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SCOPE NOTE 6

Surrogate Motherhood: Ethical and Legal Issues

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Revised January, 1988

(SCOPE NOTE 6, "Surrogate Motherhood: Ethical and Legal Issues," written in August 1984 has been revised and updated, since much new material is available. The highly publicized Baby M case renewed public interest in such reproductive arrangements, and both popular and academic writing on the ethical and legal issues ensued.)

Background

Among the many applications of the new reproductive technologies (including artificial insemination by donor—AID, in vitro fertilization—IVF, embryo transfer, and embryo freezing) surrogate motherhood has such far-reaching consequences that it raises a multitude of ethical and legal questions. It has been hotly debated in courts and legislatures, and has merited consideration by Commissions, Inquiries, Working Parties and professional societies in Australia, Great Britain, France, Canada, and many other countries, as well as in the United States (see citations 1-14). What distinguishes surrogacy from other reproductive technologies is not the technology itself but the circumstances of its application—an arrangement whereby one woman bears a child for another, with the intent of relinquishing the infant at birth. The surrogate arrangement is most often made between a couple (where the wife is infertile) and a “surrogate”; in the contract signed by both parties, the surrogate agrees to be artificially inseminated with the husband’s sperm, to bear a child, and at birth to give up all parental rights and transfer physical custody of the child to the “commissioning couple.” Although contracts vary, they always include provisions concerning the rights and responsibilities of all parties, both before and during pregnancy and after the birth of the child. The heart of the arrangement is the promise by the surrogate to give up custody of the child and the promise of the other party to accept the child. Several authors (21)(28) distinguish between “full” and “partial” surrogacy, “full” surrogacy utilizing in vitro fertilization and embryo transfer and “partial” surrogacy using artificial insemination. Coverage in this Scope Note is restricted to “partial” surrogacy, the more common of the two.

What is the motivation for choosing to enter a surrogate arrangement? There are several reasons why a couple might choose to have a child through a surrogate. Infertility is a common reason. With approximately 15 to 20 per cent of all couples infertile and a decrease in adoptable babies, many argue that surrogate motherhood provides a unique opportunity for certain couples to have a child biologically related to the husband. Other reasons range from the desire to avoid passing on a genetic defect to convenience. Many ethical analyses draw a sharp distinction between these motivations.

Some insist that surrogate motherhood is as old as the story of Abram, Sarai and Hagar in Genesis 16. Others underline the novelty of such arrangements (28). In fact, the first recorded surrogate arrangement involving artificial insemination was made in 1976 in Dearborn, Michigan, by Noel Keane, a lawyer, who founded Surrogate Family Services, Inc., an agency that matches infertile couples and women willing to act as surrogates (50). Three years later, Richard Levin, M.D., set up Surrogate Parenting Association, Inc., in Louisville, Kentucky. To date, there have been several hundred surrogate births (41), and there are more than 30 centers that match infertile couples and surrogate mothers. These centers charge a fee of \$20,000 to \$25,000 (\$10,000 of which normally goes to the surrogate mother).

Legal Actions to Date

What have the courts said about surrogate arrangements? Legal action in the state of Kentucky provides an example. In 1981, the Attorney General of Kentucky brought a civil suit against Surrogate Parenting Associates, Inc., declaring, in reference to state baby-selling statutes, that surrogate contracts are illegal when a fee is involved. In 1983, the Kentucky Circuit Court ruled that a fee paid to the natural mother is not equivalent to the sale of a child, but an Appeals Court upheld the Attorney General's position. However, most recently, in a 1986 decision, the Kentucky Supreme Court ruled that state statutes prohibiting baby-selling do not apply to surrogate arrangements (18). Furthermore, two other recent court decisions, including the Baby M decision, strongly support commercial surrogate arrangements (27).

Curiously, legislation has been slow in coming. To date, the only national legislation specifically addressing the issue of surrogate motherhood has been enacted abroad: two acts prohibiting the commercialization of surrogacy, one in Victoria, Australia (16), and the other in Great Britain (17). During the spring of 1986, a proposed amendment to the British Surrogacy Arrangement Act 1985 was introduced in the House of Lords as a Private Members' Bill, but later "died." In the United States, according to a 1987 American College of Obstetricians and Gynecologists' compilation (15), there are 64 state bills that were introduced in the current legislatures from January to June 1987. Of those, according to an August 1987 compilation of the National Committee for Adoption, half would prohibit surrogacy arrangements while half would allow surrogacy arrangements. Twenty would set up a study of surrogacy. Two states have actually passed legislation on surrogacy—Louisiana has prohibited surrogate contracts (H 327) and Nevada has allowed surrogate contracts (SB 272). Several other states have passed legislation to set up study groups or task forces on surrogacy: Delaware (SJR 4), Indiana (HCR 61), Rhode Island (S 626) and Texas (SR 643). On the federal level, on May 14, 1987, Rep. Thomas Luken introduced into a subcommittee of the House Committee on Energy and Commerce a federal bill, H.R. 2433, "Surrogacy Arrangements Act of 1987," prohibiting all commercial surrogacy arrangements. On September 15, 1987, Rep. Robert Dornan introduced a second bill, H.R. 3264, to prohibit certain conduct relating to surrogate motherhood; it was referred to the House Judiciary Committee.

Ethical Issues

Perhaps legislation is slow in coming because society has not yet been able to resolve the myriad of ethical and legal questions surrounding surrogate motherhood. Ethical issues abound. Many argue that surrogate arrangements depersonalize reproduction and create a separation of genetic, gestational, and social parenthood. Others argue that there is a change in motives for creating children: children are not conceived for their own sakes, but for another's benefit. Much is unknown.

What is the degree of stress on the couple and especially on the surrogate mother? Can true informed consent ever be given by the surrogate, and can anyone predict the emotions associated with relinquishing a child? What are the possible adverse psychological effects on the child? What identity crisis might ensue, and will there be a desire on the part of the child to know his/her gestational mother? Will surrogate arrangements be used not only by infertile couples but also for the sake of convenience, or by single men or women? Should the surrogate be paid? Would this lead to commercialization of surrogacy and expose the surrogate mother to possible exploitation? What happens when no one wants a handicapped newborn? Should the couple and surrogate remain unknown to each other? Should the child be told? What kinds of records should be kept, and should the child have access to them? What kind of medical and psychological screening should be provided to all parties?

Legal Questions

Closely linked to such ethical questions are a multitude of legal questions concerning surrogacy, because laws were written for other circumstances, not specifically for surrogacy. Are surrogacy contracts enforceable? Are they illegal? Is payment of a fee in violation of baby-selling statutes, i.e., is it payment for services rendered or for the child? Is the contract counter to public policy? What happens if the surrogate decides to keep the child? What would be appropriate damages for breaches of the contract? Would they be monetary, or would they require specific performance? How could disputes over visitation rights be resolved? Who is the legal mother? How can the husband of the infertile woman establish his paternity rights? Who should participate in decisions affecting the welfare of the fetus and the newborn? Would prohibition of surrogate arrangements violate constitutional rights to privacy or rights to procreate?

These are complex questions and issues. They have been studied in Great Britain (Warnock Committee)(10), in Canada (Ontario Law Reform Commission)(7), in France (Comité Consultatif National d'Éthique)(9), in Victoria and New South Wales, Australia (Waller Committee and New South Wales Law Reform Commission)(5

and 3), in other states of Australia (Queensland, Tasmania, South Australia, Western Australia), in Spain (Congress of Deputies' Special Commission), in West Germany (Benda Commission), in the Netherlands (Dutch Health Council), as well as in the United States (American Fertility Society and Office of Technology Assessment)(2 and 13).

Reports and Policy Statements

1. American College of Obstetricians and Gynecologists (ACOG). **ETHICAL ISSUES IN SURROGATE MOTHERHOOD**. Washington: ACOG, 1983. 2 p. [Available from: ACOG, 600 Maryland Ave., SW, Suite 300 East, Washington, DC 20024-2588. Tel: 1-202- 638-5577.]

The American College of Obstetricians and Gynecologists, in a succinct statement of policy, identifies ethical issues unique to surrogate motherhood arrangements as well as those shared with artificial insemination by donor (AID). Other concerns raised by the presence of a fee are addressed. It concludes that while the decision of whether or not to participate in a surrogate arrangement is an individual one for each physician to make, the ACOG has "significant reservations" about this approach and makes several recommendations to physicians confronted with such a situation.

2. American Fertility Society. Ethics Committee. **Ethical considerations of the new reproductive technologies**. *Fertility and Sterility* 46(3—Suppl. 1): 1S-94S, September 1986.

An excellent resource, this in-depth study begins with a 30-page section on general ethical and legal issues pertaining to the new reproductive technologies (law and procreative liberty, moral right to reproduce and its limitations, moral and legal status of the pre-embryo, etc.). It concludes with a thoughtful and comprehensive consideration of each of the reproductive technologies in particular, and the specific issues they raise. The two chapters dealing specifically with surrogate gestational mothers and surrogate mothers each cover a background on the technique, some reservations towards this form of surrogacy, and the rationale for its use. The committee's considerations and recommendations conclude this work.

3. Australia. New South Wales. New South Wales Law Reform Commission. **SURROGATE MOTHERHOOD: AUSTRALIAN PUBLIC OPINION.** (Research Report 2 on Artificial Conception). Sydney, Australia: the Commission, May 1987. 85 p. [Available from: New South Wales Law Reform Commission, Goodsell Building, 8-12 Chifley Square, Sydney, N.S.W. 2000, AUSTRALIA.]

In order to better define its recommendations on surrogacy, the New South Wales Law Reform Commission conducted a national public opinion survey. The results are published in this highly detailed report. Opinions solicited range from general attitudes on surrogacy, payment of the surrogate mother, involvement of intermediaries in surrogate arrangements, the enforce-ability of such arrangements, disclosure of the identity of the surrogate mother, and the availability of surrogacy to persons other than married couples or for non-medical reasons. The results are analyzed according to various personal and demographic factors.

4. Australia. South Australia. Working Party on In Vitro Fertilization and Artificial Insemination by Donors. **REPORT OF THE WORKING PARTY ON IN VITRO FERTILIZATION AND ARTIFICIAL INSEMINATION BY DONOR.** South Australia: South Australian Health Commission, 1984. 56 p.

In a short section on surrogacy, the Working Party recommends that a policy should be formally adopted by the Australian government in reference to the Adoption of Children Act to prevent surrogacy from being practiced in South Australia.

5. Australia. Victoria. Committee to Consider the Social, Ethical, and Legal Issues Arising from In Vitro Fertilization (Chairman: Louis Waller). **REPORT ON THE DISPOSITION OF EMBRYOS PRODUCED BY IN VITRO FERTILIZATION.** Melbourne: The Committee, 1984. 88 p.

A five-page section on surrogacy, in what is popularly referred to as the Waller Report, examines the state of its practice in IVF programs in Australia. The Committee views commercial arrangements as the purchasing of children and finds them completely unacceptable. It recommends that no such

surrogacy arrangements be made in Victoria.

6. British Medical Association (BMA). Board of Science and Education. **SURROGATE MOTHERHOOD.** London: British Medical Association, May 1987. 37 p.

After a brief introduction, the Board of Science and Education of the BMA examines and analyzes in detail the legal position on surrogacy in England, and ethical and social issues surrounding the practice. Conclusions from different jurisdictions throughout the world are presented. There follows an examination of the various implications of legitimation of surrogacy and a section on the positions of the medical profession. The report, while recognizing the suffering produced by infertility, concludes that “the interests of such couples are outweighed by legitimate social considerations opposing surrogacy.” The interests of the child remain primary.

7. Canada. Ontario. Law Reform Commission. **Proposals relating to surrogate motherhood.** *In: REPORT ON HUMAN ARTIFICIAL REPRODUCTION AND RELATED MATTERS (VOLUME 2).* Toronto: Ministry of the Attorney General, 1985, pp. 218-271.

After providing an excellent, comprehensive overview of the approaches of other countries to surrogate motherhood, the Committee examines the policy in principle. The majority endorses the practice but recommends regulatory legislation. The Committee then presents in detail a proposed regulatory scheme, considering in turn the prospective parents, the surrogate, and the courts and their respective responsibilities under the proposed scheme. Finally, the terms of agreement (surrender of child, payment, birth of handicapped child, abortion, etc.), penalties for breaches of contract, and other miscellaneous issues are addressed.

8. Congregation for the Doctrine of the Faith. **INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY.** Vatican City: The Congregation, 1987. 40 p.

This document details the Roman Catholic Church’s position on the new reproductive

technologies, including surrogacy, stated within the context of the basic theological and moral teachings of the Roman Catholic Church.

9. France. Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé. **AVIS SUR LES PROBLEMES ETHIQUES NÉS DES TECHNIQUES DE REPRODUCTION ARTIFICIELLE.** (OPINIONS ON THE ETHICAL PROBLEMS OF ARTIFICIAL REPRODUCTION TECHNOLOGIES). (Includes attached working paper on surrogate mothering and article on legal aspects of surrogate mothering.) Paris: Comité Consultatif..., 1984. 37 p. [*Available from: Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé, 101 rue de Tolbiac, F-75654 Paris, Cedex, FRANCE.*]

Does every person have a right to have a child? This is the central question facing society in surrogate motherhood, according to this French committee. It insists that priority be given to the best interests of the future child, which will necessarily limit the right of everyone to have a child. The committee also condemns the commercial aspect of surrogacy arrangements and states that in France such a contract is legally void. "This is the law and it should not be changed."

10. Great Britain. Department of Health and Social Security. Committee of Inquiry into Human Fertilisation and Embryology. **REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY** (Chairman: Dame Mary Warnock). London: Her Majesty's Stationery Office, 1984. 103 p.

The Warnock Report, as it is popularly known, includes a five-page section on surrogacy examining the present status of surrogacy in England, and outlining arguments for and against the procedure. Then follow the Inquiry's recommendations: (1) that legislation be introduced to render criminal surrogate agencies in Great Britain, and to render criminally liable the actions of professionals engaged in surrogate arrangements; and (2) that legislation be introduced to make all surrogate arrangements illegal contracts, unenforceable by courts. In a dissenting opinion, two members of the Inquiry hold that it would be inappropriate

to declare all surrogacy arrangements illegal and encourage regularization through a licensing authority. [*For Americans wishing to purchase this report, a revised American edition authored by Dame Mary Warnock and entitled A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILISATION AND EMBRYOLOGY was published in 1985 by Basil Blackwell in New York. It includes an introduction by Dame Warnock.*]

11. Great Britain. Department of Health and Social Security. **LEGISLATION ON HUMAN INFERTILITY SERVICES AND EMBRYO RESEARCH: A CONSULTATION PAPER.** London: Her Majesty's Stationery Office, December 1986. 15 p.

As regards surrogacy, the British Government, in this consultation paper, invites comments and views on such issues as how maternity and paternity should be defined in surrogate arrangements, the clarification of the enforceability/unenforceability of the contract, which parties are subject to liability in a commercial surrogate agreement, and whether noncommercial surrogacy services should be permitted. A white paper summarizing replies to this consultation paper is to be issued in December 1987.

12. New York. Senate. Judiciary Committee Staff. **SURROGATE PARENTING IN NEW YORK: A PROPOSAL FOR LEGISLATIVE REFORM.** Albany, NY: The Committee, January 1987. 59 p.

The New York State Senate Judiciary Committee recommends in this report that the state recognize surrogate contracts as legal and enforceable, but in need of regulation. It emphasizes the necessity for safeguarding the welfare of the child, the importance of informed consent for all parties, and the need for regulation to avoid exploitation and over-commercialization. The Committee provides firm guidelines for regulation in these domains, including recommendations for judicial approval of the surrogate contract before insemination of the surrogate mother. In addition, it recommends legislation to insure full informed consent of both parties, to provide judicial approval of any fees paid, to establish the legal identity of the child, to establish

remedies for breach of contract, and to establish eligibility of the parties. The document itself consists of five major sections: background, problem areas, uncertainty in “surrogacy law,” options for governmental response, and recommendations.

13. United States. Congress. Office of Technology Assessment. **INFERTILITY: MEDICAL AND SOCIAL CHOICES**. (Project Director: Gary B. Ellis). Washington, DC: OTA, forthcoming in May, 1988. 402 p. (Thirty-two page summary also available.)

This OTA assessment will analyze the scientific, legal, ethical, and economic implications of infertility prevention and treatment. It will include chapters on the causes, prevention, diagnosis, and treatment of infertility; quality assurance for infertility services; economic, ethical, constitutional, and legal considerations surrounding the new reproductive technologies; the frontiers of reproductive technologies; and numerous appendices. Specific attention will be given to the ethical and legal questions surrounding surrogacy, as well as to its commercial aspects. The assessment’s conclusions will include a specific discussion of policy issues and options for congressional action.

14. Working Party of Council for Science and Society. **HUMAN PROCREATION: ETHICAL ASPECTS OF NEW TECHNIQUES**. Oxford: Oxford University Press, 1984. 91 p.

Two short sections discuss surrogate mothering. The Working Party finds commercialization of surrogacy undesirable, but does not think that the procedure should be prohibited by law. Rather, it holds that it should be handled by a non-profit adoption agency.

Court Decisions and Legislation

15. American College of Obstetricians and Gynecologists. Department of Government Relations. “**Surrogate motherhood-related state legislation introduced to date during the 1987 state legislative sessions (January 1, 1987 to June 15, 1987)**.” June 15, 1987. 30 p. [Available from: Department of Government Relations, ACOG, 600 Maryland Ave., SW, Suite 300 East, Washington, DC 20024- 2588. Telephone:

1-202-638-5577.]

The American College of Obstetricians and Gynecologists offers here a compilation of 1987 state bills on surrogacy, arranged by state. This compilation includes the bill number, author, topic and a summary of each of the 64 bills, as well as the date the bill was introduced and in what state committee it was introduced.

16. Australia. Victoria. **INFERTILITY (MEDICAL PROCEDURES) ACT 1984**. (Act No. 10163). Melbourne: Victorian Government Printing Office, 1984. 24 p. [Available from: Victorian Government Bookshop, 41 St. Andrews Place, East Melbourne, Victoria, AUSTRALIA.]

In a strongly worded section on surrogate motherhood, this Victorian legislation prohibits any-one from publishing an advertisement seeking or offering a woman’s services as a surrogate mother, as well as giving or receiving payment for a surrogate arrangement. The penalty is 50 penalty units or two years’ imprisonment. The legislation also declares void any contract under which a woman agrees to act as a surrogate.

17. Great Britain. **SURROGACY ARRANGEMENT ACT 1985** (slip law). Chapter 49, Sections 1-5, 1985. 6 p.

This Act establishes that no person in the United Kingdom may take part in commercial negotiations that would lead to a surrogacy arrangement. Such persons are declared guilty of an offense.

18. Kentucky. Supreme Court. *Surrogate Parenting Associates, Inc. v. Commonwealth*. February 6, 1986 (date of decision). *Southwestern Reporter*, 2d Series 704: 209-216.

The Supreme Court of Kentucky, in the most recent of a series of decisions involving Surrogate Parenting Associates, Inc. (SPA) handed down between 1981 and 1986, ruled on the question of whether the corporation’s involvement in the business of surrogate parenting violated several local statutes, including the prohibition against the buying and selling of children. The Supreme Court concluded that there are fundamental differences between the buying and selling of children prohibited by Kentucky statute and the contracts arranged by SPA. Because legislation

has not specifically addressed the latter procedure, the Supreme Court cannot outlaw it. Two dissenting opinions were expressed.

19. Michigan. Supreme Court. *Syrkowski v. Appleyard*. January 17, 1985 (date of decision). *Northwestern Reporter*, 2d Series 362: 211-214.

Referring to Michigan's amended Paternity Act, the Michigan Supreme Court allowed the father of a child born to a surrogate mother who had been artificially inseminated with his sperm to petition the circuit court for an order declaring his paternity and entry of his name on the child's birth certificate.

20. New Jersey. Superior Court, Chancery Division: Family Part, Bergen County. *In re Baby 'M'*. 31 March 1987 (date of decision). *Atlantic Reporter*, 2d series 525: 1128-1176.

In this well-publicized case, a surrogate mother, Mary Beth Whitehead, refused to relinquish the child she had contracted to bear for William and Elizabeth Stern. In the decision, Judge Sorkow identified the two issues to be: to determine whether the contract the parties signed was enforceable and to specify how it should be enforced. After assessing the stability of both parties, Judge Sorkow awarded permanent custody of the child to the Sterns and terminated the parental rights of Mary Beth Whitehead. The surrogate parenting agreement signed by both parties was thereby specifically enforced.

Chapters in Books

21. Andrews, Lori B. **Surrogate mothers**. *In her: NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS*. New York: St. Martin's Press, 1984, pp. 197-242.

Written in a style that is easily understood, this book contains a lengthy chapter on surrogate motherhood. Advice is provided to those seeking a solution to infertility via surrogate arrangements. In sixteen short sections, Andrews advises infertile couples on the medical, social, emotional, legal and practical aspects of surrogate arrangements. An appendix lists nine surrogacy programs in the United States.

22. Dickens, Bernard M. **Surrogate motherhood:**

legal and legislative issues. *In: Milunsky, Aubrey; Annas, George J., eds. GENETICS AND THE LAW III*. New York: Plenum Press, 1985, pp. 183-214.

In an excellent analytical chapter in this substantive book, the author proposes and analyzes three legal models upon which surrogate motherhood may be assessed: natural reproduction, adoption, and artificial insemination by donor. Three different principles which might guide the development of legislation on surrogacy are next provided and discussed: the static approach, the private ordering approach, and various state regulation approaches. After listing 31 legal issues raised by the new reproductive technologies, the author cites the texts of four state bills varying in their response to surrogacy, reviewing them along with a number of other bills in terms of specific legal issues found in surrogacy.

23. Rassaby, Alan A. **Surrogate motherhood: the position and problems of substitutes**. *In: Walters, William A. W.; Singer, Peter, eds. TEST-TUBE BABIES: A GUIDE TO MORAL QUESTIONS, PRESENT TECHNIQUES AND FUTURE POSSIBILITIES*. New York: Oxford University Press, 1982, pp. 97-109, 155-157.

After examining the present state of Australian law on surrogacy and the problems of the enforceability and acceptability of surrogacy arrangements, the author concludes that the government must legislate to permit surrogacy with regulation.

24. Singer, Peter; Wells, Deane. **Surrogate motherhood**. *In their: MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION*. New York: Charles Scribner's Sons, 1985, pp. 93-115.

Two Australian authors provide an overview of attitudes on surrogacy in the United States, Great Britain and Australia. They examine the possible legal structures that could be used to regulate the procedure. A system based on the model used to govern adoption in Australia is proposed—the establishment of a State Surrogacy Board.

Journal Articles

25. Andrews, Lori B. **The aftermath of Baby M:**

proposed state laws on surrogate motherhood. *Hastings Center Report* 17(5): 31-40, October/November 1987.

In this comprehensive, well-documented analysis of state legislation on surrogate motherhood, the author groups and analyzes the varying state bills according to their approach to surrogacy: some prohibit all commercial surrogate arrangements while others would rather make the contracts void and unenforceable or establish regulations for surrogacy. Some legislatures have chosen to establish study commissions of varying composition. Then follows a discussion of how legislatures confront such key issues as: the commercial aspect of surrogacy, the question of custody, who may have access to surrogacy and who makes decisions during pregnancy, the screening of the participants, how informed consent may be facilitated, whether the surrogate may change her mind, and who should have access to the records and when.

26. Andrews, Lori B. **Legal and ethical aspects of new reproductive technologies.** *Clinical Obstetrics and Gynecology* 29(1): 190-204, March 1986.

Drawing upon a variety of reports of commissions studying in vitro fertilization issues throughout the world, the author sets forth and elaborates upon specific ethical principles that must be considered and that might eventually serve as a basis for regulation. She suggests the law should allow the reproductive technologies to develop, but with regulation, following a medical model, and recommends that certain current barriers be eliminated or modified. References to laws pertaining to the reproductive technologies are provided in extensive footnotes.

27. Annas, George J. **The baby broker's boom.** *Hastings Center Report* 16(3): 30-31, June 1986.

Following a detailed description of two recent court decisions that strongly support commercial surrogate motherhood arrangements, the author states that the questions of paternity and maternity have not been taken seriously by the courts. He concludes by affirming that commercial surrogacy encourages the exploitation of all parties involved and the dehumanization of

babies, and he argues that it is time for state legislatures to act.

28. Capron, Alexander M. **The new reproductive possibilities: seeking a moral basis for concerted action in a pluralistic society.** *Law, Medicine, and Health Care* 12(5): 192-198, October 1984.

This article is an edited version of testimony given at hearings on human embryo transfer before the Subcommittee on Investigations and Oversight of the U.S. House Committee on Science and Technology (August 8, 1984). In it the author argues that faced with new reproductive technologies we need more than a prohibit/ permit model; he favors a "creative preservation" approach involving regulation and education, and suggests five actions that might be taken in these areas. "What is lacking now is not the recognition of the issues but the means to address them in a thoughtful way," the author concludes.

29. Clark, Natalie L. **New wine in old skins: using paternity settlements to facilitate surrogate motherhood.** *Journal of Family Law* 25(3): 483-527, April 1987.

After analyzing the current legal ambiguity surrounding surrogacy, the author proposes that until courts and legislatures have determined law as regards surrogacy there be established better means of legalizing surrogacy contracts (for example paternity suit settlement contracts).

30. Cohen, Barbara; Friend, Teresa L. **Legal and ethical implications of surrogate mother contracts.** *Clinics in Perinatology* 14(2): 281-292, June 1987.

In an article addressed specifically to health care professionals who consider offering assistance in surrogate arrangements, the authors point out the legal ambiguity of such contracts and concrete legal problems that could arise. While not recommending that surrogate contracts be prohibited, they do suggest that they be treated as pre-birth agreements that call for regulation to protect the surrogate mothers' right to decide. In referring to the 1983 ACOG statement and the 1984 Judicial Council of the AMA statement, the authors urge physicians to ensure that the surrogate is not pressured into

giving up the child.

31. Elias, Sherman; Annas, George J. **Social policy considerations in non-coital reproduction.** *Journal of the American Medical Association* 255(1): 62-68, January 3, 1986.

After summarizing commission reports on non-coital reproduction from Great Britain, Australia and the United States, the authors propose legislative action for two aspects of surrogacy: identification of the mother and commercialization. They conclude by recommending action on three levels: enacting model state laws defining the gestational mother as the legal mother; encouraging professional organizations to develop guidelines; and establishing a national body of experts in the field of non-coital reproduction.

32. Katz, Avi. **Surrogate motherhood and the baby-selling laws.** *Columbia Journal of Law and Social Problems* 20(1): 1-53, 1986.

The focus of this article is on the relationship between surrogacy and state adoption laws (especially baby-selling laws). Through examination of the best interest of all parties, the author demonstrates that surrogacy arrangements should not be banned by reference to these laws. After a critical analysis of the evolution of court decisions in five states relating to the adoption of children born to surrogate mothers, the article discusses different approaches states have taken in introducing legislation relating to surrogacy. The author supports moderate regulation as the most viable option.

33. O'Brien, Shari. **Commercial conceptions: a breeding ground for surrogacy.** *North Carolina Law Review* 65(1): 127-153, November 1986.

After tracing the evolution of surrogacy, the author describes in detail judicial and legislative activity relating to present-day surrogate arrangements. She then examines the question of whether commercial surrogacy is a fundamental right and concludes that because commercial surrogacy contributes to the development of an image of children as commodities and contains a high potential for exploitation it should not be ratified.

34. Robertson, John A. **Embryos, families, and**

procreative liberty: the legal structure of the new reproduction. *Southern California Law Review* 59(5): 939-1041, July 1986.

Although only a minor portion of this lengthy article deals specifically with surrogacy, it was referred to in the Baby M decision, and by others assessing the legal issues surrounding the new reproductive technologies. It examines the legal structure of these new technologies through discussion of the scope of procreative liberty and the extent of constitutional protection for the new technologies. The need for protection of the interests of all parties and major sources of conflict (e.g., the status of the embryo, and discarded embryos) are also discussed.

35. Stumpf, Andrea E. **Redefining mother: a legal matrix for new reproductive technologies.** *Yale Law Journal* 96(1): 187-208, November 1986.

In this Note, the author highlights the ineptitude of the legal system's handling of surrogacy and proposes a new approach to procreation, namely using the procreative process itself, rather than the traditional definition of mother, as the starting point for analysis. She divides the procreative process into four stages with definite transition points, providing the basis for the legal analysis that follows. The author concludes that given an appropriate legal system, the surrogate arrangement can prove beneficial.

36. Taub, Sheila. **Surrogate motherhood and the law.** *Connecticut Medicine* 49(10): 671-674, October 1985.

A comparison of surrogate motherhood and AID is used to demonstrate that the two procedures require different legal treatments. Pending legislation is reviewed. Although the author thinks that specific legislation is required to make surrogate arrangements legal and enforceable, she suggests that the passage of legislation at this time would be premature.

37. Walters, LeRoy. **Ethics and new reproductive technologies: an international review of committee statements.** *Hastings Center Report* 17(3): 3-9, June 1987.

This article provides a comprehensive analysis of fifteen major committee statements on the

new reproductive technologies; eight countries are represented. Results of this detailed analysis are summarized in a two-page table that indicates the position of each committee on various issues involved in clinical in vitro fertilization, surrogate motherhood, and human embryo research. The accompanying text interprets and expands upon these results. The author notes that of fourteen statements that have taken a position on fee-for-service surrogacy, eleven disapprove and only three approve of this new reproductive arrangement.

Additional Readings

38. Brahams, Diana. **The hasty British ban on commercial surrogacy.** *Hastings Center Report* 17(1): 16-19, February 1987.
39. Brahams, Diana. **Surrogacy, adoption, and custody.** *Lancet* 1(8536): 817, 4 April 1987.
40. Davis, Joseph H.; Brown, Dirck W. **Artificial insemination by donor (AID) and the use of surrogate mothers: social and psychological impact.** *Western Journal of Medicine* 141(1): 127-130, July 1984.
41. Donovan, Patricia. **New reproductive technologies: some legal dilemmas.** *Family Planning Perspectives* 18(2): 57-60, March/April 1986.
42. Fleming, Anne Taylor. **Our fascination with Baby M.** *New York Times Magazine*, pp. 33-38, 87, 29 March 1987.
43. Gersz, Steven R. **The contract in surrogate motherhood: a review of the issues.** *Law, Medicine, and Health Care* 12(3): 107-114, June 1984. (See also article by Holder below.)
44. Hanafin, Hilary. **THE SURROGATE MOTHER: AN EXPLORATORY STUDY.** California School of Professional Psychology, Los Angeles, Ph.D. diss., Psychology. 208 p. University Microfilms Order No. AAD84-28847.
45. Hirsh, Harold L. **Surrogate motherhood: the legal climate for the physician.** *Medicine and Law* 5(2): 151-167, March 1986.
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SCOPE NOTE 6 was prepared by Sue A. Meinke, who is Project Researcher at the National Reference Center for Bioethics Literature.

Current Awareness

Citations for ongoing new publications on ethical and legal issues raised by surrogacy may be obtained by searching both MEDLINE, using the MeSH term “surrogate mothers,” and BIOETHICSLINE, using “host mothers (kw).”

For assistance in searching BIOETHICSLINE, please call 1-800-MED-ETHX (1.800-633-3849) or 1-202-687-3885. Individual off-line searches are available free of charge from the National Reference Center for Bioethics Literature, and will be mailed directly from the National Library of Medicine.

Any publications listed in this Scope Note or in any BIOETHICSLINE printouts which are not available locally can be obtained through the Document Delivery Service of the National