Legally Recognising Intention: Parenthood in Surrogacy and Assisted Conception

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Abstract

Since its emergence in the late 1970s, surrogacy has been both socially and legally problematic. However, it can be argued that there has been an evolution of opinion regarding the practice of surrogacy, on both a cultural and a professional level. Many of the problems predicted by academic and other commentators have not occurred or, if they have, they are not widespread: surrogacy is not, on a general level, exploitative; neither does it commodify children or the reproductive process. It does, however, provide a reproductive option of last resort for some people or couples experiencing infertility or involuntary childlessness. As such, and because no danger is presented purely by allowing the practice of surrogacy to continue, it must be facilitated and legitimated as a reproductive option. Furthermore, because it is used as a method of founding a family, those who play the familial roles should be recognised, in order to make the social reality of motherhood and fatherhood a legal reality. Current regulation allows but discourages the operation of surrogacy. This thesis questions whether this should be the case and, in concluding that it should not, suggests ways in which surrogacy could be regulated in the future. The essence of these recommendations is that the intending parents in a surrogacy arrangement should be legally recognised as the parents of the child born to the surrogate. This thesis will argue that this recognition should be based on the concept of intention and supported by the enforcement of surrogacy arrangements as contracts.

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Table of Abbreviations

ACT	Australian Capital Territory
AI	Artificial Insemination
AID	Artificial Insemination by Donor
AIH	Artificial Insemination by Husband
BMA	British Medical Association
CA	Court of Appeal
C.O.T.S.	Childlessness Overcome Through Surrogacy
ECHR	European Convention on Human Rights
GIFT	Gamete Intra-Fallopian Transfer
HFEA	Human Fertilisation and Embryology Authority
HFE Act	Human Fertilisation and Embryology Act 1990
HL	House of Lords
HR Act	Human Rights Act 1998
ICSI	Intra-Cytoplasmic Sperm Injection
IUCD	Intra-Uterine Contraceptive Device
IVF	In Vitro Fertilisation
NHS	National Health Service
UCTA	Unfair Contract Terms Act 1977
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999
UK	United Kingdom
US	United States
ZIFT	Zygote Intra-Fallopian Transfer

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Preface

> '[T]he present position in the UK with regard to surrogacy is thoroughly confused, and there is understandably a good deal of dissatisfaction with it.'[1]

Mary Warnock, chair of the 1985 committee of inquiry into human fertilisation and embryology, has changed her views on surrogacy.[2] Perhaps, it may be assumed that this is a benefit of hindsight. This thesis seeks to show that initial responses to surrogacy, when it began to be a modern reproductive option, were largely unfounded and led to overly restrictive regulation of the practice. Looking back, we can see that predictions that surrogacy would have dire consequences for women and children have not materialised. This may be due, in part, to legislation that was put in place to control the use of surrogacy: if this is the case then those elements of existing legislation should be maintained. However, in modern times, surrogacy is not as problematic as it was presumed that it may become, and the law relating to the practice requires substantial modernisation. In particular, surrogacy should be facilitated as a legitimate reproductive option, and peripheral issues associated with it should be (re)addressed. This thesis argues that existing legislative provisions relating to surrogacy be repealed and

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[1] Dame Mary Warnock, *Making Babies: Is There a Right to Have Children?* (Oxford: Oxford University Press, 2002) 91.

[2] In a recent statement on surrogacy, she said 'I now believe that it would be better if the process were officially regulated, and more openly discussed between doctors, prospective parents, surrogates, and later, with the resulting children' (*ibid* 92). Elsewhere, reflecting on her time chairing the committee, she has admitted that 'on this issue I might properly been accused of being too emotional, not to say irrational. I felt a very strong abhorrence of surrogacy, and I should not have allowed this to influence me as it did' (*Nature and Mortality: Recollections of a Philosopher in Public Life* (London: Continuum, 2003).

replaced with new legislation.

One problem with current regulation that will be specifically identified is that of how legal parenthood is acquired. A study of how parenthood is acquired following the use of various forms of assisted reproduction techniques and surrogacy shows a lack of uniformity. Because it will be argued that the restriction of access to surrogacy is not something to be desired, it is therefore suggested that the acquisition of legal parenthood following a surrogacy arrangement be made consistent with that following the use of other assisted reproduction techniques. In doing so, it is suggested that the concept of intention become the basis for determining parenthood following the use of assisted reproduction or surrogacy, as it appears to be the only method by which consistency can be achieved while at the same time reflecting the social reality of the family relationships created.

The first chapter of the thesis will locate the use of surrogacy within the context of increased infertility rates, ever-developing scientific and technological fields that can offer additional methods of overcoming or circumventing infertility, and an increased level of social awareness of infertility and the various methods available to overcome it. It will also, while providing a background for the thesis as a whole, seek to show in general terms why it is time for the existing law relating to surrogacy to be repealed. This general introduction to the thesis will also assist in placing the following chapters, which deal more specifically with the

reasons why new surrogacy legislation should be formed, in context.

In the second chapter, a selection of critiques and criticisms of the practice of surrogacy, particularly those made by feminist scholars, will be analysed. When surrogacy first emerged as a modern reproductive option, there were a number of feminists (and others) who objected to the practice, for a number of reasons. Three arguments in particular are considered in turn: the contention that surrogacy means that women are exploited; the idea that surrogacy implicitly prioritises the genetic link between fathers and their offspring; and perceived negative effects on children born following surrogacy arrangements. Although these stances can, in the main, be argued against, if such results remain a possible result of legitimised surrogacy, then future legislation, while facilitating the practice for those who require it, ought to continue to address these issues.

The argument that it is time to re-legislate for surrogacy is continued in the third chapter, which considers two Government commissioned committees of inquiry (the Warnock and Brazier Committees), the perceived problems with surrogacy that they identified, and their respective reports and recommendations. Building on this, the fourth chapter will reflect on individualised surrogacy problems, such as those arising in particular cases. Judicial responses to surrogacy will be examined alongside a consideration of Governmental responses to the reports mentioned above.

Chapter five will conduct a comparative analysis of the approach taken to assisted reproduction and surrogacy and the issue of parenthood in a selection of other jurisdictions. By looking at alternative approaches to regulation, we may discover an alternative way to approach surrogacy in this country. In chapter six, continuing the theme of considering *how* surrogacy should be (re)regulated, possible models that could be adopted by future legislation will be highlighted and discussed, including an analysis of the usefulness of contract. Chapter seven will finalise the argument for the recognition of intention, by looking at the practical implications of such a change to the law.

In conclusion it will be shown that because there is nothing inherently wrong with surrogacy, it does not require differential treatment by the law. Therefore, for it to be recognised as a legitimate reproductive option, the acquisition of parenthood should be aligned with that for other forms of assisted reproduction. Recognising the pre-conception intentions of those who use any kind of assisted reproduction – including surrogacy – would mean that a level of consistency would be achieved that can be balanced against the interests of all the parties involved. Intentional parenthood in surrogacy can also be supported by recognising surrogacy arrangements as enforceable contracts and the adoption of a contractual framework can also provide protection for the parties involved.[3]

[3] Additional concerns, such as whether surrogacy arrangements should be authorised by courts or a central surrogacy agency, how payments should be regulated, or how education and counselling services could be provided, are beyond the scope of this thesis. However, at times mention will be made of these issues in the context of asking how the interests of the parties involved can be best protected.

Chapter One

Misconceptions

Introduction

Although surrogacy may have 'emerged at the eye of the storm over the 'reproduction revolution'',[1] public and medical opinions of surrogacy have changed positively since its emergence in the UK in the late 1970s. However, because legislative and other attention has generally been paid to a number of (perceived) ethical, moral, social and legal problems that were raised by the emergence of surrogacy as a modern assisted reproductive practice, as yet no considered attempt has been made to align the acquisition of legal parenthood following surrogacy with the acquisition of parenthood following the use of other reproductive methods. Nor does it currently seem that parenthood is recognised as an element of the regulation of surrogacy that needs to be (re)addressed.

A central purpose of this thesis is to analyse whether differential treatment of people who attempt to become parents by entering surrogacy arrangements is necessary and, if this is not the case, to argue that there has become a pressing need for legal reform in this area. It will conclude that the existing law on surrogacy needs to be reformed to reflect the fact that surrogacy has not proved

[1] Robert G. Lee and Derek Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (London: Blackstone Press, 2001) 191.

to be as problematic as it was presumed that it may become. Additionally, it will show that a number of the presumed problems inherent in surrogacy, if they were to emerge in the future, can, to a large extent, be protected against by an improved framework of legislation. In conjunction with such reform of the law, the question of parenthood following surrogacy arrangements can be (re)addressed, with the aim being to align the acquisition of parenthood following surrogacy arrangements with that following the use of other reproductive technologies.

This thesis seeks to show that there been a recognisable change in methods of family construction,[2] especially in terms of the numbers of people using alternative forms of conception, and also that there has been a general evolution of popular and medical opinion towards an acceptance of the use of the majority of assisted reproduction techniques (including surrogacy) in family creation. This would suggest that an equivalent legal evolution is also required. The thesis concentrates specifically on one aspect of assisted reproduction where the law has so far failed to mirror both technological development and popular acceptance: parenthood. The law relating to the parenthood of children born following the use of an assisted reproduction technique, or from surrogacy, is vastly inconsistent and, following surrogacy in particular, is arguably incongruous with social reality. In the exploration of this problem it will be shown that there is the potential for legal parenthood in all assisted reproduction situations to be based on a singular concept, resulting consistently in the right outcome in all

[2] By this I mean family construction for infertile or otherwise childless people – generally it can be assumed that those who can have children in the usual fashion will continue to prefer to do so.

cases. This idea centres around the recognised legal construct of intention: when families are formed 'artificially'[3] it should be the person(s) who procreationally intended the child to come into being who should be legally recognised as the parents of that child, and this can be supported by recognising the arrangement that they make as an enforceable agreement. As will be shown, the recognition of such intention already forms the basis of some dispute resolution in surrogacy and other family law cases. Intention is also recognised as a key factor in other areas of law. It will be argued that the recognition of procreational intention would provide a more consistent approach to the determination of legal parenthood in assisted reproduction and surrogacy situations by reflecting more accurately the social reality of the particular families involved. Additionally, to support the intention concept, the use of contract can uphold the intentions of the parties, whilst also providing protection from unconscionable arrangements.

By locating the use of surrogacy within the context of increased infertility rates, scientific and technological developments that offer additional methods of overcoming or circumventing infertility, and an increased level of social awareness of infertility and the various methods available to overcome it, this chapter, while providing a background for the thesis as a whole, will seek to show generally *why* it is time for the law relating to surrogacy to be reviewed. This, too,

[3] I prefer not to use the term 'artificial' in conjunction with reproductive technologies as I believe it has negative connotations. The families that are formed using AI, IVF, surrogacy etc are not themselves artificial, in that they (usually) attempt to mirror, as far as is possible, the traditional model of a family. Throughout, therefore, I will use the term 'assisted conception' (or reproduction), as this more accurately reflects the situation and the motivations of the parties involved.

will help to place the following chapters in context. These will deal more specifically with the reasons why new surrogacy legislation should be formed. Chapter two will analyse a number of critiques and criticisms of the practice of surrogacy, particularly those made by feminist scholars. Chapter three will build on this, by considering the perceived problems with surrogacy that were considered by two Government commissioned committees of inquiry – the Warnock and Brazier Committees – and their respective reports.[4] Individualised surrogacy problems, such as those arising in particular cases, will be explored in depth in chapter four, and the judicial responses to them will be examined alongside a consideration of Governmental responses to the reports mentioned above.

Having discussed *why* it is time to review and reformulate surrogacy legislation, subsequent chapters will consider *how* the law relating to surrogacy could be improved. A particular aim of these chapters will be to show that the minimisation of any risks inherent in surrogacy arrangements can be achieved by dealing in legislation with both large-scale problems that may have been seen as characteristic of surrogacy, and individualised problems that have materialised in particular surrogacy cases. To begin this section, a chapter will be dedicated to an analysis of laws relating to surrogacy in a selection of other jurisdictions, in

[4] *Committee of Inquiry into Human Fertilisation and Embryology, Report* Cmnd 9314 (1984) (London: HMSO) (The Warnock Report). The Warnock Committee was established in July 1982, and reported its findings in July 1984. *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (1998) (London: HMSO) (The Brazier Report). The Brazier Committee was established in June 1997 and reported its findings in October 1998.

order to determine if these have had to contend with particular surrogacy problems in individualised cases, or whether there are elements of their regulation of surrogacy that we might learn from. Chapter six will consider some possible models that could be adopted by future legislation and the final chapter of this thesis will propose, in line with the central theme of the thesis as a whole, that the most valuable way to regulate surrogacy for the future would be to recognise intention.

1) Introducing surrogacy

What is usually meant by the term surrogacy is that one woman agrees to carry and deliver a child for an infertile couple (the intending or commissioning parents), with the intention to give the child to that couple when it is born. Derek Morgan describes surrogacy as 'an understanding or agreement by which a woman – the surrogate mother – agrees to bear a child for another person or couple';[5] Shelley Roberts suggests that it is 'any situation where there is an arranged separation of the genetic, gestational and social components of motherhood'.[6] Surrogacy was defined by the Warnock Committee as the 'practice whereby one woman carries a child for another with the intention that the child should be handed over after birth'.[7] This formulation was further extended by the

[5] Derek Morgan, 'Surrogacy: An Introductory Essay' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (London: Routledge, 1989) 55-84, 56.
[6] Shelley Roberts, 'Warnock and Surrogate Motherhood: Sentiment or Argument?' in P. Byrne (ed.), *Rights and Wrongs in Medicine* (London: King Edward's Hospital Fund for London/OUP, 1986) 80-114, 80-81.
[7] The Warnock Report, n 4 above, para. 8.1. It is interesting to note that this definition precludes men from commissioning surrogates.

Surrogacy Arrangements Act 1985, which states in addition that the full parental rights of the birth or carrying mother are also intended to be passed over to another person or persons after the birth under a surrogacy arrangement. Under section 1(2) of the Surrogacy Arrangements Act, a surrogate is defined as:

> 'a woman who carries a child in pursuance of an arrangement -
> (a) made before she began to carry the child, and
> (b) made with a view to any child carried in pursuance of it being handed over to, and the parental rights being exercised (so far as practicable) by, another person or other persons', and

under section 1(3) a surrogacy arrangement is also defined:

> 'An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.'

It is interesting to note that although parental rights and obligations are to be transferred to the commissioning mother or couple, nothing is said about the 'new' parents' claim to be legally recognised as such. According to the Surrogacy Arrangements Act, they will merely be exercising parental rights. It can be argued that it is equally as, if not more, important for the commissioning couple to be

given the legal status of parenthood as a result of a surrogacy arrangement, but this is not the case.

Whatever the best definition of surrogacy is, the practice can take one of two general forms. The first is known as 'partial surrogacy' (also called straight surrogacy, traditional surrogacy or genetic surrogacy) and the second is known as 'full surrogacy' (also called gestational surrogacy, host surrogacy, IVF surrogacy or womb-leasing).[8] Partial surrogacy involves the fertilisation of the surrogate's own egg with the sperm of the commissioning father (or a donor) – this is most commonly done by AI, but sometimes follows intercourse.[9] Neither of these methods necessarily has to involve high technology, and it is probable that a number of private surrogacy arrangements take place on this basis. Because the surrogate's eggs are used in partial surrogacy she will be the genetic mother of the child. The commissioning father will also usually be genetically related to the child, unless donated sperm was used. It can probably be assumed that such

[8] The first gestational surrogacy procedure was reported in 1985 in W.H. Utian *et al*, 'Successful Pregnancy After In vitro Fertilisation-Embryo Transfer from an Infertile Woman to a Surrogate' (1985) 313 *New England Journal of Medicine* 1531 (reference taken from Craig R. Sweet, 'Surrogacy: Practical Medical Aspects' *The American Surrogacy Centre*, 1996 (www.surrogacy.com/medres/article/aspects.html, 2001) 1-10, 1). Robert G. Lee and Derek Morgan, n 1 above, 212, note 19) dispute the terms 'partial' and 'full' surrogacy on the basis that the 'work' that the surrogate does is always full and that it is 'the contribution of the commissioning couple that genetically is partial or full'. Perhaps a more accurate description of the two forms of surrogacy, then, would be 'partial' (where the child is genetically partially of the surrogate) and 'absent' (where the surrogate has no genetic relation to the child). For ease, however, I will continue to use the terms 'partial' and 'full' throughout.

[9] The British Medical Association (BMA) states that such occasions are 'rare' (*Changing Conceptions of Motherhood: the Practice of Surrogacy in Britain* (London: British Medical Association, 1996) 7. See, however, *Re an Adoption Application (Surrogacy)* [1987] 2 All ER 286 for an example of where the surrogate had intercourse with the commissioning father 'with the sole purpose of procreating a child'.

situations are less common as it would mean that both the male and female partner in the commissioning couple would have fertility problems.

Full surrogacy usually takes place when the commissioning mother is able to produce eggs but is unable to carry a child to term, or at all. Examples may include a woman born without a womb or who has had severe irremediable pelvic disease, a full hysterectomy or multiple miscarriages. Multiple miscarriages may occur because the hormonal environment in the womb is unbalanced or the cervix is incompetent, for example, which would indicate that pregnancy itself is inadvisable. Pregnancy may also be inadvisable in some women as it may cause potentially serious health risks for other reasons. Even though she may not be technically infertile, she may have a medical condition, such as severe hypertension or diabetes, which may possibly make pregnancy a dangerous experience for her or a baby. A woman might also have been unsuccessful in a number of IVF or other fertility treatments. Such situations would make natural parenthood an impossibility, and in such circumstances, surrogacy may be the only option for a couple to have a child.[10] Furthermore, even adoption may be unavailable to some women or couples, especially those who may have delayed adoption applications while attempting various methods of assisted reproduction.

Full surrogacy can be used when the commissioning mother also cannot produce

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[10] Patricia Briody was a woman for whom surrogacy would have been the only option to have a child. For details of her infertility problems, caused by 'as abysmal a case of obstetrical negligence as one is likely to find', see Derek Morgan, 'The Bleak House of Surrogacy: *Briody* v. *St Helen's and Knowsley Health Authority*' (2001) 9 (1) *Feminist Legal Studies* 57-67, 61.

eggs, in which case an egg donor would be used. If her eggs are used then following drug and hormone treatments used in IVF, they will be extracted and fertilised *in vitro* with her partner's sperm (or that of a donor), and one or more of the resulting embryos will be transferred to the surrogate's uterus. As with 'ordinary' IVF, surplus embryos can be frozen and stored for future attempts. In full surrogacy the commissioning parents can both be the genetic parents of the child, with the surrogate acting merely as a carrier or incubator. For this reason, this form of surrogacy is probably the most attractive. Full surrogacy requires more technical medical intervention than partial surrogacy, and as such, has become a more regulated procedure, being governed by the rules contained within the Human Fertilisation and Embryology Act 1990.[11] Notwithstanding which form of surrogacy is used, however, the legal position as regards parenthood remains the same. It is the woman who gives birth to the child, and no other woman, who will always be legally recognised and registered as the mother of that child.[12] Therefore, even if both the commissioning parents were genetically related to the child, they will not have parental status. Given that the commissioning couple will play the social role of parent, it is argued that it should be they who are automatically awarded parenthood when the child is born, based on the pre-conception intentions of all parties involved and the agreement formulated on this basis. This thesis will argue that this should indeed be the

[11] There is some room for argument that this should be the reverse as it can perhaps be suggested that where a surrogate has a genetic link it may be easier or more tempting for her to renege on the agreement.

[12] Human Fertilisation and Embryology (HFE) Act 1990, section 27 (1): '[t]he woman who is carrying or has carried a child as a result of the placing in her or an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child'.

case as it is they who initiate and plan for the child to be born. They intend to be the parents of the child and the woman acting as surrogate does not.

Surrogacy is a method that is rarely used willingly. It tends not to be the first option that people consider if they experience difficulties with having children, and couples often come to it as a 'last resort'.[13] Surrogacy has tended to operate in the shadows of other assisted conception techniques, partly because of the ethical problems that tend to be associated with the practice. However, as will be argued below, it can be contended that surrogacy has gained recognition: people do know more about surrogacy, and recognise that some people might have no alternative. Although initially there may have been fears that allowing surrogacy would mean that women would choose not to become pregnant through vanity or convenience, this situation has not occurred: the BMA has stated that 'such "social" requests are highly unusual'.[14] Surrogacy is really only used by those who need it, either because they have tried and failed other assisted reproduction techniques and have ruled out adoption, or because they cannot (and could not) form a family 'naturally' any other way. Because surrogacy may be the only option for some couples to have a child, it has gained acceptance by clinicians offering surrogacy, who have argued that to ban surrogacy would be wrong because 'for the small group of women for whom this is the only available

[13] The BMA recommends that 'surrogacy should only be considered in cases where there are no other treatment alternatives' (n 9 above, 7).
[14] *ibid.*

treatment of their infertility, it would be unreasonable and unfair not to do so'.[15]

The concept and use of surrogacy is not a new phenomenon, nor was it in the 1980s when it was drawn to public attention by the media. As Lee and Morgan have pointed out, although there is little evidence of surrogacy in operation before this time, it is likely that surrogacy did not 'emerge hydra-headed and fully formed in 1984 when the national newspapers appeared to announce its birth with Kim Cotton'.[16] Because it does not necessarily involve medical techniques or even any kind of expertise, as an informal practice, surrogacy has probably been in use for a long time. Peter de Cruz states that 'the practice of a woman bearing a child for another is as old as childbirth itself',[17] and refers to surrogacy as 'the second oldest profession'.[18] In fact, although they are probably not directly comparable, there are references to the use of a form of partial surrogacy in the Old Testament. In the book of Genesis, Abraham's wife Sarah could not give him an heir as she had passed childbearing age. So she said to him; '[t]he Lord has kept me from having children. Why do you not sleep with my slave girl? Perhaps she can then have a child for me'.[19] Similarly, Jacob and his two wives, Rachel and Leah, used servant girls, Bilbah and Zilpah, to carry some of their children.[20] The stories of Sarah, Rachel and Leah also became a literary basis for the religious beliefs of the imagined Gilead society in Margaret Atwood's *The*

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[15] Peter Brinsden *et al*, 'Treatment by *in vitro* Fertilisation with Surrogacy: Experience of One British Centre' (2000) *British Medical Journal*, vol. 320, 924-928, 927.
[16] Robert G. Lee and Derek Morgan, n 1 above, 194.
[17] Peter de Cruz, *Comparative Healthcare Law* (London: Cavendish, 2001) 457; citing S. Downie, *Babymaking: Technology and Ethics* (London: Bodley Head, 1988), 113.
[18] Peter de Cruz, *ibid* 168.
[19] The story of Sarah is in Genesis 16: 1-16.

Handmaid's Tale,[21] a novel in which an imagined future American society changes so radically as to force some women known to be fertile into becoming 'surrogates' for the powerful men whose wives could not have children. However, these stories all involve the instruction of a slave or a maid to bear a child for her masters, and as such cannot positively be compared with contemporary surrogacy arrangements.

There are also references in the literature on surrogacy to the effect that there is a 'commonly held belief that inter-familial surrogacy is historically a reasonably common practice'.[22] It is also suggested that the practice of some forms of surrogacy occurs relatively frequently in some societies, such as some in Africa or within Asian communities, where it would be regarded as quite normal for a woman to have a child for a sister or a friend who was not able to do so herself.[23] As mentioned before, partial surrogacy needs relatively little or no intervention and so can take place privately. However, as Derek Morgan points out,

> 'the lessons of history and anthropology may only have limited guidance to offer in explaining and understanding surrogacy ... [t]here may be much to suggest that we should confine our study of

[20] Genesis 30: 1-25.
[21] Margaret Atwood, *The Handmaid's Tale* (London: Vintage, 1996).
[22] See Derek Morgan, n 5 above, 67.
[23] Lorraine M. Harding, 'The Debate on Surrogate Motherhood' (1987) *Journal of Social Welfare Law* 37-63, 54.

the phenomenon to westernised societies, and to modern ones at that'.[24]

Thus, it must be remembered that while historical and anthropological evidence of the use of surrogacy is useful in illustrating a point, it must be considered in the circumstances of the society in which it was/is practised. For example, the African communities in which surrogacy may be used may place great cultural and societal emphasis on the extended family, and therefore, the surrogacy practised is a way of facilitating this, and is not necessarily perceived as a method of circumventing infertility. But it is also likely to be the case that the use of surrogacy, especially facilitated by reproductive technology, has grown throughout the Western world; there is certainly some evidence that the incidence of known surrogacy arrangements taking place in this country is, or has been, increasing.[25]

Increased use of surrogacy has been directly related to the decline in the use and availability of adoption and unsuccessful attempts at other reproductive techniques.[26] Reasons suggested for the decline in the number of children

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[24] Derek Morgan, n 10 above, 65.

[25] There is some factual evidence of an increase in the number of surrogacy arrangements taking place in this country. In 1989, Derek Morgan estimated that 29-43 cases of 'known surrogacy' had occurred in the UK since 1976 (n 5 above, 68). The C.O.T.S. *Comprehensive Guide to Surrogacy* (Unpublished, 2000) states (at 7) that up until November 1999, the organisation (see n 37 below) had been involved in 'the births of 310 surrogate children in the last eleven years'. See also the BMA, n 9 above.

[26] Derek Morgan, n 5 above, 73-74. IVF success rates are remarkably low: current rates (per cycle) for IVF (meaning the 'take-home baby' rate) are estimated at an average of about 20 per cent. The Human Fertilisation and Embryology Authority's national data statistics (2000) give an average of 18.2 per cent of IVF cycles resulting in a live birth, but suggest also that success rates

available for adoption may relate to the increased availability and ease of obtaining both contraception and abortion in the latter decades of the last century, and a greater level of social acceptance of single mothers.[27] Authors also comment on the 'acute shortage of children available for adoption', and further state that 'in some places there may be only older or handicapped children'.[28] On the other hand, couples who find themselves unable to have a child may nowadays be more likely to turn to a doctor or infertility specialist first in order to see if they can have 'their' own child. Fertility treatments enable people to have children of their own: even where donated material is used the appearance is that a child is conceived and born 'naturally'. There are therefore at least two reasons why surrogacy may become the favoured option for an infertile couple; not only is there the desire for genetically or related or biologically linked offspring, but the desire for a 'perfect' child may be a crucial factor. Gillian Douglas notes that this is not a 'selfish' desire, for there 'is no reason why infertile couples should be expected to fulfil the needs of such children, rather than anyone else'.[29] Adoption has further drawbacks in the sense that it is usually an extremely lengthy process, that by law, a child must be 19

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for individual clinics are diverse. Emily Jackson points out that '[t]here are, for example, clinics with live birth rates as low as 5.6 per cent per IVF cycle, while rates of 31.2 per cent are achieved elsewhere' (*Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001, 167). Bourn Hall clinic gives its 'live birth rate' in 2000 as 27 per cent (http://www.bourn-hall.co.uk/results/_frameset/index.htm 28 March 2003).

[27] See Mary Warnock, *Making Babies: Is There a Right to Have Children?* (Oxford: Oxford University Press, 2002) 40; Caroline Bridge, 'Adoption Law: A Balance of Interests' in Jonathan Herring (ed.) *Family Law: Issues, Debates, Policy* (Cullompton: Willan Publishing, 2001) 198.

[28] Douglas Cusine, *New Reproductive Techniques: A Legal Perspective* (Aldershot: Gower, 1988) 9; Caroline Bridge elaborates, saying that primary concern for adoption is now focussed on 'children who are often emotionally damaged by years in care, sometimes disabled or of mixed race' (*ibid* 199).

[29] Gillian Douglas, *Law, Fertility and Reproduction* (London: Sweet and Maxwell, 1991)106.

weeks old before it can be adopted,[30] and that the background and circumstance of adopted children may not always be known. An infertile couple may have been trying to conceive naturally for a number of years, or may have tried some treatments for infertility and been unsuccessful. Thus by the time that they consider adoption, they may already be regarded as unsuitable candidates because of their age.[31] There are also further restrictions placed on adoption; it has not been available jointly for non-married couples, for example.[32] This therefore has eliminated all couples who are not (or cannot be) married and people who might wish to adopt a child singly. It seems therefore that adoption is very closely concerned with concepts of the 'normal' nuclear family. It is arguable, however, that this is also the case with surrogacy and other forms of assisted reproduction.

As a modern occurrence, little was heard of surrogacy in this country until the late 1970s, when the first case reached the UK courts.[33] The practice became more widely known with the well-publicised cases of 'Baby Cotton' in the UK and 'Baby M' in the USA in the 1980s.[34] Nevertheless, any evidence that surrogacy is or has been more widely used may reflect at least two factors: the use of surrogacy is generally less 'out of favour' than it was because of changes in

[30] Adoption Act 1976, section 13.
[31] There are no official or legal age limits relating to adoption, but choosing adopters is done by local councils, and there are more requesters than there are children. For this reason, older people are not favoured as they have, for example, shorter life spans, more health problems, etc.
[32] Adoption Act 1976, section 15. But see 'Unmarried Couples Win Right to Adopt' *The Independent*, 23 January 2002, http://news.independent.co.uk/uk/legal/story.jsp?story=115921.
[33] *A* v *C* (1978) 8 Fam Law 170, later reported as *A* v *C* [1985] FLR 445.

social attitudes and increased knowledge of infertility problems.[35] Surrogacy has also been more widely accepted by the medical profession as a means of circumventing infertility.[36] However, as yet there are no real statistics on the incidence of surrogacy, although some clinics offering IVF surrogacy keep limited records, and the C.O.T.S. organisation record how many surrogacy arrangements pass through them.[37] It was thought that allowing couples who had used surrogacy prior to 1 November 1994, when parental orders made under section 30 of the Human Fertilisation and Embryology (HFE) Act 1990 became available, to apply for an order in the first six months of their operation would give an indication of the actual incidence of surrogacy. However, few applications were made.[38] The Government commissioned Brazier Report (1998) suggested that statistics on surrogacy ought to be collected but this procedure is yet to have been started in any official sense.[39] It is questionable whether representative

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[34] *Re C*, first reported in *The Times* 7 January 1985, later formally reported as *Re C (a Minor)* [1985] 2 FLR 846; *In the matter of Baby M* (1988) 537 A 2d 1227. Discussion of the cases can be found in chapters four and five respectively.

[35] The BMA acknowledged this in respect of surrogacy when it stated that there is 'apparent growing public acceptance of surrogacy and changing attitudes in society generally about this practice. This has led to a reduction in the amount of secrecy surrounding the practice and to a corresponding increase in the number of people requesting advice and support from the medical profession about surrogacy arrangements' (n 9 above, xi).

[36] The BMA, in a representation of the formal opinion of the medical profession, stated in 1984 that it would be 'unethical' for a doctor to participate in a surrogacy arrangement. Between then and 1996, the association's opinions changed gradually, until it announced in March 1996 that the 'blanket ban' that they had once placed on doctors to assist with surrogacy was lifted. The 1996 report recognised that surrogacy might be a 'reproductive option of last resort'. A reason for the change of heart was that further research had shown the BMA that the number of births from surrogacy in this country was increasing as society found them more and more acceptable (*ibid* 1). See also Rachel Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day-Sclater and M. Richards (eds), *What is a Parent? A Socio-legal Analysis* (Oxford: Hart Publishing, 1999) 121-141.

[37] Childlessness Overcome Through Surrogacy, a non profit-making organisation, set up by Kim Cotton, that provides support and advice for potential commissioning couples and surrogates.

[38] Reasons for this are suggested by R.G. Lee and D. Morgan, n 1 above, 195.

[39] The Brazier Report, n 4 above. The Report will be discussed in detail in Chapter 3.

figures could actually be collated as it is likely that many private (or even secret) arrangements take place.[40]

When people fail at achieving parenthood naturally, and following attempts at various forms of assisted reproduction, this can result in further stigmatisation of their childlessness and usually in some level of psychological trauma, 'all of which may at least provide a partial explanation of why some people seem prepared to go to 'desperate' lengths to get children'.[41] Some of the more accepted assisted reproduction treatments can also prove problematic in other ways – they are time consuming, expensive, and many have low rates of success, especially for a first attempt. So when surrogacy is used in order to obtain a child for an infertile couple, it is usually come to after all other assisted conception techniques have been unsuccessfully attempted, and adoption has been ruled out, for one reason or another.[42] However, the 1998 Brazier Report found that the numbers of surrogacy arrangements being undertaken had been steadily increasing in the UK, and were 'likely to continue to do so'.[43] On this basis, Margaret Brazier herself has elsewhere indicated that surrogacy must therefore maintain some kind of attraction for a variety of reasons, both for couples seeking to use a surrogate and for surrogates themselves. She adds that rates of success in surrogacy arrangements are comparatively high and,

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[40] British Medical Association, n 9 above, 8. Do-it-yourself surrogacy, where a woman agrees to carry a child for others, and where she provides the genetic material, needs no medical input. It is likely that many such arrangements take place, and possible that birth registration is falsified. See, for recognition of this, The Brazier Report (*ibid*) para 6.4.

[41] Eric Blyth, 'Children's Welfare, Surrogacy and Social Work' (1993) 23 *British Journal of Social Work* 259-275, 262.

[42] C.O.T.S., n 25 above, 6.

although UK law theoretically limits the payment of surrogates, in reality, surrogates do often get paid quite considerable amounts.[44] As illustrated, in practice, surrogacy can take a variety of forms, but in each of these, a third party becomes involved in the procreational process, and this can raise a number of social, legal and ethical problems.

This thesis will argue that surrogacy needs to be available, but controlled. This can be achieved with reform of existing legislation, while facilitating surrogacy as a reproductive option for those who require it and enabling parenthood to be recognised automatically for the social (intending) parents. Surrogacy can be placed in context against increasing infertility rates, raised levels of awareness of infertility as a social misfortune for which a remedy should be available, and continuing scientific and technological development in the field of assisted reproduction. For a very small sub-set of people who cannot conceive naturally or cannot be helped using reproductive technologies such as IVF, or more 'low-tech' interventions such as AID, surrogacy may offer the only or optimum solution to childlessness. But while the vast majority of reproductive technologies are subject to a tight and uniform regulatory structure, it is arguable that surrogacy is not. Although those who need to use surrogacy are numerically relatively insignificant, the current regulation of surrogacy is unsatisfactory as it applies to them. For the purposes of this thesis, the most unsatisfactory element of existing regulation is that the rules governing the acquisition of parenthood following

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[43] The Brazier Report, n 4 above, para 3.44.

surrogacy are inconsistent with the rules governing the acquisition of parenthood in all other situations. This thesis intends to establish whether there is something sufficiently distinctive about surrogacy to justify its anomalous legal treatment. If this is not the case, as this thesis intends to show, a means by which the acquisition of parenthood can be made uniform will be proposed.

2) Putting surrogacy in context

Since the technological breakthrough in reproductive technology that enabled the birth of the first 'test-tube baby', Louise Brown, in 1978, the development of assisted reproductive technologies has been increasingly rapid. In the early part of the twenty-first century, we are at the fringes of an age where mammalian reproductive cloning has been achieved, and human reproductive cloning has therefore become theoretically possible.[45] Developments in reproductive science have produced many thousands of children across the world and generated research that has greatly expanded to enable assisted reproduction processes to proceed more smoothly, increasing the success rates of such treatments. It has also brought about research into treatments for injuries and diseases such as

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[44] Margaret Brazier, 'Can You Buy Children?' (1999) 11 (3) *Child and Family Law Quarterly* 345, 350.

[45] Although human reproductive cloning is specifically not legal in the UK (Human Reproductive Cloning Act 2001, section 1), many other countries have also formally banned or have placed a moratorium on human cloning, and some do not allow the cloning of human embryos even for research purposes as the UK does. A claim that the first human clone had been born was made towards the end of 2002 by Clonaid, a Canadian company linked to the Raelian religious sect. Since that time, the cult has claimed the birth of an additional four cloned babies. At the time of writing, none of these claims have been substantiated. (See 'Cult Scientists Claim First Human Cloning' *The Guardian*, 28 December 2002, http://www.guardian.co.uk/international/story/0,3604,865889,00.html).

Alzheimer's, Parkinson's and diabetes, which could not have been speculated about by the pioneers of *in vitro* fertilisation (IVF).[46] The embryonic stem cell has been the subject of much debate in recent years – this is a cell, which is derived from early embryos, left over from IVF or created specifically for research purposes in some instances, that has the capability to develop into any other cell type. It is hoped (although this technique is not without its critics, due to the fact that embryos are destroyed in the process of deriving stem cells) that this type of cell, when it is known how to control its development, will be one of the biggest tools in modern medicine, offering treatments for conditions that previously had none or few that were effective. This is also the age of the aftermath of the Human Genome Project. The human genome has been sequenced and is allowing further insight into the nature of the human being and the genetic traits potentially within it. Gene therapy has come into existence, as has the genetic alteration of embryos in IVF procedures in order to ensure they are free from specific diseases at birth. In all, reproductive technology has flourished, meaning that the research derived from the original intention of creating babies for those that could not have them naturally, or without assistance, is enabling better or more specifically targeted infertility treatments, and has the potential to become an even more valuable part of human medicine in general.

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[46] Hence the statutory instrument amending the HFE Act 1990 to allow embryo research to be undertaken for new purposes (Human Fertilisation and Embryology (Research Purposes) Regulations 2001). The breakthrough in IVF led to human embryo research, which caused considerable amount of debate, public and parliamentary, eventually resulting in the HFE Act 1990. Embryo research was allowed to be carried out for one of five reasons from 1991. Stem cell research and therapeutic cloning were thought to have been added to this by the 2001 Regulations, but a High Court decision (*R* v *Secretary of State for Health, ex p Quintavalle* [2001] 4 All ER 1013) initially meant that this was not the case, leaving therapeutic cloning unregulated.

Inevitably, speculation about the ethics and the need to control the use of and access to reproductive technologies has also greatly expanded. People need assurances that the technology will not get out of control, or fall into the hands of the 'wrong' people.[47] It is feared that advances in reproductive technology will enable people, not just the infertile or involuntarily childless, to create 'perfect' or 'designer' babies: this phrase 'epitomizes the disquiet felt about attempts to control or manipulate reproduction in ways that seem to some to be unreasonable or beyond the realms of acceptability'.[48] It could be suggested that this fear harks back to the memory and fear of the eugenic principles of the Nazi regime. If people are allowed to pick the characteristics of their children, such as gender, they will have the potential to abuse this power. This becomes a greater fear if or when other characteristics could be chosen for artificially reproduced children: eye colour, intelligence, sexual orientation, athletic ability or freedom from disease, for example.[49] Many issues have arisen: who actually needs these

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The decision has, however, been overruled by the Court of Appeal and House of Lords (*R* v *Secretary of State for Health, ex p Quintavalle*, Times Law Reports, 14 March 2003).

[47] Recent debates on human reproductive cloning have been overshadowed by claims made by some parties that they are cloning humans (see n 45, above). Although technology makes this theoretically possible (see 'First Human Embryo Cloned' *The Guardian*, 26 November 2001, www.guardian.co.uk/Archive/Article/0,4273,4307302,00.html), the safety of the process is not fully known as cloned mammals have had various 'faults'. Notwithstanding the unsubstantiated claims that have been made, on this basis, it can be argued that 'the risks of human cloning would be too great for it ever to be tried in the foreseeable future. One of the worst risks would be that even if a successful baby were born, its future health would be a matter of 'waiting to see' (Mary Warnock, n 27 above, 96).

[48] Veronica English and Ann Sommervile, 'Drawing the Line: The Need For Balance' in Ellie Lee (ed.), *Designer Babies: Where Should We Draw The Line?* (London: Hodder and Stoughton, 2002) 1-14, 6. Further disquiet about the spectre of 'designer babies' is voiced by Josephine Quintavalle, 'Better By Accident Than Design' in the same collection, 62-75. For a more complex discussion of liberty issues raised by choosing characteristics of children versus the potential for discrimination, see John A. Robertson, 'Genetic Selection of Offspring Characteristics' (1996) 76 *Boston University Law Review* 421.

[49] Veronica English and Ann Sommervile, *ibid* 5.

treatments? Who should pay for the treatments? Who should be able to have access to the treatments? Which specific treatments should be allowed and which not? Keeping tight controls on the technologies that become possible may enable abuses to be avoided. However, overly restrictive controls may preclude valuable uses of the technology, and the fear of new advances, coupled with often unduly strict controls, clouds the issue of the value of these practices – those that could be beneficial to many people if they were accessible. The perception of reproductive technology as something that exists on the fringes of morality, particularly any new developments that have not yet been 'accepted' as, say, IVF has, is problematic. Due to this perception, the meanings and implications of these practices remain relatively inaccessible, especially to those who seek to use them. Michelle Stanworth stated, even before science had advanced as far or as fast as it has, that the advancement of reproductive technology means that 'the future of reproduction, sexuality, parenthood and the family – remains unclear'.[50] Despite being made in 1987, the sentiment behind the statement remains true today.

Perhaps or partly because of the regulation of assisted reproduction practices,[51] which can be seen, up to a point, to be a control over scientists and doctors who have the power to manipulate nature, the majority of these technologies have generally become broadly socially accepted (or acceptable), especially those

[50] Michelle Stanworth (ed.), *Reproductive Technologies: Gender, Motherhood and Medicine* (Cambridge: Polity Press, 1987) 1.
[51] The HFE Act 1990 now regulates most assisted reproduction and related research practices. There are also pieces of secondary legislation.

which were developed earlier. We now know that if someone cannot have children naturally there are likely to be ways of determining why this is, and more importantly, that there may be ways to fix or circumvent the problem. But even in this age where almost anything appears possible and reproductive technologies in general appear to have become acceptable, and when it seems that there are far greater potential dangers than surrogacy could present, there remains a feeling, to some extent, that surrogacy is still not a 'legitimate' treatment for childlessness. This is reflected in, and perhaps facilitated by, laws that do not allow surrogacy to be aligned with other reproductive practices. Although surrogacy is likely to be more widely practiced than is reported,[52] people may still harbour general moral and ethical objections to the practice, such as the belief that it is not morally right for a woman to give away what is seen to be her child to another person or persons, or, that if she does this, it should be an act of generosity, not for financial gain on her behalf. Tabloid anecdote suggests that for the layman this seems to be the crux of the matter – it is the 'yuk factor' of surrogacy. However, the fact that some people have a strong aversion, ethical or otherwise, to a practice does not mean that it should not be something that is available, subject to certain safeguards designed to protect both the ethical interest and the participants themselves. The limited availability of abortion provides a good example of this. On this basis, it can be argued that surrogacy needs to be available, but controlled, in order to prevent abuses of the practice.

[52] See n 36, above.

a) Infertility and technology

Infertility is described as the inability [of a couple] to conceive after a year or more of trying to do so. This figure is based on couples having regular sexual intercourse without contraceptive protection.[53] It can also mean that a couple have suffered repeated miscarriages or stillbirths. As Gillian Douglas points out, however, there appears to be no objective definition of infertility, and achieving this is more than likely to be impossible.[54] Infertility and infertility treatments, or methods of overcoming, alleviating or circumventing infertility or other involuntary childlessness, otherwise known as assisted reproduction technologies or techniques, are central to this thesis. Infertility is not only a personal, medical problem. It is a problem that concerns both wider society and, now that science has advanced to a state where there are methods of alleviating infertility or involuntary childlessness through the manipulation of parts or even individual cells of the human body in a clinic or laboratory, the law.[55] There are many pressures for people to become parents; there are many images of the 'ideal family' perpetuated by the media and, arguably, '[t]his view of the desirable family norm has maintained the pressure on the involuntary childless couple to

[53] The World Health Organisation defines infertility as 'a failure to conceive after unprotected intercourse for a period of one year' (cited in Tim Appleton, 'The Distress of Infertility: Impressions From 15 Years of Infertility Counselling' in Peter Brinsden (ed.), *A Textbook of IVF and Assisted Reproduction* (London: Parthenon, 1999) 401). He goes on to say that '[a] significant number of couples will still fail to conceive after 2 years, and it may be several years before a couple realise that a problem exists'.

[54] Gillian Douglas, n 29 above, 105.

[55] This is not to say that the creation of families was never regulated – but the laws that were in place were generally those concerned with bastardy, title, etc., and more recently, adoption.

reproduce so as to become a 'proper' family'.[56] Not to be able to reproduce is often regarded as 'failure', and similarly produces a feeling of inadequacy, as there are cruel social stigmas associated with childlessness and infertility.

Undoubtedly, however, not all of those who cannot have children are infertile. Others are involuntarily childless because they do not have the ability to create a child without technical or medical assistance. This category could include single women who do not wish to find a male partner, however temporary; lesbian women who would like to have children together but do not wish a man to be involved;[57] a single man who wants to father a child without a woman;[58] or a gay male couple who want children 'of their own'. While infertility treatments or surrogacy may be able to be utilised to facilitate the creation of families for such people, any arguments as to whether this *should* be permitted are beyond the scope of this thesis, other than in the context of the acquisition of parenthood.

There are, and have always been, many factors to which medical subfertility or infertility may be attributed. Infertility can be but is not always a genetic problem; it can be related to or stem from a number of different factors. Douglas Cusine helpfully states that 'for convenience, [causes of infertility] can be classified as environmental, physical or psychological. In some cases there is a combination

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[56] Gillian Douglas, n 29 above, 103.
[57] A discussion of the impact of the development of reproductive technologies on the ability of lesbian couples to form families (and a negation of the necessity of fatherhood) is undertaken in Kate Harrison, 'Fresh or Frozen: Lesbian Mothers, Sperm Donors, and Limited Fathers' in Martha Fineman and Isabel Karpin (eds), *Mothers in Law* (New York: Columbia University Press, 1995).
[58] See 'Single Father of Triplets Defends Surrogacy Deal' *The Independent*, 18 September 2001, www.independent.co.uk/story.jsp?story=94612.

of factors'.[59] One such factor can be the use of certain contraceptive methods, such as the Intra-Uterine Contraceptive Device, or IUCD, which, it has been thought, can delay or impair fertility temporarily or in the long term.[60] The development of the contraceptive pill and its subsequent mainstream use by many women as a contraceptive has also been linked to the increasing problem of infertility for two reasons. First, it may be that the availability of the contraceptive pill has allowed women to take more control over their reproductive lives and delay the age at which they try to have children. Secondly, it is possible that the pill is a cause of environmental factors that could lead to infertility, in that high levels of estrogens are released into the water systems as a waste product. Furthermore, therapeutic abortion can also sometimes result in infertility, as can repeated spontaneous miscarriage. Another identifiable causal factor is the age at which many couples are and have been choosing to start a family. This average age is becoming higher – that is, many people are choosing to delay having their children until a later stage in their lives. Perhaps this is mainly because many women are delaying the age at which they bear children until after they have established a career, or because social pressures on both women and men to have children early have lessened.[61]

In women in particular, fertility decreases with age, as the ovaries contain all of a

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[59] Douglas Cusine, n 28 above, 5.

[60] Some recent reports now dispute this, and modern IUCDs may be less likely to do so. See, for example, 'Coil Link to Disease is a Myth, Say Scientists' *The Independent*, 23 August 2001, www.independent.co.uk/story.jsp?story=90177.

[61] Office for National Statistics, *Social Trends* no.32 (2002), 46; '[i]ncreased female participation in higher education and the labour market, and the greater choice and effectiveness of contraception have encouraged the trend towards later childbearing and lower fertility'.

woman's eggs from birth. As she ages, so do her eggs. It is also thought that up to twenty years before the menopause the quality of the eggs begins to deteriorate, and a woman gradually becomes sub-fertile. Ten years before the menopause, the average age of which is 51, women are likely to be infertile.[62] Therefore, women who wish to pursue their careers or who start thinking about having a family later are at more risk of being affected by sub-fertility or infertility. But it is obviously not only women who can have fertility problems. The male sperm count or quality can greatly vary, or decrease according to many factors, including age,[63] general health levels (this is also affected by stress) and the area in which they live. Exposure to or abuse of drugs, and environmental factors such as pollution may also affect fertility in both men and women.[64] Infertility can therefore be seen as both a personal problem, and one of society.

There are many and varying estimates on the prevalence of infertility amongst the population of the United Kingdom. It is however, true to state that the number of people or couples who suffer or will suffer from infertility has been steadily, and is still, rising.[65] Statistics commonly quoted estimate that approximately 15% of today's UK adult population, or that one in six couples in developed countries

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[62] J. P. de Bruin, H. Bovenhuis, P. A. H. van Noord, P. L. Pearson, J. A. M. van Arendonk, E.R. te Velde, W.W. Kuurman and M. Dorland, 'The Role of Genetic Factors in Age at Natural Menopause' 16 (9) *Human Reproduction* 2014-2018.

[63] B. Eskenazi, A.J. Wyrobek, E. Sloter, S.A. Kidd, L. Moore, S. Young, and D. Moore, 'The Association of Age and Semen Quality in Healthy Men' (2003) 18 (2) *Human Reproduction* 447-454.

[64] Susan Benoff, Grace M. Centola, Colleen Millan, Barbara Napolitano, Joel L. Marmar, and Ian R. Hurley, 'Increased Seminal Plasma Lead Levels Adversely Affect the Fertility Potential of Sperm in IVF' (2003) 18 (2) *Human Reproduction* 374-383.

[65] Gillian Douglas, n 29 above, 105.

may be affected by infertility during their reproductive lives,[66] although there are inevitably higher estimates. Gillian Douglas estimates that '[a]nything from 11-22% of the adult population [may] be affected'.[67] Consequently, she says, 'many authors refer to the number of *couples* experiencing infertility... [on] this basis, the estimates vary from one in six couples to one in ten in the United Kingdom'.[68] Douglas Cusine, however, points out that a large number of these statistics do not take into account the incidences of infertility among the unmarried or cohabiting population.[69] In agreement, Emily Jackson states that 'since a diagnosis of clinical infertility can only be made once an individual has articulated an unfulfilled desire for a child within a heterosexual relationship, the actual incidence of fertility problems is unknowable'.[70]

Yet despite this increase in the prevalence of infertility, and despite a healthier attitude to openness about and discussion of fertility problems, there remains a heavy stigma attached to childlessness. This stigma remains despite more general changes in societal attitudes to sex, or to marriage, or to having children, and operates despite the increased availability, popular exposure and knowledge of a variety of treatments or methods for overcoming or bypassing infertility or

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[66] Emily Jackson, n 26 above, 162. In 1996, the BMA estimated that 'between 1 in 6 and 1 in 8 couples in the UK have fertility problems' (n 9 above, 6). The Human Fertilisation and Embryology Authority say that 'up to one in six couples have difficulties in conceiving' (www.hfea.gov.uk, 28 March 2003).
[67] Gillian Douglas, n 29 above, 105. Her references are taken from 'Population Study of causes, treatment and outcome of infertility', M. Hull *et al*, (1985) 291 *British Medical Journal* 1693; and N. Pfeffer and A. Woolett, (1983) 'The Experience of Infertility', no reference given.
[68] Gillian Douglas, *ibid*.
[69] Douglas Cusine, n 28 above, 5.
[70] Emily Jackson, n 26 above, 162.

childlessness. Emily Jackson contends that infertility or involuntary childlessness is distressing because

> '[i]n addition to the fact of childlessness, infertility can threaten people's self-esteem and their sense of control over their lives. Where a couple have assumed that they would have children, a diagnosis of infertility disrupts their assumptions about the trajectory of their shared future'.[71]

For an adult woman or couple, to have children is generally seen as being both natural and correct. This principle is entrenched in our societal, political and religious beliefs, and is upheld by our law and our social welfare policies. In childhood we are taught that there is a mother, a father and their children: that this is what a family is. From young adulthood we are subjected to a great deal of social pressure to have children – it is seen as unnatural or atypical not to do so, and especially not to want to do so.[72] It is also acknowledged that for those that have problems in attaining this goal, 'achieving parenthood removes the stigma of infertility'.[73] In the last 25 years in particular, that is, since the initial development of IVF, there have been many medical and scientific developments

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[71] Emily Jackson, *ibid* 163 (note 10).

[72] This is even the case in an age where it is not necessarily seen as unnatural not to get married. Of course, however, standards alter: evidence shows that the average age of the first child, for both men and women, is getting higher (Office for National Statistics, n 61 above, 46). So, while it may once have been considered unnatural not to have had a child by, for example, 25 years old, it seems now that this is the case only once one is near or past the age of 30 (see also Wolfgang Lutz, Brian C. O'Neill, and Sergei Scherbov 'Europe's Population at a Turning Point' (2003) 299 *Science* (5165) 1991-1992).

that aid the management of both female and male causes of infertility. Although surrogacy and artificial insemination have been improved by many of these developments, they have, in comparison, been used for centuries; these are methods of circumventing infertility or involuntary childlessness that do not necessarily require a great deal of technical or medical skill to perform. The first recorded use of artificial insemination in humans was in 1799, although the practice had been used for some time before then in animal husbandry.[74] The first time that AID was successfully used is said to be in the USA in 1884.[75] Other observers state that artificial insemination by donor has been used for the treatment of infertility in this country since the 1930s.[76] Surrogacy may be older still: as previously mentioned, a form of the practice is mentioned twice in the Old Testament.[77]

Alongside higher levels of infertility there is an increased and increasing awareness in society of the problems of infertility. New medical technologies in assisted reproduction have been widely publicised, especially since the early

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[73] Rachel Cook, n 36 above, 135. She goes on to say 'it is perhaps ironic that the method itself [surrogacy] is stigmatised'.

[74] George P. Smith states that 'artificial insemination, as a technique for improved animal husbandry, occurred as early as 1322, while the first reported case of human AI (AIH) was in 1799. Not until the early part of the twentieth century were recorded instances of donor insemination observed' ('The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers' (1983) 5 *Western New England Law Review* 639-665, 640 (citing Smith, 'Through a Test-tube Darkly: Artificial Insemination and the Law', (1983) 67 *Michigan Law Review* 127, 128-129). Peter de Cruz puts the date for the first use of AIH at 1790, 'when John Hunter, a British doctor, succeeded in carrying out an artificial insemination of a linen draper's wife with her husband's seed. The husband was suffering from a disability which made normal intercourse impossible' (n 17 above) 167.

[75] Peter de Cruz, *ibid.*

[76] Rachel Cook, n 36 above, 122; and see generally, Naomi Pfeffer, *The Stork and the Syringe: A Political History of Reproductive Medicine* (Cambridge: Polity Press, 1993).

[77] Text surrounding n 19 and 20, above.

1980s, and knowledge of the procedures involved has, as a result, become more widespread. In turn, this revived academic interest in the area of reproduction after it had somewhat 'waned after the battle to legalise abortion had been won in the 1960s'.[78] Increased visibility of infertility was also aided by the widespread publicity given to surrogacy cases in the 1980s, and the parliamentary debates taking place throughout that decade, eventually resulting in the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology (HFE) Act 1990. The ethics of reproductive processes have been, and continue to be, minutely examined;

> '[s]ince the introduction of IVF in 1978 ... the subject of infertility has been much more widely discussed than before. New techniques of treating this complaint have been introduced and the outlook for a couple with infertility problems is now much more hopeful than it was two decades ago'.[79]

Coupled with a decline in adoption due to there being fewer children, particularly babies, available to adopt,[80] and a change in emphasis from adoption being regarded as, if not the only, then at least a better solution to infertility, the use of

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[78] Gillian Douglas, n 29 above, v.

[79] Sir Malcolm MacNaughton, in foreword to Douglas Cusine, *New Reproductive Techniques: A Legal Perspective* (Aldershot: Gower, 1988) vii.

[80] Jonathan Herring comments that '[o]ne of the significant changes in the nature of adoption is that the average age of children being adopted has risen' (*Family Law* (Harlow: Longman, 2001) 527). He adds, within comments on 'crisis' in adoption, that 'couples who seek to adopt healthy white babies are likely to be disappointed' (at 528). Evidence also shows that '[t]he percentage of all children adopted in Great Britain who were below the age of one decreased from 26 per cent in 1981 to 5 per cent in 2000' (Office for National Statistics, n 61 above, 50).

assisted reproduction techniques has become more visible.

Infertility is therefore becoming less of a hidden problem and, as such, has also been academically recognised as a problem that has many intricacies requiring attention from law and policy makers.[81] As reproductive technologies involve the manipulation of the earliest forms of life, the human gametes[82] and embryo, it is never likely that all people will be ethically satisfied with the practices: there is 'profound moral disagreement' on these issues.[83] This makes the regulation of reproductive technologies and related research both necessary and difficult. The law must be involved in the realm of infertility, if only because the science and technology that is inherent in the clinical management of assisted conception often challenges some people's concepts of morality.[84] A problem that remains to be addressed, however, is the tendency of the law to proceed slowly and inefficiently in these matters, so much so that it can be left behind by technological advance and altered social perceptions: Thomas de la Mare, for example, has argued that there is a 'regulatory lag' in dealing with reproductive issues.[85] This is a further argument for a review of the law, particularly in relation

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[81] Emily Jackson points out that '[a]s the reproductive process has been opened up to more intensive scrutiny, and as the opportunities for its external manipulation multiply, law has assumed an ever greater significance' (n 26 above, 1).

[82] Sperm and ova.

[83] Emily Jackson, n 26 above, 1.

[84] Although this is the case on a political level, there are some who would disagree, arguing instead that it should be up to those who wish to exercise their own reproductive autonomy and the scientists involved who should determine the boundaries. An argument of this nature can be found throughout Emily Jackson's work (n 26 above).

[85] Thomas de la Mare, 'Assisted Conception and the Human Rights Act 1998', paper presented at the *Human Fertilisation and Embryology First Annual Legal Conference*, The Law Society, London, 22 November 2001. And, as Michael Kirby has succinctly put it, the 'hare of science and technology lurches ahead while the tortoise of the law ambles slowly behind'. ('Medical

to surrogacy, both in the interests of those who are infertile and are considering the use of a surrogate, and of those people who act as surrogates or participate in treatments. If this is the case, as this thesis in part seeks to show, then it can be argued that this 'lag' ought to be addressed, to bring the law into line with current perceptions of surrogacy.

b) Social constructions

The social construction of the family and of the members and roles of people within the family have been greatly altered by the many advances made in assisted reproduction in the latter part of the twentieth century and beyond. It is also likely that this will continue to be the case as further technological developments are made. This challenge to the model of the family has been especially relevant when considering the use of surrogacy as an alternative to 'natural' sexual reproduction and some forms of medicalised assisted reproduction because the processes involved can be reduced to their component parts. Surrogacy can be seen to even further fragment the reproductive process than many other of the well-known forms of assisted reproduction.[86] Science has made it possible to separate sex and intimacy from the processes of procreation: now the individual acts involved in the creation of a child can be and are isolated. Love, sex, pregnancy, birth and childcare do not now have to go hand in hand.

Technology and New Frontiers of Family Law' in Sheila McLean (ed.), *Legal Issues in Human Reproduction* (Aldershot: Dartmouth, 1989) 14).

[86] Such as artificial insemination (AI) by husband or by donor, or in vitro fertilisation (IVF) in its many forms.

In the UK, the law has tended to respond slowly and sometimes negatively to most challenges to the traditional formulation of the family and the roles contained within it.[87] This is particularly true of surrogacy, where the law may be said to be largely inconsistent with that relating to other forms of assisted reproduction. For example, following the use of most reproductive technologies, there is some automatic recognition of the element of social parenthood. Where donor gametes are used, for instance, the law provides that a female recipient of donated eggs will be legally regarded as the mother of any child she gives birth to,[88] and where a child is conceived following the use of donated sperm (AID), the social father is legally regarded as the father if he is either married to the woman who was inseminated,[89] or they received licensed treatment 'together'.[90] In surrogacy, there is no automatic legal recognition of the social parents. In fact, the surrogate (and her husband, if she is married) will be legally recognised as the parents of any child born.[91] The social parents, subject to certain criteria, can apply for a 'parental order' which, if applicable, enables them to be 'treated in law' as parents.[92]

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[87] For example, the HFE Act 1990, which regulates many or most of the practices involved in assisted reproduction, and which created the Human Fertilisation and Embryology Authority, a body which licenses such practices, was not passed until 1990, twelve years after the first 'test-tube baby' was born.

[88] Human Fertilisation and Embryology Act, section 27 (1).

[89] Human Fertilisation and Embryology Act, section 28 (2).

[90] Human Fertilisation and Embryology Act, section 28 (3). The requirement that the couple receive treatment 'together' has held to be a strict one in the recent Court of Appeal judgement of *Re R (A Child)* [2003] EWCA Civ 182. The case has implications for the basing of parenthood on intention following assisted reproduction: these will be discussed further in Chapter 4, below.

[91] Human Fertilisation and Embryology Act, section 27 (1).

By responding in this way (or not responding at all), the law treats as different a section of the familial population, namely the infertile or involuntary childless.[93] This applies, in particular, to those who seek to use a surrogate in order to have their children, when it can be argued that the recognition of their difference is exactly what is not required by such people.[94] This thesis, while analysing the shortfalls of the current legal regulations for surrogacy and suggesting how these might be reformed, will address in particular a specific example of a legal shortfall for people using surrogacy. That is, following a surrogacy arrangement, the people who are the most likely to care for the child (the intending or social parents) are not those who are legally recognised as its parents. This is not the case when children are born 'naturally' or following other forms of assisted reproduction and it therefore needs to be asked whether it is necessary to treat intending parents and children in surrogacy arrangements differently from those who form their families in other ways.

Because traditional legal conventions and presumptions of the family and the roles within it are not equipped to include or cater for 'new' or alternative methods of family construction, this often means that what may be socially recognised as a family unit is not fully recognised as such by the law. Most of the technologies in question are no longer 'new', they are socially recognised and generally

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[92] Human Fertilisation and Embryology Act, section 30.

[93] Some people choose to remain childless. 'Involuntarily childless' would therefore include those who try to have a child but find that they cannot and also those for whom having a child would be impossible without assistance, such as single people or homosexual/lesbian couples. Marjorie M. Schultz calls the latter 'socially infertile' ('Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' (1990) *Wisconsin Law Review* 297, 314).

accepted.[95] It can be argued that families are also increasingly recognised on a social rather than a legal basis and a greater understanding of reproduction and genetics enables the layman to understand 'new' mechanisms for circumventing infertility and yet recognise and accept the social unit that is formed as a family, even if it differs to their own, or one of the participants in the reproductive process does not continue to be involved.

c) Increased awareness

Most aspects of reproduction have, for the most part, become firmly under the control of science. Doctors, and the medical profession generally, have long held the keys to safe and reliable contraceptive methods, abortions, pregnancy and childbirth, allowing, to some extent, our fertility to be controlled and people to choose whether or when to have children. Now the medical profession also holds the key to alternative forms of reproduction, those that allow people to become pregnant and to have children, when they would not have been able to do so without aid. As Gillian Douglas explains;

> '[h]uman reproduction has become a medical matter, and this has had two consequences. First, the woman, whose role is clearly

[94] This is despite the fact that it is the technique itself that generates this difference because, uniquely, the woman who gives birth and the intending social mother are different people.
[95] For example, artificial insemination (AI) has been used in humans for more than a century (see n 74, above), and in vitro fertilisation (IVF) has been practised since 1978. Both practices raised concerns at their outset, but as the use and availability of them has grown, concerns about their use have diminished.

> central to reproduction, has become increasingly invisible ... The second consequence is that control over reproduction is vested largely in the medical profession'.[96]

She goes on to give examples where doctors have become increasingly empowered in the area of reproduction and associated areas of medicine and science. Certainly 'the new high-technology techniques of assisted reproduction (apart from artificial insemination which requires no medical expertise) belong firmly to the laboratories of medical scientists'.[97] This medical domination (and the fact that resources are not unlimited) leads unquestionably to the notion that women have to qualify, in a sense, for contraception, abortions or infertility treatments, for example.[98]

As stated above, infertility is more than a medical problem. People face both internal and external pressures to start a family. These pressures are everywhere in daily life: images of the perceived 'normal family' (and the abnormal family) pervade the media, television, advertising, films and fiction. To have a family is to be seen to be normal. Therefore, the infertile or involuntary childless have even greater problems,[99] and face even greater pressures to 'fix' the problem: the concept of the 'normal' family puts pressure on them to do so. Unfortunately,

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[96] Gillian Douglas, n 29 above, xix-xx.
[97] Gillian Douglas, *ibid* xx.
[98] This is a familiar concept in the context of abortion. See generally Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (London: Pluto, 1997).
[99] Not all involuntary childless people face this pressure – a homosexual couple wishing to have a child may be regarded as abnormal – 'only deserving cases are permitted to take advantage of what is on offer' (Gillian Douglas, n 29 above, xx). Unfortunately, those who decide who is

even with the many advances in medical knowledge of infertility and the management and treatment of it, there remains an unnecessary and cruel social stigma attached to childlessness, which cannot be assuaged purely by professional medical management.

It may be argued that there has been an increase in societal awareness of infertility, perhaps due to intense media publicity over some of the many issues raised in reproduction, including infertility. News reporters competed for the first and best pictures at the time of the birth of Louise Brown, the world's first IVF baby, in 1978. It is said that 'some members of the press went to enormous lengths to find out whatever details they could about the case. Some dressed as hospital porters or window cleaners. Large sums of money were offered for the slightest piece of information'.[100] Not only was the birth of the world's first 'test-tube baby' covered in depth by the world's news reporters but other issues in infertility and reproduction have been covered in the years since that event. The birth of the world's first sextuplets, the surrogacy stories in the early to mid-1980s, the case of Mandy Allwood refusing to undergo selective terminations of her multiple pregnancy, the debates and developments on reproductive technologies and embryo research in the early 1990s, the cloning of Dolly the sheep in 1997 and, more recently, 'designer babies'[101] or cloned babies[102] in the

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'deserving' or not are depending on perceived social and cultural reasoning.

[100] Jack Challoner, *The Baby Makers: The History of Artificial Conception* (London: Channel 4 Books, 1999) 44. The book details more of the press attention than space allows for here.

[101] For a recent example of this issue in the news see 'High court rules out 'designer' baby' *The Guardian*, 21 December 2002, http://www.guardian.co.uk/uk_news/story/0,3604,864063,00.html. The High Court ruling is to be challenged in the near future: 'Family challenge designer baby block' *BBC News Online* 31 March, 2003, http://news.bbc.co.uk/1/hi/health/2903017.stm.

news – all of these issues and others have caused media sensation which it would have been very difficult to miss.

The development and subsequent public attention given to assisted reproductive technologies means that access to better medical information and facilities for the treatment or control of infertility has theoretically become easier. There have been increased reports of potential solutions to the problems of the infertile; more and more potential treatments are becoming available all the time. In general, it might be argued that due to increased popular exposure of the issue, people have become more aware that infertility exists and that there are potentially many ways to treat it, including the use of surrogacy.[103] Even the most scientific of these methods are becoming accepted as a part of life, their names have become well known and well cited phrases. It can probably be assumed that most people will know what 'artificial insemination', 'IVF' or 'surrogacy' means, even if the actual science behind the procedures is not fully understood.[104] In turn, this has led to greater acceptance of the use a wide range of assisted reproduction techniques.[105] The development of assisted reproductive technologies has meant that a corresponding development of the law has, to some extent, taken place. As Emily Jackson has pointed out, the development of

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[102] See n 45 above.
[103] There have been, for example, surrogacy story-lines in *Brookside* (Channel 4), *Holby City* (BBC1), *Eastenders* (BBC1) and also in the American sitcom series *Friends*.
[104] Consider, for example, the use of a baby in a test tube in a recent advertisement for the Teacher Training Agency. The commentary asks 'can you explain how?' and while it might be that many people could not explain the procedures of IVF, it might be argued that the use of a baby in a test tube as an image assumes that people watching the advertisement know, to whatever extent, what a 'test-tube baby' is.

new and different treatments for infertility has also 'wrought a profound change in the relationship between the law and reproduction', explaining that '[u]ntil recently, parenthood was only regulated *after* children had been born'.[106] Although the majority of reproductive science has been strictly regulated, however, legislators could not have had the foresight to cover all potential developments, thus there will always be some things that slip through the regulatory net. For example, the HFE Act 1990 is not equipped to deal with the practice of purported sex selection by 'sperm-sorting',[107] and neither is there specific legislation covering processes such as GIFT,[108] ZIFT,[109] or ICSI.[110]

It is still interesting to observe, however, that although there is much provision made for family planning – contraception, pregnancy care or medicalised birth, for example – in this country, still very little of this is directed towards those with an inability to conceive rather than towards those who seek to prevent conception or to facilitate and support a pregnancy after conception has occurred naturally and easily. For those who cannot conceive either easily or naturally, there are some, but few, infertility services available on the NHS. However, as noted by Gillian Douglas, those that are available receive a low priority and

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[105] Robert Lee and Derek Morgan state, too, that since 1985, surrogacy has changed from 'the private and invisible to the public and intermittently visible' (n 1 above, 201).
[106] Emily Jackson, n 26 above, 161.
[107] See, 'Baby 'Gender Clinic' Enquiry' *The Observer*, 4 November 2001, www.guardian.co.uk/Archive/Article/0,4273,4292195,00.html.
[108] Gamete Intra-Fallopian Transfer (GIFT) is the procedure where eggs, retrieved after drug and hormone treatment in the same way as they would be for IVF, and sperm are mixed together outside of the body and then placed in the Fallopian tubes of the woman undergoing treatment.
[109] Zygote Intra-Fallopian Transfer (ZIFT) is a similar procedure to GIFT but instead of separate gametes being transferred, a fertilised egg (zygote) is.

'those couples able to afford it turn sooner or later to private treatment'.[111] This is clearly political, and again points to the notion of couples having to be 'deserving' of treatment. Additionally, there is a problem in that National Health Service treatment provision, if available, is governed by a 'postcode lottery', where people or couples needing treatment for infertility benefit or suffer according to where in the country they live. Some area Health Authorities provide, for example, more IVF cycles per couple than do others, or set a higher age threshold for treatment than other Health Authorities. Another interesting, if not entirely related, observation made by Douglas is that 'recognition of the fact that family planning is a two-sided coin may explain why the People's Republic of China has set up IVF and AID clinics to help the infertile'.[112] Here, it seems, we treat family planning in the reverse, enabling people to abstain from family creation and maintain their pregnancies, while providing little in the way of non-privatised assistance for those who have problems in achieving or maintaining a pregnancy.[113] For this reason, infertility treatment services are also the province of those people who have the ability to afford them.[114]

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[110] Intra-cytoplasmic Sperm Injection (ICSI). An IVF procedure in which a single sperm is injected directly into an egg to fertilise it.
[111] Gillian Douglas, n 29 above, 5.
[112] Gillian Douglas, *ibid* 6.
[113] Emily Jackson (n 26 above, 171-172) suggests that the reason for the greater provision of services to prevent conception, or interventions during pregnancy or childbirth is because these are not equated with the 'unnaturalness' that is seen when the acts of sex and conception are separated.
[114] It might be argued that if it is the case that people are obliged to pay for infertility treatments then they should be entitled to receive what they bargained for. Whether this contractual notion can be extended to surrogacy will be analysed in Chapter 6, below.

Not all treatments for infertility involve the use of high technology medical assistance. A large proportion of in- or subfertility can often be treated with steroids or other drugs, or by corrective surgery. However, although these methods generally have a fairly high rate of success, they are not themselves free of risk and may not at all times be appropriate. What may be called the 'new' techniques in assisted reproduction were in part developed to tackle this problem; rather than 'curing' the cause of the inability to have children, the problem is often able to be circumvented by technology.[115] Such methods of assisted reproduction tend only to be resorted to after 'easier' methods have been unsuccessfully attempted. None of the methods are simple methods of family formation and, as Rachel Cook points out, 'those who participate are likely to be highly selected individuals ... attitudes of the general public to techniques of family formulation will influence who participates'.[116] For this reason, generally these techniques will not be used unless necessary: they will not be the method of choice for getting children.

3) Introducing surrogacy arguments

The practice of surrogacy has tended to raise more ethical objections than most other treatments for infertility. As Robert Lee and Derek Morgan explain;

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[115] There has been some criticism of this tendency to circumvent rather than cure, or prevent, but for a blunt response, see Gillian Douglas (n 29 above, 106) who contends that 'this view invites the response 'so what?''.
[116] Rachel Cook, n 36 above, 125.

> '[s]urrogacy is one of those sorts of ethical problem on which everyone appears to have a view, defending it strongly and indeed passionately, and on which hardly anyone seems neutral. It is at the heartland of the ethical divide in which we also find subjects such as abortion, research and experimentation on human embryos, genetic engineering and cloning'.[117]

But it can be suggested that a possible reason for this is because, in addition to the more common concerns, surrogacy raises further issues due to the frequent involvement of money/payments within the context of a private arrangement. Children are seen to be natural, not as items that can be bought or sold; the idea of purchasing, or contracting for children is seen as abhorrent.[118] Other linked issues such as the exploitation of the surrogate can also raise general concerns, the idea being that stronger parties may exploit those weaker than themselves in order to get what they desire: in this case, a baby. Furthermore, if there is money involved in a surrogacy arrangement, the child may be seen, or may later regard him or herself to have been turned into a mere commodity, reduced from the "precious gift' of a baby into something that money can buy'.[119] Concerns for surrogate children are also based on the perceived unnaturalness of a child's separation from its birth mother, and the potential psychological implications this might have for the child if this is known. This may be heightened if the surrogate was also the genetic mother. However, such separations are hardly

[117] R.G. Lee and D. Morgan, n 1 above, 192.
[118] See, generally Margaret Brazier, n 44 above, 345-354.

unprecedented in the light of adoption. Also of concern (but less frequently mentioned) is the psychological and social health of any existing children of the surrogate, or indeed the commissioning couple, as they may or may not understand what is happening around them or why: Peter de Cruz has stated that surrogacy may '[confuse] children who were not produced by surrogacy who have to live with the surrogacy-produced child as part of their family'.[120] It has, however, been shown that this is not necessarily the case – openness about what is going on enables children to rationalise the events around them, for example, a mother being pregnant but giving the baby away.[121] This might suggest that openness is something that legal reform of surrogacy laws might wish to achieve.

There may be other moral and religious objections to surrogacy, such as to the introduction of a third party into a marriage, a traditional, private and somehow sacred relationship, sanctified by the church. Of course, this specific concern would be hard to justify if the couple seeking to use a surrogate were not married, but in this event it would be likely that the argument could be developed to include the belief that children should only be products of a sanctified marriage. In addition, there are symbolic concerns attached to surrogacy regarding our understandings of womanhood, motherhood and childbearing, and

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[119] Michelle Stanworth, n 50 above, 1.
[120] Peter de Cruz, n 17 above, 171.
[121] See generally Eric Blyth, ''Not a Primrose Path': Commissioning Parents' Experiences of Surrogacy Arrangements in Britain' (1995) 13 *Journal of Reproductive and Infant Psychology* 185-196, and Eric Blyth, '"I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology* 189-198.

the family as an institution. There are also ideological concerns that have been seen to relate to the symbolic entrapment of women into stereotypical roles as breeders and carers.[122] Motherhood as a whole concept becomes fragmented into its genetic, gestational and nurturing components. This reductionist analysis of motherhood can challenge traditionally held beliefs and assumptions, including perceptions of the bond formed between the gestational mother and child. Ultimately, then, surrogacy has been perceived to be a direct challenge to both the meaning of motherhood and to the nuclear family structure.[123] Because of this, practical issues relating to parenthood, status and rights, and questions as to who are to be legitimately regarded as the parent(s) of a surrogate born child, and why, are significant, and ought to become paramount when formulating new legislation. Such issues, however, have tended to be overlooked in favour of more general moral and ideological concerns. This thesis will argue that these general concerns can be adequately addressed by legislation, allowing for more specific issues such as parenthood to also be (re)considered.

However, it is also true to say that although some currently used techniques for alleviating infertility or childlessness have been available for a long time, and although modern assisted reproduction techniques offer incredible potential, many current infertility treatments evoke much ethical and moral discussion,

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[122] See, generally, Gena Corea (ed.), *Man Made Women: How Reproductive Technologies Affect Women* (Bloomington: Indiana University Press, 1987).

[123] Radhika Rao argues that 'assisted reproductive technologies possess the potential to undermine the traditional [family] paradigm in three fundamental and possibly far-reaching ways' ('Assisted Reproductive Technology and the Threat to the Traditional Family' (1996) 47 *Hastings Law Journal* 951, 952).

whether this is related to access to services, funding, or other issues. Treatments or techniques that involve a person or people external to the couple who will actually raise the resulting child seem in particular to have generated a great deal of debate. For example, there has been much debate about the ethics of using donor gametes, as this results in the child not being genetically related to one or other of its parents.[124] This debate has been heightened by the questions raised by anonymity (should donors of gametes be allowed to remain anonymous?), secrecy (should children be told of their method of conception?) and payment (should donors be paid for their services?).[125] There has also been considerable debate on the ethics of allowing couples who lead an 'alternative lifestyle' to access treatments.[126] For example, this would include both lesbian couples (who could use artificial insemination to allow them to have a child) and gay couples (who could use a donor egg, fertilised by one or other of their sperm, and carried by a surrogate). Neither of the parties in these arrangements may be what is technically classed as 'infertile' but they *are* an involuntarily childless couple. The ethics of allowing single people (usually women) to be assisted to have a child when they may also technically not require assistance has also been questioned. These questions become all the more pertinent when the often slender resources available for these treatments are considered. Although some of these treatments are available, to a limited extent, through the NHS, the question also arises as to whether people should be allowed to pay (privately) to have children, just because they are financially able to do so.

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[124] See Susan Golombok, *Parenting, What Really Counts?* (London: Routledge, 2000) 30-38.
[125] Susan Golombok, *ibid* 35.

The specific practice of surrogacy has also generated a considerable amount of debate – both moral and legal – in the UK and elsewhere. Perceived ethical problems linked to assisted reproduction techniques are heightened with surrogacy: the introduction of a tangible third person to the procreative process challenges social norms and many longstanding beliefs, especially of the sanctity of Christian marriage.[127] There also remains an idea that surrogacy has 'dubious social acceptance'.[128] The principal issues that the practice of surrogacy has raised centre on whether it is ethically permissible to allow one woman to bear a child for another. More specifically, the issue is whether it is morally wrong for a woman to conceive and give birth to a child with the intention of surrendering it, despite the fact that it is being 'surrendered' to a person or people who strongly desire to have their own child to raise and call their own. In addition to the moral debate, further questions are raised by other elements of surrogacy – payment, for example, becomes linked to baby-selling. There are also questions relating to exploitation, both of the surrogate and of the child.[129] These questions are asked generally when surrogacy takes place, but especially when money becomes involved in any surrogacy arrangement. It is thought by some that paying for

[126] Susan Golombok, *ibid* 45-60.
[127] The introduction of a tangible third person might be seen as being worse than using a gamete donor, for example.
[128] Rachel Cook, n 36 above, 2.
[129] But, interestingly, it is not usually asked whether the commissioning couple are exploited (or exploitable). Because it is assumed that this couple is economically better off than the surrogate, they commission her and they will do what they can to get the baby they long for, etc, the point that they could be exploited is overlooked. There is potential for a woman to propose to act as surrogate for payment and for her to turn around and say 'no, I want to keep my baby', knowing that she (in the UK and most other jurisdictions) has complete impunity to do so. A number of the arguments against surrogacy are analysed in detail in Chapters 2 and 3, below.

surrogacy is akin to reducing a child to commodity status.[130] It has also been suggested that paying a surrogate is comparable to prostitution or even slave labour,[131] and that women who act as surrogates are exploited because they are usually of a lower socio-economic status than the person or couple who commissions them.[132] It has, however, been noted that the large majority of the surrogacy debate has taken place in an empirical vacuum:[133] the only type of empirical evidence available about 'real life' surrogacy stories being that from occasional newspaper or magazine reports and television programmes, which tend to be affected by bias and change with the times, or from the individual case report – a biased account in and of itself as only problematic surrogacy cases tend to reach the courts. Ruth Deech, former Chair of the Human Fertilisation and Embryology Authority (HFEA) has noted that surrogacy only tends to find public and media disapproval when something in the arrangement goes wrong.[134] When a surrogacy arrangement runs smoothly, few objections are raised (although this may well be because such situations go largely unreported).

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[130] See M. Radin, 'Market Inaliability' (1987) 100 *Harvard Law Review* 1849.

[131] Mary Lyndon Shanley compares surrogacy to 'contracts for consensual slavery' in ''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* (Oxford: Westview Press, 1995) 156-167, 165.

[132] See, generally, Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (London: The Women's Press, 1988).

[133] Eric Blyth, '"I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology* 189-198, 189.

[134] Ruth Deech, 'Family Law and Genetics' in Roger Brownsword, W.R. Cornish and Margaret Llewelyn (eds), *Law and Human Genetics: Regulating a Revolution* (Oxford: Hart Publishing, 1998) 105-123, 115. Mary Warnock has also recognised this: '[i]n the decade or so since legislation there have been numerous surrogacies arranged ... doubtless many have gone smoothly .... But the press delight in the stories of failures, of couples who refuse to accept a child who is born with some defect, or of birth-mothers who refuse to surrender the child, or of commissioning couples who simply decide they do not want a child after all or get divorced before the child is born' (n 27 above, 90).

Thus, 'the disposition of sympathy is dependent almost entirely on the facts of the individual case'.[135]

There are also some personal autobiographical accounts of surrogacy arrangements. For example, Kim Cotton (*Re C*) has written two books about the surrogacy arrangements that she undertook; Mary Beth Whitehead (*In the matter of Baby M* (1988) 537 A 2d 1227) has also written a personal account, and there are smaller accounts of personal stories contained within C.O.T.S. information).[136] However, the point can be made that the surrogacy arrangements that are successful, where all the parties are happy, are grossly under-represented in all sections of the media. Indubitably, this helps to create a negative perception of surrogacy, which becomes problematic for those who enter surrogacy arrangements. In the UK and elsewhere, surrogacy has been regulated to reflect this: the components of surrogacy that are the least well regarded, such as commercial arrangements, have been prohibited and the tendency of the remaining regulation is to discourage the practice.[137] This, however, has left other components of surrogacy, parenthood in particular, under-considered by regulation. Whilst the determination of legal parenthood

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[135] R.G. Lee and D. Morgan, n 1 above, 192.

[136] Kim Cotton and Denise Winn, *Baby Cotton: For Love and Money* (London: Dorling Kindersley, 1985); Kim Cotton, *Second Time Around: The Full Story of My Second Surrogate Pregnancy* (New Barnet: Kim Cotton, 1992); Mary Beth Whitehead and L. Schwartz-Nobel, *A Mother's Story* (New York: St Martin's Press, 1989); C.O.T.S., *Comprehensive Guide to Surrogacy* (Unpublished, 2000). The surrogate from *Re an Adoption Application (Surrogacy)* [1987] 2 All ER 826 also pseudonymously co-wrote a book about her experience, called 'Surrogate Mother: One Woman's Story'.

[137] This was indeed the intention of the Surrogacy Arrangements Act 1985, as the Brazier Committee implicitly acknowledged (Brazier Report, n 4 above, para 3.4).

following surrogacy has been included in legislation,[138] the initial assumption relied upon is that the surrogate *is* the mother, and it is this assumption that has been under-considered. This thesis seeks to show that the assumption should be reversed: the commissioning (intending) parents should be legally recognised as the parents of the child from birth.

Whilst all these matters and any ethical concerns raised by surrogacy are eminently interesting and could be debated at length, this thesis will be centred primarily around the particular issue of the acquisition of legal parenthood in surrogacy arrangements, in the context of a wider review and reformulation of existing surrogacy legislation. The majority of writers tend to argue amongst themselves about whether surrogacy is exploitative, and who for, or about the moral questions of whether it is right to allow surrogacy to be practised at all, or whether payment of surrogates should be allowed.[139] They argue about who should be allowed to utilise the services of a surrogate, who should be allowed to be a surrogate, and for what reasons. As a result, the issue of parenthood – which participants are legally recognised as the parents of a surrogate-born child,

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[138] For example, section 30 of the HFE Act 1990 (which came into effect on 1 November 1994) provides a mechanism that allows the commissioning parents in a surrogacy arrangement to apply to become legally recognised as the parents of the child.

[139] See, among many examples, Michael Freeman, 'Is Surrogacy Exploitative?' in Sheila McLean (ed.), *Legal Issues in Human Reproduction* (Aldershot: Dartmouth, 1989) 164-184; Martha Field, *Surrogate Motherhood: The Legal and Human Issues* (Cambridge, Massachusetts: Harvard University Press, 1990); Ruth Macklin, 'Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis' (1988) 16 (1-2) *Law Medicine and Health Care* 60; Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex and Unwed Parents* (Boston: Beacon Press, 2001).

and why – is often overlooked.[140] Perhaps this is because it has been seen as a second-order question, in that questions relating to exploitation or commercialisation have been considered more important. Or perhaps it can be taken to indicate that many of those who write about surrogacy are happy about parenthood arrangements and how they are currently delineated by the law. There are few who challenge the legal formulation,[141] possibly because it is felt that the law represents what is proper and should be permissible or, more likely, because few have thought about it and even fewer are personally involved. It is likely that people will simply assume that a woman who gives birth to a child is its mother. This assumption is indeed where the original law came from – how could it have been possible to ever assume otherwise?

The question of morality also has to be considered in determining who the parents of a surrogacy child should be, and it probably does hold influence over some commentators. Traditionalists might argue that it is inherently wrong to bring a third party into a relationship (marriage or otherwise) and the procreative process (conception, pregnancy and childbirth) – areas that are typically

[140] Taking the point made by Andrew Bainham, ('Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in A. Bainham, S. Day Sclater & M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999) 25, 28-29), I use the word 'parenthood' throughout rather than 'parentage'. He suggested that they are not one and the same; that parentage is equivalent to genetic parentage, and parenthood means the actual legal status as a parent involving the activity of and responsibility for raising a child.

[141] John Lawrence Hill, ('What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (May 1991) 66 *New York University Law Review* 353) and Emily Jackson (n 26 above), are two among a number of academic commentators who have indicated that there may be better ways to regulate the acquisition of legal parenthood following surrogacy.

private.[142] This third party, the surrogate, has a second effect – is it possible that they too have a claim to be recognised socially and/or legally as the parent of the child? The question of morality has also changed as society has, and perhaps we have reached a time where the perceived morality that surrounds assisted reproduction and surrogacy is largely out of date: societal attitudes to the whole institution and meaning of marriage (illustrated by increased levels of cohabitation,[143] divorce[144] and often remarriage), to reproduction (for example, sex outside of marriage, higher levels of social acceptance or tolerance of homosexuality), and to having children (knowledge and acceptance of new reproductive technologies, adoption, step-children and single-parenthood) have altered.

In surrogacy the woman who acts as the surrogate is, in this country and many others, always legally recognised as the actual mother of the child, and she must register herself as such.[145] But it could be argued that the use of a third party in surrogacy is comparable with artificial insemination using donor sperm, or perhaps to the use of an egg donor. Here again a third party is introduced – albeit not necessarily as a 'real' or tangible person – to the process of creating a

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[142] This argument also applies (perhaps to lesser extent) to gamete donors, who also play a third part in the procreative process. It seems that there is less concern that donors should be recognised as parents but this is perhaps because of a semantic issue, to which I shall return later.

[143] Office for National Statistics, n 61 above, 42.

[144] Office for National Statistics, *ibid*, 43-44.

[145] Human Fertilisation and Embryology Authority *Code of Practice* (Fifth Edition) (London: HFEA, 2001) Annex D; 'Surrogate parents (birth mother and her partner/husband) are the legal parents of a child born through a surrogacy arrangement until legal parentage is transferred to the commissioning couple. The surrogate mother must therefore register the baby to which she has

child. It could also be argued that more of this third party is involved than in some cases of surrogacy as there will always be a genetic link between a sperm or egg donor and the resulting child which is not necessarily the case in surrogacy, as a surrogate can carry an IVF embryo that is the product of the commissioning couple's gametes, or of donor gametes, or a combination of both. However, sperm and egg donation have evoked little recent ethical or moral discussion on this point, and there are now few legal problems with their use. It could be suggested that this is perhaps because of the *nature* of the intervention – the surrogate *as a person* is more involved – she plays a part for the nine months of pregnancy and more, not just for a few minutes.[146] She is also part of the reproductive event, not something that has gone before it; a donor has already given their gamete by the time any pregnancy is established. In the case of sperm donors this could have happened some time ago as semen can be frozen and stored for later use quite easily, and for egg donors this is beginning to be the case. Again the question as to whether it is right for a woman to give birth to a child and surrender it becomes problematic – it is probable that this is seen to be more of a problem than the donation of a gamete which often tends to be seen as some sort of altruistic act, even though (or especially because) a genetic link is being surrendered, and notwithstanding any payments that donors may receive.

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given birth in the normal way. Her husband or partner should normally be registered as the father.'

[146] Or much longer in the case of egg donation, which is a very uncomfortable and invasive procedure.

There are inevitably arguments both for and against allowing surrogacy to operate as a reproductive choice. Generally, however, most of the points made in argument against the operation of surrogacy can be countered, as will be seen in the following chapters, and it therefore seems that whilst surrogacy should be regulated in some way, any regulatory scheme should attempt to facilitate surrogacy *because* it may be the only option for some people to have a child, while offering protection for the parties involved. It should be possible, given the wealth of academic debate that has taken place on many of the issues raised since surrogacy caught the public eye, to construct future surrogacy regulation on a basis that takes account of any problems that have previously been encountered with the practice while taking reasonable account of all parties concerned. When the results of empirical research studies are added to the pool of academic knowledge, this should be even easier to achieve. Any such regulation could limit or eliminate the parts of surrogacy that it is thought necessary to curtail, while facilitating surrogacy arrangements on a more general level. In particular, issues that have previously not yet been focussed on in depth ought to be considered, including that of how parenthood is achieved following a surrogacy arrangement.

4) Recognising intention

There is nonetheless the potential to argue that however the surrogate is inseminated (or however the child is conceived), her intention to carry that child

for the benefit of another person or persons should be recognised when determining parenthood (as is the donor's intention to surrender their genetic claim to parenthood). As previously stated, the law continues to determine and uphold that the surrogate is the rightful legal mother, shown purely by the act of giving birth, rather than any reliance on genetics: she may have no biological link to the child.[147] But by acting as a surrogate she is not intending to be the mother of the child she gives birth to. In addition, it is the couple who commission her who *do* intend to have and raise the child and yet they are not automatically recognised as parents. The surrogate may, of course, change her mind about surrendering the baby to the commissioning couple.[148] Such an action will cause problems, but currently no problems relating to legal parenthood on her part, as she will automatically be legally recognised as the mother.[149] Problems with parenthood are encountered even when everything goes well in a surrogacy arrangement – where the surrogate is content to hand over the baby and there are no complications – here, the commissioning couple are not recognised as the parents of the child that they will now raise and they may be genetically related to. This is problematic, as it means that commissioning parents have not yet become 'real' parents (in a formalistic sense). While surrogacy differs from other reproductive techniques because of the level of involvement of the third party, it might be argued that the intentions of the parties involved should form the basis

[147] Human Fertilisation and Embryology Act 1990, section 27 (1).
[148] This term will be used throughout as a matter of simplicity, although I acknowledge that single people or homosexual/lesbian couples (this is not implied) may also, if less commonly, wish to commission surrogates.
[149] Parenthood problems may, therefore, only be caused in this situation for the intending parents, and will be heightened if the commissioning couple are also the genetic parents of the child.

for legal parenthood, especially where there is no dispute and particularly where the agreement made between the parties is formed in the manner of a contract. It appears that intentionality is recognised, albeit implicitly, for other forms of assisted reproduction: if a child is born following artificial insemination using donor sperm, for example, the *intending* father is recognised as the legal father by section 28(3) of the Human Fertilisation and Embryology Act 1990.[150]

One question this thesis seeks to answer is whether there is a way to reconcile the law relating to assisted reproduction and surrogacy with the desire (and, it might be argued, the right) of commissioning couples to be officially – both socially and legally – recognised as the parents of their surrogate born or otherwise 'artificially' conceived child, and, if so, how this might be achieved. It will argue that such couples ought to be automatically recognised as the parents of the child that they brought into the world, whether there is a genetic relationship between them and the child or not, and will suggest that a way in which this can be done equitably and consistently is to legally recognise their pre-conception intention with the support of contract. For certain people the biological factor may be an important one and therefore the idea could be put forward that it should be the genetic parents who are legally recognised as the parents of the child. This reasoning has many flaws, however, which will be discussed below at length.[151] It certainly would not produce the desired outcome

[150] Unless treatment services are literally not received 'together' with the mother (*Re R (A Child)* [2003] EWCA Civ 182). Also see *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCH 259 (QB).
[151] Chapter 7, below.

in all surrogacy arrangements and therefore, because of its inconsistency, should not be relied on.

For the participants in surrogacy arrangements, any status or place in the family that has been created is determined by the law. The common law has always given weight to the presumption that the mother of a child is an indisputable biological fact, proved by parturition: as Cretney has said, 'in most cases someone would have seen the mother give birth'.[152] Legally recognising the reality of social circumstance would appear to be a more reasonable way of defining what a family is and who the individual members of it are (or are not), as doing so can provide consistency, both within surrogacy arrangements and between surrogacy and other forms of assisted reproduction. The changes that *were* made by the HFE Act 1990 have not fully considered parenthood; the original text of the Surrogacy Arrangements Act 1985 did not consider it at all. The mere fact that some people need assistance to have children does not mean that it should be harder for them to become parents in both a practical and a legal sense: while this seems to have been addressed in some areas of assisted reproduction, this does not seem to be so in the case of surrogacy.[153]

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[152] Stephen M. Cretney, *Family Law* (London: Sweet and Maxwell, 3rd ed, 1997) 153. This has also been held in a relatively recent court decision. In *The Ampthill Peerage* [1977] AC 547, it was said that 'motherhood, although also a legal relationship, is based on fact, being proved demonstrably by parturition'.

[153] The Brazier Committee recorded an argument submitted by John Harris that 'the whole structure of regulation of infertility treatment recommended by Warnock and enacted in the Human Fertilisation and Embryology Act 1990 is an infringement of human rights, and constitutes discriminatory treatment of infertile people, since they are subject to restrictions not imposed on those who can conceive by natural means' (Brazier Report, n 4 above, para. 4.31).

This thesis seeks to argue that the acquisition of parenthood – an automatic legal status including parental responsibility – should be as easy to achieve for the infertile or involuntarily childless as it is for those who can have children 'normally', without assistance. The idiosyncrasies that exist in the current law are both unnecessary and unacceptable. Gillian Douglas has commented that

> 'parenthood can be seen as a psychological concept as well as a physical and biological one. The commissioning parent, by initiating the surrogacy process, and being prepared to act as the rearing parent after the birth, should be recognised as the person who *conceives* the child psychologically'.[154]

Further, Andrea Stumpf has argued that '[t]he mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers'.[155] It can be reasoned that this psychological aspect of becoming a parent is as significant as biological conception and, as it is now possible and sometimes necessary to separate the processes involved in preparing for, conception of, giving birth to and raising a child, the birth mother (surrogate) should be recognised in law as simply that – the woman who gave birth to the child – but not automatically as its mother. The surrogate born child is really very little different to any other planned child that is born with the exception

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[154] Gillian Douglas, n 29 above, 146.
[155] Andrea Stumpf, 'Redefining Mother: A Legal Matrix for New Reproductive Technologies' (1986) 96 *Yale Law Journal* 187-208, 196. Similar arguments are evinced by Anton van Niekerk

that gestation takes place in a woman who will not raise the child – a third party to an intentional decision to bring a child into the world, to build a family – who has agreed to do so for whatever reasons, be it altruism, opportunity or something else. The psychological preparation for the birth of the child can be regarded as important as the biological conception. Furthermore, it might be argued that mother*hood* necessarily involves mother*ing*. Therefore, where it was the intention to separate these elements, the birth mother should be recognised by the law as exactly that, and not be given automatic legal and social acceptance as the 'real' mother of the child.

Whether or not surrogacy will ever be regarded as morally acceptable by everyone is impossible to determine, but remains unlikely. It may possibly be that acceptance of surrogacy has reached its apex: some people have beliefs and opinions that will never be swayed. Even if the point of total acceptance is never reached, or until it is, consideration ought to be given to the more complex, and potentially more important issues raised by assisted reproduction and surrogacy, such as the interests of those receiving assistance or the commissioning couple, of the child born to a surrogate, and of the surrogate herself. The legal status that these people are afforded needs to be further addressed, and that is, in part, what this thesis will attempt to do.

Discovering the actual problematic areas of surrogacy is vital in order to be able

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and Liezl van Zyl, 'The Ethics of Surrogacy: Women's Reproductive Labour' (1995) 21 (6) *Journal of Medical Ethics* 345, 347 and Emily Jackson, n 26 above, 269.

to regulate it well in the future. If we are to say that surrogacy should be allowed to operate, to some extent at least, because it may be the only option for some couples to have a family, and that women should be allowed to enter into surrogacy arrangements if they have made an informed autonomous decision, then it must be policed in order to make it safe. The modern practice of surrogacy is now 25 years old. We can look back over those years to see what particular problems have emerged and, with the benefit of hindsight, attempt to address them through legislation. If we find that we can identify negative or potentially negative aspects of surrogacy then this must be something that is legislated against, as far as is possible. But, in addition to the policing and regulation of the perceived negative aspects of surrogacy bargains, any further regulation of surrogacy must be both facilitative and enabling. The following two chapters will examine a number of large-scale theoretical arguments against surrogacy, and will show that none of these have become manifest. Because surrogacy is not demonstrably wrong, the chapter argues that it should be facilitated as a reproductive choice, by regulating it to prevent future manifestation of large-scale problems. Additionally, the subsequent chapter will look more closely at smaller-scale problems that have arisen in individual surrogacy cases, and will seek to show how these too can be addressed within new legislation.

Chapter Two

Surrogacy: Critiques and Criticisms

Introduction

Having located the use of surrogacy within the context of increased levels of infertility, new methods of overcoming or circumventing infertility, and an increased level of social awareness of infertility and the various methods available to overcome it, the conclusion drawn from the opening chapter was that it is now an appropriate time for the law relating to surrogacy to be reviewed. This chapter will begin to deal more specifically with the reasons why new surrogacy legislation should be formed, by analysing a number of critiques and criticisms of the practice of surrogacy, particularly those made by feminist scholars.

The emergence of surrogacy as a modern reproductive technique brought with it a number of difficult ethical, moral, social and legal questions which, it seems, have no easy answers. How attempts to answer these questions have been or are to be made will have an effect on other elements of the surrogacy debate, including that of how parenthood ought to be legally assigned following a surrogacy arrangement. It can be assumed, for example, that if surrogacy as a practice is seen as ethically or socially problematic, then the question of parenthood will be one that is set aside until the perceived underlying problems

are ironed out. This chapter will argue both that surrogacy as a general practice (notwithstanding isolated cases) may not actually be as problematic as it has been thought to be at various times since its emergence into the public consciousness and that, consequently, consideration ought now to turn to legislating against particular problems that have been seen to arise. Other peripheral concerns, such as how to assign parenthood, will also be addressed. This theme will be continued in the following chapter when evaluating Governmental responses and recommendations. The focus in chapter four will turn to more individualised surrogacy problems: how problems within surrogacy cases have been dealt with by the courts and how the government addressed surrogacy following the reports of its committees of inquiry will be assessed. Subsequent chapters will then consider *how* improved regulation of surrogacy might be achieved.

To consider all of the criticisms of surrogacy that have been made since its emergence into the public consciousness in the late 1970s would be well beyond the scope of this chapter. For this reason, it is easier to identify a particular group or genre of critics and to consider some of their ideas. When surrogacy was identified as a modern reproductive technique, some feminists reacted very strongly to the practice.[1] This chapter will identify and critically assess a selection

[1] See generally, for examples of objection to surrogacy within the context of criticism of assisted reproductive technologies as a whole, Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Winchester, MA: Allen and Unwin, 1987); Andrea Dworkin, *Right Wing Women* (London: Women's Press, 1983); Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (London: The Women's Press, 1988) and Gena Corea (ed.), *Man Made Women: How Reproductive Technologies Affect Women* (Bloomington: Indiana University Press, 1987).

of the major feminist arguments against surrogacy.[2] In some cases it will be possible to use alternative feminist arguments in support of surrogacy within the critique. With the benefit of hindsight and experience it can be shown that the main concerns of a number of feminist voices against surrogacy, particularly those from the 1980s, have not materialised.

The feminist concerns

Many of the perceived problems with surrogacy have been identified and articulated by feminist theorists.[3] This is certainly not to suggest that all feminists feel or have felt the same way about surrogacy, or that there is something that can be identified characteristically as a 'feminist perspective': there is no 'monolithic view or theory' held by feminists.[4] However, in broad terms, and extending beyond the single issue of surrogacy, there are a number of general elements on which feminist theorists may agree. For example, many feminists agree that women often tend to operate and organise their lives differently to men: that, for women, actions and principles are based on connectedness and communication in relationships rather than principles of hierarchy, antagonism, power and domination. They might also agree that while women and men speak

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[2] It would not be possible in a chapter of this length to identify and discuss all the feminist stances as regards surrogacy. However, there are a number of similar positions or themes that have arisen, and it will be a selection of these that are studied in depth.

[3] A number of objections have been raised against surrogacy: for example, it has been seen to be potentially or explicitly exploitative of women and/or children; it has been seen to commodify children and/or reproduction; it has been seen as baby-selling etc. These examples will be raised and discussed later within the chapter.

[4] Joan C. Callahan, 'Editor's Introduction' in Joan C. Callahan (ed), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995), 2.

in 'different voices', neither of these voices has any superiority over the other.[5] While men may perceive all people as being separate and, in some senses, in competition with each other, women tend to emphasise interdependency and an ethic of care, particularly among feminine groups.[6]

Additionally, many feminists share the belief that because of the inherent differences between men and women, and a large-scale historical acceptance that men's world-view and male ethics are 'better' than female interpretations of the world, women in general have been oppressed by or subordinated to men. As a group, therefore, when faced with problematic situations, feminists seek to locate women's experiences or 'voices' within that situation, highlight how or why that voice has or may have been oppressed, and indicate ways in which such oppression can be avoided in the future. Feminists tend to agree that a system of male dominance, or patriarchy, exists in society, and that this conceals the female voice (or female voices) in a number of situations. Surrogacy may be one of these situations. Furthermore, a number of feminists will not only want to remove the male dominance inherent within a particular situation or area, but will actively seek to promote, in accordance with the care ethic, the welfare of women and children. This has many connotations for the surrogacy debate, although it should be noted at the outset that not all feminists will agree upon either problem or solution in this respect. Feminists, seeking to promote the welfare of women

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[5] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982).
[6] Joan C. Callahan, n 4 above, 4.

and children may, as will be seen, still disagree on how best this welfare may be achieved.

Male dominance, or patriarchy, is seen in various elements of contemporary society and criticism can be directed at a number of formal and informal institutions that are seen to perpetuate this; traditional conceptions and constructions of marriage and the family, the workplace, politics and the law, for example. Only when considerable changes are made to these systems will women really be able to be seen as equal to men. For example, women continue to be paid less than men for comparable or the same jobs, while often having fewer opportunities for advancement in their chosen profession.[7] In many cases, the fact that it is only women who can have children, and who generally assume responsibility for the maintenance and upkeep of the home, as has traditionally been the case in our patriarchal society, only serves to facilitate this.

On the broad subject of assisted reproduction and, in particular, surrogacy, there are a number of disagreements amongst feminists.[8] Some have argued that surrogacy arrangements should be respected and enforced, in order to show that women are both capable of making autonomous agreements for themselves, and

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[7] This is despite the Equal Pay Act 1970. See 'Gender Pay Gap Widens' *The Scotsman*, 20 January 2003; 'Female Graduates Earn 19% Less Than Male Colleagues' *The Independent on Sunday*, 23 March 2003.

[8] Joan C. Callahan, n 4 above, 10. Joan Mahoney has said that '[s]urrogacy is not an easy issue for feminists' ('An Essay on Surrogacy and Feminist Thought' in Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1990) 183-197, 183). More recently, Vanessa E. Munro also argues that '[t]he feminist movement remains fundamentally divided over the issue of surrogacy' ('Surrogacy and the Construction of the Maternal-Foetal Relationship: The Feminist Dilemma Explained' (2001) 7 *Res Publica* 13, 13).

should be able to be held to them.[9] Others have argued that to enforce (or even to allow) surrogacy arrangements commodifies both women and children and opens the door to the exploitation of women by men,[10] or that the practice 'reduces women's labour to a form of alienated and/or dehumanised labour'.[11] In between, there are a range of other views on surrogacy, such as those, for example, which agree with surrogacy in practice but not with specific elements of the process, such as payments, which have at times been seen as part of a wider commercialisation of the reproductive process.[12] At the other extreme, however, there are some who believe that acting as a surrogate is 'the ultimate feminist act', because women act for other women to enable them to have the family (and therefore relationships of connectedness) that they could not otherwise have.[13] It is useful to explore and critique some of these types of argument in order to elicit an understanding of whether surrogacy does necessarily cause the problems it has been assumed to and, if it does not, to be

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[9] For example, Lori Andrews argues that surrogates should be held to their promises because not to do so assumes that women are less capable than men at making and keeping agreements. It also assumes that women are tied to their biology, perpetuating the 'biology-is-destiny' myth ('Surrogate Motherhood: The Challenge for Feminists' in Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1990) 168-182). Also see Ruth Macklin, 'Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis' (1988) 16 (1-2) *Law Medicine and Health Care* 60, and Carmel Shalev, *Birth Power: The Case for Surrogacy* (New Haven: Yale University Press, 1989), 11.

[10] See generally, for examples, Christine Overall, n 1 above; Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (London: The Women's Press, 1988) and chapters in Gena Corea (ed.), *Man Made Women: How Reproductive Technologies Affect Women* (Bloomington: Indiana University Press, 1987).

[11] Anton van Niekerk and Liezl van Zyl, 'The Ethics of Surrogacy: Women's Reproductive Labour' (1995) 21 *Journal of Medical Ethics* 345.

[12] Rosemary Tong, ('Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus' in Joan Callahan (ed.), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995)) for example, has argued that surrogacy should continue but should be governed by a more ethical adoption model.

[13] Lori Andrews argues, for instance, that acting as a surrogate gives women a feeling of power and liberty: '[t]hey are creating new life, something no man can do. Pregnancy is the last word in femininity' (*New Conceptions* (New York: St Martins Press,1984) 207-208).

able to put forward a case for allowing surrogacy to continue in a regulated form that will facilitate the practice whilst attempting to prevent similar or additional problems from arising. Three arguments in particular pose interesting questions, and will be considered in turn. First, the contention that surrogacy leads or adds to the domination and exploitation of women that already exists in our society. Secondly, the idea that surrogacy implicitly prioritises the genetic link between fathers and their offspring and, thirdly, the view that a negative effect is had on children born following surrogacy arrangements. If it can be seen, for example, that exploitation does not necessarily arise out of surrogacy arrangements, but that it remains a *possibility*, then future surrogacy legislation, while facilitating the practice for those who require its use, can attempt to pre-empt the occurrence of any such exploitation.[14]

1) Domination and exploitation

> 'An analysis of reproductive technologies must expose the role they play in the multi-faceted exploitation and domination of women ... The 'new' technologies ... reinforce the degradation and oppression of women to an unprecedentedly horrifying degree. They reduce women to living laboratories: to 'test-tube women'.[15]

[14] Lori Andrews (n 9 above, 169-176) has argued coherently that merely because surrogacy may have the potential to be harmful does not mean that it should be prohibited, comparing, as one example, the regret that may be felt after giving up a child with the regret that may be felt after a termination of pregnancy.

[15] Renate Duelli Klein, 'What's 'New' About the 'New' Reproductive Technologies?' in Gena Corea (ed.), *Man Made Women: How Reproductive Technologies Affect Women* (Bloomington: Indiana University Press, 1987) 64-73, 65.

Many feminists have been suspicious of reproductive technologies, including medicalised surrogacy, because, for example, when the practices emerged into public consciousness in the 1970s and 1980s, they believed that they were in the control of a male-dominated medical profession. Some feminists commentators on the subject have gone as far as to say that men have sought to gain control over reproduction in order to maintain control over women, as being able to reproduce is an inherent part of being female. For example, Gena Corea refers to surrogates as 'breeder women', foreseeing that '[t]hrough the years, with widespread use of [reproductive] technologies, social institutions will be restructured to reflect a new reality – tightened male control over female reproductive processes'.[16] Duelli Klein argues that male 'technodocs have embarked on dissecting and marketing women's bodies: eggs, wombs and embryos'.[17] Taken one step further, both Corea and Andrea Dworkin have claimed that reproductive technologies generally, and surrogacy in particular, equate to prostitution.[18] On this point, Dworkin argues

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[16] Gena Corea, 'The Reproductive Brothel' in Gena Corea (ed.) *Man Made Women: How New Reproductive Technologies Affect Women* (Bloomington and Indianapolis: Indiana University Press, 1987) 38-51, 38. The term 'reproductive brothel' originated with Andrea Dworkin in her book, *Right Wing Women* (London: Women's Press, 1983); Corea accepts unquestioningly a number of the problems suggested by Dworkin, saying that 'the fact that women are hated in a male-supremacist culture makes it foolish to dismiss Dworkin's argument as unthinkable' (39).

[17] Renate Duelli Klein, n 15 above, 66. Similarly, in relation to surrogacy in particular, Phyllis Chesler has referred to the separation of motherhood into component parts as 'vivisection' (*Sacred Bond: Motherhood Under Siege* (London: Virago Press, 1990) 9).

[18] They are not alone: Emily Jackson (*Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) 302) also cites Katha Pollit, saying 'take away the mothers' delusion that they are making babies for other women, and what you have left is what, in cold, hard, fact, we already have: the limited-use purchase of women's bodies by men – reproductive prostitution' (Katha Pollit, *Reasonable Creatures: Essays on Women and Feminism* (New York: Vintage Books, 1995) 69) and Thomas Shannon; 'in renting her uterus the surrogate is assuming the role of a reproductive prostitute ... like the prostitute, the surrogate takes a capacity intimate

> 'motherhood is becoming a new branch of female prostitution with the help of scientists who want access to the womb for experimentation and power ... Women can sell reproductive capacities the same way old-time prostitutes sold sexual ones but without the stigma of whoring because there is no penile intrusion. It is the womb, not the vagina that is being bought'.[19]

To this, Corea adds '[w]hile prostitutes sell vagina, rectum and mouth, reproductive-prostitutes will sell other body parts: wombs; ovaries; eggs'.[20] She also claims that '[t]he surrogate industry is one which rents women's bodies for reproductive purposes', and that to regulate the practice of surrogacy, or to give it public approval would make what she calls 'professional breeding' become commonplace.[21] It seems that she bases at least part of her claim on the British case *A* v *C*,[22] where the young woman hired to act as a surrogate had been previously working as a prostitute,[23] but this does not mean that surrogacy itself is like prostitution and nor does it mean that surrogates can be equated to professional breeders. If professional breeding were to become commonplace, as she puts it, she envisages that

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to herself, objectifies it, prices it, and puts it on the market' (Thomas Shannon, *Surrogate Motherhood: The Ethics of Using Human Beings* (New York: Crossroad Publishing, 1988) 152).

[19] Andrea Dworkin, n 16 above, 182.

[20] Gena Corea, n 16 above, 39.

[21] Gena Corea, *ibid* 43.

[22] *A* v *C* (1978) 8 Fam Law 170; [1985] FLR 445.

[23] Gena Corea, n 16 above, 44.

> 'stables of surrogate mothers would be establishing a primitive form of the reproductive brothel. The assembly-line approach would be used ... ('Some of the surrogates are pregnant, some are being inseminated, some are waiting to be selected')'.[24]

Further extending the prostitution analogy, she seemingly accepts that to allow surrogacy would naturally result in the exploitation of poorer races, assuming, for example (from her US perspective), that Mexican and Third World women will begin gestating babies for wealthier westerners. On this basis, she argues, surrogacy not only harms women in the singular, but women as a whole group, by dividing them into the haves and have-nots. She imagines that coloured women in the US would be labelled

> ''non-valuable', sterilised and used as breeders for the embryos of 'valuable' women. The white women judged genetically superior and selected as egg donors would be turned into machines for producing embryos. Through superovulation, 'valuable' females as young as 2 years and some as old as 50 or 60 could be induced to produce eggs'.[25]

Embryos would be transferred, she argues, to women in 'the lower 80 to 90 per

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[24] Gena Corea, *ibid* 44-45. This has echoes of Margaret Attwood's futuristic novel, *A Handmaid's Tale* (London: Vintage, 1996): '[t]he Republic of Gilead allows Offred only one function: to breed. If she deviates, she will, like all dissenters, be hanged at the wall or sent out to die slowly...' (inside cover).

cent of the female population', those that would once have been called surrogate mothers 'in the early stages of the reproductive revolution when engineers had been conscious of the need for good public relations'.[26] This is before the more distant future when the 'Mother Machine' is developed, dispensing with the need for surrogates in their entirety (and consequently, apart from egg donors, enabling men to dispense entirely with the need for women). Taking Corea's analogy further still, Duelli Klein compares reproductive technologies with pornography, calling it 'violence against women in a new and frightening sense'.[27] Building on the powerful image of Corea's 'Mother Machine', Duelli Klein saw (in 1987) the prospects for the future of women as 'gloomy'.[28] Wrongly predicting that by the year 2000, women would have entirely lost control of reproduction, she urges women to 'fight', and 'organize' against 'the international technology craze' that would allow men to further dominate women, in both the medical and domestic spheres.[29]

Arguing that surrogacy (and other assisted reproduction techniques) is analogous to prostitution (and pornography) is stating the case far too strongly. It is a wild extension on Corea's part, for example, to make the leap between animal farming practices and the use of reproductive technologies in humans.[30] Although some of the *procedures* or *methods* used may the same or similar, the

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[25] Gena Corea, *ibid* 45.
[26] Gena Corea, *ibid* 48.
[27] Renate Duelli Klein, n 15 above, 70.
[28] Renate Duelli Klein, *ibid* 70.
[29] Renate Duelli Klein, *ibid* 71.
[30] She makes this leap explicit: Gena Corea, n 16 above, 40-42.

intentions, or *reasons*, for performing them are different. The problem with a number of the feminist analyses of surrogacy is that too many of them assume that only particular types of surrogacy exist. Radical feminists, such as those whose arguments have been considered above, may believe that surrogacy should be prohibited, but they do so on the basis that they see commercial surrogacy as wholly and inevitably exploitative, and see non-commercial surrogacy as harming women in other ways. Wholly commercial surrogacy does have the potential to harm women, as it may create the impression that a woman is only worth what her reproductive capacity allows. However, carefully regulated surrogacy, for payment or otherwise, does not have to be exploitative and it would be possible to facilitate non-exploitative surrogacy through careful regulation of the practice. Some Marxist feminists have also seen surrogacy as akin to prostitution,[31] arguing, too, that instead of selling sexual services, a surrogate sells her reproductive services. They argue that neither the prostitute or the surrogate have a 'free choice' in this matter, that they are driven into acceptance of it by, for example, being 'unable to secure a job that pays her enough to live in dignity'.[32] When confronted with the Hobson's choice of remaining in poverty or selling her body, both the prostitute and the surrogate choose 'exploitation as the lesser of the two evils'.[33]

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[31] Christine Overall, n 1 above, 116.

[32] Rosemary Tong, n 12 above, 64. Emily Jackson counters this argument by saying '[I]t may be true that surrogate mothers might prefer to have an abundant range of convenient, well-paid and fulfilling jobs from which to choose, although there are never going to be many other sources of income that simultaneously enable women to be full-time carers of their own children. Thus, if surrogacy is preferable to the other options available to would-be surrogate mothers, denying them this source of income and satisfaction because the lack of alternative employment opportunities is to be deplored, seems perverse' (n 18 above, 299).

[33] Rosemary Tong, *ibid* 65.

However, while it may be the case that some forms of commercial surrogacy, for example profit-driven surrogacy agencies, may involve a degree of exploitation of the women involved due to the very nature of their operation, this is not going to be the case every time surrogacy is paid for, and it is certainly not the case that all surrogacy is commercial. Even where an agency or similar operation is involved, the risks of exploitation can be minimised by efficient regulation of its practices. Furthermore, in comparing surrogacy to prostitution, the implication is that all women who act as surrogates do so out of necessity. The point is missed that not all surrogates feel it necessary to enter these arrangements, not all of them get paid, and many do it for reasons above and beyond the money involved.[34] Comparing surrogacy to prostitution is implicitly a criticism of *all* the women involved, making it seem as if they do something sordid and underhand when they agree to have a baby for someone else and, perhaps, to be paid for it. Prostitution is the sale of sex, and is associated with immediate and temporary (and usually male) pleasure. A woman who is paid for being a surrogate sells a service incomparable to prostitution: the result of her service is the provision of a child for a person or persons who could not have otherwise had one. This is worth far more than immediate and temporary sexual pleasure or the gratification of others provided by a prostitute.

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[34] See, generally, Eric Blyth, '"I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology* 189-198; and *Re an Adoption Application (Surrogacy)* [1987] 2 All ER 826.

Furthermore, despite the feminist arguments stated above,[35] surrogacy is not practised by scientists who want to gain power and knowledge over the womb and over women. Techniques involved in surrogacy are by no means experimental, and the science that is involved, when necessary, is medical.[36] Scientists are not the pimps of surrogates for men who only wish women to have babies for them, as Dworkin, Corea and Duelli Klein seem to suggest. In fact, it is clinicians rather than scientists who will offer surrogacy and, in many cases, no medical intervention will have been made. To suggest this is to do a disservice to both the clinicians and the surrogates, and to detract from the fact that those seeking to use surrogacy actually have a genuine desire to have a child. There is an argument to acknowledge the fact that most of the power to control surrogacy (unless using non-technical and privately arranged insemination techniques) is vested in the medical profession, which is traditionally a male domain, but that is not to say that these males, or any others, have the intention to exploit this position.[37] It is also not to say that there are not female clinicians, fertility nurses and fertility counsellors playing their role in the provision of the surrogacy service and other forms of assisted reproduction.[38]

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[35] For example, text surrounding n 15-29 above.

[36] Medical intervention is necessary when full surrogacy is used, but this is not necessarily the case for partial surrogacy.

[37] Indeed, an interesting argument has been put forward by Jalna Hammer: '[n]o doubt women can be abused by the spread of this practice, but surrogacy, like AID, can put power in women's hands. Could this explain the vehemence of the opposition to *all* surrogacy, not just the money-making agencies?' ('Transforming Consciousness: Women and the New Reproductive Technologies' in Gena Corea, n 16 above, 96).

[38] An interesting point is, however, made by Renate Duelli Klein, who points out that as part of a general 'absence of explanation, counselling and a lack of discussion' of reproductive technologies (note she was writing about the position in 1987), '[t]here is no discussion about the

More liberal feminists, while believing that surrogacy as a whole is not exploitative, accept that some specific aspects of surrogacy arrangements may be harmful. While a contract to bear a child for someone else is not necessarily problematic, particular elements of that contract may be. A woman should not be able to contract out of certain inalienable rights, such as her right to choose autonomously what she does to and with her body during the time she is pregnant.[39] She cannot be contractually obliged to undergo a Caesarean operation, medical tests or an abortion against her will, for example.[40] Similarly, she cannot be prevented from doing certain things that may or may not harm the baby, such as smoking, drinking, or taking particular forms of exercise. On this basis, a surrogate could not be liable to compensate a commissioning couple if, because of her conduct, she produced a less than 'perfect' baby, or failed to produce one at all. In a surrogacy arrangement, what the surrogate 'contracts out' of (metaphorically or literally) are any parental claims she may have had over the child, not her inalienable right to bodily autonomy and thus the argument would remain the same even if surrogacy arrangements were made

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social construction of motherhood and the question of real 'choice' a woman has in a society that continues to equate 'real' woman with mother and wife' (n 15 above, 67).

[39] The most obvious parallel to this situation comes from abortion case law, where husbands attempting to prevent abortions have been denied. See, for example, *Paton* v *Trustees of British Pregnancy Advisory Service* [1979] QB 276; *C* v *S* [1988] QB 135; *Kelly* v *Kelly* 1997 SLT 896.

[40] *Re MB* (1997) 38 BMLR 175 (CA), recognised an absolute right of a pregnant woman to refuse any medical treatment, affirmed in *St George's Healthcare NHS Trust* v *S, R* v *Collins, ex parte S* (1998) 44 BMLR 160 (CA). It may, however, be argued that if surrogacy contracts were ever to be implicitly or explicitly recognised, a surrogate, having previously agreed to something and later refusing, may void the contract, and therefore be wholly responsible for the child. As the law stands, this would be the case if the commissioning couple simply pulled out of the agreement. If parenthood following surrogacy were redefined, making the commissioning couple the legal parents at birth, then the agreement may be made void by the surrogate's behaviour in an explicitly contractual sense. If contracts for surrogacy were explicitly recognised then as breach of either an express or an implied term, it may allow the contract to be terminated in the technical contractual sense.

enforceable.[41] These arguments suggest that if people are to be able to enter into surrogacy arrangements, there ought to be as much information available to them as is possible. Before any agreement is reached, all of the attendant risks associated with surrogacy ought to be explained to all the parties involved, preferably by someone with no vested interest in the particular surrogacy arrangement, such as a counsellor.[42] A surrogate should enter an arrangement only after she is able to give full and informed consent and the commissioning couple should enter an arrangement with full knowledge of the things that can go wrong.[43]

As has been seen, the issue of exploitation is often cited in the surrogacy payments debate. Exploitation can, however, work in both directions, although many commentators choose always to focus on the surrogate as the most likely 'victim' of exploitation. The surrogate can be exploited as she may desperately need the money that surrogacy can provide her and possibly her existing family. However, the commissioning couple might also potentially be exploited: they may be asked for large sums of money by the surrogate, their desire for a child being so great that they would pay extortionate amounts for the service. A surrogate holds a position of power over a commissioning couple during the time she is

[41] This is not to say that reduced payments could not be contracted for in such situations.
[42] This notion lends support to the establishment of non-profit surrogacy agencies, and/or a body like the UK's Human Fertilisation and Embryology Authority, to oversee and/or licence agencies (or clinics) providing surrogacy services.
[43] Interestingly, Lori Andrews (n 9 above, 172) has argued that *because* of the lengthy contracts often signed by surrogates, women entering surrogacy arrangements are often 'much better informed on that topic than are most women who get pregnant', and it therefore 'strikes [her] as odd to assume that the surrogate's consent is not informed'. Additionally, she contends, 'with the

pregnant with their child, and it is possible that she may use her position to make threats that induce them to pay her more or do other things for her. It is normally true, however, that the commissioning couple are likely to be the ones with the greatest financial means,[44] but this obviously does not necessarily mean that the relationship between them and a surrogate would be exploitative. This was certainly not the opinion of the majority of the Warnock Committee, however, who said that '[e]ven in compelling circumstances the danger of exploitation of one human being by another appears to the majority of us to far outweigh the potential benefits, in almost every case'.[45]

The fact that exploitation *may* be possible begs the question as to whether the law should be used in order to prevent it. The question then is; if so, to what extent should the law be involved? The law might provide various mechanisms to avoid or limit exploitation: if it is assumed that to allow people to enter private bargains for surrogacy may result in exploitation, then might state-funded surrogacy, for example, provide a more ethical solution? Or should a legal limit be set on the sums that can be paid? Or on which women (according to their 'normal' level of income) should be allowed to enter surrogacy arrangements? It has been suggested that 'to speak of outlawing surrogacy in terms of preventing

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volumes of publicity given to the plight of Mary Beth Whitehead, all potential surrogates are now aware of the possibility that they may later regret their decisions'.

[44] This is not always the case. Martha Field (*Surrogate Motherhood: The Legal and Human Issues* (Cambridge, Massachusetts: Harvard University Press, 1990) 25) states that 'not only the affluent hire surrogates. There are some less well to do families who have had children this way'.

[45] *Committee of Inquiry into Human Fertilisation and Embryology, Report* Cmnd 9314 (1984) (London: HMSO) (The Warnock Report) para. 8.17. Mary Warnock has, however, since decided that the position of the dissenting minority of the Warnock Committee was the preferable option

exploitation is paternalistic; only imperative policy reasons should ... prevent a woman disposing of her body as she wants'.[46] Although if there is one, the 'true' analogy with the surrogate would be the egg donor, further argument in favour of the autonomy of the surrogate can also be raised about the distinctions drawn between male sperm donors and surrogates; 'currently, males may sell their sperm. The 'surrogate father' sperm donor is legally recognised in all states – the surrogate mother is not. If a man may offer the means for procreation then a woman must equally be allowed to do so'.[47] Furthermore, women can be paid or receive fertility services at a reduced cost in exchange for their eggs.

Arguably then, surrogacy in general is not a form of exploitation of women for their child-bearing capacity, but is a service which, in the interests of autonomy, any woman should be able to provide should she desire to do so and is not coerced into so doing by duress or her economic situation.[48] To say surrogacy necessarily exploits women is to question the decision-making capacities of those women who choose to become surrogates. This point is well made by Ruth Macklin, who states that 'the charge that surrogacy exploits women and should therefore be prohibited questions a woman's ability to know her own interests

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(Dame Mary Warnock, *Nature and Mortality: Recollections of a Philosopher in Public Life* (London: Continuum, 2003) 104).

[46] J. K. Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (Aldershot: Dartmouth, 2nd ed, 1998) 255. Michael Freeman has also argued that to restrict surrogacy by prohibiting payments for it would be to place unreasonable limits on a woman's right to do with her body as she pleases ('Is Surrogacy Exploitative?' in Sheila McLean (ed.) *Legal Issues in Human Reproduction* (Aldershot: Dartmouth, 1989) 164, 170).

[47] *In the Matter of Baby M* (1988) 537 A 2d 1227 (NJ Supreme Court).

[48] Lori Andrews, n 9 above.

and to enter into a contractual agreement knowingly and competently'.[49] She argues that women have the right to decide what to do with their own bodies, and that to say surrogacy exploits all women is paternalistic.[50] The argument for autonomy has been further developed by Paul Lauritzen;

> 'the fact that a woman may come to regret her agreement to become a surrogate or that she may agree for reasons that we do not approve of is no reason to make exception to the general legal policy allowing competent individuals to provide a service for a fee. Thus, to prohibit surrogacy is paternalistic and wrong'.[51]

As an advancement to this argument, Callahan reminds us that even if the potential for exploitation may be present in surrogacy, action can be taken to 'attempt to limit the activities of *exploiters*, even if fully competent people might choose to be exploitees'.[52] Furthermore, it can be argued that autonomy can be protected and that limits can be placed on any potential infringements of it by ensuring that women who contemplate becoming a surrogate are provided with valid and comprehensive information on which to base their decisions. While this may not *guarantee* that all decisions are autonomously made, it could provide checks and balances to ensure, as much as is possible, that women who agree

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[49] Ruth Macklin, 'Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis' (1988) 16 (1-2) *Law Medicine and Health Care* 60.
[50] Ruth Macklin, *ibid.*
[51] Paul Lauritzen, *Pursuing Parenthood: Ethical Issues in Assisted Reproduction* (Bloomington: Indiana University Press, 1993) 103.
[52] Joan Callahan, 'Introduction' in Joan C. Callahan (ed), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 26.

to become surrogates base their decision on knowledge that is available, and make a competent decision based on the information that they have. If the way that such information is given to them is monitored or regulated, this would provide additional security.

The Warnock Committee also recognised the argument (although it was not accepted) that

> 'the bearing of a child for another can be seen not as an undertaking that trivialises or commercialises pregnancy, but, on the contrary, as a deliberate and thoughtful act of generosity on the part of one woman to another',[53]

and that

> 'there is no reason, it is argued, to suppose that carrying mothers will enter into agreements lightly, and they have a perfect right to enter into such agreements if they so wish, just as they have a right to use their own bodies in other ways, according to their own decision'.[54]

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[53] The Warnock Report, n 45 above, para 8.13. The Warnock Committee deliberations on surrogacy will be discussed in more detail in the following chapter.
[54] The Warnock Report, *ibid*, para 8.14.

As long as surrogacy was undertaken within a scheme that allowed for the fullest possible information to be given within the pre-counselling of both potential surrogates and potential commissioning parents, then the likelihood of the agreement being based on an informed choice would be greater.

Baby selling and/or exploitation of the child?

A further objection to paid surrogacy is that it can be regarded as the sale of a baby.[55] This was certainly the case in the judgement given in an American case, *Doe* v *Kelly*,[56] where it was said at first instance, following a dispute arising in a paid surrogacy, that

> 'baby-selling is against the public policy of the State ... [m]ercenary considerations used to create a parent-child relationship and its impact on the family unit strike at the very foundation of human society and are patently and unnecessarily injurious to the community. It is a fundamental principle that children should not and cannot be bought and sold'.[57]

Modern adoption laws make criminal any payments related to gaining consent to

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[55] In particular, Margaret Brazier ('Can You Buy Children?' (1999) 11(3) *Child and Family Law Quarterly* 345-354, 345) calls the argument that commissioning couples are not buying a baby when they pay for the services of a surrogate 'specious'.
[56] *Doe* v *Kelly* [1980] FLR (BNA) 3011.
[57] Cited in Peter de Cruz, *Comparative Healthcare Law* (London: Cavendish, 2001) 461-2. On the development of a 'capitalist baby industry', see Margaret Radin, 'Market Inaliability' (1987) 100 *Harvard Law Review* 1849, 1926.

an adoption, making arrangements for it or for procuring an adoption *per se*.[58] It seems possible, therefore, that some surrogacy arrangements could be caught within this legislation if the express intention of the parties was thought to be the adoption of any resulting child by the commissioning couple and if, within that arrangement, the surrogate was to be paid. It should, however, be noted that a distinction can be drawn between payment for adoption and for surrogacy, and probably is drawn in practice. In a surrogacy arrangement, monetary arrangements are most likely to be made before the onset of pregnancy, rather than during the gestation period or after the birth of a child.[59] Lori Andrews argues that surrogacy cannot (or should not) be cast as baby selling because this would mean that other forms of assisted reproduction would equally be cast as such. For example, the clinician who performs (and sells) an IVF service would, taken in a literal sense, potentially be selling a baby (or selling a potential baby). Further, she argues that surrogates should be allowed to receive payments for their service: women should be able to bargain away their parental rights in much the same way as men do when they are paid for sperm donation.[60] Not to do so would mean that men retained control of how women could or could not operate in the marketplace,[61] thereby adding to Andrews' more general contention that some feminist arguments against the practice of surrogacy only serve to undermine gains feminists have made in other areas of reproduction and

[58] Adoption Act 1976, section 57(1) (formerly Adoption Act 1958, section 50).
[59] For example, see *Re an Adoption Application (Surrogacy)* [1987] 2 All ER 826.
[60] Lori Andrews, n 9 above, 169-170.
[61] Vanessa Munro, n 8 above, 17.

elsewhere, including contraception, abortion and family structuring.[62]

Jamie Levitt also points out that, in comparison with 'baby-selling', 'the surrogate's pregnancy is purposeful and prearranged and she can negotiate for as long as she feels is necessary'.[63] This would mean that the commissioning couple do not 'buy' a baby: they are making an agreement to pay for 'work' or services that will be undertaken for them. This seems to make the agreement to pay more appropriate as it can be classified as payment for services. Therefore, it could be maintained that

> 'even if the adoption laws – particularly those relating to the passage of money between the two principal parties – are thought to be infringed by a surrogacy arrangement, it is still possible to argue that the financial consideration given to the surrogate is not a matter of purchase of the baby but, rather, one of payment for services rendered and of expenses for the inconvenience involved; that being the case, the issue would simply be one of assessing what would be the level of remuneration that would not give rise to doubts as to intention'.[64]

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[62] See generally, Lori Andrews, n 9 above.
[63] Jamie Levitt, 'Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, 475. Others have argued that paid surrogacy is distinct from baby selling – see, for example, J.K. Mason, n 46 above, 259; Michael Freeman, 'Does Surrogacy Have a Future After Brazier?' (1999) 7 *Medical Law Review* 1, 6-7 and Lori Andrews, n 9 above, 176.
[64] J.K. Mason, *ibid* 233-4.

What can be surmised from payments in surrogacy is that if the agreement was made before the pregnancy was established, the pregnant woman is being paid for her pregnancy, not 'her' baby. It is not the same as agreeing to pay a woman who is already pregnant, or who has already given birth. Notwithstanding the semantic debate over surrogacy and the fact that the surrogate should not be regarded as the mother of the child,[65] the recognition of this intention – to make an agreement to pay for a pregnancy – may also add weight to the premise that the child is that of the commissioning couple. Their pre-conception intention is greatly significant, as without their actions, there would be no pregnancy to pay for.[66] On this basis, the *pregnancy* is factually, albeit not physically, that of the commissioning couple. By extension, this should mean that they are automatically recognised as the parents of the resulting child: if they have paid for the pregnancy, its end result is the baby that they bargained for, while the surrogate did not. This formulation may become problematic in situations where, for example, the surrogate fails to conceive, has a miscarriage, or delivers a dead baby. Should she be paid in such circumstances and, if so, how much? The baby is an integral part of a surrogacy arrangement and it might be argued that without a baby, there should be no payment. This, however, is something that can be legislated for, to an extent, and will be discussed at greater length in subsequent chapters dealing with how future surrogacy legislation could be formed. Furthermore, if surrogacy arrangements were to be based in contractual theory, as will be discussed in a later chapter, such eventualities could be

[65] Discussed in Chapter 7 below, in text surrounding note 59.

covered either by express terms agreed upon by the parties, by statute, or by the provision of some kind of insurance.

Exactly how much money would be considered to constitute the intention to either compensate a surrogate for her time and inconvenience, and where the line would be drawn between this and payment for a baby or procurement of an adoption would be difficult for anyone to pinpoint,[67] and it is hard to imagine that any consensus could be reached. It seems, therefore, that because the value of having a much desired child cannot be priced for each individual, and the desired recompense for pregnancy services will be different for different women acting as surrogates, that we will be offered little guidance on this point by statute, or a way of specifically defining what constitutes this intention in law. Further, by extension it could be argued that the payment itself could not provide evidence of intention to procure an adoption – making an agreement with a woman to conceive and bear a baby that she will ultimately surrender is by definition a surrogacy arrangement,[68] even if the later intention of the commissioning couple is to adopt that child rather than apply for a parental order.[69] At the time of making the arrangement, the commissioning couple may have no specific intentions as to how they will acquire legal parenthood. In surrogacy, parental orders cannot be

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[66] And pre-conception intention is strongly linked to the contractual concept of intention to create legal relations, reinforcing the idea that agreements should be validated and allowed to stand.
[67] Athena Liu, *Artificial Reproduction and Reproductive Rights* (Aldershot: Dartmouth, 1991), chapter 6.
[68] Surrogacy Arrangements Act 1985, section 1(2).
[69] Human Fertilisation and Embryology Act 1990, section 30. See also *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 759, where payments within a surrogacy arrangement were found to be in breach of section 57 of the Adoption Act 1976, but were retroactively authorised (under the

obtained by unmarried couples, non-residents, or those where there is no genetic link between either of them and the child, and so adoption of the baby would provide the only option for such a commissioning couple to become parents.[70] Why should it be that they cannot recompense a surrogate but a married British couple with a genetic link to the child can?

Although the idea of buying a baby may be thought of as offensive, this, as has been shown above, is not actually what happens in a surrogacy arrangement. In addition, if we are happy to allow payments for other reproductive services, then surrogates should also be able to be recompensed, especially because the contribution they make to the pregnancy is greater than the input of any other participant in an 'artificial' reproduction process. Payments do not commodify the child, nor do they necessarily mean that the surrogate has been exploited. In any case, the potential for exploitation can be curtailed by various means. Autonomous decisions made by women to act as surrogates should be supported in order to give recognition to their ability to make competent choices about how, when and whether to reproduce. If there must be some limits placed on the arrangements that they can make then these must be necessary and not paternalistic. If the concern is exploitation, or that surrogates may be operating on a for-profit basis, perhaps a system of state-funded surrogacy would be a preferred way forward. Failing that, and given that other issues may be raised regarding payment if something goes wrong with the pregnancy, a contractual

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provisions of section 57(3) by Callman J, distinguishing *Re an Adoption Application (Surrogacy)* [1987] 2 All ER 826.

basis to surrogacy and support from insurance could be a way to facilitate arrangements.

Initial conclusions

Despite the fears of Corea and others,[71] over two decades have passed without the future foreseen by them coming into existence. As Vanessa Munro appealingly points out, '[n]ot all slopes are slippery and any ethical argument that determines its conclusions on a premise assuming the contrary must always be approached with some level of trepidation'.[72] Surrogacy has not become a huge industry, especially not one taken over by the powers in society in order to breed a 'better' population.[73] Surrogacy arrangements may still be entered into by less well-off women who agree to bear a child for a wealthier couple, but there is no need for this to be necessarily exploitative if safeguards are put in place *and*, in any event, it is not inevitably the case. Indeed, the fact that there is this concern should lead us to seek a solution. If we acknowledge that, potentially at least, surrogacy may create problems of this sort, there are at least two options – to ban surrogacy in its entirety, or to regulate it. Because surrogacy is sometimes the only alternative for some people to have children,[74] banning it should not be a option, leaving us to consider how best to regulate it in the interests of all

[70] The unmarried couple would not at present, however, be able to adopt jointly.
[71] See pages 68-72 above.
[72] Vanessa Munro, n 8 above, 22.
[73] It should also be noted that many of Corea's assumptions were based on developments in methods of animal farming, ensuring that 'the best' animals were bred to produce, for example, better quality meat. This industry is consumer and profit driven more so than having babies could ever be.

involved. For example, it could be that surrogacy is regulated so that women who agree to become surrogates must already be, to a certain extent, financially secure (or at least not financially desperate).[75] This would eliminate any potential exploitation of, for example, women from less privileged countries and, generally, tend towards preventing surrogacy arrangements being entered into out of financial necessity. It may lessen the number of women willing to bear children for others, but if it minimises the *potential* for harm to women (either in the singular or as a group) then it should be welcomed. Banning surrogacy altogether prevents anyone benefiting from the procedure, and may have the additional effect of driving surrogacy arrangements 'underground' where even less protection would be available. On this basis, it may be wrong to remove it as an option for the infertile. What is necessary are safeguards against any potential problems that can be identified.

Some liberal feminists have questioned the assumptions made by other theorists that surrogacy is harmful.[76] In particular, they question whether commercial surrogacy, or any surrogacy where a woman receives payment, is exploitative of women. They ask why it should not be regarded as exploitation for a woman to enter an unpaid surrogacy arrangement rather than to be able to charge and receive reasonable recompense for her services. Carmel Shalev, for instance, argues that

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[74] Chapter 1 above, 10.
[75] Vanessa Munro, for example, asks '[a]re we protecting those in economically dire circumstances from oppression when we remove their capacity to sell their reproductive abilities for desperately needed cash?' (n 8 above, 21).

> 'the refusal to acknowledge the legal validity of surrogacy agreements implies that women are not competent, by virtue of their biological sex, to act as rational, moral agents regarding their reproductive activity'.[77]

Again this argument has its basis in patriarchy, which allowed the impression that women were, by nature, suited to domesticity and care-giving because of their biological reproductive functions, and not to operation as separate rational beings. It is the perspective of the sheer 'naturalness' of a woman's role as wife and mother that has been perpetuated by patriarchy, and which is challenged when women disassociate themselves from this role. While this may be the case, it is, however, a simplistic reflection of the complex argument involved. Shalev's argument applies only to *women* who seek to become surrogates (thereby entering an arrangement) and perhaps women who seek to use a surrogate, but not to men, or indeed, *couples* who do the same. While it may be attractive to claim that non-acknowledgement of surrogacy arrangements is a slight on women's capacity to enter agreements, the same argument is not advanced for men, when it is probably true to say that the majority of surrogacy arrangements are entered into by a man and a woman seeking jointly to have a child.

2) The desire for a genetic link

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[76] Carmel Shalev, n 9 above; Lori Andrews, n 9 and 13 above; Ruth Macklin, n 49 above.
[77] Carmel Shalev, *ibid* 11.

Feminists have also argued that it is not only gender hierarchy or economic domination that is detrimental to women acting as surrogates, or to women as a group if surrogacy is allowed to continue, and contend that surrogates face further pressures stemming from the domination of patriarchy. For example, Rosemary Tong believes that women are taught, to their detriment, to be altruistic: that 'patriarchy teaches women that women who do not help others when it is in their power to do so are "bad women"'.[78] It has also been argued that surrogacy arrangements are one of a number of patriarchal tools used by men to facilitate their own offspring.[79] This claim has historical connotations. It is based in the need of men to have heirs to pass their property to, and so continue their family lines.[80] Women and children were once the property of men, so control over heritage – both of property and biology – was once much easier. However, as the role of women has changed over time, allowing women more independence from their husbands and role as wife and mother, men have had less and less control in this area.[81] The development of assisted reproductive techniques and modern surrogacy practices has been seen as an attempt to regain this control.[82] George Annas points out that many of the surrogacy arrangements that have been well-publicised over the last few decades have typically involved white middle-class men and their partners using a surrogate in

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[78] Rosemary Tong, n 12 above, 65.
[79] Gena Corea, n 1 above.
[80] Although it might be argued that traditionally, the hope was for male heirs, whereas modern surrogacy is used to gain *children* of either gender.
[81] Patricia Smith, 'The Metamorphosis of Motherhood' in Joan C. Callahan (ed.), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 109-130, in particular 118-119.

order that they can have their (or, specifically, his) own genetic children.[83] Joan Callahan agrees that in the majority of 'gestational motherhood cases ... that have involved legal intervention, white fertile men were attempting to acquire children genetically related to them'.[84]

Surrogacy, and other forms of assisted reproduction, may be used in order for a couple to have a child that is genetically related to one or both of them. However, the desire to maintain genetic connections is seen by a number of feminists to be a typically male trait, harking back to days where genetic lineage was closely linked to patriarchy in terms of children's legitimacy, heritage and inheritance.[85] Some feminists believe that assisted reproduction techniques wrongly continue to prioritise the genetic link, whereas social, rather than genetic, connections should be emphasised and respected. In this respect, adoption of children is perceived to be a better solution to involuntary childlessness than reproductive technologies, as it allows women to 'mother' and children to be 'mothered' and cared for without the need for there to be any genetic link between them, or

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[82] See above, 68.

[83] George Annas, 'Fairy Tales Surrogate Mothers Tell' in Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1990) 45. But it might be argued that as many infertile (white, middle-class or otherwise) women share the same interest in having a child of their own as do their husbands/partners. Full surrogacy is an example of this as the commissioning female has to undergo the same interventions as she would for IVF but must have her child carried by another women. The middle-class argument is also not one that should mean that surrogacy should not be allowed – the fact that men, women or couples who can afford it choose to use a surrogate does not of itself mean that surrogacy should be condemned. As has been argued above, if the potential for exploitation exists, it can be controlled. Infertility is expensive for the majority of people who seek a way to have children, not only for those who need to use a surrogate. Perhaps this indicates that mechanisms (for example, insurance-type or state fund-based schemes) should be developed in order to help pay for all forms of fertility treatment for anyone who needs it?

[84] Joan C. Callahan, n 52 above, 24-25.

between the child and the social father.[86] This exultation of adoption, however, denies the reality that it has become increasingly less possible for people to adopt because fewer children, especially babies, are available.

Unquestionably, genetics is not the only way that parenthood can be determined. Traditionally, the genetic link – or at least a (visual) biological link, before much was known about the details of genetics – between adults and their children was used to determine parenthood. Obviously, for women and the offspring they bore, a biological link was visible and the genetic link was therefore assumed. For men, marriage to the woman who bore a child 'proved' the genetic link, and was the means by which family lineage and inheritances were passed on. Carmel Shalev argues that the prioritisation of biology was originally linked to the threat to men posed by adultery and illegitimacy, stating that

> 'these two concepts, together with the institution of marriage, once constituted the traditional common law of reproductive relations; that is, they determined the scope of permitted sexual activity and at least on the face of it defined the parent-child relation as a matter of biology'.[87]

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[85] See Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: Norton, 1989); Carmel Shalev, n 9 above, 21-22 and 24.
[86] Joan Mahoney, 'Adoption as a Feminist Alternative to Reproductive Technology' in Joan Callahan (ed), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 35-54.
[87] Carmel Shalev, n 9 above, 8.

Shalev and others base their position upon the need to recognise women's autonomy in reproduction. They argue that reproductive choices should be open to women (and to men), as long as taking advantage of them does no harm to anyone else: not to recognise the legitimacy and enforceability of a surrogacy arrangement constitutes an unnecessary and unfair restriction of autonomy, both of the surrogate, and of those who enter the arrangement with her.[88] Many of the

> 'more liberal feminists tend to emphasise women's autonomy and reproductive choice, and they argue that if women want children genetically related to themselves and/or their partners, these options should be open to them and other feminists should not criticise women for seeking them'.[89]

Although many would concede, as argued above, that the desire for genetic relatedness is 'overemphasised' in our culture due to its history in patriarchy,[90] regarding this as an exclusively male trait is recognised as fallacy.[91]

Maintaining (or creating) a genetic link to one's children was perhaps the impetus behind the development of many (or most) assisted reproduction technologies. AID, one of the oldest forms of assisted reproduction, may not actually maintain

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[88] Vanessa Munro, n 8 above, 16.
[89] Joan Callahan, n 4 above, 11.
[90] Rosemary Tong, n 12 above, 68.
[91] On the other hand, Vanessa Munro points out that some feminists have argued against autonomy as a guiding principle as it can be seen as 'an irrational, male construction which stresses a discontinuity from the rest of human life which is far removed from women's epistemological position' (n 8 above, 16).

the genetic link, but it does maintain a semblance of 'normality' by allowing the illusion of the paternal genetic link to be maintained.[92] IVF, a later development, allows a couple to each provide their genetic component (if this is possible) and create a child genetically related to both of them, when biology has made this impossible to achieve naturally.[93] More modern extensions of basic uses of reproductive technologies can enable, for example, a woman to have a child genetically related to her dead husband, or a post-menopausal woman to carry a child genetically related to her male partner. In couples where pregnancy is either ill-advised or impossible, a child genetically related to both partners in a heterosexual relationship can be born if a surrogate is used. As Callahan illustrates, even couples in which the male partner is infected with HIV may go to great lengths to 'clean' his sperm in order that the genetic link can be preserved.[94]

Despite this seeming desire of both mothers and fathers to maintain genetic connections with their children, a number of feminist scholars have argued against the genetic (or biological) link setting the standard by which parenthood should (or should not) be determined. Indeed, it may be argued that technological developments in assisted reproduction brought with them a separation of genetics from parenthood: they allow a differentiation between the

[92] This perhaps explains why the AID process has historically been linked to secrecy – both within the family and outside it.
[93] Genetics may not be the only reason these techniques were developed – the 'experience' of pregnancy and childbirth is also likely to have created demand.
[94] Joan Callahan, n 52 above, 20.

social and the biological aspects of parenthood.[95] Aside from the fact that society has developed so that inheritances and the avoidance of illegitimacy are not generally primary concerns when having children, it now appears that a genetic tie to a child is not truly *necessary* in order for a person to be recognised as its parent either in fact or in law.[96] Historically, there was little reason to question the desire for genetic ties, but now it could be argued that 'the pervasive emphasis on genetic parenthood in our society'[97] is both outdated and unjust. For example, to base the legal acquisition of parenthood on genetics alone would mean the 'wrong' people being recognised as a parent of a particular child in a number of situations: sperm donors would become legal fathers (as would rapists), while any man performing the social role of parent would not be, despite the intentions of the parties involved.[98]

Barbara Katz Rothman argues that the assumption that parenthood is based primarily on genetics should be dismissed, stating that

> 'genetic connection was the basis for men's control over the children of women. The contemporary modification of traditional

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[95] This was not recognised, however in *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCH 259 (QB), despite the fact that the biological father was not raising the children (nor was he even in contact with them), while another man was, and despite the fact that he did not intend to be the father of those children.

[96] Sperm donors, for example, are not recognised as legal parents whereas the man performing the social role of father can be (HFE Act 1990, section 28). This is not to say it is not the 'first choice' among prospective parents – that is, given the choice, it is likely that a couple would *rather* be genetically related to their children than not.

[97] Joan Callahan, n 52 above, 19.

[98] See further Chapter 7, below. Also see *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCH 259 (QB).

> patriarchy has been to recognise the genetic parenthood of women as being equivalent to the genetic parenthood of men. Genetic parenthood replaces paternity in determining who a child is, who it belongs to. I believe it is time to move beyond the patriarchal concern with genetic relationships'.[99]

Rothman sees the genetic model of parenthood as inextricably linked to patriarchal possession of children and domination of women, while Joan Mahoney argues that using genetic links to determine parenthood is both outdated and inadequate and that to establish parenthood in this way commodifies reproduction by associating children with property or ownership.[100] Further, she contends that one of the problems with this approach is that it 'focuses on the rights of parents – or those people deemed to be parents because of their genetic connection to the child – rather than on the needs of the child',[101] and that while

> 'in Western society, families used to need children in order to keep their property (i.e., land holdings) intact ... [t]oday we have less landed property to pass on and we are less concerned with

[99] Barbara Katz Rothman, n 85 above, 39. Joan Mahoney, who evinces a similar argument, notes that 'although it is hard to find evidence to support this suspicion, I am not alone in making the assumption' (n 86 above, 47-48 and note, 54).
[100] Joan Mahoney, *ibid*, 43.
[101] Joan Mahoney, *ibid*, 36.

> continuing an estate ... But while families no longer need children as property, children still need families'.[102]

On the basis of these arguments, she contends that parenthood should be based on social connections and relationships rather than who the genetic progenitors of a child are. What becomes important is the actual *act* of parenting, or even the definition of the word 'parent'. If this is taken as meaning 'he or she who parents a child' then it is obvious that a close social connection will be sufficient. If however, the word parent is held to mean a biological progenitor, then we are back to genetics. But it might be that in an age where biological components of parenthood can and frequently are being separated from the social element of parenting – by divorce, remarriage and adoption as much as by the use of assisted reproductive technologies and surrogacy – the social definition of parent should prevail. Mahoney points out that, despite there being no *need* to have children in modern society, they continue to be valued, and that there must be a reason for this outside of tradition. While having children may be a basic biological imperative in order to continue the species, she argues further that 'it seems clear that adults gain something from nurturing, just as children gain from being nurtured. If, then, we need children to love, perhaps we can begin to define parenthood in those terms, rather than in terms of ownership'.[103]

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[102] Joan Mahoney, *ibid*, 43.
[103] Joan Mahoney, *ibid*, 44.

Even if definitions can be altered, however, it is unlikely that the *desire* for a genetic relationship with offspring will immediately disappear. To desire to be related to children can be seen as 'normal' - it is unquestionably a fall-out from history and a patriarchal society, and there may be more to it than that. It may also be an innate natural desire, a biological imperative – part of what makes us human. In either case (or both), those who use surrogacy (or any other form of assisted reproduction) should not be condemned for having that desire and trying to achieve it. The argument is not raised against fertile couples who have children in the normal way and it seems that only when some intervention is needed is the desire both highlighted and criticised. Although there may be some people who would argue in all cases that the desire to maintain or continue genetic ties is purely a social construction, this would mean arguing that it would be more legitimate (if only in terms of 'political correctness') for every couple to think about adopting a child before they considered natural reproduction, let alone assisted reproduction. The genetic desire might be socially constructed, but that does not mean it is not normal. Infertile people or couples, it can be argued, strive to maintain a semblance of perceived normality in achieving their families – whether this is a bad thing or not is open to question, but one which unfortunately falls beyond the scope of this thesis.

Taking the genetic desire still further, it is assumed by some radical feminists that a number of women who commission surrogates do so only in order to fulfil their

male partner's desire for a child genetically related to him.[104] While it seems possible that, in some cases, a woman has gone along with surrogacy to please her husband, it must not be forgotten that women may have as strong a desire to have children as do men. Tarring all commissioning males with the brush that says they use surrogacy to fulfil their need to beget genetically relate offspring again ignores the fact that it may be 'natural' to want to have your own family and that this may apply to women as well, who choose surrogacy as the most 'normal' way they can of having the family that they too desire. Similarly, this proposition seems to conveniently forget that IVF surrogacy allows both of the commissioning couple to have a child genetically related to them. What does this say of the commissioning mother's desires?[105]

It has been argued that surrogacy cases have been decided by the prioritising of genetics. In America, for example, *Johnson* v *Calvert*[106] eventually went the way of the genetic parents, and in the famous case of *Baby M*,[107] Mary Beth Whitehead, the surrogate, was acknowledged to be the baby's mother based on her genetic relationship with the child. Although the case was not eventually decided in her favour, Joan Callahan points out that giving Baby M to the commissioning father, William Stern, was found not to be 'baby-selling' (as Mary Beth Whitehead claimed) as it was also his biological child and he could not

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[104] Barbara Katz Rothman, n 85 above, 38.
[105] Barbara Berg argues that feminists (and others) must listen to the voices of the infertile, and must not ignore the actual experiences of women who may also desire strongly to have a child of their own, whether this is a desire for a genetic link, or a desire to gestate a child ('Listening to the Voices of the Infertile' in Joan C. Callahan (ed), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 80-108.
[106] *Johnson* v *Calvert* 286 Cal Rptr 369 (Cal Ct App 1991).

purchase what was already 'his'.[108] Callahan contends that the *Baby M* decision 'indicates how a man's genetic connection to a child can be more commanding than a woman's'.[109] Looking superficially at a number of other surrogacy cases from the UK, it may well be imagined that this is the case. In the British case *Re C*[110] for example, the child born to a surrogate was given into the care of its genetic father. A more considered look at surrogacy cases, however, indicates otherwise.

In *Re P*,[111] for example, despite the genetic connection between a man and twins, it was ruled that this did not outweigh the fact that they would have 'bonded' with the surrogate in the time she had care of them. This, and other cases, actually suggest almost the opposite of what Callahan claims: the courts prefer that children stay with their 'natural' mother – a concept not based on genetics but on birth – as it is perceived that this is better for the children in terms of their welfare.[112] *Johnson* v *Calvert*, *Baby M*, and *Re C* can all be reconciled with this position by looking at the different factual circumstances of each case. In *Johnson*, unlike the other cases, full surrogacy had been performed. Perhaps, then, it can be argued that the pull of both genetic links was strong, especially when combined with the parties' original intentions and the fact that the

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[107] *Baby M, In the matter of* (1988) 537 A 2d 1227.
[108] Joan Callahan, n 52 above, 21.
[109] Joan Callahan, *ibid.*
[110] *Re C (A Minor)* [1985] FLR 846.
[111] *Re P (Minors) (Wardship: Surrogacy)* [1987] 2 FLR 421.
[112] Of course, this may not necessarily be the case. Arguments that a child's welfare interests will be better protected or, at least as well protected, by stability may tip the balance towards the commissioning couple. Until maternal-foetal bonding is better understood, there is nothing to

commissioning parents were already caring for the child.[113] In *Baby M*, the erratic behaviour of Mary Beth Whitehead (in particular her initial willingness to surrender of the child and then later refusal to do so before going 'on the run'), meant that although the court was faced with a choice between two genetic parents, welfare of the child considerations probably indicated that the child would be best served in the 'safer' environment offered by the commissioning parents. In *Re C*, there was no dispute over the child. If there had been, it is possible that a British court may well have decided in favour of the surrogate, given the fact that courts in later decisions seem so convinced that this is best for the child.[114] However, there is nothing to indicate that the welfare of a child born following a surrogacy arrangement would generally be better served by remaining with the surrogate. Indeed, the argument that welfare interests would be best protected by the intending couple is at least as strong.

Despite the lack of evidence that courts in surrogacy disputes prioritise the genetic link, concerns about the genetic relatedness of a child to its parents have been raised by various commentators:

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indicate an automatic preference *on the child's part* for staying with the birth mother. In any event, if this was the case, it would have a number of implications for adoption.

[113] This is also reflected in the decision in *Re Q (A Minor) (Parental Order)* [1996] 1 FLR 369, another full surrogacy case in which the commissioning parents were already caring for the child. Here, the issue was not a dispute over who should keep the child, but whether the statutory parental order (HFE Act 1990, section 30) could be authorised in the circumstances (a payment had been made to the surrogate). Indeed, it may be argued that the parental order itself gives explicit recognition to such circumstances.

[114] There is one case in particular that does not fit with this analysis: the Australian case *Re Evelyn* [1998] Fam CA 55. That case, and its unusual decision, is considered in more detail in chapter five, below.

> 'Concern has been expressed in relation to [donor insemination] in particular that the imbalance in the genetic relatedness of parent to child which arises when this method of conception is used might have consequences for the relationship between the parents, and between the parents and their child'.[115]

In partial surrogacy, the intending mother will not be genetically related to the child but the surrogate will. It may also be the case that the commissioning father is not the genetic father. A lack of genetic relatedness could also occur for one or both intending parents in full surrogacy if donor gametes are used. But does (or could) a lack of genetic relatedness negatively impinge on the interests or the welfare of the child? It might, for example, be argued that one (or both) of the commissioning parents could feel 'estranged' from the process of creation, from the other commissioning parent, or from the child, if they were not genetically related to it. But this in itself does not legitimate the prohibition of surrogacy, as the argument can equally apply to other practices that allow genetic links to be severed, such as AID, egg donation and adoption.

This relatedness also works in another direction. Where the surrogate (or the gamete donor) is genetically related to the child, further problems may be caused. Such problems are linked both to the knowledge of this fact (by the genetic and non-genetic parent, and the child if she has been told), and the

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[115] Rachel Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day-Sclater and M. Richards (eds), *What is a Parent? A*

secrecy of it where the circumstances of their birth are unknown by the child. Some children (or adults), knowing they are the product of artificial insemination, have an urge to seek their father, in a similar way to adopted children wishing to seek out their birth mother or parents.[116] In AID in this country at present, the sperm donor is usually anonymous, especially where the insemination procedure takes place at a licensed clinic. In surrogacy, the woman acting as surrogate, whether this be full or partial, will be known to the commissioning parents, and may even form a close relationship with them. This is not necessarily going to be the case for the child, but, as with adoption, intending parents in surrogacy arrangements are encouraged to tell their children where they came from and how they were conceived.[117] If the surrogate is also the genetic mother of the child, similar problems as may be encountered in adoption and AID might occur if the child wishes to know its 'real' mother. This presumes that the child has knowledge of how she was brought into the world; it is suggested, however, that children from whom a secret about their conception or creation is kept will suffer purely because of that secret. It is thought that this may place a strain on the relationship between the social parents and the child; that the child will grow up knowing that something is 'not quite right', sensing that they are not being told

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Socio-legal Analysis (Oxford: Hart Publishing, 1999) 121-141, 128.

[116] There is less evidence of this being the case in egg donation situations, perhaps because of the connotations of motherhood being perceived to be associated with gestation and nurturing when gestation is separated from genetics. It can be noted that in egg donation situations, there is an implicit acknowledgement of the social or intending parent, analogous to that which is made explicit in AID.

[117] This is certainly implicit in the British Medical Association' advice (*Changing Conceptions of Motherhood: the Practice of Surrogacy in Britain* (London: British Medical Association, 1996) 50). See also comments from the perspective of surrogates (Eric Blyth, n 34 above).

everything about a particular subject.[118]

Having conducted empirical research looking at families with children who lack a genetic link to one or both parents (adoptive families, donor insemination families, egg donation families, families created through surrogacy and step-families), psychologist Susan Golombok suggests that a genetic relationship between two parents or between either parent and a child is not necessary in order to be a good parent or for the social and emotional development of the child.[119] There may, however, be a desire for genetic relatedness as this is one thing to aspire to in the quest to seem like a 'normal' family. She highlights that 'the old saying '[b]lood runs thicker than water' is familiar to us all and reflects a deep-seated belief that genetic bonds are stronger than even the closest of friendships'.[120] But this does not mean that there will be any detriment to the child's welfare when a genetic link is not present between parent(s) and child. In any case, she points out, nobody seems to have claimed that the lack of genetic relatedness *per se* is detrimental to adopted children. She also argues that because the children in these situations are 'wanted very much', the lack of genetic relatedness would have no effect on the relationship between parent(s) and child, and states that these parents were 'particularly involved' with their children, more so than 'natural' parents were.[121]

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[118] Susan Golombok, *Parenting, What Really Counts?* (London: Routledge, 2000) 35.
[119] Susan Golombok, *ibid* 24-44.
[120] Susan Golombok, *ibid* 24.
[121] Susan Golombok, *ibid* 36.

In full surrogacy, both of the intending parents could be related genetically to the child, therefore the surrogate 'intrudes' on the parent/parent and parent/child relationship to a lesser extent.[122] She will still be the woman who gave birth to the child, however, so will be legally regarded as the mother of the child[123] and will be the woman named on the birth certificate. This could in itself mark a fairly large intrusion into the life of a child. As Susan Golombok points out, there has been little research undertaken on the children born following surrogacy arrangements. There are certainly similarities between children born from partial surrogacy and those born following AID or egg donation, in that only one of their social parents will be genetically related to them. But it can also be assumed that in both types of surrogacy, there are distinct differences: as mentioned above, it is not known, for example, 'how a child will feel about having been created for the purpose of being given away to other parents, particularly when the surrogate was paid to host the pregnancy'.[124]

Lastly, in this discussion about the perceived importance of maintaining a genetic link, it should briefly be mentioned that genetics is not the only biological relationship that women have with children. The gestational relationship between woman and child is also a persuasive way to define motherhood and, although

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[122] Note that in surrogacy and AID, the absence of sex in conception may be problematic: '[The] reduction in involvement by one sexual partner implies the replacement of their contribution or involvement by someone else. This intrusion of an "outsider" into the couple's relationship appears to carry implications of unfaithfulness or adultery' (Rachel Cook, n 115 above, 131).
[123] Human Fertilisation and Embryology Act 1990, section 27.
[124] Susan Golombok, n 118 above, 39. It seems, however, that Golombok bases her position on the fact that the surrogate is the true mother of the child. If the construction of motherhood following surrogacy was altered and education about surrogacy was facilitated, it may be that the child would not have negative feelings.

stemming from the genetic link (before modern technology could separate genetics from gestation, all women carried only their genetic children), is linked to various other arguments, notably that the gestational mother will bond to the child she carries, be it genetically related to her or not.[125] But the arguments against this are similar to those against the genetic influence holding priority: adoptive mothers do not gestate their children, and generally without negative effect on their relationship. If the relationship between an adoptive child and the adoptive mother fails, this is not necessarily due to either lack of a genetic or gestational relationship and it cannot be assumed that it is; there are other factors, that may or may not be linked, that may be the cause, such as secrecy about the nature of the relationship, which may undermine trust, or any of the numerous reasons that children fall out with their 'real' parents. Thus, it cannot be said that the gestational relationship ought to be prioritised, in the same way that this cannot be said of genetics. On this basis, it may be that an alternative means of allocating parenthood to parties involved in surrogacy arrangements should be sought. A method that would provide for a measure of consistency without relying on biology would be the recognition of the pre-conception intention to become a parent.

3) What about the children?

Following from the concern that the lack of a genetic link to social parents may disbenefit children, other ways in which criticism has been directed at surrogacy

[125] Maternal-foetal bonding is discussed further in Chapter 7, below.

have also been concerned with the potential the practice may have to harm children. The harm perceived generally falls into two categories. First, a child may suffer psychologically due to the manner of its conception. It may not understand, for example, why its 'mother' would not keep it (or perhaps, in some extreme circumstances, why all its potential parents rejected it),[126] in a similar way to the way some adopted children might feel when they find out that they were given away by their 'real' parents, if this is the case. This, however, is like saying that because a child is born without having a say in the way it was conceived, it may suffer harm in the future. If we are to prohibit surrogacy on this basis, 'one-night stands' should be prohibited too, in case they result in pregnancy, or pregnancies that do occur in such circumstances should be terminated. This, it is suggested, would be thought to be too much of an infringement on personal liberty and autonomy.

Because surrogacy deals with the lives of individual human beings, it would be difficult to legislate for every potential situation. But it might be that, through regulation that is carefully based on past experiences and which considers potential future problems, we can facilitate the practice of surrogacy in order to minimise or reduce harms that may possibly occur. No child has a say in the way it comes into the world, and ethically it is usually true to say that it is better to be born than not at all.[127] Arguably, what this argument breaks down to is that children born to surrogates may face some stigma due to the way they were

[126] Rosemary Tong, n 12 above, 67.
[127] *McKay* v *Essex AHA* [1982] QB 166.

conceived (if it becomes public knowledge), or may face personal confusion or anxiety. Proper counselling of those that enter surrogacy arrangements may go some way to alleviating these potential harms. If, for example, a commissioning couple are counselled on the best way to tell their child of its origins (on the assumption that openness is better than secrecy) and to deal with its questions, then there is no reason based on surrogacy alone that the child should be unhappy with its situation. Indeed, this is one respect in which surrogacy mirrors adoption.[128] As for stigma, this is not a problem belonging to the child, but to society, although the child may be harmed by it. Education about infertility, means of preventing, alleviating and circumventing it should become more widespread. Just as children of single or adoptive parents are less likely to be socially stigmatised in today's society, so children born following surrogacy arrangements can become accepted. Fertility education, it can be argued, should begin early, perhaps becoming part of sex education in schools.[129]

This also begs the question of what happens to the children born from surrogacy arrangements who do not end up being cared for in a stable family relationship. For example, if a child is born disabled, the commissioning couple may feel that it would be too difficult to raise it. The surrogate, too, may choose not to keep it.[130] Although this would be a sad situation, it is arguably no different to what might

[128] And methods of dealing with surrogacy might also go the same way as adoption, with a tendency towards the more 'open' model. An open model of surrogacy would suggest that the woman who acted as surrogate and all the circumstances surrounding the choice of the parents to use the surrogate are known to the child.

[129] This may not make an immediate change to the way surrogacy is perceived, but it could be hoped that it would at least have a gradual effect, perhaps incremental by generations.

happen if a disabled child was born in 'normal' circumstances. The difference would be that three people, rather than two, had made this choice, but in this circumstance, insisting that any of the parties *must* care for the child, would be contrary to the situation and choices faced by fertile people.[131] However, the current law establishes that the surrogate is the legal mother and, therefore, it will be her, despite the prior intentions of the parties involved, who ultimately has to make this decision. By recognising the intending parents as the legal parents, it would be them who had to make the choice, and the surrogate would be absolved of the responsibility of doing so. Her agreement to become a surrogate presupposes that she did not intend to have parental responsibility or to make such decisions while, by intentionally organising and creating the pregnancy, the commissioning couple may be assumed to have assumed this potential burden.

Second, there is an argument that children, individually and as a group, are harmed by surrogacy arrangements because they have become commodified.[132] Some radical feminists believe that allowing surrogacy to operate is like establishing a market in babies, where those who want them can effectively go and buy them, in the same way that other goods can be purchased. Margaret

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[130] As happened originally in the US Stiver/Malahoff case. See, for a summary of the case, Carmel Shalev, n 9 above, 97.

[131] It may also be in the child's best interests to remain with neither of the parties: Kennedy and Grubb, *Medical Law* (London: Butterworths, 3rd ed, 2000) 1398.

[132] See, especially, Margaret Radin, n 57 above and Vanessa Munro, n 8 above. Martha Field has also argued that 'reproductive technology, including surrogate motherhood, is the first step towards a developing ideology in which we are learning to see children as products' (n 44 above, 28). However, a persuasive counter-argument is made by Emily Jackson (n 18 above, 306), who says 'it is simply not true that the commissioning couple buy the right to treat the child as a commodity, since if they did in fact treat the child as an object, they would clearly fail to meet the basic standard of adequate parenting required by law'.

Radin has taken this argument further, suggesting that enabling some people to 'sell' babies would necessarily mean that we may all begin to 'subconsciously measur[e] the dollar value of our children'.[133] If children were commodities, then they could be accepted or rejected as any other consumer goods can be, for example if they are defective, or no longer wanted. Under such conditions, contends Rosemary Tong,

> 'parent's love for their children would no longer be unconditional; rather, it would depend on whether or not the children were "good" products'. In a worst-case scenario, parents might trade in their defective "models" for the very latest "models" science and technology have to offer'.[134]

It must be remembered, however, that if the choice is made by a commissioning couple (and perhaps the surrogate) to 'reject' the child because of a disability, this is not likely to be because its potential parents feel that it is another commodity that can easily be accepted or rejected by them as consumers. More likely, it will be a difficult choice for them to make in the wake of their desire and expectations for the child. Additionally, as stated above, this situation is no different to that which currently occurs for fertile couples. What should be important in these situations is that a party who did not expect or intend to have parental responsibility is not left with it, simply because there is perceived to be a

[133] Margaret Radin, *ibid* 1849.
[134] Rosemary Tong, n 12 above, 67.

choice between potential parents. Moreover, Tong's contention suggests that potential parents will be prepared to resort to eugenic practices in order to get the child they desire, a claim that is unlikely to find support among couples for whom infertility was a problem in the first place.[135] Having a child is the end result that is desired by couples who opt for surrogacy (and other assisted reproductive techniques) and it is likely that only when faced with the potential difficulties of disability, for example, will commissioning parents think about 'rejecting' the child. Even if they do so, this will not be because they see that there is the easy option of 'replacing' the child.

Contrary to (or in spite of) the above arguments, it may also be argued that of all the people affected by surrogacy arrangements, children benefit the most. Surrogate-born children are usually desperately wanted, because surrogacy has often been come to as a last resort. As Rosemary Tong points out, albeit in very general and simplistic terms, 'wanted children tend to be loved – and therefore happy – children'.[136] Even if there was a 'crisis of confidence' moment when a surrogate-born child found out its origins,[137] this could be dealt with within the confines of a loving family environment and counterbalanced by a happy life experience.

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[135] If, however, this was found to be true, it might be thought wise to limit the availability of surrogacy to those who are medically or practically infertile.
[136] Rosemary Tong, n 12 above, 69.
[137] Rosemary Tong, *ibid.*

Vanessa Munro, however, contends that this argument is 'trivialising and dismissive', and does not take into account 'potentially damaging' individual responses to the gaining of such knowledge about one's biological origin.[138] However, her argument can be refuted as it assumes that the knowledge will be suddenly gained instead of the fact always being understood. Moreover, she contends that the wider social significance of selling children is ignored by this argument, as are the arguments of many commentators that 'the surrogacy procedure promotes the general degradation and devaluation of children to the status of commodified objects'.[139] This, however, merely establishes that the argument is circular: the contention that wanted children are happy children is a response to the criticism of devaluation of children by surrogacy. It argues that children are not devalued merely because an arrangement is entered into in order to get them, *because* they are 'desperately wanted'. But the commodification argument is equally a response to that claim: because children are, to a certain extent, bargained for, they are commodified. Perhaps commentators will have to agree to disagree on this point: it seems that either one agrees with the baby-selling/commodification argument, or one does not, believing instead that autonomy should allow people to enter bargains for the provision and the receiving of services and that children will not automatically be disadvantaged by such arrangements. Nevertheless, the whole argument, albeit circular, gives additional strength to the proposition that counselling and education should be available for (and welcomed by) the prospective parents and

[138] Vanessa Munro, n 8 above, 18.
[139] Vanessa Munro, *ibid.*

more generally to prepare them for such an event and should be welcomed in this respect. Further, education within society – increasing the awareness about different family types, for example – may go some way towards precluding any hurt or dispelling a 'crisis of confidence' for the child, by dispelling the myth that is children that are bought and sold in surrogacy, rather than a service paid for.

A further – and under-considered – issue to do with the welfare of the child born from surrogacy is the way that the commissioning or intending parents are treated by the law. The difficulties in actually achieving parenthood through surrogacy may place a strain on the relationship between the parents, and the stress factor involved cannot be considered to be in the best interests of any child witnessing it before or after the event. In itself, notwithstanding any emotional attachments that might develop, this is one argument for automatically recognising the intending parents as the real parents of the child. Rachel Cook comments that the experience of intending parents is

> 'characterised by lack of control and uncertainty, both about the process of the arrangement, and the outcome. Potentially this may lead to difficulties or delay in the establishment of a relationship with the baby, lower self-esteem and self-efficacy in relation to feelings about being a parent, and a more stressful experience of parenting'.[140]

Currently, the experience of intending parents is contained within the knowledge that up until a parental order is granted, if it can be, there is no certainty that they have a child that they can call theirs.

Another argument on this point links to the child's knowledge of their parentage, and is the reverse argument to that more often stated in relation to secrecy about the origins of a child born following assisted reproduction procedures such as AID or surrogacy. If a child grows up with the firm belief that two particular people are its parents, basing this on the fact that they have been the ones caring for them since birth and have performed the part of the nurturing role,[141] then it is surely arguable that it is not in their welfare interests for them to find out this is not the case. Registering the surrogate as the mother on the birth certificate always leaves this open for discovery, with a greater potential for the child to be hurt. Even if the parents are open about the nature of the child's conception, such a discovery may cause confusion, especially if sudden. Therefore, it would better reflect the social reality of the post-surrogacy situation if the intending parents were registered as the parents from the time of birth, thus legitimating the actual social circumstances of the family created.[142]

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[140] Rachel Cook, n 115 above, 134.

[141] There has, however, been some evidence that intending mothers in surrogacy arrangements may be able to be induced to lactate, thus enhancing their nurturing role by breast-feeding. See F.P. Biervliet, S.D. Maguiness, D.M. Hay, S.R. Killick and S.L. Atkin, 'Induction of Lactation in the Intended Mother of a Surrogate Pregnancy: Case Report' (2001) 16 (3) *Human Reproduction* 581.

[142] As stated above, perhaps there is an argument for surrogacy to be performed 'openly', in the sense of open adoption. It is true that this is likely to be the case in a number of surrogacy arrangements at present, but the practice could be regulated in order that all parties were both educated and advised about potential difficulties, while understanding that the surrogate (and the surrogacy arrangement) ought to be known to the child. Empirical evidence comparing the

4) Conclusions

Although some of the critiques and criticisms of surrogacy made by feminist scholars may, in some cases and to certain extents, have validity, they cannot be said to apply universally to all surrogacy arrangements, all of the time. In any case, with better or more facilitative regulation of surrogacy, these concerns may become less and less relevant, except to those feminists who strongly hold the belief that surrogacy is merely a tool of patriarchy – enabling 'fertile' males to control reproduction and obtain offspring genetically related to them. On this point, however, the argument made by Barbara Berg can be reiterated: feminists who are against surrogacy should stop to consider the infertile women – their voices, and not speak *for* them in a general way.[143]

It can also be argued that the arguments for and against surrogacy are exaggerated – and the whole issue can be said to boil down to the fact that surrogacy, as it currently stands, has (or may have) only the *potential* to either harm women, or devalue children or the reproductive process in general. This does not necessitate the abandonment of surrogacy as a reproductive alternative. However, if this is accepted, action should be taken to facilitate surrogacy in order that it remains available to those who may have no alternative, while offering protection from potential harms. In developing new regulation for surrogacy we should try to anticipate ways in which potential harm may manifest

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experiences of families in which the surrogate is known, and those in which she has no further contact (or minimal contact) after the birth would be useful.

itself, or particular practices that may lead to such harms, and pre-empt their appearance. This theme will be continued in the following chapter, where responses to and recommendations regarding surrogacy on a regulatory level will be considered.

[143] Barbara Berg, n 105 above.

Chapter Three

Surrogacy: Responses and Recommendations

Introduction

Having now considered some of the feminist critiques of surrogacy, it is now worth considering occasions when arguments against surrogacy (or particular elements of it) were raised more concretely. The Government commissioned Warnock and Brazier Reports in particular considered a number of potential ethical and moral problems that the practice of surrogacy might raise.[1] A selection of responses to the perceived problems, and to a number of practical regulatory problems looked at by the two committees, will be examined and critiqued in this chapter. It will be seen that neither report, nor the legislation that followed them, have come to wholly satisfactory conclusions about surrogacy management. It will be concluded that none of the large-scale problems that were foreseen by feminists or in these reports have materialised. In addition, as a prelude to the following chapter, it will be surmised that more 'minor' or isolated problems that have emerged, for example, in particular cases, are all things that could be protected against by new legislation. Because it cannot be shown that surrogacy is inherently wrong, this chapter concludes that it should be facilitated

[1] *Committee of Inquiry into Human Fertilisation and Embryology, Report* Cmnd 9314 (1984) (London: HMSO) (The Warnock Report); *Surrogacy: Review for Health Ministers of Current*

as a legitimate reproductive choice, by regulating it to prevent future manifestation of large-scale problems.

Governmental considerations

A number of the critiques and criticisms of surrogacy that were exposed and explored by feminists and others, and the potential problems with the practice that were highlighted within them, combined with the emergence of commercialised surrogacy in the UK, prompted a governmental response to surrogacy in the 1980s.[2] In turn, this led to legislation mainly concerned with the prohibition of commercial surrogacy.[3] Later, another inquiry was commissioned to look into the levels of payments received by surrogates, among other issues.[4] Each time the government considered the issues, a number of recommendations were made. This section of the chapter will identify the responses of the government to the two surrogacy inquiries and critically consider the recommendations that were made on each occasion.

Arrangements for Payments and Regulation, Report of the Review Team Cm 4068 (1998) (London: HMSO) (The Brazier Report).
[2] The Warnock Report, *ibid.*
[3] Surrogacy Arrangements Act 1985.
[4] The Brazier Report, n 1 above.

1) The Warnock Report[5]

In the early 1980s, following surrogacy reaching the UK courts,[6] reports of the actions of commercial surrogacy agencies in the media, and rapid developments in forms of assisted reproduction and embryology more generally, it was felt by the Government that regulation of the area might be desirable. Thus, a committee of inquiry was established in 1982 by the Secretary of State for Health and Social Services, to be chaired by Mary Warnock. The ambit of the Committee was:

> 'to consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the ethical and legal implications of these; and to make recommendations'.[7]

The Warnock Committee was to study and report on IVF and other assisted reproduction technologies in the light of concern over the potential uses of IVF technology by scientists, including the use of gametes and embryos in reproductive medicine and also research. Within this ambit, the Committee looked at surrogacy and analysed its use as one of the many 'techniques for the

[5] The Warnock Report, n 1 above.
[6] *A* v *C* (1978) 8 Fam Law 170; later reported as [1985] FLR 445.
[7] The Warnock Report, n 1 above, para. 1.2.

alleviation of infertility'.[8] After hearing and evaluating many of the arguments both for and against many of the practices it was concerned with, including surrogacy, the Committee eventually came to the conclusion by majority, (but not unanimously) that surrogacy was objectionable and the use of surrogacy as a treatment for infertility should be actively discouraged. There was clear disapproval of the concept and practice of surrogacy from the majority of the Committee, and many of the recommendations that it made are indicative of this.

The Committee recommended that the establishment and use of commercial and non-profit making surrogacy agencies should be prohibited,[9] and that those involved in such should be subject to criminal sanctions including fines and terms of imprisonment.[10] This would also comprise any other intermediaries who may knowingly assist in making any arrangements for a surrogacy agreement in order to benefit themselves financially, for example anyone who was paid to initiate, facilitate or negotiate the making of a surrogate arrangement. Therefore, the criminalisation of commercial surrogacy would not only encompass for-profit agencies but also any other active participants involved in a surrogacy scheme for money, other than the potential surrogates and commissioning couples, who were to be exempted from criminal liability. It does not seem that this was because their plight was understood or wholly recognised by the Committee, but more that it had the interests of any potential child in mind and wished children to

[8] Chapters 3-8 of the report are given this heading.
[9] The Warnock Report, n 1 above, para. 8.18.
[10] *ibid.*

be free from the perceived 'taint of criminality'.[11] This not only meant that criminalisation of surrogacy *per se* was to be avoided, but also that surrogacy should be discouraged by other means.

This was not the approach taken by the Committee towards non-financial, or private arrangements, however. Here it was recommended that arrangements that were undertaken between the commissioning couple and the surrogate only should not be legislated against, and that any money or other material benefit that was exchanged in such an agreement would not be unlawful. In this case, where an agency did not arrange payment, it would therefore be legal for the surrogate herself to receive payment, whether this was in recompense for her time and service, or purely for her own financial benefit. Such an arrangement would remain a private agreement between the parties. The Warnock Committee did, however, believe that any contract of this kind would be illegal and would be unenforceable in the courts.[12]

It has been said that the majority of the general public 'finds surrogate motherhood unpleasant',[13] and finds especially distasteful the use of commercial agencies to facilitate such arrangements. Therefore, the recommendation that commercial and profit making agencies be prohibited by the law would probably not have been against general popular belief. Surveys taken shortly after the time

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[11] The Warnock Report, n 1 above, para. 8.19.
[12] *ibid.*

the Warnock Committee was hearing evidence appear to support this contention,[14] as they 'indicate not only that surrogacy enjoys limited acceptance amongst the British public, but that support for both commercial and altruistic surrogacy declined between 1985 and 1989'.[15] The fact that it was recommended that private, non-profit making arrangements should not be prohibited, even though they may also have been considered distasteful or immoral by some, reflects a reluctance to interfere with the private actions of individuals acting within their own personal sphere. This probably also offers some explanation for the reason that the surrogacy issue was dealt with so rapidly in terms of commercialism and profit making, and why the suggestions made in the expression of the minority view were not considered to be valid at the time.

It is interesting to note that part of the view of the dissenting minority was the recognition that because surrogacy might greatly benefit some infertile couples who had no alternative, there may be some place, albeit under strict guidelines, for surrogacy to be controlled and regulated in some way by the state, in the best interests of all parties concerned.[16] It was imagined that this would include licensed non-profit making agencies that would be comparable to adoption

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[13] Shelley Roberts, 'Warnock and Surrogate Motherhood: Sentiment or Argument?' in P. Byrne (ed.), *Rights and Wrongs in Medicine* (London: King Edward's Hospital Fund for London/OUP, 1986) 80-114, 85.

[14] See 'The Debate No Woman Can Ignore' *Woman*, 12 January 1985, 52-54, and data included in the British Social Attitudes surveys (L. Brook, S. Hedges, R. Jowell and J. Lewis, *British Social Attitudes: Cumulative Sourcebook – the First Six Surveys* (Aldershot: Gower Publishing, 1992) M.1-11).

[15] Eric Blyth, 'Children's Welfare, Surrogacy and Social Work' (1993) 23 *British Journal of Social Work* 259-275, 263.

[16] *Expression of Dissent: A*, Surrogacy (1); 'We recommend that the licensing authority proposed in Chapter 13 should include surrogacy within its terms of reference, and that any non–profit

agencies. Within these, there would be 'well represented' childcare skills and the provision of 'adequate counselling'.

As stated above, it is possible that the views expressed by the Warnock Committee Report were a reflection of the more general views, opinions and concerns about surrogacy held by the wider society at that time, in the light of the representation of surrogacy and commercial agencies in the press. In this sense the dissenting opinions can be compared with the ambivalence likely to have been felt by many people who did not have strong opinions about the practice of surrogacy outside the commercial market, if at all. There is now, however, some doubt about the efficacy of the Warnock recommendations in the light of recent comments made by Mary Warnock herself.[17]

2) After Warnock

The Warnock Report led to the enactment of the Surrogacy Arrangements Act 1985, which banned commercial surrogacy.[18] Later, the Human Fertilisation and Embryology Act 1990 was passed, which added to the regulation of surrogacy, including a specification that all surrogacy arrangements would be

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making agency that wished to assist in making surrogacy arrangements would have to be licensed by the authority'.

[17] She says now 'those who signed the expression of dissent about surrogacy proposed a form of regulation, not unlike the regulation of adoption, which now seems to me eminently sensible' (Mary Warnock, *Nature and Mortality: Recollections of a Philosopher in Public Life* (London: Continuum, 2003) 104), and adds 'I blame myself for failing to recognise the good sense of this minority report; I should have urged that it be adopted as the recommendation of the committee'.

[18] See Chapter 4, below, for more detailed discussion of the Act.

unenforceable.[19] Later in the 1990s, it had become apparent that the way that surrogacy was regulated by the two Acts was largely inefficient, especially with regard to payment of surrogates, and that the 'prices' charged by some women for their service could be very high indeed. The Warnock recommendations had failed to provide adequate regulation of surrogacy arrangements or protection of those who entered them. This 'patchwork of provisions' regulating surrogacy was clearly unsatisfactory.[20] In June 1997 the Labour Government commissioned a further committee to review the practice of surrogacy and to consider and report on whether the current regulation and policy was adequate, or whether further or different regulation might be necessary. The new committee, chaired by Professor Margaret Brazier, focused mainly on the issue of payments in surrogacy arrangements, with a view to a new report, making suggestions as to how the law might be reformed.[21]

In the first chapter of the Brazier Report, events leading up to the establishment of the new Committee were highlighted as reasons why the practice and regulation of surrogacy was due to undergo a detailed review.[22] The importance of the changed attitude of the medical profession in relation to surrogacy was stressed, with reliance on the differences between the reports of the British

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[19] Human Fertilisation and Embryology Act 1990, section 36 (inserting section 1A into Surrogacy Arrangements Act 1985).
[20] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) 263.
[21] The Brazier Report, n 1 above.
[22] The Brazier Report, *ibid*, paras 1.6 – 1.13.

Medical Association in the years between 1984 and 1996.[23] In addition, the Brazier Report showed that infertility clinics had gradually become more involved in surrogacy and that many were currently providing IVF surrogacy services.[24] It was also stated that there had been numerous surrogacy situations with both negative and positive outcomes reported in the media over the immediately previous years, suggesting that the actual practice of surrogacy was on the increase.[25] Included within these media representations was the news that Bill Handel, the director of a Los Angeles-based commercial surrogacy agency, was trying to recruit couples from the UK who wished to take advantage of the more relaxed laws regarding surrogacy in California. British newspapers had reported that Handel was apparently charging up to £35,000 for such arrangements. The case of Karen Roche was also paid particular attention. She was a British woman acting as a surrogate for a Dutch couple, for which she was to be paid £12,000. Apparently, having changed her mind about the arrangement, she claimed to have terminated the pregnancy, a claim that was soon denied, amidst mass publicity, and an announcement made that she would not give up the child. Media attention was also focussed on a case involving triplets born to a

[23] In 1984 the opinion of the medical profession was that it was better for doctors not to become involved in surrogacy arrangements at all. In 1990, the BMA published *Surrogacy: Ethical Considerations*, which suggested that medical assistance in surrogacy was ethical in some circumstances: 'where the commissioning couple suffers from infertility due to a medically recognised disorder, and where all other appropriate means for enabling them to have a child have been tried and failed'. In 1996, the BMA published *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain*, in which it was acknowledged that surrogacy was an acceptable reproductive option 'of last resort' for some people.

[24] The Brazier Report, n 1 above, para. 1.7. It does, however, appear that surrogacy will only currently be provided by clinics 'for infertile women with certain clearly defined medical problems' (Peter Brinsden *et al*, 'Treatment by *in vitro* Fertilisation with Surrogacy: Experience of One British Centre' (2000) 320 *British Medical Journal* 924-928, 924). See also V. English, A. Sommerville and P.R. Brinsden, 'Surrogacy' in Francoise Shenfield and Claude Sureau (eds), *Ethical Dilemmas in Assisted Reproduction* (Carnforth: Parthenon Publishing Group, 1997) 31-40, 39.

surrogate, although de Cruz points out that the reporting of this case was done 'almost entirely positively as an example of surrogacy helping those who would otherwise remain childless'.[26]

Further cases also surfaced where surrogacy had been used to facilitate unusual familial circumstances; in the US, a couple sought permission to use a surrogate to carry their daughter's previously fertilised eggs after her death, so that they could become grandparents;[27] in the UK there were reports of a mother acting as surrogate for her daughter (therefore the genetic grandmother was also the gestational mother of the child),[28] and a daughter acting as surrogate for her mother (thus the baby was both her half-sister and her gestational daughter).[29] Cases such as these highlighted that the use of surrogacy could still be a cause for concern, in that various issues could be raised over possible welfare concerns of any children born following such bizarre arrangements.[30] Coupled with the fact that levels of payments to surrogates were thought to be increasing, it was thought that a review of the practice of surrogacy and of how it was regulated had become necessary.

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[25] The Brazier Report, n 1 above, paras. 1.8 – 1.12.
[26] Peter de Cruz, *Comparative Healthcare Law* (London: Cavendish, 2001) 185.
[27] The Brazier Report, n 1 above, para. 1.12.
[28] The Brazier Report, *ibid.*
[29] The Brazier Report, *ibid.*
[30] A discussion of the additional implications of 'unusual' surrogacy arrangements (e.g. 'grandmother surrogacy') is beyond the scope of this thesis, which primarily concentrates on the types of surrogacy entered into by an infertile couple as a 'last resort', having failed to achieve parenthood by more conventional means.

3) The Brazier Report

The Brazier Committee was asked to review the existing law and practice relating to the making of surrogacy arrangements and was charged to attempt 'to ensure that the law continued to meet public concerns'.[31] The Committee's terms of reference were threefold:

- 'to consider whether payments, including expenses, to surrogate mothers should continue to be allowed, and if so on what basis;
- 'to examine whether there is 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;
- 'in the light of the above to advise whether changes are needed to the Surrogacy Arrangements Act 1985 and/or section 30 of the Human Fertilisation and Embryology Act 1990'.[32]

Therefore, the remit was not to consider all aspects of surrogacy. In particular, it seems, although a review of section 30 of the HFE Act 1990 was within the terms of reference, the Committee was not being asked to consider the law governing parenthood following surrogacy arrangements *per se*, but only insofar as the

[31] The Brazier Report, n 1 above, para. 1.1.
[32] The Brazier Report, *ibid*, para. 1.2.

assumption had already been made that the correct starting position was that the surrogate should be legally regarded as the mother of a surrogate-born child. This section will analyse three elements of surrogacy considered and recommended upon by the Brazier Report: payments, regulation of surrogacy and parenthood.

a) Payments

The Brazier Committee reported that, despite the ban imposed on commercial surrogacy by the Surrogacy Arrangements Act, 'surrogacy is, in effect, increasingly practised on a commercial basis'.[33] The Committee found that surrogates were being paid 'in excess of any reasonable level of actual expenses incurred as a result of the pregnancy',[34] including a number of payments of between £10,000 and £15,000.[35]

Whilst the Report may be said to have adopted 'a more conciliatory line in some respects',[36] it nevertheless made recommendations that would more tightly control the future operation of surrogacy if implemented, especially with regard to payments made to surrogates. The Report's recommendations included that payments to surrogates should be prohibited, with the exception of compensation for 'genuine and verifiable' expenses incurred by the surrogate as a result of the

[33] The Brazier Report, *ibid*, para. 1.13.
[34] The Brazier Report, *ibid*, para. 3.20.
[35] The Brazier Report, *ibid*, para. 5.4.
[36] Peter de Cruz, n 26 above, 169.

pregnancy.[37] It was said that this might include maternity clothing, healthy food, domestic help, travel, telephone and postal expenses, counselling fees, legal fees, life and disability insurances, pregnancy tests, medical costs, child care, medicines and vitamins, for example. Further to such expenses, absolutely no additional expenses or payment should justifiably be allowed. The Committee also recommended that the basis on which payments ought to be made should be established by the parties prior to making a surrogacy arrangement, and that legislation should define expenses and empower ministers to issue directions on what constitutes 'reasonable expenses' and the methods by which this should be proven.[38]

Many reasons were given for the prohibition of all payments other than expenses, including the assumption that it would be in the best interests of the child to limit payments and that surrogacy arrangements were more likely to be successful if they were entered into on a purely altruistic basis. Emily Jackson points out that both of these assumptions were made entirely without supporting evidence; there is no evidence that a child may be harmed purely because a payment was made to its gestational mother, for example, and it may be equally arguable that surrogacy arrangements are less likely to break down if the surrogate *is* rewarded by payment.[39] The Report also suggested that the

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[37] The Brazier Report, n 1 above, para. 5.25.
[38] The Brazier Report, *ibid*, para. 7.11.
[39] Emily Jackson, n 20 above, 284. Jackson's reasoning behind the second argument is that 'failure rates in the US, where commercial surrogacy is the norm, are much lower than in the UK'. Similar arguments have been made in the first part of this chapter against generalised presumptions made by feminists to the effect that paid surrogacy leads to domination and exploitation of women.

potential for the surrogate to extort money from the commissioning parents would be lessened if payments were prohibited,[40] and predicted, following the same reasoning, that the amount charged by surrogates for their service would 'increase exponentially' if it was not. This was seen by the Committee as being a negative prospect as it may cause the incidence of surrogacy arrangements to rise. Evidently this was not something that was problematic for the Committee, as it did concede that eliminating payments might cause the number of women willing to act as surrogates to decrease, but found that this was not a disagreeable potential outcome.[41]

In general, the Brazier Report suggests that strategies should be employed to prevent money being involved in surrogacy arrangements at all. However, this is probably more suggestive of the reporting group's general attitudes to surrogacy than to the effect that it perceived allowing payments to continue would have. The recommendations were probably designed to eventually be a preventative measure against the practice of surrogacy becoming more prevalent, or a deterrent for anyone considering using surrogacy in order to have a child, including those infertile couples for whom surrogacy may be an option of last resort. As Rachel Cook points out, this approach to surrogacy is hardly consistent with the current approach to other infertility treatments in this country, specifically sperm donors. Sperm donors get paid for their 'services', and not only

[40] The Brazier Report, n 1 above, para. 5.21.
[41] The Brazier Report, *ibid*, para. 4.37. It should also be remembered that Margaret Brazier herself is against payment for the donation of reproductive services of any kind (including sperm

is this the case, but they are actually induced to become donors for money.[42] In addition, some egg donors are paid (albeit that the payment is wholly non-proportional to sperm donors)[43] or participate in 'egg-sharing' schemes where, if they are themselves undergoing IVF treatment, they may receive discounted or free treatment. Furthermore, some reports have suggested that a woman can be very well remunerated for her eggs.[44]

b) Regulation

The Brazier Report considered and rejected a number of alternative systems that could be used to regulate the practice of surrogacy. For example, the British Fertility Society had suggested during the consultation process that surrogacy should be brought within the ambit of the HFEA and take place only in licensed clinics.[45] The Committee rejected this idea on the grounds that surrogacy was more like adoption[46] and is a 'practice involving social and ethical questions of a different kind and order to other forms of assisted conception'.[47] This is not the

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and egg donation), and a rigorous defender of altruism. See generally, Margaret Brazier, 'Can You Buy Children?' (1999) 11 (3) *Child and Family Law Quarterly* 345-354.

[42] Rachel Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day-Sclater and M. Richards (eds), *What is a Parent? A Socio-legal Analysis* (Oxford: Hart Publishing, 1999) 121-141, 132.

[43] For comment on this fact (and the Brazier Committee's views about payments to surrogates) see Hazel Biggs and Robin Mackenzie, 'Donor Eggs, Surrogates and Pregnant Men' (1999) 3 *Progress in Reproduction* (1) 9.

[44] For examples; 'Women Sell Their Eggs to Pay Off Student Debts' *The Sunday Times*, 3 June 2001, www.sunday-times.co.uk/news/pages/sti/2001/06/03/stinwenws01014.html and 'Women Sell Eggs to Pay For College' *The Times*, 28 May 2001, www.thetimes.co.uk/article/0,,3-2001180594,00.html.

[45] A similar point to that expressed by the dissenting minority of the Warnock Committee (see Eric Blyth, n 15 above, 263 and *Expression of Dissent: A*, Surrogacy (5).

[46] The Brazier Report, n 1 above, para. 6.13.

[47] The Brazier Report, *ibid*, para. 7.9.

case: surrogacy involves nearly all of the social and ethical questions that may arise in other forms of assisted conception and adoption *combined*, with additional elements such as higher levels of payments. In addition, the HFEA itself was quoted in the report as saying that 'the nature of the regulation required for surrogacy agencies is outside the HFEA's remit and expertise'.[48] Presumably, however, such expertise could be developed, although there may well be a case for an entirely separate agency or agencies, given the complexity of the issues surrounding surrogacy.

The Brazier Committee eventually suggested that non-profit making surrogacy agencies should be established and registered with the Department of Health and that these should operate within a statutory Code of Practice required to be established under the terms of a new Surrogacy Act, the Surrogacy Arrangements Act 1985 and section 30 of the HFE Act having been repealed. It suggested that the Department of Health should draw up this Code of Practice after consultation with other relevant bodies.[49] The Code of Practice would be binding upon all registered surrogacy agencies and would act as an advisory Code for any party concerned with surrogacy, including those entering private arrangements.[50] It was proposed that the relevant parts of the Code could be incorporated into the existing HFEA Code of Practice so that it would also bind fertility clinics assisting in surrogacy arrangements.[51] In addition, it was

[48] The Brazier Report, *ibid*, para. 6.18.
[49] A number of 'relevant bodies' were suggested in para. 7.26.
[50] The Brazier Report, n 1 above, para. 7.18.
[51] The Brazier Report, *ibid*, para. 7.19.

suggested that interim measures be put in place, including the drawing up of a voluntary Code of Practice by the Department of Health prior to new legislation being enacted.[52] Furthermore, the new Surrogacy Act would include what the Committee considered to be the best elements of the existing Surrogacy Arrangements Act 1985, namely the provision that surrogacy arrangements are unenforceable and the prohibitions on commercial surrogacy.

The Brazier Committee also recommended that a 'memorandum of understanding' should be drawn up between the parties to a surrogate arrangement.[53] This should 'record the parties' arrangements to secure the future welfare of the child', which would include any details about future contact that it would have with the surrogate and a determination about what the child should be told about the manner in which it was created. The 'memorandum' would also address whether and what screening procedures should take place both pre-conceptually and pre-natally.[54] It was also proposed that other issues related to the pregnancy, once established, should be addressed by the memorandum, including any decision of the parties in relation to the smoking, drinking and eating habits of the surrogate and how the surrogate should be supported by the commissioning couple throughout her pregnancy. Provisions for after the birth of the child, such as how and in what circumstances the child is to be handed over to the commissioning couple and whether and how the intending parents will seek to acquire legal parenthood should also be made. Certain contingencies,

[52] The Brazier Report, *ibid*, para. 7.30.
[53] The Brazier Report, *ibid*, para. 6.25.

such as what would happen in the event that a fetal or birth abnormality is discovered, or injury or death occurs to the surrogate herself should also be provided for in the memorandum, including the provision of life and disability insurances for the surrogate.[55] Although the Committee envisaged that the non-contractual nature of such a memorandum was to be emphasised,[56] it seems that such a document would definitely be of a quasi-contractual nature in that it defines certain obligations and actions that each of the parties ought to abide by. This is surely just a step away from saying that parties *must* abide by such criterion, and perhaps reflects that a contractual element in any surrogacy reform may not be such a bad idea after all. The memorandum of understanding can be seen as a reflection of the parties' intentions and, as such, might suggest that the Brazier Committee believed intention to be important and it can be argued that if this is the case, future legislation ought to consider the memorandum of understanding to be the basis of a contractual agreement between the parties. If it can be shown that the autonomy of surrogates ought to be protected, by facilitating the making of surrogacy agreements in an environment in which the potential of exploitation is minimised, then surrogates ought also to be held to agreements they make and such definitions of obligations need not be wholly unenforceable.

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[54] The Brazier Report, *ibid*, para. 8.12.
[55] The Brazier Report, *ibid*, para. 8.13.
[56] The Brazier Report, *ibid*, para. 8.14.

c) Parenthood

The Brazier Committee also envisaged that a revised section 30 parental order scheme would continue to operate, but that commissioning couples would only be able to apply for an order if they could show that they had complied with all the provisions of the new Surrogacy Act, including any limits placed on payments. Under the new Act, a judge would not be able retrospectively to authorise payments.[57] The Report suggested that further criteria should be added to the Act, in addition to those already contained within the current section 30 requirements, 'in order to ensure that the welfare of the child is better protected'.[58] These included that all applications for parental orders should only be heard in the Family Division of the High Court, so that approval is 'given by judges of the highest experience'. Further, prior to the granting of a parental order, the Committee said that DNA testing to establish that at least one of the commissioning couple is genetically related to the child, and that criminal/police record checks of the commissioning parents should be allowed. Therefore, despite considering the welfare of the child to be of high importance, the apparent mistrust of those who seek to become parents of children born for them by a surrogate prevented the Brazier Committee considering whether the actual issue of parenthood had been adequately contemplated by previous legislation: it seems that they assumed that the correct mechanism by which this should be achieved is a reformed version of the existing parental order system. These

[57] The Brazier Report, *ibid*, para. 7.22.
[58] The Brazier Report, *ibid*, para. 7.24.

welfare considerations and how they should be addressed effectively prevented further analysis and guidance being included in the Report on who should be regarded as parents and how parenthood is defined, leaving the situation as poorly defined as ever. Arguably then, although it is an issue that greatly affects commissioning parents, parenthood has not yet been fully considered by governmental reports or in legislation. Presumably the Brazier Committee felt that the issue had been dealt with adequately by the incorporation of section 30 into the HFE Act, or was one of the least important issues still to consider when regulating surrogacy. If the intention of the report and any subsequent government action was to deter the use of surrogacy then consideration of how parenthood would be acquired might well have been thought unnecessary by the Committee members.

4) Conclusions

Two Government reports and the two pieces of legislation on surrogacy have not brought us to a place in which it could be said that all of the issues raised by assisted reproduction in general and surrogacy in particular have been satisfactorily addressed. There has been no challenge to traditional legal concepts of the family or the roles within it, as demanded by new and innovative methods of creating families, despite the fact that this may be necessary in the light of the separation of biological and social parenthood that surrogacy in particular allows. Can it be said that continuing to determine families and the

roles within them in terms of genetics (real or imagined) and gestational inputs is still valid? Because of the introduction of the parental order mechanism, parenthood *itself* has not been an issue that has so far been raised in the 'official' surrogacy debate, although it would seem that this should be something that would be of high importance, given that our constructions of the family and its members have continued to be challenged by science. It is easy to see why the perceived commercialisation of surrogacy was the first so-called 'problem' to be dealt with, and perhaps even why there may be concern about payments in surrogacy generally. But it is equally plain to see how certain assisted reproduction techniques and surrogacy entail fragmentation of what may be called the traditional family form, and this begs the question as to why parenthood was not an issue given higher priority in either report.

Familial roles were given some consideration in the HFE Act 1990 but the convoluted sections that deal with motherhood and fatherhood do not fully take into account the reality of all the situations that the Act covers. The rights of commissioning couples to be recognised as parents are given minimal consideration by the adoption of the parental order mechanism. What is the reason for this low level of consideration for 'the family', an institution upheld and revered by almost every other governmental policy? Why is it that the development of reproductive medicine and technology has not forced the issue into the limelight? Perhaps staying with the familiar notions of parenthood that come from old and out-dated presumptions is the easy option, or it might be said

that anything that differed from the perceived 'norm' was instantly regarded as 'bad' and therefore in need of discouragement. Challenging or changing the established presumptions might upset traditionalists, just as other issues that challenge what is 'normal' do, such as the concept of homosexual or lesbian marriage, for example. Perhaps, however, it is now time to question previous governmental responses on this issue and to recognise what is permitted by technology (and what there is an increasing demand for): the creation and recognition of families for those who cannot achieve this 'naturally'.

This could be achieved by re-regulation (and is probably what happens in practice in most fields – legislation is enacted, some borderline cases come up, judges make decisions, legislation perhaps changes in time if there become too many precedents outside it, etc). After 25 years of modern surrogacy, we have the benefit of hindsight and experience on which to base a future legislative path as regards surrogacy. General problems (actual or potential) that have been highlighted can and ought to be considered. Specific problems that have formed the basis of individual cases ought also to inform legislation. As will be seen in the following chapter, the majority of specific cases concern one problem: who is (or should be) the legal parent of the surrogate-born child? If surrogacy is accepted as a mechanism for overcoming involuntary childlessness, a balance needs to be struck to protect those who become involved with it from potential harms, such as exploitation by commercial operators, while recognising that people are competent to enter their own autonomous arrangements and

facilitating the arrangements that they make. This can be dealt with by addressing the general problems, which, unfortunately, cannot necessarily be done through legislation alone, but might also require re-education about the way people perceive families, infertility, and alternative methods of reproduction. Once this is in place, more specific problems can begin to be addressed, such as the parenthood issue.

This chapter and the last have argued that surrogacy as a general practice (notwithstanding isolated cases) does not raise the number of problems that it has been presumed to at various times since it's emergence into the public consciousness. Because this is the case, consideration ought now to turn to legislating against particular problems that *have* been seen to arise, while also addressing what may previously have been peripheral concerns, such as how to assign parenthood. Despite problems that were foreseen or continue to be seen with the practice of surrogacy, it seems there is no single, strong, coherent argument in support of not allowing the practice to continue. This being the case, it can therefore be argued that *because* of isolated incidences where problems with particular surrogacy arrangements have arisen, there is a need to properly (re)regulate the practice, so as to minimise the risk of such incidences occurring in the future. Certain issues, such as the operation of commercial agencies, can be legislated against or regulated, as has been shown by existing legislation. Other problems that may be identified could perhaps be controlled or guarded against through a carefully planned licensing system, for example. The following

chapter will explore cases in which distinct and particular issues have arisen within surrogacy arrangements and consider how these too could be dealt with by new legislation. Further, mechanisms that could be used to achieve a more general aim of bringing the law relating to the practice of surrogacy as a whole into line with the current social position will be considered. If this can be achieved, then there will be room for other, more peripheral, aspects of surrogacy, such as the assignment of parenthood, to be (re)considered in greater depth.

Chapter Four

Presumptions, Problems and Potential:

Judicial and Regulatory Responses to Surrogacy

Introduction

Previous chapters have shown that the majority of negatively projected visions of surrogacy have either not materialised, or can be argued against. It may be, therefore, that we can assume that large-scale ethical problems in surrogacy that were foreseen but have not arisen should not lead us to prohibit or further restrict the use of surrogacy. However, some of the issues raised may indicate to us areas of surrogacy that we should pay particular attention to when framing future law. Against a background discussion of current surrogacy legislation in the UK, this chapter will address further problems with surrogacy, particularly those that are more distinct in nature, arising, for example, from individual cases where there has been a dispute following a surrogacy arrangement. It will also examine judicial and regulatory responses to a number of the problems that have arisen with surrogacy and, in doing so, will necessarily rely on material discussed in the preceding chapters. Issues raised within individual cases might also require consideration when framing future legislation, as might areas of current legislation that might be found to be lacking.

The chapter will begin with a consideration of how some of the earliest surrogacy cases were received by the courts. These early cases help to illustrate that surrogacy as a modern reproductive concept was perceived in a negative fashion, in all likelihood leading to the wider-scale debate on the practice of which some was highlighted in chapter two. It is certainly the case that some of these cases led to the inclusion of surrogacy within the remit of the Warnock Inquiry, for example. The second part of this chapter will consider the effect of the recommendations of the Warnock Committee: the almost immediate passage of the Surrogacy Arrangements Act 1985, and the build-up to subsequent legislation. A critique of the 1985 Act will be undertaken, including discussion about the lack of attention paid in the legislation to the challenge to traditional concepts of parenthood that surrogacy presented. Discussion will then turn to the Human Fertilisation and Embryology Act 1990 and, in particular, the definitions and meanings it gave to motherhood and fatherhood and the introduction of the section 30 'parental order' mechanism by which intending parents could have parenthood transferred to them in certain (limited) situations. A critical analysis of this section will also be undertaken, enabling the conclusion to later be drawn that the means of acquiring parenthood following surrogacy arrangements remains inadequately dealt with by legislation.

The final section of this chapter will consider intention as an alternative method of (re)considering parenthood. It will begin by looking at how the concept of

intention has been used in some American surrogacy cases[1] and contrast this with how pre-conception intentions appear to have been ignored in two recent cases in the UK in which the concept may have been particularly useful.[2] Both sets of cases serve to illustrate the potential to use this concept in determining legal parenthood following the use of assisted conception generally and particularly in the case of surrogacy.

1) Presumptions: the early cases

Before the Surrogacy Arrangements Act was passed in 1985, there was no law specifically pertaining to surrogacy that would make the practice unlawful. However, this may be because surrogacy arrangements were a phenomenon that only caught the attention of the public and the Government towards the end of the 1970s and at the beginning of the 1980s. When this did occur, there were indications that the practice may have been regarded by the courts as unlawful.[3] It appears that, in any event, it would have been extremely unlikely that any contract or agreement that was made between parties commissioning a surrogate and the surrogate herself would have been legally enforceable by either of the parties in the event of a dispute. In general terms this is because of the many public policy considerations that this would have been seen to involve:

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[1] *Johnson* v *Calvert* 286 Cal Rptr 369 (Cal Ct App 1991); *In re the Marriage of Buzzanca* (1998) 61 Cal App 4th 1410 (Cal CA).
[2] *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCH 259 (QB); *Re R (A Child)* [2003] EWCA Civ 182.
[3] *Committee of Inquiry into Human Fertilisation and Embryology, Report* Cmnd 9314 (1984) (London: HMSO) (The Warnock Report), para 8.19: '[w]hile we consider that most, if not all,

it was thought that 'a contract by a parent to transfer parental rights and liabilities to another person will always be unenforceable on the grounds that it is against public policy'.[4] That a parent cannot give up their legal obligations towards a child in this way is a fact that is firmly founded in English law,[5] and it has long been the case that matters brought before a family court that relate to the care or custody of a child will be decided in the 'best interests' or in terms of the welfare of the child(ren) involved.[6] Therefore, any surrogacy arrangement that culminated in a dispute over who was going to raise the child would have been decided on this basis even before surrogacy was specifically regulated in 1985.

Critics of surrogacy (and indeed of most types of assisted reproduction) 'often cite the possibility of a negative impact upon children's welfare as though this itself provides reason to restrict or prohibit [it]'.[7] The use of 'welfare of the child' and 'best interests' principles could and has meant that any arrangement made between commissioning parents and a surrogate could be disregarded if the court did not see that it was in the best interests of the child for that agreement to be fulfilled. Therefore, any 'contract' pertaining to surrogacy would not be

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surrogacy arrangements would be legally unenforceable in any of their terms, we feel that the position should be put beyond any possible doubt in law'; *A* v *C* (1978) 8 Fam Law 170.

[4] Lorraine M. Harding, 'The Debate on Surrogate Motherhood' (1987) *Journal of Social Welfare Law* 37-63, 46.

[5] Children Act 1975, section 85(2); 'A person cannot surrender or transfer to another person any parental right or duty he has as respects a child'. The provision establishes exclusive parental rights and duties in the mother of an illegitimate child and prohibits the surrender or transfer of parental rights and duties to another person.

[6] Children Act 1989, section 1(1). For a critique of the assumption that principles from family law, in particular the welfare of the child principle, should inform legal involvement in assisted reproduction, see Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *Modern Law Review* (2) 176.

[7] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) 173-174.

enforceable if it were not found to be in the child's best interests and a surrogacy arrangement was unlikely ever to be found to be in the child's best interests if it was held to be against public policy. This premise was illustrated by the first UK surrogacy case that was decided by the court. *A* v *C*[8] reached the courts when the surrogate refused to keep to her part of a surrogacy agreement made with an unmarried couple and hand over the child once it was born. She had agreed with the commissioning father, A, to act as a surrogate for him in order that he would be able to have his own biological child. In return for this, she was to be paid £500. During the pregnancy the surrogate, C, changed her mind about the agreement, saying that she wished to keep the child and forgo the money that she would be due. When the child was born, the commissioning father initiated wardship proceedings maintaining that he should be given full custody of the child.

At first instance, the High Court awarded the custody and care of the child to the surrogate. Comyn J said that the agreement had been 'pernicious' and was contrary to established notions of public policy.[9] In addition (and purely academic because of the policy arguments against the surrogacy arrangement), because it was believed that the baby would have bonded with its mother while in her womb, it was thought to be in the child's 'best interests' for it to stay with her. However, unusually in this case, the commissioning father was awarded limited access to see the child purely because he was the genetic or biological father.

[8] *A* v *C* (1978) 8 Fam Law 170; [1985] FLR 445.
[9] *A* v *C* [1985] FLR 445, 449.

The court also said that the child was to remain a ward of court until it reached the age of majority or a further court order was granted.

The Court of Appeal removed the right of access of the commissioning father and condemned the whole arrangement as being 'sad and miserable' and 'bizarre and unnatural'.[10] The appeal judges considered that for the child to remain in contact with the commissioning father would do more harm than good to the child in the long term. They also decided that the contract between the commissioning couple and the surrogate, which stated that she was to be paid to be artificially inseminated with the sperm of the commissioning father, carry the resulting child, give birth to it, and then surrender all rights over that child to the commissioning couple, was void. The opinions of the judges were clear: Ormrod LJ described the surrogacy arrangement as a 'sordid little bargain'[11] whilst Cumming-Bruce LJ called it 'a kind of baby-farming operation of a wholly distasteful and lamentable kind' and a 'guilty bargain which should never have been made'.[12] In agreement, Stamp LJ referred to the case as 'an ugly little drama'.[13] The court also decided that any agreement that was made for a mother to surrender her child (thus assuming and reinforcing the belief that the surrogate is always the mother – she was genetically so in this case, but would not be in all surrogacy situations) would not be enforced if that mother later changed her mind and chose to keep the child.

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[10] Per Ormrod J, 455.
[11] *ibid* 457.
[12] At 459.
[13] At 461.

It is interesting to note that in this case, although the decision was said to be made on the 'best interests' of the child principle, the fact that the mother had been a prostitute had no bearing on the decision of the court as to these 'best interests' or the welfare of the child.[14] This can be directly contrasted with court decisions in other areas, for example, the denial of access to fertility treatment to a former prostitute on the welfare of the child basis.[15] Public policy was playing a far larger part in the decision in *A* v *C*, and the 'best interests' principle was used because the court was not prepared to make either party give up or accept the child in the event of a contractual dispute:

> '[m]aking a child the subject of a binding agreement of this type treats it as though it were a form of property, and is not in keeping with the current emphasis in family law'.[16]

The acerbic comments made by the judges in both of the courts can probably be seen to be representative of a more general antipathy towards the use of surrogacy. In a sense, this can be justified: this was the first surrogacy case to come before the courts at a time when the majority of new reproductive techniques were all relatively uncharted legal areas.[17] However, it is also

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[14] Chapter 2, above, text surrounding n 22 and 23.
[15] *R* v *Ethical Committee of St Mary's Hospital (Manchester), ex p Harriott* [1988] 1 FLR 512.
[16] Lorraine Harding, n 4 above, 46.
[17] Artificial insemination had been both morally and legally challenged. It was claimed in the courts in both Britain and the US that the practice of AID can be likened to adultery (See *MacLennan* v *MacLennan* 1958 S.C. 105. A discussion of the American courts' uncertainty about whether AID constituted adultery can be found in Ken Daniels and Karyn Taylor, 'Secrecy and Ownership in Donor Insemination' (1993) 12 *Politics and the Life Sciences* (2) 155-170, 156). Additionally, the Archbishop of Canterbury set up a Commission of Inquiry into the practice of AID

interesting to note the introduction of the concept of genetic relatedness to the court's deliberations. By initially awarding the genetic father access to the child, the court, it could be argued, was concerned that genetic ties should not be broken, although those rights were later removed. Presumably the first court, but not the appeal court, assumed that genetic relatedness was directly linked to the welfare of the child.

In the years immediately following *A* v *C*, there was little action in the courts over surrogacy disputes. In the early part of 1985, however, there was much public and political outcry caused by media reports that American commercial surrogacy agencies were operating in the United Kingdom, and that British women were being paid by these agencies to have babies for wealthy American couples.[18] It was reported that

> 'commercialisation of this practice (surrogacy) has already occurred in the United States and, in our view, this is a very dubious development. Agencies, usually lawyer's firms – have been established which specialise in finding surrogate mothers for prospective parents. Fees of the order of US $25,000 have been

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in 1945, and, following its report (Archbishop of Canterbury's Commission, *Artificial Human Insemination: the Report of a Commission Appointed by His Grace the Archbishop of Canterbury* (1948)), sought to make AID a criminal offence in 1948. A 1960 report by the Feversham Committee thought that allowing donor insemination might 'lead to indifference towards the marriage vows, and thus weaken the institution of marriage' (*Report of the Departmental Committee on Human Artificial Insemination* (1960), Cmnd 1105 (London, HMSO)). Also see Emily Jackson, n 7 above, 165.

[18] One of the reasons why the Warnock Report (n 3 above) was commissioned. See also Chapter 3 above, 125.

quoted; some of it goes to the surrogate mother and the rest to the agency'.[19]

One such commercial agency was involved in the case of 'Baby Cotton'. As may be imagined, media reports in this country did not favour the practice of surrogacy, especially after the 'Baby Cotton' case came to light.[20]

In the 'Baby Cotton' case, an American couple, in which the wife had a genital defect rendering her unable to have children herself, had used an American commercial agency, the National Centre for Surrogate Parenting (NCSP), to arrange a surrogacy for them in England. As a part of this arrangement, the commissioning father came to the UK to provide semen, with which Kim Cotton, a British woman, was artificially inseminated, although the two genetic parents never met. Kim Cotton agreed to hand over the child at birth to a representative of the NCSP. The commissioning couple would pay £13,000 to the agency, of which Kim Cotton was to receive £6,500. On 4 January, 1985, soon after the child was born, and amid much media attention aimed at discovering the identity of the parties, she left the hospital, without taking the baby with her. The commissioning father was then informed that he could collect the baby from the hospital. However, the local authority had been notified of the arrangement or, more specifically, it had been notified that a woman was giving away a child that

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[19] Council for Science and Society (Report of a Working Party), *Human Procreation: Ethical Aspects of the New Techniques* (Oxford: Oxford University Press, 1984) 50.
[20] First reported in *The Times*, 7 January 1985, later formally reported as *Re C (a minor)* [1985] FLR 846.

she had carried and given birth to. It applied for, and received, a place of safety order for the child, which was therefore taken into local authority care while the authorities decided what they should do about the situation.[21]

Following legal advice, the commissioning father initiated wardship proceedings asking that care and control of the child be his responsibility, and the child was subsequently made a ward of court.[22] The case was heard by Latey J who made it clear that the best interests of the child concerned had to be at the heart of wardship decisions, but that the court would not have to consider the ethical and social implications of the arrangement that had been made, including its commercial nature, because the decision had to be based on what was best for the child for the future. The court confirmed that the commissioning father was the natural father of the child, that he and his wife were still willing to take responsibility for her and that the natural mother, Kim Cotton, did not want to keep her. The commissioning couple were professional people who would be able to support a child economically, and the court also found that they were 'excellently equipped to meet the baby's emotional needs'.[23] Latey J said that he had found that they were 'warm, caring, sensible people, as well as highly

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[21] It has interestingly been noted that most lawyers 'regarded this step as inappropriate or incompetent, because the ['place of safety orders'] were designed to deal with children who are neglected by their parents or are likely to be ill-treated by them ... It was not intended to deal with children born to surrogate mothers' (Douglas Cusine, *New Reproductive Techniques: A Legal Perspective* (Aldershot: Gower, 1988) 197). Also relevant to this is the notion of who is the parent. The child was not being neglected by those that were to *act* as, and actually be its parents. Further, Peter de Cruz points out (*Comparative Healthcare Law* (London: Cavendish, 2001) 175) that '[i]t might be noticed that the child was, in fact, already in a hospital, which qualifies as a 'place of safety''.

[22] *Re C (a minor) (wardship: surrogacy)* [1985] 14 Fam Law 241.

[23] *Re C (a minor)* [1985] FLR 846, 848.

intelligent. When the time comes to answer the child's questions, they will be able to do so with professional advice if they feel they need it'.[24] The court decided that it was in the child's best interests to be committed to their care and control, and accordingly also authorised the father to remove the baby from the jurisdiction, providing that he agreed to bring her back if the court said he must do so. The wardship was continued until any further order was made. Although an order that there would be no disclosure of the identities of the parties involved was also made, much media and political attention continued to be directed at the case, not only because of the fact that Kim Cotton had been seen to be abandoning a child *per se*, but also because it was known that she had received a substantial sum of money to do so. The public and media reaction to her case probably also had much to do with the fact that the agency involved was American and was actively recruiting British surrogates to provide children for wealthy American parents.

The 'Baby Cotton' case was, like *A* v *C*, decided on what the court and the authorities thought would be in the best interests of the future welfare of the baby, in both the short and the long term. The baby had already been born and therefore the arrangement and method of its conception and gestation was held to be largely irrelevant. Although the 'methods used to create the child, and the commercial aspects of the case raised delicate problems of ethics, morality and social desirability',[25] what actually mattered when it became time for a decision to

[24] *per* Latey J, 848.
[25] Margaret Brazier, *Medicine, Patients and the Law* (London: Penguin Books, 2nd ed, 1992) 284.

be made was the practical welfare of the child concerned. As Latey J asserted; 'the baby is here. All that matters is what is best for her now that she is here, and not how she arrived'.[26] He decided that the commissioning couple were in the best position to care for the child. They obviously wanted the child very much, and had been prepared to undergo a long and emotional process, with no guarantee of success, in order to have her. There was no dispute from the surrogate; Kim Cotton was happy about the arrangement and did not want to keep the child.

An important, and perhaps the most interesting part of the case, was that Latey J rejected any claim that the commissioning parents were automatically unsuitable *because* they had entered into a commercial arrangement in order to get a child. It is also interesting to note that if the court had decided the other way, that it was in the best interests of the baby to stay with its birth mother, the commissioning couple would not have got the child, despite the court ruling that they were economically, emotionally and socially in the best position to care for and raise the child. However, this situation would be unlikely in the event that there is no dispute from the birth mother, in which case it is interesting to note that the bonding assumption would not be raised. Seemingly, this goes against arguments that have been raised elsewhere stating that because of the perceived bond between a woman and a child she gives birth to, the best interests of the child would be more likely to be served by staying with the

[26] *per* Latey J, 848.

gestational mother.[27] Or, more specifically, it suggests that the bonding argument can be displaced in an appropriate case by the wishes of the birth mother. Legally, the mother of the child in the Baby Cotton case would have been Kim Cotton. The commissioning couple at this time would not have been recognised socially or legally as the parents of a surrogate born child unless and until the court decided that they could keep the child, and they subsequently adopted. Today, section 30 of the HFE Act, in addition to adoption provisions, provides the 'parental order' mechanism by which commissioning couples can achieve the status of parenthood, but this would not have been applicable to 'Baby Cotton's' intended parents.[28]

2) Post-Warnock regulation of reproduction

Following the report of the Warnock Committee,[29] and the adverse publicity of the 'Baby Cotton' case and others, almost immediate action was taken in Parliament on the single issue of surrogacy. Other issues that had been examined by the Committee, including IVF, gamete donation and embryo research were not dealt with by the government until a later date. Interestingly then, the Surrogacy Arrangements Act 1985 was the first legislation to come from the Warnock report, although Parliament promised to cover the many other

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[27] For example, *A* v *C*, above.
[28] They would not have satisfied all the criteria asked of them by section 30: they were American and not 'domiciled in a part of the United Kingdom' (s 30(3)(b)) and may also have fallen foul of the requirement that 'no money or other benefit' should be given by them in consideration of the arrangement made (s 30(7)). Parental orders are discussed in further detail at page 170 below.
[29] The Warnock Report, n 3 above.

issues raised by the report in future legislation. The Warnock Committee Report was published in July 1984, and parliamentary discussions on human fertilisation and embryology began in earnest – debates that would not end until legislation was passed in 1990. Following the Warnock Report, a Voluntary Licensing Authority (VLA, later the Interim Licensing Authority, or ILA) was established by the Medical Research Council and the Royal College of Obstetricians and Gynaecologists to monitor developments in assisted reproduction. The VLA would consider research applications and could grant licenses for research and clinical practice. Although it was not a statutory body and in effect had no legal power, the VLA illustrated the potential for the operation of a regulatory body in the field of assisted reproduction.

The first attempt to legislate more generally for reproductive technologies and embryology came in 1985, when Enoch Powell's Unborn Children (Protection) Bill was put before Parliament. If passed, the Bill would have prohibited any further research into assisted reproduction technologies as it proposed that the manipulation of any embryo would be an offence except when that embryo was used in actual infertility treatments. The Bill had a great deal of support, and progressed easily to its third reading so the supporters of embryo research had to launch a counter-attack. In November, PROGRESS, a group of scientists, clinicians, politicians and others who supported embryo research and assisted reproduction, was officially launched at the House of Commons. The group was established as a direct response to Powell's bill, and sought to campaign against

it through increased public understanding and awareness of embryo research. Yet still there were many heated debates before Powell's bill was defeated; indeed, because the Bill still had a great deal of support, its opponents resorted to filibustering in order to talk the Bill out of time. Meanwhile, the VLA issued embryology guidelines in accordance with the recommendations made in the Warnock Report, setting a 14-day limit on embryo research and requiring signed consent from the 'parents' to do so. In 1986, Ken Hargreaves MP introduced another version of the Unborn Children (Protection) Bill, arguing that there was still great support in Parliament for the prohibition of embryo research. The Bill had little chance of being enacted but served to keep the debate in the public eye. Outside Parliament, the pro-research lobby was continuing to expand and both sides continued to put pressure on the Government for realistic legislation. In November 1987, the Government at last responded to the Warnock recommendations and published a White Paper on Human Fertilisation and Embryology, which outlined a framework for such legislation.[30]

It seems peculiar that surrogacy was legally regulated before any other infertility treatments in the United Kingdom, especially as one might draw close parallels between the practice of partial surrogacy and the equally elementary process of artificial insemination. As with surrogacy, informal methods of artificial insemination (AI) are likely to have been in use for some time. The distinction

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[30] *Human Fertilisation and Embryology: a Framework for Legislation* Cm 259 (1987) (London: HMSO). A full account of the development of the debate around reproductive technologies and embryo research can be found in Jack Challoner, *The Baby Makers: The History of Artificial Conception* (London: Channel 4 Books, 1999) chapter 6.

between the two practices, however, and probably one of the reasons why the legislators reacted to surrogacy as fast as they did, is that surrogacy necessarily means the introduction of a third party into the childbearing relationship. In addition, the commercial element of surrogacy had been exposed.[31] AID can also be said to introduce a third-party, but it does not involve the same proximity within the third-party relationship and so may be distinguished from surrogacy. Although medicalised AI became popular in the 1970s, it had already been the subject of two formal committee investigations, and litigation.[32] Within the Warnock Report AID underwent a further critical examination, yet legislation of the practice was not as swift as it was for surrogacy. Even the development of IVF and subsequent additional reproductive technologies and research areas in which there was a need for regulation had not prompted the Government to act.

a) The Surrogacy Arrangements Act 1985

The immediate legislative result of the Warnock Committee Report and the immense volume of media attention heaped on the Baby Cotton case was the Surrogacy Arrangements Act 1985. This was stated to be

[31] Though it is interesting to note that Mary Warnock now says that the majority view 'was over-influenced by the fact that, at the time, there were numerous stories in circulation about highly profitable commercial surrogacy agencies in the United States, and off-shoots of such agencies appeared poised to establish themselves in the UK, advertising for surrogates and sending out their particulars to would-be users, often in glaringly sexist terms, with fees to be paid through the agency' (*Making Babies: Is There a Right to Have Children?* (Oxford: Oxford University Press, 2002) 89).

[32] See n 17 above.

'[a]n Act to regulate certain activities in connection with arrangements made with a view to women carrying children as surrogate mothers'.[33]

Much discussion and debate on surrogacy was undertaken in Parliament, most of this being unfavourable to the practice. As had been the case with the Warnock Committee, commercial surrogacy was certainly frowned upon. Peter Bruinvels MP summed up this disfavour during one parliamentary debate, saying that 'a financial transaction, to secure the lease of a woman's womb, is repugnant'.[34] In March 1985, the Secretary of State for Health and Social Services issued a statement on behalf of the Government, saying that it was believed that commercial surrogacy was in principle undesirable, and that any commercial agencies practising surrogacy should be banned.[35] The Surrogacy Arrangements Act 1985 banned any profit making by agencies or other intermediaries involved in the negotiation for or establishment of a surrogacy arrangement.[36] Under section 2(2) of the Act, to do so became a criminal

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[33] Surrogacy Arrangements Act 1985, section 1.
[34] HC Deb vol 77 col 50 1984/5.
[35] Lorraine Harding, n 4 above, 51.
[36] Surrogacy Arrangements Act 1985, section 2(1): 'No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—
(a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,
(b) offer or agree to negotiate the making of a surrogacy arrangement, or
(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements ...
... (3) For the purposes of this section, a person does an act on a commercial basis (subject to subsection (4) below) if—
(a) any payment is at any time received by himself or another in respect of it, or
(b) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement
In this section "payment" does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother'.

offence. Even medical practitioners would be guilty of an offence if they were paid for any consultation or medical guidance they gave to a surrogate or a commissioning couple. The Act did not, however, prohibit all medical or other assistance in a surrogacy, as long as no direct profit was made by the participants. This was against the recommendation of the Warnock Committee, which had proposed that any third party intervention, including medical help or treatment, should be made a criminal offence, whether undertaken for payment or not. The Act confirmed that the commissioning couple and the woman acting as the surrogate would not be committing an offence, even if money passed between them, before or during the pregnancy.[37] This indeed was a matter of policy; it was felt that it would be against public policy to criminalise surrogates or commissioning couples, thereby criminalising people for attempting to become parents or helping others to do so, and also contrary to policy (and the child's best interests) to bring a child into a criminal home.

The Surrogacy Arrangements Act also made it an offence, under section 3, to advertise for the services of a surrogate or as a surrogate: 'any advertisement containing an indication (however expressed) ...' would constitute an offence. Here there is no exemption for the commissioning parents or potential surrogates. It also became illegal to advertise as an agent who would participate in the arrangement of a surrogacy, or to compile information to promote or assist in a surrogacy arrangement. Therefore, even though non-profit making arrangements were not subject to criminal sanctions under the Act, even if the

[37] Surrogacy Arrangements Act, section 2(2) (a) and (b).

surrogate received a fee for her services, it became extremely difficult for arrangements of this type to be made. By making all advertisements for or as a surrogate, or as a non-profit making agency illegal, there was little scope to make such an arrangement other than privately. People who committed an offence under the Act were liable for a fine of up to level 5 on the standard scale and/or up to three months in prison.[38]

There has been much academic criticism of the Surrogacy Arrangements Act.[39] It was a hasty measure, made in the wake of media and popular indignation that followed the 'Baby Cotton' case, and it did not even attempt to cover all the aspects and issues that relate to such a delicate and sensitive matter as surrogacy. It did not attempt to change the fact that the commissioning couple could not be recognised as parents until after they had adopted a child, therefore it certainly did nothing for the rights of commissioning couples; or for the more general rights of the infertile when choosing to enable themselves to have a child. The question as to whether contracts for surrogacy could be enforceable in the event of a dispute between surrogate and commissioning couple, even in a private arrangement, was also certainly neglected, overlooked or avoided. The Act therefore had limited effect in that it was designed in the majority to prevent the operation of profit making agencies that acted as intermediaries between prospective commissioning parents and potential or actual surrogates. It was not

[38] Surrogacy Arrangements Act, section 4(1) (a) and (b).
[39] See especially Simon Lee, 'Re-Reading Warnock' in P. Byrne (ed.), *Rights and Wrongs in Medicine* (London: King Edward's Hospital Fund for London/OUP, 1986) and Michael Freeman, 'After Warnock – Whither the Law?' (1986) 39 *Current Legal Problems* 33-55.

designed to prevent the operation of surrogacy in its entirety, or to prevent payments to surrogates. It did not consider the potential problems for parenthood that surrogacy can present, nor did it provide any mechanism by which the commissioning parents could acquire legal status as parents. The passage of the Act was summed up by Simon Lee;

> '[f]or all the high principles expended by discussing surrogate motherhood, in reality what has counted in parliament has been media pressure and the practical difficulties of drawing any fine lines between permissible and non-permissible forms of surrogate motherhood. Hence, the law's response has been swift and certain: commercial agencies for surrogate motherhood have been outlawed and in due course a fuller range of legal responses will follow'.[40]

Later in 1985, the Surrogacy Arrangements (Amendment) Bill, a private member's measure, was introduced to the House of Lords. This contained proposals that would make all surrogacy arrangements illegal, whether commercial or not. All private agreements would be included. The intention was to include those surrogacy arrangements in which the surrogate was paid, even if only for the expenses she incurred as a result of her pregnancy. It was also proposed that anyone who took part in arranging a surrogate pregnancy would

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[40] Simon Lee, *Law and Morals: Warnock, Gillick and Beyond* (Oxford: Oxford University Press, 1986) 39.

be criminally liable, therefore, even the surrogates and commissioning couples would be subject to criminal penalties. Because not all surrogacy is commercial, and because it may be an option of last resort for some people, making surrogacy of all types illegal would seem to be a very extreme and reactionary step. This is probably why the Bill got no further than its reading in committee in 1986, especially bearing in mind the public policy implications behind the non-criminalisation of surrogates and commissioning couples in the original Act.

It is thought however, that the passage of the new Bill 'was terminated following Government indications that surrogacy would be considered in future legislation dealing substantively with the recommendations of the Warnock Committee',[41] which means that such extreme measures could perhaps have been passed at a later date (although by this time, the public shock may have eased). The balance of the Surrogacy Arrangements (Amendment) Bill was clearly tipped against those couples for whom surrogacy would be the only way to have a child. It is arguable, both in the context of the mid-1980s and with the benefit of such hindsight as we now have, that the measures it proposed were far too extreme. It is also possible that such draconian measures would push the practice of surrogacy underground, creating a 'black market' surrogacy service, in which both women acting as surrogates and commissioning couples would have little protection against exploitation. It seems, therefore that although some regulation of surrogacy may be necessary, especially in order to prohibit any people from

[41] Eric Blyth, 'Section 30 – The Acceptable Face of Surrogacy?' (1993) *Journal of Social Welfare and Family Law* 248-259, 253.

making a substantial profit out of the exploitation of the misfortune of others, that to ban the practice of surrogacy in its totality would do more harm than good.[42] It is arguable, therefore, that the law, having decided to avoid the extremes of either the total prohibition or the active enforcement of tightly controlled surrogacy arrangements, should try to strike a balance, or make it absolutely clear whether it encourages or discourages the practice of surrogacy, and to what extent. This would have to be done in terms of policy, which 'involves balancing society's perceived needs against the interests of the parties in making their own bargain, a process which requires both identifying those needs and evaluating their import'.[43] If the law is to allow the operation of surrogacy, even if this is not encouraged, then it ought to be as facilitative as is possible to allow those who use the process to create their families with as little hindrance as is possible. Part of this formulation, therefore, would need to consider how the commissioning parents acquire legal parenthood.

It has been noted that precisely because there was so much obvious initial 'panic, public outrage and the vilifying press campaign'[44] over the problem of surrogacy, far more careful attention ought to have been paid to clarifying some

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[42] Jamie Levitt ('Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, 472) recognises that if surrogacy was not regulated, or was banned by legislation, it would 'go underground'. Further, Michael Freeman ('Does Surrogacy Have a Future After Brazier? (1999) 7 (1) *Medical Law Review* 1-20, 8) believes that banning payments for surrogacy would 'drive potential surrogates away from regulated surrogacy and into an invisible and socially controlled world where the regulators will be more like pimps'.

[43] Martha Field, *Surrogate Motherhood: The Legal and Human Issues* (Cambridge, Massachusetts: Harvard University Press, 1990) 16.

[44] Kenneth Norrie, 'United Kingdom: Legal Regulation of Human Reproduction' in Sheila McLean (ed.) *Law Reform and Human Reproduction* (Aldershot: Dartmouth, 1992) 212.

of the finer points and issues of the debate before any legislation was passed. Mary Warnock recounts that the majority of the Warnock Committee thought that to regulate surrogacy by agency, as was proposed by the dissenting minority, was to 'condone' surrogacy, 'a practice they regarded as intrinsically wrong, and likely to lead to trouble, if not to disaster, for all the parties involved, including the child'.[45] Following the Warnock Report and the attitude of the media, it was felt that what was needed in particular was immediate action on the matter of commercial agencies. This seems to be the reason why the Government acted 'not so much as to solve the legal problems as to salve the public conscience'.[46] The problem with this sort of political reaction is that although what may be thought of as immediate and more pressing issues are addressed, others are ignored totally, or not considered in enough detail. Worse still, 'the impression is given that all the problems are indeed solved'.[47] Shelley Roberts argues that the

> 'recommendations proposed in the [Warnock] report and adopted in the Government's Bill introduced in 1985 attack only that which is superficially distasteful about surrogacy. The effect of the provisions [of the Act] would be to reduce the volume of surrogacy transactions but sweep the remainder out of sight, where the real problem would be beyond society's ability to respond or to

[45] Mary Warnock, n 31 above, 88-89. See also Chapter 3 above, note 17.
[46] Kenneth Norrie, n 44 above, 212.
[47] Kenneth Norrie, *ibid*. By way of example, he lists a number of issues that were not addressed: 'the right of the father to access; the position of the child if both parties reject it on birth (for example, if it is handicapped); the control of the surrogate during the pregnancy; restitution of any money paid as a result of an unenforceable contract; and the legality and ethics of surrogacy 'for convenience''.

remedy'.[48]

The Surrogacy Arrangements Act, therefore, solved very little for the proponents of either side of the surrogacy argument. Although it stands in stark contrast to legislation in some other countries, which may prohibit even non-profit making surrogacy agencies, any payment of a surrogate (even if only for expenses she incurs during pregnancy), or the actual practice of surrogacy itself, it failed to consider some important issues, or even alternatives to formally prohibitive forms of legislation: the question asked was not whether there should be some prohibition, but to what *extent* surrogacy should be prohibited at that time.[49] People who needed or wished to use surrogacy, or choose to become surrogates themselves, were left little indication of what they can or cannot legally do, and what their legal status would be if they do so.

b) The Human Fertilisation and Embryology Act 1990

In the 1987 White Paper[50] that preceded the Human Fertilisation and Embryology (HFE) Act 1990, it was agreed that it was conceivable that 'non-commercial

[48] Shelley Roberts, 'Warnock and Surrogate Motherhood: Sentiment or Argument?' in P. Byrne (ed.), *Rights and Wrongs in Medicine* (London: King Edward's Hospital Fund for London/OUP, 1986) 103.

[49] It is interesting to note, however, that in the time between the passage of the 1985 Act and the present day, Mary Warnock herself has changed her views on surrogacy (see note 31, above) and has 'come to think that probably [the] minority was right' (n 31 above, 88). This adds strength to the argument put forward in the previous chapter that the large-scale problems that it was believed surrogacy would bring have never materialised and, as this is so, surrogacy should be facilitated as a legitimate means of family formation. Having surrogacy controlled by an agency, as suggested by the Warnock minority, is a sensible option, as it allows for both regulation of arrangements and protection of the parties involved.

surrogacy services could be brought within the framework of the law in the future'.[51] Despite this, and the shortcomings of the 1985 Act, immediate action on the matter of surrogacy was to be limited. The direct action that was proposed by the White Paper, was to 'withhold encouragement to private or non-commercial surrogacy (such as would be afforded by legislation)',[52] and to formally establish that all surrogacy arrangements or contracts would be unenforceable in British courts by either of the parties.

The HFE Act was eventually enacted and became law in 1990. Although the Act deals mainly with issues surrounding specific medicalised infertility treatments and issues in embryology, it also provided for the establishment of a statutory body to monitor and control the provision of infertility treatments. Section 5 of the HFE Act established the Human Fertilisation and Embryology Authority (HFEA), which replaced the Interim Licensing Authority on 1 August 1991. Morgan and Lee say that the Act was passed because, following the Warnock Report and subsequent developments, a universal piece of legislation was required to 'regulate research on embryos, to protect the integrity of reproductive medicine and to protect scientists and clinicians from legal action and sanction'.[53] In relation to surrogacy, the 1990 Act also consolidated some and amended other of the provisions that had been detailed in the Surrogacy Arrangements Act

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[50] *Human Fertilisation and Embryology: a Framework for Legislation* Cm 259 (1987) (London: HMSO).
[51] Eric Blyth, n 41 above, 253.
[52] Eric Blyth, *ibid.*
[53] D. Morgan and R. Lee, *The Human Fertilisation and Embryology Act 1990*, (London: Blackstone Press, 1991).

1985. For example, section 36 of the HFE Act finally established that all contracts for surrogacy were unenforceable in law.[54]

Section 27(1) of the HFE Act encompasses surrogacy and other forms of assisted reproduction, and unequivocally provides that any woman, and 'no other woman', who has carried and given birth to a child 'as a result of the placing in her of an embryo or of sperm and eggs' will be the legally recognised mother of that child. Therefore, the wife of a commissioning couple would still have to adopt any child born for her by a surrogate, whether or not she was genetically related to it. The term 'womb-leasing', even though this is the most exact definition of what actually happens when a fertilised embryo containing the genetic material from both of the commissioning couple is placed into the uterus of a surrogate for the periods of implantation, gestation and birth, remains that – only a term. In semantic terms, womb-leasing does not infer that the surrogate is the mother; it implies that she is leasing, or lending a part of her body to benefit someone else. Section 27 means that neither the genetic mother (this may either be the commissioning mother, the surrogate, or a donor) or the social or intending mother (the woman who will raise and care for the child) are given any legal recognition, and they are to be governed by older laws that define the concept of motherhood. Therefore, it can be said that section 27 HFE Act confirms, but makes no change to the law in relation to the commissioning mother in a surrogacy relationship, despite the fact it would seem more appropriate in the light of the division of reproductive labour that surrogacy can involve, for the law

[54] By inserting section 1A into the Surrogacy Arrangements Act 1985.

to at least to have considered constructing motherhood on a basis other than pregnancy and birth.

Emily Jackson believes that 'protecting the surrogate's right to keep the child to whom she has given birth appears to be a non-negotiable part of the British regulatory scheme'[55] and suggests that the perceived benefit of this formulation is having an unambiguous definition of motherhood. Furthermore, she points out that an alternative way of defining motherhood, based on a genetic test, would give different results depending on whether partial or full surrogacy had been used, and might in some cases leave 'the woman least likely to want to raise the child' having legal recognition as its mother.[56] However, it can be argued that non-negotiable motherhood according to the formulation in the HFE Act does not remove ambiguity at all. Instead, because of the separation of the physical and social processes involved in having a child by surrogacy or another form of assisted reproductive technique, it can be argued that it *creates* or maintains ambiguity by failing to recognise and legally acknowledge the visible social family unit that is intended to be formed. Despite the fact that section 30 of the HFE Act allows a parental order to be granted which provides 'for a child to be treated in law as the child of the parties' to a surrogacy arrangement, this is subject to a number of conditions which do not make a parental order available to *some* parties who enter surrogacy agreements, which arguably is not consistent with the fact that others can be so treated in law.

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[55] Emily Jackson, n 7 above, 266.
[56] Emily Jackson, *ibid.*

It is acknowledged that a much wider scope remains in the question of paternity after the HFE Act. Depending on whether the commissioning father provided a gamete for artificial insemination into the surrogate; whether the surrogate became pregnant through natural sexual intercourse with him; or whether the surrogate was married, 'the child's legal father could be a woman's husband/partner, the sperm donor, or no-one'.[57] Before the HFE Act, the commissioning father in a surrogacy arrangement would be recognised as the father if the child was conceived by natural sexual intercourse, or if he (as the genetic father) and the surrogate received treatment together for the pregnancy. Since the Act, however, the Government has resolved to restrict this easily achieved definition of paternity by proposing that the commissioning father, even if he has a genetic link to the child, should not be allowed to establish his fatherhood in this way. This was clearly an attempt to restrict the establishment of paternity to the limited form that can be obtained through recourse to section 30 of the Act. Section 28 of the HFE Act gives the meaning of father (in an assisted reproduction or surrogacy situation) as the party to the marriage with the woman giving birth, unless 'it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs, or to her insemination'. If no man falls within this category, that is, if the surrogate is not married, then a man who was treated 'together' with the said woman (but not having provided his sperm) can be treated as the father of the child. The definitions of fatherhood given by the

[57] Eric Blyth, n 41 above, 254. See also Gillian Douglas, *Law, Fertility and Reproduction* (London: Sweet and Maxwell, 1991) 157.

HFE Act can therefore lead to a child being born legally fatherless,[58] which appears to be inconsistent with the intentions behind the legislation.

It should also be noted that not all forms of surrogacy will take place under a regulatory umbrella. The HFE Act only covers activities performed in a licensed clinic, and so any surrogacy arrangement that involved the use of IVF or the clinical use of AI would, therefore, be regulated. All full surrogacy arrangements fall under this umbrella, but not all partial surrogacy arrangements. Any do-it-yourself surrogacy arrangements, whether involving privately performed AI or conception by ordinary sexual intercourse, could take place on private premises and, will therefore not be regulated. This means that, providing the parties had willing friends, effectively anyone could use surrogacy. This would include those thought to be 'undesirable' parents (whether because of the unnaturalness of them being such in a biological sense, or because they would be likely to be considered unsuitable for treatment due to welfare of the child considerations) who would not receive treatment in a clinic. Emily Jackson highlights this point by saying '[t]he ease with which a woman can inseminate herself undoubtedly undermines effective legislative control, so, for example, the informal surrogacy arrangements entered into by gay or single men tend to be made in a regulatory vacuum'.[59]

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[58] This was the case in *Re Q (A minor) (Parental Order)* [1996] 1 FLR 369, discussed by Craig Lind in 'Fatherhood and the Unmarried Infertile Man' (1997) *New Law Journal* 196-198. See also *Re R (A Child)* [2003] EWCH 259.

[59] Emily Jackson, n 7 above, 262, citing Olga van den Akker, 'Organisational Selection and Assessment of Women entering a Surrogacy Agreement in the UK', (1999) 14 (1) *Human Reproduction*, 262.

Section 30

Section 30 of the HFE Act came into being as the result of a rushed amendment made to the original HFE Bill during its passage through Parliament. The amendment was introduced as the direct result of a High Court case in which the legal parenthood of twins born following a full surrogacy arrangement had to be determined at the request of a local authority.[60] Section 30 was introduced by Michael Jopling, a Cumbrian MP, after the intending parents in the case, the couple who had commissioned the surrogate and were the genetic parents, approached him essentially because they objected to having to adopt 'their own' IVF children. Section 30 can be said to have been 'designed to provide a means whereby morally acceptable surrogacy arrangements can be given legal recognition',[61] subject to certain restrictions. It effectively allows for a kind of adoption by, or a transfer of parenthood to, the commissioning parents of a child born to a surrogate. For example, if the couple are married, both resident in the UK, and if at least one of them is genetically related to the child, they can apply to a court for an order that allows them to be legally recognised as the parents of that child.[62] This, of course, is only possible if the surrogate, (the 'real' mother according to the Act) and her husband, if she has one, give their unconditional consent,[63] and if the commissioning couple have had care of the child for a

[60] *Re W (Minors)(Surrogacy)* [1991] 1 FLR 385.
[61] Kenneth Norrie, n 44 above, 212.
[62] Human Fertilisation and Embryology Act 1990, s 30(1).
[63] Human Fertilisation and Embryology Act 1990, s 30(5); 'The court must be satisfied that both the father of the child (including a person who is the father by virtue of section 28 of this Act), where he is not the husband, and the woman who carried the child have freely, and with full

certain period of time.[64] A parental order will also only be granted if it is applied for within the first six months of the child's life,[65] and if no money, other than that authorised by the court as being for 'reasonable expenses' has changed hands.[66]

Section 30, then, will only apply to surrogacy arrangements which can be broadly categorised as 'morally acceptable', as Kenneth Norrie identified.[67] Presumably this implied definition would only include married couples that have a 'legitimate' medical reason for seeking the services of a surrogate, and therefore are considered to be deserving of the status of parent, if the surrogate agrees to renounce her apparently 'non-negotiable' right to motherhood.[68] It also seems that the moral acceptability of those receiving assistance legislated for under the HFE Act is something that pervades its entirety. There are similarities in intention behind the moral reasoning for allowing parental orders to be granted under section 30 and that which is behind section 13 of the HFE Act, which, as Eric Blyth points out, was also a late addition to the original Bill.[69] Section 13(5) requires that licensed centres that provide assisted reproduction treatments must

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understanding of what is involved, agreed unconditionally to the making of the order.' Section 30(6) provides that this consent is ineffective if given within six weeks of the birth of the child.

[64] Human Fertilisation and Embryology Act 1990, s 30(3)(a): the period of time is unspecified, although at the time of the making of any parental order, 'the child's home must be with the husband and the wife' (the commissioning couple).

[65] Human Fertilisation and Embryology Act 1990, s 30(2).

[66] Human Fertilisation and Embryology Act 1990, s 30(7). In previous cases, payments to surrogates have been retrospectively authorised by the courts (see, for examples *Re an Adoption Application (Surrogacy)* [1987] 2 All ER 826; *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 759; *Re Q (A Minor) (Parental Order)* [1996] 1 FLR 369. A more recent example is *Re C* [2002] EWCH 157 (Fam); [2002] 1 FLR 909). What may constitute 'reasonable expenses' may change if the recommendations of the Brazier Report are acted upon (see Chapter 3, above, text surrounding n 37 and 38).

[67] Kenneth Norrie, n 44 above.

[68] Gillian Douglas (n 57 above, 159) suggests that the desire behind limiting parental orders to married couples 'was to restrict surrogacy to those deemed deserving, or suitable'.

take the welfare of any resulting child into account before any such treatment begins. Included in this welfare assessment is the 'need of that child for a father'. Blyth states that

> '[d]espite earlier government insistence that the interests of the child are 'paramount', the Bill originally laid before parliament made no reference to them, and what became Section 13 did so only following attempts to prevent single women's access to assisted conception services'.[70]

This does not seem unlikely, given the apparent desirability that only 'morally acceptable' people should be permitted to become parents through assisted reproduction. Allowing a single woman access to surrogacy would also mean that a child could or would be born without an intended father.[71] This would be a factor that would be taken into account as being potentially detrimental to the welfare of that child if full surrogacy using IVF was provided by a clinic. But it could be argued that if a single woman needs to use artificial methods of conception in order to have her child, she should be given the same opportunity as an infertile couple would be.[72] Single mothers can have children without technological assistance and their existence has come to be more accepted (or acceptable) in our society. A single woman having a child 'naturally' is not

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[69] Eric Blyth, n 41 above, 254.
[70] Eric Blyth, *ibid.*
[71] It should be noted, too, that section 13(5) was introduced after an amendment seeking to restrict fertility treatment services to married couples lost by one vote.

formally assessed for her suitability to become a parent on the grounds that the child will not have a father.[73] It is also interesting to consider that Diane Blood, a single woman wishing to use fertility treatment to have the child that she and her husband had planned before his death, eventually became a single mother.[74] Although the issue in that case was her husband's consent to treatment, or lack of it, the single mother issue and discussion of the child's perceived need to have a father, was not central to the Human Fertilisation and Embryology Authority's decision to decline her access to fertility services.

In addition to the need to consider whether a father would be present as part of the consideration of the welfare of the potential child is the requirement to 'consider the suitability' of the potential parents which is suggested by the Human Fertilisation and Embryology Authority (HFEA) Code of Practice. The Authority in itself does not regulate surrogacy *per se* but does 'maintain an interest in surrogacy arrangements'. This 'interest' apparently stems from the fact that the Authority

> 'had originally been concerned that some people might decide to use a surrogacy arrangement simply because the woman did not wish to carry the child because of, for example, a fear of damaging

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[72] Whether there are rights to have children is discussed below.
[73] See further Juliet Tizzard, 'Jumping through Hoops' (1998) 2 (1-2) *Progress in Reproduction* 3 and, generally, Emily Jackson, n 6 above.
[74] *R* v *Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 All ER 687 (CA). On the representation of Diane Blood as the epitome of a 'good mother', see Hazel Biggs, 'Madonna Minus Child. Or – Wanted: Dead or Alive! The Right to Have a Dead Partner's Child' 5 (2) *Feminist Legal Studies* 225-234.

her career or ruining her figure'.[75]

Surrogacy does, however, automatically come under the remit of the Authority when IVF and embryo transfer procedures are used, if the surrogate is artificially inseminated with the sperm of the commissioning father in a licensed clinic, or if donor eggs are used.[76] The HFEA Code of Practice contains the generally understandable requirement to check the medical histories of the parties (although this could be used to discriminate against prospective parents – again this is not a process that occurs when fertile people want to have children), and the far less acceptable requirement to review their social histories. Therefore, although regulated surrogacy arrangements are made possible under the HFE Act, as is the limited potential to become the registered and legally recognised parent of a child that is born this way, this process involves personal critique and examination which could be described, at best, as unjust. At its worst this policy may be blatantly discriminatory: fertile couples are not required to detail their social histories if they wish to become parents, and neither should they be. As Blyth illustrates;

'that [considerations of applications under Section 30 HFEA] are more stringent than those relevant to other forms of assisted

[75] C.O.T.S., *Comprehensive Guide to Surrogacy* (Unpublished, 2000) 14.
[76] The HFE Act 1990 regards the artificial insemination of a surrogate as pure donor insemination. Again this construction is influenced by the construction of the surrogate as the mother, but the sperm is, in effect, not donated to her. If it were considered that the commissioning parents were the real parents of the child then an alternative term might have to be found (although it may simply be the case that 'donating' is to be construed loosely in this part of the legislation, used

> conception (e.g. requirements concerning marital status and definition of the proceedings as 'family proceedings' falling within the remit of the Children Act 1989) at least introduces a suspicion that surrogacy has been exposed to the application of double standards. In combination with Section 13 and the Code of Practice, Section 30 demands an explicit conformity in lifestyle and family form for those who wish to achieve parenthood by surrogacy'.[77]

Apart from the fact that these requirements are together more stringent than for other assisted reproduction treatments, in general no fertile couples who wish to start a family are subject to these kind of socio-legal criteria.[78] Moral acceptability as a criteria for receiving assisted reproduction treatments, or, more specifically, for achieving the status of parent is not persuasive, as it cannot be said that everyone would have the same moral criteria, or that this applies when fertile people have children naturally or when the regulatory system is side-stepped by do-it-yourself arrangements. Section 30, it can be said, performs only a minimal function of selecting which intending parents are suitable, while leaving the wider questions regarding parenthood unanswered. That is, does the way the law

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merely to connote the use of someone's gametes other than those of the partner of the woman being inseminated).

[77] Eric Blyth, n 41 above, 254.

[78] There are, of course, exceptions to every rule. Notably, for example, fertile people of couples with learning difficulties might have their fertility controlled according to someone else's definition of their 'best interests' or the welfare of any of their potential children. It can perhaps be said that those people or couples that are subject to these requirements are not those that *should* be if we are to take the sort of requirements laid down in the HFE Act as a yardstick against which moral acceptability and parental suitability are to be judged.

determines parenthood following surrogacy arrangements reflect the best method by which this should be achieved? Alternatives have yet to be considered: in relation to surrogacy, section 30 is the only challenge to the traditional presumptions enshrined in the law. However, it may be argued that in forming section 30, although it is *in practice* an alternative to the presumptive position or to the need for adoption, it did not emerge *because* the idea that there might be alternative *bases* for parenthood arose. Left unconsidered is the fact that parenthood following surrogacy could start from different presumptions.

3) Alternative bases for determining parenthood

Cretney believes that 'the rules created by the Human Fertilisation and Embryology Act 1990 have to deal with almost impossibly complex circumstances', and says that 'they can no doubt be justified on the basis of a pragmatic assessment of what is expedient in the majority of cases'.[79] Yet pragmatism and expediency may not be good reason for denying those whose intention it is to be parents of a planned and wanted child from being recognised as such. In a technical, medical sense, achieving a family through assisted reproduction (or surrogacy) is relatively 'easy' to do, and Cretney's point on pragmatism and expediency can be challenged by stating that the circumstances that are created by the usage of artificial means of conception are not 'impossibly complex' at all. Indeed, there is no reason that they should be if it was believed that the law should reflect the social reality of parenthood. If we did not rely on

pre-existing (and arguably out-dated) legal presumptions in this area, and based the law regarding parenthood in assisted reproduction and surrogacy on different criteria, such as can be found in other areas of law – promise, intention, expectation and reliance, for example – the reality of the families created would be better reflected. Of course, to do so for surrogacy would necessarily mean acceptance of the premise that surrogacy should be allowed to operate as a modern reproductive practice and that it need not be actively discouraged.

Such legal concepts have already been utilised in deciding some surrogacy cases in the United States. One of the most notable is the case of *Johnson* v *Calvert*.[80] In this case, there were competing claims to parenthood by the two women involved in the surrogacy arrangement, both of whom had a statutory basis for legal motherhood. Although the commissioning mother in the surrogacy agreement was also the genetic mother (described as the 'natural' mother) of the child, this was not the deciding factor for the decision to override the claims of the birth mother (surrogate) who wished to keep the child: '[r]ather, it was that the commissioning parents had [also] had the *intention* to procreate a child whom they could bring up'.[81] This focus on the intention of the commissioning couple was the deciding factor in the 'tie-break' and allowed the commissioning parents to have legal rights to and responsibility for the child. According to Panelli J, if it was not 'for their acted-on intention, the child would not exist'. While this is

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[79] Stephen M. Cretney, *Family Law* (London: Sweet and Maxwell, 4th ed, 2000) 200.
[80] *Johnson v Calvert* 286 Cal Rptr 369 (Cal Ct App 1991). The case will be discussed further in the following chapter.
[81] Gillian Douglas, n 57 above, 637.

indubitably also true of the majority of surrogacy cases, it is not a concept that has gained substantial recognition in either a judicial or regulatory sense.

In the more recent case of *Buzzanca*,[82] a Californian appeal court held that the intended parents of a surrogate-born child, the result of the implantation of an anonymously donated embryo (thus having no genetic relationship to either the surrogate or to the commissioning couple), were the legal and natural parents of the child. Although *Buzzanca* was essentially a divorce and child-support case, the court of first instance had held that the child had no lawful parents, due to the lack of a genetic link between the child and either of its potential parents. On appeal from the intending mother, this decision was reversed for the reason that the intended parents initiated and consented to a medical procedure that resulted in the birth of a child, the court being keen to avoid labelling a child legally parentless. Recognising that intention was a basis for legal fatherhood in donor insemination, the court decided that, by extension, this should equally apply to those who initiated the implantation of a surrogate with a donated embryo. The decision meant that Mr. Buzzanca, who had filed for divorce before the child was born, *would* be considered to be the father of the child and accordingly would have to be financially responsible for it. The outcome in the case was obviously due to concern for the child's welfare. If, however, the initial analysis followed in *Johnson* was relied upon, the surrogate would be the only woman with a claim to legal motherhood, based on gestation. It appears, therefore, that intention may

[82] *In re the Marriage of Buzzanca* (1998) 61 Cal App 4th 1410 (Cal CA).

only be regarded as a potential 'trumping' factor in the absence of a dispute.[83] Nevertheless, the decision in *Buzzanca* reflects on the realistic potential of intention as a basis for determining legal parenthood in all surrogacy or assisted reproduction situations. Additionally, basing parenthood on intention would reflect the fact that all parties to a surrogacy arrangement have intentions: at the outset it can be presumed that the surrogate has the intention to relinquish the child.

Two recent decisions in the UK appear to have missed the potential for the application of intention in determining parenthood. Neither is a surrogacy case, but both can be used to illustrate the potential of recognising intention, rather than relying on out-dated presumptions. Recognising intention would produce consistency without detrimentally affecting the welfare of the children born. Indeed, in this sense, it is merely an alternative presumption. Given that few surrogacy arrangements and attempts to use assisted reproduction techniques result in disputes, it is possible to argue that the presumption should favour the intending parents in all such situations as this would better reflect the reality of the majority of outcomes (where there is no dispute) and would be more consistent with the acquisition of parenthood for fertile people.

In *Re R*,[84] a woman succeeded in her attempt to deny paternity to her ex-partner, an infertile man with whom she had begun fertility treatment. IVF using donated

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[83] Although not understood as determining parenthood by intention, in *Re C (a Minor) (wardship: surrogacy)* [1985] 14 Fam Law 241, the absence of a dispute between the surrogate and the commissioning couple meant that intention was implicitly recognised.
[84] *Re R (A Child)* [2003] EWCA Civ 182.

sperm produced a number of embryos, two of which were unsuccessfully transferred to the woman's womb, while others were stored at the clinic for future use. The couple separated after this initial unsuccessful attempt. Later, the woman went to the clinic and had some of the stored embryos transferred to her womb, becoming pregnant and subsequently giving birth to a girl. She had not told the clinic that she was separated from her former partner, nor indeed that she was now with a new partner. Had she done so, the treatment would not have gone ahead. Neither did she inform her former partner that she was continuing the treatment. On application to the High Court, Hedley J had granted the intending father a declaration of paternity, pursuant to section 28(3) of the Human Fertilisation and Embryology Act 1990.[85] The phrase 'treatment services together' was interpreted by Hedley J for the purposes of section 28(3) as meaning that the provision of services continued until either party or the clinic expressly withdrew from the understanding that the parties were being treated together. This was not true on the facts of the case, and the intending father was recognised as the legal father on this basis.

The issue for the Court of Appeal in *Re R* was whether the 'treatment services together' rule applied where a man had participated as the mother's partner during much of the treatment provided but had separated from her by the time

[85] The section provides that a man who is neither the genetic father of a child, nor is married to the mother, can be treated in law as the father in circumstances where the mother and that man (the intending father) had 'treatment services provided for [them] together by a person to whom a licence applies'.

that the embryo which led to the child's birth was transferred to her. The Court of Appeal, in a judgement given by Lady Justice Hale, ruled that

> '[t]he wording of section 28 makes it clear that the time at which legal paternity is created is the time when the embryo or the sperm and eggs which subsequently result in the birth of the child are placed in the woman. ... Section 28(3) also focuses on the act of placing the embryo or sperm and eggs in the mother, further suggesting that the question whether this is done 'in the course of treatment services provided for her and a man together' should be answered at this time and no other'.[86]

In effect, this decision stripped the man of his paternity of the child, despite the fact that it can be argued he had as much (in terms of intention) to do with bringing her into the world as her mother. While the Court of Appeal did not remove the contact order (which was not appealed against), it stressed that the parties should carefully consider whether the child continuing to have contact with the intending father would be beneficial to her. One reason why it may, it was suggested, was that 'the [intending father] might have an important role in helping the child to understand and come to terms with her origins'.[87] Although this case was confined by statutory construction, the argument may nonetheless be made that had parenthood been statutorily defined in terms of intention, the

[86] *Re R (A Child)* [2003] EWCA Civ 182, para 21.
[87] *ibid*, para 34.

man would have been regarded as the child's legal father from birth. If the woman wished to challenge this (for example, on the grounds that this was not in the child's best interests) then it would have been for her to do so. Recognising intention in this circumstance would not only have provided this child with two parents, including a legal father (as it seems is desired by section 13(5) of the HFE Act 1990), but would not be so remarkably different to circumstances in which a child was conceived naturally before its parents separated, thus making the law relating to assisted reproduction more consistent with reality. Although another man may act *socially* as the father of the child, this too is no different to many situations faced by fertile parents: step-parents, for example, have no legal tie to the children they care for unless they adopt. Similarly, such reasoning could be extended to situations like those in *Re R*.

In *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others*,[88] a case that followed almost immediately from *Re R*, the issue again centred on the legal fatherhood of children born after the use of IVF procedures. This case, however, came to light after a procedural accident at a fertility clinic: a white women (Mrs A) undergoing IVF (using ICSI) with her husband had been mistakenly fertilised with the sperm of a black man (Mr B) undergoing treatment with his wife on the same day. The question for the court was whether Mr A (the husband of the woman inseminated and the intending father of her child) or Mr B (the man whose sperm was accidentally used, therefore the genetic father) was the legal father of the mixed-race twins born as a result. The judgement handed down by

Dame Elizabeth Butler-Sloss confirmed that the children, YA and ZA, should remain with Mr and Mrs A but, in order to establish the legal parentage of the twins, it was necessary to determine whether sections 28 or 29 of the Human Fertilisation and Embryology Act 1990 applied. If section 28(2) or (3) applied to the facts of the case, Mr A would have been the legal father. However, in deciding that these sections did not apply, Mr B, as the biological father, became the legal father.[89]

The legal issue turned on interpretation of section 28(2)[90] and the meaning of 'consent' within this section, as elaborated on in Schedule 3 of the HFE Act. Because of the rigidity of the HFE Act and the definitions contained within it, this instance had to be treated as a situation in which donor sperm was used: this meant that the consent issue was a relevant one. Because Mr A did not consent to the use of donor sperm in the treatment of his wife the default position was that the biological father was the legal father. Dame Butler-Sloss pointed out that 'there was no intention to have sperm donation from a third person'.[91] This was

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[88] *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCH 259 (QB).

[89] Although he would have no automatic parental responsibility as he was not married to the mother.

[90] Human Fertilisation and Embryology Act, section 28(2): If –

(a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was party to a marriage, and

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

then ... the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).

[91] *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCH 259 (QB), para. 14. Again this points to the rigidity of the statute: situations which are not covered by its provisions are still discussed in those terms (e.g. 'sperm donation'), when arguably it is the terms themselves which should be questioned. Dame Butler-Sloss herself clearly states that 'the present situation where the sperm of a man has been placed in the eggs of a woman by mistake

because Mr B had not 'waived' legal fatherhood by donating his sperm to Mr and Mrs A in the first place, but the presumption of legitimacy of a child born to a married woman (i.e. that her husband would be the legal father) *had* been rebutted by genetic tests showing Mr B to be the biological father. It is arguable, however, that although on one level the interpretation of the law in *Leeds* is correct, because the law does not apply directly to this situation, it was open to be interpreted differently. While Mr A had not given consent to the use of sperm from a third party in the ICSI procedure, he *had* consented to the procedure and done so under the assumption that the sperm used was his own: he still *intended* to be the father of any resulting child. Additionally, he was the *psychological* father of the children,[92] particularly having been involved in preparing for their birth throughout the pregnancy.

The argument can again be made that had parenthood been statutorily defined in terms of intention (or if it were to be in future),[93] Mr A could have been regarded as the child's legal father from birth. It is not inevitable that regarding Mr B as the legal father is in the children's best interests. Although it will be physically obvious to the children that one of their parents is not their biological parent, it does not follow that Mr A, who will raise the children as his own, should not be legally recognised as their father. This is merely one of those cases where openness about the circumstances of the conception is to be encouraged.

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was not in the minds of those drafting the Bill or in Parliament's mind when passing section 28' (at para. 21).

[92] Chapter 1, above, text surrounding n 154 and 155.

Recognising intention would again have recognised reality: if then Mr (and Mrs) B wished to challenge that presumption (for example, on the grounds that this was not in the child's best interests) then they could do so. Section 13(5) of the HFE Act 1990 reflects the desirability of children having fathers. These children have a father who intended them to be born and is happy to raise them. The only argument that their best interests would be better served by recognising Mr B as their legal father must be based in greater weight being given to biological parentage over social parenthood and it might be surmised in this case that biology was prioritised to reflect the racial difference between the potential parents (despite this issue being noticeably absent from the judgement).[94] Dame Butler-Sloss commented that '[t]o refuse to recognise Mr B as [the twins'] biological father is to distort the truth about which some day the twins will have to learn through knowledge of their paternal identity'.[95] Mr B had already been confirmed as the children's biological father, but it does not have to follow that he is their legal father. It is arguable in this case that the twins ought to have knowledge of their biological 'paternal identity', but again this does not necessitate the award of legal fatherhood to Mr B. It was open to the court to interpret this case differently, *because* it fell outside the provisions of the HFE Act 1990. Arguably, an opportunity has been missed.

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[93] Or, because statutory interpretation of the HFE Act 1990 did not quite fit this situation, intention could have been used as a 'tie-break', as it was in *Johnson* v *Calvert*, n 81 above.
[94] It is interesting to note that had there been no racial difference between the parties here it is likely that there would have been no dispute at all, therefore allowing, albeit accidentally, the intending father to be recognised as the legal father.
[95] *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCH 259 (QB), para. 56.

4) Initial conclusions: potential

In surrogacy and other forms of assisted reproduction, registering intending parents as the legal parents would bring greater consistency. In the two recent cases outlined above, different outcomes would have been achieved, which arguably may have been better for the families that were created, at least in terms of reflecting the reality of their situation. There will always be some cases which are harder than others, but the benefits of the application of a consistent rule – an intention-based test for parenthood – far outweigh the disadvantages of having a system of rules which do not and cannot fit every situation, especially given that the number of disputes (and accidents) is relatively small.

Recognising intention may, however, deter some potential surrogates from entering such an agreement in the first place or serve as a constant reminder through the pregnancy term that the child is not that of the surrogate. This would not, however, be a negative outcome, as intention would bring greater consistency and, potentially, security. At present, whatever her motivations for entering a surrogacy arrangement, the woman acting as surrogate knows that she is safe to change her mind. If she wants to keep the baby when it is born then she can do so with impunity as it is she who is both socially and legally recognised as the mother of the child. Although for this reason such a change to registration procedure might lessen the numbers of women who choose to become surrogates, it would also go some way to answering the most important

question that surrogacy raises before the process is even begun; who are the parents of the surrogate-born child? It would also mean that it would be the surrogate who would have to challenge this through the courts – a further deterrent.[96] But it is unlikely that the numbers of willing surrogates would decline as rapidly as may be expected – although they draw a lot of publicity, the situations where surrogacy cases end in dispute and reach the courts are very much in the minority.

Those who intend and take action towards having a child by means of assisted reproduction or surrogacy are showing a form of commitment that may often be lacking in the fertile world. For the infertile, conception is no accident, and thus another reason that reliance on out-dated presumptions in the law should be challenged. Not only could intention help to solve the question of parenthood, when 'but for' those with the intention, a child would never have been born, but additionally if qualifications as to suitability are to be used or welfare of the child questions are raised, it goes some way to illustrating the commitment involved by those seeking external help in enabling them to become parents. At present, the law is irregular and unacceptable. It remains inextricably linked to out-dated concepts and constructs when society, technology and medicine have changed the way a family can be created.

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[96] Emily Jackson (n 7 above, 270) suggests that the presumption favouring the intending parents could be rebuttable if the surrogate objects, and that in such circumstances it could be replaced by a 'default rule, such as the conventional British definition of motherhood, or a "best interests" test'.

Chapter Five

An Examination of Legal Approaches in Other Jurisdictions

Introduction

The development of legislation in relation to the practice of surrogacy and assisted reproduction has been by no means uniform in all jurisdictions. The United Kingdom Surrogacy Arrangements Act 1985 was the first specific piece of legislation on surrogacy to be passed in any country, but this was soon followed by some legislation in other countries. The Human Fertilisation and Embryology Act 1990 is one of only a handful of national regulatory responses to assisted reproduction and surrogacy, yet has served as a model to other jurisdictions. A variation in international regulatory styles serves to illustrate the widespread difficulties of achieving consensus on subjects like surrogacy and assisted reproduction which may be perceived to be ethically and morally difficult. This is a point well summarised by Kennedy and Grubb, who say that '[g]iven the controversial nature of the issues raised by surrogate arrangements, it is, therefore, perhaps no surprise that legislation in other countries around the world has adopted different policy options'.[1] Robert Lee and Derek Morgan point out that

> '[d]ifferences in legislative response, differences in the extent to which questions such as those arising from the advent and

> adventure of reproductive technology constitute items on public, social and legal policy agendas, will depend on permutations and nuances in tradition, religion, culture, economics and wealth'.[2]

Thus, it is to be expected that different countries take different approaches to the regulation of such potentially contentious issues, and it should not be surprising to find 'moral and legal pluralism' when looking at the regulatory systems of other jurisdictions.[3]

Having such variety also serves to show, in some cases, that alternative regulatory styles can be effective and, by studying some of these, it may be possible to find ideas which could be included in any future reform of surrogacy legislation in this country. Not surprisingly, most countries that have legislated on any or all of the issues in surrogacy have been united in the opinion that commercial surrogacy should be prohibited, due to the inherent possibility of exploitation that is believed to exist within the operation of commercial surrogacy agencies. At the other extreme, some have gone further and opted for a complete ban of all aspects of surrogacy.

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[1] Kennedy and Grubb, *Medical Law* (London: Butterworths, 3rd ed, 2000) 1361.
[2] Robert G. Lee and Derek Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (London: Blackstone Press, 2001) 267.
[3] Robert G. Lee and Derek Morgan, *ibid.* It should, however, be noted that they see this pluralism as operating at the margins of the 'ethical page', meaning that, in the large part, there is often moral consensus on the majority of issues. For example, it appears that there is widespread agreement that commercial surrogacy practices ought to be prohibited, but other issues on the fringes of surrogacy, such as payment to surrogates or the acquisition of parenthood are more widely contested.

Rachel Cook explains that 'surrogacy is prohibited in the majority of European countries either by legislation, government regulations, or ethics committees. Israel and the United Kingdom are the two exceptions'.[4] Similarly, in the UK, the Surrogacy Arrangements Act 1985 prohibits only commercial surrogacy and other practices, such as advertising for or as a surrogate, that are associated with it.[5] The 1998 Brazier Report,[6] which reviewed surrogacy legislation and how the practice was operating then, made further recommendations, including that payments in surrogacy arrangements should be restricted to only provable and legitimate expenses. As yet, however, no further change has been made to the surrogacy laws in the UK, in this respect or any other. In Israel, the law allows only full surrogacy, using only the commissioning male's sperm, for religious reasons linked to illegitimacy. Margaret Brazier believes that the reason why the majority of the other European states observe a ban, formal or otherwise, on surrogacy is because it has to do with 'trade in body parts or bodily services'.[7] This is against Article 21 of the Bioethics Convention, which has been adopted by the Council of Europe.[8]

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[4] Rachel Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day-Sclater and M. Richards (eds), *What is a Parent? A Socio-legal Analysis* (Oxford: Hart Publishing, 1999) 121, 122.

[5] For a detailed explanation of the UK law, see Chapter 4 above.

[6] *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (1998) (London: HMSO) (The Brazier Report), discussed in Chapter 3, above.

[7] Margaret Brazier, 'Can You Buy Children?' (1999) 11 (3) *Child and Family Law Quarterly* 345, 346.

[8] The Convention for the Protection of Human Rights and Dignity of the Human Being with the Application of Medicine and Biology 1997. Note that not all European countries are signatories to the Convention. Lee and Morgan (n 2 above, 272, note 29) point out that as of January 2000, only 'ten states had signed the Convention: Denmark, Finland, France, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and Sweden'.

Of course, it is also true to say that surrogacy would not be likely to be welcomed in primarily Catholic countries, of which there are many throughout Europe, due to the emphasis that the religion places on the sanctity of the family. Peter de Cruz argues that '[t]he view of the Catholic Church on surrogacy appears unequivocal. The practice is regarded as 'morally illicit''. As evidence for this, he cites the Vatican issued Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation, 1987, which states that surrogacy

> 'is contrary to the unity of marriage and to the dignity of the human person. [It] represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood; it offends the dignity and right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitutes those families'.[9]

Despite this, it is not, however, true to say that there is a formal ban on surrogacy operating across most of Europe, or even across most of catholic Europe. Only Austria, Germany, Norway, Denmark and Sweden specifically do not allow surrogacy in any form. Surrogacy is implicitly forbidden in France, the payment of surrogates is not allowed in the Netherlands and surrogacy contracts are unenforceable in Greece.

Although a state may not have specific legislation pertaining to or directly prohibiting surrogacy, such legislation as there is may, however, make it incredibly hard for surrogacy to operate, and bureaucracy may stifle the procedure still further. In federal jurisdictions, achieving consensus on how to regulate surrogacy seems equally difficult. In the United States of America, for example, the law relating to surrogacy appears to differ according to whichever individual state the participants are in. There is currently no federal law relating directly to surrogacy in America, Canada or Australia.[10]

Because there is such variation internationally, and because the law in the UK was an international first and hastily achieved, it appears pertinent, in the light of proposals made in this thesis that the law in this country should be reformed, to compare some of the different legislative approaches from around the world to our own. As previously stated, examples from other jurisdictions may assist us in trying to determine how to proceed in this country (or how not to). The aim of this chapter is not expressly to identify where and which model of surrogacy regulation is best but, by looking briefly and selectively at the regulatory approach taken by some other jurisdictions, to observe that there are different ideas and approaches taken, and to consider if and how some elements of these might be imported into future UK legislation. It may be that it would be preferable for there to be an international regulation of surrogacy, or at least of some aspects of it, in order, for example, to prevent the exploitation of women or

[9] Peter de Cruz, *Comparative Healthcare Law* (London: Cavendish, 2001) 458-9.

couples from countries where there is currently little or no regulation by women or couples from elsewhere seeking to evade the restrictions imposed by their own nation's law.[11] A discussion on that scale, however, is beyond the scope of this chapter. Instead, a selection of legislative approaches will be examined, from countries that are both similar and different to the UK in either their legislative structures or social organisation. Examples will be taken from different types of jurisdiction; France (as a primarily Catholic and civil law country) will provide a European example; Israel (because of the religious aspect involved and facilitative attitude towards surrogacy) will provide a Middle Eastern example, and Australia, Canada and the USA will be used as examples of federally governed nations which allow the operation of different laws within their states or territories.

1) France

In 1985, in common with many of the findings of other jurisdictions at about this time, a national opinion poll taken in France showed that the majority of public opinion opposed payments to surrogates, and that there was only a thirty per cent approval amongst women for wholly altruistic surrogacy.[12] Peter de Cruz

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[10] Canada is likely to be the first of these nations to pass such legislation, as will be discussed below.

[11] International regulation may also have helped in cross-jurisdictional cases such as *W and B* v *H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008; *W and B* v *H (Child Abduction: Surrogacy)* (No. 2) [2002] 2 FLR 252; [2002] Fam Law 501. It may also help to avoid the possibility of surrogacy 'tourism' and problems associated with it in terms of enforcement.

[12] Christian Byk, 'France: Law Reform and Human Reproduction' in Sheila McLean (ed.), *Law Reform and Human Reproduction* (Aldershot: Dartmouth, 1992) 156. See also Peter de Cruz, n 9 above, 476.

states further that as the practice of surrogacy in France gained negative press attention, it became 'regarded as a practice deserving condemnation, which it duly received from the French National Ethics Committee, the Ministry of Justice and the Ministry of Health'.[13] In 1987, the French Government brought a number of actions before the courts in an effort to curtail the activities of French surrogacy agencies. Although a number of these agencies claimed that they were non-profit making and also that they served to prevent a trend in 'black market' surrogacies,[14] the French courts ruled that surrogacy was illegal. Their decisions were based on two principal reasons. First, they said that any surrogacy arrangement is a contract concerning the human body and is therefore prohibited under the French Civil Code.[15] Secondly, in France, the 'status of an individual cannot become the matter of a commercial arrangement'.[16]

In addition, Article 345 of the French Criminal Code states that '[a]ny person who substitutes one child for another or holds a child out as the offspring of a woman who is not its mother, shall be punished by imprisonment from five to ten years'. The mother of a child is 'based upon the recognition of the 'umbilical link'', a principle which derives from the Civil Code of Napoleon.[17] Peter de Cruz points out that the criminal provision can be circumvented if the commissioning father (when he is the genetic or 'natural' father) jointly registers the birth with the

[13] Peter de Cruz, *ibid.*
[14] Christian Byk, n 12 above, 157.
[15] Article 1128.
[16] Claude Sureau, 'From Surrogacy to Parenthood' (1997) 12 (3) *Human Reproduction* 410-411, 411.
[17] Claude Sureau, *ibid.*

surrogate, therefore recognising her as the mother, and the commissioning mother later adopts.[18] The necessity to circumvent the legislation is a consequence of the definitions of parenthood or motherhood. It seems, therefore that France may also benefit from reform in this area in order to enable surrogacy to operate more easily, and that there is little we could glean from their law for use in our own. The question would then become whether France would want more liberal regulation of surrogacy: if opinion polls suggested a general public disfavour of the practice then this may not be so, although opinion may well have changed since the mid-1980s. It is also interesting to note that the formulation from the French Criminal Code would allow the surrogate, and potentially also the commissioning parents, to become subject to the 'taint of criminality' which some UK commentators seemed so keen to avoid, in the interests of any children concerned.[19]

Article 353(1) of the French Criminal Code further provides that if any person induces, for gain, a parent or parents to abandon their child, either born or to be born, they commit a criminal offence. Peter de Cruz suggests that this provision is equivalent to the 'criminalising of the intermediary who, for commercial purposes, initiates or takes part in any negotiations with a view to the making of a surrogacy agreement which is the intention of s 2 of the English Surrogacy Arrangements Act 1985'.[20] By this provision, the 'taint of criminality' is removed

[18] Peter de Cruz, n 9 above, 477.
[19] The Warnock Committee, for example, rejected the use of criminal sanctions against commissioning couples or surrogates for this reason.
[20] Peter de Cruz, n 9 above, 477.

from the surrogate herself, who may also act for financial gain. Agencies would therefore be prevented from operating to facilitate surrogacy arrangements, whether they do this for profit or not. This provision would also seem to catch any other parties who assist in the making of a surrogacy arrangement and therefore must apply to any clinician who is paid to perform AI or IVF procedures in surrogacy. Perhaps a clinician may be able to avoid this by claiming he does not 'induce' anyone to give away their child, but such a claim is likely to be tenuous if he knows he is involved in surrogacy.

In France, then, the situation stands that very few forms of surrogacy will be free from legal sanctions. Only those that are arranged privately with no assistance from third parties, including both agencies and clinicians, and where no money is involved seem to satisfy the provisions of the French Criminal Code. If the birth mother wishes to give up her child, then the commissioning father can be registered as the natural parent of the child, and his wife can later adopt. This adoption process would take the normal procedure through the court. But it seems that this is a poor substitute for a system in which surrogacy could be facilitated as a reproductive option, even one of last resort.

However, three aspects of surrogacy have been highlighted as remaining controversial in French Civil Law which seem to suggest that the French position as regards surrogacy is unlikely to change. First, it is said that in France,

'motherhood is an immutable state of being',[21] making an agreement to carry a child with a view to its being raised by someone else a distortion of the mother-child relationship. In a manner similar to the UK, French law provides that it is the woman who gives birth that should be regarded as the mother of a child.[22] Secondly, the potential for exploitation of women who act as surrogates by commercial agencies is a continual fear. Although there is no legislation specifically banning the operation of agencies as there is no French equivalent to the Surrogacy Arrangement Act 1985, it seems that any attempt to operate as such an agency would be met with criminal consequences because of the elements stated above. The absence of a legal framework does mean, however, that the question as to whether surrogacy arrangements are enforceable or not has not been answered by legislation and that there have been no recent examples of surrogacy cases in the French courts. Two cases, heard in 1989 and 1991, saw the French *Cour de Cassation* strongly voice its disapproval of the practice of surrogacy.[23] The respective courts ruled that surrogacy agencies acted for an 'illicit and immoral purpose', and that all surrogacy arrangements, even for unpaid or altruistic surrogacy, are illegal as they are an unauthorised disposal of the body and therefore in direct conflict with French public policy, which regards certain things as outside of the realm of agreements, including all transactions relating to the body. It has also been suggested that that French

[21] E. Steiner, 'Surrogacy Agreements in French Law' (1992) 41 *International and Comparative Law Quarterly* 866.
[22] Articles 319 and 341 French Civil Code.
[23] The *Alma Mater Association* case (1989) Cass Civ 1, 13 December 1989, D 990, J 273, and *Procureur General v Madame X* (1991) (the *Madame X* case) Cass Ass Pleniere, 31 May 1991, J 417, cited in E. Steiner, n 21 above.

courts will take every opportunity to 'strike at transactions which in their view are prejudicial to the institution of the family'.[24]

2) Canada

Until recently, the Canadian legal approach to surrogacy had been somewhat more enabling than that of many other jurisdictions, in that there was no specific regulation of the practice and surrogacy arrangements came rarely before the courts.[25] There are also no official figures as to how many surrogacy cases there are in Canada each year, although an anecdotal estimate of 30 has been given.[26] In Canada, matters of family law (including adoption), birth registration and healthcare are provincial. The Federal Government can offer direction in these areas but it is up to each province to create their own laws. In all provinces and territories, the woman who gives birth is currently legally recognised and registered as the mother, meaning that in order to transfer parenthood after a surrogacy arrangement, the proper adoption process should be undertaken.

a) Ontario

Following the impact of surrogacy on the world scene in the early to mid-1980s, in 1985 a Report of the Ontario Law Reform Commission on Human Artificial

[24] M. Amos and F. Walton, *Introduction to French Law*, cited in Peter de Cruz, n 9 above, 481.
[25] It is not known, for example, whether surrogacy contracts are enforceable in Canada, as a case on that point has yet to come before the courts.

Reproduction and Related Matters recommended that formally regulated surrogacy arrangements should be legalised.[27] It also supported allowing the option of paid surrogacy. Such recommendations may be seen as some of the most liberal legislative thought on surrogacy since it gained regulatory attention, and as such, despite their coming to nothing, they are worth a closer examination. This is especially true given the Canadian Government's recent recommendations on surrogacy, which will be discussed below.

The reasoning behind such permissive recommendations was said to be that 'recourse to medical means of alleviating the effects of infertility ... cannot conscionably be forbidden',[28] and it was thought that the total legal prohibition of surrogacy would lead to the clandestine and undesirable operation of surrogacy services, a 'black market' in surrogacy. The potential problems that could be encountered by allowing surrogacy arrangements to take place were outweighed by this fact, and therefore it was proposed that legislation should take the form of the legal regulation of a legitimate practice. As part of the proposal, it was assumed that the Canadian courts would have a major role in the system of regulated surrogacy. They would be asked to approve all surrogacy arrangements, including any payments that were proposed, before they were put into operation.[29]

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[26] Health Canada, personal correspondence. It is believed that most cases are via IVF (full surrogacy).
[27] Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, 1985. This was a set of provincial (rather than federal) recommendations. No laws ultimately resulted from the Commission's report.
[28] Ontario Law Reform Commission, *ibid* 232.
[29] The full recommendations of the Committee can be found at pages 233-273.

The courts would have to consider the suitability of the potential commissioning parents, assessing them in terms of both their ability to raise a child and provide for it, and for their reasons for seeking the use of a surrogate in order to get that child. It should be noted that no requirement to detail the medical and/or social histories of the commissioning parents was established, although there is some indication that the surrogate herself would have had to provide this kind of detail. The potential surrogate, it was proposed, would be screened for her suitability for the 'job' by the courts. Both her physical and mental health would be assessed, as would the effect that embarking on a surrogate pregnancy may have on her life and that of her existing family. Any prospective parents would therefore have to be given the prior approval of a court before they entered into a surrogacy arrangement, but after the assessments of the parties had been found by the courts to be satisfactory, the surrogacy arrangement would have been allowed to go ahead. The child, when born, would be genetically tested to determine beyond doubt that it was the biological child of the commissioning father (except in the relatively rare cases where donor sperm may be used). At first it seems that the assessment system proposed for Ontarian surrogacy arrangements is similar to the welfare of the child assessment that must be made when deciding whether to allow parties access to infertility treatments (including medicalised surrogacy) in the UK. However, it appears that considering the potential of the commissioning couple to offer a stable home, and assessing the surrogate to minimise the risk element is a far cry from the assessment of whether parties are 'deserving' of a child in the UK.[30]

[30] See Chapter 1, text surrounding n 98 and 99; Chapter 4, n 68.

Most interestingly, under the system proposed by the Ontario Law Reform Commission, a surrogate who did not wish to hand over the child after birth would have been compelled to do so by the court if the arrangement had been approved.[31] Such a proposal goes against all established traditional notions of the concepts of motherhood and parenthood, and so differs greatly to the effect of both the legislation of surrogacy and the outcomes of disputed surrogacy cases in UK experience. The reverse situation would also have been the case; if the commissioning parents refused to accept the child, for example if it were handicapped, they would still have been held legally responsible for it. After the birth of the child, the commissioning or intending parents would be registered as its only parents, and recognised as such both legally and socially. A surrogacy arrangement that failed to comply with the legal regulations proposed would be determined to be unenforceable by the courts, and pecuniary fines could then be imposed on those who entered into such an arrangement. This suggests that those that did comply would have been fully enforced in all respects. Coupled with the court's ability to compel the surrogate to give up the child, this proposal, although it does not expressly mention it, would have given effect to the intention of the parties involved in the surrogacy arrangement. For this reason it is unfortunate that the proposals never became law, as to see such a system in operation would allow present-day legislation (in Canada and elsewhere) to be informed by the success or otherwise of the provision.

The Ontario Commission proposals are seemingly the most permissive proposed

[31] Ontario Law Reform Commission, n 27 above, 252.

legislation relating to surrogacy that has come about in any jurisdiction. In effect, the scheme proposed in Ontario is tantamount to a kind of 'surrogate adoption', especially as there would have been no need for recourse to normal or alternate (such as section 30) adoption procedures by the commissioning parents. The process which the commissioning parents and surrogate would have gone through before formally entering the arrangement is similar to adoption procedures, but would take place before the birth (or conception) of a child. Such a system does somewhat fail to take into account any maternal instincts of the surrogate herself, but this could be said to be an improvement on the present law of many jurisdictions, which tend to rely heavily on this. Potentially defaulting surrogates may have been discouraged from entering into surrogacy arrangements if they knew that they would lose rights to any child that they carried. By putting aside the traditional notions and concepts of motherhood, the rights of the infertile would have been more fully recognised. With a careful screening process, and the potential for women to be surrogates more than once under the Ontarian scheme, it was hoped that the rights of the surrogate would never be compromised and so never be at issue. Because of the judicious screening of all parties, the clear definition of the procedures that they must follow and what the circumstances would be in the event of dispute, it could have been hoped that it would be unlikely that a breakdown in the surrogacy arrangements would occur. As such, it is unfortunate that the recommendations of the Ontario Law Reform Commission did not become law, in order that we could see whether certain aspects of it, for example, enforcing the arrangement,

were successful.

b) The current position[32]

No formal regulation came from the Ontario Commission proposals and no surrogacy legislation has been passed in other provinces. Surrogacy has therefore operated in a legislative vacuum in Canada, both provincially and federally, since the time that the proposals were made. Few developments on surrogacy have taken place between 1985 and the present day. In 1995, Health Minister Diane Marleau declared a voluntary moratorium on nine practices deemed to be unacceptable, of which one was the operation of commercial surrogacy arrangements. The moratorium was, however, never strictly enforced because it was voluntary and not set in statute. In 1996, Bill C-47 (The Human Reproductive and Genetic Technologies Act), which contained 12 prohibitions, including one on commercial surrogacy, was introduced, but died on the Order Paper when an election was called in 1997.

In May 2001, however, Health Minister Allan Rock presented draft Assisted Human Reproduction (AHR) legislation to the Canadian House of Commons Standing Committee on Health.[33] He asked them to review the draft AHR

[32] I would like to thank Jennifer Woodside for her invaluable comments on the current legislative developments in Canada.

[33] Although health regulation is a provincial matter, the AHR legislation will be applied federally (occasionally the federal government can make laws in the area of health that will apply across the board in all provinces/territories). The draft legislation is founded upon the federal responsibility for criminal law, as is other federal health protection legislation such as the Food and Drugs Act and the Tobacco Act. In Canada, the courts have affirmed that the criminal law

legislation, and provide comments and recommendations, particularly in terms of what sort of regulatory body should be set up to oversee the whole AHR area. The Standing Committee was given until 31 January 2002 to complete their review. The purpose of the AHR legislation was;

> 'to ensure that Canadians using assisted human reproduction techniques do so without compromising their health and safety. Second, the Government aims to ensure that promising research involving human reproductive materials takes place within a regulated environment'.[34]

The draft legislation defined a surrogacy arrangement as 'any preconception arrangement in which a woman agrees to carry a child for another person with the intention of surrendering the child at birth'.[35] It proposed that commercial surrogacy be prohibited, on the grounds that it 'treats children as objects. It also treats the reproductive capacity of women, and reproduction in general, as economic activities'.[36] It was believed that 'some women could be vulnerable to exploitation if commercial surrogacy was allowed',[37] and the draft proposals contained consent regulations that would be developed to help ensure that women choosing to be surrogates would be doing so of their own free will. Paid

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power will support the creation of prohibitions which serve a public purpose, including public peace, order, security, health and morality. The draft AHR legislation contains prohibitions pertaining to a number of unacceptable activities including cloning and commercial surrogacy.

[34] Health Canada press release, 3 May 2001.

[35] Health Canada Overview Paper, 3 May 2001. It would be illegal, however, for a woman under the age of 19 to become a surrogate.

[36] Health Canada Overview Paper, *ibid.*

professional services, such as legal, medical and other types of counselling, would be permitted to support the surrogate.

However, the Standing Committee on Health (who finished their Report ahead of schedule),[38] have said that:

> The overall well being of children is compromised by deliberately producing children through assisted human reproduction, who may be uncertain about their origins. Commercial surrogacy treats children as objects and treats the reproductive capacity of women as an economic activity. Non-commercial (altruistic) surrogacy arrangements can also be socially harmful for the resulting child and place the health of women at risk.[39]

The Committee agreed with the prohibition on commercial surrogacy, but went further, saying that surrogacy for non-commercial reasons should be discouraged but not criminalised. It said that there should be a prohibition against 'any form of consideration, incentive or compensation, financial or otherwise, being offered or provided to any party involved, directly or indirectly, in any surrogacy arrangement'.[40] This prohibition would include even those parties who provide

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[37] Health Canada Overview Paper, *ibid.*
[38] House of Commons Canada, *Assisted Human Reproduction: Building Families* Standing Committee on Health, 12 December 2001 (Bonnie Brown MP, Chair). The Standing Committee Report can be found at www.parl.gc.ca/InfoComDoc/37/1/HEAL/Studies/Reports/healrp01-e.htm.
[39] House of Commons Canada, *Assisted Human Reproduction: Building Families*, *ibid* (text surrounding recommendations 10-12).
[40] House of Commons Canada, *Assisted Human Reproduction: Building Families*, *ibid.*

professional medical, legal, and psychological services to any of the participants in a surrogacy arrangement.[41] However, in order to protect the health of the surrogate mother and of any resulting child in any surrogacy arrangement, the Committee further recommended that 'an exception be created for physicians and other health care professionals who provide services necessary for the care of the pregnant woman'.[42]

The Committee said that if non-commercial surrogacy was to occur, the well being of the resulting child and the fully informed choice of the participating surrogate mother needed to be ensured, and that this could be done via several mechanisms. It said that counselling for all parties must be provided with respect to non-commercial surrogacy. Any doctors donating their services to facilitate a non-commercial surrogacy arrangement would have the responsibility to ensure that all parties had access to counselling services. The Committee also said that 'individuals who aspire to add a child to their family through surrogacy must be subject to the same scrutiny as individuals who seek to adopt a child',[43] and therefore recommended that provinces and territories of Canada should be 'encouraged to provide mandatory counselling to the commissioning couple, surrogate mother and partner through existing publicly funded services available

[41] To minimise the commodification of the surrogate mother and resulting child, the Committee recommended (Recommendation 10) that 'Clauses 4(4) [of the draft legislation] that excepts legal, medical, and psychological services and 10(d) that allows reimbursement of expenses to a surrogate mother be eliminated'.
[42] Recommendation 11.
[43] Text surrounding recommendations 10-12.

for adoption and to amend relevant family law to recognize the birth mother as the legal mother'.[44]

The Standing Committee on Health recommendations imply that surrogacy should not be encouraged at all. The Canadian Government had 150 calendar days to respond to the Committee's recommendations. Its response came in the form of revised AHR legislation, which was tabled in Parliament on 9 May 2002.[45] Payments to women acting as surrogates would be prohibited by the proposed new legislation, which is currently still under debate and will go through the usual legislative processes before receiving Royal Assent.

However, although the Committee's recommendations may be implemented by forthcoming AHR law, it is to be hoped that they do not reflect the opinion of the wider population.[46] It seems odd that legislation in Canada should be so strict given the fact that surrogacy seems to have been relatively unproblematic in Canada and considering how apparently liberal the first proposals in Ontario were. It seems that these facts have not informed the present situation at all and it can only be assumed that, given the infrequent use of surrogacy in Canada and the lack of case law this has entailed, the regulators have been looking abroad to

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[44] Recommendation 12.
[45] Bill C-56, titled an '*Act Respecting Assisted Human Reproduction*'. One proposals of the bill was to establish a regulatory body, the Assisted Human Reproduction Agency of Canada (AHRAC), which, in a similar way to the UK's Human Fertilisation and Embryology Authority (HFEA), would license, monitor and enforce the new law.
[46] Although Anne McLellan, who introduced the bill, said that the proposed legislation 'addresses some very complex and important issues. Canadians have made it clear that they want safe procedures and the benefit of important medical discoveries, but not at any cost. This proposed Act clarifies what we, as a society, find acceptable' (Health Canada press release, 9 May 2002).

see problems with surrogacy. Perhaps by seeing that surrogacy can cause difficult cases to arise elsewhere, different views on the best way(s) to discourage surrogacy have been formed by legislators.[47] However, after the Committee recommendations there were examples of protest against the perceived strictness of them in, for example, Canadian newspapers.[48] Further protests continued since the introduction of the bill, culminating in a recent amendment, passed on 26 March 2003, which would allow payments to a surrogate for 'lost employment income' in limited circumstances.[49] Perhaps the draft legislation was not, therefore, a recognition of what Canada, as a society, finds acceptable.[50]

The Standing Committee recommendations and the draft legislation that followed give no consideration to the determination of parenthood following surrogacy arrangements, instead relying on the presumption that the birth mother will be the legal mother. Considering that there are cases that have challenged this in the US, and legislation dealing with parenthood is present, albeit to a limited extent, in the UK, for example, it is curious that the parenthood issue has not been dealt

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[47] Indeed, this has been acknowledged: '[t]he proposed Act puts Canada in line with measures taken in other major industrialized countries. It is a comprehensive and integrated approach, drawing on best practices and experiences from countries around the world' (Health Canada press release, 9 May 2002).

[48] For example, 'Surrogacy Lawyer Begs Politicians Not to Ban Payment' *Ottawa Citizen*, 27 December 2001, www.nationalpost.com/news/national/story.html?f=/stories/20011227/968905.html.

[49] The *Halifax Herald* reported that critics call the amendment, introduced by Liberal MP Hedy Fry, 'a major reversal of government policy' and that members of the Commons health committee fear the amendment 'could open the door to "rent-a-womb" contracts' ('Bill's Critics Fear 'Rent-a-Womb' Contracts: Amendment Would Allow Surrogate Mothers to be Paid in Some Cases', 28 March, 2003).

[50] See n 46 above.

with more thoroughly in the latest Canadian proposals.[51] That there has been a relatively recent court case in Manitoba where a commissioning couple who were the genetic parents of a child carried by a surrogate persuaded a judge, prior to the birth of the child, that their names and not the surrogate's should be on the birth certificate, increases the peculiarity of this fact.[52] It remains to be seen whether this bill, if and when it is passed, will be the final word on surrogacy in Canada. But the proposed new legislation is interesting both because of a seeming change in attitude (and a lack of specific reasons for this change) and because case law and legislation elsewhere (including places where surrogacy seems to have been more problematic) has both allowed surrogacy and discouraged it less.

3) Australia

The regulation of health provision in Australia is, as in Canada, governed by state rather than federal governments. The provision of fertility services comes within this, and three of the eight states have passed specific assisted reproduction legislation. In the others, 'legal questions are an amalgam of the common law and ethical guidelines'.[53] Surrogacy is regulated within assisted reproduction legislation in Victoria, South Australia and Western Australia, while Queensland, the Australian Capital Territory (ACT) and Tasmania have enacted legislation

[51] Especially as the proposed legislation appears to have given this detailed consideration in other respects, particularly in relation to AID.
[52] *J.C.* v *Manitoba* [2000] M.J. QL 2000 MBQB 173.
[53] R.G. Lee and D. Morgan, n 2 above, 289.

specifically on surrogacy.[54] In the ACT, full surrogacy is permitted providing the arrangement is non-commercial. The five other states prohibit full surrogacy. In all of the states, contracts for surrogacy are void and unenforceable.[55]

a) State laws

Like the Warnock Committee in the UK, a similar committee in the Australian state of Victoria[56] unequivocally condemned all commercial surrogacy arrangements.[57] The Committee report said that the core of a surrogacy arrangement was the buying and selling of a baby:

> '[t]he buying and selling of children has been condemned and proscribed for generations. It should not be allowed to reappear, and no technological assistance, available to infertile couples, should be afforded to any such arrangements'.

Many members of the Victorian Committee accepted the contention that all forms of surrogacy involved the manufacture of a baby for others, and stated that they

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[54] Loane Skene, 'An Overview of Assisted Reproductive Technology Regulation in Australia and New Zealand' (2000) 35 *Texas International Law Journal* 31, note 5.
[55] In this respect, Skene (*ibid* 32) describes the ACT legislation as 'ahead of regulations elsewhere'. Note that Queensland's Surrogate Parenthood Act 1988 has further restrictions than other states, in that it 'makes entering into or offering to enter into any surrogacy agreement whatsoever, 'whether formally or informally, and whether or not for payment or reward' an offence' carrying a maximum penalty of $6,000, three years imprisonment, or both (ACT, Surrogacy Discussion Paper 1, reflecting the law as at October 1993, accessed at http://actag.canberra.edu.au on 7 January 1999).
[56] The Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, or the Waller Committee.

had 'grave doubts whether any such surrogacy arrangements are in the best interests of the child whose birth is so planned'. Consequently, the Committee recommended that surrogacy involving IVF, AI or other medical intervention should not be legal in any form in Victoria.

Such a ban did not occur, but the Committee's recommendations led the State Government to enact the world's first legislation on assisted human reproduction: the Infertility (Medical Procedures) Act 1984 (Vic.). Section 30(1) and (2) of the 1984 Act related to surrogacy, prohibiting advertisements 'soliciting or offering surrogate mother services and the giving or the receiving of any payments or rewards for such services'.[58] They also provided that a contract for surrogacy was void, and therefore unenforceable in the courts. Voluntary, or altruistic (and notably, free) surrogacy was not prohibited. In 1995, a new Infertility Treatment Act was passed, consolidating the law relating to assisted reproduction and surrogacy in Victoria.[59] Section 60 of that Act continues the prohibition on the advertising for or as a surrogate, and on the giving or receiving of payment for surrogacy. The practical operation of surrogacy therefore remains very restricted in Victoria. Parenthood following surrogacy is not determined by the Act, but by family law provisions that existed prior to it. The birth mother and her husband

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[57] Waller Committee, *Annotated Bibliography on Surrogate Mothering*, March 1984.
[58] Helen Szoke, 'Regulation of Assisted Reproductive Technology: The State of Play in Australia' in Ian Freckleton and Kerry Petersen, *Controversies in Health Law* (Melbourne: The Federation Press, 1999) 244.
[59] Helen Szoke (*ibid*) states '[t]he Act is comprehensive'. This has not meant, however, that surrogacy has been unproblematic in Victoria, as the ban on payments and advertising in the state has led Victorian couples to enter 'secret, often expensive and illegal arrangements to have a child' ('$120,000 for Baby in Outlawed Surrogacy' *Herald Sun* (Melbourne), 23 April 2001).

will be registered as the parents of the child.[60]

Each state of Australia, with the exception of the Northern Territory, has at some point commissioned an inquiry into surrogacy. These inquiries have generally resulted in legislation: Victoria was the first state to legislate in 1984, but this was soon followed by an amendment to existing family law legislation in South Australia in 1988, Queensland's Surrogate Parenthood Act 1988, Tasmania's Surrogacy Contracts Act in 1993 and the ACT's Substitute Parent Agreement Act 1994. South Australia enacted the Reproductive Technology Act in 1988, which amended the Family Relationships Amendment Act 1984, making surrogacy contracts void and unenforceable. The birth mother and her husband will be registered as the parents. The Northern Territory has no specific legislation, but services there are provided from South Australia and as such, the law in South Australia is followed. In Western Australia, the Human Reproductive Technology Act 1991 does not deal with surrogacy, although legislative proposals had been drawn up in 1986. Seemingly surrogacy was dropped from the legislation somewhere in the long consultation and revision process that ensued.[61] New South Wales also has no legislation dealing with surrogacy, despite a 1988 Law Reform Commission Report recommending that commercial surrogacy be prohibited and altruistic surrogacy be discouraged.[62] Legislation prohibiting

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Support groups 'estimate at least 100 infertile, gay or single Australians are surfing the Internet to secure a surrogate mother here (sic) or overseas'.

[60] Helen Szoke, *ibid* 261.

[61] For details, see Helen Szoke, *ibid* 248.

[62] New South Wales Law Reform Commission, *Report: Artificial Conception – Surrogate Motherhood* (1988) 38.

commercial surrogacy was proposed but never enacted.[63] Queensland established a committee of inquiry in 1983, which had among its terms of reference to review whether surrogacy should be permitted. The only legislative controls that were proposed by the Committee when it reported in 1984 were for surrogacy;[64] it was recommended that it should be illegal 'to advertise and recruit women to undergo a surrogate pregnancy' and that ethical guidelines 'should be established for medical services which involve surrogacy'.[65] The Committee also recommended that the 'irrefutable presumption that the woman who gives birth to a child is its mother' be reinforced.[66] Under the resulting Surrogate Parenthood Act 1988, it became an offence to make or seek surrogacy arrangements. Any surrogacy agreements made are void and unenforceable. In Tasmania, a committee also considered whether surrogacy should be permitted.[67] Few of its recommendations were enacted, although the state's concerns about surrogacy were reflected in the Surrogacy Contracts Act 1993, which makes it an offence to seek surrogacy arrangements.

The Australian Capital Territory is described as 'distinctive in being the only jurisdiction in Australia where altruistic surrogacy is legislatively enabled, through

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[63] Helen Szoke, n 58 above, 250. On this, she comments (at 251) '[i]t should be noted as a stark exception that the most populous Australian State has yet to enact any legislative controls in the area of assisted reproduction ... Responsibility for decisions about the many controversial aspects of treatment, such as surrogacy... remains with the institutional ethics committee'.
[64] Demack, J, *Report of the Special Committee appointed by the Queensland Government to Enquire into the Laws Relating to Artificial Insemination, In Vitro Fertilisation and Other Related Matters*, Qld Parliament, Brisbane, 1984.
[65] Helen Szoke, n 58 above, 251.
[66] Helen Szoke, *ibid.*
[67] D. Chalmers, *Committee to Investigate Artificial Conception and Related Matters*, Hobart, 1985.

the provisions of the Substitute Parents Agreement Act 1994'.[68] A discussion paper issued in 1993 proposed that both paid and unpaid surrogacy arrangements should be unenforceable and that participation in an arrangement would be a misconduct. However, the 1993 Act did not implement these proposals, instead permitting altruistic (full) surrogacy providing it has no commercial element and no 'soliciting' takes place.[69] In 1997, the Artificial Conception (Amendment) Bill was tabled in the ACT, which contained provisions relating to the status of the child born following a surrogacy arrangement. It proposed that a 'person who has indicated their intention to become the legally recognised parent of a child' could apply for a 'parentage order'.[70] This would have allowed the commissioning parents (or *parent*, taking into account the singular) in a surrogacy arrangement to become the legal parents of the child, in a similar way to section 30 of the Human Fertilisation and Embryology Act in the UK. However, the passage of the Bill failed to satisfy procedural rules and was not passed, meaning that parenthood is still defined in the traditional way.

Other states and territories within Australia are governed by ethical guidelines and case law. Many of the general guidelines apply even where there is specific state legislation, provided this is not inconsistent, and '[t]here is also room for a more uniform approach through the common law, as decisions of the High Court

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[68] Helen Szoke, n 58 above, 252.
[69] For a critique of the distinction drawn between altruistic and commercial surrogacy in Australian legislation, see generally Anita Stuhmcke, 'For Love or Money: The Legal Regulation of Surrogate Motherhood' (1995) 2 (3) *Murdoch University Electronic Journal of Law* (no page numbers).
[70] Helen Szoke, n 58 above, 253.

of Australia are generally followed in the lower courts'.[71] A working group of the National Health and Medical Research Council (NHMRC) (a statutory authority with the function 'to [advise] the Australian Community and Commonwealth, State and Territory Governments on standards of individual and public health and [to] [support] research to improve those standards')[72] published new guidelines on assisted reproduction in 1996.[73] The guidelines have a section dealing specifically with surrogacy, and provide that the provision of assisted reproduction services, including surrogacy, must be underpinned by 'respect for and protection of the interests, rights, dignity and welfare of all the individuals involved in ART, in particular those of any children who may be born as a result of the technology and those of the couples and in particular the women'.[74]

b) *Re Evelyn*[75]

Until 1998, the Australian Family Court had never decided a dispute in a surrogacy case. *Re Evelyn* was the first such case to be litigated.[76] The case involved an inter-state surrogacy arrangement between two sets of couples who were originally friends. Dr and Mrs S, who lived in South Australia, agreed with Mr and Mrs Q, who lived in Queensland, that Mrs S would carry a child for Mrs Q,

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[71] Loane Skene, n 54 above, 33.
[72] Loane Skene, *ibid* 45.
[73] NHMRC, *Ethical Guidelines on Assisted Reproductive Technology* (Canberra: AGPS, 1996).
[74] R.G. Lee and D. Morgan, n 2 above, 293.
[75] *Re Evelyn* [1998] Fam CA 55.
[76] Margaret Otlowski ('*Re Evelyn* – Reflections on Australia's First Litigated Surrogacy Case' (1999) 7 *Medical Law Review* 38-57, 38) remarks that '[p]rior to this case, there had been a growing sense of anticipation in Australia regarding surrogacy litigation, particularly in the light of

who was unable to have children following ovarian cancer which had necessitated a full hysterectomy. This had been known prior to their marriage. Dr and Mrs S had three existing children, and Mr and Mrs Q had adopted a child. Mrs S was artificially inseminated with the sperm of Mr Q, and became pregnant. When the child, 'Evelyn', was born, both couples initially lived together with her in a shared apartment, Mrs Q acting as the primary carer. Mrs S was registered as the mother according to South Australian law. A week later, Mr and Mrs Q returned with Evelyn to Queensland. Mrs S 'found it difficult to cope with relinquishment and became frustrated with what she regarded as an inadequate level of communication between the couples'.[77] She went to Queensland to retrieve the baby and return with it to South Australia. Both couples then initiated court proceedings against each other in their respective states. An interim hearing in Brisbane resulted in an order, pending the real hearing, for the child to be placed with Mr and Mrs Q and that Dr and Mrs S should be allowed access. The judge dismissed an appeal by the Ss to stay the proceedings.

At the hearing, which took place when 'Evelyn' was one year old and had been primarily in the care of the Qs, both parties sought custody of the child, and in the alternative, sought access to her. The Ss argued that 'Evelyn' would gain more of a 'sense of completeness'[78] if she remained with her natural mother and

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overseas experience, and much speculation as to how the Australian courts would deal with a contested surrogacy case'.

[77] Peter de Cruz, n 9 above, 473; Margaret Otlowski, *ibid* 39.

[78] Margaret Otlowski, *ibid* 40.

biological siblings.[79] Jordan J ruled that the surrogacy arrangement was void and unenforceable under the state's legislation, and decided that Mrs and Mrs S should have custody of the child and responsibility for her day-to-day care.[80] He recognised the claim made by the Qs and ordered that they should have specific rights of contact, and that they should share in the decision-making about the long-term care and development of the child. Although Jordan J had expressed the view that public policy considerations did not mean the court should disregard the arrangement altogether, and stated that he should 'take account of the *intentions* and expectations of the four adults who co-operated to bring about her birth',[81] this ultimately did not affect the judgement:

> 'the 'preponderance of public policy considerations' was seen as prevailing over the expressed intention of the parties, although at all times the best interests of the child remained the paramount consideration'.[82]

In making this decision, Jordan J predicted that 'Evelyn' would, in the future, suffer psychological problems related to her identity and the method in which she

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[79] This claim seems to have been based directly on genetics in combination with gestation. Mrs S was both the birth and biological mother, thus her claim may have been stronger than that of Mrs Q. Arguing the benefit of biological siblings was an added bargaining tool. However, it should not be forgotten that Mr Q was Evelyn's biological father, that the Qs had raised Evelyn for a year, and that she had an adopted brother.

[80] *Re Evelyn* No. B.R.7321 of 1997 (unreported).

[81] Jordan J, *ibid* 29 (emphasis added).

[82] Margaret Otlowski, n 76 above, 41. It might be argued, however that public policy is based on what the public know, think and are told. If they were told that Evelyn's life would be more disrupted by leaving the social family unit she was in (Jordan J acknowledged that Evelyn had formed a 'close bond' with the Qs), and if the constructions of motherhood did not presume that

was conceived. His decision was partly based on the fact that he ruled Mrs S to be best equipped to deal with these problems.[83] In addition he ruled that Mrs S would suffer 'extreme grief' if the child was not placed with her and that 'Evelyn' would gain more from living with her half-siblings than with an adopted brother.

Mr and Mrs Q appealed this decision to the Full Court of the Family Court, presenting new 'expert evidence', and on the grounds that the trial judge had erred in his decision not to seek further evidence.[84] They also claimed that 'Evelyn' was leading a contented life with the Qs and had formed strong attachments to them. On this ground they questioned the decision of the judge that 'Evelyn' should go to live with the Ss. They argued that the judge's findings as to the future happiness of the child were speculative and were 'untested theories or guesswork in relation to the problems that may arise for 'Evelyn' in the period from adolescence to early adulthood'.[85] On this basis they also argued that all decisions in surrogacy disputes would favour the surrogate. The Family Court agreed with the decisions of the trial judge and dismissed the appeal on all grounds. The court stated that the trial judge had not simply decided the case on biological motherhood, but had taken into account each family's situation and the qualities of the two sets of prospective parents. They concluded that the

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genetics and gestation were the determining factors, it might be thought that many would not argue otherwise. Her 'best interests' were not necessarily served by disruption.

[83] Jordan J perceived that the biological mother would be best suited to deal with any problems Evelyn might have in the future, thus positioning motherhood above fatherhood. In a sense, it could be argued that his judgement would make the future worse for Evelyn, who, instead of being told that 'friends helped us have you' would have a background of dispute and litigation. How Evelyn will cope with that knowledge remains to be seen.

[84] *Re Evelyn* (1988) FLC 92-807.

[85] Peter de Cruz, n 9 above, 473.

placement of 'Evelyn' with the Ss would be better for her as it would 'be likely to raise fewer questions in her mind given her unique situation'.[86]

The Q's rejected the decision and refused to relinquish 'Evelyn' to Dr and Mrs S. Instead, they appealed further to the Family Court, asking for leave to appeal to the High Court of Australia. The High Court refused the application to reopen the case and affirmed the ruling of the Family Court. 'Evelyn' went to the Ss, and the Qs were given some limited contact rights and allowed some input into decisions pertaining to her long term welfare and development.[87]

c) Comments

Surrogacy is obviously seen as undesirable in Australia. What could prove to be more problematic, however, is the lack of legislative consistency between Australian states. There is some level of uniformity, in that commercial surrogacy cannot operate in any state due to either legislative or policy provisions. For the same reasons, it seems that surrogacy arrangements will not be enforceable in any state. Although Australia is a large country, travel is not difficult either within or without its borders, and the 'variations amongst jurisdictions means that there will be a movement of couples wishing to pursue treatment'.[88] The availability of surrogacy services advertised on the internet may well mean that Australian

[86] Peter de Cruz, *ibid* 474.
[87] Again, this can be argued not to be in the child's best interests, especially if the adults are in conflict.
[88] Helen Szoke, n 58 above, 255.

couples seek their surrogates abroad,[89] and this, of course, could mean that they are disadvantaged or made more vulnerable to exploitation, especially given that there is no international law regarding surrogacy. It is also of concern that there are no statutory provisions clarifying parenthood status following surrogacy in Australia. Even in the ACT, where full surrogacy is facilitated by legislation, a proposal that would have meant recourse to adoption procedures was unnecessary failed. Perhaps, because of the discouragement or prevention of surrogacy that exists in most of the states, and the current low demand for surrogacy (at least full surrogacy)[90] it is felt that parental transfer mechanisms are unnecessary.

The decision in *Re Evelyn* was that the interests of the child would best be served by living with her biological mother, according to the paramountcy principle.[91] Within the decision, however, provision was made for the commissioning parents to maintain contact with the child, and have decision-making input into her life. It may be argued that this is detrimental to the well-being of the child because of the nature of the dispute which preceded the decision. It may also appear to suggest, with relevance to any future surrogacy cases decided in Australia, that maintaining the familial connection with the biological mother is regarded as the primary indicator of 'best interests' in terms

[89] See n 59 above.
[90] Helen Szoke, n 58 above, 255 and note 118.
[91] Margaret Otlowski (n 76 above, 44) explains that this was a 'widely held expectation' as it is consistent with family law in Australia and cases decided in the UK and the US.

of 'long-term considerations, particularly identity and adjustment issues'.[92] It will be interesting, therefore, to see how this would impact on a disputed *full* surrogacy case.[93] What the decision does clearly indicate, however, is that surrogacy in Australia will remain problematic. It is assumed that surrogacy arrangements are contrary to public policy, and legislation (or the lack of it) in most states reflects this. What the case also shows is that people are willing to enter into surrogacy arrangements despite the legislation. Given the facts of the case, there is much to be said, as Otlowski has argued, 'for a regulatory model which ensures that a woman offering to be a surrogate mother is well-informed about what a surrogacy arrangement involves, receives appropriate counselling and acts free of coercion'.[94] Legislators in Australia must recognise that surrogacy is not going to go away just because it is not liked. It is the preferred or only option for some people to have children, and as such, efforts should be made to regulate it fairly.

4) Israel

In 1991, Israeli Health and Justice ministers set up a public-professional committee to look at the social, ethical, religious and legal aspects of IVF and

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[92] Margaret Otlowski, *ibid* 46.

[93] It seems, however that any future case will be decided on its own facts and circumstances. Although *Re Evelyn* has determined that the paramountcy principle is the correct approach to take when deciding surrogacy disputes, the decision does not set precedent for the future. Indeed, the Full Court of the Family Court, while dismissing the Qs appeal, did indicate that 'had it been required to consider the case afresh, [it] may have come to a different conclusion' (Margaret Otlowski, *ibid* 47). Perhaps, then, it can be hoped that *Re Evelyn* will not necessarily be followed in future cases. In addition, the full court has made it clear that there is no presumption in favour of the biological parent (or the biological mother, even where the child in dispute is a girl).

related practices.[95] The Committee's remit was to propose legislation, with special regard to the way that surrogacy arrangements should operate in Israel. It presented its report in 1994,[96] stating that surrogacy should be allowed to operate under legal regulation and careful supervision. A decision in the High Court of Justice in 1995 ruled that existing IVF regulations prohibiting surrogacy should be cancelled by 1 January 1996 because they were discriminatory. A group of infertile couples had petitioned the court claiming that the regulations were discriminatory against those who could not afford to seek surrogacy outside of Israel, for example in the US, and therefore did not have the chance to have their biological children.[97] In 1996, the Israeli parliament (the Knesset) passed legislation based on the proposals of the Committee, reflecting also, to some extent, the High Court ruling.[98] This was the first Israeli law concerning infertility, and is particularly interesting because it 'had to negotiate a compromise between the restrictions of the orthodox regulations and the liberal views of the secular Israelis'.[99] It is also made Israel the first example of a country where all surrogacy agreements are directly and individually regulated by the state.

The way that surrogacy has been dealt with in Israel provides an interesting

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[94] Margaret Otlowski, *ibid* 51.
[95] The Public-Professional Committee to Investigate In-Vitro Fertilisation.
[96] Israeli Ministry of Justice (July 1994) *Report of the Public-Professional Committee to Investigate In-Vitro Fertilisation* [in Hebrew] (Jerusalem: Israeli Ministry of Justice).
[97] *Zabro* v *Minister of Health* 1995 HC 5087/94.
[98] The Law of Surrogacy Agreements (Authorization of the Agreement and the Status of the Child) 1996. According to Deborah Honig, Orit Nave and Dr Roni Adam ('Israeli Surrogacy Law in Practice' (2000) 37 (2) *Israeli Journal of Psychiatry Related Science* 115-123), the literal translation of the Hebrew title of the Act is 'The Law of Agreements to Carry Embryos (Authorization of the Agreement and the Status of the Child)'.

comparison to other jurisdictions, especially because there, more than anywhere else studied, the concepts of parenthood and the family are tied inextricably to religious beliefs and, as such, are paid particular attention. The attitude to surrogacy in Israel differs widely among the main religions of the country;

> 'Judaism agrees with its practice, and the earliest recorded case of surrogacy appears in the Bible (Genesis 16:2). Most Christian churches forbid it, on the basis that it is contrary to the unity of marriage and to the dignity of procreation of a human being. Islam does not permit surrogacy on the premise that pregnancy should be the fruit of a legitimate marriage. Also, according to the Quran 'Our mothers are those who provide the womb and give birth'. Hinduism allows surrogacy, but problems may arise if a male child is not conceived, as this is considered a religious duty'.[100]

The Israeli legislation is also an example of state-controlled surrogacy and as such is more directly comparable to the regulation of surrogacy in the UK than that of other legislatures, which may have a variety of laws and other regulations that deal only indirectly with surrogacy or act only on a prohibitive level.

Israel's surrogacy legislation has six main aspects. First, all surrogacy arrangements must be authorised and supervised by an interdisciplinary public

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[99] Abraham Benshushan and Joseph G. Schenker, 'Legitimizing Surrogacy in Israel' 12 (8) *Human Reproduction* 1832-1834, 1832.

'Approving Committee'. The Committee is nominated by the Health Minister and consists of seven members: two obstetricians/gynaecologists, one physician qualified in 'internal medicine', a clinical psychologist, a social worker, a lawyer and an official representative of the religion of the participants in the surrogacy arrangement that approval is being asked for. The applicants must abide by the decision of the majority of the Committee. Surrogacy arrangements that are entered into without the authorisation of the Approving Committee are criminal acts, carrying a one-year prison sentence.

Second, only married (and therefore heterosexual) couples resident in Israel may take advantage of surrogacy,[101] and only full surrogacy is permitted, in which the gametes of both of the commissioning couple should be used.[102] 'Special dispensation' can be granted to use an anonymously donated egg, but '[i]t is an absolute requirement that the intended father's sperm be used to create the embryos'.[103] The reason for the limitation to Israeli citizens is thought to be to 'prevent abuse of women from underdeveloped countries and illegal commercialization of the procedure'.[104] The commissioning couple must present a medical report to the Committee, showing that the intending mother is

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[100] Abraham Benshushan and Joseph G. Schenker, *ibid* 1834.

[101] Deborah Honig *et al* (n 98 above, 2) make the interesting point that 'Jewish couples from countries in which surrogacy is prohibited may find the Surrogacy Law a compelling reason to utilize the Law of Return, become residents here, and seek authorization for a surrogacy arrangement'.

[102] It is interesting to note that the Israeli law refers to the commissioning parents as the 'intended parents' (Deborah Honig *et al*, *ibid* 1).

[103] Deborah Honig *et al*, *ibid*. This is because much emphasis is placed on the perpetuation on the father's lineage, described as 'bearing a striking similarity to the surrogacy described in the book of Genesis'. Benshushan and Schenker (n 99 above) point out that '[s]perm donation is not allowed, since in Judaism it would make the child 'illegitimate''.

incapable either of conceiving or of maintaining a pregnancy. Furthermore, a medical opinion considering the suitability of both the commissioning couple and the proposed surrogate must be given. This would include their medical histories and a gynaecological examination of the surrogate and tests for transmittable diseases that may be carried by her. A psychological assessment of all parties must also be made, and a statement must be issued by a social worker or psychologist to show that the commissioning couple had been counselled as to alternative ways to try to have children. It is a requirement of the Approving Committee that both the commissioning couple and the surrogate receive counselling before entering the agreement and throughout the pregnancy. For the surrogate, this must also continue for six months after the birth of the child.

Third, payments are controlled: commercial or profit-making surrogacy is not allowed but reasonable expenses can be paid to the surrogate if approved by the Committee. Money is put into a trust fund and the Committee 'can recommend monthly payments to the surrogate mother to cover actual expenses including medical expenses, insurance, legal consultation, loss of time and income, suffering or any other reasonable compensation'.[105] It is, however, a criminal act for any party, including an agency or other intermediary, to make or receive any unauthorised payments in relation to a surrogacy arrangement. Fourth, the

[104] Benshushan and Schenker, *ibid.*
[105] Benshushan and Schenker, *ibid* 1833. However, Deborah Honig *et al* (n 98 above, 3) have stated that although 'initially, it seemed like surrogacy would not become prohibitively expensive in Israel, over the last three years, surrogate mothers have been requesting, and receiving, increasingly higher pay. Surrogate mothers currently demand approximately $25,000 as a base pay to carry a child for the intended parents'. This seems to be in direct contradiction to the original intention of the law.

woman acting as surrogate must be single or divorced;[106] otherwise the child would be illegitimate according to the Jewish religion. The surrogate must also be unknown and unrelated to the commissioning couple, in order to prevent pressure being put on female relatives to have a child for others that cannot. An arrangement is more likely to be approved by the Committee if she belongs to the same religion as the commissioning couple (in Judaism, the religion of the child is determined by the religion of the mother),[107] although an inter-religious arrangement may be authorised where none of the parties are Jewish, after consultation with the clergy member. Realistically, this would be unlikely, given the different approaches taken to surrogacy by the main religious groups in Israel.

Fifth, the surrogate is only allowed to withdraw from the arrangement (before the adoption procedure is complete) under certain conditions.[108] The court will only approve her withdrawal where a report from a social worker provides evidence of a change in circumstances that 'justifies' her change of mind and it considers that the welfare of the child will not be negatively affected by her doing so. Where this is the case, the surrogate will be recognised as the legal mother and repayment of monies paid to her can be ordered by the court. The surrogacy arrangement cannot compromise the rights of the woman acting as surrogate to undergo medical treatments or procedures, including the right to have an abortion according to Israeli law. If, however, she does terminate the pregnancy against

[106] Section 2(3).
[107] Section 2(5).

the will of the commissioning couple, she may be required to pay them compensation. Some of her other rights are limited: her diet or intake of alcohol or drugs can be determined by the commissioning couple.

Finally, the status of the child after its birth has also been determined by the Israeli surrogacy law. The presumption that the woman who gives birth to the child is its mother is followed (as it is where the surrogate is 'allowed' to change her mind), but in order to avoid the problems that can be caused by a post-birth change of heart by the surrogate, a number of provisions as to how the transfer of the child should take place were included in the legislation. The child is under the legal guardianship of a state appointed social worker from birth until the transfer and adoption procedures are completed. By the end of the fifth month of pregnancy, the commissioning couple must notify the social worker where the child is to be born and the estimated date of birth. Within 24 hours of the birth, either of the commissioning couple or the surrogate must notify the social worker, who will then have sole custody of the child. The law states that the child must be handed to the commissioning couple, in the presence of the social worker, as soon after birth as is possible,[109] and that the commissioning couple must accept custody of the child and apply to adopt (a 'parent's order') within seven days.[110] If an application is not made within this time, the social worker will apply on their behalf. Delivery or acceptance of the child without the social worker's presence is a criminal act, again carrying a one-year prison sentence. The adoption request

[108] Section 13.
[109] Section 10(a).

will then be approved by the court, unless to do so would be manifestly against the best interests of the child; the commissioning couple will then be recognised as the parents of the child in all respects.[111] If the commissioning couple 'withdraw' from the agreement, the default position is that the surrogate will become the legal guardian of the child. Where she too refuses to care for it, the child will be taken into the care of the state.

The approach taken by the Israeli Knesset was necessarily detailed because of the unique religious interests and practices that the law had to satisfy. It is also thought 'rare for an Israeli couple to accept a childless life, in a culture that so highly values children and family'.[112] For this reason, IVF is described as 'commonplace' in Israel, and fertility services are fully covered by health insurance.[113] The same reasoning is probably behind the recognition of surrogacy. Because there is such attention paid to many elements of surrogacy, including how the arrangements are to be made, how payments are legitimised and the status of the child, the Israeli law makes an interesting comparison to the

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[110] Section 11.

[111] It could reasonably be presumed that the surrogacy arrangement will not be known about by the child. Israel has had a policy of secrecy and anonymity following conception by gamete donation (although not in adoption, being the first country to permit adoptees access to their birth and adoption records at the age of 18), and it was intimated by Ruth Landau ('The Management of Genetic Origins: Secrecy and Openness in Donor Assisted Conception in Israel and Elsewhere' 13 (11) *Human Reproduction* 3268-3273, 3272) that this would also apply to surrogacy. However, the law provides that a register of surrogate births must be kept in which the names of the intended parents, the surrogate and the child are recorded. Access is permitted to the child at the age of 18 and the Registrar of Weddings can also check the records to ensure that a surrogate-born child does not marry the genetic child of the surrogate, as they are regarded as siblings (Deborah Honig *et al*, n 98 above, 5).

[112] Deborah Honig *et al*, *ibid* 1. The authors later note that in the first three years of the Act's operation, 73 couples filed applications to enter surrogacy arrangements, of which 50 were approved.

[113] Deborah Honig *et al*, *ibid*.

way surrogacy has been regulated in the UK, the only other country to have produced detailed and specific facilitative surrogacy legislation. It seems that state-regulated surrogacy has been successful in Israel, with 90 arrangements having been approved out of 108 applications and 30 babies born to surrogates for 22 commissioning couples (all of whom have been Jewish) in the period between the law's enactment and May 2001.[114] Perhaps this is an indication that some level of direct state intervention in surrogacy arrangements is desirable.

5) The USA

The United States of America has, without doubt, been central to the development of the surrogacy debate. America was involved in surrogacy from an early point; it has been said that

> '[s]ince the late 1970s, several American individuals and agencies [became] interested in organising surrogate transactions and have offered such services as recruiting women, screening and counselling them and arranging for their insemination on behalf of clients wishing to commission a child'.[115]

As with Canada and Australia, state legislatures are largely responsible for any regulations dealing with health provisions. There is no central federal legislation

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[114] *The Jerusalem Post* 'Surrogacy: Bearing the Greatest Gift of All' 27 May 2001.
[115] Peter de Cruz, n 9 above, 460.

pertaining to issues in assisted reproduction, including surrogacy.[116] In the United States, the legislation of many of the individual states once tended to be generally favourable towards the use of surrogacy as a treatment for infertility or involuntary childlessness. In the early part of the 1980s, following the development of a number of agencies offering various surrogacy services, and at about the time that American commercial surrogacy agencies were causing problems in the UK, many American states were on the way towards the total legalisation or formal regulation of the practice.[117] In 1980, there had been a well-publicised and successful surrogacy case that served to put the practice in a good public light.[118]

Despite the early success and favour that surrogacy found in the US, controversies soon arose. In 1981 a dispute arose between a commissioning couple and a surrogate, Denise Thrane, who changed her mind about giving up the child during the pregnancy. Although there was initially a dispute over the custody of the child, this became overshadowed by the revelation that the commissioning mother was a transsexual. The commissioning father, who was also the genetic father of the child, withdrew his paternity claim, but the judge

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[116] This is despite, as Robert Lee and Derek Morgan point out (n 2 above, 285) 'over 20,000 conceptions following IVF treatment each year'. They also note (285-286) that a Uniform Law (draft provisions proposed by the American Law Institute, which states can, but do not have to, adopt) called the Uniform Status of Children of Assisted Conception Act (USCACA), promulgated in 1988, provides for court-approved surrogacy arrangements. The Act has been adopted in two states.

[117] See R. Alta Charo, 'United States: Surrogacy', in Sheila McLean (ed.), *Law Reform and Human Reproduction* (Aldershot: Dartmouth, 1992).

[118] Elizabeth Kane is said by Peter de Cruz (n 9 above, 461) to have been the first known commercial surrogate in the USA. Her reasons for becoming a surrogate were apparently 'her

went ahead to say that it was likely he would have ruled in favour of the surrogate because of legal provisions for artificial insemination which stated that if sperm was used by someone other than the man's wife, he was not to be treated in law as the father of the child.[119] Cases such as these highlighted that some problems could be encountered in surrogacy arrangements, but came before the more infamous case of 'Baby M' in 1987 and 1988,[120] after which many states sought either to introduce legislation to ban surrogacy outright, or at least to extensively limit the practice.[121]

a) Baby M

In the 'Baby M' case, a woman, Mary Beth Whitehead, agreed to become a surrogate to provide a child for the Sterns, a childless couple. Mary Beth Whitehead signed a detailed surrogacy contract, under which she was to be paid $10,000 plus expenses. An agency was paid $7,500 to facilitate the arrangements and draw up the contract. Mary Beth Whitehead became pregnant after being artificially inseminated with the semen of William Stern, the commissioning father. She carried the baby and gave birth to it in March 1986, when she then refused to give it to the commissioning parents. This became front

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'Christian life' and 'sisterhood' and that she felt becoming a surrogate gave childless people new hope'.

[119] For a more detailed summary of the case, see Peter de Cruz (*ibid*). He adds that a similar decision was reached by a Michigan court in 1981. In this case a judge refused to declare the genetic father to be the legal father because of the presumption that a woman's husband is the father of any child that is born to her.

[120] *In the matter of Baby M* [1987] 13 Fam. L. Rep. (US) 22, 2001; *Re M* (1988) 109 NJ 396; (1988) 537 NJ 396 (*Baby M*); *In the matter of Baby M* (1988) 537 A 2d 1227 (NJ Sup Ct).

page news in America when she resorted to desperate measures to keep the child, 'first absconding with her out of the State involving a car chase that was covered by national television and then going to court to oppose the Sterns'.[122] The Sterns had taken legal action against her to gain custody of the baby.

In the protracted custody battle that followed, Mary Beth Whitehead claimed that she should be able to keep the child because she was its natural mother. In the first instance, the New Jersey Superior Court held that the surrogacy contract should be fulfilled, as it was valid and enforceable. William Stern was declared to be the child's father and was awarded permanent custody. The surrogate's parental rights were terminated, and Mrs Stern was made the legal mother of the child by adoption. The legal reasoning for the court's decision was that the 'best interests' of the child would be better served by being brought up by the Sterns. Although the Sterns were economically better off, presumably at least some of this decision was based on the negative opinion of Mary Beth Whitehead that had been formed by the judge. Having found that she had lied to the Sterns, threatened them with suicide and accusations against Mr Stern, Judge Sorkow called her 'domineering', 'manipulative', 'exploitative' and 'evil'.[123] Mary Beth Whitehead appealed against this decision, and fought what was to be a 'long,

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[121] A recent newspaper article says that 'paying for babies' in surrogacy 'is only illegal in six states' ('Surrogacy: Cash for Dignity' *The Boston Herald*, 5 March 2003).
[122] Peter de Cruz, n 9 above, 463.
[123] Peter de Cruz, *ibid* 463-4. In contrast, Elizabeth Stern was portrayed as a 'perfect mother figure' – for a discussion of the constructions of the two potential mothers, see Hazel Biggs, 'Madonna Minus Child. Or – Wanted: Dead or Alive! The Right to Have a Dead Partner's Child' 5 (2) *Feminist Legal Studies* 225-234, 232, and generally, Valerie Hartouni, 'Reproducing Public Meanings: In the Matter of Baby M' in *Cultural Conceptions: On Reproductive Technologies and the Remaking of Life* (Minneapolis: University of Minnesota Press, 1997).

bitter and public battle' through the courts.[124]

The decision that the parties should be held to their contract was eventually quashed by the Supreme Court of New Jersey following an appeal by Mary Beth Whitehead and her husband. The contact was found to be in contravention of the prohibition of payments in adoption and other adoption laws and the adoption of 'Baby M' by Mrs Stern was overturned. All surrogacy contracts were said to be void as they were contrary to public policy. However, the decision that 'Baby M' should remain with and be brought up by the Sterns was upheld. Again the decision was said to reflect the perceived best interests of the child, as placement with the Sterns would give a more 'secure' and 'nurturing' home life.[125] Mr Stern was then awarded full custody, although Mary Beth Whitehead was recognised as the legal mother and was given visitation rights. The determination of the child's best interest in the 'Baby M' decisions seem to have followed the exact opposite of the emphasis that has been placed on best interest in surrogacy cases in the United Kingdom. Here, in the event of a dispute, it would be unusual for the courts to decide that a child's best interests were not with its 'natural' mother, the woman who gave birth to the child. Even where it may be shown that the commissioning couple are in a better social or economic position to bring up a child, the bond that it is perceived that the child has with its birth mother is regarded as being more important by the UK courts. It is also unlikely that a court would find that a child's best interests would be served by its having

[124] Margaret Brazier, *Medicine, Patients and the Law* (London: Penguin Books, 2nd ed, 1992) 285.
[125] Cited in Peter de Cruz, n 9 above, 465.

contact with the party that is not to bring it up. For example, in *A v C*,[126] although contact rights were initially given to the commissioning father (who was also the genetic father), these were later taken away.

In the wake of the unfavourable publicity of the 'Baby M' case, and the public controversy which surrounded it, the state of New Jersey, and many other states, legislated either to prohibit or to seriously restrict surrogacy in an attempt to prevent such a situation recurring. Peter de Cruz states that '[s]omething like 11 states [of America] have now prohibited commercial surrogacy, but some states have not even addressed the surrogacy question at all'.[127] Jamie Levitt explains that surrogacy legislation across the individual states of America 'may be divided into three categories: outright prohibitions of surrogacy, exemption of surrogacy from other legislative provisions, or regulations of the surrogacy process'.[128] Charo says that the 'approaches taken by state legislatures may be broadly grouped into five categories: static, private ordering, inducement, regulatory, and punitive'.[129] Some states, however still fully allow the practice of surrogacy, or have few restrictions. Others may have legislated against surrogacy but the practice may still operate for a number of reasons; de Cruz gives examples:

> '[c]ertain states, like Kentucky, prohibit surrogacy programmes and

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[126] *A v C* [1985] FLR 445.
[127] Peter de Cruz, n 9 above, 460.
[128] Jamie Levitt, 'Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, 465. Levitt continues with specific examples of how particular states have dealt with surrogacy.
[129] R. Alto Charo, n 117 above, 239.

> also prohibit receiving payment in exchange for termination of parental rights. However, it seems that the law largely goes unenforced. Oklahoma law says that, if the husband and wife consent to an egg donation, the resulting child is theirs. By having the surrogate husband deny consent, the law is effectively nullified. The law of Arizona criminalised all forms of surrogacy, whether paid or unpaid, but this law was held unconstitutional by the Arizona Supreme Court in 1994'.[130]

It seems that other states have legislated against aspects of surrogacy only. For example, there are states which allow the practice of surrogacy but say that surrogacy contracts are unenforceable.[131] In summary of the current situation, it is said that

> '[a]lmost half of the states have legislation dealing with surrogacy, some criminalising participation in arrangements and/or in brokering, some explicitly permitting 'altruistic surrogacy' and a few (e.g., Florida, new Hampshire, Nevada and Virginia) either expressly allowing commercial surrogacy or (while forbidding 'payments' to surrogates) permitting payment of broadly defined 'expenses''.[132]

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[130] Peter de Cruz, n 9 above, 460.
[131] Peter de Cruz, *ibid.* Interestingly, he points out that '[t]hese laws would, in any event, only apply if both the couple and the surrogate are from the same state'.
[132] R.G. Lee and D. Morgan, n 2 above.

However, there are also examples of very permissive state legislation, especially with regard to the determination of legal parenthood of the children born following surrogacy arrangements or assisted reproduction. This is a situation specifically addressed by legislation in Florida where Statute 724.14 says of parenthood following surrogacy that 'the couple agrees to accept custody of and assume full parental rights and responsibilities immediately upon the child's birth regardless of any impairment of the child'.[133] The most recent development on this front is found in section 5(1)(5) of a bill for a Minnesota Assisted Reproduction Act,[134] which states

> 'the prospective gestational surrogate and spouse, if any, and a known donor, if any, relinquish all rights and are free of all duties as the parents of any children conceived through assisted reproduction and are not the parents of any such children for any purpose'.

Section 5(1)(6) continues:

> 'the intended parent or parents become the parent or parents of any child or children conceived through assisted reproduction, regardless of the number, health, or physical condition of the

[133] Cited by Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) 269, note 31.

resulting child or children'.

The Bill would also authorise gestational surrogacy (where the surrogate did not use her own genetic material),[135] and enforce arrangements,[136] including provisions for payments,[137] counselling[138] and confidentiality.[139]

b) The Californian approach

Other American court decisions on surrogacy highlight the differences in approach taken by the various states. In *Johnson* v *Kelly*, a Californian court held that the legal mother of a child in a full surrogacy arrangement is the genetic mother. This is in direct comparison to the law in many other US states and in the UK.[140] Peter de Cruz states that 'every other country which has examined this problem has concluded that the woman who gives birth is the 'natural mother' of the child in a gestational [full] surrogacy. Apart from the UK, these countries include Germany, Switzerland, Bulgaria and South Africa'.[141] A similar decision on parenthood has been reached in a more recent Californian case involving full surrogacy.[142] This decision 'highlights the advances and changes that surrogacy

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[134] Minnesota House of Representatives, Bill No. 792, March 2003.
[135] Section 2 (9).
[136] Section 5 (6), subject to prior court approval.
[137] Section 5 (1) (6) (b-e).
[138] Section 3.
[139] Section 5 (8).
[140] For example, the UK's Human Fertilisation and Embryology Act, section 27.
[141] Peter de Cruz, n 9 above, 468. His evidence for this is unclear, especially given that full surrogacy is made illegal in Germany by Article 1(2) of the Embryo Protection Act 1990.
[142] *Johnson v Calvert* 286 Cal Rptr 369 (Cal Ct App 1991), discussed previously in Chapter 4, above.

has undergone since the 1987 Baby M decision'.[143] In this case, a dispute occurred during the surrogate pregnancy and the surrogate, Anna Johnson, decided that she would not hand over the child when the time came. Both the commissioning parents, Mark and Crispina Calvert, and the surrogate filed claims to parenthood and custody. Anna Johnson sought a declaration that under the law of the state of California, the woman who gave birth to a child was to be regarded as its mother. The Calverts argued that, as the child's genetic parents, they were entitled to exclusive parental rights.[144] The court of first instance ruled that the Calverts were the child's 'genetic, biological and natural' parents, and that the surrogate had no parental rights over the child.[145] The surrogacy contract, voluntarily entered into and signed, was to be enforced. The decision was affirmed upon appeal.

Anna Johnson then further appealed to the Supreme Court of California, but her appeal was again dismissed. The Supreme Court held that Crispina Calvert was the natural mother of the child, after considering two potential methods of determining motherhood. Using the Uniform Parentage Act of 1975, the court found that both genetic and gestational motherhood could be used to determine the 'natural' mother of a child. In the circumstances, both the commissioning mother and the surrogate would have had equal claims. The court had to decide between them as Californian law allowed there to be only one mother, despite

[143] Jamie Levitt, n 128 above, 454.
[144] A good account of the first instance case, the issues raised and the arguments relied on is given by Jamie Levitt, *ibid* 451-454.

advances in reproductive technology which could enable the genetic and gestational mothers of a child to be different women. In making the decision, Panelli J reasoned that

> 'when one woman is the genetic mother of the child and a different woman is its gestational mother, the issue of who is the child's 'natural mother' at law is to be resolved by inquiring into the parties' *intentions* as manifested in the surrogacy agreement. The woman who intended to procreate the child – she who intended to bring about the birth of a child whom she intended to raise as her own – is the natural mother under Californian law'.[146]

It was also held that this decision did not run contrary to public policy on grounds of payment for adoptions, commodification of children, 'involuntary servitude' or other exploitation of women. Thus, it appears that *Johnson* v *Calvert* has set a precedent, albeit only in California, that the genetic mother, as the *intentional* mother, is to be recognised as the mother of any child born to a surrogate where there are competing claims.[147] It seems, however, that this will only apply to full

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[145] It seems here that a distinction was possibly drawn between 'genetic' and 'natural', meaning that the genetic link was not the only consideration the court based their decision on.
[146] *Per* Panelli J [ref], Lucas CJ, Mosk, Baxter, George and Arabian JJ concurring. Emphasis added.
[147] On 12 October 2001, the Supreme Judicial Court of Massachusetts ruled unanimously (overturning a lower court decision) that Marla and Steven Culliton, the genetic parents of twins born to a surrogate, should be named on the birth certificate. The *Boston Globe* reported that the court 'is apparently just the second state high court to rule that a woman who agrees to be a gestational carrier, but is not genetically related to the babies, is not the legal mother. Legislatures in a few other states, including Florida and Illinois, have made similar determinations'. ('Ruling Backs Genetic Parents' 13 October 2001) Thus it seems that when

surrogacy: in partial surrogacy the commissioning mother is not the genetic mother, and will not have a competing claim to motherhood under the Uniform Parentage Act. It may be possible to extend the concept of intention, however, as it does seem that it would apply to any commissioning mother (or father), genetically related or not.[148]

Examples of surrogacy cases in America serve as a reminder of the difficulty in finding legal consensus, or legislative consistency on the issue of surrogacy. The 'need for uniform regulation of surrogacy and other reproductive technologies' was highlighted by the first instance judge in *Johnson* v *Calvert*.[149] In a federal system, however, each state must set its own rules and some are bound to be more tolerant than others. For this reason and because of an increase in its use, there have been calls for acknowledgement of surrogacy by the Federal Government to avoid the 'disparate' treatment of it by individual states.[150]

Amongst this disparity, the Californian regulatory example clearly stands out. California has become the most notable of the American states that do allow

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intentional parenthood mirrors genetic parenthood, the American courts and legislatures are moving towards an intention-based parenthood, both where there is dispute (*Johnson* v *Calvert*) and where there is not. It remains to be seen how a partial surrogacy case would be decided.

[148] *In re the Marriage of Buzzanca* (1998) 61 Cal App 4th 1410 (Cal CA), discussed in the previous chapter, a Californian appeal court, in determining child support provisions after a divorce, held that the intended parents of a genetically unrelated surrogate-born child were the legal and natural parents of the child.

[149] Jamie Levitt, n 128 above, 454.

[150] Jamie Levitt, *ibid* 455. But federal legislation may prove to be difficult in any case, given the reluctance to provide federal funding for research and development in this sort of area, an idea briefly touched upon by R.G. Lee and D. Morgan, n 2 above, 287. Consequently, 'research and treatment services (where they do take place) are private sector, market driven and market provided, where the 'entrepreneurial' activities of American scientists and reproductive specialists become more difficult to regulate at a federal level'.

surrogacy to operate. The state laws appear to be facilitative of closely supervised surrogacy arrangements, and supportive of those arrangements that may have been privately made, especially in the case of full surrogacy. Elements of the Californian system could provide inspiration for any future regulation of surrogacy in this country. Current law in the UK provides that only the gestational mother can be regarded as the legal mother of a child born from a surrogacy arrangement[151] and that surrogacy contracts are unenforceable.[152] The intention to procreate is not recognised. Californian law shows that there is the potential to use intention as the deciding factor in determining the parenthood of children born following surrogacy arrangements. This potential, as part of a theme running through this thesis, will be further discussed in the following chapter.

6) Conclusions

As Robert Lee and Derek Morgan say, 'the global nature of the reproduction revolution makes the lack of attention to concerted international legislation perhaps more surprising than would be its presence'.[153] But to regulate surrogacy on an international basis would be both extremely difficult and likely to create, rather than prevent, problems. The disparity of regulation of surrogacy between jurisdictions (and within them) is not only an indication that different nations (or states) have different preferences and presumptions when it comes to what a family is and how it should be (or should not be) created, but shows once

[151] Human Fertilisation and Embryology Act 1990, section 27.
[152] Surrogacy Arrangements Act 1985, section 1A, as inserted by HFE Act 1990, section 36.

again that surrogacy is a difficult and sensitive area when it comes to legislation. There are, both within continents and across the world, differences between countries 'of a philosophical, economic and social nature which are not easily (even if desirably) bridged'.[154] This therefore means that effective regulation of surrogacy must take place within the boundaries of different states, and reflect the concerns that each state has about the practice, while taking into account the interests and rights of the parties involved. This is not to say that jurisdiction in some countries might not inform the development of regulation in others, and indeed there is a strong case for arguing that before future regulation takes place, the best and the worst elements of the legislation and case law of other jurisdictions ought to be at least considered.

Examining the approaches taken by other jurisdictions can perhaps, therefore, partly inform us how to (and how not to) regulate surrogacy in our own country. We may wish to consider the idea of intention-based parenthood, relied upon in Californian courts (and elsewhere) in full surrogacy arrangements, when we legislate for surrogacy in the future. Additionally, we could consider the potential for state-authorised surrogacy arrangements, as in Israel and under the proposed new state legislation in Minnesota. This does not have to take the same format, but could involve licensed bodies that 'authorise' arrangements, provide for counselling, and regulate payments and procedures. We may wish to consider the enforcement of surrogacy 'contracts', as was proposed in Ontario

[153] R. G. Lee and D. Morgan, n 2 above, 270.
[154] R. G. Lee and D. Morgan, *ibid* 270-271.

and Minnesota in conjunction with the above. What we can also learn, as evidenced by legislation and the first litigated case in Australia, is that not to regulate surrogacy efficiently and fairly may, in the long term, create more problems and disputes. If surrogacy were offered as a legitimate medical intervention, and arrangements were facilitated by the law rather than prevented or discouraged by it, fewer disputes may arise. In previous chapters it has been shown that surrogacy presents fewer problems than were anticipated when it was drawn to public attention in the 1970s and 1980s. It has also been shown that, in a minority of surrogacy arrangements, problems do arise, but that these can be taken into account by future legislation. It is time to re-regulate, so let us also be aware of the consequences of both past and overseas regulation as we do so.

Chapter Six

Disputes in Surrogacy and Methods of Resolution

Introduction

History confirms that the predictions of those opposed to surrogacy have not materialised. As a result, it is now vital that the law reassess the practice in the light of all the evidence available and the current needs of infertile people who might seek to use surrogacy. Individualised problems that have been identified with the practice, for example those resulting from particular cases, can also be dealt with within the framework of a new model for surrogacy regulation. Additionally, problems that have occurred, or elements of legislation that has been passed in other jurisdictions, such as were identified in the previous chapter, may also inform the way we are to progress. This chapter proposes a number of potential future models that could be included in such regulation and compares them to the way that surrogacy has so far been regulated in this country.

Aside from the general misgivings voiced by some sections of society, disputes in surrogacy are generally seen to occur between the woman acting as surrogate and the commissioning couple. Probably the most common reason is the failure of the surrogate to surrender the child as agreed. This can happen after the birth

of the child,[1] or she may decide this during the pregnancy.[2] Other reasons for disputes between the parties to a surrogacy agreement might include behaviour or actions taken by the surrogate, such as smoking, drinking or taking drugs through the pregnancy, when she had agreed to abstain. She might also use her position to try to extort money from the commissioning couple. Conversely, the behaviour of the commissioning couple might also cause disputes. They may place unreasonable demands on the surrogate or withhold payments to her if something is done or not done by her. Dispute has, for example, previously arisen over the number of babies carried by the surrogate and the willingness of the surrogate to abort multiple foetuses.[3] However, it is not true to say that there are a large number of disputed surrogacy cases. Emily Jackson points out that '[c]ontrary to the prophecies of many of its critics, disputes between surrogate mothers and commissioning couples are in practice rare',[4] and highlights the fact that it is only the failed cases that tend to attract media attention.

When there are irreconcilable surrogacy disputes, where a private agreement cannot be reached, court action is needed to resolve them. Disputes that involve the refusal of the surrogate to part with the child generally come down to a

[1] As in *In the matter of Baby M* (1988) 537 A 2d 1227.
[2] As in *Johnson* v *Calvert* 286 Cal Rptr 369 (Cal Ct App 1991).
[3] Helen Beasley, a British surrogate, became pregnant with twins. There was an agreement that if the commissioning couple decided to abort one of the foetuses before 12 weeks, the surrogate would do so. The commissioning couple did not decide upon this until the 13th week and the surrogate refused to abort. The commissioning couple then abandoned the agreement and Ms Beasley sued; see 'Surrogate Mother Sues Over Demand for Abortion' *The Independent*, 11 August 2001, www.independent.co.uk/story.jsp?story=88203. Also see *W and B* v *H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008, where the discovery that the surrogate was carrying twins resulted in dispute and the surrogate eventually pulling out of the agreement.

question of who are the child's parents and how the welfare of the child would best be served. Again, however, although the majority of surrogacy cases that are known focus on this event, there is 'little evidence to suggest that women regret agreeing to be surrogate mothers'.[5] Where this type of dispute does happen, it seems that there is no real consensus on the issue in the courts. Some courts have held that it is best for the child to maintain the perceived bond between child and birth mother over and above all other potential claims.[6] In the UK, the birth mother is always regarded as the legal mother of the child, and decisions as to custody and parenthood following a surrogate's refusal to surrender the child tend to favour her unless there are definite welfare indications that the court should do otherwise. Courts in the US have applied different motherhood criteria to a surrogacy case.[7] Some courts have decided that the welfare of the child would be best served by its being placed into something that resembles a traditional nuclear family environment.[8]

As a result of decisions in the courts (and here it must be added that the

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[4] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) 264.
[5] Emily Jackson, *ibid* (note 12).
[6] In *Re P (Minors) (Wardship: Surrogacy)* [1987] 2FLR 421, the issue of whether a surrogate mother can change her mind was dealt with after the surrogate refused to hand over twins that she had carried in a partial surrogacy arrangement. Sir John Arnold, President of the Family Division, identified that, despite the fact the material welfare of the children would be better served by the commissioning parents, the surrogate had the stronger case as the twins had lived with her for five months and had bonded with her. He said that he found nothing that would 'outweigh the advantages to these children of preserving a link to the mother to whom they are bonded, and who had exercised a satisfactory degree of maternal care'.
[7] For example, in *Johnson* v *Calvert* 286 Cal Rptr 369 (Cal Ct App 1991, discussed in the previous chapter) the decision had to be made between two definitions of motherhood given in statute, one prioritising birth and the other genetics. The commissioning mother was the genetic mother and so both she and the surrogate could adduce evidence of motherhood using the different rules.

comparison is drawn in the majority from court decisions in the UK and the US) neither of the parties to a surrogacy arrangement can be sure what the outcome would be if their dispute were to come to court, although it can be assumed that it would usually be the surrogate who retains custody of the child if the dispute arises because she is unwilling to give it up.[9] Family cases, more than others, are decided on the basis of their individual facts and on a case-by-case basis. Precedent plays a minor role, hence different outcomes can be achieved, and the only truly constant factor is the court's reliance on the welfare principle in the event of a dispute, which is arguably applied inconsistently. It also does not produce results consistent with non-disputed surrogacy arrangements.

It has been argued in previous chapters that new surrogacy legislation should be enacted. Given the usefulness of hindsight in showing that the practice is less fraught with difficulty and has less propensity for danger (in terms of exploitation, commodification, etc) than it was once believed, it can be argued that legislation must make the final outcome of surrogacy arrangements more predictable, objective and consistent. Because surrogacy does not necessarily harm those (solely or in the collective) that it might have been thought to, and because it still remains an option of last resort for a number of people who cannot have children in other ways, access to and support in making agreements should be facilitated

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[8] *Re C* [1985] FLR 445; *In the Matter of Baby M* (1988) 537 A 2d 1227.

[9] However, in *W and B* v *H (Child Abduction: Surrogacy)* (No. 2) [2002] 2 FLR 252; [2002] Fam Law 501, Hedley J authorised the removal of twins born to a British surrogate and their being taken to California (where the intending parents lived and where the surrogacy arrangement had been entered into), acknowledging that California was the correct jurisdiction in which the case should be decided, despite the fact that the surrogate had returned to England, changed her mind about the agreement and resolved to keep the children.

and the settlement of disputes in surrogacy and the basing of decisions subjectively on the welfare principle is also something that should be reconsidered when determining how best to regulate surrogacy. Parenthood following surrogacy arrangements should be allocated to the commissioning or intending parents – it is not self-evident that this would have negative implications for the welfare of the child. In terms of consistency, which persons play the role of parents should not be based on case-by-case assessments, but provided for by the law by reversing the current presumption. There may still be surrogacy disputes, but these would come after the event and the burden should be on the surrogate to show that parenthood should be altered and awarded to her.

1) The potential of contracts: resolving or preventing disputes

> '[I]f we consider adoption together with the subsequent innovation of artificial insemination, we find a trend from status (biological predetermination) to contract in the constitution of the legal family. In other words, individual autonomy in determining the consequences of reproductive activity, rather than biological connection, becomes a fundamental principle of the legal definition of parenthood. This trend stops, however, at surrogacy'.[10]

[10] Carmel Shalev, *Birth Power: The Case for Surrogacy* (New Haven: Yale University Press, 1989), 11.

In the interests of consistency in the treatment of the parties to a surrogacy arrangement (which, it will be remembered from discussion in chapter four, above, has not been provided by the parental order mechanism), there is room to question whether there could be a uniform method of resolving (or preventing) disputes in surrogacy, including the question of legal parenthood, which will be discussed in more depth in chapter seven. All aspects of surrogacy arrangements made in the UK are unenforceable – this is a central tenet of our regulation,[11] and it has been suggested that the intention behind maintaining the unenforceability of all surrogacy arrangements is to further discourage the practice of surrogacy: 'surrogacy contracts will seem precarious, and people will be unwilling to risk so much upon such a patently insecure arrangement'.[12] If the deterrence of surrogacy is required as a primary purpose of legislation then it can be argued that we should maintain this function of the existing law. If, however, as previous chapters have shown, it can be argued that deterrence of surrogacy is not manifestly necessary, then the rigid and absolute unenforceability of all surrogacy arrangements needs to be reappraised.

Some commentators have indeed suggested that there is scope for the law of obligations to be applied to surrogacy arrangements[13] and there are also

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[11] Surrogacy Arrangements Act 1985, section 1A (as amended by the Human Fertilisation and Embryology (HFE) Act 1990, section 36); 'no surrogacy arrangement is enforceable by or against any of the persons making it'.

[12] Emily Jackson, n 4 above, 308.

[13] See generally Emily Jackson, *ibid*; Marjorie M. Schultz, 'The Gendered Curriculum: Of Contracts and Careers' (1991) 77 *Iowa Law Review* 55 and 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' (1990) *Wisconsin Law Review* 297; Janet L. Dolgin, 'Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate' (1990) 38 *Buffalo Law Review* 515.

examples of written contracts being used in some surrogacy cases or referred to when there is a dispute.[14] Even if surrogacy arrangements were not explicitly called 'contracts', it is arguable that they might still be encompassed by contract due to their relational nature, in a similar way to other relational contracts, in that agreements can be implied.[15] Since this may be the case, it is apparent that there might be some logic in allowing the operation of formal (enforceable) contracts within surrogacy arrangements. While arguing in favour of the use of binding contracts in surrogacy might, at first, seem distasteful, this section seeks to show that there is a potential for grounding the regulation of surrogacy arrangements in contract, relying on the principle of freedom of contract and the built-in ability of contract law to police unconscionable bargains. It will show that surrogacy arrangements can be generally defined as contracts and will discuss the application of specific contractual principles and remedies to surrogacy disputes. It is intended that this will further demonstrate that it is not necessary for all surrogacy arrangements to be unenforceable and that there is the potential, using already well-established principles of contract law, to regulate surrogacy both equitably and consistently.

Although it is 'undoubtedly true that contractual ordering is often assumed to be an inappropriate way to organise domestic relationships',[16] it is not at all clear

[14] *In the Matter of Baby M* (1988) 537 A 2d a very detailed surrogacy contract was used, an extract of which can be found in Kennedy and Grubb, *Medical Law* (London: Butterworths, 3rd ed, 2000), 1364-1367.
[15] See further John Wightman, 'Intimate Relationships, Relational Contract Theory, and the Reach of Contract' (2000) 8 (1) *Feminist Legal Studies* 93-131.
[16] Emily Jackson, n 4 above, 309.

why this should necessarily be the case, especially when agreements are made in which parties perform 'domestic' services for another. In any case, it might well be argued that a surrogacy arrangement is not a 'domestic relationship' but a business arrangement or the contract for the provision of a service, especially if it takes place between strangers operating at arm's length. Seemingly, it is only because a birth is involved that the 'domestic' label is attached to surrogacy, in which case it can be argued that a surrogacy arrangement should be more precisely constructed as a transaction between two parties in the same sense that a contract with a fertility clinic would be. It seems relatively unproblematic to describe a surrogacy arrangement as a type of contract: two parties enter into a reciprocal agreement that one will conceive and bear a child for the other, usually for some form of remuneration. There is an initial offer: either this comes from the commissioning couple (perhaps to pay) or from the surrogate (to conceive, bear and hand over the child). Acceptance of the offer is met with consideration, forming a bilateral agreement before any performances begin.[17] Even if there was no payment involved consideration could be found for the surrogate's offer to have the child: the burden of raising the child will be taken from her as her parental rights and obligations are transferred, therefore, there is still some form of exchange. Furthermore, in a surrogacy arrangement, express terms can, and

[17] Consideration has been variously described. One traditional definition says that 'a valuable consideration, in the eyes of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other' (*per* Lush J, *Currie* v *Misa* (1875) LR 10 Ex 153, 162). It would also be possible to construe the contract as unilateral, especially if phrased 'if you carry and give birth to a baby for us, we'll pay you'. However, it would provide more security for a commissioning couple to ensure a bilateral agreement was reached, so as to oblige the surrogate (generally) to perform. It is unlikely to matter, however, how the elements of the agreement are made up. The courts will

are likely to, be added to the agreement, such as terms requiring the surrogate not to smoke, to attend certain medical examinations, to allow amniocentesis or other medical procedures during pregnancy, or to undergo an abortion if the commissioning couple so choose.[18] It may also be that there are terms which would be implied into surrogacy contracts even if not expressed, in order to make the contract make sense,[19] for example, or as a matter of policy that a particular term should be implied into a contract of this type.[20]

Currently, where an argument about the enforcement of a surrogacy agreement based on a supposed 'contract' might fall down is the requirement in law that a contract should be supported by the intention of the parties to enter legal relations.[21] If an intention to create legal relations between the parties to a surrogacy arrangement can be identified, this becomes another reason to question why contracts for surrogacy are unenforceable. The test to find legal intention is an objective one: if a reasonable person would have thought that the

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decide a dispute according to what criteria they apply (e.g. intention, welfare, genetics). In this situation it may not matter *how* an agreement is formed, just that one *has been* formed.

[18] It is, however, unlikely that any term taking away the surrogate's ability to control her own body would be supported, particularly any which purported to take away her right to an abortion. Margaret Radin has argued that the choice of having an abortion is not commodifiable ('Market Inaliability' (1987) 100 *Harvard Law Review* 1849, 1934). Additionally, Joan Mahoney has argued that '[t]he prospect of women being forced to undergo medical procedures against their will is truly horrifying' ('An Essay on Surrogacy and Feminist Thought' in Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1990) 183-197, 187).

[19] *The Moorcock* (1889) 14 PD 64. It is interesting to note that in such situations where a term has not been expressed, the courts imply terms to reflect the parties' *intentions* under the contract.

[20] *Liverpool City Council* v *Irwin* [1976] 2 All ER 39.

[21] This is described as an agreement 'having been made in the contemplation of legal consequences' (J. Beatson, *Anson's Law of Contract* (Oxford: Oxford University Press, 27th ed, 1998) 70). Arguably, the parties involved are more likely to have contemplated the legal consequences of their arrangement *if* surrogacy arrangements were made enforceable.

agreement made would give rise to legal obligations, the parties will be bound.[22] However, due to the nature of the agreement, such intention is not likely to be presumed in a surrogacy arrangement.[23] This intention is possibly the most important element in arguing that surrogacy arrangements should be supported and enforced by law – if both the surrogate and the commissioning couple have the intention to make their agreement legally recognised or binding, why should this not be acknowledged? Recognition of the parties' intent, particularly in the face of a dispute, is currently lacking in law. The argument against enforcement is based in public policy objections in the event of a change of mind by the surrogate. However, surrogacy is not necessarily exploitative, nor does it commodify the child or reproduction in general. On this basis, women should have their autonomous decisions respected when entering agreements, and it might be asked what policy reason commands that all surrogacy contracts remain unenforceable, particularly because such a change to the law would not be made in isolation, but within a framework of legislation designed to maximise the benefits of surrogacy while protecting those who may be vulnerable.

If the contractual model were to be followed in the regulation of surrogacy, then it

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[22] *Carlill* v *Carbolic Smoke Ball Co.* [1893] 1 QB 256. There can be dispute over the existence of intention, or parties can state that they do not intend to have legal obligations from their agreement. In addition, 'the context in which an agreement is made, what was said when it was made, and the vagueness of the language used, may be held to be inconsistent with an intent to contract, although, where the agreement is made in a commercial context, the onus on a party who asserts that an agreement was made without intent is a heavy one' (J. Beatson, *ibid* 72).

[23] An intention to create legal relations is inferred in commercial contracts but not in domestic agreements. This lends weight to the assertion that surrogacy should be regarded less as a 'domestic' arrangement and more like a business transaction. However, Laurence Koffman and Elizabeth Macdonald point out that 'although the word "intention" is used, the test is really one of judicial policy' (*The Law of Contract* (Croydon: Tolley, 4th ed, 2001) 79).

might perhaps be more evident that parties entering surrogacy arrangements would have the intention to be legally bound given that the knowledge that contracts would be enforced may act as a deterrent to those who were not wholly certain. In circumstances where the intention is clear, the argument for enforcing the contract is strong: this means that the allocation of parenthood to the commissioning couple should also be supported, as will be argued in the following chapter. In addition, if a surrogate expressly agrees to contract away elements of her bodily autonomy, voluntarily and in full knowledge that she does so, and in return for some form of consideration, she should both be allowed to do so and her agreement should be legally recognised.

a) Policing the bargain

If surrogacy arrangements were to become enforceable contracts, this would confer upon the parties involved an additional layer of protection. Allowing enforceability is not the same as preventing all disputes – there may, for example, be disputed cases which arise from situations in which the surrogate claims she did not know all the terms of the contract, or was pressured into accepting them. As with contracts in general, a contract for surrogacy or particular elements within such a contract could, in some circumstances, be deemed unenforceable, thus offering protection to the parties who enter such an agreement. For example, if the woman acting as surrogate had not entered into the agreement voluntarily, or in full knowledge of the circumstances, she could

argue that the contract had been vitiated by her lack of true consent. Therefore, if she entered the contract under duress, or had been unduly influenced, she would be able to set the contract aside if she so wished.[24] Furthermore, if it were found that the contract contained unfair terms, either party affected by these would be able to have the term removed from the contract.

i) Vitiating factors

Often where autonomous decision making has been compromised by the presence of duress or undue influence, a contract can be set aside if the injured party so wishes: the injured party in such circumstances can elect to continue with the contract or to rescind it.[25] In the unlikely situation that a woman agrees to become a surrogate because threats are made to her person, the traditional doctrine of duress will apply.[26] Although this might occur in a family situation in which a surrogacy arrangement is made, it is more likely, however, that the more recent doctrine of economic duress would be more appropriate in a surrogacy context. Economic duress means that it is the economic interests of the individual

[24] This means that if duress or undue influence is found, the surrogate will be able to rescind the contract if she chooses, meaning it has no legal effect and she could keep the baby. The same would likely be true in cases of misrepresentation: even in cases where a court found the misrepresentation to be entirely innocent, their discretion to award damages in lieu of rescission of the contract (Misrepresentation Act, section 2 (2)) is not likely to be exercised in a surrogacy situation. Presumably this outcome would be the reason she chose to claim that the contract was vitiated in the first place. What facts could be represented to a woman, later turning out to be untrue, but which may have induced her to enter the contract without themselves becoming a term of the contract, are difficult to imagine. Thus it could be surmised that misrepresentation would have a limited role to play in policing surrogacy bargains and, as such, it will not be discussed further.

[25] Both duress and undue influence 'relate to the situation where one party has distorted the other's decision to contract; rither duress or undue influence will render a contract voidable' (Laurence Koffman and Elizabeth Macdonald, n 23 above, 312).

making the contract that are being threatened and it is unlikely that any pressure applied to a woman to enter a surrogacy arrangement would threaten her economic interests rather than purport to enhance them. There are two criteria to be satisfied in order to determine whether economic duress was present in the formation of an otherwise binding agreement.[27] Although any threats made to the surrogate may well be 'illegitimate', it is unlikely, however, that she would also have 'no reasonable alternative' but to agree with the request, as she could simply refuse to enter the arrangement. On the other hand, economic duress may be a valid argument if illegitimate threats were made by the woman acting as surrogate once the contract had been embarked upon, in order to force the commissioning couple to modify the agreement and pay her more money.[28] For example, if she threatened to abort the child unless more money was paid, this may fulfil both of the criteria necessary for a successful claim of economic duress. The existing law of contract could, therefore, be easily applied to disputes of this nature.

It is also unlikely that a successful undue influence claim would be able to be made by the surrogate against the commissioning couple. If it were, it would have to be a claim of actual undue influence, as for presumed undue influence to arise, there must be a pre-existing relationship between the parties of a nature in

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[26] *Barton* v *Armstrong* [1976] AC 104.
[27] The tests for the presence of economic duress come from *Enimont Overseas* v *Rojugotanker Zadar (The Olib)* [1991] 2 Lloyd's Rep 108.
[28] This would make any such modification voidable, as in more 'traditional' business contracts where money is extorted in this fashion: *Atlas Express* v *Kafco (Importers and Distributors) Ltd* [1989] 1 All ER 641.

which undue influence could be exercised.[29] Unless the surrogate was a close family member or friend, therefore, presumed undue influence by the commissioning couple (two-party) does not seem an option. There may be the possibility to argue three-party undue influence if, for example, the husband of the surrogate influenced her to enter the agreement.[30] Their relationship would not be one in which it was presumed by the law that the risk of undue influence was evident.[31] Such a relationship would have to be established on the facts: if it can be demonstrated that the wife relied on the husband for advice, or placed her trust and confidence in his decision-making, then the presumption might arise.[32] The situations in which undue influence normally arises are where one party makes a financial transaction because of the influence of another. If the principle of undue influence could be extended to the entering of surrogacy arrangements, then in a case of third-party undue influence, the commissioning couple would have the same obligations as the bank or other creditor. That is, they must ensure for themselves that the transaction has been entered into freely, by

[29] *Barclays Bank plc* v *O'Brien* [1994] 1 AC 180. Again, such situations may be more likely in family arrangements. New legislation on surrogacy could address the heightened potential for duress or undue influence within families by prohibiting arrangements being made between, for example, siblings or mother and child.

[30] *Barclays Bank plc* v *O'Brien* (*ibid*); *CIBC Mortgages* v *Pitt* [1993] 4 All ER 433.

[31] Such as when one party is traditionally held to have an influential relationship over the other: doctor/patient, solicitor/client, religious advisor/disciple, for example. Husband/wife does not fall into this category (described as type 2A presumption, but into that known as type 2B, where a subjective test of the relationship between them is required: see *Barclays Bank plc* v *O'Brien* (*ibid*).

[32] As in *Barclays Bank plc* v *O'Brien* (*ibid*); *CIBC Mortgages* v *Pitt* (n 30, above); *Lloyds Bank* v *Bundy* [1974] 3 All ER 757.

speaking to the potential surrogate alone and advising her to get independent legal advice.[33]

Actual undue influence is where a party enters a contract because they were directly influenced by another party to do so. It is said that '[t]he relevant party has not exercised his, or her, own decision-making powers because of the trust and confidence he, or she, places in the other or because of the relationship between them of dependency and ascendancy or dominion'.[34] Thus, the fact that there is domination of one party over another will be sufficient to prove the existence of actual undue influence.[35] However, this again seems dubious in relation to most surrogacy arrangements as the woman potentially acting as surrogate can simply refuse to do so. Entering such an arrangement is not going to be a step that is taken lightly, no matter what the pressures or influence put on a woman are.[36]

ii) Unfair contract terms

There are two mechanisms that the law of contract provides for the removal of unfair terms that have been incorporated into contracts. The Unfair Contract

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[33] *Barclays Bank plc* v *O'Brien* (ibid). By extension, if they cannot assure themselves that she makes the agreement freely (that is, that she remains under the influence of the third party) they should not enter the agreement (*Credit Lyonnaise Bank Nederland* v *Burch* [1997] 1 All ER 144).
[34] Laurence Koffman and Elizabeth Macdonald, n 23 above, 325.
[35] *BCCI* v *Aboody* [1989] 1 QB 923.
[36] It is also unlikely that the commissioning couple could be unduly influenced to enter the contract, as it is likely that they will be the ones seeking the services of a surrogate. However, it may be possible that a case of undue influence could arise between the commissioning partners, where one influences the other to use a surrogate.

Terms Act (UCTA) 1977 and the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999 can police certain types of term and may therefore be useful weapons against an onerous surrogacy contract. The biggest current problem with using the UTCCR 1999 is that the regulations only apply to consumer contracts. This would mean contending that a surrogate provides a commercial service, which is contrary to the Surrogacy Arrangements Act 1985, so would only have potential if, in future, surrogacy arrangements were reclassified or it was recognised that they could operate commercially. The UCTA 1977 applies to both consumer and non-consumer contracts but its name is misleading as it generally only applies to exemption clauses.[37] It also deals mainly with 'business liability' which would mean that private arrangements, whether classified as contracts or not, may fall outside its scope. While the UCTA 1977 may be of limited use even if surrogacy arrangements were deemed to be enforceable contracts, the idea behind both instruments policing unfair terms may, however, be of use when considering how to legislate for surrogacy in the future. New surrogacy legislation could provide for 'Unfair Terms in Surrogacy Contracts Regulations', for example, determining whether terms more particular

[37] An exemption clause is a term within a contract that purports to exclude or limit a defendant's liability in the event of breach. The types of clauses envisaged by the UCTA are those that attempt to exclude liability for breach of implied terms of the Sale of Goods Act 1979 relating to quality and fitness of goods (section 6); for breach of implied terms of the Supply of Goods and Services Act 1982 about quality and fitness (section 7) or contractual negligence (section 2); liability for negligence in tort (also section 2) and exemption clauses in consumer or standard form contracts generally (section 3). Classification of surrogacy arrangements as (business) contracts for a *service* would, it is contended, bring them under the 1982 Act. While babies should not be classified as 'goods' in this sense, so there could be no implied terms about quality or fitness, this would, however, impose an obligation on the surrogate not to act negligently in relation to the agreement (Supply of Goods and Services Act 1982). Saying this, however, whilst identifying the salient issues, also raises the significant flaws in adopting the UCTA for surrogacy. However, new surrogacy legislation could perhaps contain provisions in a similar vein to the

to surrogacy arrangements could be relied on or not, in a similar vein to the consumer and other regulations that already exist to regulate other types of contractual situations.

b) Resolving disputes

Problems with seeing surrogacy arrangements as binding contracts will obviously materialise when there is a dispute.[38] In ordinary contractual circumstances some remedy is necessary if there is a breach of contract. Minor breaches may warrant a discounting of the price, for example, and a major breach of contract will allow the other party to terminate the agreement and claim damages based on their expectation loss.[39] In other words, they would be given a sum of money that represents what they expected to get from the contract.[40] Other remedies are available for some types of contractual breach. Of these, the most likely to be argued in a surrogacy situation seems to be specific performance, where a party in breach is ordered by a court to physically perform their side of the bargain. In surrogacy, this would mean that if the surrogate changed her mind about the agreement and decided to keep the baby, she would be obliged by the court to

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UCTA but adapted to better suit the practice and the type of contract involved. It could also insist upon a statutory regulatory body to oversee arrangements and ensure their fairness.

[38] Although, as previously mentioned, recognising surrogacy arrangements as enforceable agreements might actually lessen the amount of disputes to resolve.

[39] Terms within contracts are classified in an hierarchical ordering: breach of a 'condition' entitles the injured party to terminate; breach of a 'warranty' only gives a right to claim damages. A third type of term, the 'innominate term' (*Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26) is one which can be breached in any number of ways, with varying consequences. If the factual consequences of the breach are deemed serious enough, the breach can be treated as breach of condition. If not, only the right to damages arises.

hand it over to the commissioning couple, rather than to compensate them monetarily for their loss. Although this would give the commissioning couple what they bargained for, and the surrogate would receive payment, the remedy has other implications, such as the psychological effect on the surrogate who would, in effect, have had a child forcibly removed from her. Could it be asked, in this situation, that she should be held to her side of the bargain? If she initially had both the intention to create legal relations with the commissioning couple, thus forming a binding contract in which she agrees to surrender a child to them, and the original intention to be a surrogate, is this not reason enough for her to be compelled to do so?

For two reasons it is currently unlikely that this argument would stand: first, to enforce the contract in this way would be oppressive, and secondly, the specific performance remedy is equitable and discretionary and therefore traditionally very limited in UK law. As a surrogacy arrangement may be compared to a contract for personal services, specific performance would be unlikely to be applicable as it would 'place too great a restriction on the freedom of the individual'[41] and damages would more likely be seen as the appropriate remedy. Specific performance is, however, available in contracts for 'unique goods'.[42] It

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[40] It is said that the injured party 'is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed'; *Robinson* v *Harman* (1880) 5 App Cas 25 (Parke B, 35).

[41] Laurence Koffman and Elizabeth Macdonald, n 23 above, 502. Although it might be argued that the nature of the specific performance remedy in this case (surrendering the child) would less restrict the surrogate's freedom than allowing her to keep the child. I thank John Wightman for this point. However, this argument would not work in the reverse.

[42] Whereas 'unique' goods are generally thought of as having some 'artistic merit' (*Falcke* v *Gray* (1859) 4 Drew 651), specific performance has been awarded in contracts for items with 'peculiarly

might be argued, therefore, that a contract for surrogacy is a contract for something unique, and therefore the equitable remedy should be available. This might, however, run contrary to the argument that surrogacy arrangements are not for the sale of a baby, but for the supply of a service.

Given that it is unlikely that parties to a surrogacy arrangement would be bound under a contract physically to fulfil their obligations, in the event that the surrogate reneged on the agreement to surrender the child when it was born (a breach of condition) or if she gave notice of this before the child was born (an anticipatory breach),[43] she would be liable to provide a remedy for the commissioning couple. Taking into account the nature of the agreement, it is unlikely that the commissioning couple would feel compensated by money, and it would be difficult in any event to calculate their (economic) expectation loss, thus a nominal sum only may be awarded to represent their contractual right,[44] in addition to the reimbursement of any losses incurred in reliance of the agreement.[45] It is likely that the commissioning couple will have incurred such losses, such as the cost of items bought in anticipation of the arrival of a child, or medical expenses that they have paid on behalf of the surrogate. Presuming that they had agreed to pay the surrogate a sum of money for her service, a breach of

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and practically unique value to the plaintiff' where a substitute cannot easily be obtained (*Behnke* v *Bede Shipping Co Ltd* [1927] 1 KB 649). A child might fall into this category.

[43] What is required is 'an intimation of an intention to abandon and altogether refuse performance of the contract ... [or of] an intention no longer to be bound to the contract' (*per* Lord Coleridge in *Freeth* v *Burr* (1874) LR 9 CP 208, at 213).

[44] *Surrey CC* v *Bredero Homes Ltd* [1993] 1 WLR 1361. Equally it is unlikely that the surrogate would have the financial means to provide the commissioning couple with their expectation loss. If she were required to do so it would be detrimental to the welfare of the child.

[45] *Anglia Television* v *Reed* [1971] 3 All ER 690.

this type would, however, mean that they did not have to pay her at all, as it would be difficult to argue that there had been any substantial performance on her part.[46]

What of other types of dispute? If, for example, the surrogate fails to attend a medical appointment that she has agreed to, or smokes while she is pregnant, contrary to the agreement, what would the remedy be for the commissioning couple? For failure to attend appointments or refusal to undergo medical procedures, it is likely that the commissioning couple would want to claim specific performance, requiring the surrogate to adhere to her agreement. However, the specific performance remedy is not available for 'minor' breaches of contract and as indicated above, would likely not be available for contracts for services. Traditionally the remedy for 'minor' breaches[47] would be damages, offset against the contract price, but this is not a satisfactory remedy especially in the event that the surrogate does not attend an appointment that might have given the parties to the contract an indication that something was wrong with the baby, for example. To offset this difficulty, an express term enabling the commissioning couple to opt out of the contract or a liquidated damages clause might be used. However, it may be seen that any clause which explicitly or implicitly demanded

[46] The surrogacy arrangement could be construed as an 'entire' contract if all payment became due upon delivery of the child (*Cutter* v *Powell* (1795) 6 Term Rep 320). Traditionally, no payment is required if parties do not perform 'entirely', but this has been qualified by the more recent doctrine of substantial performance (*Hoenig* v *Isaacs* [1952] 2 All ER 176). Even if the surrogate had had the baby it would be hard to argue that she had substantially performed as although in the physical sense she would have done much of what was agreed, substantial performance is based on the fulfilment of obligations. Thus, it is likely that she would not be entitled to payment at all.

[47] Breaches of warranty or less significant breaches of innominate terms.

conformation with obligations that 'purported to interfere with the bodily integrity of the surrogate mother'[48] would be seen as unlawful, given that to carry out tests or procedures that the surrogate had refused to undergo would be both an assault and a battery. Although there seems to be no solution to this problem, Emily Jackson suggests that

> '[j]ust as unfair terms in consumer contracts may be severed, and the contract can continue without the offending term, any term that purported to restrict the surrogate mother's decision-making authority about the management of her pregnancy could be struck out'.[49]

Thus, the potential of contract law's in-built policing mechanisms is again recognised.

A contractual analysis would work similarly if the dispute was over the failure of the commissioning parents to accept the child. If the surrogate was willing to surrender the child but the commissioning parents refused to accept it, this would put them in breach of contract, entitling the surrogate to a remedy. Damages may perhaps be easier to calculate in this situation. If the commissioning couple refused to accept the child because it was handicapped or they had divorced, for example, the surrogate would be likely to wish to claim specific enforcement of

[48] Emily Jackson, n 4 above, 313.
[49] Emily Jackson, *ibid.*

the contract by taking an action to recover the agreed sum.[50] If she claimed her expectation loss, she would be awarded the amount that the commissioning couple had agreed to pay her, which is hardly compensation for being unwillingly left with a child that would cause expense in itself. In this situation, therefore, unless she puts the child up for adoption, it could be argued that she should be awarded damages based on the cost of raising a child that she did not expect to raise.[51] If the breach was not of this nature, for example if the commissioning couple agreed but failed to provide her with necessary maternity items, or transport to a medical appointment, what then would be her remedy? It is possible that she could claim the items required or a monetary sum to reflect them, any costs incurred by herself as a result of the breach and possibly a sum in addition to reflect any discomfort or inconvenience caused.

An additional point to consider when asking whether surrogacy arrangements could be covered by contracts is the potential for a claim for additional damages

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[50] This form of specific enforcement of the contract involves the payment of monies owed at the end of a contract where all the obligations have been performed by one side yet they still await payment. It would only work in a surrogacy situation if no interim payments had been made. Otherwise, a claim for damages, subject to the common law limitations of remoteness, mitigation and causation, would have to be taken. None of these factors would seem to limit the surrogate's claim to damages: the loss is not too remote a consequence of the breach that caused it, and the only way the surrogate could mitigate would be for someone else to pay for her baby. This would be paid adoption and so would fall foul of the Adoption Act 1976, section 57.

[51] Presumably, under the precedent set by 'wrongful birth' cases, no compensation would be available following the birth of a *healthy* child (*McFarlane* v *Tayside Health Board* [2000] AC 59, 2000 SC 1, HL). However, there is the possibility that a surrogacy case might be distinguished from wrongful birth cases on the basis of contract, if it is established that contracts in surrogacy are binding. For a discussion of the potential that contractual claims may be distinguished in cases where the claim is for the cost of bringing up an unwanted healthy child, see 'Infertility Treatment: Multiple Birth and Damages for the Birth of a Healthy Baby' (2001) 9 *Medical Law Review* 170-173, which speculates on what may have happened in a follow-up judgement to *Thompson* v *Sheffield Fertility Clinic* had the case not have been settled out of court (see 'Mother of IVF Triplets Settles for £20,000', *Guardian*, 24 February 2001).

for mental distress. If a surrogacy contract was able to be recognised as a binding agreement, thus allowing a claim in the event of a breach by either party, then there would also be the potential to allow an additional claim by the non-breaching party for damages to compensate them for mental distress caused by the breach. A surrogate's refusal to hand over the child is highly likely to cause the commissioning couple severe distress and a woman acting as surrogate will also be distressed if the commissioning couple renege and she is left with a baby that she does not want. Traditionally, damages for mere disappointment or distress caused by the breach of a contract were not available,[52] but the courts have since developed rules that allow people to claim sums representing their disappointment in particular types of contract.[53] Simplified, it seems that damages for distress can be claimed when the contract in question was a contract to provide pleasure or enjoyment[54] or freedom from distress.[55] It does not seem that it would be difficult to argue for a disappointed commissioning couple on either of these grounds as a surrogacy contract may been said to be one to provide pleasure by the fact that the commissioning couple would receive a much longed-for child, or it may be said that the contract was made to free them from the distress of infertility or involuntary childlessness. Where it is the surrogate who claims mental distress, the argument is less clear as it is likely that even if her motives were altruistic, the actual purpose of her side of the *contractual* bargain, if it were so constructed, was simply to receive payment.

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[52] *Addis* v *Gramophone Co. Ltd.* [1909] AC 488.
[53] *Bliss* v *South East Thames Regional Health Authority* [1987] ICR 700.
[54] *Jarvis* v *Swan Tours Ltd.* [1973] 1 QB 233.
[55] *Heywood* v *Wellers* [1976] QB 446.

Thus, it seems that there is scope for applying principles of contract to surrogacy arrangements and the way that 'ordinary' contracts are policed might inform future specific regulatory devices for surrogacy, such as the policing of certain terms in surrogacy contracts. There is a traditional interpretation that says contract theory cannot apply to domestic arrangements,[56] but it has been argued that this is not necessary and, in fact, that enforceability of surrogacy arrangements might actually, in conjunction with other legislative provisions, provide *greater* protection of the parties involved. Surrogacy should not necessarily be classified as a 'domestic' arrangement, as in many cases the parties to the arrangement deal at arm's length and negotiate specific terms. Additionally, they may intend their agreements to be legally binding, this being more likely if surrogacy contracts were enforceable. Acknowledging this would allow the reclassification of surrogacy, enabling it to fall outwith family and medical law alone and for regulators to pay more heed to the realistic operation of the practice. Having regulation supported by the principles of contract could go a long way, for example, towards preventing the exploitation of surrogates or extortion of commissioning couples by them. Furthermore, if a surrogacy arrangement was able to be dealt with in similar ways to other contracts, remedies would be available in the event of disputes.

[56] An argument soundly refuted by John Wightman, n 15 above, and Elizabeth Kingdom in 'Cohabitation Contracts and the Democratisation of Personal Relations' (2000) 8 (1) *Feminist Legal Studies* 5-27.

c) Arguments against a contract model

The principles of contract law outlined above provide an attractive model within which the (re)formulation of new surrogacy law could be situated, owing to the in-built capability of contract to police unconscionable bargains and provide remedies in the event of dispute. The use of contractual principles would support intentional parenthood with enforceability. However, there has been a wealth of academic debate surrounding the issue of recognising contract in surrogacy. Some commentary has been favourable, arguing that contractual enforceability reflects the autonomous decisions of women who enter into surrogacy arrangements.[57] Other commentators have rejected the contract model, arguing that there are better ways to regulate surrogacy than to enforce it through contract, seen as a tool of the market and, as such, inappropriate to govern relationships.[58] A selection of these arguments are highlighted in this section in order to determine if, despite its initial attractiveness, contract is unsuitable as a tool with which to deal with surrogacy in the future.

Carmel Shalev proposes that 'the legal consequences of surrogacy ... should be determined as a matter of contract in accordance with the expressed intention of the parties before conception'.[59] Another alternative she has proposed is a model

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[57] In particular, see Carmel Shalev, n 10 above.
[58] See generally, Rosemary Tong, 'Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus' in Joan C. Callahan (ed.), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995; Joan Mahoney, 'Adoption as a Feminist Alternative to Reproductive Technology' in Joan C. Callahan (ed), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995).
[59] Carmel Shalev, n 10 above, 99.

of the family based on the recognition of a constitutional right to privacy and the autonomous decision-making authority of individuals to define legal parenthood before conception.[60] It can be argued that this would entail recognition of a form of social contract and so the premise could be extended to countries outside of the United States where there is no such constitutional right. Recognition of such a right could, however, be enshrined in legislation, according to the standards set by Shalev:

> '[s]o long as the normative consequences of the reproductive collaboration are clarified before the potential human life begins, the interests of the child-to-be and the integrity of the legal family can be adequately protected'.[61]

Rosemarie Tong, however, has rejected a contract model of surrogacy, saying that as many semantic problems are raised by the term 'contractual motherhood' as by the term 'surrogate motherhood',[62] and argues that modified adoption laws would be the best way to counter many of the problems that feminists have found with surrogacy.[63] Identifying that there is no single feminist 'position' on surrogacy,[64] and that criticisms of the practice vary massively, she contends that all forms of what she prefers to call 'gestational motherhood' can 'be assimilated

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[60] Carmel Shalev, *ibid* 11.
[61] Carmel Shalev, *ibid* 11-12.
[62] This semantic debate is discussed in Chapter 7 below, text surrounding n 59 and 60.
[63] Rosemary Tong, n 58 above, 57.
[64] See Chapter 2 above, text surrounding n 4.

into *properly modified adoption laws*'.[65] This, she argues, would answer many of the criticisms levelled against the practice and would work on the basis of what would serve *most* women best according to the 'guiding principles of feminist ethics'.[66] It would allow for similar features to adoption procedures to be introduced to surrogacy; cooling-off periods for both the commissioning couple and the surrogate, for example,[67] without any of the perceived distastefulness that might accompany enforceability.

Arguments against using an adoption model, she foresees, would be based either in the claim that the surrogate has the initial 'custodial advantage',[68] or the claim that one or both of the commissioning couple may have a genetic link to the child. She dismisses these arguments by saying first, that the custodial advantage held by the surrogate would be the same as the situation in adoption, and therefore it would be acceptable providing the commissioning couple realise this from the outset: that is, realise that the surrogate may change her mind and not hand over the child to them. Such a formulation, however, would change nothing: at present, the commissioning couples in surrogacy arrangements should be all too aware that if the surrogate changes her mind, they will not get the baby that they have been preparing for. It would be better (certainly from the point of view of the commissioning couple, and perhaps even for the child as it may lessen the likelihood of dispute) to devise a method whereby certainty is

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[65] Rosemary Tong, *ibid.*
[66] Rosemary Tong, *ibid.* She gives a further, more detailed, account of what this means to her at page 62.
[67] Rosemary Tong, *ibid* 61.

present from the outset, and therefore, a contractual model may be preferred. In any event, the 'custodial advantage' is held in adoption precisely *because* a legal parent is giving up their child to another person(s). In surrogacy, the agreement to give up the child is made before conception. It does not necessarily follow, therefore, particularly when the intentions of the parties are taken into consideration, that the surrogate should have 'custodial advantage'. In addition, it might be argued that giving her such an advantage is *more* likely to lead to a dispute over parenthood.

Second, Tong argues that genetic input does not equal 'ownership' of the child, merely the *right* to establish a relationship with it. At birth, she contends, the only person who has a 'direct' relationship with the child is the gestational mother, who was 'committed enough to the [foetus] to bring it to term'.[69] This is surely arguable: the commissioning couple in a surrogacy arrangement will be equally, if not more, committed to the foetus, despite their lack of direct physical involvement after the conception. 'But for' them, the conception and pregnancy would not have been initiated. It is likely too that they will maintain contact with the woman acting as the surrogate throughout the pregnancy, perhaps attend doctors appointments with her in order to be involved with the development of the child, will financially (and emotionally) support her, and, above all, will be intimately connected to all of this through the *expectation* that the child will be theirs after its birth.

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[68] Rosemary Tong, *ibid.*
[69] Rosemary Tong, *ibid.*

Joan Mahoney does not believe that surrogacy contracts should be *specifically* enforced. In fact, she contends it would be morally repugnant to do so.[70] Elsewhere she argues that a move towards a contract model of parenthood (not specifically only for surrogacy) would increase the commodification of children and, in surrogacy, of women.[71] Further, she argues that a contract model

> 'appears to continue to rely on the notion that children may only have one parent of either sex and, therefore, it does not help to resolve the problems that arise when children have had more than one person of either sex acting in a parental capacity, or more than one biological parent of either sex, and the courts are called upon to resolve disputes between them'.[72]

However, this need not be the case. A contractual model of surrogacy would mean that in an arrangement between a lesbian couple and a sperm donor, the lesbian couple would be socially recognised as the parents of the resulting child and legally entitled to become its carers immediately after birth.[73] The same would be the case for a gay male couple who commissioned a surrogate to bear a child for them, or for single people or a heterosexual couple. In this sense, the contract model is similar to the intention model. In *Johnson* v *Calvert*,[74] a case

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[70] Joan Mahoney, n 18 above, 187.
[71] Joan Mahoney, n 58 above, 44.
[72] Joan Mahoney, *ibid* 45.
[73] Nancy Polikoff, 'This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families' (1990) 78 *Georgia Law Journal* 459.
[74] *Johnson* v *Calvert* 286 Cal Rptr 369 (Cal Ct App 1991), discussed in Chapter 4, above.

where the court was asked to resolve a dispute between two mothers with valid claims to parenthood, intention was the deciding factor as to which parents the child should go to. Having an enforceable contract between the parties which formally recognises intention may be said to be preferable to such a dispute reaching the court in the first place. The advantages of having a consistent framework in which to establish parenthood arguably outweigh the perceived disadvantages of enforceablility.

Mahoney also argues that a contract model of parenthood would be 'essentially masculine', whereas 'a feminist approach to families would be constructed, instead, on relationships rather than rights'.[75] But this approach is not inconsistent with the contract model, which allows those who *will* form the relationships within a family context, to be legally recognised as being related to one another.[76] In her definition of parenthood, she 'would include all of those who have played a parental role in a child's life as parents'.[77] Using her definitions of 'playing a parental role', this would mean, in a surrogacy arrangement, a child having from the very outset, three parents. She argues that this is not the same as determining who should have custody of the child and responsibility for it, and that this can be determined by using current methods – such as the best interests tests. It is, however, arguable that in the interests of perceived

[75] Joan Mahoney, n 58 above, 45.

[76] Mahoney's basing of parenthood on the relationship model means that although 'neither a sperm donor nor an egg donor is a child's parent *without more*', meaning some kind of social relationship established with the child, 'it is clear that a gestator, whether or not she is also a child's genetic mother, is a parent' (n 58 above, 46) This is problematic as, first, it assumes that a surrogate might *want* to be recognised as a parent and, second, her intention *not to be* a parent is not taken into account.

'normality' and a desire to stick close to the nuclear family ideal, this test can operate, at least presumptively, before the child is born, and be based on factors such as the agreement that was made and the intention of all the parties concerned. One reason why this might be preferred would be that knowledge of the situation from the outset might make separation (of the surrogate and the child she gives birth to) less difficult and disputes less likely.

Carmel Shalev argues that modern perceptions of the family *are* based on a contract model, rather than concepts of ownership and status, using adoption as an example. Because of the move from status to contract, and the dissolution of gender stereotypes that this allows, she argues that surrogacy should be a legitimate form of family creation and additionally that surrogacy arrangements (or contracts) ought to be upheld.[78] Contract (recognising intention) would provide a more stable framework within which parenthood in surrogacy can be acquired, which would be preferable to the piecemeal approach currently followed. Given that surrogacy is not as fraught with ethical problems as it may once have been thought to be and, because for a very small group of people who cannot conceive naturally, surrogacy may offer the only or optimum solution, the process ought to be facilitative rather than restrictive. Arguably, better and more comprehensive regulation of surrogacy will offer more protection to those entering surrogacy arrangements.

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[77] Joan Mahoney, *ibid* 47.
[78] Carmel Shalev, n 10 above, especially 18-20 and 99-100.

2) Redefining the family

The way that the family has traditionally been perceived may be a reason why the law has so far sought to discourage surrogacy. Challenging the way families are defined may assist in gaining further recognition and acceptance of surrogacy. Mahoney states that the 'idea that a family consists of one man, one women, and the children they produce together is both a fairly recent concept and one that is prevalent primarily in Western middle-class culture'.[79] This ideal of the nuclear family has been perpetuated in our modern society, and serves as the standard with which all other families are compared.[80] However, some 'unconventional' family forms have come to be accepted – such as step-parent or adoptive families, or single or unmarried parenthood – albeit sometimes with a certain degree of reticence, in that they are not perceived to be 'ideal'.[81] Divorce and remarriage have become easier. Contraception has improved so that even married couples do not have to reproduce immediately, and can choose to have children, if they want them, at a later date, when, for example, they have paved a career for themselves and become financially secure. When a couple have problems having children naturally, they can be assisted to do so by

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[79] Joan Mahoney, n 58 above, 35.

[80] See generally Katherine O'Donovan, *Family Law Matters* (London: Pluto Press, 1993). She argues that the nuclear or 'cornflakes family' is an 'idealised family, which may never have existed, but which is represented in advertising and fiction' (30).

[81] Mary Warnock argues that 'there are so many unorthodox forms of the family these days' in *Making Babies: Is There a Right to Have Children?* (Oxford: Oxford University Press, 2002) 67. Patricia Smith points out that the 'cornflakes' family, as we envisage it, is in itself a myth: 'When traditionalists select a model of the ideal family from the 1950s ... it should be recognised that the family arrangements prevalent at that time were themselves transitional' ('The Metamorphosis of Motherhood' in Joan C. Callahan (ed.), *Reproduction, Ethics and The Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 109-130, 127).

technological developments in reproduction. IVF, in that it mimics, as far as is possible, the 'natural' creation of a family, has received little criticism on this front. AID, however, has only become accepted over time.[82] Much of this is to do with changes in attitude as to what is acceptable in family formation. But where this leaves lesbian, gay or surrogate families, or post-menopausal or widowed women, for example, is not clear. These people may have equal desires to conform to the family form, but are deemed unconventional both by being unable to do so 'naturally' and for the method they have to use to do so. They are also, in as far as is possible to them, trying to fit into the nuclear family ideal: two women and their children, for example, is really not very different to a man, his wife and their children.

If definitions of the family, and of what makes a parent, were changed, then all of the situations outlined above *could* be legitimate family forms. Recognition of the social, or intentional, element of parenting would be desirable to all the parties concerned.[83] Given that the Western concept of parenthood has evolved from children being seen as the 'property' of their fathers, through a Victorian idealisation of motherhood, to a recognition that the best interests of children

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[82] Chapter 4 above, n 17.

[83] In an editorial comment following the birth of mixed-race twins to a white couple undergoing IVF treatment, (later decided as *Leeds Teaching Hospitals NHS Trust* v *Mr and Mrs A and Others* [2003] EWCH 259 (QB)), it was asked '[i]s it a tragedy for children to grow up with people who are not their genetic relatives? No. Is it a tragedy for children to grow up with parents of a different race? No. It must have been terribly upsetting for the white couple to discover the mistake. But they have two children; children that they planned and wanted and, despite the mistake, are no doubt delighting in. After all, these are things that make people parents, not the fact that they share the same genes' (Juliet Tizzard, 'Embryo Mix-up Need Not be an Unmitigated Disaster' *BioNews* 166, 15 July 2002).

ought to be considered when determining what happens to them,[84] the best interests standard ought not to be based on preconceptions of what a family is, or ought to be. In a society where there is a multiplicity of what may be termed familial relationships, the best interests test should recognise who that child had formed relationships (social bonds) with, or who intended to have its best interests as their own, and why.[85] Thus, if two women have been raising a child together, the child will have formed 'parental' bonds with both of them, and the genetic 'father' should have no claim to parenthood.[86] The same would be the case when a child has been born from AID to a heterosexual couple – although the presumption is that the social father is currently recognised by the law,[87] there is some element of doubt when the genetic (or natural) 'father' is referred to. There is also no reason why this calculation cannot (and should not) be made before birth.

Currently, it appears that, as Mahoney identifies with regard to the US, neither genetics or social relationships create parenthood, but it exists as is determined by the law.[88] For example, the law determines who is granted legal parenthood following adoption, it creates the presumption that the social father is the legal

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[84] Joan Mahoney, n 58 above, 36.
[85] Joan Mahoney (*ibid* 44) expresses this well when she says 'while families no longer need children as property, children still need families. The human child is unable to provide for itself physically or emotionally for some time; and babies clearly need a caretaker, preferably one or more continuous caretakers over the course of the first 15 or 20 years of life'.
[86] This is not to say that the child should not be informed that a donor was involved in its creation, merely that the word 'parent' or 'father' should not become attached to a man who donates sperm to enable others to have a child.
[87] Human Fertilisation and Embryology Act 1990, section 28.
[88] Joan Mahoney, n 58 above, 43.

father following AID, and the presumption that the woman who gives birth to a child is always its mother:[89]

> 'Neither legislatures nor courts seem to be eager to expand the definition of 'parents' to include other people who may be closely associated with a child and who may be viewed *by the child* as a parent, nor to legally acknowledge non-standard parental entitlements in such alternate arrangements as gestational surrogacy and same-sex parenting'.[90]

In all, it can be argued that a number of the problems that have been associated with surrogacy, as highlighted in previous chapters, would be countered by a reconceptualisation and redefinition of what constitutes a family, and of what makes a parent. Current definitions of motherhood and fatherhood are limited in extent, and do not take into account either developments in assisted reproduction techniques that enable genetic and social parenting to be separated, or the fact that parenthood, as is well argued by a number of feminist and other scholars, can as equally be based on social connections as it can be on genetics.[91] In a modern society, it would make for a more consistent approach to prioritise the

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[89] Human Fertilisation and Embryology Act 1990, section 27.
[90] Joan Mahoney, n 58 above, 43 (emphasis added).
[91] For example, see Joan Mahoney, *ibid*; Marjorie M. Schultz, 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' (1990) *Wisconsin Law Review* 297; Marsha Garrison, 'Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage' (2000) 113 *Harvard Law Review* 835; Lori Andrews, 'Regulating Reproductive Technologies' (2000) 21 *Journal of Legal Medicine* 1-21; Andrew Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important

social element of parenthood, as to do so would mean that the people who intended for the child to be born, or intended to care for it would be recognised as the parents of any given child in all circumstances.[92] There have been some attempts made to try to shift our perception of what counts as parenthood.[93] Mahoney argues strongly for the nurturing element of parenthood to be taken into account, saying 'it seems clear that adults gain something from nurturing, just as children gain from being nurtured, If, then, we need children to love, perhaps we can begin to define parenthood in those terms, rather than in terms of ownership'.[94] Despite her argument containing a rejection of contractual and/or intention based parenthood, the nurture model does have benefits:

> 'if women bond with the children they nurture, then the way those children came into their lives becomes less relevant, if not irrelevant... Acceptance of the nurturing model of parenthood not only changes the way we resolve disputes between people claiming

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Distinctions' in A. Bainham, S. Day Sclater & M. Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999) 25-46; Nancy Polikoff, n 73 above.

[92] This is not to say that genetics should have no importance. DI and adopted children who seek to find their genetic 'parents' must do so for a reason – however, by redefining who or what is a mother, father or parent, it would mean they weren't looking for their biological 'father' or 'mother' or 'parents' but simply looking for that person(s) to whom they are genetically, but not socially or in any other way, linked. This would mean that those who do perform the social parenting role would always be recognised as the (legal) parents – as is the case in DI now – but would work across the board. Note also that the Government, in having to reconsider the rights of transsexuals to marry (July 2002) is looking to redefine what a 'family' can be.

[93] I am reminded of an episode of the American series 'Friends' in which a character is asked by a school teacher 'are you one of Ben's mothers?'. Ben's 'mothers' are a lesbian couple. (*Friends*, Channel 4).

[94] Joan Mahoney, n 58 above, 44.

to be parents, but should also lead to changes in the way we evaluate methods of becoming parents'.[95]

But the argument is the same for intentional parenthood – and, in fact, despite the rejection by Mahoney, the nurture model is incorporated into this, with the exception of allowing three parents to be legally recognised as such following a surrogacy arrangement.

Other scholars have argued that we should recognise the intention to become (and act as) a parent as the legal basis of parenthood. Marjorie Maguire Schultz argues that 'within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate and bargained-for ought presumptively to determine legal parenthood'.[96] In this model, intention creates the *presumption* of legal parenthood, thus it may be able to be challenged. This would open the door, for example, for a genetic father to claim parenthood of a child being raised by a lesbian couple or a surrogate to claim parenthood of a child being raised by someone else. In both cases, the decision would have to be made on the basis of the child's best interests, and, as has been argued, if one of the bases of best interests is the social bonds that have been formed and another is continuity, decisions may turn in favour of the social (intending) parents unless there is a clear welfare indication to the contrary.

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[95] Joan Mahoney, *ibid.*
[96] Marjorie Maguire Schultz, n 91 above, 323.

Similarly, John Lawrence Hill has argued that intention-based parenthood should be recognised.[97] One of the reasons he gives for this is that if the surrogate were not recognised as the mother of the child, there can be no claim of baby-selling against the practice of surrogacy.[98] Joan Mahoney accuses him of 'circular reasoning' on this point, arguing that 'if we say the gestator of a baby is not the mother, she is not engaged in baby-selling, since she cannot sell what she doesn't own; but she is nonetheless taking money for waiving parental rights to a child whose mother she would have been but for the contract saying she is not'.[99] This would not be the case, however, if a redefinition of what it means to be a parent were undertaken, such as if Schultz's presumption of parenthood by intention were adopted. Given Mahoney's belief that the nurturing element of parenthood ought to be given recognition, her problem with Hill's argument appears to be illogical.

In a different sense, Nancy Polikoff has also argued for intention-based parenthood.[100] For her, a redefinition of parenthood should mean 'anyone in a functional parental relationship that a legally recognised parent created with the intent that an additional parent-child relationship exist'.[101] Whilst on the surface this appears to be the same as the situations above, this would mean that legally recognised parents could *include* another person who would not normally be

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[97] John Lawrence Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (May 1991) 66 *New York University Law Review* 353.
[98] John Lawrence Hill, *ibid* 356.
[99] Joan Mahoney, n 58 above, 44.
[100] Nancy Polikoff, n 73 above.
[101] Nancy Polikoff, *ibid* 572.

recognised as a parent *after the event*. It would not create a presumption that certain people are to be, or are not to be, legally recognised as parents. Thus, while it would allow a step-parent to be legally recognised as a parent or a lesbian partner sharing parental responsibilities, parenthood following a surrogacy arrangement would mean that one of the parties *originally* recognised as a parent would have to intend to add the other. A commissioning couple, therefore would not *both* be legally recognised as the parents of the child they will bring up if only one of them is genetically related to the child. In the UK, the commissioning mother (or mothers) could never be legally recognised as such. What it would mean is that whoever is legally recognised as the parents – for example, the woman who gave birth – could *add* the commissioning mother (or father) to the parental list. But she would also remain on it herself. This problematic formulation suggests that intention, if it is recognised as something that defines parenthood in assisted conception situations, must be recognised pre-birth, or better still, pre-conception.[102]

3) An alternative possibility? The Human Rights Act 1998

It could be argued that there are some fundamental rights involved for those who need assistance from assisted reproductive technologies in creating their families. The passage of the Human Rights (HR) Act 1998, and its subsequent coming into force on 2 October 2000 gives protection for people in the UK as a

[102] The step-parent argument is wholly different to the birth of children following assisted conception or surrogacy as it relates to relationships formed after the child has been born, as with

number of articles from the European Convention on Human Rights and Fundamental Freedoms (ECHR) have become incorporated into UK law and thus are now enforceable in domestic courts. It is possible, therefore, that the HR Act might affect some of the current regulation of assisted reproduction, if certain rights are thought to be infringed by it. This is particularly the case as the HR Act created a new cause of action against public authorities, which would include, for the purposes of this thesis, National Health Trusts, local and district health authorities and the HFEA.[103] It is now unlawful for a public authority to act in a manner inconsistent with the HR Act or that is incompatible with an ECHR right,[104] unless it has been required to do so by domestic legislation that is incompatible with the ECHR.[105] Even where this is the case the legislation must then be reviewed by the relevant minister after a declaration of incompatibility is made against it by a court.

In relation to assisted reproduction technologies, it may not only be the HFEA that can be held to account. Graham Miles, a solicitor and legal adviser to the HFEA, has stated that there is also 'a strong argument for saying that [private] clinics are 'public authorities' when providing treatment to NHS patients', citing that during the passage of the Human Rights Bill through Parliament it was said that doctors might be covered by the HR Act when dealing with NHS patients but

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adoption.

[103] According to the Human Rights Act 1998, s 6(3)(b), a public authority is 'any person certain of whose functions are functions of a public nature'.

[104] Human Rights Act, s 6(1).

[105] Human Rights Act, s 6(2).

not with private patients.[106] He also indicates that it might be argued that clinics may be covered under the HR Act even when treating private patients 'given that they operate in the public domain and exercise powers and duties of a public nature under a statutory scheme'.[107] A Convention right can only be interfered with if such interference is lawful, for a legitimate aim, and is necessary in a democratic society. There is a list of 'legitimate aims' provided in some of the Convention articles, which include interests of national security, public safety or the economic wellbeing of the country. But, as Graham Miles points out,

> '[i]t is not sufficient for the restriction to be pursuant to a legitimate aim. It must also meet a pressing social need and be proportionate to the legitimate aim pursued. The principles of 'proportionality' mean that the public authority concerned needs to take into account the effect of the restriction on the particular individual and consider whether there is any less restrictive means of meeting this pressing social need'.[108]

The rights of an individual may only be restricted in so far as this is necessary and proportionate to achieving the aim of protecting the wider public interest. By definition, this means that '[t]he State may only take such measures to restrict the exercise of the right as are 'necessary in a democratic society'. Any measures

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[106] Graham Miles, 'Human Rights and the Regulation of Fertility Treatments' (April 2001) *Journal of Fertility Counselling* 24-28, 24.
[107] Graham Miles, *ibid.*
[108] Graham Miles, *ibid* 25.

taken must correspond to a 'pressing social need'.[109] Taking a decision about whether to give someone assisted reproduction treatments that prevents a person having access to those treatments may be said to meet a pressing social need if, for example, the allocation of scarce resources is in question. This would, however, be a more difficult argument for privately paid for fertility services.

It might be possible to derive a right to assisted reproduction treatment for all infertile citizens from the rights given under Article 8 (the right to respect for family life) and Article 12 (the right to marry and found a family) of the ECHR. If this were the case, public authorities could be found to be in breach of a Convention right when taking decisions relating to assisted reproduction, such as who should have access to treatments. The question that may be asked, now that ECHR rights are incorporated into our law, is whether there is actually a tangible right to found a family as this is formulated in Article 12 ECHR,[110] what this right means, and whether the right to respect for private and family life given in Article 8 might affect treatment decisions.

Article 8 begins '[e]veryone has the right to respect for his private and family life'. It seems, however, that the right to respect for 'family life' relates only to that already in existence, preventing unjustified interference with family life when a family life already exists. It has been held that family life does not necessarily

[109] Tom Lewis, 'Convention Terms and Concepts' in Austen Garwood-Gowers, John Tingle and Tom Lewis, *Healthcare Law: The Impact of the Human Rights Act 1998* (London: Cavendish, 2001) xlv-xlix, xlvii.

mean only relations in blood or by marriage, but can be based on the facts of a particular relationship.[111] For this reason, the reverse is true: sperm donors do not have the right to respect for a family life with any children born from their donation purely by virtue of the genetic link.[112] In any event, it has been decided that the refusal of non life-saving treatment, although not in the context of assisted reproduction, is justified because Article 8 ECHR 'imposes no positive obligations to provide treatment'.[113]

Having a statutory right to found a family might have many implications for the infertile or involuntary childless. If there were such a right, it could be argued that the state, local health authorities or the HFEA would be obliged to provide or allow assisted reproduction treatments for all those who needed them in order to create a family. Most assisted reproduction treatment is, however, currently paid for privately. If a positive right to treatment was found, making assisted reproduction treatments available wide-scale on the NHS, subject to all limitations that other treatments have, this situation might be reversed.

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[110] Article 12 ECHR says that '[m]en and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right'.
[111] *B* v *UK* [2000] 1 FLR 1, [2000] 1 FCR 289; *X, Y, Z* v *UK* [1997] 2 FLR 892, [1997] 3 FCR 341 EctHR.
[112] *G* v *Netherlands* (1993) EHRR CD 38.
[113] *North West Lancashire HA* v *A, D & G* [1999] Lloyd's Rep Med 399. Alasdair Maclean ('The Individual's Right to Treatment Under the Human Rights Act 1998' in Austen Garwood-Gowers, John Tingle and Tom Lewis, *Healthcare Law: The Impact of the Human Rights Act 1998* (London: Cavendish, 2001) 81-97, 96) suggests that 'there may be occasions when the individual will be able to demand treatment as a right under the HRA 1998. These occasions will be limited to emergency life-saving care and to those where the individual has been discriminated against on some spurious or iniquitous ground such as disability or age'.

However, having a right to found a family might mean only that no obstacles should be placed in the way of those seeking access to (and able to pay for) assisted reproduction treatment. In other words, it would mean that there should be no restrictions in place that would take some people's 'right' to found a family away. Most clinics or assisted reproduction treatment providers currently have age limits and other regulations determining who they will treat (in terms of the 'suitability' criteria and the potential effect on the welfare of a resulting child) and it might be arguable that such criteria would have to be abolished if it were found that a 45 year old had as equal a right to found a family as a 30 year old. If this were the case, it would then have implications for those others who cannot have children 'naturally', not because they are infertile and need treatment, but for example a same-sex couple (even a lesbian couple, where it could be considered that a child could be conceived and born without treatment), or a single woman. A lesbian couple or single woman might have an equal right to use artificial insemination as a heterosexual married couple, for example.

Although some of the above arguments seem very plausible, rights discourse is of very limited application when it comes to assisted reproduction services. There is no established or recognised right to reproduce in the UK, and it is

> 'not yet clear whether unmarried couples have the same right to found a family under Article 12 as married couples. In Strasbourg

there has been a reluctance to acknowledge that the right to found a family can exist outside of marriage'.[114]

An application claiming the right to adopt in order to found a family has also been rejected.[115] Thus, it seems that the definition of 'family' will be an important factor. In the UK, there has been limited recognition of the right to reproduce, as shown in *Re D (a minor) (Wardship: Sterilisation)*.[116] In this case, which involved the sterilisation of an 11-year-old girl, Heilbron J described every woman's right to reproduce as a basic human right.[117] These comments were limited to rights for women (the decision did not seem to say that there was an equal right for men to reproduce), and were also focusing on the perceived rights of the fertile not to have their ability and opportunity to reproduce interfered with by the state, rather than the positive right to reproduce which might enable infertile women to be provided with access to assisted reproduction technology in order that they could have a child.

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[114] Graham Miles, n 106 above, 25-6. Miles also indicates that '[i]nteresting arguments may be expected in the UK courts concerning the rights of the 'unmarried family' and gay couples'.
[115] *X & Y* v *United Kingdom* (1978) 12 DR 32.
[116] *Re D (a minor) (Wardship: Sterilisation* [1976] 1 All ER 326; [1976] Fam 185.
[117] [1976] Fam 185, 193. This 'right' was reconsidered in the House of Lords in *Re B (A Minor)(Wardship: Sterilisation)* [1988] AC 199, where it was found to be 'of value only if accompanied by the ability to make a choice' to reproduce (at 211). This would seem to limit the rights of those who do not have the capacity to understand the consequences of reproduction, and it could be argued that it should also be interpreted negatively, thereby giving the right to reproduce to competent people only. Other cases permitting the sterilisation of mentally incompetent adults also cast doubt on the 'right'.

In contrast, in *R* v *Secretary of State for the Home Department, ex p Mellor*,[118] the right to reproduce of a fertile married man imprisoned for life was not recognised. Mr Mellor claimed that the Secretary of State's refusal of his request that his wife be artificially inseminated with his sperm while he was in prison was in contravention of his human rights under both Article 8 and Article 12 ECHR. Lord Phillips MR decided that Mr Mellor's request was beyond the scope and intention of Article 12, which did not confer an absolute right to be able to procreate at all times. Although the Secretary of State was bound to consider applications made by prisoners in respect of the artificial insemination of their wives, and there is no absolute ban preventing this from occurring, the decision must be made taking into account a number of factors. The fact that Mr Mellor was 'justifiably deprived of the enjoyment of family life' by imprisonment was considered, as was the prison service's policy of restriction of access to artificial insemination 'to those who can reasonably be expected to be released into a stable family setting and to play a parental role in bringing up any child that might be conceived'.[119] This is a very similar limitation to the HFE Act 1990 specification of the need for a child to have a father when making decisions as to who should have access to treatment.

The European Court of Human Rights at Strasbourg has always treated Articles 8 and 12 as subject to a considerable margin of appreciation for states, being

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[118] *R* v *Secretary of State for the Home Department, ex p Mellor* [2001] 3 WLR 533.
[119] Graham Miles, n 106 above, 26. He also points out that apparently one of the reasons for this limitation was 'the disadvantage of single parent families', leading him to consider 'how a court

reluctant to impose its own view when there is no identifiable Europe-wide consensus.[120] This means that the Court has recognised that different countries and cultures may have different interpretations of the Convention rights and views about what is appropriate in deciding what their own laws and regulations relating to marriage and family life say. The Court has indeed confirmed 'that the State maintains the 'prerogative ... on moral grounds to seek to deter [certain] acts' in relation to biomedicine.[121] It is therefore unlikely that any positive obligations arising under Article 12 could require the state to provide any particular treatments on demand,[122] including surrogacy. The right to found a family is thus principally a negative right; that is, a right to be free from state interference preventing the founding of a family by natural means. Or it might mean that the state should not interfere unnecessarily with private arrangements that are made to enable people to have children by alternative means. Again, this brings us to the question as to whether, in the current climate, it is 'necessary' to discourage surrogacy. To the extent that the right to found a family gives a right to state assistance this is an example of a social right, rather than an individual one: in setting boundaries to the right, the state has to take into account the wider social implications of its implementation. In some situations, an alternative

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might approach a challenge to a Licensed Centre's refusal to offer treatment where any child would be brought up in a single parent environment'.

[120] Tom Lewis, n 109 above, xlvii.

[121] *Laskey, Jaggard and Brown* v *United Kingdom*, Reports 1997-1, para. 50, cited in Steven Wheatley, 'Litigating Bioethics: The Role of Autonomy and Dignity' in Austen Garwood-Gowers, John Tingle and Tom Lewis, *Healthcare Law: The Impact of the Human Rights Act 1998* (London: Cavendish, 2001) 67-80, 79.

[122] Although Tom Lewis (n 109 above, xlviii) argues that 'it was never certain that [the margin of appreciation] would apply under the Human Rights Act (HRA) 1998. Giving it wide scope domestically would contradict with the reality of giving rights full and due recognition in this country which is arguably why the HRA 1998 was put in place'.

way to assert rights under the ECHR might be to invoke Article 14, which prohibits discrimination[123] and gives 'protection against different treatment, without an objective and reasonable justification, of persons in similar situations'.[124]

In the UK, many units offer infertility treatment programmes. However, candidates for fertility treatments are carefully selected, both because of the vast demand for treatments and the limited supply, and because (as the Warnock Committee implicitly accepted in their 1984 Report)[125] the moral implications of fertility treatments seem to require that they should not be provided where it would be morally or socially inappropriate to do so. Therefore, it is apparently justified in many cases that, for example, single women, homosexuals and lesbians and those over a particular age are not entitled to receive treatment. The right to treatment (although not fertility treatment) has also been held, in the context of refusal of treatment (a sex change operation), to be justified in terms of resource allocation.[126]

It seems, therefore, that there is no positive right, despite the implementation of the Human Rights Act 1998, to found a family in the UK – at least not in terms of a claim to receive treatment or to be provided with fertility services, including

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[123] Article 14 ECHR says that '[t]he enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.
[124] Graham Miles, n 106 above, 26.
[125] For example, see *Committee of Inquiry into Human Fertilisation and Embryology, Report* Cmnd 9314 (1984) (London: HMSO) (The Warnock Report), paras 2.5 – 2.13.

surrogacy. This will always be able to be justified, and will never be held under the HR Act to be incompatible with Convention rights, as a state and the public bodies within it can operate according to their own interpretation of the social 'morality'. Not unless attitudes change on a wide scale about who and what the family is will there ever be a reason why treatment has to be provided for people to found 'families' outside of the current norm. Even if this were to happen, limitations on treatment and access to it could still be justified in terms of resources and prioritisation of those who are perceived to have a legitimate medical need.

4) The future

Surrogacy has been largely forgotten since the HFE Act. The Brazier Report seems to have been predominantly an academic exercise, given that its recommendations have yet to be acted upon by the Government who commissioned it.[127] The impact of the Human Rights Act 1998 on the provision of assisted reproduction services and the operation of surrogacy arrangements is, at best, negligible. Does the lack of action therefore indicate that nothing needs to be done about the way that surrogacy is regulated? Or does it simply mean that the Government have not realised the necessity for further regulation, do not yet know which path it will take, or simply have higher priorities? Current legislation on surrogacy is inadequate, as previous chapters have argued: there

[126] *North West Lancashire HA* v *A, D and G* [1999] Lloyd's Rep Med 399 (CA).

is a need to reconsider the law as it relates to surrogacy in this country. It would also seem that the question of parenthood, notwithstanding other issues in surrogacy that may require further attention, remains an important issue that needs to be (re)addressed.

It does appear that there has been an 'evolution of opinion' towards surrogacy since the early reported cases and the first legislation in the United Kingdom, both publicly and within the medical profession.[128] It can, for example, be said that 'surrogacy has come a long way since, in 1985, Kim Cotton caused shock and moral uncertainty by handing over her child to an American couple for £6,500'.[129] Kim Cotton, who became a well-known advocate for surrogacy, also agrees that attitudes towards surrogacy have gradually changed. She attributes this in part to 'better' ways to go about surrogacy arrangements and in part to the fact that people have become increasingly aware that infertility is a problem that needs to be addressed both socially and by the law. The practice of surrogacy is also becoming more frequently talked about in non-academic circles. It has even been made an issue in various soap operas and dramatic story lines on the television,[130] and has also been the subject of a sensitively approached and rationally presented BBC documentary.[131]

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[127] *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (1998) (London: HMSO) (The Brazier Report).
[128] Robert G. Lee and Derek Morgan (*Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (London: Blackstone Press, 2001) 201) refer to a 'metamorphosis of surrogacy', within which they included the 'ethical evolution' of the views of the BMA.
[129] 'The Other Woman' *The Guardian*, 22 April 1996.
[130] As mentioned in Chapter 1 above, n 103.

The increased popular exposure of surrogacy and other issues associated with infertility and assisted reproduction may possibly be an indication that alternative methods of forming families are becoming recognised and socially legitimated as they become more commonplace in our society. The heterogeneity of the family form in the current time means that most people will know at least one family that does not fit the traditional 'cornflakes' definition.[132] Thus, it may follow that the introduction of the third party to the procreational relationship is viewed more often as a necessity rather than a moral wrong. Changes and developments in the science of assisted reproduction have probably also served to lessen the perception of surrogacy as distasteful. This does not mean that everyone will agree with the practice, but it might be argued that 'ordinary' surrogacy has become one of the lesser of a number of 'evils' in today's reproductive marketplace. Other issues in assisted reproduction tend to dominate the headlines to a greater extent these days; post-menopausal pregnancies,[133] 'test-tube incest',[134] babies being born with three genetic parents,[135] babies 'designed' for 'spare parts',[136] or babies born by human reproductive cloning[137] being just

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[131] *Surrogate Babies*, BBC1, February 2000.
[132] See n 80 above.
[133] For example, the 2001 case of Lynne Bezant; 'Clinic Boss Defends Pregnant Woman, 56' *The Guardian*, 23 January 2001, www.guardianunlimited.co.uk/uk_news/story/0,3604,426769,00.html.
[134] There have been at least three cases of 'test-tube incest' reported in the last year: the Salomones, 'Test-tube 'Incest' Sparks French Outrage' BBC News Online, 21 June 2001, http://news.bbc.co.uk/hi/english/world/europe/newsid_1400000/1400951.stm; in the US, 'US Woman has Test Tube Baby with her Brother' *The Guardian*, 14 July 2001, www.guardian.co.uk/Archive/Article/0,4273,4221700,00.html; and in the UK, 'Sister to be Impregnated with her Brother's Child at London Clinic' *The Independent*, 27 August 2001, www.independent.co.uk/story.jsp?story=90799.
[135] 'Babies Born with Two Mothers and One Father' *The Daily Telegraph*, 5 May 2001, www.telegraph.co.uk:80/et?ac&pg=/et/01/5/5/nbabe05.html.
[136] 'Rules Eased on Designer Babies' *The Guardian* 13 December 2001, www.guardian.co.uk/Archive/Article/0,4273,4318831,00.html.

some of them.

It must be possible to reach a consensus position on surrogacy. Although compromises mean that neither 'side' gets exactly what they were bargaining for, this would be preferable to the approach taken by our current hybrid regulation, particularly if we have determined that there is no apparent need to deter the use of surrogacy as a reproductive option. As was seen in chapter five, other jurisdictions have approached the regulation of surrogacy in different ways, some of which have elements that we could perhaps learn from. As it currently stands, the law relating to the practice of surrogacy in the UK is highly ambiguous, as on the one hand, it appears to indicate some kind of disfavour towards the practice, and on the other, it allows surrogacy to operate within at least a minimal regulatory framework. Emily Jackson has traced this ambiguity as far back as the Warnock Report, saying that the report appeared to be ambivalent as to what was required of legislation in this area, and that

> '[t]heir judgement that surrogacy arrangements are flawed but inevitable led to the passage of legislation with two disparate goals: the rules are intended both to offer some protection to the vulnerable parties (believed principally to be the surrogate mother

[137] 'Baby Cloning to Carry 10-year Jail Sentence' *The Daily Telegraph* 23 November 2001, http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2001/11/23/nclone23.xml, and 'Human Cloning is Immoral and Parliament Should Ban It' *The Daily Telegraph* 23 November 2001, www.dailytelegraph.co.uk:80/dt?ac&pg=/01/11/23/do01.html.

and the child), and to discourage involvement in surrogacy'.[138]

This is an accurate reflection of the current position, and Jackson's assessment of the Warnock committee's ambivalence appears to have been confirmed by Dame Mary Warnock herself.[139] Unless the desired intention of the law is to discourage surrogacy by making it difficult then it is largely ineffective and reform is therefore required. If the law is to reflect the fact that some people may need to use surrogacy, and allow them the opportunity to do so in a way that is minimally interventionist and non-discriminatory, then further issues need to be considered by the legislators, including the question of parenthood. Alternative forms of regulation may, if attempted, initially be controversial, but controversy dies down in time, as can be evidenced by the debate and regulation on abortion, or even IVF. Given that there are technological developments continuing apace, the existing law on abortion has been subject to review,[140] as any law governing surrogacy could be.

In surrogacy, it is true that '[g]iven the complexities of the issues arising and the nature of the interests involved, it is inevitable that the law will be involved in some shape or form and to some or other extent. The question then becomes what form that law should take'.[141] Of course, it is possible that various

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[138] Emily Jackson, n 4 above, 262.
[139] See Chapter 4 above, n 31 and 49.
[140] For example, a change was made by the Human Fertilisation and Embryology Act 1990, section 37 allowing abortions to take place only up to 24 weeks, rather than the 28 weeks allowed by previous legislation.
[141] Kennedy and Grubb, *Medical Law* (London: Butterworths, 3rd ed, 2000) 1359.

disciplines of law may be, as they are now, used to govern the practice of surrogacy. But this certainly does not mean that the best or only way to regulate surrogacy is by piecemeal amendment. What is required (as was suggested by the Brazier Committee) is a total repeal of the existing laws on surrogacy. In addition, the formulation of new surrogacy legislation should combine the best of the old regulation with new provisions, coherently expressed, carefully formulated, and written with the aim of consolidating the law, based on past experience with surrogacy. The following chapter will argue that the best way to achieve this would be to enforce surrogacy arrangements and give recognition to preconception intention when determining legal parenthood.

Chapter Seven

Legally Recognising Intending Parents in Surrogacy and Assisted Conceptions.

Introduction

As has been shown in previous chapters, methods of creating children by 'non-[illegible] means or by those requiring medical intervention have greatly increased and accessible – over the last three decades.[1] methods of artificial conception were developed, on (IVF) in 1978,[2] some methods of assisted or still possible. Notably this includes artificial technical, or non-medical form of surrogacy; this 'partial' surrogacy, where the surrogate herself

atement. Artificial conceptions have improved technologically onceiving children for the infertile have been developed, arriers to fertility. However, although these developments it seems that treatment and availability will always be – most notably cost, but, as has been seen in the media in y (both on a world scale and on a more localised level),

ul human IVF attempt when Louise Brown was born – the development for some time before this. Gynaecologist Edwards started work together in 1968, but Edwards had owledge into reproduction in mammals since the 1950's. In ideas that some of his knowledge obtained from animals ne infertility. See further, Jack Challoner, *The Baby Makers:* London: Channel 4 Books, 1999).

provides half of the genetic material.[3] Both AI and surrogacy, and other more recent developments in medicalised reproduction such as IVF have served to fragment the orthodox, or traditional reproductive process. The conception, gestation and the raising of a child can now be easily separated, and further, the possible 'parents' can be numerous due to the many potential source combinations of gametes – again these 'parents' can be separated from the acts of conception and gestation. In theory, a child born from various assisted conception techniques could have up to six potential parents.[4] This would be the situation in what is called 'full' or 'host' surrogacy with gamete donors – the surrogate is the woman who carries and gives birth to the child, which is neither genetically related to her or to the commissioning parents who will eventually raise it.

Assisted conception generally, and surrogacy in particular, present challenges to traditional definitions of parenthood. Although the law has compensated for this in most assisted reproduction situations, for example by recognising the

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[3] This is always possible to attempt with the intending father having sexual intercourse with the surrogate in the hope that she will bear a child, such as is found in biblical stories. Self or at least non-medical insemination is also fairly easy to attempt, providing a willing male will donate his semen. The alternative, 'full' surrogacy, has only been possible since the development of IVF. It involves an embryo (either the product of the gametes of the intending couple, or of donors, or a combination of both) being implanted into a surrogate, in order that she carry the resulting child to term, give birth to it, and then hand it to the intending couple to raise.

[4] Simplified, these could be the two gamete providers, the gestational/birth mother and her husband or partner, if she has one, and the two intending parents, where these are different people. Interestingly, John Lawrence Hill ('What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights' (May 1991) 66 *New York University Law Review* 353, 355) has identified sixteen possible reproductive combinations in addition to 'traditional conception and childbirth'. This total has come about by varying the sources of both male and female gametes, the location of fertilisation (inside or outside of the body) and the site of gestation.

intending father when AID is used,[5] and has attempted to provide a mechanism for the transfer of parenthood following surrogacy, this has left the law inconsistent. It is certainly not the case that parenthood and the 'natural' biological/genetic relationship have always gone hand in hand: as mentioned, artificial insemination and 'partial' surrogacy have been in use for some time. In medical use, artificial insemination using donated sperm always means that the social or intending father is not the genetic father,[6] and, as previously explained, the surrogate in partial surrogacy would be genetically related to the child when the intending mother would not. However, it is not unheard of for children to be raised by those who are not genetically or gestationally related to them. The legal status of parenthood can be and is conferred on non-biologically related persons by statutory adoption since the 1926 Adoption of Children Act[7] and, like the practice of surrogacy, it is likely that some forms of social or non-institutionalised adoption have taken place throughout history, before regulatory structures and formal procedures were established.

These examples suggest that there is an existing 'strong social tradition [recognising] the purely social and psychological dimensions of parenting, even

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[5] Human Fertilisation and Embryology (HFE) Act 1990, section 28.

[6] Again, there is evidence to show that in many cases where insemination by donor takes place, secrecy is involved. By this I do not necessarily mean that the child is not told of its origins, or the fact that, for the time being at least, donor insemination is an anonymous process, but even that many parents using AID keep such information secret from their family and friends. This probably has more to do with the perceived stigma for the male of having to resort to the use of another man's sperm than it does with saving the face of the family institution, but there is something to be said about that secrecy and its effect on how assisted reproduction techniques are more generally perceived. It is relevant to note here that intended fathers are recognised in AID procedures, by virtue of the HFE Act 1990 ss 28(2) and (3), if they are either married to, or receive treatment 'with' the woman inseminated.

where these occur in the absence of biological ties'.[8] For this reason, the question arises as to who is to be called 'parent' of a child born from surrogacy or any given method of assisted conception, and why? Surrogacy and assisted conception create familial situations outside of the 'ordinary', where it can usually be safely assumed that a man and woman who have a child are its parents.[9] Should the definition of parent in these alternative circumstances, where the actual acts of parenting and creation are separated, be based on this implied perception of the 'ordinary' (as is now the case), on component parts (such as the genetic link), physical input (e.g. gestation), or on a social basis,[10] for example, upon intention? That is, in surrogacy and assisted conception, should those who intended to be the parents of the child be legally recognised as the parents of that child and registered as such, or can alternative factors, such as genetics or gestation/parturition, be said to be more important?

The purpose of this chapter is to argue for intention to be legally recognised as the pre-birth deciding factor in 'awarding' parental status to the intending parents of a child born following surrogacy or assisted conception.[11] More precisely, it is

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[7] This transfer of parenthood is not, however, a pre-birth concept as I have argued that intention in surrogacy should be.

[8] John Lawrence Hill, n 4 above, 354. Psychological parenthood is also a concept raised by A. van Niekerk and L. van Zyl, who have said that the commissioning couples in a surrogacy arrangement, or those going through IVF or related procedures are already 'socially and psychologically pregnant' ('The Ethics of Surrogacy: Women's Reproductive Labour' (1995) 21 *Journal of Medical Ethics* 345-349, 347). See also Chapter 1, above, text surrounding n 154 and 155. The concept has also been recognised by the courts. See, for example, *Re M (Child's Upbringing)* [1996] 2 FLR 441 (CA), 54-55 (*per* Ward LJ).

[9] It is probably the case that this assumption is based on a perceived biological link.

[10] Or I might say 'socially realistic'.

[11] The dual intention both to create a child and to become a parent. Intention encompasses the motivation to have a child, the involvement in the procreative process (however minimal in a biological sense) and nurturance: see generally Rachel Cook, 'Donating Parenthood:

to argue that parenthood based on intention should not have to be 'awarded' at all, but become a 'naturally' occurring event (subject to registration of birth, as with all 'normal' births) in surrogacy and assisted conception situations. If it is true that there is a 'strong social tradition' that acknowledges the social and psychological aspects of parenthood, then it should be possible to provide a rational alternative to legal presumptions that currently define parenthood, when the processes involved in the creation of a family differ from the accepted or traditional norm. This chapter will show that the legal concept of intention, a concept already recognised and enshrined in various areas of law, would provide the most logical result in all forms of assisted conception practices.[12] It will not be suggested that intentional parenthood should be recognised universally: the concept is only used here in reference to the parenthood of children born from surrogacy or assisted reproduction techniques, thus it would leave children conceived and born 'normally' unaffected.[13] It will be illustrated that all users of the common forms of assisted conception could benefit from parenthood being recognised in such a way. At the very least, they could be accorded the same rights in recognition of their parental status as those who can have children

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Perspectives on Parenthood from Surrogacy and Gamete Donation' in A. Bainham, S. Day-Sclater and M. Richards (eds), *What is a Parent? A Socio-legal Analysis* (Oxford: Hart Publishing, 1999) 121-141.

[12] In contract law, an agreement is not recognised as binding unless a subjectively viewed 'intention to create legal relations' can be identified, and when a court needs to imply terms into a contract, it will do so by determining the subjective intentions of the contracting parties. Intention also features in other areas of contract, in criminal law and in equity.

[13] It is worth noting that intention *could* not become a universal factor in determining the parenthood of all children born, whether by assisted conception or 'naturally'. Some children born 'naturally' are not intended; thus the concept would leave them totally parentless. Conversely, this serves to illustrate the potential for using intention as the determining factor in deciding the parenthood of a child born by assisted reproduction – all of these children will be fully intended. This also reflects on the 'best interests' of the child arguments – how can it not be in the good

without assistance. It will also be shown that intention, as a presupposed basis for parenthood in surrogacy and assisted conception would always result in the 'right' people being legally recognised in parenthood.

The practice of surrogacy is fraught with practical and legal difficulties, as has been illustrated throughout this thesis. This chapter concentrates specifically on one small but highly problematic dimension: that the surrogate, as the woman who gives birth to the child is always recognised as the legal mother of that child.[14] This creates a range of difficulties – first, it prevents the intending mother being recognised as the legal mother of the child, when it is she who will raise it. Secondly, and by extension, it prevents the intending father from being recognised as the father of the child that he will raise. Common law presumptions operate to make the husband or partner of the surrogate the legal father of any child born to her, a legal fiction that is unnecessary.

1) The case for intention-based parenthood

There are many general reasons for using intention as a basis for determining the parenthood of a child born from surrogacy or assisted conception. Because, it is assumed, those who intend such a child to be born cannot have a child

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interests of a child to be born to, and legally recognised as the child of, parents who fully intend and desire to raise it?

[14] By virtue of the HFE Act 1990, section 27(1).

themselves by 'natural' means,[15] then the processes of creating that child may be separated for one reason or another. Different situations will create different combinations of those who may seemingly have valid claims for parenthood. However, it can be argued that those that initiate such a process, prepare themselves to gain and raise a child and have it in their lives; those who perhaps have had previous failed attempts, and who probably have paid for some kind of treatment, should have the stronger claim to parenthood. Jamie Levitt has argued that

> '[t]he use of reproductive technology is an unambiguous indicator of intent. Users of such technology intend to produce a child and intend to accept the responsibility of caring for it ... Use of the surrogate method, manifesting procreative intent, should invoke the legal presumption that the child belongs to the intenders'.[16]

It is entirely true that without them, the birth of the child would not have been 'initiated' at all.[17] The intending couple can therefore be said to have

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[15] To recap, this may be because one or other partner is in- or sub-fertile, because both partners are of the same sex, or because a single person is assisted to have a child (obviously a single woman could have a child by biologically 'natural' means, but she may wish to use assisted conception to avoid knowledge of the 'father', or the apparent necessity for the biological father to be involved in any way, such as by being required to pay child support). It may also be the case that assisted conception is chosen in order to avoid inheritable conditions.

[16] Jamie Levitt, 'Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, 470. Marsha Garrison ('Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage' (2000) 113 *Harvard Law Review* 835, 861) agrees that '[u]ndeniably, it is easier to assess intention when conception occurs technologically than when it occurs sexually'.

[17] This has been upheld in the US surrogacy case of *Johnson* v *Calvert* (1993) 5 Cal 4th 84. Jamie Levitt (*ibid* 469-470) states that '[u]ntil the *Johnson* decision, courts had given little consideration to the motivations of the intending parents. These intending parents, however, initiate

> 'a unique role as the instigator[s] of the pregnancy. Conception is "ordered" or "commissioned" by the intended parents, who are motivated (it is assumed) by usual parental motivations such as the need for adult status and identity, the opportunity for development of affectionate and intimate relationships, and the need for expansion of the "self". Achieving parenthood removes the stigma of infertility.'[18]

However, it may be arguable that the genetic and gestational contributors to the child (if they are different people) may also have valid claims to parenthood. This chapter will argue that although such claims may often be valid, they are not as strong or as socially realistic as those of the intending parents, for reasons detailed below.

There are at least three specific arguments for recognising intention-based parenthood in surrogacy and assisted conception, as outlined by Hill.[19] The first is the 'prima facie importance of the intended parents in the procreative relationship': without their initiative and motivation, the child would not have been created.[20] The second focuses on the unfairness of permitting the surrogate to break the promise to relinquish the child, when it was always her stated intention

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and invest in the process and their interests also need protection. The desire to create a child is the first stage of parenthood and occurs well before any physical conception'.

[18] Rachel Cook, n 11 above, 135.

[19] John Lawrence Hill, n 4 above.

to relinquish it, and the third suggests that there are good reasons for acknowledging the identity of the parents from the time of conception. This third reason for recognising intention as a deciding factor in determining legal parenthood centres on the need for certainty and uniformity, and also the need of parents and children in assisted conception situations for a pre-birth (or pre-conception) knowledge or identity. Those who commission a surrogate would know from the outset that they were to become parents. Legal parenthood would not be something that had to be settled in protracted court action. Neither would commissioning parents have the additional pressure and stress of having to apply for a parental order under the Human Fertilisation and Embryology (HFE) Act, if they were eligible to do so, or to go through adoption procedures if they were not.[21] Recognising intention may also serve to deter some people (meaning donors/surrogates) from assisting in a conception for someone else. If it was known with some degree of certainty from the outset that any resulting child would not be theirs legally or socially, potentially some disputes would be avoided.[22] These arguments can be juxtaposed with the arguments that might be raised for favouring the genetic or gestational parent(s) with legal parenthood: it can be seen that the right outcome would be achieved by using intention, that

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[20] John Lawrence Hill, *ibid*, 414.

[21] This, as Emily Jackson points out, may actually be more detrimental to the welfare of the child than allowing the certainty of intention (*Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) 270); '[w]here the surrogate mother is happy to hand over the child at birth, the British approach to parenthood nevertheless demands that the child's life starts with litigation, albeit amicable'.

[22] This would mean that the surrogate would be the one who would have to challenge the parenthood if she did not want to give up the child: the rebuttable presumption is reversed. The child, because of their intention, would be registered as that of the commissioning couple. The existing parental order process under the HFE Act 1990 could in theory be adapted to register the surrogate as the mother if her challenge against the intending parents were successful.

'[t]hese arguments should trump the relatively weaker claims of either the gestational host or the biological progenitors'.[23]

Reasons for not recognising the genetic or gestational parent(s) can also be generalised. Generally, if the genetic contributor is not also the intended, commissioning or 'initiating' parent of the child born through whichever process, be it AI, IVF or surrogacy, then it can be assumed that the contributor acts in the capacity of a donor. In essence then, they have agreed to give voluntarily, as per the dictionary definition of 'donate',[24] of themselves. The suggestion, therefore, is that doing so is an act of altruism, whether the recipients are known to the donor or not. Following from this, it would be illogical to award the status of parent to someone who had *donated* genetic material or gestational time in order for a child to be created.[25] It may also be argued, following the logic of Katherine O'Donovan, who contends that the importance attached to genetic ties is socially influenced (albeit in the context of gamete donation),[26] that to prioritise the genetic relationship in all cases would be to maintain an artificial construction of

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[23] John Lawrence Hill, n 4 above, 414.
[24] Concise OED: 'donate: give or contribute (money etc.), esp. voluntarily to a fund or institution.'
[25] The extension of this analysis that best illustrates the point is that of the student sperm donor – who typically donates his sperm in return for a small payment, but would have no intention to become the 'father' of all the children his donation(s) may potentially create. Arguably, it is absurd to register donors as parents for two simple reasons: 1) they did not intend to become such – their intention, if any, was to allow their 'product' to be used by someone else. 2) A sperm donor may make more than one 'deposit' and as such become the 'father' of many children (it is also unlikely that a single egg would be harvested from an egg donor).
[26] Generally, Katherine O'Donovan, ''What Shall We Tell the Children?' Reflections on Children's Perspectives and the Reproduction Revolution' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics at the Beginnings of Life* (London: Routledge 1989) 96-114. Also see generally, Olga van den Akker ('The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK' (2000) 15 (8) *Human Reproduction* 1849-1855), who observes that women who can use their genetic material in a surrogacy arrangement are more likely to believe that the genetic link is important than those who cannot.

parenthood. Although in many surrogacy arrangements the genetic parents will also be the intending parents, the development of assisted reproduction technologies and the use of them in surrogacy means that this fact cannot be assumed. In many cases, however, only one intending parent will have a genetic link to the child, and to distinguish between parents in this way would be wholly undesirable.

In the context of surrogacy, it is more often argued that the gestational mother ought to be accorded priority if she later changes her mind and elects to keep the child she has agreed to bear for someone else, and this position is reflected in the current law on surrogacy and motherhood in the UK.[27] Such arguments are based on the supposed logic of long-standing legal and social presumptions that the woman giving birth to a child is undisputedly its mother,[28] 'bonding' arguments, and are also based in the arguments that have tended to surface about surrogacy generally, including the belief that surrogacy is inherently wrong.[29] Arguments against surrogacy range from those that state that it is wrong to agree to bear a child for another, especially when money (and then potentially exploitation and/or commodification) comes into the frame, to surrogacy being akin to prostitution or even slavery.[30]

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[27] The HFE Act 1990, section 27, states; 'The woman who bears the child (and no other woman) shall be regarded as its mother'. Alison Diduck and Felicity Kaganas (in *Family Law, Gender and the State* (Oxford: Hart Publishing, 1999) 110) refer to this as a 'choice that law has made between 'mothers''.

[28] Reflected as *'mater est quam gestatio demonstrat'*: the mother of a child is she who gave birth to it: motherhood is 'demonstrated' by gestation.

[29] Some of these reasons have been discussed in Chapters 2 and 3, above.

[30] The slavery argument seems to have been raised more strongly in the US as it seems to have been linked to 'a great potential for racial discrimination'. See Jamie Levitt, n 16 above, 459.

When parenthood is at issue, the gestational mother's potential claim will centre around the fact that she has given her time, her energy and her body – she has made the largest single physical contribution to the child. The argument that without her, the pregnancy and birth would not have occurred seems, but is not, analogous to the argument for the intending parents. The intending parents initiate the conception, gestation and birth of a child. If, in that equation they need to use a woman to act as a surrogate (again, this arrangement could use any combination of genetic material, some of it may even be that of the surrogate), then it seems reasonable to argue that 'but for' the surrogate, the pregnancy could not occur – the child would not be gestated. But this argument falls down because of the addition of choice. The difference between the claim of the surrogate and that of the intending parents is that they chose to use her (and presumably, she chose to be a surrogate, thus offering her services). Still, 'but for' the intending parents, the child would not exist.

2) How recognising intention would work in practice

In this final chapter, it is worthwhile detailing exactly how the family in general, or the child specifically, in surrogacy or particular assisted conception situations would benefit from legal reform allowing intention to be the primary factor in determining parenthood. As has been argued, intention (broadly encompassing the intention to conceive and raise the child, and the surrogate's intention to gestate it but not raise it) would become the general presumption in such

circumstances, and challenges to parenthood would have to be directed at the commissioning/intending parents, instead of by them, as is currently the case. The remainder of this chapter will look at the practicalities of using intention as the determinative factor for parenthood in surrogacy and some forms of assisted conception. Intention will be set in opposition to the other potentially valid parenthood claims that exist: those of the genetic and gestational 'parent(s)'.

a) Artificial Insemination by Donor (AID)

AID provides a good model for a comparison of the potential claims to parenthood of the genetic contributor with those of the intending parents. Here, the intending parents would be the couple who have chosen to use the donor, perhaps because of male sub- or infertility, or perhaps because they are a lesbian couple wishing to have and raise a child. It may also be the case that fertile heterosexual couples might use AID – to avoid the inheritance of sex-linked (male line) genetic diseases, for example. The intending parent could also be a single woman wishing to have a child. This assumes that the (or one of the) women who is/are to raise the child also has a genetic link to it. The only other person in either of these formulations with a possible claim to parenthood would be the sperm donor, again because of the genetic link – but the concept and nature of donation should arguably preclude his claim.[31]

If it were said that the genetic link was to determine parenthood, an illogical situation would arise. In AID the legitimate (in the sense of genetically related and intending to raise the child) mother would share her parental status, rights and responsibilities with a man who, in his donor capacity, would usually be a stranger, who would live outside the home, and who never would have had any intention to be the child's father.[32] Thus, if there is no other method of determining parenthood outside of the genetic or biological link, in the case of a heterosexual couple planning to raise the child together, the legal father of the child would not then be the man who actually plays the social role of father. This would, in effect, be discrimination against the social father because of his inability to provide genetic material. It would also go against the concept and meaning of donation. This is especially pertinent in a situation where two lesbian women use a sperm donor to enable one of them to bear a child that they will call theirs. In this situation, recognising the genetic donor as the father of the child is totally unrealistic on all counts. A single woman choosing AID will do so for a variety of reasons, which may even include the desire for her child to remain fatherless. Again, recognising the sperm donor as the father would not fit the intended situation or reflect the social reality.

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[31] This is the 'common sense' argument against his claim. Further exploration of the potential situations caused by recognising the genetic link give additional strength to the claim of the intending parents (see below, 313-319).

[32] It is helpful to distinguish between the positive intention *to* be a parent, and the negative intention *not* to become a parent during processes of assisted conception. It seems that the negative intention is already recognised by the law: when a child is born from AID the HFE Act 1990, s 28 (6)(a) states that the sperm donor will not be the child's legal father. Section 27, by recognising the birth mother as the legal mother in all circumstances, also effectively removes motherhood from egg donors, but does not recognise the negative intentions of surrogates.

Although in an AID situation a heterosexual couple receiving licensed treatment would currently both be legally recognised as the parents of the child born,[33] the deciding factors (the common law presumption of maternity, marriage and 'receiving licensed treatment together' under the HFE Act) would only allow the birth mother in a lesbian couple to be so recognised.[34] The child would be registered as legally fatherless.[35] If AID was done 'privately' and a known donor was used,[36] heavy persuasion may be used to get the woman to name the biological father for the birth certificate, or the man may be pursued by the Child Support Agency for child support payments.[37] If the concept of intention were used as a pre-birth allocation of parenthood, then those who were intended to play the social parental roles (whether this be a heterosexual couple, a lesbian couple or a single woman) could legally and legitimately be recognised as parents of the child that they both or singly, in all senses other than the doubly

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[33] Even if AID was used by a heterosexual couple without recourse to a licensed clinic, current presumptions would recognise both of them as parents if they were married and allow them to be registered as such. It is likely also that even if they were not married, the intending father would be named on the birth certificate.

[34] This is obviously the same if AID is performed privately. Only the birth mother will be recognised. Although clinics licensed by the HFEA to provide AID services do have the discretion to treat lesbian couples (and some do: anecdotal evidence suggests that about 25 of the 101 licensed clinics in the UK will treat lesbian couples), this discretion is limited by the statutory indication that in determining who should receive treatment regard should be had to certain factors, 'including the need of that child for a father' (HFE Act s 13(5)). Even if treatment is given, both women cannot be legally recognised as parents. It is interesting to note, however, that lesbian parenting has been legally recognised in a parental responsibility sense: see *Re C (A Minor) (Residence Order: Lesbian Co-parents)* [1994] Fam Law 486, but this is a far cry from *parenthood.*

[35] Which in itself is not problematic. However, the other woman, as an equal partner and also an intending parent, will not be recognised.

[36] As in the scenario mentioned by Sally Sheldon in "Sperm Bandits', Birth Control Fraud and the Battle of the Sexes' (2001) 21 (3) *Legal Studies* 460-480, 475.

[37] Sally Sheldon (*ibid*) argued that this pursuit of men who were not regarded or not wanted by the mother as the 'father' (in the active sense) is implicitly a mechanism to maintain the nuclear family, because it is perceived as the 'norm', or the 'right' way. John Lawrence Hill (n 4 above, 390) has acknowledged that dominant images of the importance of the genetic link may mean

biological, planned for and created. The donor in this circumstance would also be exonerated from the recognition and responsibilities that parenthood entails – as it would be assumed was always *his* (negative) intention. It is unlikely that a donor (because of the whole concept of donation) would wish to become the father of any (or all) of the children he 'fathers' biologically.[38]

Arguments against favouring the genetic link

It is likely to be a viable proposition for some that the genetic parents of a child should be registered as the legal parents of that child, no matter how the child was created. This is based on the premise that there is an unique biological relationship shared by genetic parent and child. Hill says that it

> 'is beyond dispute that an important aspect of parenthood is the experience of creating another in 'one's own likeness'. Part of what makes parenthood meaningful is the parent's ability to see the child grow and develop and see oneself in the process of this growth'.[39]

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that it is 'only natural that ... our feelings regarding this issue reflect precisely the sentiment that law should preserve as a family unit that which nature has rendered genetically similar'.

[38] In the ongoing discussions on donor anonymity, it has been recognised that if donors were unable to remain anonymous (to various extents), the number of men donating would be likely to fall, and/or the donor 'population' would be likely to change; for example from younger, single men, to older, married men, as has been seen in Sweden. From this, we can assume that donors do not intend to become the 'fathers' of children. For whatever reason they donate, they assume that their responsibility ends there. Of course, it may also be argued that those men who might continue to donate if anonymity was removed are less concerned about this responsibility. However, I think it would be safe to argue that even those men who consent to information being

This analysis is safe when applied to those who can conceive naturally, and even to some of those who cannot;

> '[t]he significance of the genetic connection between parent and child undoubtedly is part of what makes infertility a painful experience ... It is this desire which impels some to use reproductive technologies and arrangements, including surrogate parenting, to create a child rather than to adopt'.[40]

However, for those who cannot have a genetically related child by any means, this analysis offers no solution to their unfulfilled desire to become parents. Neither does it offer anything to a partner in a relationship who cannot provide genetic material when his/her partner can, and who would then be registered as a parent.

Indubitably also, the genetic link is seen as 'normal'.[41] It is the way in which most children are linked to their parents.[42] Intuitively, therefore, most of us could see a reason for prioritising the genetic or biological connection. However, despite this,

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provided about them to their donor offspring would object to being either socially or legally recognised as the father.

[39] John Lawrence Hill, n 4 above, 389.

[40] John Lawrence Hill, *ibid.*

[41] Katherine O'Donovan discusses some issues raised by the perceived significance of genetic ties in 'A Right to Know One's Parentage' (1988) 2 *International Journal of Law and the Family* 27-45.

[42] Although recent studies suggested that as many as one in ten of us may not actually be genetically related to our fathers, even though we have assumed or been represented to that we are. Interesting discussion on this point can be found in Robin Baker, *Sperm Wars* (London: Fourth Estate, 1996) 55-61.

the genetic argument does not work universally to accord the rights of parenthood to the 'right' people. Even in 'normal' conception situations there is room for argument against the registration of genetic parents as the parents of the child as not all children are conceived or born intentionally; this is probably most likely to be the case for the male partner in the relationship. It could also be pointed out that parenthood based on the genetic link allows a rapist to be the father of a child conceived within the act of rape,[43] as it would men 'duped' into conceiving children.[44] Registering genetic fathers in situations which would otherwise leave a 'single mother' with a child may seem like a sensible idea to some,[45] but it is certainly no guarantee that that man will shoulder any of the responsibility any more so than would be the case if he were not registered, and neither is it an argument that he should. Even within marital situations there has been some discussion of the percentage of children born from extra-marital affairs, therefore the male genetic parent may not necessarily always be the acting parent anyway.[46] In surrogacy and assisted conception there are two other situations in which genetics and biology can be said not to give enough to justify automatic legal parenthood or, in fact, where they may give too much. Although

[43] John Lawrence Hill, n 4 above, 388. It could also be argued on this point that a rapist does not 'intend' to be a father (at least not in the sense of being involved in the act of parenting a child).
[44] Sally Sheldon, n 36 above.
[45] And seems to be reflected in policy and practice; see generally Sally Sheldon, *ibid.* This is also linked to the prevailing construction of the 'Single Mother' as financially dependent on the state or others. It begs questions (as does the rape point) about the kind of responsibilities society would prefer to be imposed on people creating children. Unintentional parenthood – especially fatherhood – (outside of the donation situation) seems to justify to policy makers that the father must make financial contributions to the upbringing of the child. This may not be required in all cases (or wanted by the mother).
[46] See generally, Robin Baker, n 42 above.

some of these points have been raised elsewhere, it is worth paying them specific attention here:

i) Gamete donors would become parents

Usually gamete donors have no other involvement in the creation of any child created from their donation other than the act of offering their genetic material for use by others. The commonly understood meaning of 'donation' is to give something away, without requiring anything in return, inferring that the possibility of parenthood is also relinquished by donors. Donors of sperm or eggs do not have the intention to raise or even be involved in the lives of the child(ren) that may result from their act,[47] and if they did, it is unlikely that they would be allowed to donate (this would surely be a kind of misrepresentation), and almost certain that their 'donations' would not be accepted by the prospective parents if this were the case. This 'passive' contribution to the creation of a child should not be the basis of the giving of the status of parent, especially as it cannot be applied universally. This is true of both the sperm and egg donor, notwithstanding the greater physical intervention required in donating eggs. If parenthood were awarded on the basis of genetics, then gamete donors would always become parents of the children they helped to create, in contradiction of the meaning and intention of donation.

[47] In fact it seems that their intention is not only *not* to be parents, but that they have the positive intention that *someone else* be parents.

ii) The genetic claim may be based on property arguments

The potential argument that the genetic parents should be legally recognised because of 'property rights' they have in their own material has been discussed and dismissed by Hill. Notwithstanding the fact that one cannot actually have property rights in a child,[48] the major premise of this argument appears to be that 'persons possess property rights in the products, processes, and organs of their bodies and in any commodities developed from these sources'.[49] The conclusion to be reached on the basis of this argument would be, therefore, that the genetic contributor (donor or otherwise) would have property (or quasi-property) rights in any resultant child. Many reasons can be put forward why this should not and would not be the case. First, a genetic contributor would only have a half-interest in any resulting child, that child being the result of a fusion between the genetic material of one man and one woman. If the argument were to be logically followed, then each genetic contributor would have an equal property share in the child.[50] Therefore, the property argument could only be feasible where both the genetic contributors intend to raise the child together – that is, in 'normal' heterosexual conception, conception assisted by AI (without a donor) or IVF, or in full surrogacy where both genetic contributors are the commissioning parents. It would not work for AID or for partial surrogacy and should be rejected on that basis.

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[48] Although it may be possible to have property rights in stored gametes or an embryo (within licensed treatment services) since they will have been treated or altered in some way either in production or storage.
[49] John Lawrence Hill, n 4 above, 391.

The second and more interesting property argument that may be put forward involves payment for donated gametes. As a consequence of payment, the genetic material, it is suggested, would become, according to traditional property and sales analysis, the property of the particular clinic or hospital, who would then be free to dispose of it as they saw fit.[51] Clearly it would not be expected that as the 'owner' of genetic material that was provided in assisted reproduction, the clinic would become the parent of a child. Further in the concept of property, even if the gametes were not 'bought' but were merely donated, Hill believes that the doctrine of accession, at least in US law, 'might bar the claims of the genetic progenitors',[52] because where a raw material (in this case, the 'raw' genetic material), has been altered significantly so as to change its function or increase its value, the doctrine requires that the title or ownership of the goods in question passes to the one who made the greatest labour input. In cases of assisted conception where donated gametes were used, then, this would mean that those who gave the greatest input to the resulting pregnancy would have the property-based claim to be parents. For AID this could raise dispute, no great effort is required for (s)he who performed the insemination, seemingly leaving the parenthood claim with the gestational mother.[53] Notwithstanding these arguments, Hill identifies a more fundamental difficulty with utilising property-based genetic arguments when determining parenthood: '[w]hile people may

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[50] John Lawrence Hill, *ibid.*
[51] John Lawrence Hill, *ibid* 392.
[52] John Lawrence Hill, *ibid* 393.
[53] Note that in the case of full surrogacy with gamete donors it would be hard to argue the difference in input between the surrogate, the intending parents, or even the clinic itself if technological assistance (such as IVF or even ICSI) was given.

possess property rights in their genetic issue, they certainly do not possess property rights in the result of their genetic contributions. Put more simply, children are not property.'[54]

b) IVF

Determining parenthood by intention for those using IVF procedures as a method for having children would again result in the 'right' people – in terms of those who will actually perform the social act of parenting – being legally recognised as the parents of any child born.[55] The intending parents are the ones who, for one reason or another, cannot conceive 'naturally'[56] (or who chose not to) and will have been trying and presumably failing to have a baby by other means. They may also require one or other gamete to be provided by a donor. IVF using a sperm donor, an egg donor, and donors for both gametes will be considered in addition to IVF using the gametes of the intending parents.

Parenthood after IVF with either a sperm or egg donor (or both) would be subject to the same qualifications as AID: the donor in each case is presumed to be donating his or her genetic material, and not wishing for themselves to become or to be regarded as the parent of any resulting child. Conversely, the recipients of the donated gametes do intend to be the parents, and one of them is likely to

[54] John Lawrence Hill, n 4 above, 392.
[55] I am also including ICSI in the section on IVF. It is an extension of the ordinary processes of IVF and so would involve the same potential parents in each situation described.
[56] Or with the use of other more 'natural' techniques such as AI.

be genetically related to the child. If intention was not used as the determining factor, then the genetic link may be championed instead, again leading to a form of discrimination against whichever partner was unable to provide genetic material for the IVF treatment. This determination of parenthood would again create the unrealistic situation that one of the intending parents (who provided genetic material) will be recognised as the legal and social parent of the child along with the donor of the other genetic material, and not their own partner.

As the law stands, even if the IVF recipient female was not the genetic contributor, she would be regarded as the legal mother of the child purely because of the fact that she will be the one to give birth to it. Thus, the concept of intention will do nothing to change her situation with regard to parenthood. The IVF recipient male would be presumed to be the father of the child of his wife if the couple were married, thus the concept of intention alone would do little to change his position either, even if he were not the genetic father of the child. What the concept of intention could allow for however, is the recognition of non-married fathers who receive IVF treatment (with or without a sperm donor) with their partners, and lesbian partners. Equally important would be the universality of the provision of intention if it were adopted. As previously mentioned, it could produce the 'right' result in all cases, even if that does not necessarily differ from the current legal position. It could be said that intention produces the right result and for the right reasons, rather than by mere accident – that is, if a situation

(such as IVF within marriage) fits with current traditional presumptions and within medical and family law.

c) Surrogacy

IVF and AI become more contentious when used as part of a surrogacy arrangement.[57] For this reason it is necessary to deal with surrogacy in its two separate forms, which shall again be referred to as 'partial' (where the surrogate has used her own egg and therefore is also the child's genetic mother), and 'full' (where the surrogate is not genetically related to the child she carries). In this case, the intending couple and/or donors may have provided the genetic material.

i) Partial surrogacy

Intention in partial surrogacy eliminates the possibility of the surrogate being legally recognised as the mother – thus going against the traditional presumption that the mother is the woman who gives birth to the child, at the same time as negating the surrogate's genetic link to the child. At one time, it was generally certain that the presumption of maternity could not fail to be correct,[58] but with

[57] As previously stated, this is defined by Derek Morgan as 'an understanding or agreement by which a woman – the surrogate mother – agrees to bear a child for another person or couple', in 'Surrogacy: an Introductory Essay' in R. Lee and D. Morgan (eds), *Birthrights: Law and Ethics at the Beginning of Life*, (London: Routledge, 1989) 55-84, 56.

[58] Although historically some women giving birth will have been acting as partial surrogates, having had intercourse with another man or in some way been inseminated and agreeing to give up the child.

the advent and development of sophisticated reproductive technologies and the use of surrogacy in tandem with these, this presumption can be challenged on two bases.

First, the surrogate acts as a substitute for part of the process involved in having a child, not actually for the person (mother) herself.[59] Thus, the term 'surrogate mother' is incorrect, but 'surrogate' alone is not. The surrogate agrees to carry a child for another person(s)[60] and to surrender that child to that person(s) when it is born. Again putting to one side arguments that surrogates are or can be exploited in such a relationship, and other arguments that surface about surrogacy in general, it is the notion of this agreement that motivates the intending couple to initiate that particular pregnancy in the first place, whether this comes about (unusually) by natural conception between the surrogate and the intending father, or by the surrogate being artificially inseminated with the intending father's or donor sperm, privately or at a clinic.

Secondly, the presumption that the woman acting as surrogate is the mother can be rebutted on a similar basis as the argument for gamete donors – the surrogate in effect is also making a donation. In partial surrogacy she donates both her

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[59] There have been discussions as to exactly what the surrogate is substitute for, or, indeed, whether it is she who is the substitute at all (see in particular Derek Morgan, n 57 above, 56). If one does not take the current legal definition of mother always to be true then the semantic argument on this matter is not necessary.

[60] I include this gender-neutral and plural-free definition as potentially a surrogacy could be for a single person of either sex or either a heterosexual or homosexual couple. There are recent examples of surrogacy being used by homosexual men who wish to have a child. For example, the Drewitt-Barlow case where a homosexual couple from Essex used an American surrogate after they were initially refused by adoption agencies.

genetic material and her time, energy and bodily resources throughout the gestation period and at birth. At the time she makes the agreement, she herself does not intend to keep the child as her own despite the fact it will be genetically her child. This in itself is another reason for changing the legal registration and recognition of parenthood in surrogacy situations. If the surrogate later wishes to make a claim for the child then it should be for her to do so, after the child has been registered as that of the person(s) who intended for it to be born, and intended to be its parents.[61] Of course, there seems to be some room for argument that partial surrogacy should not be used, that is, a surrogate should not provide any of the genetic material for a child she carries for someone else, but that discussion falls outside the scope of this chapter.[62]

ii) Full surrogacy

In full surrogacy, the surrogate has no genetic connection to the child she carries (unless she is related to either of the commissioning couple). The child may be the result of the fusion of the gametes of the commissioning couple in IVF, or if one or both of the couple produces poor quality or no gametes, donor material may be used. Again, the donors would be exempt from being recognised as the parents of the child created by virtue of the nature of their contribution. As

[61] A further argument for reversing the registration of surrogate born children centres on the bizarre combinations of parenthood that can arise after a surrogate arrangement and before a section 30 parental order is awarded by the courts (if it is). The husband of a woman acting as surrogate (if she is married) will be registered as the father of the child, when it is unlikely that he will ever have had anything more then a supporting role. He will have made no input genetically or physically to the child, and certainly did not intend to become the father.

mentioned previously, this logic could also be extended to the surrogate. In full surrogacy the surrogate does not 'donate' any of her own genetic material, but she does still give her time, energy and bodily resources to enable the commissioning couple to have a child.[63] Recognising intention as the basis for parenthood in cases of full surrogacy would provide the 'right' outcome – the child is not linked to the surrogate, and, more importantly, the intending parents are the ones who were motivated to initiate its conception and intend to take all responsibility for that child for all of its life. They should be legally recognised as the parents of that child from the time it is born, whether they are genetically linked to it or not.[64]

Using intention to determine parenthood precludes the necessity for such a mechanism as the section 30 parental order, which in effect transfers parental rights between six weeks and six months after the birth of the child if all parties are still in agreement that this should be so. Parental orders can be criticised for the stringent requirements, which serve to limit their availability to prospective commissioning parents. For example, the requirement that one or more of the

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[62] This is, however, one of the provisions contained within a current Minnesota bill on assisted reproduction, discussed in Chapter 5 above, 236-237.

[63] By comparing the actions of a surrogate to donation, I do not support the view that surrogates should not be paid. On the contrary, sperm donors can get paid for their 'services' (as do egg donors to a more limited extent (although see 'Women Sell Their Eggs to Pay off Student Debts' *The Sunday Times*, 3 June 2001, www.sunday-times.co.uk/news/pages/sti/2001/06/03/stinwenws01014.html, and 'Women Sell Eggs to Pay for College' *The Times*, 28 May 2001, www.thetimes.co.uk/article/0,,3-2001180594,00.html). Surrogates should be paid for the greater (proportionally) 'donation' that they make.

[64] This point raises another very general argument against using genetic links to deciding parenthood. In full surrogacy it may be the case, if donors are used for both gametes, that the genetic 'parents' are unknown. In addition, as Emily Jackson points out (n 21 above, 267), they are also likely to be the people who least want to be the parents of the child.

couple claiming parenthood must be genetically related to the child, or that the couple must be married in order for parenthood to be awarded. Most of this criticism is directly related to the fact that such requirements do not exist for people who can conceive in the 'normal' way.[65] In fact, to regard intention as the factor that determines parenthood in a surrogacy situation would be fairer to all parties concerned. The intending couple and the surrogate would be recognised for the actual roles they play: the commissioning couple intend to be parents and the surrogate intends to give the child up.

Arguments against favouring the gestational link

The claim that the gestational mother, and thus the surrogate, should be legally recognised as the mother of any child she gives birth to seems to have been the most compelling of all arguments raised and consequently has been reflected and incorporated into our law. Intuitively the gestational mother appears to have more of a claim to parenthood than that based on the genetic link alone. As mentioned previously, historically this definition would have proved relatively unproblematic. Four reasons why the gestational claim may be assumed to carry more weight than any other can be identified:

[65] Similar arguments on this point are made by Gregory E. Pence in *Re-creating Medicine: Ethical Issues at the Frontiers of Medicine* (Lanham, MA: Rowman and Littlefield, 2000), in the chapter entitled 'Recreating Motherhood: Buying Reproductive Help', 63-93. See also Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 (2) *Modern Law Review* 176.

a) Bonding occurs between the gestational mother and child

The first possible argument is centred on the claim that there is a bond that develops between mother and child during gestation. There are many theoretical formulations and interpretations of this supposed bond – thus, as Hill states, there is a 'lack of uniformity (of opinion) [which] has important implications for the claim that bonding is an inevitable concomitant of pregnancy and childbirth'.[66] He argues that pregnancy is more than likely to be a different experience for every woman, and although he accepts that there is both scientific and anecdotal evidence that may support the bonding hypothesis,[67] he also recognises that there is evidence, which directly challenges this.[68] As far as the bonding theory reflects upon the determination of parenthood, it could be argued that in changing the way that parenthood is determined in assisted conception and especially surrogacy may serve to negate the bonding process itself. If it could be argued that bonding may be as much a reflection of social construction as it is of biology then, if for example the surrogate did not ever *expect* to be legally recognised as the parent of the child she carries (and she knows that the intending parents do), bonding may not take place at all. Jamie Levitt states that

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[66] John Lawrence Hill, n 4 above, 396. The bonding argument also does nothing for fathers, as it seems to be based on gestation alone. It is interesting to note that the Warnock Committee said in their discussion on surrogacy that 'no great claims should be made' in respect of bonding because of a paucity of evidence about the process (Dame Mary Warnock, *A Question of Life. The Warnock Report on Human Fertilisation and Embryology*, Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) 46).

[67] For example, the fact that many women mourn the loss of their babies, even non-viable foetuses (John Lawrence Hill, *ibid* 397).

> '[n]umerous studies indicate that external circumstances affect the bonding process between the surrogate and the fetus. If a surrogate knows from the outset that the contract is binding and that the baby belongs to the intentional parents, her expectations and thus emotional ties to the child are therefore likely to be different'.[69]

Supporting this view, Rachel Cook discusses a controlled study undertaken by Fischer and Gillman in 1991, which shows that 'surrogate mothers indeed showed less attachment to the foetus and different experiences of pregnancy when compared to non-surrogate mothers'.[70] In addition, it could probably be argued that if bonding is based on involvement (as it may be if the gestational claim is upheld), intending parents who initiate and continue to be involved with a pregnancy may actually have a similar claim.

b) It is better for the child to stay with its gestational mother

A second argument raised for favouring the gestational link is based on the 'best interests' argument. Hill notes that every US state has recognised a presumption that it is in the best interests of a child to remain with or be placed with its natural

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[68] The most striking examples are termination of pregnancies and surrendering children for adoption at birth.
[69] Jamie Levitt, n 16 above, 476.
[70] Rachel Cook, n 11 above, 133.

parents.[71] Again, however, this presumption appears only to be favouring the genetic or biological link, and depends entirely on one's definition of 'natural'. The argument appears to be based on the assumption that children having an uncertain 'biological legacy' may be psychologically harmed.[72] Hill recognises that the same argument was used against AI forty years ago, and states that 'it is no more compelling now than it was then'.[73] Thus, this is an argument for the intentional parents being favoured over the gestational in the case of a dispute over parenthood. The best interests argument in this sense does not support the claim that the gestational mother (or the genetic parent) has a claim to parenthood that trumps the claim of the intending parents, although this is the 'prevailing popular belief and legal fiction'.[74] In addition, when a surrogacy arrangement is entered into, a woman acting as a surrogate has no intention to keep the child that she carried. Emily Jackson points out that

> 'to ignore the centrality of ... intention and instead ascribe *prima facie* parenthood to a couple that never intended to keep the child may not promote the child's welfare'.[75]

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[71] John Lawrence Hill, n 4 above, 400.
[72] This argument does not stand up for many reasons, mostly because it implies that all adoptees, and potentially step-children, would suffer psychological harm. Also, the argument would not apply to full surrogacy or IVF, but only to AID, egg donation and partial surrogacy. If the argument stands, however, this may incline people to regard partial surrogacy as potentially more damaging than full surrogacy.
[73] John Lawrence Hill, n 4 above, 404.
[74] John Lawrence Hill, *ibid.*
[75] Emily Jackson, n 21 above, 270.

c) Relinquishment may harm the gestational mother

The argument that relinquishing a child may psychologically harm the gestational mother applies (in this context) only to surrogacy, and is potentially one of the bases for the rigidity of the legal definition of motherhood.[76] In the main, the argument is based on adoption experiences and statistics that show that many relinquishing mothers grieve and/or search for the child that they surrender.[77] It is arguable, however, that surrogacy is distinguishable from adoption: central to any knowledge of relinquishment in adoption is that it came *after* the fact. It can also be assumed that the reasons for surrendering a child for adoption are very different to those involved in surrogacy relinquishment: they are not based on a pre-conception agreement and largely do not involve other parties from the pre-conception stage. In addition, it can be suggested that any harm felt by the surrogate is comparable to the 'loss' that may be felt by the intended parents if the child is not passed over to them; must these 'losses' be weighed against each other? If so, on what basis would we then determine who was to be regarded as the parent of the child? Perhaps because the agreement and the intention of the gestational mother may be seen to have changed, this should affect the outcome. Following this argument to its logical conclusion supports the use of contractual theory (in tandem with intention) in disputes following surrogacy arrangements.

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[76] Emily Jackson, *ibid* 266.

d) The gestational mother contributes most to the creation of the child

Does sheer physical involvement mean that in the event of a dispute, a surrogate (or any gestational parent)[78] has the greatest claim over the child? It has been argued that children 'belong' to the gestational mother on the basis of input.[79] Obviously this argument is linked to those discussed above (bonding and relinquishment), and it is arguable that it can therefore be dismissed for similar reasons. It also again depends on definition: what is involvement? Intending parents are 'involved' in the creation and maintenance of the pregnancy prior to the surrogate becoming involved; they also spend more emotion (and often money) on the pregnancy and in preparation for the child – might this in fact mean that their claim to parenthood is stronger? The significance of social parenthood means that the involvement of the commissioning parents is essential. This is something given great importance by surrogacy agencies both in this country and abroad, and is something considered to be important in the success of the majority of surrogacy arrangements brokered through them.[80] In addition, '[i]t is suggested that this involvement can simultaneously provide much-needed social support for the surrogate mother as well as a *continued*

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[77] John Lawrence Hill, n 4 above, 405-406 (and relevant footnotes) discusses the results of some studies.

[78] Because this again seems to be a claim based on gestation: gamete providers have a certain amount of physical involvement, and certainly, egg donation involves uncomfortable and invasive procedures and a higher level of risk, but this does not compare to the level of physical input given by the gestating woman.

[79] Barbara Katz-Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: Norton, 1989) 44: '... [a]nd from the woman's point of view? We can use this man's sperm or that one's to have our children... our bellies will swell, life will stir, milk will flow... For women, what makes the child ours is the nurturance, the work of our bodies. Wherever the

reminder of the identity of the "real" parents'.[81] This, then, can serve the dual purpose of accentuating the physical, mental and financial involvement of the intending couple while encouraging and increasing the 'detachment' of the surrogate. If it is also true that part of intention is 'nurturance',[82] then the intending parents, if the child is transferred to them, are in the best position to nurture that child.

Furthermore, Hill also argues that championing the gestational mother on the basis of her physical involvement should be dismissed in the same way as an argument based on the genetic link; that the claim, if there is one, is based in a 'kind of property right in the child'.[83] Even if this is wrong, the analogy he uses is persuasive: 'the surrogate has no more of a claim to the [child] by virtue of this argument than a builder has in a house constructed by another'.[84] Extending this analogy, it could be said that even if the surrogate is comparable with the 'builder', the intending parents would then be the architects or investors, hence it could be said that they have an equal or potentially more valid claim to parenthood.

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sperm came from, it is in our bodies that babies grow, and our presence and nurturance that make our babies ours'.

[80] See generally, C.O.T.S., *Comprehensive Guide to Surrogacy* (Unpublished, 2000).

[81] Rachel Cook, n 11 above, 136, emphasis added.

[82] See n 11, above.

[83] John Lawrence Hill, n 4 above, 408

[84] John Lawrence Hill, *ibid.*

3) Conclusions

Because methods of creating children by 'non-natural' means or by those requiring medical intervention have greatly increased, and perhaps also because of the increased popular exposure to these 'collaborative-reproductive techniques',[85] it has become necessary for us to rethink how we define parenthood. In particular, because there is the possibility that up to six people may have a claim for parenthood of a child born from assisted conception, a universal principle ought to be established that would enable the 'right' people to be recognised as parents in any given case. It seems that the recognition of intention might be one way of providing this, and it may be that such a test has become appropriate following the development of assisted reproduction techniques that mean that parenthood, especially motherhood, can be broken down into its component parts. Furthermore, in a more general sense, because we are able, to a large extent, to control our fertility, this means that 'procreation increasingly involves both the biological process of reproduction *and the intention to become a parent*'.[86]

Though the genetic link argument may have some support, it is an argument, which does not withstand scrutiny. As has been shown, the claim of the genetically linked contributor is based upon the premise of an unique biological tie between them and the child: the creation of a child in one's own image. The

[85] John Lawrence Hill, *ibid* 418.
[86] Emily Jackson, n 21 above, 269, emphasis in original.

claim necessarily fails in assisted conception situations because it would mean that donors would become the legally recognised parents of any or all children that they participated in the creation of. To allow this would contradict the whole meaning and intention of donation. Recognising donors would also lead to the unrealistic situation that two entirely separate individuals were recognised as the parents of the child, when they are likely to be complete strangers. This formulation could therefore even be challenged by anyone who aims to uphold the nuclear family model. The genetic link is also rejected as the determining factor in parenthood because of the fact that it could be seen to be a property based claim; thus again creating an indefensible situation whereby two unrelated parties may have an equal proprietary interest in a child, and, if the property analogy were further extended, a clinic may also have a claim to 'ownership'. In itself the claim is inherently flawed, as it could not produce an universal outcome in relation to *all* assisted conception techniques.

Claims based on gestation are similarly flawed in a number of respects. The claim merely perpetuates the existing formulation of motherhood, and should thus not be a basis for the recognition of parenthood.[87] It also prioritises the mother whilst doing nothing for fathers. The 'best-interests' argument is not at all convincing, especially when turned on its head and the position of the gestational 'mother' is challenged on the basis of the agreement to relinquish the child. For

[87] Randy Frances Kandel ('Which Came First: the Mother or the Egg? A Kinship Solution to Gestational Surrogacy' (1994) 47 *Rutgers Law Review* 165-239) argues that in gestational (full) surrogacy, consideration should be given to the recognition of three parents under a 'contractual

the same reasons, a claim based on the potential harm caused by relinquishment or upon the fact that pregnant mothers might bond with the child they carry must also fail. It would be hard to argue that the gestational 'mother' had no claim to the child – but it is not difficult to see that her claim is morally outweighed by the claim of the intending parent(s). Furthermore, it is suggested that perhaps the gestational mother bonds with the child because of an inherently 'natural' expectation of raising it.[88] Thus, a surrogate may potentially 'bond' with the child because she always retains the capacity to challenge the claim of genetic or intentional parents because of the presumption of motherhood that is the cultural and legal fiction. There are, therefore, valid reasons for not leaving this avenue open – if it is known from the outset that it will be the intending parents who will be the legal parents of the child she carries, perhaps the surrogate will not form this bond, or any bond formed will be different.

It is therefore clearly arguable that because the intended parents initiate, plan and engineer the birth of the child, they should be legally recognised as the parents of that child that, but for them, would not exist.[89] It is they who choose to

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kinship', thus enabling the gestational mother to retain a connection with the child. Whether such an arrangement could be said to be in the child's best interests is debatable.

[88] See, however, Liezl van Zyl and Anton van Niekerk ('Interpretations, Perspectives and Intentions in Surrogate Motherhood' (2000) 26 *Journal of Medical Ethics* 404-409, 407), who argue that it may be the 'surrogate's perception that the child is not her own' and that this perception 'tends to shape her entire experience of pregnancy'. The authors quote surrogates interviewed by Helene Ragone as saying, for example, "I never think of the child as mine. After I had the baby, the mother came into the room and held the baby. I couldn't relate that it had any part of me"; "I don't think of the baby as my child. I donated an egg I wasn't going to be using"; "The baby isn't mine. I'm only carrying the baby" (405).

[89] Of course, arguing this does not negate the input of others in the creation of the child, suffice it to say that while all parties are 'necessary', the efforts of the intending parents should be accorded priority. The genetic or gestational contributors become donor participants only in the creation of the child, which was instigated by those who intended to have the child.

use a means of assisted conception, thus choosing whether to use a donor of genetic material or a surrogate.[90] They are the 'first cause'[91] of the child and as such are of *prima facie* importance in the procreational relationship. Acknowledging this as parenthood depends upon a rejection of the biologically-based traditional arguments for parenthood: a recognition that parenthood does not depend upon anything inherently biological, but rather upon an initial intention, pre-conception, to have a child, and to initiate the process with which that child is to be brought into the world. Hill states that '[i]t might be argued that this is a peculiar approach to the determination of parental status since it places a mental element, intention, over the tangible, biological tie'.[92] This argument can, however, be challenged with reference to other areas of law where the mental state, or intention, gives authority, including contractual agreements or criminal acts, for example. But it is clear from comparisons with other methods of family formation, notably adoption, that although

> 'other elements [than intention] may be valued, [they] are indeed unnecessary. It is clear from a psychological perspective neither the genetic, sexual or gestational elements are necessary for successful parenting'.[93]

[90] In the literal sense only, perhaps.
[91] John Lawrence Hill, n 4 above, 414.
[92] John Lawrence Hill, *ibid.*
[93] Rachel Cook, n 11 above, 136.

Because the current law regarding the parenthood of children born from assisted conception often omits to recognise the 'right' person(s) as the parent(s) of the child, and because of the lack of consistency in parental determination, it may be that the intention-based argument should succeed.[94] The causal relationship between intended parents and child should mean that they are the legal 'parent'. It can also be said that the recognition of intention would more precisely reflect the expected outcome for all parties concerned. Equally, in an agreement such as a surrogacy arrangement, or even the agreement a donor makes with a clinic, all parties make what may be called 'pre-conception commitments':[95] '[i]nitially it is the intention of all adults in a surrogacy arrangement that the intended parents become the social parents'.[96] In donating gametes, it is assumed that the donor commits him or herself not to be further involved in the life of the child, which they may help to create. A surrogate implicitly refrains from claiming parenthood over the child: she agrees to bear and give birth to a child for someone else – her 'intention is clear, even though her motivations may not be'.[97] The commissioning parents in a surrogacy arrangement base their entire expectations upon the agreement made with her and the implied promise contained within it. Thus, it could be argued that it is unfair for the surrogate to break her promise and that there are good reasons for legally recognising intending parents, based upon

[94] Marsha Garrison (n 16 above, 878-882) puts forward a strong case for consistency in determining parenthood following assisted reproduction and surrogacy, arguing that it is not the 'mechanics' involved that are important, but the relationships that will be formed.
[95] John Lawrence Hill, n 4 above, 415.
[96] Rachel Cook, n 11 above, 135.
[97] Rachel Cook, *ibid*.

their (detrimental) reliance upon the promise, and their expectation.[98] Reliance in surrogacy can sometimes extend to the payment of a great deal of money to a surrogate, and, in any case, is likely to involve some alternative forms of financial and emotional expenditure in preparation for having a child. The arguments against the contractual formulation are mainly based in arguments that have been previously expounded. If it is argued that the gestational mother should not be held contractually liable to the intending parents if she reneges on the agreement, then this must be based upon arguments that seek to prioritise the claim of the gestational mother over any other. Consequently, it must also be based in the presumption of motherhood that is currently enshrined in our law. An alternative challenge to the reliance or expectation theory may be based in a distaste for allowing what is essentially a commercial mechanism to become a defining factor in an inherently private process. It may be seen that in this way a child is becoming commodified. However, the use of contractual principles, in conjunction with the acknowledgement of intention, would be a beneficial element of future surrogacy regulation, in that consistency could be achieved in the determination of legal parenthood.[99]

[98] For discussion of the application of contract theory to surrogacy, see Chapter 6, above. See also Marjorie M. Schultz ('Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' (1990) *Wisconsin Law Review* 297, 302), who says that 'legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future. Where such intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and expectations ... they should be honored'.

[99] As discussed in Chapter 6, enforceable contracts in surrogacy would also help to protect surrogates and commissioning couples.

There are valid reasons to assure the identity of the parents of a child at the time of conception: it is surely better all round for the parents of a planned child to be determined prior to its birth – and where better than at conception (or pre-conception) to avoid any uncertainty or dispute? It is not in a child's best interests to have any or all of its potential parents involved in dispute over parenthood after it is born,[100] and enforceability of surrogacy arrangements may also help to prevent disputes, even if this is at the risk of fewer women being prepared to become surrogates. Certainty and completeness is obviously important if intending parents are recognised, as it would allow them to plan for their child that 'but for' them, would not come into existence. The certainty argument would continue to work in the event of the commissioning couple refusing to take the child. If, for some reason, they decided that they did not want the child, for example, if it were born disabled, then they would be held to their agreement, at least in terms of having parental responsibility, on the basis that it was their intention to have the child. As Emily Jackson points out, the current formulation of the law in this country would mean that a surrogate mother would automatically have parental responsibility if there was a refusal on the part of the commissioning parents, when the child was one that she never intended to have. The commissioning couple would be relieved of any responsibility even though 'but for' them, the child would not exist.[101]

[100] John Lawrence Hill would go further than a rebuttable presumption in favour of the intending parents; 'permitting challenges to the parental status of the intended parents virtually ensures that the child will grow up in the functional equivalent of a broken home' (n 4 above, 417).
[101] Emily Jackson, n 21 above, 269.

It seems, therefore, that neither the gestational claim or the argument based upon the genetic link present a clear reason why either should be championed when determining the parenthood of a child born from surrogacy or assisted conception. It has been shown that the intending parents in surrogacy and assisted conception have a claim to parenthood that is both stronger and less flawed than the claim of either the genetically related contributor(s) or of the gestational mother (where these processes are separated). In order to accept this, assumptions that current provisions in the law uphold and perpetuate must be challenged. Families in themselves have changed as society has changed, not only because of technological developments, but also because of alternative attitudes and beliefs about what is acceptable in reproduction. In order to recognise this, and in order not to discriminate against people seeking parenthood through assisted conception or surrogacy, the method of determining legal parenthood also needs to be reformulated.

Even if contractual theory is not employed in the arguments for the intending parents, it can be argued that it would be inequitable for the genetic contributors or the gestational host to renege on their implied promises to make no further claim on the child which they may assist in the creation of. The intending parents in any form of assisted conception or in surrogacy are the 'right' people to be recognised as the parents of the children that are born as a result because if not for them then the child would not exist.[102]

[102] The presumption that the birth mother *is* the mother of a child is not only entrenched in our law and the recognition of her as the mother is socially and culturally constructed, thus we tend not to

challenge it. John Lawrence Hill (n 4 above, 419) notes that this is a 'deep intuition', that it is only a 'modern understanding that parenthood is as much a social, psychological and intentional status as it is a biological one'.

Conclusion

Changing Misconceptions

> Our society has not come anywhere near to settling the question of what counts as parenthood; anyone who tells you otherwise is selling something.[1]

There are many questions that remain to be satisfactorily answered regarding surrogacy. If we are to say that surrogacy should not be prohibited in order that it remain a legitimate reproductive option for the circumvention of infertility or involuntary childlessness, then we have to answer these questions in order to decide upon a way forward. Having looked at the most commonplace arguments against surrogacy, it is clear that none of them stand up to detailed scrutiny. It has not been demonstrated that surrogacy inherently results in the exploitation of women or the commodification of children, for example. If parties to a surrogacy arrangement can be said in general not to be hurting each other or anyone else then it seems sensible to remove restrictions on the practice, enabling it to be available as a legitimate reproductive option for those who need it. Future legislation must, however consider some of those questions that remain unanswered, such as whether we are best serving the needs of all parties who

may be involved in surrogacy arrangements, or whether an alternative attitude toward the provision of surrogacy would provide the optimum use of the technique. Should we determine that people should be able to choose to provide surrogacy as a service, whether this be for money, other gain, or anything else? If this is the case, then regulation of surrogacy ought, as far as is possible, prevent the *possibility* of harm. If people can, within a regulatory framework, choose to use surrogacy, then why should we fail to legally recognise them as parents when, if not for their intentions, the child would not have existed?

How to (re)regulate?

A careful approach to surrogacy is now required. It is imperative that decisions relating to surrogacy are not taken in a similar vein to those underlying previous considerations. Empirical studies on the welfare of those who have already participated in surrogacy arrangements could be said to be essential in this regard. The experiences of the commissioning couples and surrogates who participated in Eric Blyth's studies in no respect indicate that surrogacy should be further curtailed.[2] Studies of surrogate-born children would, however, be incredibly useful, but even in their absence, it is possible to surmise from existing studies on children born from other types of reproductive arrangement, in

[1] Glenn McGee, 'Trials and Tribulations of Surrogacy: Legislating Gestation' (1997) 12 (3) *Human Reproduction* 407-408, 407.
[2] Eric Blyth, '"I wanted to be interesting. I wanted to be able to say 'I've done something interesting with my life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology* 189-198 and ''Not a Primrose Path': Commissioning Parents' Experiences of Surrogacy Arrangements in Britain' (1995) 13 *Journal of Reproductive and Infant Psychology* 185-196.

particular following the use of artificial insemination procedures, that surrogacy *per se* is not harmful. What such studies suggest is that it is not the manner of conception itself that is harmful, but the way in which children learn of this, or the way in which families deal with the knowledge.[3]

The history of the regulation and review of assisted reproduction and surrogacy in the UK has not resulted in consistent legislation. If surrogacy became better regulated then it may be possible to eliminate many of the things thought to be a risk to the welfare of the child, such as the potential for dispute, or knowledge that the child has an 'original mother'. If we take into account the fact that, despite what we may be forgiven for believing due to media reports of surrogacy arrangements that go wrong, there is a low level of dispute in surrogacy, then it seems that there is little reason to prohibit or restrict the operation of the practice. Of course, there will be some surrogacy arrangements that fail, but this is no reason to limit the reproductive choices of those who find themselves already facing restricted choices by infertility or involuntary childlessness. Instead of discouraging surrogacy, future regulation should determine whether any aspects of the practice are truly undesirable and legislate against these, while providing a comprehensive regulatory framework in which surrogacy can exist.

Criticisms of surrogacy appear to fall into three main categories: the exploitation of women, the commodification of children or reproduction, and the potential of harm to the resulting child. Susan Golombok has shown that these claims do not

[3] See generally Susan Golombok, *Parenting, What Really Counts?* (London: Routledge, 2000).

seem to have been true in relation to children conceived of other assisted reproduction techniques, and, where problems occur in adoption, it tends to be when the child has been adopted at an older age.[4] In any case, each of the claims can be levelled at different enterprises, and none of them can be sustained against a comparison of the treatment of fertile couples who wish to conceive. Similarly, the welfare argument in surrogacy must fail on its own merits, for

> 'unless we are concerned to prevent reproduction in anyone who may offer a sub-optimal environment for their children's upbringing, then restricting the reproductive options of infertile [and involuntary childless] people on the basis of some vague appeal to child welfare may be both disingenuous and discriminatory'.[5]

Furthermore, it has already been asked whether the law is too restrictive of procreative choice, and suggested that to ban surrogacy outright would be overtly paternalistic.[6] On the evidence it appears, therefore, that surrogacy should be regulated in a way that allows its use by those who require it.

Having found that many of the arguments against surrogacy are weak or flawed, it appears odd that current legislation and the Brazier Committee's proposals for

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[4] Susan Golombok, *ibid.*
[5] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) 174.

reform indicate a perceived need to discourage the practice. In addition, the HFEA Code of Practice states that clinics licensed by them should only give assistance in surrogacy arrangements in cases when 'it is physically impossible or highly undesirable for medical reasons for the commissioning mother to carry the child'.[7] This is despite the appearance that surrogacy in general has become more acceptable both to the medical profession and to society.

Peter de Cruz asks whether it is 'morally defensible to create a situation where it is highly likely that the child will be the centre of moral, ethical and legal controversy'.[8] But this is not an inevitable result of surrogacy, nor does it have to be if the right balance of regulation for surrogacy and related practices is struck. It is right that the way forward is not to step backward – to criminalise the practice of surrogacy any further would, in the long term, have a negative effect. In any case, how would criminalised surrogacy be policed if we have previously acknowledged that some surrogacy arrangements must already go unnoticed?[9] Regulation of the practice of surrogacy has to provide the solution, leaving us with the question of what form that regulation should take.

The Brazier Committee asked whether surrogacy regulation should be centralised or decentralised. Arguably a little of both is appropriate, as is the

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[6] J.K. Mason and R.A. McCall Smith, *Law and Medical Ethics* (London: Butterworths, 5th ed, 1999) 85.
[7] Human Fertilisation and Embryology Authority, *Code of Practice* (Fourth Edition) (London: HFEA, 1998) para. 3.20.
[8] Peter de Cruz, *Comparative Healthcare Law* (London: Cavendish, 2001) 487.
[9] Chapter 1 above, text surrounding n 40.

case with current regulation of the provision of other infertility treatments. If we are to say that surrogacy should be regarded as a 'legitimate treatment for childlessness', then it extends from this that its regulation should at least be on a par with that of other legitimate treatments. Apparently the medical profession might agree with this, because, in the BMA statement to the Committee who compiled the Brazier Report,[10] it was pointed out that surrogacy arrangements could be entered into by people who were not aware of the full implications of their actions. The BMA response highlighted that most people are not fully aware of the ethical, legal, medical and emotional factors involved in surrogacy, that a high proportion of those who used surrogacy did not seek medical advice, and that voluntary agencies were the only known source of information.[11] The BMA suggested that surrogacy agencies be regulated and that their expertise be put to use, so that intending participants could receive the best advice. It also suggested that payments should not able to become so high that they become an incentive for a woman to enter into a surrogacy arrangement, and that regulation ought to be enacted to prevent this. In addition, it suggested that 'using a regulated agency could become one of the criteria for granting a parental order under S30 of the HFE Act 1990', and that regulated agencies should be able to employ professional staff and perhaps charge a fee to cover costs only. Many of the BMA's suggestions could sensibly be incorporated into future legislation, in addition to a change to how legal parenthood is acquired.

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[10] *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (1998) (London: HMSO) (The Brazier Report).

What is clear, however, is that surrogacy would not benefit from continuing to be regulated inclusively with other treatments: having it controlled by the Human Fertilisation and Embryology Act and Authority has so far proved problematic, both in the sense that only full surrogacy arrangements are regulated in this way and because of the inadequacies of the parental order mechanism. What is required, is, as the Brazier Committee suggested, a newly revised Surrogacy Act, which repeals all provisions of the Surrogacy Arrangements Act 1985 and the relevant provisions in the Human Fertilisation and Embryology Act 1990, and starts the regulation of surrogacy from scratch. With the knowledge we now have about surrogacy, including the problems that remain with it and the benefits that can be retained by allowing it as a fully legitimated option, it should be relatively easy, after careful consideration, to envisage a system that regulates surrogacy whilst working favourably toward all parties concerned.

Taking examples from legislative systems elsewhere, and elements gleaned from academic study and previous cases, both relating to surrogacy and to other practices in which some of the same or similar issues arise, it should be possible to arrive at a scheme which facilitates surrogacy as a reproductive option whilst remaining non-discriminatory to its participants on both horizontal or vertical levels. What is meant by this is that individual participants should not be discriminated against within an arrangement. Similarly, participants should not be discriminated against by virtue of the fact that they are involved in surrogacy at all, for example, by making access to the service harder than access to other

[11] Peter de Cruz, n 8 above, 186.

fertility services, or by making parenthood more difficult to obtain. This is not to say that the regulation of other infertility services is necessarily better than that of surrogacy, or that it is even as good as it could be. What it does mean is that there are some issues that need to be (re)considered when regulating surrogacy, because regulation at the present time is inadequate. Parenthood is one of these issues.

Surrogacy is not going to go away. If anything, it is likely that the demand for it will grow as society continues to develop tolerance toward alternative lifestyles and alternative modes of family formation. If surrogacy, or elements of it, is unavailable in this country, people will travel to get the service they want. 'Reproductive tourism' has become increasingly viable and the options will increase. Michael Freeman observed in 1990 that things do not go away just because some people do not like them.[12] Furthermore, he pointed out that

> '[w]ith infertility at new high levels ... and increasing, with opportunities to adopt healthy and acceptable babies curtailed by relatively liberal abortion laws, easier access to contraception (in particular the contraceptive pill) and greater tolerance of single parenthood, it is difficult to see the demand for surrogacy (and other 'new ways of making babies') diminishing'.[13]

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[12] Michael Freeman, 'Is Surrogacy Exploitative?' in Sheila McLean (ed.) *Legal Issues in Human Reproduction* (Aldershot: Dartmouth, 1989) 164-184, 177.
[13] Michael Freeman, *ibid* 164.

Currently, the regulation of surrogacy exists uncomfortably between medical and family law.[14] As, in some circumstances (but not in all), it has both medical elements and challenges traditional constructions of parenthood; the law that governs the practice should not seek to locate itself in either of these categories specifically. It is likely to be better for all concerned if the better elements of medical law, family law and other areas of law, such as contract, were brought together into an entirely new system of regulation. Having a regulatory framework of some 'surrogacy-specific rules and provisions that apply incidentally to the practice of surrogacy'[15] means that the law is not located in such a way as to be facilitative for those who wish to enter into surrogacy arrangements, which disbenefits them. In addition, the law, as it stands, seems to exist uncomfortably with the expectations of those involved, especially with regards to the ability of surrogates to receive payment, or the ease with which parenthood may be achieved. One way to better this would be to make 'surrogacy-specific' rules and, within this, introduce principles from contract law, in order that parties' expectations are given more consideration.

The two reports and two pieces of legislation that have dealt with surrogacy in the UK are inconsistent. Regulation has not been facilitative of surrogacy. Indeed the opposite is true, in that it has sought to restrict or discourage (and prohibit in case of commercial agencies) certain elements. We can assume that the reason for this cautionary regulation of surrogacy is because it has been perceived that it

[14] Emily Jackson, n 5 above, 263.
[15] Emily Jackson, *ibid* 283.

has potential to exploit women and commodify children, or that it is contrary to the 'normal' way of going about founding a family. It can, however, as has been previously stated, it can be argued that such great caution is unnecessary. In the absence of empirical evidence, there is nothing to suggest that surrogacy has a negative effect on *all* women or *all* children. In fact, most arrangements are successful. The fact that some arrangements go wrong or that some women and children may be negatively affected is not a reason to prohibit or restrict the operation of all surrogacy arrangements, but *is* a reason to explore ways in which surrogacy can operate taking into account particular vulnerabilities of all parties concerned, hence the contract model may be valuable. Surrogacy has also gained a more positive image and is recognised as a 'treatment' that some couples may need to use in order to have children. Fears that it might be used for reasons of vanity or convenience have not materialised and, even if this were the case, and society believed that this was wrong, this too could be legislated for. There is also evidence that denying or restricting access to reproductive treatments, including surrogacy, might lead people to travel abroad where the services they require can be bought. This 'reproductive tourism' has the potential to result in exploitation and/or negative results for those seeking to use it, and is another reason why access to certain treatments should be fairly and reasonably facilitated in the UK.

Payments

There is no reason to believe that payments to surrogates cannot be legitimated through a combination of regulation and regular review, perhaps with an upper limit being placed on them. This could be encompassed in new legislation and there is therefore no need for an outright ban on payments. In addition, if sperm and egg donors continued to receive payment (or egg-sharing benefits), and clinics can charge to perform assisted conception procedures, there is no reason why a surrogate ought not to be able to charge for her services. Comparisons, such as those implicitly made by Margaret Brazier with blood, organ and tissue donation are unhelpful;[16] surrogacy should not have to be a *gift*, and, in any case, it should be remembered that payment does not in itself negate altruism (and vice versa). Brinsden *et al* argue that while altruistic surrogacy may be desirable, in order to make 'surrogacy a viable treatment option, a modest and sensible payment to the hosts for their services is a reasonable and practical solution'.[17] Thus, we should allow payments whilst legislating as best we can to avoid the potential for exploitation or extortion.

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[16] Margaret Brazier, 'Can You Buy Children?' (1999) 11 (3) *Child and Family Law Quarterly* 345-354. Also see the Brazier Report, n 10 above, paras. 4.42 and 5.13.

[17] Brinsden *et al*, 'Treatment by *in vitro* Fertilisation with Surrogacy: Experience of One British Centre' (2000) 320 *British Medical Journal* 924-928, 927. An interesting idea put forward by Jamie Levitt ('Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' (1992) 25 *Columbia Journal of Law and Social Problems* 451, 493-494) is that there should be both an upper and a lower limit on compensatory payments (consideration for the service provided) *in addition to* medical, counselling, legal fees etc. He recommended that all monies should be paid to an agency, acting as middle-man, as a form of insurance for both parties - the surrogate is not paid up-front, yet she knows the money is there for her and the commissioning couple cannot default on payments. In addition, he proposed that the commissioning parents paid a surrogacy tax (5-10 per cent of the contract price) to the state, which would be set aside to create a fund to which couples eligible for surrogacy, but who could not afford it themselves could apply for a kind of 'grant'.

Furthermore, it can be argued that eliminating payments would mean a decline in the number of women willing to become surrogates. If future legislation in the UK was to ban payments to surrogates, or tightly restrict them, some commissioning couples would undoubtedly turn to women in other countries to host pregnancies for them, increasing the so-called 'reproductive tourism' problem. Margaret Otlowski, for example, points out that there has been evidence of this in Australia since tight restrictions were placed on surrogacy there.[18] This would bring with it a multitude of problems – including many of those that the Brazier Committee was so keen to prevent – as, in theory at least, it would enable the exploitation of women by British couples, possible extortion of British couples and, apparently, subsequent damage to any resulting child's welfare. It may also cause other, more practical problems, such as those relating to citizenship, if a child is born to a woman from another country. Indeed, this was a problem faced by same-sex parents Drewitt and Barlow when they tried to bring their twins back into the UK after they had used an American surrogate.[19]

Families and parenthood

Although an alternative form of family creation is used in surrogacy (and this argument would be the same for IVF and even AID), the unit that is created by this means resembles most closely what 'the family' is, and is intended to do so

[18] Margaret Otlowski, 'Re Evelyn, Reflections on Australia's First Litigated Surrogacy Case', 7 (1) *Medical Law Review* 38-57, 57.
[19] See 'Gay Couple Face Tough Battle to Win British Citizenship for Twins' *The Daily Telegraph*, 3 January, 2000.

whether consciously chosen or not. Indeed, 'surrogacy could be said to *support* traditional patriarchal models of the family and of women, by enabling the commissioning couple to constitute themselves into a 'real' family with a child, and by rescuing the commissioning woman from a lesser status in society by enabling her to take on the role of 'mother".[20] However, the recognition of parenthood following a surrogacy arrangement is inconsistent compared with the acquisition of parenthood following the use of other forms of assisted reproduction. The parenthood question, therefore, is one that must urgently be answered by legislation.

Recognising intention is the most sensible way in which the law relating to parenthood in surrogacy can be reformed. In conjunction with other principles of contract law the concept of intention offers the simplest solution to many of the parenthood problems that surrogacy presents. Given that when a surrogacy arrangement goes according to plan, and the surrogate is happy to hand over the child, all that section 30 of the Human Fertilisation and Embryology Act 1990 actually does (when it is applicable) is retrospectively recognise the intentions of the parties, it is apparent that there has already been some incorporation of the intentional element of parenthood into the law in the UK.

In addition to the recognition of intentional parenthood, future legislation could provide further benefits by recognising surrogacy arrangements as enforceable

[20] Gillian Douglas, *Law, Fertility and Reproduction* (London: Sweet and Maxwell, 1991) 147. It is likely that this is linked to the stigma created by infertility and the corresponding desire to be

contracts. It could then be broadly determined what terms in surrogacy arrangements were legitimate or illegitimate, enabling people to enter agreements knowing exactly where they stand in the event of a dispute.[21] For example, terms could be statutorily implied which would guarantee the surrogate's right to refuse specified treatments or to undergo procedures that the commissioning couple unreasonably demand of her. If agreed between the parties with no element of undue pressure or duress, express terms may be added to the agreement and remedies provided for in the event of breach.

Furthermore, the recognition of intentional parenthood carries with it the implication that the commissioning couple agree to accept the baby in any circumstances – as it was they who had the original intention to conceive then responsibility for the baby should be theirs. Thus, they too can be held to their side of the bargain. If properly implemented, the importation of contractual principles into surrogacy arrangements would leave only a small risk – the surrogate may still change her mind. But, with the law having recognised the intentions (both negative and positive) of the parties, it would be for her to challenge the parenthood allocation. In this event, a default position could be that a court decides what is in a child's best interests. Such a decision, however, would not be based on assumptions that currently prevail and there would therefore be no bias toward the surrogate as the birth mother. If the court found for the surrogate, remedies could be available to the commissioning couple, such

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'normal'.

as damages, which could allow them to enter another surrogacy arrangement.[22] This is not entirely satisfactory but, through the reconstruction of parenthood, coupled with a regulatory structure that both facilitated the arrangement and provided support throughout for the parties, disputes would be less likely than they are at present. Also, for this reason, the argument supporting the partial regulation of surrogacy by the establishment of official surrogacy agencies is a compelling one.[23] The benefit of this would be that bodies of expertise would develop and counselling and other services could be provided for the participants in surrogacy arrangements.

Because there can be complex permutations of parenthood when surrogacy is used, it is necessary for the participants in a surrogacy arrangement to be aware, preferably before entering an agreement, of their rights and status. If the law remains nebulous as it is now, it seems that there is *more* likelihood that surrogacy arrangements will end in dispute. These could be prevented if the law were clear and provided guidelines both on how to enter and fulfil a surrogacy arrangement responsibly, and on more practical matters such as the conduct of the parties during the arrangement, payment and achieving parenthood. The largest obstacle to a redefinition of the law on surrogacy is the construction of the family that prevails in society and the presumptions, both social and legal, of

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[21] There is also the potential for an instrument similar to the Unfair Terms in Consumer Contracts Regulations 1999 to be applied specifically to surrogacy contracts.
[22] It might also be the case that surrogacy agencies offered a form of 'surrogacy insurance' whereby, having paid premiums, commissioning couples received a payout to cover the costs of entering another arrangement if the surrogate was awarded payment or if something else went wrong.
[23] As suggested by the dissenters in the Warnock Report and in operation in Israel.

motherhood and fatherhood that this construction enshrines and considers to be in a child's best interest. To enable any new legislation on surrogacy to be effective, consistent and equitable requires that these presumptions are re-examined and reconstructed and, in so doing, modern reproductive advances and their impact on the construction of parenthood must be taken into account.

Changing Misconceptions

Surrogacy does not fit exactly into the legal mould of other forms of assisted reproduction or adoption. Neither does it perfectly square with family, medical or contract law principles. Rules on adoption were not designed to handle advances in medical technology that enable people to have children and so cannot be directly compared. Other forms of assisted reproduction do not involve the transfer of care of a baby, a tangible human being, from one party to another. As a result, rules that determine parenthood adequately in some assisted reproduction situations, for example in AI, cannot stretch to enable the same equitable treatment of surrogacy situations. Some time ago, Andrea Stumpf summarised the situation (in the US) this way:

> [b]y default, surrogacy arrangements are being mapped onto a legal system that was not designed to handle the new reproductive technology. Legal mismatching by courts is creating an incoherence, which promises to worsen as ad hoc approaches

> accumulate. Artificial forms of reproduction challenge the public's very notion of family, but neither courts nor elected officials can afford to avoid these explosive issues.[24]

Leaving the courts to decide parenthood following surrogacy cannot be said to be the optimum alternative. This is especially true when judges have no concrete guidance, only a semblance of knowledge of the issues and history of assisted reproduction and surrogacy, and when they have to make a family law decision in a situation where it does not fit. Allowing this to continue would mean that further inconsistency is encouraged.

Taking into account the evolution of opinion in favour of surrogacy, the fact that demand for it will not cease and the fact that current regulation is inconsistent and may result in people entering into dangerous arrangements abroad where regulation is less strict, this thesis has argued that new legislation should replace old. In formulating new legislation, attention should be paid to the merits of contract and to the recognition of the intentions of the parties in surrogacy arrangements. All parties enter the arrangement with the intention that the commissioning couple will have and raise the child and this should be recognised in terms of which parties are regarded as the legal parents of the child. This determination of parenthood would be fairer for both the commissioning couple and the child, and consistent with the acquisition of parenthood in other forms of

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[24] Andrea Stumpf, 'Redefining Mother: A Legal Matrix for New Reproductive Technologies' (1986) 96 *Yale Law Journal* 187-208, 192.

assisted conception. In the event of dispute, a court can take into account the provisions made in the surrogacy contract, and also consider which party would serve the interests of the child best. Intention should be the guiding factor in surrogacy cases, especially with relation to parenthood. Surrogacy-specific contract theory will reinforce that intention and provide remedies in the event of disputes. These reforms will help to address misconceptions.

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