WITH A LITTLE HELP FROM MY FRIENDS: THE INTERSECTION OF THE GESTATIONAL CARRIER SURROGACY AGREEMENT, LEGISLATIVE INACTION, AND MEDICAL ADVANCEMENT

I. INTRODUCTION

In this time of rapid advancement and development in all areas of life including transportation, communication, and medicine, the law is often last to advance and develop. In fact, in many areas of rapid research and invention, such as medical science, our laws have yet to adapt. Consider gestational carrier surrogacy agreements: although frequently utilized, most Americans would likely have difficulty evaluating the impact of one of these agreements upon their daily lives.[1] Such agreements seem beyond the boundaries of settled law, reaching into a morass of issues and rights involving morality, ethics, and responsibility. Even courtrooms and legislatures, places not inhabited by legal novices, confront substantial difficulty creating laws as sophisticated and comprehensive as the medical science they are designed to regulate. Legal implications often remained unsettled, such as in cases where the genetic mother and father, the sole contributors of the genetic material of a child, are not physically the parents to (or perhaps for) whom the child is born.

This Comment is premised on two distinct, yet related, notions regarding the American legal system. First is the idea that the American legal system is designed to build precedent that is both coherent and predictable for potential litigants.[2] Second, is the notion that legislative and statutory gov-

1. Surrogacy can take on many variations, each one dealing with who supplies what biological material, what the relationship is between the parties, and who carries the baby to term. For a broader explanation of various surrogacy settings see Laura M. Katers, Comment, *Arguing the "Obvious" in Wisconsin: Why State Regulation of Assisted Reproductive Technology has not Come to Pass, And How it Should*, 2000 WIS. L. REV. 441, 444-51. This Comment deals exclusively with a female gestational carrier surrogate who bears the child of two other persons, with the non-bearing female supplying the ova and the male to whom she is romantically, maritally, or otherwise linked supplying the sperm cells. Note that there are no unrelated donors in this setting. A more user-friendly facts set will be explained shortly.

2. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); Teague v. Lane, 489 U.S. 288, 332 (1989) (stating that stare decisis "fosters predictability in the law, permitting litigants and potential litigants to act in the knowledge that the precedent will not be overturned lightly and ensuring that they will not be treated unfairly as a result of frequent or unanticipated changes in the law"). Precedent was also valued in the Colonial period, when Blackstone's influ-

ernance are proper methods of developing an effective pre-litigation legal framework.[3] As one commentator has stated, "[I]t should be obvious that we now live in an age of statutes."[4] Judge Calabresi opined, in a chapter entitled "Choking on Statutes":

> The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law. The consequences of this "orgy of statute making" in Grant Gilmore's felicitous phrase, are just beginning to be recognized.[5]

The terms "gestational carrier,"[6] "birth mother,"[7] "donors,"[8] and "parents"[9] each carry a special, and sometimes unwieldy, import within agree-

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ence was prominent in formative American jurisprudence. *See generally* William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5 (1994). The discourse regarding the scope and importance of the role of precedent and stare decisis in American law remains relevant in legal scholarship. For some views on the role of stare decisis in modern jurisprudence, see Charles J. Cooper, *Stare Decisis: Precedential Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 401-10 (1988); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422-33 (1988); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Jed I. Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 982-86 (1996); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1346-50, 1359-62 (1990).

3. U.S. CONST. art. I, § 8 (discussing the powers of Congress to legislate).

4. Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings*, 33 FAM. L.Q. 543, 549 (1999). Further, examine your local law library—countless feet of shelf space are devoted to items including the United States Code, the Federal Register, the Code of Federal Regulations, and other volumes of government documents. *See e.g.*, U.S. Government Laws, Regulations, Decisions, and Guidelines Catalog: Code of Federal Regulations *at* http://bookstore.gpo.gov/regulatory/cfr.html (last visited Sept. 29, 2002) (stating that "the complete CFR contains 50 titles and approximately 900 volumes"); *but cf.* Michael H. Shapiro, *Is Bioethics Broke? On the Idea of Ethics and Law "Catching Up" with Technology*, 33 IND. L. REV. 17 (1999) (discussing whether or not an internal regulatory scheme under the auspices of bioethics may be helpful in resolving issues related to this Comment, or if there is any "catching up" to be done at all).

5. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) (citations omitted).

6. Nomenclature is important in gestational carrier surrogacy settings. According to an article in the newsletter of the Boston Bar Association's family law section, there were several amicus briefs filed in the *Culliton* case advocating the use of "gestational carrier" instead of "gestational surrogate." Susan L. Crockin, *SJC Rules on Parentage in Gestational Carrier Arrangements*, FAM. L. SEC. NEWSLETTER, Dec. 2001, at 4. The parties filing the amici briefs contended that the "distinction, if followed by other courts, should help develop a more sensitive terminology and move legal debates away from older cases involving traditional surrogacy" including the discussion of gestational carrier arrangements under the adoption framework. *Id.* Here the term "gestational carrier surrogacy" is used because it includes both the more accurate distinction and the broader, more easily recognized term with which the majority of the population is familiar.

7. "A biological mother, as opposed to an adoptive mother." BLACK'S LAW DICTIONARY 162 (7th ed. 1999). Note that even legal dictionaries have not yet fully contemplated the varied facts sets through which one may become the birth mother of a child.

8. "An individual from whom blood, tissue, or an organ is taken for transplantation." STEDMAN'S MEDICAL DICTIONARY 463 (25th ed. 1990). Ova and sperm cells are genetic materials, and are almost certainly contemplated to fall within the scope of that definition.

9. Black's Law Dictionary states:

> In ordinary usage, the term denotes more than responsibility for conception and birth. The term commonly includes (1) either the natural father or the natural mother of a child, (2) the

ments to bear the child of two others. Such clinical terms do not adequately represent the human context in which these relationships arise. The images and language "gestational carrier surrogacy" most likely brings to mind might be more like the images and language in science fiction or comedy films where there are inevitably drastic consequences from tampering with the natural course of human life. However, surrogacy has no comparison to Dr. Frankenstein's monster, assembled from the parts of other humans,[10] nor can it be compared with the (supposed) hilarity arising out of the duplication of Michael Keaton's character in *Multiplicity*, where with each generation there is a diminished capacity and increased dissimilarity to the original.[11] Rather, a more readily understandable image for this discussion comes from the plot lines of the NBC television series *Friends*.[12]

During the third season of *Friends*, one of the show's six major ensemble characters, Phoebe Buffay, found out that her younger half-brother, Frank, was romantically involved with Alice, a woman several years his senior.[13] Shortly thereafter, Frank and Alice married and immediately wanted to have children.[14] Upon learning that Alice, while fertile, could not bear the couple's children, the newlyweds approached Phoebe to serve as the gestational carrier for the pair in an effort at in vitro fertilization so that they could have children of their own genetic matter.[15]

> adoptive father or adoptive mother of a child, (3) a child's putative blood parent who has expressly acknowledged paternity, and (4) an individual or agency whose status as guardian has been established by judicial decree. In law, parental status based on any criterion may be terminated by judicial decree.

BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). In legal scholarship, there is an evolving debate regarding the status of legal parenthood. *See* Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 641-42 (2002) (discussing several categories of parenthood posited by the American Law Institute in its "Principles of the Law of Family Dissolution").

10. IMDb Plot Summary for *Frankenstein* (1931), *at* http://us.imdb.com/Plot?0021884 (last visited Mar. 10, 2002).

11. IMDb Plot Summary for *Multiplicity* (1996), *at* http://us.imdb.com/Plot?0117108 (last visited Mar. 10, 2002).

12. "Beginning its ninth season as the leadoff series on NBC's enormously popular 'Must See TV' Thursday-night lineup, 'Friends' continues to garner critical acclaim and ratings success. The series reigns as the number one show on television." *Friends*: About the Show, *at* http://www.nbc.com/Friends/about/index.html (last visited September 25, 2002). Since debuting in 1994, the show:

> [H]as received 44 Emmy Award nominations, including five for Outstanding Comedy Series. The cast won a Screen Actors Guild Award in 1996 for Outstanding Ensemble Performance in a Comedy Series and has been nominated four times (1996, 1997, 1998, 2002) for a Golden Globe Award for Best Television Series, Musical or Comedy.

Id. During the 2001-2002 season *Friends* averaged approximately 24.9 million viewers each week. Lee Marguiles, *Tuned In: Keeping in Touch with Friends*, L.A. TIMES, Mar. 7, 2002, at F61. Presumably this cultural phenomenon is not lost on our more academic audience.

13. Seth Kurland, "The One With the Hypnosis Tape," *at* The Complete *Friends* Script Index: http://www.thecfsi.com/season3/318towht.htm (last visited Mar. 10, 2002).

14. Seth Kurland, "The One With Phoebe's Uterus," *at* The Complete *Friends* Script Index: http://www.thecfsi.com/season4/411towpu.htm (last visited March 10, 2002).

15. *Id.* "The term *in vitro fertilization* usually refers to the process by which a doctor stimulates a woman's ovaries, removes several eggs in a procedure called laparoscopy, and fertilizes them in a Petri dish." MARTHA A. FIELD, SURROGATE MOTHERHOOD 35 (1988).

The following dialogue from the episode where Phoebe was asked to act as Frank and Alice's carrier shows well the human element incumbent in cases of gestational carrier surrogacy. Upon learning that Frank and Alice had eloped, Phoebe remarked:

> Phoebe: . . . So, I gotta get you a gift now. Is there anything you need?
> Frank: Uhh, yeah.
> Alice: We've been trying to get pregnant, uh pretty much ever since we got engaged, we thought we'd get a jump on things, y'know no one's getting any younger.
> Frank: See the thing is umm, we're not able to y'know, uh, conceive.
> Alice: And we've tried everything, we've seen a bunch of doctors.
> Frank: Yeah, and they—and they say that our—that our only chance to have a baby is that if they take my sperm, her egg and put it together in a dish and then put it into another girl. So we were wondering if you could be the girl that we could put it into.
> Phoebe: (shocked) That's a really nice gift. I was thinking of like a gravy boat.[16]

Phoebe, though startled by the request, served as a gestational carrier so Frank and Alice could have a family.

Hopefully using the *Friends* framework will humanize and demystify the issue of gestational carrier surrogacy. As evidenced by the fact that nearly 25 million Americans each week watched *Friends* last season, it is apparent that the show is one to which a substantial portion of the population can relate.[17] The use of this hypothetical framework should in no way be construed as disparaging or degrading the significance of the legal, ethical, medical, and moral issues that arise in situations where, in an effort to conceive, people use alternatives to conventional parenthood. Perhaps this method of having children could soon become as accepted as adoption. The exposure of gestational carrier surrogacy on *Friends* could herald both the growing employment of alternatives to conventional conception and the instant need for legislatures to address this topic thoughtfully, or risk the development and application of inconsistent, fragmented caselaw from various jurisdictions.

Law cannot develop in a vacuum, especially when governing medical breakthroughs. Marsha Garrison has stated that "[t]here is a wealth of popular and scholarly literature dealing with the ethical . . . medical, and human issues arising from [] new technologies" and those views should be considered when making law, either via caselaw or statutes, that impacts gesta-

16. Kurland, *supra* note 14.
17. Marguiles, *supra* note 12.

tional carrier surrogacy.[18] Therefore, several factors from both inside and outside the legal realm should be considered in analyzing this issue.[19] Though much relevant scholarship has been developed regarding traditional surrogacy, and many of the issues tangentially related to gestational carrier surrogacy have been explored, this Comment tacks only in the direction of gestational carrier surrogacy where a non-childbearing female supplies the ova and the male to whom she is linked romantically, martially, or otherwise, supplies the sperm cells. Under that set of facts the issues of biological claim to legal parenthood are much clearer, and, therefore, courts and legislatures can address that specific claim to parenthood more easily than in other conceivable situations. Developing coherent law and public policy is both a modest and attainable goal for gestational carrier surrogacy debates, and presents an arena that should pose little difficulty for courts and legislatures, as contrasted with broader, thornier problems that could arise when the biological parents are not also the intended parents of a child.

In Part II a brief analysis of legal models developed via caselaw through the 1990s to the present and legislative models governing surrogacy will be discussed. Because of *Culliton*'s impact as binding precedent on Massachusetts' common law, cases from both inside and outside Massachusetts will be detailed. Part III of this Comment will examine the *Culliton v. Beth Israel Deaconess Medical Center*[20] decision, a novel case on the analysis of gestational carrier surrogacy agreements. *Culliton* serves as a focal point for analysis due to the court's pragmatic approach to solving the riddle of gestational carrier surrogacy in the absence of legislative guidance. The framework provides a useful template for similarly situated courts to use in order to effectively decide future cases.

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18. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 840 (2000).

19. Many scholars have discussed the issues surrounding all forms of surrogacy under the rubrics of existing legal frameworks. Alexander M. Capron & Margaret J. Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood,* in SURROGATE MOTHERHOOD 59 (Larry Gostin ed., 1990) (advocating adoption as the proper framework for the issue); Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995); Linda Kelley, *Family Planning, American Style*, 52 ALA. L. REV. 943, 945-48 (2001); Carl E. Schneider, *Surrogate Motherhood from the Perspective of Family Law*, 13 HARV. J. L. & PUB. POL'Y 125 (1990). Other works have considered the impact of other disciplines on these ostensibly legal issues. *See, e.g.*, ROBERT BLANCK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS (1995); GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS (1985); LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE (1994); *see also, e.g.*, Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2350 (1995) [hereinafter Andrews, *Beyond Doctrinal Boundaries*] (stating that surrogacy "has been criticized as presenting intolerable risks to women including . . . psychological risks . . . and symbolic risks."); A.J. Smith, *In Search of a Christian Ethic for Surrogate and Donor Parentship*, *at* http://www.kalico.net/articles/fertility_and_parenthood/surrogate.html (last visited Feb. 9, 2002) (including a bibliography of several sources considering surrogacy from a moral or theological perspective); Ethical Issues in Surrogate Motherhood, ACOG Comm. Op. (Committee on Ethics, American College of Obstetricians and Gynecologists, Washington, D.C.), Nov. 1990. However, there has been relatively little scholarship devoted exclusively to solving the problems associated with the gestational carrier surrogacy fact set upon which this is Comment is predicated.

20. 756 N.E.2d 1133 (Mass. 2001).

II. GESTATIONAL CARRIER SURROGACY LAW PRIOR TO *CULLITON V. BETH ISRAEL DEACONESS MEDICAL CENTER*

A. Caselaw Models for Gestational Carrier Surrogacy

1. Pure Intent Test

An early case dealing with gestational carrier surrogacy issues was *Johnson v. Calvert*.[21] There, the Supreme Court of California sought to resolve who the legal parents of a child were, pursuant to a gestational carrier agreement.[22] The carrier (Johnson) earned $10,000 in installments to carry a zygote, formed by the union of the father and mother's (Calverts) gametes, and carry the child to term.[23] Upon the birth of the child, the carrier agreed to give up "all parental rights" pertaining to the child that she bore for the Calverts.[24] However, a dispute arose between the parties over both disclosure of information and performance under the agreement, and the gestational carrier threatened to refuse to give the child to the intended parents upon the child's birth.[25] Because of the novelty of the questions presented to the court, interpreting the California version of the Uniform Parentage Act[26] became a fairly tangled process, with many interesting positions advocated by several parties.[27] Ultimately, the court relied on a test to determine the intent of the parties, holding:

> We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[28]

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21. 851 P.2d 776 (Cal. 1993).

22. *Johnson*, 851 P.2d at 778.

23. *Id.* at 777-78.

24. *Id.* at 778.

25. *Id.*

26. The Uniform Parentage Act, first passed by the National Conference of Commissioners on Uniform State Laws in 1973, was designed to deal with questions of legitimacy and parentage. National Conference of Commissioners on Uniform State Laws, *Summary: Uniform Parentage Act, at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp (last visited Oct. 1, 2002). The Uniform Parentage Act's import in the area of assisted reproductive technologies has little relevance because the commissioners passed the Uniform Status of Children of Assisted Conception Act as "a response to the technologies of assisted conception, like in vitro fertilization and artificial insemination." National Conference of Commissioners on Uniform State Laws, *Summary: Uniform Parentage Act, at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp (last visited Oct. 1, 2002) (discussed further at Part II.B, *infra*).

27. *See Johnson*, 851 P.2d at 781 n.8 (noting that the ACLU advocated declaring both Mrs. Calvert and Johnson as the mothers of the child, creating a joint custodial arrangement similar to the one created after a divorce proceeding).

28. *Id.* at 782 (citations omitted).

Thus, the intended parents were declared the parents of the child. The court, in affirming the judgment of the court of appeals, looked to the contract-based interests of the parties for guidance on this issue of first impression.[29] This intent test would be examined and criticized in subsequent cases from other jurisdictions, but at least one commentator has stated that "[a] presumption that the intended parents are the legal parents is not [a] radical . . . departure from existing laws . . . ."[30]

2. Hybrid Genetics Test

The *Johnson* intent test was not without its critics, including the court in *Belsito v. Clark*.[31] In *Belsito*, the sister of the genetic mother acted as a gestational carrier for her sister and the sister's husband after the genetic mother was diagnosed with cervical cancer.[32] As a result of this diagnosis, the genetic mother's uterus was removed via a hysterectomy, but the treating physician was able to save the genetic mother's eggs.[33] The sister voluntarily asked if she could serve as a gestational surrogate for the couple, and did so without monetary compensation.[34]

The *Belsito* court was mindful of the existing legal definition of "natural parent" under Ohio law and in legal texts[35] and explained that "[i]n modern terminology, blood relationship would be described as shared DNA or genetics."[36] After clarifying the definition that it would use to determine natural parenthood, the court examined the Ohio version of the Uniform Parentage Act.[37] The court removed the topic of gestational carrier surrogacy from within the scope of the Act, stating that "[s]urrogacy technology did not exist and a separate birth and genetic mother were factually impossible when the statute, caselaw, and common law were formulated."[38] The court buttressed its reasoning by stating that the Uniform Parentage Act was intended to address only questions of legitimacy, not questions arising under alternative modes of conception.[39]

The court criticized *Johnson* for "three important reasons: (1) the difficulty in applying the *Johnson* intent test; (2) public policy; and (3) *Johnson*'s failure to recognize and emphasize the genetic provider's right to con-

29. *See id.* at 782-85.
30. Andrews, *Beyond Doctrinal Boundaries*, *supra* note 19, at 2370.
31. 644 N.E.2d 760 (Ohio Comm. Pl. 1994).
32. *Belsito*, 644 N.E.2d at 761.
33. *Id.*
34. *Id.*
35. *Id.* at 762-63 (citing Owens v. Bell, 451 N.E.2d 241, 243 (Ohio 1983), and BLACK'S LAW DICTIONARY 172 (6th Ed. 1990) for the proposition that natural parenthood is determined by aspects of shared blood or common ancestry).
36. *Id.* at 763.
37. *Belsito*, 644 N.E.2d at 763 (discussing OHIO REV. CODE ANN. § 3111 (West 2002)).
38. *Id.*
39. *Id.*

sent to procreation and to surrender potential parental rights."[40] By contrast, the Ohio court relied on "existing law . . . to fashion new law."[41]

The court in *Belsito* developed a two-step analysis for determining parental rights and roles. The court decided to first determine the question of natural parenthood using genetics as the basis for declaring who had the natural parental rights in cases of gestational carrier surrogacy.[42] Next, the court looked to determine the legal parents of the child. According to the *Belsito* court, only when there has been a waiver of the parental rights by the genetic parents should the court examine who the legal parents of the child are.[43] Thus, since the carrier "has not contributed to the genetics of the child, and the genetic parent or parents have not waived their rights, she [the carrier] cannot be determined the natural parent. She cannot sell a right she does not have."[44] Only by the consent of the natural parents may the carrier assert a claim of maternity over a child for whom she has supplied none of the genetic material.[45] The court in *Belsito* effectively maintained both of the traditional family law tests for parenthood: birth and genetics.[46]

Unfortunately, the court's two-step test could be characterized as only having one meaningful step: the determination of the genetic parents. The second step only allows for parental rights to be given to the carrier under the consent of the genetic parents, thus creating an improbable and unrealistic circumstance in light of the genetic parents' initial agreement with the carrier for the purpose of having a child of their own. Therefore, while the *Belsito* case does align itself with a hybrid test that respects both birth and genetics, it is apparent that the Ohio court valued the interests of the genetic parents and their efforts to conceive over the interests of the birth mother.

3. Constitutional Invalidation of an Existing Statutory Scheme

Soos v. Superior Court [47] further developed the law concerning gestational carrier surrogacy. In that case, the father and mother began proceedings for dissolution of their marriage during the pregnancy of their gestational carrier.[48] The Arizona statute at issue stated, in pertinent part, that "[a] surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child."[49] However, this conclusive presumption was contrasted with the rebuttable presumption

40. *Id.* at 764.
41. *Id.* at 766.
42. *Belsito*, 644 N.E.2d at 766.
43. *Id.* at 767.
44. *Id* at 766.
45. *Id.*
46. *Id.*
47. 897 P.2d 1356 (Ariz. Ct. App. 1994).
48. *Soos*, 897 P.2d at 1358.
49. *Id.* at 1359 (quoting ARIZ. REV. STAT. § 25-218(B) (1990)).

allowing fathers to prove paternity.[50] Arizona enacted that statute to "stop 'baby brokers' and to stop the trafficking of human beings."[51]

The mother challenged the statute's constitutionality, advocating that the statute's allowance of a method to prove paternity, but not maternity, violated her rights to procedural due process.[52] The court held that Arizona had unreasonably denied the mother equal protection of the laws "[b]y affording the Father a procedure for proving paternity, but not affording the Mother any means by which to prove maternity."[53] The *Soos* court also valued the rights of the genetic/intended mother over the rights of the birth mother, and saw this constitutional invalidation as one way to equitably develop those interests.

4. Pre-Birth Order Cases

Two other cases have dealt with the issuance of pre-birth orders, similar to the facts of the *Culliton* case. While factually similar to one another, the results reached in *Arredondo v. Nodelman*[54] and *A.H.W. v. G.H.B.*[55] were markedly different. In *Arredondo*, the genetic parents of twins brought an action for a declaration of maternity in family court, then appealed to the Supreme Court of Queens County to gain subject matter jurisdiction over their claim.[56] The Arredondo twins' official birth certificate listed the carrier, Nodelman, as their mother and left blank the name of the father.[57] The court granted the petition brought by the genetic/intended parents without opposition from the city or any party in the litigation,[58] thereby recognizing the genetic/intended parents as having claim to legal parenthood rather than the birth mother.

Conversely, the *A.H.W.* court declined to allow the genetic parents to be listed on the birth certificates of the children born by their gestational carrier, despite a written agreement between the parties.[59] A New Jersey regulation governing birth records stated "the woman who gives birth must be recorded as a parent on the birth certificate."[60] However, the court sought to render the most accommodating judgment possible, while still remaining true to the laws of New Jersey by which they were bound.[61] The court could

50. *Id.*; *see also* ARIZ. REV. STAT. ANN. § 25-218(C) (West 1990).
51. *Id.* This statute is one example of legislation addressing surrogacy by strict prohibition. This and other legislative structures governing surrogacy will be discussed in more detail at Part II.C, *infra*.
52. *Id.* at 1360; *see* U.S. CONST. amend. XIV.
53. *Soos*, 897 P.2d at 1361.
54. 622 N.Y.S.2d 181 (N.Y. Sup. Ct. 1994).
55. 772 A.2d 948 (N.J. Super. Ct. Cl. Div. 2000).
56. *Arredondo*, 622 N.Y.S.2d at 181.
57. *Id.*
58. *Id.*
59. *A.H.W.*, 772 A.2d at 954. "The parties' detailed fifteen page agreement clearly reflects their shared intent and desired outcome for this case." *Id.*
60. *Id.* at 953 (citing N.J. ADMIN. CODE tit. 8, § 2-1.4(a) (1999)).
61. "The most prudent course, prior to legislative action, is to follow the current statutes as closely as possible while allowing the parties, to the maximum extent possible, the relief requested." *Id.* at 954.

not order the gestational carrier to submit to a pre-birth order that would bind her to surrender parental rights, but did opine that the carrier would be allowed to surrender her parental rights to the genetic parents at the end of the mandated seventy-two hour period, forty-eight hours before the information for the birth record was to be entered, leaving the genetic parents as those listed on the record of birth.[62] Thus, the birth mother had a claim to legal parenthood that would trump a claim by the genetic/intended parents if she chose to exercise it under this model. As evidenced by these pre-birth order decisions, there is a lack of consistency in cases regarding gestational carrier surrogacy.

5. Hypothetical Application of Current Caselaw

Consider the following hypothetical situations regarding gestational carrier surrogacy in light of the inconsistency of precedent.

First: If, during proceedings to determine who the legal parents of Frank and Alice's children (delivered by Phoebe) were, the following occurred:

> Frank enters the convenience store near the courthouse. Feeling that his day is not going well, he buys a lottery ticket. After playing the scratch-off game, Frank realizes that he has just won $254.71 million, after taxes. Upon realizing that he can now buy his own refrigerator repair school, or maybe three of them, Frank drops dead from a massive heart attack. A very sad occurrence for one so young, made more tragic by his lack of proper estate planning. Because Frank had no will, his winnings will pass via intestacy to his descendants. However, there are problems:

(A) Are the children his descendants?
(B) Are they "legitimate children" of his and Alice's marriage?
(C) Will they receive the same share if the court declares them to be Phoebe's illegitimate children?

The court discussed at length *In re Baby M*, 537 A.2d 1227 (N.J. 1988), decided twelve years before this case. *See id.* at 952-54. The *Baby M* case was one of the most publicized legal issues of the late 1980s, and played a major role in the *Arredondo* court's analysis when dealing with this variation of the surrogacy issues decided in *Baby M*. *See, e.g.*, Gary N. Skoloff & Edward J. O'Donnell, *Baby M: A Disquieting Decision*, 18 SETON HALL L. REV. 827, 827 (1988); Developments in the Law, *Medical Technology and the Law—II. Reproductive Technologies*, 103 Harv. L. Rev. 1525, 1547, n. 141 (1990). To add to the media lore of the *Baby M* case, it later became a made for television movie starring Dabney Coleman and JoBeth Williams, who was nominated for an Emmy (Outstanding Lead Actress in a Miniseries or a Special) and a Golden Globe (Best Performance by an Actress in a Mini-Series or Motion Picture Made for TV) for her portrayal of Mary Beth Whitehead. Internet Movie Database, *Awards for Baby M (1988) (TV)*, *at* http://us.imdb.com/Tawards?0094696 (last visited Oct. 13, 2002).

62. *A.H.W.*, 772 A.2d at 954.

Second: Frank, Alice, and Phoebe move to the state of Yore, which is known for its amenable climate and high quality of life. However, shortly before the children are born, the Yore state legislature passed an act declaring that, effective immediately, surrogacy was illegal. As a penalty, all of the children born to surrogates will be taken as wards of the state because, as stated by state Sen. Moor from the north of Yore, sponsor of the Traditional Family Promotion Act, in a debate on the floor: "Obviously all surrogates are inherently evil as they follow in the line of Haggar. Surrogates and those nasty baby buyers are *clearly* unfit as parents." Phoebe, Frank, and Alice mount a constitutional challenge to the legislation.

What one will find after examining these situations under current case-law is that results will vary widely from jurisdiction to jurisdiction. It is unanswered questions of this type that will prove difficult to answer in the near future.

B. Legislative Models Governing Gestational Carrier Surrogacy

Statutes governing surrogacy may be loosely categorized as following one of four typical models. The first is a statute in which the state declares all surrogacy agreements void and/or unenforceable in that jurisdiction. Second, some states prohibit only surrogacy agreements in which the surrogate is compensated with something of value over the expenses incurred as a result of the pregnancy. A third view is a state policy whereby only one specific outcome or element of surrogacy agreements is addressed. Finally, some states have chosen to approve surrogacy, but do so with significant safeguards and procedural requirements in the legislation. These statutory models and the interests that they purport to protect will be addressed below. While these statutory schemes have been criticized by Professor Andrews, they do represent the major legislative models governing surrogacy.[63]

1. Uniform Legislation

In 1988, the National Conference of Commissioners on Uniform State Laws (NCCUSL) finalized the Uniform Status of Children of Assisted Conception Act (Assisted Conception Act).[64] The Assisted Conception Act pro-

63. Andrews, *Beyond Doctrinal Boundaries*, *supra* note 19, at 2375 (stating that "[t]he current statutes covering surrogacy are, for the most part, wrongheaded").

64. Laura A. Brill, *When Will the Law Catch Up with Technology?* Jaycee B. v. Superior Court of Orange County*: An Urgent Cry for Legislation on Gestational Surrogacy*, 39 CATH. LAW. 241, 266 (1999).

vided states two alternatives, a court-mandated approval of surrogacy agreements or a total prohibition on surrogacy contracts.[65] However, if the intended parents entered into a surrogacy agreement without court approval under the first option, then the agreement was voided and the child declared to be the child of the birth mother.[66] NCCUSL's commissioners also included several procedural safeguards before the court could validate a surrogacy agreement.[67] However, the Assisted Conception Act only covers situations where the intended parents are a married couple and one or both of them will provide some genetic material.[68] Only one state has adopted each alternative put forth in the Assisted Conception Act,[69] so the commisioners' efforts at achieving uniformity across the jurisdictions could likely not be termed a success.[70] There are, however, some aspects of the Assisted Conception Act that have flowed into other statutory schemes. Following are descriptions of the fragmented legislative outlooks that states have taken on this issue.

2. Total Prohibition on Surrogacy Agreements

Several jurisdictions have declined to enforce surrogacy contracts. Jurisdictions prohibiting enforcement of these agreements as contrary to public policy include: Arizona,[71] the District of Columbia,[72] Indiana,[73] Michigan,[74] New York,[75] North Dakota,[76] and Utah.[77] As discussed earlier, statutes developing a total prohibition approach have been held as unconstitutional in at least one jurisdiction.[78] In fact, the Utah provisions governing surrogacy contain a conclusive presumption that the birth mother is the mother of the child.[79] The statute states, in pertinent part, that "[i]n any case arising under [a surrogacy agreement], the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the

65. *Id.*
66. *Id.* at 266-67.
67. *Id.* at 267.
68. *Id.*
69. Virginia adopted Alternative A and North Dakota adopted Alternative B. National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Status of Children of Assisted Conception Act, at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uscaca.asp (last visited Oct. 13, 2002).
70. *Id.*
71. ARIZ. REV. STAT. ANN. § 25-218 (West 2001); *see also* notes 46-52 and accompanying text at Part II.A, for a discussion of the *Soos* case, in which the Arizona courts invalidated this statute on constitutional grounds.
72. D.C. CODE ANN. § 16-402(a) (2001).
73. IND. CODE ANN. §§ 31-20-1-1, -2 (West 1999).
74. MICH. COMP. LAWS ANN. § 722.855 (West 2002).
75. N.Y. DOM. REL. LAW § 122 (McKinney 1999).
76. N.D. CENT. CODE § 14-18-05 (1997).
77. UTAH CODE ANN. § 76-7-204 (1999).
78. Soos v. Superior Ct., 897 P.2d 1356, 1358 (Ariz. Ct. App. 1994); *see also supra* text accompanying notes 47-53.
79. UTAH CODE ANN. § 76-7-204(3)(a) (1999).

father of the child for all legal purposes."[80] No Utah cases have analyzed this statute in a case factually similar to *Soos*, where a constitutional challenge to the statutory scheme was mounted. However, if a state uses an alternate statutory construction that avoids the problems presented in *Soos*, then the prohibition on surrogacy could potentially be upheld. These jurisdictions have effectively chosen to subjugate the rights of the genetic/intended parents to those of the birth parents. Further, these jurisdictions may not have considered gestational carrier surrogacy in debates over this legislation, and thereby are propagating unintended consequences with this prohibition. In any event, the policies of these jurisdictions run directly counter to Professor Richard Epstein's view that "we need a legal regime where surrogacy contracts will be enforced come hell or high water."[81] This statutory model may soon represent a small minority view of effective surrogacy legislation.[82] At least one commentator has stated that "allowing gestational surrogate arrangements" is "[c]onsistent with the national trend."[83]

Another interesting aspect of a legislative ban on surrogacy involves the penalty imposed for such a violation. The statutory scheme used in Michigan applies criminal penalties to discourage the use of surrogacy agreements.[84] Being a party to a surrogacy agreement is a misdemeanor punishable by: a fine of up to $10,000; imprisonment of up to one year; or a combination of both.[85] Any "person other than a participating party" that facilitates the arrangement or formation of a surrogacy agreement may be punished by a felony conviction that carries a maximum penalty of up to $50,000 and a five-year prison term.[86] That section deters any agency or individual from serving as a clearinghouse for information regarding surrogacy services and would likely result in the deterrence of potential genetic/intended parents from finding information regarding gestational carrier surrogacy. Professor Andrews has criticized this aspect of surrogacy legislation as "counterproductive with respect to assuring that potential surrogate mothers are able to make an informed choice."[87]

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80. *Id.*

81. Epstein, *supra* note 19, at 2339.

82. *See* Daniel Rosman, *Surrogacy: An Illinois Policy Conceived*, 31 LOY. U. CHI. L.J. 227, 250 (2000).

83. *Id.*

84. MICH. COMP. LAWS ANN. § 722.859 (West 2002). This aspect of surrogacy legislation has been criticized and discussed by several commentators. Andrews, *Beyond Doctrinal Boundaries*, *supra* note 19, at 2363; *cf.* Shapiro, *supra* note 4, at 92 (discussing administrative sanctions). Shapiro suggests administrative sanctions could be beneficial in regulating behavior counter to bioethical norms—a concept that could be considered as a legislative alternative to criminal penalties in this area. *See id.*

85. MICH. COMP. LAWS ANN. § 722.859(2).

86. *Id.* § 722.859(3).

87. Andrews, *Beyond Doctrinal Boundaries*, *supra* note 19, at 2362-63.

3. Prohibition of Compensated Surrogacy Agreements

Other states have taken the view that a surrogacy agreement that does not compensate the mother is not violative of public policy of the state and include: Kentucky,[88] Louisiana,[89] Nebraska,[90] and Washington.[91] A central concern behind these states' invalidation of compensated surrogacy concerns a practice commonly known as "baby selling." While more readily identified with the adoption context, these states purport to ensure that financial pressures do not affect parenthood choices and, thereby, subscribe to an anti-commodification view of surrogacy.[92] This statutory view is commensurate with some noted feminist critiques opposing surrogacy agreements as a commodification of the reproductive abilities of a woman.[93] However, gestational carrier agreements do pose thorny problems for traditional feminist oppositions to surrogacy.[94] There has been much scholarship devoted to feminist critiques of birth methods and familial roles in modern society.[95] These and other works should be examined for in-depth analysis of feminist critiques of surrogacy.

At least one state, Maryland, has laws that prohibit compensation when citizens are seeking to obtain children via adoption, a common provision to stop "baby brokers."[96] This statute could possibly be implicated in a gestational carrier surrogacy case.[97] The pertinent statutory section dictates that it is illegal to pay compensation both in the procurement of an adoption or in the contemplation of procuring an adoption.[98] The Attorney General of Maryland issued an opinion regarding the application of these laws to a

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88. KY. REV. STAT. ANN. § 199.590(4) (Michie 1999). Notably, this statute was enacted to overrule a decision by the Kentucky Supreme Court that stated that a compensated surrogacy agreement was not violative of state statutes in force to prevent "black market" sale of babies. *See* Surrogate Parenting Assocs., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986).

89. LA. REV. STAT. ANN. § 9:2713 (West 1991).

90. NEB. REV. STAT. ANN. § 25-21, 200 (1995).

91. WASH. REV. CODE ANN. §§ 26.26.230, .240 (West 1997).

92. One commentator has stated that:

> [C]ommodification of women's reproductive capacity is harmful for the identity aspect of their personhood and in a judgment that the closeness of paid surrogacy to baby-selling harms our self-conception too deeply. There is certainly the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized. Surrogates with "better" qualities will command higher prices in virtue of those qualities. This monetization commodifies women more broadly than merely with respect to their sexual services or reproductive capacity.

Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1932 (1987).

93. *See* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, *in* THE ETHICS OF REPRODUCTIVE TECHNOLOGY 205, 206-08 (Kenneth D. Alpern ed., 1992).

94. *Id.* at 216-17.

95. *See* LORI B. ANDREWS, FEMINIST PERSPECTIVES ON REPRODUCTIVE TECHNOLOGIES (1989); CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS (1987); DEBORAH L. RHODE, JUSTICE AND GENDER (1989); CARMEL SHALEV, BIRTH POWER (1989); Andrews, *Beyond Doctrinal Boundaries*, *supra* note 19. These works, among others are a more thoughtful and relevant analysis of feminist critiques of alternative reproductive technologies than could be provided herein.

96. MD. CODE ANN., FAM. LAW § 5-327(a) (1999).

97. *See* discussion of *A.H.W. v. G.H.B.* in text and notes, *supra* Part II.A.

98. *See* discussion of *A.H.W. v. G.H.B.* in text and notes, *supra* Part II.A.

traditional surrogacy arrangement, stating that in "our opinion, surrogacy contracts that involve the payment of a fee to the birth mother are, in most instances, illegal and unenforceable under Maryland law" because payment under the terms of the agreement would be in contemplation of procuring the adoption of the child by the intended parents.[99] However, the opinion did differentiate between traditional surrogacy and a gestational carrier surrogacy agreement:

> It is possible that the result would be different in a gestational surrogacy case. Some states have held that the product of a gestational surrogacy agreement is the natural child of the couple who arranged the surrogacy. . . . Thus, in at least some gestational surrogacy arrangements, the intended parents may be considered the natural parents and adoption would be unnecessary. Moreover, since the natural parents have the presumed right to custody . . . there would be a strong argument that payments under the agreement were not for the purchase of custody of the child. However, there is no law in Maryland addressing parentage in this context.[100]

This opinion from the Maryland attorney general's office certainly does not equate to precedent or legislative action, but gives at least some foundation for the development of a case for both compensated and uncompensated gestational carrier surrogacy agreements in Maryland.

4. Limited Legislative Governance of Surrogacy

Other states have taken a more limited approach to the issue of gestational carrier surrogacy. Typically, states that have taken a limited legislative stance on surrogacy agreements have merely exempted them from criminal punishment. In Alabama, the legislature decriminalized surrogacy and removed it from the scope of the state's "baby selling" prohibition.[101] Interestingly, the commentary to the statute says that the legislature determined surrogacy contracts should be covered by separate legislation.[102] However, since that law was enacted in 1990 there has been no legislation passed to cover any form of surrogacy, gestational or traditional. Similarly, both West Virginia[103] and Iowa[104] have exempted surrogacy from the scope of the prohibition on financially motivated adoptions. However, it should be

99. Although Surrogacy Contract Involving Payment of Fee to Birth Mother is Illegal and Unenforceable Under Maryland Law, Invalid Payments Do Not Bar Approval of Adoption Petition, 85 Op. Att'y Gen. 00-35, at 1 (Dec. 19, 2000).

100. *Id.* at 17 n. 22 (citations omitted).

101. ALA. CODE § 26-10A-34 (1992) (stating that "[s]urrogate motherhood is not intended to be covered").

102. *Id.*

103. W. VA. CODE ANN. § 48-22-803 (Michie 2001).

104. IOWA CODE ANN. § 710.11 (West 1993).

noted that the Iowa statute seemingly, and perhaps unintentionally, is limited to traditional surrogacy only. The statute states, in pertinent part, that: "For purposes of this section, a 'surrogate mother arrangement' means an arrangement whereby a female agrees to be artificially inseminated with the semen of a donor, to bear a child, and to relinquish all rights regarding that child to the donor or donor couple."[105] From the plain language of the statute, it seems that gestational carrier surrogacy agreements were not contemplated by the Iowa legislature.

An alternative enactment of minimal legislation is in place in Arkansas. There, the state legislature modified its paternity laws so as to declare a child born to a surrogate mother as the child of the intended parents.[106] However, inclusion of surrogacy under paternity laws may sometimes prove to be problematic for courts during the interpretive process. As the court in *R.R. v. M.H.*[107] found, there were problematic contrasts in legislative intent and practical operation of a Massachusetts statute that declared any child born through artificial insemination with the consent of the mother's husband to be "the legitimate child" of the mother and her husband, a construction that seems only to contemplate artificial insemination where there is male infertility present in the relationship.[108] As courts have noted in several cases, there are problems with attempting to apply contract, adoption, paternity, or other dissimilar provisions of law to the gestational carrier agreement.[109] Limited legislative action on surrogacy in general, with minimal (if any) contemplation of gestational carrier surrogacy, can sometimes lead to an unintended consequence or the development of somewhat twisted precedent, thereby wedging the problem into the mold of existing statutory law.

5. Legal Surrogacy Governed by Statute

By contrast, some states have taken a proactive approach to the analysis of surrogacy laws, developing statutory provisions to legalize surrogacy agreements, and include: Illinois,[110] Florida,[111] Nevada,[112] New Hampshire,[113] and Virginia.[114] Generally, the states that take this approach to gestational carrier surrogacy regulate heavily the parties that may participate in

105. *Id.* Note that the statute was passed in 1989. *Id.* The first known in vitro fertilization procedure was performed in 1978. *See* National Conference of Commissioners on Uniform State Laws, *Summary: Uniform Status of Children of Assisted Conception, at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-usocoac.asp (last visited Oct. 27, 2002). Therefore, the Iowa legislature could have contemplated gestational carrier surrogacy, but that is not likely.

106. ARK. CODE ANN. § 9-10-201 (Michie 2002).

107. 689 N.E.2d 790 (Mass. 1998).

108. *R.R.*, 689 N.E.2d at 795 n.9 (discussed further at Part II.C *infra*).

109. *See supra* Part II.A-B.

110. 750 ILL. COMP. STAT. ANN. § 45/6 (West 1999).

111. FLA. STAT. ANN. ch. 742.15 (Harrison 1994).

112. NEV. REV. STAT. ANN. 126.045 (Michie 1998).

113. N.H. REV. STAT. ANN. § 168-B:16 (1994).

114. VA. CODE ANN. §§ 20-159, -160(B)(4) (Michie 2000).

a gestational carrier agreement.[115] Some of the more common requirements include: proof of the medical inability of the intended parents to conceive or bear their own children, preauthorization of the agreement by a court, participation in complete medical and psychological exams by all parties (often including the husband of the gestational carrier if she is married), and informed consent granted by all parties to the agreement.[116] Both Florida and Nevada require that the intended parents be legally married.[117] The Illinois statute addresses precisely the issues presented under a *Culliton*-type fact set.[118] These statutes significantly limit the contractual freedom of the parties, but they are significant assets to state courts in analyzing cases in this area and parties to gestational carrier surrogacy agreements because of the legal certainty they provide.

Legislative action is likely the most direct and least problematic manner of addressing assisted conception. Statutory safeguards present within these legislative provisions clearly define the rights and responsibilities of all parties to a gestational carrier agreement. Such legislation serves the policy goals of achieving maximum responsiveness to the concerns of citizens and prevents the unreasonable, illogical, and unintended consequences that arise when courts are given little or no legislative input on novel questions.

*C. Pre-*Culliton *Caselaw in Massachusetts*

Caselaw regarding surrogacy in Massachusetts developed before the advent of *Culliton*. One of the first cases of importance, *R.R. v. M.H.*,[119] involved an agreement requiring a surrogate to be inseminated with the sperm of the biological father, a traditional surrogacy agreement.[120] In consideration of the mother's promise to bear the child and surrender all parental rights to the biological father and his wife, the surrogate was paid $10,000.[121] Despite agreement language stating "that no payment was made in connection with adoption of the child, the termination of parental rights, or consent to surrender the child for adoption," the court invalidated the agreement on public policy grounds, citing fears of commodification.[122] The court stated "compensated surrogacy arrangements raise the concern that, under financial pressure, a woman will permit her body to be used and her

115. *See* FLA. STAT. ANN. ch. 742.15; NEV. REV. STAT. ANN. 126.045; N.H. REV. STAT. ANN. § 168-B:16; VA. CODE ANN. §§ 20-159, -160(B)(4).

116. *See* FLA. STAT. ANN. ch. 742.15; NEV. REV. STAT. ANN. 126.045; N.H. REV. STAT. ANN. § 168-B:16; VA. CODE ANN. §§ 20-159, -160(B)(4).

117. FLA. STAT. ANN. ch. 742.15; NEV. REV. STAT. ANN. 126.045.

118. *See* 750 ILL. COMP. STAT. ANN. § 45/6; Rosman, *supra* note 82, at 231-33.

119. 689 N.E.2d 790 (Mass. 1998).

120. *R.R.*, 689 N.E.2d at 791. Note the difference between this case and *Culliton*—here the surrogate is also the biological mother of the child in a traditional surrogacy agreement.

121. *Id.* at 792. The court said the mother was paid "for services rendered in conceiving, carrying and giving birth to the Child." *Id.*

122. *Id.* For a further analysis of this concept see text accompanying notes 88-100 at Part II.B, *infra*. *See also* Radin, *supra* note 92 (discussing commodification issues).

child to be given away."[123] The court's main disagreement concerned the final payment to the birth mother being conditioned on the surrender of the child to the father and his wife.[124]

In dicta, the court noted, "there is nothing inherently unlawful in an arrangement by which an informed woman agrees to attempt to conceive artificially and give birth to a child whose father would be the husband of an infertile wife," but opined that a mother should be given a "suitable period" after the child's birth in which she may determine whether or not to relinquish custody of the child.[125] Further, the court laid out several factors to ensure that a surrogacy agreement would be upheld including: informed and written consent of the birth mother's husband, the birth mother being an adult, the birth mother having had at least one prior successful birth, therapeutic evaluation of all parties involved, infertility or risk to the health of the father's wife, fitness of the intended parents, and whether or not all the parties involved had legal advice and counsel regarding the agreement.[126] Further, the court determined that any custody agreement in a surrogacy case was subject to an "adoption-style" or judicial determination of custody to be made in the best interests of the child.[127] The court in *R.R.* sought to fill the gaps and resolve the contrasting issues in applicable statutory law without the benefit of legislation on point, and, in fact, requested that the Massachusetts legislature address those gaps and inconsistencies.[128]

A year later, the Massachusetts Supreme Judicial Court faced a similar agreement to the one in *Culliton.* In *Smith v. Brown*,[129] the Supreme Judicial Court of Massachusetts granted direct appellate review of a family court case where the Smiths, the genetic parents, sought a pre-birth order to have themselves declared as the legal parents of the child to be born by Susan Brown, the gestational carrier and sister of the genetic mother (the court used pseudonyms).[130] Both the gestational carrier and her husband admitted all of the allegations in the complaint, and all parties jointly moved for a judicial declaration that the Smiths were the legal parents of the unborn child.[131] The lower court entered a judgment directing that, on the birth of the child, the Smiths would be declared the legal parents of the child under the Massachusetts law governing illegitimate children.[132] None of the parties appealed that judgment.[133] Rather, the lower court, on its own motion, sought to have the jurisdiction's highest court answer important questions

123. *R.R.*, 689 N.E.2d at 796.
124. *Id.* at 797.
125. *Id.*
126. *Id.*
127. *Id.*
128. *R.R.*, 689 N.E.2d at 797.
129. 718 N.E.2d 844 (Mass. 1999).
130. *Smith*, 718 N.E.2d at 845.
131. *Id.*
132. *Id.* at 845.
133. *Id.*

on what law should govern gestational carrier surrogacy.[134] In dicta, the court commented that probate and family courts would likely need to develop a pre-birth procedure for determining the rights of parties to gestational surrogacy agreements.[135] The Supreme Judicial Court of Massachusetts posited that the lower courts could use their equity power to allow relief to the petitioning parties.[136]

Even a cursory review of the caselaw governing surrogacy in Massachusetts reveals an area of the law that is far from settled and is due, at least in part, to the intersection of emerging technology and the absence of clear statutory guidance from the Massachusetts legislature.

III. *CULLITON V. BETH ISRAEL DEACONESS MEDICAL CENTER*: JUDICIAL ANALYSIS AND GESTATIONAL CARRIER SURROGACY

A. Facts of the Culliton *Case*

Marla and Steven Culliton entered into an agreement with Melissa Carroll whereby Carroll would act as a gestational surrogate for the couple.[137] The Cullitons turned to the option of surrogacy after Marla went through seven years of fertility treatments and endured six miscarriages.[138] In their agreement with Carroll, the Cullitons agreed to pay Carroll's lost wages and expenses associated with carrying their children.[139] Under the terms of the agreement, the payments made to Carroll "[were] not conditioned 'upon the termination of any parental rights or the placement of the child with [the Cullitons].'"[140]

By media accounts, Marla and Carroll interacted extensively during the pregnancy.[141] The two took birth classes together, went to doctor appointments together and even went to an establishment that took three-dimensional photos of the unborn children that the Cullitons contracted with her to bear.[142] In fact, when speaking about events in which the two had

134. *Id.* at 845 n.3. In the opinion of the state appellate court, some of the two main questions (and ten sub-questions) posed by the lower court went "beyond the facts of the case and . . . involve[d] unforeseen complex issues concerning the rights of the genetic parents and the gestational carrier" and requested guidance "on such topics as insurance obligations, emergency treatment during pregnancy . . . and consideration of termination of pregnancy and rights of parenthood between the parties, to mention just a few." *Smith*, 718 N.E.2d at 846.

135. *Id.* at 846.

136. *Id.*

137. Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133, 1135 (Mass. 2001).

138. Ellen Glazer, *Sharing a Pregnancy Society*, BOSTON GLOBE, June 10, 2001, at C1.

139. *Culliton*, 756 N.E.2d at 1135. Some expenses covered in the agreement were "medical expenses, maternity clothing, travel expenses, childcare expenses [for Carroll's own children], legal expenses, telephone expenses, medically necessitated lost wages, psychological counselling expenses, health insurance expenses, and living expenses." *Id.* at 1135 n.6.

140. *Id.*

141. *See* Glazer, *supra* note 138, at C1.

142. *Id.* The article stated that:

> Melissa [Carroll, the gestational carrier,] was also a good sport about visiting Womb with a View . . . where 3-D ultrasounds of the twins gave Marla and Steve a good view of the ba-

participated, Marla was quoted in the *Boston Globe* as saying, "[Carroll] says that it is my pregnancy and I should have what I want."[143]

B. Procedural History and Action in the Lower Courts

Before the children were born, the Cullitons filed a complaint in the Essex Division of the Probate and Family Court.[144] The couple sought a declaration of paternity and maternity in their favor, as well as a pre-birth order directing the hospital at which the twins were to be born to supply their names as those that should be listed as father and mother of the twins on their birth certificates.[145] In support of their complaint, the Cullitons filed an affidavit from the physician that supervised the in vitro fertilization stating that the embryos being carried by Carroll were, in fact, those fertilized by the Cullitons.[146] Also filed with the affidavits and complaint was a stipulation requesting entry of judgment in favor of the Cullitons.[147]

The judge in the lower court dismissed the complaint and asserted "that he did not have the authority to issue a prebirth order of parentage."[148] The judge's analysis examined the Massachusetts statutes that govern adoption and paternity actions and concluded that, under the relevant provisions, an order for adoption could not be entered until after the fourth day following the birth of a child.[149] The lower court distinguished the two major surrogacy cases in Massachusetts, *R.R. v. M.H.*[150] and *Smith v. Brown*,[151] on the grounds that *R.R.* differed factually as it did not deal with a gestational carrier surrogacy setting and that the issues in *Smith* applicable in *Culliton* were left decided by the *Smith* court and discharged the Culliton's claim.[152] The lower court, presided over by Judge John Cronin, stated that the judge did not have the authority at that level to enter the judgment and relief requested by the Cullitons.[153]

Upon dismissal by the lower court, the Cullitons sought relief from the appeals court.[154] The Cullitons asked the appellate court for an injunction

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> bies' faces—not to mention a videotape, a compact disc, and two [four by six] inch glossies to bring home.

Id.

143. *Id.*
144. *Culliton*, 756 N.E.2d at 1135.
145. *Id.* at 1136.
146. *Id.* at 1136 n.7.
147. *Id.* at 1136.
148. *Id.*
149. *Culliton*, 756 N.E.2d at 1136.
150. 689 N.E.2d 790 (Mass. 1998).
151. 718 N.E.2d 844 (Mass. 1999). For an extended analysis of these cases, see *supra* Part II.B.
152. *Culliton*, 756 N.E.2d at 1136.
153. *Id.* However, that was a point of contention since the Cullitons' attorney, Melissa Brisman, asserted that some judges in that court had allowed precisely the relief requested by the Cullitons. Kathleen Burge, *Ruling Backs Genetic Parents*, BOSTON GLOBE, Oct. 13, 2001, at B1. Brisman stated: "Whether or not you became the parent of your own biological child was based on which judge you got." *Id.*
154. *Culliton*, 756 N.E.2d at 1136.

preventing the hospital from issuing the birth certificates of the twins until the legal disputes over the pre-birth order were resolved.[155] The court of appeals granted the injunction.[156] Subsequently, the Massachusetts high court took up the Cullitons' appeal sua sponte the day after the twins were born and, therefore, continued the injunction granted by the court of appeals.[157]

C. Supreme Judicial Court of Massachusetts Decision

The court, after summarizing the facts and procedural history in the case, initially noted that the probate and family court judge "acted prudently in seeking to place this case before [the Supreme Judicial Court] as quickly as possible."[158] The court acknowledged that there was no governing caselaw in Massachusetts that could properly address the issues that the court faced in *Culliton*.[159]

Next, the court noted there was no statute that could govern this situation, contrasted with the lower court decision in which the judge applied the Massachusetts law governing the determinations of paternity and maternity for children born out of wedlock.[160] Here, the court determined that these statutes were inapplicable because "[w]hile the twins technically were born out of wedlock[] because the gestational carrier was not married when she gave birth to them, it is undisputed that the twins were conceived by a married couple. In these circumstances the children should be presumed to be the children of marriage."[161] The court also noted foreseeable problems in applying the statutes had the gestational carrier been a married woman, as the children would then have been presumed to be the product of the marriage between the carrier and her husband.[162] The court held one method of proving paternity included testimony of a spouse concerning sexual intercourse during the probable period of conception.[163] The court stated the problem inherent in attempting to decide an issue of first impression such as this:

> As shown by the facts of this case, reproductive advances have eliminated the necessity of having sexual intercourse in order to procreate. It is apparent, after examining the paternity statute in detail, that the statute is simply an inadequate and inappropriate de-

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Culliton*, 756 N.E.2d at 1136. The court evaluated the caselaw from outside Massachusetts, noting the fragmented and inconsistent decisions from other jurisdictions. *Id.* at 1136 n.8. See text accompanying notes 21-62 for a more extensive analysis of these decisions in Part II.A., *supra*.
160. *Id.* at 1137.
161. *Id.* (citing C.C. v. A.B., 550 N.E.2d 365 (1990)).
162. *Culliton*, 756 N.E.2d at 1137 (citing MASS. GEN. LAWS ch. 209C, § 6 (1998)).
163. *Id.* (citing MASS. GEN. LAWS ch. 209C, §§ 8, 16(d) (West 1998)).

> vice to resolve parentage determinations of children born from this type of gestational surrogacy.[164]

With this admission, the Supreme Judicial Court of Massachusetts rejected the view of gestational carrier surrogacy as falling under the auspices of the governing state statute for making determinations of paternity and maternity in traditional conception situations.

Next, the court turned to the adoption statutes of Massachusetts. In doing so, the court was forced to address its prior decision in *R.R.*, acknowledging that the factual distinction between surrogacy by artificial insemination and gestational carrier surrogacy was sufficient to distinguish the *Culliton* case from their prior precedent.[165] The court stated that, "While this court has previously looked to the adoption statute in deciding whether to enforce a traditional surrogacy agreement, the court did so 'to assure that no economic pressure will cause a woman . . . to act as a surrogate.'"[166] The court then clearly marked the line of distinction between the two surrogacy situations. In "traditional" surrogacy, the birth mother has a claim to the child as a parent not only on the grounds of birth, but also because the child was formed of her own egg, whereas in gestational carrier surrogacy, the birth mother has no genetic relation to the child at all.[167]

Concerns with the potential unintended consequences of applying the adoption statute also played a role in the court's decision.[168] If the adoption statutes were applied, the birth mother would have undisputed control over the fate of the child for at least four days.[169] The birth mother could then choose to give the child up for adoption, make important medical decisions for the child, and would subject the true, genetic parents of the child to the adoption process, a prospect that could potentially prevent the parents from taking custody of their children for a significant amount of time.[170] The court stated, "As is evident from its provisions, the adoption statute was not intended to resolve parentage issues arising from gestational surrogacy agreements."[171]

The court then addressed its decision in *Smith*, where it stated that the probate and family courts in Massachusetts could consider prebirth orders declaring paternity and maternity under a state law giving the courts power to grant equitable relief where appropriate.[172] The *Culliton* court then articulated the appropriate standard for application of equity powers in gestational carrier surrogacy settings by trial level courts as follows:

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164. *Id.*
165. *Id.* at 1137-38.
166. *Id.* at 1137 (citation omitted).
167. *Culliton*, 756 N.E.2d at 1137-38.
168. *Id.* at 1138.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Culliton*, 756 N.E.2d at 1138 (quoting Smith v. Brown, 718 N.E.2d 844 (Mass. 1999)).

> Here, where (a) the plaintiffs are the sole genetic sources of the twins; (b) the gestational carrier agrees with the orders sought; (c) no one, including the hospital, has contested the complaint or petition; and (d) by filing the complaint and stipulation for judgment the plaintiffs agree that they have waived any contradictory provisions in the contract (assuming those provisions could be enforced in the first place), we conclude that pursuant to the Probate and Family Court's general equity jurisdiction under [the relevant state statute], the judge had authority to consider the merits of the relief sought here.[173]

With that, the Supreme Judicial Court of Massachusetts formally developed law in the absence of legislative guidance.

The court supported its decision through policy rationale. From the enactment of state laws that provided for the issuance of accurate birth certificates, the court extrapolated that the state legislature's concern with establishing the clear identity of parents as soon as possible.[174] The court surmised the *Culliton* decision worked to minimize the impact of the unintended consequences of a delay in the declaration of parentage in gestational carrier surrogacy cases.[175] Further, the court reasoned that by passing laws "mandat[ing] [that] health insurance companies . . . provide certain coverage for infertility treatments" the legislators were paying attention to the continuing growth of use in emerging reproductive technologies.[176] However, the court ultimately yielded to the legislature as the "most suitable forum to deal with the questions involved in this case, and other questions as yet unlitigated, by providing a comprehensive set of laws that deal with the medical, legal, and ethical aspects of these practices."[177]

However, the Massachusetts Department of Public Health expressed concerns regarding state law mandated reporting of vital statistics of all births.[178] The hospital must provide information on the statistics of the pregnancy, information on the mother's health, complications in the pregnancy, and information on the health of the newborn.[179] "The department uses the reported information to monitor maternal and infant health and mortality, as well as to conduct research on births from assisted reproductive technology."[180] In order to meet the needs of the health department, "the party or parties commencing an action seeking relief with respect to

173. *Id.*
174. *Id.* at 1139 (citing MASS. GEN. LAWS ch. 46).
175. *Id.*
176. *Id.*
177. *Culliton*, 756 N.E.2d at 1139.
178. *Id.* at 1139-40.
179. *Id.* at 1140.
180. *Id.* The court stated in an accompanying footnote that the Massachusetts Department of Public Health had adopted the definition of "assisted reproductive technology" that the federal Centers for Disease Control had promulgated, which specifically included in vitro fertilization but excluded artificial insemination and the use of fertility drugs. *Id.* at 1140 n.10.

any information contained in a birth certificate or with respect to any of the information required to be supplied by the hospital's reporters" should let the Registrar of Vital Records and Statistics of the Department of Public Health know of both the commencement of the action and any judgment or order regarding an adjudication as to that information.[181] This measure ensured that information regarding the birth mother would be provided to the pertinent state agency, thereby meeting the reporting requirement.[182] However, the notice requirement placed on the party seeking judicial relief "*does not* relieve the hospital's reporters of the duty to supply the department or registrar with the confidential information concerning the identity of the woman who delivered the children . . . as well as all required [health] information concerning the gestational carrier."[183] The court in *Culliton* effectively addressed the practical concerns raised by the state agencies and, to an extent, updated the relevant law to accommodate the changing landscape of reproductive technology.

The court then addressed what would be the practical procedural outcome of the instant case. The court eschewed any need to remand the case for further proceedings because of the stipulation of judgment made by all of the parties in the case.[184] Noting that the twins had been born after the complaint was filed, the court ordered entry of the stipulated judgment officially naming Marla and Steve Culliton the parents of their children as listed in the hospital's records.[185]

IV. CONCLUSION

After *Culliton*, there is little doubt that the constantly evolving laws concerning gestational carrier surrogacy have taken what seems to be a logical step forward, at least in Massachusetts. The highest court in that jurisdiction has articulated a clear set of standards that meet the goals of both the state and the parties involved in the agreement. The intended parents, the genetic parents, are now able to be determined prior to the birth of their children and the gestational carrier is no longer saddled with the burdens and choices associated with a minimum four day waiting period on her motherhood. However, what will happen the next time a gestational surrogacy matter is litigated? It is almost certain that no one can say.

As discussed in Parts II and III, multiple interpretive views have been articulated to define the gestational carrier surrogacy arrangement. While it is important to carefully analyze the theoretical and academic questions that arise from gestational carrier surrogacy, there are also countervailing practical considerations. As stated by the Cullitons' lawyer, both the validity of a

181. *Culliton*, 756 N.E.2d at 1141.
182. *Id.* at 1140.
183. *Id.* at 1141 (emphasis added).
184. *Id.*
185. *Id.*

gestational carrier surrogacy agreement and the rights and responsibilities of the parties to that agreement are often judge-specific in jurisdictions without legislation to address the delicate issues presented in gestational carrier surrogacy.[186]

Further, as evidenced by the cases and hypothetical situations discussed herein, similarly situated individuals may often be treated very differently depending on the law of the jurisdiction. Many commentators and courts have called for legislative action to address issues surrounding surrogacy.[187] Their calls for governing legislation should be heeded because state legislatures do not, or at least should not, want courts developing fragmented and inconsistent caselaw that may or may not serve the optimal policy interests at stake. State legislatures should consider carefully the form that gestational carrier surrogacy will take in their state. However, when gestational carrier surrogacy cases arise, absent guidance from the state legislature, courts should look to *Culliton* as a pragmatic judicial solution to these innovative, but no longer novel, problems.

For all of the usefulness and accessibility provided by using the *Friends* characters in this discussion, real life problems remain. NBC never aired an episode where Phoebe met the children she bore for Frank and Alice. In fact, Frank and Alice never again appeared in another episode. Phoebe has seemingly lived happily ever after. Human costs, however, are not to be taken lightly. There are serious ethical, moral, physical, and psychological considerations that parties considering entering into a gestational carrier surrogacy agreement must evaluate. Attendant legal concerns must be carefully considered. As difficult as it is to raise a "normal" family in any context, in this setting, shoring up familial bonds grows exponentially more complex due to the potential involvement of the courts and the legislature.[188]

The cases discussed here, and those yet to be litigated, do not govern the rights of fictional characters. Rather, those that appear in court to have their rights determined are real people who want to be parents. This is more than a discussion of freedom to contract; this topic reaches a couple's freedom to have and raise a family, regardless of the limitations of their own bodies. While this Comment admittedly only addresses limited issues related to surrogacy, and does so in but one of the multiple situations where parental rights are at stake, it presents an effective solution to this narrow problem that should be solved quickly while debate about the thornier problems of surrogacy continue. State legislatures should be mindful as they travel quickly forward toward the intersection of the law and technology.

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186. Burge, *supra* note 153, at B1.

187. Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 603 n.23 (2002); Rosman, *supra* note 82, at 254 ("Given the predictable future litigation [of surrogacy issues], it is essential that the [Illinois] General Assembly carefully evaluate the issues and promulgate a comprehensive legislative policy.").

188. *See* Troxel v. Granville, 530 U.S. 57, 63 (2000) (O'Connor, J., for the plurality) (stating that the "demographic changes of the past century make it difficult to speak of an average American family").

And should those legislators decline to take up the challenge of developing relevant law in this area, the courts should seek coherent and pragmatic resolutions in gestational carrier surrogacy agreements using *Culliton* as their guide.

Adam P. Plant