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THE RAZOR’S EDGE OF HUMAN BONDING: ARTIFICIAL FATHERS AND SURROGATE MOTHERS

GEORGE P. SMITH, II*

I. INTRODUCTION

While current estimates approximate the total number of issue conceived by artificial insemination as being 250,000—with yearly estimates ranging from 10,000 to 20,000—several hundred surrogate mothers have been or, are currently, thought of as serving in this capacity here in the United States. From reading the Biblical tale of Sarah directing her husband, Abraham, to conceive a child with the assistance of her handmaiden, Hagar, it is evident that the practice of surrogate motherhood has existed for years.

For many, infertility, sterility, genetic incompatibilities and/or physical handicaps do not in any way appear to diminish the need for having children in order to have what is regarded as a complete marriage. Adoption is often a long, complicated procedure lasting

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2. Id.


4. Simply defined, a surrogate mother is a woman who contracts with a man to be impregnated through artificial insemination. She additionally contracts to carry the issue of this artificial union and to relinquish the child and all parental rights, after delivery, to the biologic father. More often than not, this biologic father is married to an infertile woman who hopes to adopt the child in the course of time. Paper presented by Parker, The Psychology of Surrogate Motherhood: An Updated Report of a Longitudenial Pilot Study 1, Interdisciplinary Symposium on Surrogate Mothers, Wayne State University, Detroit, Mich. (Nov. 20, 1982).


anywhere from four to seven years. For many couples, continuation of the bloodline is of central importance. With the assistance of surrogates, such continuation can be achieved anywhere from but a year and a half to two years. Married women who share this view have been known to state: "I want my husband's baby even if someone else carries it." It is astonishing and incongruous to realize that, with children in such great demand for some, there presently exists some four hundred thousand or more unwanted children in foster care arrangements. Tragically, time, circumstances and socio-economic conditions often change parental attitudes after an infant is added to the family unit: the sought after and prized child all too often becomes an unwanted liability.

An early 1969 Harris opinion survey of some one thousand, six hundred adults from throughout the country concerning advances and applications of the "new" developing biology, revealed a fascinating attitudinal profile. Nineteen percent of all interviewed approved of AID, or heterologous, donor insemination, while fifty-six percent disapproved of the process. Where the sole method to achieve conception is by use of the AID procedure, that is, obtaining semen from a donor and injecting by syringe into the woman's reproductive tract, thirty-five percent of those interviewed approved of the technique. Forty-nine percent of the men interviewed in the survey agreed in principle with homologous insemination, that is, taking semen from the husband. Sixty-two percent of the women interviewed approved of pregnancies achieved by the artificial injection of their husbands' semen where physical or psychological difficulties precluded fertilization through sexual intercourse.

7. Adoption and Foster Care 1975: Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess. 6 (1975). The four to seven year time period refers to the normal waiting period for a healthy, white child. Because of lesser demand, adoption times are shorter for children who are older, have physical or emotional disabilities, or are non-white. Krucoff, supra note 6.

8. Supra note 6.


10. There are two principal ways undertaken for human artificial insemination: homologous and heterologous. When semen is secured from a wife's husband and artificially injected by instrument into her reproductive tract, the process is termed homologous or AIH. When semen is obtained from a third-party donor, the process is referred to as heterologous or AID. Artificial insemination, as a technique for improved animal husbandry, occurred as early as 1322, while the first reported case of human artificial insemination (AIH) was in 1799. Not until the early part of the twentieth century were recorded instances of donor insemination observed. Smith, supra note 1, at 128-29.

Another sampling of public opinion occurred in 1978, shortly after the first recorded success of “Baby Louise Brown’s” birth in England, when Gallup conducted a poll to determine American attitudes concerning the procedure of in vitro fertilization. The poll revealed public approval of the procedure by a two-to-one margin. A majority stated they would be willing to follow this procedure if they were childless and wished to have offspring. Nationwide, fifty-three percent would undergo this medical intervention and thirty-six would not. While no sophisticated studies have been conducted regarding the public’s acceptance or rejection of surrogate motherhood, there is every indication that it will not be universally accepted or rejected. Rather, a case-by-case response will be forthcoming with the reasons for the initial action being carefully scrutinized.

This article will examine the plight of the artificial father and surrogate mother by focusing on how the law views artificial insemination. From this focus, the author will explore alternative responses for dealing with problems involving surrogate mothers, donor insemination, and infertility and show their symbiotic, if not direct, relation to the problem of infertility.

II. THE ARTIFICIAL FATHER

Generally in dealing with heterologous artificial insemination cases (AID), the donor is unknown. The major issues involve whether the putative father, (i.e., the husband of the artificially inseminated mother), becomes the legal father of the artificially conceived child and whether the wife has committed adultery by participating in the act with or without her husband’s consent.

In 1948, the New York Supreme Court recognized that a woman artificially inseminated by a third-party donor—with her hus-

also, Brody, Sperm Found Especially Vulnerable to Environment: Miscarriages, Defects, Infertility Linked to Damage by Toxins, N.Y. Times, Mar. 10, 1981, at C1, col. 5.

12. In vitro fertilization is the procedure employing a laparoscope that seeks to remove eggs from the ovaries of a female and fertilize them outside the body. Once successful fertilization is achieved, anywhere from a 16- to 32-cell stage being recorded, the embryo is then implanted in the uterus of the female. See Weintraub, First Test-Tube Baby Born in British Hospital, Wash. Post, July 15, 1978, at 1, col. 1.


Interestingly, a 1978 Harris survey of 1,501 women found widespread approval (66%) of in vitro fertilization by those women who actually planned to have children. When given the option of adoption, more than twice as many chose adoption (57%) as in vitro fertilization (21%). A surprising 63% wanted in vitro fertilization banned totally until further research indicated whether the intervention would increase the likelihood of birth defects. R.H. BLANK, THE POLITICAL IMPLICATIONS OF HUMAN GENETIC TECHNOLOGY 152 (1981).
band's consent, gave birth to a legitimate child. 14 The woman's husband was "entitled to the same rights as that acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent under the circumstances would be entitled." 15

With the case of *Gursky v. Gursky* 16 in 1963, however, a New York trial court held that even though a husband consents to his wife's use of AID, the child is nonetheless, illegitimate. In 1968, a considerably more enlightened and contemporary California Supreme Court in *People v. Sorensen* 17 rejected the Gursky thesis and held that a husband who gives his consent to his wife's use of AID intervention cannot disclaim his lawful fatherhood of the child for the purpose of child support. 18 The court construed a state penal nonsupport statute to incorporate liability of a consenting father of the AID child—finding a genetic relationship, as such, unnecessary in order to establish the required father-child relationship. 19

A considerable degree of sophistication was shown by the New York Supreme Court in 1973 with its holding in *Adoption of Anonymous*. 20 Instead of adhering blindly to Gursky, the court found a strong state policy favoring legitimacy. Furthermore, the court acknowledged that a child born of consensual artificial insemination by a donor, accomplished during a valid marriage, was legitimate and thereby entitled to enjoy all rights and privileges of a child who was conceived in a natural way by the same marriage.

Since *Sorensen* and *Anonymous*, a growing number of states have passed legislation making legitimate the offspring of AID when the husband consents to the procedure. 21 These judicial and legislative developments indicate clearly that both branches of government

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15. *Id.*
17. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968). See also Smith, *supra* note 11.
18. 68 Cal. 2d at 283-84, 437 P.2d at 498, 66 Cal. Rptr. at 10.
19. *Id.*
no longer equate AID with adultery as they once did, and may even signal the public's willingness to sanction more startling genetic developments.

Recently, a New Jersey court held that an unmarried woman, who conceived a child through sperm artificially donated by a friend, was required to allow custodial and visitation rights for the donor despite her wishes, but consistent with what was perceived as the best interests of the child. Even though refusing to take a specific position on the propriety of the use of artificial insemination between unmarried persons, the court recognized the donor as the natural father, and imposed upon him the responsibility to support and maintain the child.

Today, with the social and legal recognition of equality of rights for women, and of their reproductive autonomy granted by the United States Supreme Court in Roe v. Wade, the issue of the necessity of a husband's consent for an act to be performed on his wife's body has become less significant. Nonetheless, it is to be hoped that married women who contemplate offering to become surrogate mothers, or submit to AID for their personal benefit or desire to have a child, will do so only after consultation with their husbands. Failure to disclose such acts may be tantamount to deceit.

22. See Orford v. Orford, 58 D.L.R. 251 (Ont. Sup. Ct. 1921); Doornbos v. Doornbos, 23 U.S.L.W. 2308 (unreported decision of Super. Ct. Cook County, Ill., Dec. 13, 1954) (held that use of AID without a husband's consent was adultery). In MacLennan v. MacLennan, 1958 Sess. Cas. 105, decided in Scotland, AID was recognized as being an adulterous act. And in England, in a 1949 case, a marriage was annulled, and the issue born from the use of an homologous insemination (by the husband, himself, not a donor) were held to be illegitimate. L. v. L., [1949] 1 All. E.R. 141.

23. Smith, The Medicolegal Challenge of Preparing for a Brave Yet Somewhat Frightening New World, 5 J. LEGAL MED. 9 (Apr. 1977). See also Smith, Manipulating the Genetic Code: Jurisprudential Conundrums, 64 GEO. L.J. 697 (1976); Smith, supra note 1; Shaman, Legal Aspects of Artificial Insemination, 18 J. FAM. L. 331 (1980). Neither the surrogate mother nor the artificial father/donor participates in any physical acts of sexual intercourse. In those cases where a wife gives her consent to a surrogate mother arrangement or a husband consents to his wife's participation in donor insemination (AID), there is no basis for considering the fertilization techniques used in either procedure to effect a pregnancy as adulterous. Keane, Legal Problems of Surrogate Motherhood, 1980 S. ILL. U.L.J. 147, 151-52.


26. In New York, it is provided by statute that a written consent must be executed by a married woman seeking to be artificially inseminated and by her husband if the issue therefrom is to be considered legitimate. N.Y. DOM. REL. LAW § 73 (McKinney 1977). See also CAL. CIV. CODE, § 7005 (West 1975).
III. DONOR CONFIDENTIALITY v. THE RIGHT TO KNOW

A rather interesting and far-reaching precedent in the field of adoption law could, if construed broadly, seriously jeopardize donor secrecy in AID cases. District of Columbia Superior Court Judge Greene recently ruled that a twenty-two year old mother of two living in Takoma Park, Maryland, who was adopted as a child, should be granted permission to see her sealed birth records and thus learn the identities of her natural parents. The plaintiff in this case asserted her "basic right" to know her total historical identity, and also to discover whether hereditary diseases or other health problems were a part of her genetic inheritance.

A comparable argument can obviously be made by the progeny of AID. The argument for disclosure would gain even more persuasiveness in light of recent findings in the *New England Journal of Medicine*. Statistics from a recent study showed that sperm from one donor had in fact been used to produce fifty children and thus raised the very real danger of accidental incest among offspring who have the same father. The article also recorded the sloppiness of some doctors in failing to screen genetically the donors who participate in AID procedures. A mere twenty-nine percent of the doctors tested the donors of semen—and then primarily for communicable diseases. Most recipients were inseminated twice per cycle. Seventeen percent of the physicians used the same donor for a given recipient, and thirty-two percent used multiple donors within a single cycle. Only thirty-seven percent kept records on children, and only thirty percent kept records on donors. The identity of donors usually was carefully guarded to ensure privacy in order to avoid legal complications.

28. The AID child's legitimate expectations and rights are underscored when a full disclosure process of donor identity is advocated. And, the gratification of the participating couples' wish for parenthood is de-emphasized and challenged by efforts at full disclosure. In cases of this nature, it is almost impossible to balance the established rights of the parents and the donor against the wishes, desires and assertions of a "basic right" to know one's full identity made by a child of AID. R. SCOTT, THE BODY AS PROPERTY 208 (1981).
30. Id. at 587.
31. Id. at 588; cf. infra note 46. The principal complication would be a possible claim being asserted (with consequent adverse publicity) that the donor should share in the expenses of raising the child or confer testamentary rights of inheritance upon the child. See Waddington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64
Of seven hundred eleven physicians likely to perform artificial insemination by donors surveyed to determine their current practices, four hundred seventy-one responded, and three hundred seventy-nine reported that they performed this procedure. They accounted for approximately three thousand five hundred sixty-six births by this means in 1977. In addition to treating infertility, twenty-six percent of these physicians used the procedure to prevent transmission of a genetic disease, and ten percent used it for single women. Donors of semen were primarily from universities, were only superficially screened for genetic diseases, and were then matched phenotypically to the recipient's husband.32

Suppose a donor of semen, at age thirty-four, discovers that he is a carrier of the congenital abnormality—Huntington's chorea.33 His bodily movements become involuntary and his mental abilities become progressively disoriented. Death is certain. Realizing that he was a donor of semen at age twenty-one when he was a law school student, he approaches the physician who administered the artificial intervention and advises him of his condition. The physician advises, regretably, that his records of the insemination are incomplete. Sensing a grave responsibility, he seeks to learn the identity of those children whom he fathered artificially. He wishes to provide some type of financial assistance for his offspring and/or make provision in his estate for them before he dies. Quaere: Should a court of law consider a best interest of the child test, an average ordinary donor's wishes under similar circumstances standard, or a best interest of society test, in ruling on a resolution of this dilemma? If a court-ordered investigation discloses the donor's issue, should they be told of the situation without a revelation of their donor-father's identity? Does the donor in such a hypothetical case as this have a right to know the identity of his progeny even though they were conceived artificially? Why should not the same right to know be provided the donor—in cases of this nature—as the adopted child is being given in some jurisdictions to learn the identity of its birth parents? Even without legal validation of the right to

Nw. L. Rev. 777 (1970); Fitzgerald v. Rueckl, Rptr. H.R.L., Jan. 1979, (Nev.) at II-A-2. There has been little real or sustained outrage expressed over the maintenance of secrecy in the adoption for fear of incestuous marriages. Arguably in AID cases, if and when donor choice is conditioned upon an effort to discover, by screening, hereditarily transmissible defects of donors, the chances of genetic defects being transmitted through any who might, by chance, intermarry is minimized to an appreciable degree. Waddington, supra, at 805.

32. Supra note 29, at 585-87.
know genetic lineage, all too often independent investigatory means are employed and the missing identity established.

Provisions within the Uniform Parentage Act provide that all records involving AID interventions are to be kept "confidential and in a sealed file." Inspection of records is only sanctioned when a court order acknowledges the existence of "good cause." By drawing upon analogous right-to-know parental-identity cases arising in regular adoption areas, "good cause", in order to discern the identity of a donor in artificial insemination cases, could be determined to exist not only for reasons of obtaining complete medical information regarding the child's donor-father; but for additional reasons such as: allowing the AID child to resolve questions of identity and promote social adjustment; establishing a bond of love; promoting a wish to be of genuine assistance and support to a biological family unit; and determining if the rules of intestate succession were applicable.

The right to know parental lineage has received recent federal attention. Efforts were undertaken initially by Senator Carl Levin of Michigan in the second session of the 96th Congress to amend The Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 to provide for a national computerized adoption identification center. This proposed legislation was entitled The Adoption Identification Act of 1980. The specific purpose of the legislation was to provide a system whereby the natural parents, siblings, or

34. These provisions of Section 5 of The Uniform Act, have, in essence, been adopted by the following states: CAL. CIV. CODE § 7005(a) (West 1975); COLO. REV. STAT. § 19-6-106(1) (1977); CONN. GEN. STAT. § 45-69(h) (1975); KAN. STAT. § 23-130 (1977); MONT. CODE ANN. § 40-6-106 (1975); N.Y. CITY HEALTH CODE § 21.07 (1959); OKLA. STAT. tit. 10, § 553 (1974); OR. REV. STAT. § 677.365(3) (1977); WASH. REV. CODE ANN. § 26.26.050 (1976); WYO. STAT. § 14-2-103(a) (1978).

35. In re Adoption of Female Infant, 5 FAM. L. REP. (BNA) 2311 (1979); In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).


38. 126 CONG. REC. S2561 (daily ed. Mar. 18, 1980). It was referred to the Senate Committee on Labor and Human Resources and the Subcommittee on Child and Human Development where it subsequently died. See also, 126 CONG. REC. S3660 (daily ed. Apr. 15, 1980) (statement of Sen. Levin).
other natural relative of an adoptee can locate each other through a centralized computer system. The Center, which was to be established within the former Department of Health, Education and Welfare (now Department of Health and Human Services), would have been tied to voluntary participation by all involved parties. State participation through the development of state computer centers was provided.

In essence, a natural parent, a sibling or other natural relative or offspring would have submitted an application to a computerized identification center thereby initiating the locating process. The application would then have been programmed a national or state computer to match the parent, offspring, sibling, or other relative. All subjects fitting the profile of the submitted data were to have been printed out and made available to the particular agency involved with the follow-up procedure. There was a further provision for additional research and actual interviewing to determine conclusively whether the subjects match. Storage of such computer information was to have been guaranteed for ten years. If no successful match were made within this time, the proposed Act provided for a renewal of the programmed application for another ten-year period.

Senator Levin, in proposing his legislation, and re-introducing it in the first session of the 97th Congress was careful to state that it would allow adoptees and birth parents to communicate only where there existed mutual interest in communicating; thus any intrusion into the life of either party or any prospective violation of constitutional privacy rights would be avoided. No action of any nature could be taken by the center unless and until both the adoptee and his or her natural relatives independently made arrangements with the center.

39. Id. § 301.
40. Id. § 304.
41. Id.
42. Supra note 33.
43. On April 2, 1980, Senate Resolution 401 was introduced by Senator John Tower expressing disapproval of the proposed legislation which would require either automatic opening at the request of an adult adoptee of confidential birth records, court records, and adoption agency records and require agencies to notify adult adoptees that a birth parent desires to meet the adoptee even if the adoptee had not expressed a desire to meet with his birth parents. 126 Cong. Rec. S3469 (daily ed. Apr. 2, 1980). S989 is the number of Senator Levin’s Bill that he re-introduced, with some slight modification, in the First Session of the 97th Congress. This, too, died in Committee and was not introduced again. Efforts are currently being made by Senator Levin’s staff to draft a compromise bill.
IV. THE FUTURE OF ARTIFICIAL INSEMINATION

As the courts begin to recognize "a best interest of the child test"\(^4\) in deciding vexatious cases involving artificial insemination, it would surely appear that where genetic heritage is brought into question concerning the health and well-being of an AID child, the confidential files (if such are maintained) of a participating physician to an AID intervention, should be examined by a judge in camera and, where necessary, with the assistance of a geneticist. Although a strong argument against disclosure of the donor's identity can be made,\(^4\) the exigencies and circumstances of each case should be considered. And, where the utility of the good in maintaining the confidentiality of the donor's identity is outweighed by the gravity of the "harm"\(^4\) that will arise as a consequence of disclosure, then the veil of confidentiality should be pierced.

Greater safeguards must be undertaken in order to preserve the integrity and value of artificial insemination as a medico-legal process. If physicians are not sufficiently careful in their supervision and administration of the AID process, then the state must act in order to guarantee higher standards of professional care and competence. When a physician is negligent in properly screening prospective donors for artificial insemination, and a genetic abnormality

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47. The Currie-Luttrell article cites to carelessness in recordkeeping by doctors, see supra notes 29-31 and accompanying text, thus, the statement "if the records are maintained." The harms of disclosure would be headed by perhaps a dwindling of the number of donors because they would fear financial demands of support would be made against them. Reilly, supra note 46, at 202. Severe psychological damage could be done to a child born of an AID process where an acknowledgment was made that his or her mother achieved conception from "the scientific placement in her cervix of thawed sperm from a donor whose identity can never be recalled or learned." R. Scott, The Body As Property 208 (1981). Other arguments against disclosure would point to the fact that while in a conventional adoption, for example, both parents enjoy the same relationship to the adopted child, in an AID case, one parent (e.g., the social father) is at a decided disadvantage which could lead to undesirable repercussions inside and outside the family. Additional reasons for maintaining the confidentiality of the process would be: the easier nature of the matter for all concerned;

the (remote) possibility that the husband is the father, and to rule this out, the child would have to be given information of extreme intimacy, e.g., that the husband was wholly sterile or impotent; and the artificial nature of the conception is both difficult to explain and difficult to accept, particularly for a child. . . .

thus passes undetected to the issue, the physician must always be held liable for the consequences of his error.

In addition to continued judicial activism, legislative implementation should be sought by creating presumptions at law of the legitimacy of issue born of consensual AID and thus clarifying both the legal rights and duties of the husband. To the extent that greater confidentiality of donor records would be strengthened, additional adoptions of the Uniform Parentage Act should be advocated.\textsuperscript{48}

V. THE SURROGATE MOTHER—A PROFILE

The surrogate mother has been regarded correctly as the female counterpart to AID.\textsuperscript{49} This concept embraces several processes of surrogate parenthood. One is the embryo implant in which a married woman's eggs are fertilized by her husband's semen \textit{in vitro} and then implanted in specific human female carriers or "incubators". Another process might be the simple use of semen from a married woman's husband and the insertion of that semen into a female donor or surrogate who will, under a bilateral contract for services rendered, carry the issue to term and, after birth, release all her rights to the child by allowing adoption by the biological father and putative mother. Additional situations might arise in which maternally carried dominant genetic disorders exist; where a married woman's eggs would not accept fertilization; or where ovarian failures would arise and prevent the woman from conceiving but which would not preclude her from carrying another woman's embryo.\textsuperscript{50} Thus, a reverse surrogate mother situation would exist where a married man's semen was used, \textit{in vitro}, to fertilize another woman's eggs—with the embryo then being implanted into the married man's spouse.

The attitudes that prompt a woman to become a surrogate mother have been isolated to three or four. Some women possess either a sentimental or a maternal instinct, or a fascination with having a child. Others feel a sense of altruism which advances a wish to help others experience that which has been a part of the surrogate's


\textsuperscript{50} \textit{Id.}
life. Still others have cited a need for money as a reason for seeking the status of surrogate motherhood.\textsuperscript{51}

VI. POLICY ISSUES—LEGALITY OF THE BARGAIN

A number of vexatious policy issues are inherent in any consideration of surrogate motherhood. Some issues may be resolved now, others must await the test of time to be both sharpened and clarified before a resolution will emerge.

If an illegal performance promised bilaterally or unilaterally is regarded as being heinous, criminal or immoral to a high degree, courts normally will not enforce the promise that accompanies such performance.\textsuperscript{52} Before such drastic judicial action is taken, however, the court will give due consideration to the degree of the offense, the

\textsuperscript{51} Mann, \textit{Surrogate Motherhood: The Inevitable Conflict}, Wash. Post, Mar. 25, 1981, at C1, col. 1; Bumiller, \textit{Mothers for Others}, Wash. Post, Mar. 9, 1983, at B11, col. 5; Krucoff, \textit{Focus: The Surrogate Baby Boom}, Wash. Post, Jan. 25, 1983, at C5, cols. 2 and 5. Regardless of the motivations behind a woman's choice to become a surrogate mother, her fee determination may be based upon other considerations. One woman explained how she arrived at her fee this way:

Most of the women charge $10,000 . . . but because of my educational background and other qualifications, [my psychologist and I] felt I could charge slightly more. I was thinking originally of going for $15,000 but [we] felt that I may be pricing myself out of the market. So I felt $12,000 was a safer figure, because I didn't want to charge a tremendous fee and end up not getting anything.

Bumiller, \textit{supra}, at B11, col. 6. \textit{See also} Harris, \textit{Stand-In Mother—Maryland Woman to Bear Child for Couple}, Wash. Post, Feb. 11, 1980, at 1, col. 3. This article recounts how a single twenty-year old "fallen-away" Catholic acted in her role as a surrogate mother. On the September 3, 1981, NBC "Today Show," Phil Donahue interviewed a surrogate mother volunteer who was currently enrolled in law school and in addition to wanting a "body experience" also needed the money (in the range of $10,000) in order to help finance her law school education. During the course of the interview, information was presented that also showed some surrogate mothers respond to the "call" because of a desire to either make up or atone for a previous abortion in which they participated. \textit{Cf.} Krucoff, \textit{supra} note 60, at B5, col. 2.

\textsuperscript{52} A. CORBIN, \textit{ON CONTRACTS} § 1522 (1962). Six considerations should be taken into account in both designing and reaching a surrogate mother arrangement: an acknowledgment that the husband and wife seeking the contract will pay the surrogate mother a sum of money in consideration for her promise to bear and deliver the husband's child through an act of artificial insemination; statements detailing the fact that a licensed physician will perform the artificial insemination on the surrogate (and that, where appropriate, genetic screening will be utilized), that prior to the infant's delivery, the genetic father will file proper notice of intent to claim paternity; that the same genetic father will formally acknowledge the paternity of the child in question once born; that the surrogate acknowledges the fact that the donor-husband is the real, genetic father of the infant in question; and, finally, a statement by the surrogate that she will consent to the adoption of the infant by the real father and his wife. N.P. KEANE \& D.C. BREO, \textit{supra} note 5, at 117. Various model forms used in a surrogate arrangement are to be found at pages 270-305. \textit{Id.}
extent of public harm involved if the bargain is recognized as valid, and the nature of the moral quality of the conduct of the parties to the bargain in light of current community standards.\footnote{53} Obviously, as times change, so too does the public policy relevant to the particular issue under consideration or in controversy.\footnote{54} Public policy in this context may be defined simply as a legal principle which declares an act either to be unlawful (i.e., that which promotes corruption or immorality) or which has a “tendency” to be injurious to either the welfare, health, or morality of the public.\footnote{55}

A number of states make it a crime to pay anything of value to a parent in consideration for obtaining consent to adopt or obtain custody of a child and impose a heavy penalty or imprisonment for violation thereof.\footnote{56} In this way, some deterrent exists to prevent extensive “black market” operations in adoptions.\footnote{57} Since the legality of a contract is tested by, and depends upon the place where it is made,\footnote{58} a jurisdiction having such a law would hold a contract between a husband and wife with a surrogate mother, in which the latter relinquished her parental rights to an infant born of such a contract for subsequent adoption by the natural father and putative mother, to be illegal and thus invalid. The bargain is an adoption contract. Now, if this same contractual relation is viewed as a contract to bear a child, less objection and greater acceptance of the contract, itself, should be recognized simply because the purchaser is the natural father of the child. With such a consideration, fears of commercialization become less worrisome as a competing or undermining factor over the interests of the child or the biological mother.\footnote{59}

\footnote{53}{A Corbin, \textit{supra} note 52, § 1534.}
\footnote{54}{Id. § 1315.}
\footnote{55}{15 S. Williston, \textit{A Treatise on the Law of Contracts} § 1745, n.1 (1972).}
\footnote{58}{\textit{Supra} note 54, § 1792.}
\footnote{59}{Erickson, \textit{Contracts to Bear a Child}, in \textit{Ethical, Legal and Social Challenges to a Brave New World} 100 (G. Smith ed. 1982). A contract to carry a child also involves a direct social benefit otherwise not available by other means; specifically, the contract parents are enabled to obtain a child which is biologically that of the husband. Id. A type of sex discrimination violative as such of the equal protection clause might be proven owing to the fact of the disparate treatment, re the acknowledged payment, of donors of semen surrogate fathers for their services for artificial insemination.
Interestingly, an unmarried man would encounter even less legal entanglement in dealing with a surrogate. Since no wife would be involved, it would be unnecessary for a man to adopt his own child. He would simply pay the surrogate without risk and, as natural father of the child, take custody upon birth without any formal adoption procedure being required.60

Perhaps the easiest way in which to avoid the issue of illegality surrounding contracts to adopt a child or to bear one would be to have the contracting parents either make a simple gift, 61 conditional or absolute, 62 or a voluntary declaration of trust to the surrogate mother. 63

VII. Presumptions of Paternity

The Uniform Parentage Act, although adopted in only eight states, 64 presents an initial obstacle to the establishment of paternity in surrogate contract situations. Section five of the Act controls the use of artificial insemination and provides: "The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." 65

While it appears rather obvious that this provision was crafted in order to protect anonymous AID donors from all legal responsibility for those children fathered as a consequence of their donations of semen, if the provision is adopted in toto this language could well establish a difficulty for the real father under a surrogate contract to establish either paternity or to assert parental rights, such as visitation.

Children born of a validated marital union are presumed to be

and the questioned (e.g., illegal) payment to women who act as surrogate mothers. Prohibitive statutes of this nature for prospective surrogate mothers might also be held to be void for the vagueness of their purposes. And, finally, statutes similar to the one in Michigan, infra note 84, could be attacked as constituting a denial of due process principally because no standards are set that specify criteria used by a court in order to allow approval or disapproval of various charges and fees set in certain adoption procedures. Keane, supra note 23, at 166. See Comment, Surrogate Motherhood in California: Legislative Proposals, 18 SAN DIEGO L. REV. 341 (1981).


62. Id. § 7.13.

63. Id. § 7.21.

64. Supra note 48.

the legitimate issue of that union. All of the states have—regardless of their adoption of the Uniform Parentage Act—recognized this presumption. Thus, if a surrogate is married, the issue she bears will be presumed, unless rebutted by proof beyond a reasonable doubt, to be the legitimate child or herself and her husband and not of the artificial donor of the sperm. If the donor or biological father brought a custody suit and upon proof (again, beyond a reasonable doubt) that he was in fact the biological father, it would then fall to the court to determine which parent or set of parents could better serve the long term interests of the child.

Section four of the Uniform Parentage Act also establishes presumptions of paternity. When, for example, a man, after a child’s birth, receives a child under the age of majority into his home and openly holds the child out as his natural child, a presumption arises, that may be rebutted only by clear and convincing evidence that the man is the natural father of the child. Another provision allows for the establishment of a presumption of paternity when the man purporting to be the natural father acknowledges his paternity of the questioned child by filing a written statement with the appropriate court or administrative agency, informing the biological mother of this public acknowledgement, and no dispute of this acknowledgement occurs. Again, this presumption is to be rebutted only by clear and convincing evidence.

A liberal construction of these provisions of the Uniform Parentage Act could modify the rigidity of the provisions regarding issue born of artificial insemination and thereby enable a surrogate contract father to establish his paternity. In order to avoid confusion in both interpretation and implementation of the Uniform Act, however, it would be wise to modify the Act in such a manner so as to provide a specific provision or state a specific presumption establishing a mechanism for the biological father to establish his unquestioned paternity in surrogate contracts.

VIII. ADDITIONAL POLICY ISSUES

As observed, the parallel relationship between AID and contracts to bear children is inescapable. Yet, while donor identity is

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68. UNIF. PARENTAGE ACT § 4(a).
69. Id. § 4(b).
generally assured of confidentiality in heterologous insemination, the identity of a surrogate mother is generally known by the contract couple. Appearance, in fact, is often a major consideration, together with the prospective surrogate's medical history, education level, environment and cultural background, in making a judgment as to the suitability of a surrogate. Because of the increased potential for genetic anomalies in births by women over thirty-five years of age, this age is usually the cut-off for surrogate candidacy. The availability of the pool of candidates is, furthermore, normally limited to women who are presently married or who have been divorced. Single, unwed women are regarded generally as not suitable simply because their involvement would not only be regarded in some circles as promoting immorality (and perhaps technically adultery) but as a practical matter, an unproven record of birth successes might promote a further element of uncertainty for the contracting parties which is undesirable. The right of a single, unmarried woman to control her own physical autonomy is an ever-evolving concept measured in proportion to the degree of state interest in preserving the public welfare and morals. The right of a married woman to act or conduct her marital affairs without the informed consent of her husband, specifically to submit herself to surrogate mother status, remains an open-ended question.

Perhaps an even more unsettled issue is the extent of the surrogate's autonomy during the period of the pregnancy versus the extent and nature of the right of control of her and the fetus by the biological husband and his wife. If, for example, after agreeing to abstain from uses of alcoholic beverages during the pregnancy, the surrogate does in fact imbibe on a regular basis, could a court order be ob-

70. Erickson, supra note 59, at 611-13; Harris, supra note 51, at 1, col. 1; supra note 29.


72. Id. See generally, Smith, supra note 24. Interestingly, however, a sperm bank run by feminists in Oakland, California, has recently opened. It serves all women, regardless of race, marital status, or sexual orientation. The Birth of a Feminist Sperm Bank: New Social Agendas for AID, 13 Hastings Center Rep., Feb. 1983, at 3.

73. See, e.g., Orford v. Orford, 58 D.I.R. 251, 257-59 (Ont. Sup. Ct. 1921) and Doornbos v. Doornbos, 23 U.S.L.W. 2308 (unreported decision of Super. Ct., Cook County, Ill., Dec. 13, 1954) (held that a woman's use of AID without her husband's consent was adulterous).

tained to stop such consumption? If so, how could it be enforced? By total restraint (i.e., hospital confinement)? Suppose the surrogate did not reveal her propensity to consume alcohol (or unprescribed drugs) and upon birth, the child is born with a genetic impairment or defect which is determined to be as a direct consequence of the actions of the surrogate. Could the surrogate be sued for negligence? Suppose, further, neither the husband nor his wife wish to raise the defective child as their own, and the surrogate does not wish to either. Should a penalty be assessed against all concerned parties because of this "misdeed"? In such a situation, the infant would likely become a ward of the state, and therefore a responsibility of the taxpayers if and until an adoption could be arranged.

Other issues arise in the area of physician negligence. If a physician is negligent in failing to screen adequately a prospective surrogate mother candidate and upon birth, the infant is born with a genetic deficiency, might a suit for malpractice be obtained against the attending physician or the surrogate? Suppose a surrogate decides to keep the contract baby. Could she in turn sue the biological father for child support? As a practical matter, it would appear that in a case where a court decreed the biological surrogate mother had a right to keep her child and assuming the mother had insufficient funds to support herself and the child that financial support by the biological father would be in the best interests of the child and of the state. But, quaere, given this hypothetical, would it not be arguably best for all concerned to have the child in a stable economic environment with its biological father and his wife instead of being placed and raised in the possibly impoverished environment of its biological mother alone and no adoptive father? Yet another interesting question is raised in the case where the surrogate suffers mental trauma or a complete breakdown after relinquishing the baby to the biological father and his wife. Would the surrogate be able to sue the contracting parents for damages?

Further unanswered issues may arise with changes in the status of the contracting couple. What if the contracting couple divorced or one or both died before the surrogate gave birth? What would be the status of the infant upon birth? Would the contract be voided for impossibility of performance and the child recognized as illegitimate


76. The only recorded "mind change" case only covered the surrogate's desire to keep her biological child, with no issue of support being raised. Time Mag., June 22, 1981, at 71.
and a subsequent ward of the state? Obviously, if the biological father died, severe difficulty would be encountered in establishing the paternity of the infant. Assume further that upon the death of the biological father, the surrogate decided that she wished to keep the infant that she bore, but the widow wanted her husband's child. Would Solomonic wisdom be called into play dictating the birthmother win out over a widow who might never be able to have a child? 77

In order to anticipate or forestall these complexities and others that might arise, it is imperative that a tightly drawn contract be executed which defines the rights and responsibilities of all parties and establishes a mechanism or procedure for assessing damages for violations thereof. Clarity of terms and specification of duties will go far toward assisting a court to construe the provisions of a contract of this nature and, at the same time, to determine the intent of the contracting parties. Absent such a controlling instrument and definitive legislation in the area, it will fall upon the courts to employ a rather traditional equitable balancing test in determining the merits or demerits of each issue in a surrogate contract case; thus, the gravity of the "harm" (economic, social, personal, religious, etc.) of holding one particular way according to the plaintiff's case, will be weighed against the utility of the "good" (economic, social, personal, religious, etc.) in sustaining defendant's case-in-chief. Fluidity and flexibility, then, become the coordinates of action instead of predictability and stability.

Inextricably related to this area of concern are various religious considerations. Indeed, these considerations remain a serious point of contention to a complete understanding, acceptance, and advancement of the aspects of the new human genetic technology. An exegesis or even a mere tentative analysis of them remain beyond the scope of this article. 78 Suffice it to state that from the standpoint of maintaining its strengths and efficiency of power, religion must meet change with the same attitude and spirit as does science. Accordingly, while religious principles may be immutable and eternal, the continued expression of those principles require an open, continual


78. Smith, Theological Reflections and the New Biology, 48 IND. L.J. 605 (1973). See also C. MILLER, A SCIENTIST'S APPROACH TO RELIGION (1947).
development that staves off stagnation.\textsuperscript{79}

**IX. THE EVOLVING CASE LAW**

In an "informal" opinion in 1978, relative to the legality of surrogate motherhood status, Wayne County Juvenile Court Judge James Lincoln, held that a volunteer could bear a child for a couple to adopt, but that state law forbade any payment of fees to the surrogate for her service.\textsuperscript{80} Michigan attorney Noel Keane observed that, in spite of this situation, and owing to the scarcity of so few white babies for adoption which in turn means a four to five year waiting period, the demand for surrogates remains undiminished.\textsuperscript{81} After the publication of Judge Lincoln's informal opinion, the successes of Debbie, George and Good Friend were made known to the public. Debbie assisted in the impregnation of Good Friend by inserting samples of her husband's semen in Friend's reproductive tract and, now, all four (including the baby) live together.\textsuperscript{82} It would seem fair to assume that if an adverse legislative or judicial climate exists for validating surrogate motherhood, then many clandestine scenarios comparable to that of Debbie, George and Good Friend will be written. As will be seen with the next case, the "informal" opinion by Judge Lincoln was not given sufficient weight to settle the matter altogether.

In the Circuit Court of Wayne County, Michigan, an opinion of considerable import and interest was rendered by Judge Roman S. Gribbs on January 28, 1980.\textsuperscript{83} Jane Doe, her husband, John, and Mary Roe, a would-be surrogate mother, sought a summary judgment that, if granted, would have allowed them to execute their agreement to have Mary conceive a child with John, through artificial insemination duly administered by a physician, and subsequently upon birth to allow the Does to adopt the child. In consideration for her services, Mary was to have received the sum of $5,000.00 and medical expenses. At issue was the constitutionality of two Michigan statutes that made it a criminal offense to "offer, give, or receive any money or other consideration or thing of value in connection with . . . placing of a child for adoption."\textsuperscript{84} The plaintiffs,

\textsuperscript{79} G. SMITH, supra note 71, at 153. See also \textit{HUMAN SEXUALITY—NEW DIRECTIONS IN AMERICAN CATHOLIC THOUGHT} (1977).

\textsuperscript{80} Time Mag., June 5, 1978, at 59.

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Doe v. Kelley, 1979-81 \textit{Rptr. on Hum. Reproduction & the L. II-B-15.}

\textsuperscript{84} MICH. COMP. LAWS ANN. §§ 710.54, 710.69 (1980 Supp.).
in addition to seeking a declaration of unconstitutionality as to the two statutes, sought to enjoin the defendant State Attorney General from prosecuting them for proceeding with their agreement with Mary Roe.

Plaintiffs' challenge of the statutes on the ground of unconstitutionality was tied to an argument that urged the court to void the statute because of its vagueness and, furthermore, because of the statutes' invasion of their constitutional right of privacy. The court concluded that for a statute to be violative of Due Process, it must proscribe conduct that is so vague that an ordinary person of normal intelligence would be forced to guess at the meaning of the statute itself. The court concluded that the statute in question was sufficiently direct in order to give fair notice to all those affected by it.85

The second argument in plaintiffs' case was that the statute in question not only invaded their constitutionally guaranteed right to privacy, but failed to comply with basic requirements of compelling state interest and the strict drafting required of statutes that regulate an act within the privacy right. Acknowledging that only "fundamental" rights within the Roe v. Wade privacy doctrine may be so considered, the court concluded that the specific activities of marriage, which include procreation, contraception, family relationships, child rearing, and education, were not the bases of plaintiffs' action.86 Rather, plaintiffs maintained a selective attack of the statutes that prohibited the exchange of money or other valuable consideration in the adoptive process.87 The protection provisions of the statute used to effect a legal adoption were not challenged. This forced the court to conclude that a contract that utilized a statutory grant of authority to effect a child's adoption and provided for valuable compensation in connection therewith, was not within the blanket protection of the right of privacy.88

The court then proceeded, through dictum, to discuss more fully the right of privacy issue.89 Noting that intrusions into the right of privacy issue.89

86. Id. at II-B-18.
87. Id.
88. Id. at II-B-18, -19.
89. Id. at II-B-19, -20. Regardless of whether a state is obliged to authorize acts of adoption and establish procedures thereunder for their effectuation, once it has entered the field and acted, those actions are subject to the imposition of constitutional limitations. Thus, government regulations that have the effect of intruding or manipulating decisions of single or married individuals regarding family planning, "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." Carey v. Population Services Int'l, 431 U.S. 678, 686 (1977). Consequently,
privacy may be tolerated when compelling state interests so merit and when such intrusions are drawn narrowly in order to articulate the specific state interests at stake, the court observed that even if a fundamental right of privacy had been applicable, the state's actions to prevent commercialism in child adoption matters was both proper and an over-riding legitimate state interest.90 "Baby bartering" was held to be totally abhorrent to the public policy of the State of Michigan.91 Here, specifically, the money that the plaintiffs wished to pay the surrogate was intended as an inducement for her to conceive a child not normally intended to be conceived and, as such, would be a violation of the state's public policy against such acts. Thus, the court held against the plaintiffs and observed that any change in the present area of contention would have to be initiated by the legislature.92

X. A "FIRST" IS ACHIEVED

On November 9, 1980, a baby boy was born in the Louisville, Kentucky area, becoming the first recorded baby born to a surrogate mother under contract.93 By a Jefferson County Court order, the following April, the infant was legally adopted by his putative mother and his biological father. While identities of the new parents were not disclosed, the facts showed that an Illinois housewife, whose pseudonym was Elizabeth Kane, was hired for money to carry the issue of her artificial insemination. After waiting ninety days after birth, as required by Kentucky law,94 the putative mother filed for adoption of the infant. Her attorney declared that the adoption order was final and that the lawsuit maintained by the State Attorney General of Kentucky challenging the legality of the surrogate contract would have no effect.95 Presumably, the State's Attorney was maintaining his action on a statutory provision that prohibits adver-

91. Id. at II-B-20.
92. Id. at II-B-21, -22.
95. Id.
tising or soliciting children for adoption and accepting any remuneration for procuring any such child for adoptive purposes. No penalty was specified, however, for violation of this provision.  

Mrs. Kane, the surrogate, was at age thirty-seven, a mother of three children and married to a Midwestern executive. She received less than $10,000 for her services. The issue born of this arrangement thus became the first born through the work of Surrogate Parenting Associates (SPA), an organization founded in January, 1980, in Louisville, Kentucky. Stated quite simply, the function of this organization is to act as a match-maker—matching, as such, infertile couples with fertile women willing to bear babies. Fears by some of eugenic selectivity obviously come to the fore in any operation of this nature. The potential for "Master Race" making vis-à-vis a positive eugenic program of matching only the "best" or most desired genetic qualities of a man and surrogate certainly is there; but surely not of any real concern to the more sophisticated. Interestingly, surrogates normally charge anywhere from $3,000.00 to $10,000.00 for their services. SPA estimated the average cost involved in a total surrogate program to be anywhere from $13,000.00 to $20,000.00 which covers medical and hospital expenses and the fees of SPA.

96. Ky. Rev. Stat. § 199.590 (1982). In addition to his advisory opinion, 81-18, the Attorney General maintained an action to enjoin Surrogate Planning Associates, Inc. from making any further surrogate mother arrangements in the state. Annas, supra note 66, at 25. In Kentucky Attorney General Opinions, 1980-81, Opinion 81-18 states that (1) any contract agreement involving the surrogate parenting process is illegal under current Kentucky laws; (2) a mother is prohibited from giving legally binding consent for adoption or termination prior to the fifth day after the birth of the child; and (3) no person, agency or institution may charge a fee or accept remuneration from the procurement of any child. Ky. Rev. Stat. §§ 199.500(5), 199.601(2), 199.590(2). See Note, In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience, 69 Ky. L.J. 877 (1980-81).

In Syrkowski v. Appleyard, the Michigan Court of Appeals held the state's paternity law could not be used as a vehicle for validating a custody proceeding designed, in turn, to validate a surrogation contract. 9 Fam. L. Rep. (BNA) 2260 (Mich. Ct. App. Jan. 19, 1983).

97. Krucoff, supra note 60, at B5, col. 2.

98. Id.


100. Krucoff, supra note 60, at B5, col. 2. One Michigan attorney, Noel Keane, charges $3,000.00 to find surrogate mothers. Id. Since Michigan law prohibits paying for adoptions, the surrogates in Michigan are not paid. Supra note 84. Presumably, a monetary gift or other personal or real property could be made to a surrogate, however.
The first known incident of a surrogate mother attempting to rescind her contract was decided recently by a Superior Court Judge in Los Angeles, California. The plaintiff and his wife were unable to have a family and therefore sought a California widow and mother of three children to be put under contract to be artificially inseminated by plaintiff. Although not paid for her services, her medical expenses were covered. During the pregnancy, the surrogate changed her mind and expressed her intent to keep the baby when born. Plaintiff then sued for custody, but before trial requested the presiding judge to withdraw his suit. Claiming "extraordinary publicity" of the fact that his wife was a transsexual would make it difficult for his son to "lead a normal life," the plaintiff capitulated. The infant was given his birth mother's surname, but the plaintiff was listed on the birth certificate as the father and was granted no visitation rights. The plaintiff's attorney stated that plaintiff might well wish to reopen the case on the issue of visitation rights. The presiding judge of the court stated his belief that surrogates should always be allowed to reconsider and change their minds regarding such contracts.

As one editorialist put it, "The California case is telling us that this business may be convenient and practical, but that doesn't make it right. You can take sex out of pregnancy, but you can't take emotions out of parenthood." The journalist made yet another significant observation when she went on to conclude that while deciding the case on "a best interests of the child" test was proper in custody disputes, it was not here. Her argument was that since the birth mother made a greater investment of herself in the child's development, as opposed to a mere effortless donation of sperm by the genetic father, a fortiori she had a greater stake in the court's decision.

She has donated her body, nine months of her life and become part of the emotional bond that develops between a mother and child during pregnancy. If the New York couple loses custody, they simply will not be getting a child they never had. Should the baby be taken from the mother, she would be losing a child.

103. Supra notes 100 & 101.
105. Id.
In order to become a “certified” surrogate of SPA a woman must: be married and have borne at least one healthy child; reveal no transmutable genetic disorder and be in good health as a consequence of a genetic screening and a physical examination; submit herself and her husband to a successful evaluation by two psychiatrists as well as one psychologist; be abstemious of alcohol, drugs and tobacco during the length of her pregnancy and furthermore agree to terminate all parental rights to the child upon birth. Upon request, and with the aid of a computer, SPA endeavors to match both physical and cultural characteristics. In addition to this service, the fee charged includes the following: all medical and transportation expenses incurred by the surrogate; a life insurance policy for the family of the surrogate, in the event death should occur during pregnancy or at childbirth; a financial arrangement for the infant consisting of either a life insurance policy or testamentary disposition should father and his wife, the putative mother, die before the child is born; and a medical test of the child’s paternity and payment of the legal fees incurred by the surrogate. The SPA, interestingly, requires that a prospective surrogate retain her own legal counsel in order to represent her and review the contract. The applicants to SPA must certify their marriage, and submit to laboratory blood tests, a semen analysis of the husband to confirm fertility, and a complete medical report of both husband and wife.

XI. ALTERNATIVE LEGAL APPROACHES TO SURROGATE PARENTHOOD

In retrospect, it can be seen that three alternative legal approaches or strategies may be developed by states in order to meet the critical challenges of surrogate motherhood. First, specific legislation that outlaws the practice coupled with stringent enforcement codes could be enacted. This would have the obvious effect of forcing a real “black market” to develop, particularly since the process of becoming a surrogate mother is not an exceptionally difficult one to learn. Furthermore, the enforcement of a law forbidding surrogate motherhood in all forms would be difficult as a matter of policy to enforce. For example, it would be rather distasteful to many to exact a penalty for becoming a mother, or to impose a prison sentence for promoting its advancement and implementation. Such

106. Supra note 60.
107. Id.
108. Id.
would be offensive and morally distasteful to the very policy that both favors and recognizes the family as the bulwark of society.

Second, a legislative program designed to license the procedure and the surrogates participating in it as well as to protect the health and well being of the child, together with the safety of the surrogate, could be enacted. Legislation of this order and dimension would include provisions shaping the rights and determining the extent of the liabilities of the contracting parents in the surrogate compact vis-

a-vis the infant. Consideration would, additionally, be given to shaping the sphere of responsibility for various types of error which intermediaries (doctors, lawyers or mere friends of the family) might commit in facilitating the whole process. Courses of action to be taken in many of the other specific policy areas discussed previously would be ideally either tackled legislatively or delegated to administrative decision making by a licensing board constituted in order to set, enforce and implement standards considered relevant. The Kentucky experience, structured by the SPA would be a model for legislative design, inasmuch as the standards and policy areas delineated by the Association in processing a request for surrogate mothering are both comprehensive and equitable in their design and utilization.¹⁰⁹

A third and final strategy would be to purposely allow the very concept or principle of surrogate mothers to develop through case-by-case judicial determination. Obviously, this would yield a crazy patchwork quilt similar to those early and disparate cases dealing with artificial insemination.¹¹⁰ In some jurisdictions, regretably, this very process concerning artificial insemination in fact still continues.¹¹¹ Judicial activity will of necessity be the order of the day if the

¹⁰⁹. Action is already being pursued by the Science and Family Committee of the Family Law Section of the American Bar Association, chaired by Professor George J. Annas, toward the goal of developing a set of controlling principles in the area as well as possible model legislation regarding surrogate mothers and in vitro fertilizations. Annas, supra note 66.

¹¹⁰. See, e.g., Orford v. Orford, 58 D.L.R. 251 (Ont. Sup. Ct. 1921); Doornbos v. Doornbos, 23 U.S.L.W. 2308 (unreported decision of Super. Ct. Cook County, Ill., Dec. 13, 1954) where the use of AID by married women without their husband's consent was held to be an act of adultery. In Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963), the issue born of AID was held to be illegitimate. Yet, in In re Adoption of Anonymous, 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964), it was held that a husband's approval of his wife's use of AID implied a promise to pay for the child. And, in In re Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973) and People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968) it was held AID children were legitimate.

¹¹¹. The very fact that not all jurisdictions have uniformly adopted legislation
state legislatures assume their normal passive role in matters of great moment and controversy; but the preferred approach would be a legislative one.

XII. CONCLUSIONS

If regulated adequately, the "legitimization" of the status of surrogate mothers, involving legislative or judicial interpretation, and the corresponding validation of contracts to bear a child, present no insuperable problems to society. It is by realizing the vast dimensions of the twenty-first century and by preparing for them now that the law assumes its rightful posture as a predictive, rather than resultative vector of force in a scheme of modern living. Any new change or departure in custom and practice in the philosophies and coordinate actions of "new" biological and technological advances as they impact on social life initially elicit a response of horrified negation. Subsequently with time, this shades into a negation of the acts without horror; then comes a slow, yet nonetheless, perceptible type of curiosity, study and evaluation. This evolutionary thinking process concludes with a slow but steady acceptance and establishment of a new norm or construct.112

It is evident that artificial insemination is becoming more widely accepted and approved as a means of family development. The parallels and, indeed, linkage between artificial fathering and surrogate mothering are so obvious that it can be but hoped that wise judges and informed legislatures will give official recognition to this method which is also designed to further and promote the basic unit of society—the family.

conferring legitimacy upon issue born of AID is pertinent to this point. Cf. supra note 21. Interestingly, Connecticut has gone so far as to prohibit physicians from performing AID upon married women unless the husband gives his written consent. Conn. Gen. Stat. § 45-69g(b) (1975). Yet, another example of the disparity of response to the AID phenomenon is seen in the judicial declaration that a best interests of the AID child test vis-à-vis the issue of its legitimacy, necessitated a finding of legitimacy even though the parents of the child are not married.

INITIATION OF SURROGATE ARRANGEMENTS

A. When approached by a patient interested in surrogation, the physician should, as in all other aspects of medical care, be certain there is a full discussion of ethical and medical risks, benefits and alternatives, many of which have been expressed in this paper.

B. A physician may justifiably decline to participate in surrogate motherhood arrangements.

C. If a physician decides to become involved in an arrangement for surrogation,

1. The physician should be assured that appropriate screening procedures are utilized for the contracting couple and in the selection of the surrogate. Such screening may include appropriate fertility studies and genetic screening.

2. The physician should receive only the usual compensation for obstetric and gynecologic services. Referral fees and other arrangements for financial gain beyond the usual fees for medical services are inappropriate.

3. The physician should not participate in a surrogate program where the financial arrangements are likely to exploit any of the parties.

II. CARE OF PREGNANT SURGOGATES

A. When a woman seeks medical care for an established pregnancy, regardless of the method of conception, she should be cared for as any other obstetric patient or referred to a qualified physician who will provide that care.

B. The surrogate mother should be considered the source of consent with respect to clinical intervention and management of the pregnancy. Confidentiality between the physician and patient should be maintained. If other parties, such as the adoptive parents, are to play a role in deci-
sion making, the parameters should be clearly delineated, with the agreement of the patient.