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SURROGATE MOTHERHOOD

and the Politics of Reproduction

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Chapter 1 | THE NEW PROBLEM OF SURROGATE MOTHERHOOD

Legislative Responses

Surrogate motherhood can be viewed as a classic social problem in that its life history can be measured by the rise and fall of attention given to it. Media coverage is the first clear indicator of surrogacy's arrival as a social problem in the mid- to late 1980s. In the early 1980s, newspaper stories about surrogate parenting appeared only intermittently. The combined coverage provided by the *New York Times, Los Angeles Times,* and *Washington Post* totaled 15 articles in 1980, 19 in 1981, 8 in 1982, and 25 in 1983. News coverage dipped for the next two years until halfway through 1986, when Mary Beth Whitehead changed her mind and took Baby M from the Sterns. In that year, these three national papers published 41 articles on surrogacy. In the following year, during the Baby M custody trial, coverage of the issue peaked at a dramatic total of 270 articles. And in 1988, when the New Jersey Supreme Court handed down its decision on the case, although the count dropped, coverage was still relatively high, at 99 articles. Media attention ebbed and flowed in the following decade, staying at mostly pre–Baby M rates, except for 1990, when 41 articles were published among these three papers (see figure 1).

National public opinion polls indicate the impact of the Baby M case in etching surrogacy indelibly onto the national consciousness. A Gallup poll conducted during the 1987 trial found that 93 percent of those surveyed had heard of the Baby M case; 79 percent of the respondents in a

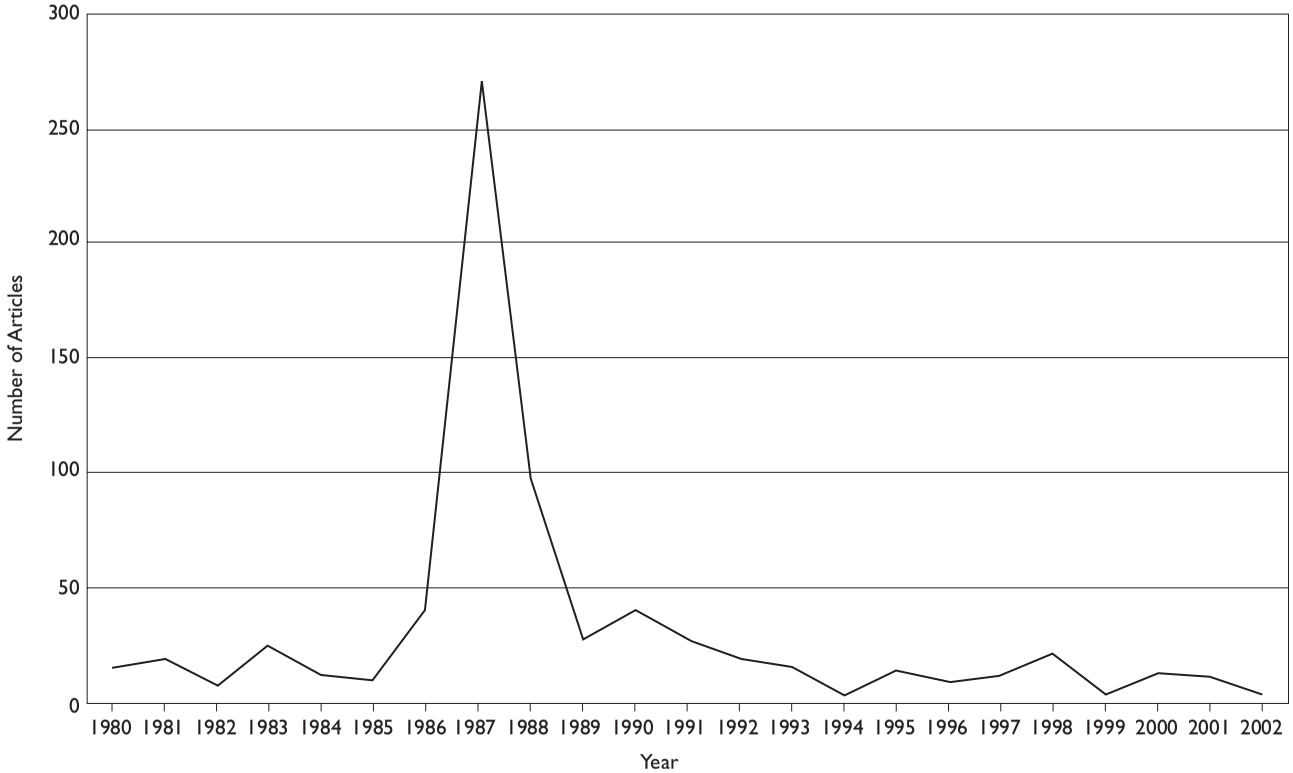

Figure 1. Coverage of surrogacy in the *New York Times, Los Angeles Times,* and *Washington Post,* 1980–2002.

Roper poll claimed they had read or heard enough about the case to feel they knew what it was about. Polls also captured the public's contradictory and ambivalent response to surrogate motherhood, both with regard to Baby M and more generally. For instance, a CBS/New York Times poll and a U.S. News & World Report poll found that most respondents favored William Stern receiving custody of the baby (74 percent and 75 percent, respectively); at the same time, when asked about whether such contracts should be legal or whether it was right or wrong for a woman to be a surrogate mother, respondents were evenly divided.[1]

The rise and fall of surrogacy as a national social problem can be gauged by more than the news coverage the issue received. Legislative attention provides an important index as well. In 1987, the year of peak news coverage of surrogate motherhood, twenty-six state legislatures introduced seventy-two bills on the topic. In the following two years, twenty-seven states introduced seventy and sixty-three bills. By 1990, however, the number of states introducing legislation dropped to ten and the number of bills to twenty-eight; by 1992, seven states had introduced a total of thirteen bills. Over the next thirteen years, no more than nine states in any given year introduced surrogacy legislation—on average from four to seven states pursued the issue in any year—with as few as one bill introduced in both 1998 and 2002 and none in 2000. In addition to prompting an increase in the number of proposals for dealing with the problem of surrogate motherhood, the Baby M case influenced the type of policy responses proposed in the years immediately following the dispute. In 1987, bills were split fifty-fifty on whether to permit or prohibit the practice, but the proportion of bills that sought to prohibit the practice rose to 57 percent in 1988, 66 percent in 1989, and 64 percent in 1990. By the mid-1990s, though, the vast majority of bills in state legislatures had taken a more accepting regulatory approach.[2]

This chapter treats the Baby M case as a dramatic event that focused political as well as public attention on surrogacy and initially helped define it as a social problem (see also chapter 4, which examines the media's role in framing surrogacy as a problem, and chapter 5, which looks closely at surrogacy policy-making constraints and opportunities). Moreover, as a key critical discourse moment, this custody battle shaped the controversies and tensions over appropriate policy solutions for several years after the trial ended.[3] Since the political arena represents an important institu-

tional space where solutions to social problems are formed and debated, this chapter first surveys the range of legislative responses to surrogate motherhood, both here and abroad. Then, to better clarify why U.S. policy making in this area has lagged, the focus narrows to two representative states, New York and California, to trace the history of the process by which surrogacy as a social problem was discovered, defined, and (sometimes) resolved at the institutional level. The remainder of the chapter examines these two states' efforts to address the challenges presented by surrogate motherhood through public hearings, bill proposals, and floor debates, from shortly before the Baby M case through 1992.[4]

POLICY RESPONSES TO THE PROBLEM OF SURROGACY ON THE INTERNATIONAL, NATIONAL, AND STATE LEVELS

Most industrialized nations have rejected or greatly restricted the practice of surrogate parenting. Australia, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Spain, Sweden, and Switzerland all have national laws that prohibit or discourage the practice (see table 1). The United Kingdom and Germany impose criminal sanctions as well.[5] The seriousness other nations have accorded the issue is also attested to by the fact that several countries have sponsored national commissions to study this new social problem. The reports prepared by these bodies frequently have served as guidelines for the national laws eventually enacted.[6]

In contrast, in the United States there is no national-level legislation regarding surrogate parenting arrangements. The lack of consensus in the United States, and the ambivalence it represents, is thus singularly American and may be accounted for chiefly by two deeply ingrained national characteristics: our simultaneous exaltation of individual rights and laissez-faire approach to the marketplace and our protective stance toward families. An additional likely influence is the contentiousness of abortion politics in the United States. Some believe this factor is largely responsible for the United States' overall lack of federal regulation in the area of assisted reproductive technologies.[7] In this regard, the lack of comprehensive surrogacy legislation parallels the country's legislative lacunae with regard to all assisted and genetic reproductive technologies.

TABLE 1. International Laws on Surrogacy, 2004

	Legality			*Parental Rights*		*Regulation*
	Bans Contracts	Bans Payment to Surrogate	Prohibits Payment to Third Parties	Intended Parents Are Legal Parents	Surrogate and Husband Are Legal Parents	Regulates Unpaid Surrogacy
Australia		x	x		x	
Austria	x					
Canada		x				
Denmark		x				
Egypt	x					
France	x					
Germany	x					
Hong Kong		x	x	x		x
Israel				x		
Italy	x					
Japan	x					

Netherlands	x			
Norway	x			
Russia				x
Spain	x			
Sweden	x			
Switzerland	x			
UK		x		

SOURCES: Kepler and Bokelmann (2000); East Coast Assisted Parenting (2000); Surrogacy UK, "Registering the Birth of a Surrogate Child and the Law," www.surrogacyuk.org/legalities.htm, and "Surrogacy Arrangements Act 1985," www.surrogacyuk.org/surrogacyact1985.pdf (both accessed October 3, 2006); Taylor (2003): Ruppe (2003); Government of South Australia, "Reproductive Technology: Legislation around Australia," 2006, www.dh.sa.gov.au/reproductive-technology/other.asp (accessed October 2, 2006); T. Smith (2004); Hong Kong Department of Justice, "Prohibition against Surrogacy Arrangements on Commercial Basis, Etc.," Bilingual Laws Information System, www.legislation.gov.hk/blis_ind.nsf/0/6497234f26732f18482569620033065 9?OpenDocument (accessed October 3, 2006); Center for Genetics and Society (2004); Teman (2003a, 2003b); Kahn (2000).

As in other countries, however, there have been national hearings on surrogacy, such as the one held in 1984 on procreative technologies by the House of Representatives Committee on Science and Technology, Subcommittee on Oversight.[8] In 1987, but after the close of the Baby M trial, another House-sponsored hearing was held. This time the Subcommittee on Transportation, Tourism, and Hazardous Waste of the Committee on Energy and Commerce called the hearing, in response to a bill introduced by Representative Tom Luken (D-Ohio). Luken's bill, HR 433, known as the Surrogacy Arrangements Act of 1987, proposed to "prohibit making, engaging in, or brokering a surrogacy arrangement on a 'commercial basis'" and to "prohibit advertising of availability of such commercial arrangements."[9] Fifteen people testified at this hearing, and most who spoke opposed the practice. Then, in 1989, in an unusual cross-party alliance, House members Barbara Boxer (D) and Henry Hyde (R) introduced legislation that would have banned surrogate parenting.[10] These national-level attempts to outlaw surrogacy parallel the dominant international response. But in the United States, unlike other countries, none of these activities produced either national legislation or influential advisory research reports.

The absence of national legislation on surrogacy in the United States can be explained largely by our federal system of government, which reserves to individual states power over certain areas, including family law. Only one attempt was made to produce a unified, state-level response to surrogacy in the 1980s. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Status of Children of Assisted Conception Act in 1988.[11] The act specified two alternative legislative options for states: (1) judicially regulating surrogacy—so that if a surrogate agreement is not approved by a court it is void; or (2) making all surrogate motherhood agreements void. The act was designed primarily to regulate the status of children born by assisted conception. However, even as a guideline to state legislatures, it was of limited influence. Only two states adopted either option. The legislative alternatives the act proposed merely captured the conflicting societal and political responses to surrogacy in the United States.[12] The continuing lack of consensus was evident in 2000, when the act was replaced by the Uniform Parentage Act. The only policy recommendation proposed in the 2000 act recognized and regulated gestational agreements, but the section was made optional, without even a recommendation for or against its adoption. The act's authors were quite

aware of the contentious and controversial nature of gestational surrogacy; they hoped an optional approach would increase the chances that states would adopt the act in its entirety.[13]

Because so few states have developed legislation, disputes over surrogate parenting often end up in court. That most existing laws, all originally designed for other transactions (e.g., adoption; donor insemination), are inadequate for guiding decisions in cases involving surrogacy arrangements is obvious in the opinions handed down by most judges. For example, in the early 1980s, before most of the public had even heard about surrogate motherhood, a judge in Arcadia, California, who was presiding over a custody dispute involving a surrogacy arrangement urged the legislature to "consider coming out with a policy statement or legal guideline" that could be applied in similar suits in the future.[14] In the Baby M case, Judge Harvey Sorkow stated that "many questions must be answered . . . [and] the answers must come from legislation."[15] As recently as 2004, a judge in Pennsylvania, one of the many states still without legislation that specifically deals with surrogate parenting, ended a ruling on a gestational surrogacy custodial dispute with a further plea for legislative intervention: "It is . . . the court's hope that the legislature will address surrogacy matters in Pennsylvania to prevent cases like this one from appearing before the courts without statutory guidance."[16] Nevertheless, state legislatures generally continue to respond very slowly to the problem of surrogate motherhood. And the laws that do exist at the state level reflect a range of positions on the issue.

In 1992, over five years after Baby M catapulted surrogate parenting into the national spotlight, only fifteen states had enacted laws pertaining to surrogacy.[17] Of these laws, two-thirds can be classified as prohibiting and banning surrogacy and one-third as permitting and regulating surrogacy (see table 2). In 1993, the District of Columbia also passed legislation prohibiting surrogacy and declaring such contracts unenforceable. It was not until 1999 that legislation was again passed on the state level. That year, Illinois enacted regulations that recognized parental rights under gestational surrogacy transactions.[18] Since then, most legislatures have not addressed the issue. Texas is a recent exception. A law passed there in 2004 allows for and regulates surrogate parenting arrangements. In general, though, at the beginning of the twenty-first century, states' most common response to surrogate motherhood remains a lack of legislation.

TABLE 2. State Laws on Surrogacy, 2005

	Legality				
	Bans Contracts	Bans Payment to Surrogate	Bans Payment but Allows for Services	Prohibits Payment to Third Parties	Permits Payment for Lawyer Services
Arizona	x				
Arkansas					
District of Columbia	x				
Florida*			x*	x*	x*
Florida**			x**	x**	x**
Illinois*					x*
Indiana					
Kentucky		x		x	
Louisiana					
Michigan		x		x	
Nebraska					
Nevada			x		
New Hampshire			x	x	x
New York			x	x	
North Dakota					
Texas*					
Utah		x		x	
Virginia			x	x	x
Washington			x	x	x

*Laws apply specifically to gestational surrogacy.
**Laws apply specifically to traditional surrogacy.
***Law declared unconstitutional in court.
SOURCES: National Conference of State Legislatures, "Surrogacy Statutes," March 4, 2005, in author's files; Brandel (1995); "Table IV: State Laws on Surrogacy," www.kentlaw.edu/isit/TABLEIV.htm (accessed May 12, 2004); American Surrogacy Center, "Legal Overview of Surrogacy Laws by State," 2002, www.surrogacy.com/legals/map.html (accessed January 24, 2005).

Enforceability		*Parental Rights*			*Regulation*	
Voids Paid Contracts	Voids Unpaid Contracts	Intended Parents Are Legal Parents	Intended Parents Are Legal Parents, but Time to Change Mind	Surrogate and Husband Are Legal Parents	Regulates Unpaid Surrogacy	Regulates Paid Surrogacy
x	x			x***		
		x				
x*		x*				
x**			x**			
		x*				
x	x					
x						
x**						
x	x					
x						
		x				
			x		x	
x	x					
x	x			x		
		x*				
x	x			x***		
x			x		x	
x						

Among those states that have implemented specific laws, the dominant policy response is similar to that found on the international level, namely policies that ban and/or do not recognize surrogacy contracts. This contradicts the common assumption that the United States, unlike most other nations, uncritically embraces new reproductive practices such as surrogate motherhood.[19] At the same time, the range of state-level legislation institutionalized thus far signals a diverse political response to surrogate motherhood. Additional evidence of the lack of consensus that surrounds surrogate parenting is present in the scores of bills introduced but never passed. Between 1987 and 1992, for instance, 208 bills on surrogacy were introduced into state legislatures. Fifteen were enacted. During this same period, fifty-five bills to form study commissions were introduced; the vast majority of these proposals didn't make it out of their respective legislatures. This relative standstill and inability to reach consensus has continued past the peak period of legislative attention to surrogate parenting. In the ten years between 1993 and 2003, fifty-one more bills on surrogacy were introduced into state legislatures, and only three were signed into law.[20]

Furthermore, within the groupings of states broadly categorized as prohibiting or permitting surrogacy, there are many variations at the level of specific provisions. Of the states prohibiting surrogate parenting, some, like Louisiana and Nebraska, merely claim surrogacy contracts as void and unenforceable; others, like Kentucky and Washington, further specify that payments to surrogates are prohibited. Of the states with a prohibitory surrogacy approach, only Michigan criminalizes the practice.[21] The states with a more permissive approach to surrogacy likewise exhibit a variety of legislative responses. Nevada, for instance, bans payments but provides limited guidelines for contracts. Both New Hampshire and Virginia provide extensive regulatory schemas for contracts. In New Hampshire, only contracts preapproved by the court are legally recognized. And although New Hampshire and Virginia allow and regulate surrogacy contracts, surrogates may be compensated only for medical and legal costs.[22]

Emblematic of the schism in state responses, and of the general ambivalence and contradictions evident nationally, were the policy approaches to surrogate motherhood pursued by the New York and California legislatures in 1992. The former took a prohibitory approach and the latter a regulatory one. The remainder of this chapter provides a descriptive his-

tory, beginning in the early 1980s and ending in 1992, of the two states' legislative proposals pertaining to surrogate motherhood. This background provides the broad context for the two different bills passed by their respective legislatures in 1992. (See chapter 5 for a detailed look at the specific forces that shaped legislators' actions.) Equally important, New York and California's experiences are representative of the trends in state legislatures across the country and of the types of political actors that characterized this instance of reproductive politics. Thus comparing the different responses to this newly identified social problem in these two specific political arenas (the New York and California legislatures) may help clarify some of the reasons behind the varied and lethargic policy response to surrogate parenting in the United States more generally.

THE LEGISLATIVE RESPONSE TO SURROGACY IN NEW YORK AND CALIFORNIA

Pre–Baby M Legislative Attention to Surrogacy: 1980–86

In the early 1980s, most people in the United States were unaware of the phenomenon known as surrogate motherhood. In 1980 and 1981, news reports appeared regarding Elizabeth Kane, the first known surrogate mother, but this coverage was nowhere near as overwhelming as the media response to the Baby M case, which began in 1986. (See chapter 4 for details regarding media coverage of Baby M.) The general inattention to surrogacy did not prevent California Assemblyman Mike Roos (D) of Los Angeles from introducing a bill in 1981 that specifically addressed the practice. Roos's involvement began when he was invited to speak at a forum on surrogate parenting held in Los Angeles and organized by Whittier Law School.[23] This exposure to the issue led Roos to conclude that surrogacy needed regulation to prevent those who participated in such arrangements from being taken advantage of, particularly the supposedly growing numbers of infertile couples.[24] Around the same time, attorney Bill Handel, director of the Center for Surrogate Parenting in Los Angeles, guest-lectured at Whittier and had the students in the class draft a model regulatory bill.[25] Roos agreed to sponsor this legislation.[26] In the 1981 and 1982 legislative sessions, he introduced two versions of the bill.[27] These proposals represented some of the first in the country to deal with surrogate motherhood. (See table 3 for a summary of California bills.)

TABLE 3. Introduction of Surrogacy Legislation: California Legislature, 1981–92

Year	*Bill #*	*History*	*Sponsor*	*Summary*
1981	AB 365	Died in Senate Judiciary	Roos	Provides for the approval of a petition incorporating a contract in which a woman agrees to be inseminated by the sperm of a man whose wife is unable to bear a child and to relinquish all legal rights to any child resulting from that insemination to the husband and wife, upon its birth, and for the enforcement of such a contract.
1982	AB 3771	Died in Assembly Judiciary	Roos	Same as AB 365 (1981).
1985	AB 1707	Died in Senate	Duffy	Authorizes the procedure by which infertile couples become parents through the employment of the services of a surrogate or through the use of a donated egg and the execution and the judicial enforcement of contracts with regard thereto, as specified.
1987	AB 2404	Died in Assembly	Longshore	Declares that contracts whereby a woman receives consideration for an agreement to undergo specified prenatal diagnostic testing or procedures for other than stated purposes and those whereby a woman receives consideration for an agreement to abort, or to consent to the abortion, of her child are contrary to public policy and are void and unenforceable.
1988	AB 2606	Died in Senate Judiciary	Montoya	Provides that contracts to terminate parental rights to, or consent to an adoption of, any person, whether or not the person has been conceived, and those transferring the custody, control, or possession of any person, whether or not the person has been conceived, are contrary to public policy, void, and unenforceable. Misdemeanor and criminal sanctions.

1988	AB 2607	Died in Senate Judiciary	Montoya	Provides that a parent-and-child relationship may be established by proof of a woman's having given birth to the child, without regard to the child's genetic makeup.
1988	AB 3200	Died in Senate Judiciary	Mojonnier	Provides that any contract to bear a child is against public policy and is void and unenforceable. Criminal sanctions.
1988	ACR 171	Signed	Mojonnier	Creates the Joint Committee on Surrogate Parenting and directs and authorizes the joint committee to ascertain, study, and critically analyze the facts related to commercial and noncommercial parenting.
1988	SB 2635	Died in Senate Judiciary	Watson	Provides for the establishment of the parent-and-child relationship in situations where a woman agrees to bear a child for a husband and wife, subject to specified requirements, including written agreement. This bill would authorize an action to be brought by a birth mother to establish the mother-and-child relationship and custody within ten days of the birth. Only payment of expenses allowed.
1989	AB 2100	Died in Assembly	Mojonnier	Any contract to bear a child is against public policy and is void and unenforceable.
1991	SB 937	Vetoed	Watson	Declares that surrogate contracts are not against sound public and social policy and regulates the process by which infertile persons become parents through the employment of the services of a surrogate or through the use of a donated ovum.

Both versions were known as the Surrogate Parenting Act, and each "would have established the legality, enforceability and regulation of surrogate parenting contracts."[28]

In response to Roos's legislative advocacy, in November 1982 the California Assembly Judiciary Committee held a public hearing at Whittier Law School. Twenty-six people testified at this hearing, including nine lawyers, four surrogate mothers, and five people from a center that arranged surrogacy contracts.[29] At this point, most people were not ready to support the idea of surrogate parenting, but neither was there much opposition to it, except from some religious organizations. Yet this small bit of opposition was enough to prevent the bills' smooth journey through the legislative process. Opposition from antiabortion groups was reported in the news as an important factor in the failure of Roos's bills.[30] The first bill died in the Senate; the second never made it out of the Assembly Judiciary Committee. Roos became frustrated when what he had perceived as a straightforward issue became increasingly complicated. He did not attempt to introduce further legislation on surrogate parenting.[31]

The lack of significant political or popular interest or concern regarding surrogacy in California continued. No other legislator became involved with the issue again until 1985, when Assemblywoman Jean Duffy (D) introduced AB 1707, the Alternative Reproduction Act of 1985. The Family Law Section of the State Bar of California was a sponsor of AB 1707, an early indicator of some institutional support for and approval of the practice in California.[32] Duffy's bill, like Roos's earlier ones, would have recognized and regulated surrogate parenting arrangements. It passed in the Assembly but died in the Senate. These three bills aimed at regulating surrogacy were the extent of the involvement by the California legislature prior to the national attention that the Baby M custody trial brought to the practice.

In New York, legislation on surrogate motherhood also was introduced into the legislature before the publicity surrounding Baby M. Assemblyman Patrick Halpin (D) sponsored bills in the 1983–84 and the 1985–86 legislative sessions. (See table 4 for a summary of New York bills.)[33] Halpin's early involvement in surrogate parenting was prompted by a case in Michigan in which neither party took responsibility for a physically handicapped child born via a surrogacy arrangement. This baby was not claimed by either of the parties involved until a blood test showed that

TABLE 4. Introduction of Surrogacy Legislation: New York Legislature, 1983–92

Year	*Bill #*	*History*	*Sponsor*	*Summary*
1983	A 5537	Died in Assembly Judiciary	Halpin	Provides for certain requirements imposed upon all parties to surrogate parental agreements. Criminal sanction impact.
1985	A 3774	Died in Assembly Judiciary	Halpin	Same as A 5537 (1983).
1987	A 2403	Died in Assembly Judiciary	Halpin	Same as A 5537 (1983).
1987	A 4748/ S 1429	Died in Assembly Judiciary/Died in Senate Child Care	Koppell/ Dunne-Goodhue	Provides that a child born in fulfillment of a surrogate parenting agreement shall be the responsibility, from birth, of the intended parents, including rights to inheritance; further provides for informed consents to be judicially approved and for enforcement of such judicially approved agreements.
1987	A 5529	Died in Assembly Judiciary	Schmidt	Prohibits any consideration for a surrogate parenting agreement but permits payments by the intended parents of all reasonable, actual, and necessary expenses of the surrogate mother rendered in the connection with the birth of the child or incurred as a result of her pregnancy.
1987	A 6277	Died in Assembly Judiciary	Barnett	Defines "surrogate motherhood" and "in vitro pregnancies" and provides that any contractual arrangements entered into for such purposes are void and unenforceable.

TABLE 4. (*continued*)

Year	*Bill #*	*History*	*Sponsor*	*Summary*
1988	A 8852/ S6891	Died in Assembly Judiciary/Died in Senate Judiciary	Proud/ Marchi	Prohibits the practice of surrogate motherhood, whether accomplished by artificial insemination or in vitro fertilization, wherein the surrogate mother agrees to surrender the child, regardless of consideration or the lack of it.
1988	A 9857	Died in Assembly Judiciary	Hevesi	Same as A 5537 (1983).
1988	A 9882	Died in Assembly Judiciary	Faso	Declares surrogate parenting to be against public policy and makes any agreement or contract providing therefore void and unenforceable.
1988	A 10851/ S 9134	Died in Assembly Judiciary/Died in Senate Judiciary	Weinstein/ Marchi	Declares surrogate parenting contracts void and unenforceable; prohibits compensation in connection with such contracts except for certain medical and legal fees; provides for certain rights of birth mothers in legal proceedings. Governor's Program Bill.
1988	A 11607	Died in Assembly Judiciary	Rules Committee	Defines "surrogate parenting contract" and prohibits its formation; penalizes violations for arranging or assisting in the formation of such contracts; makes such contracts void as contrary to public policy. Criminal sanction impact.
1989	A 994	Died in Assembly Judiciary	Schmidt	Same as A 5529 (1987).
1989	A 3467	Died in Assembly Judiciary	Faso	Same as A 9882 (1988).

1989	A 3558/ S 2884	Died in Assembly Judiciary/Died in Senate Rules	Weinstein/ Marchi	Provides that surrogate parenting contracts are void and against public policy and prohibits payment or receipt of compensation in connection with a surrogate parenting contract. Criminal sanctions impact. Governor's Program Bill.
1989	A 4205	Died in Assembly Judiciary	Barnett	Same as A 6277 (1987).
1989	A 4471	Died in Assembly Judiciary	Proud	Same as A 8852/S 6891 (1988).
1991	A 1138	Died in Assembly Judiciary	Schmidt	Same as A 5529 (1987).
1991	A 3945	Died in Assembly Judiciary	Barnett	Same as A 6277 (1987).
1991	A 4060	Died in Assembly Judiciary	Faso	Same as A 9882 (1988).
1991	A 7367/ S 1906	Signed	Weinstein/ Marchi	Establishes surrogate parenting contracts as void and against public policy and prohibits payment or receipt of compensation in connection with a surrogate parenting contract. Governor's Program Bill.
1992	A 11994	Died in Assembly Judiciary	Rules Committee	Grants the family and surrogate courts concurrent jurisdiction over petitions for review and approval of surrogate parenting agreements and sets forth the venue for court hearings; declares that any surrogate parenting agreement that does not receive judicial approval shall be considered null and void and unenforceable by the courts; requires that a surrogate parenting agreement include specific provisions; makes related provisions.

the genetic father of the child was the husband of the surrogate mother—a fact revealed on the *Phil Donahue* TV talk show. Concerned about the plight of "unwanted children" born through such arrangements, Halpin wanted legislation that would regulate the practice and stipulate custodial decisions.[34]

Halpin was not the only New York State legislator to respond to surrogate motherhood before it became a prominent social issue and nationally recognized social problem. Other members of the New York State legislature were also made aware of the practice of surrogate parenting just prior to the onslaught of publicity surrounding Baby M. In July 1986, in the case of Baby Girl L. J., Judge Raymond Radigan of Nassau County's Surrogate Court was faced with an uncontested adoption application that arose out of a commercial surrogacy agreement. Although uneasy about the commercial component of the arrangement, Judge Radigan approved the adoption, maintaining that New York State's laws against baby selling did not specifically outlaw payments to a surrogate mother.[35] Because he was unhappy over having to make a decision in what he considered a legal vacuum, the judge asked the legislature to fill this void. He forwarded his request for legislation to Senator John Dunne (R), who was then chair of the Senate Judiciary Committee. Dunne looked into the issue.[36] Early in 1987, he and fellow Senator Mary Goodhue co-sponsored S 1429, a bill that regulated the practice of surrogacy. At the same time, Assemblyman Oliver Koppell (D), who later played a key role in slowing the progress of antisurrogacy legislation, introduced an identical companion bill, A 4748, in the Assembly. Assemblyman Halpin also submitted a version of his earlier regulatory bill again in 1987. These bills, like the first few introduced in California, were designed to allow the practice of surrogate parenting to continue under specified guidelines. By this time, however, the media had introduced the public to surrogacy via the Baby M case. (See the graph of newspaper coverage in figure 1.) The Whitehead-Stern custody battle shifted the terms of the debate. Now many more legislators started to have an opinion on surrogate motherhood, and many were far more favorably disposed toward an outright ban on the practice. The next section chronicles the institutional response to the rise of surrogacy as a nationally and politically recognized social problem in the years immediately following the Baby M controversy.

The Immediate Legislative Aftermath to Baby M: 1986–88

New York State legislators responded to the Baby M case with a flurry of bills, hearings, and reports. Between 1984 and 1992, twenty-one bills pertaining to surrogate motherhood were introduced by ten different legislators.[37] Of these bills, nineteen were introduced post–Baby M. Meanwhile, starting in October 1986, four public hearings on surrogacy were held in New York. The first was jointly sponsored by the New York State Assembly and Senate Judiciary Committees. Its purpose was "to determine if legislation is appropriate to address the current phenomena of surrogate parenting and the new reproductive technologies which made such events increasingly practical."[38] The hearing had been organized by Senator Dunne after Judge Radigan's ruling on the uncontested surrogacy adoption, but by the time the hearing was held, news stories about the Baby M case had started to break. (See chapter 4 for details.) The first article in the *New York Times* regarding the Baby M case appeared on August 22, 1986. Between that date and the start of New York's first legislative hearing on surrogacy in October, seven more articles and one editorial appeared in the *New York Times.*

On the basis of the testimony provided at this first hearing, the staff of the Senate Judiciary Committee issued a report at the end of 1986. This report, *Surrogate Parenting in New York: A Proposal for Legislative Reform,* recommended regulating surrogate practices, reasoning that the enforcement of contracts would best protect the welfare of children. (See chapter 5 for details.)[39] This report was the basis for S 1429, the regulatory bill Senators Dunne and Goodhue introduced in 1987. The report also turned out to be the only official endorsement of surrogate parenting ever made by a New York State government agency or task force.[40] By the beginning of 1987, the public was being inundated with news about the Whitehead-Stern surrogate custody battle. This led to further scrutiny of and changing opinions about surrogacy. Additional public hearings were held to survey lay and professional responses to the practice. In April 1987, the New York State Senate Committee on Child Care held a meeting to discuss the merits of S 1429. Senator Goodhue was chair of this committee. A month later, the Senate Child Care Committee held another public meeting to discuss the same bill. Over thirty people testified at these two hearings,

mostly proponents of the practice, from surrogate mothers and infertile women to judges, attorneys, and those involved in arranging surrogate parenting transactions.[41]

Despite the mostly positive testimony at two hearings, the Dunne-Goodhue bill never got out of committee. Instead, the pendulum started to swing in the other direction. Legislators who did not support the practice began to introduce their own proposals. In the 1987–88 legislative session alone, nine bills were introduced in the Assembly. Of the four introduced in 1987, Halpin's bill and the Dunne-Goodhue bill regulated surrogacy, while the other two either prohibited payment or declared surrogacy contracts void and unenforceable. Of the five bills introduced in 1988, four declared surrogacy contracts void and unenforceable. The number of bills and the number of legislators who became involved with the issue indicate the level of legislative concern. While there was no consensus on how the state should proceed, the immediate response to Baby M from New York legislators was largely negative. Most sought to ban the practice.

Then-Governor Mario Cuomo (D) also became involved in defining and resolving the problem of surrogate motherhood. In 1987, he asked the New York Task Force on Life and the Law to consider the issue. Cuomo had established the task force in 1985, directing its appointed members (leaders from fields such as medicine, law, and philosophy, as well as patient advocates and representatives of religious organizations) to develop recommendations on policy issues dealing with biomedical issues connected to new developments in medical technology. Despite its mixed membership, when the task force finished its investigation into surrogate motherhood in 1988 it issued a unanimous report, *Surrogate Parenting: Analysis and Recommendations for Public Policy.* (See chapter 5 for a discussion of the wide-ranging impact of this report.) The task force recommended that "society should discourage the practice of surrogate parenting. This policy goal should be achieved by legislation that declares the contracts void as against public policy and prohibits the payments of fees to surrogates. Legislation should also bar surrogate brokers from operating in New York State."[42] Governor Cuomo adopted these recommendations as a Governor's Program Bill. A Program Bill typically addresses an issue the governor considers especially important or urgent. By law, New York governors may not directly introduce bills into the legislature, except

for those pertaining to the budget. Thus Program Bills are introduced on the governor's behalf, generally by members of the majority party.[43] Senator John Marchi (R) and Assemblywoman Helene Weinstein (D) sponsored Governor Cuomo's Program Bill on surrogacy three times. The first version was introduced in 1988.

Despite the task force's detailed report and the solicitation of public opinion at three public hearings, in December 1988 the Assembly Judiciary Committee and the Assembly Task Force on Women's Issues co-sponsored a fourth public hearing on the issue of surrogate motherhood. This hearing was set "specifically to consider comments on Assembly Bill 10851-A, which was introduced at the request of Assemblywoman Weinstein and a number of other members, and was proposed by the Governor's Task Force on Life and the Law."[44] Thirty-nine people testified at the seven-hour event. The numerous hearings on surrogacy are an indication of its contentious nature in New York. That none of the nine bills introduced in 1987 and 1988, including the Governor's Program Bill, made it out of committee also confirms the deep and ongoing nature of the conflict over the appropriate policy response. At the same time, the sheer amount of legislative attention given to an issue with practically no direct constituency also demonstrates the successful and symbolic emergence of surrogate motherhood as a social problem.

In California, as in New York, the Baby M case prompted increased legislative attention to the issue of surrogate motherhood. In the 1987 and 1988 legislative sessions, lawmakers introduced six bills on surrogate parenting, representing over half of all bills on the subject introduced in the eleven-year period from 1981 to 1992. In response to this surge of legislative interest, the Senate Committee on Health and Human Services held public hearings on surrogate motherhood in December 1987. The hearings were scheduled not to discuss any particular piece of legislation but rather to "determine our policy assessment of surrogacy. Fundamentally, we will ask should we permit this practice? Should we regulate it? Should we prohibit it?"[45]

Much as in New York, and consistent with trends nationally, the scope of the bills introduced into the California legislature diverged before and after the publicity surrounding the Baby M court battle. Legislation introduced before the trial permitted surrogacy; legislation introduced after discouraged it.[46] For instance, all three bills introduced in California

before 1987 allowed for and regulated the practice of surrogacy. In the 1987 and 1988 legislative sessions, two bills outlawed surrogacy and one permitted it under a regulatory framework. Two other bills did not directly mention surrogacy contracts, but one declared the birth mother as the legally recognized mother regardless of genetics, and the other declared void and unenforceable contracts that stipulated a woman's medical treatment during pregnancy. In sum, most of the bills introduced in California during the 1987 and 1988 legislative sessions sought to discourage and/or prohibit the practice of surrogacy, an almost complete turnaround from the legislative response prior to the Baby M case. But, as in New York, these bills did not get very far in the legislative process.

This slow progress toward resolving the problem of surrogacy prompted Assembly member Sunny Mojonnier (R) to introduce a resolution (ACR 171) in 1988 that established a joint legislative committee on surrogate parenting.[47] The resolution stated, in part, that "[t]his measure would create the Joint Committee on Surrogate Parenting, and direct and authorize the joint committee to ascertain, study and critically analyze facts relating to commercial and noncommercial parenting. . . . The measure would authorize the joint committee, among other things, to appoint advisory committees." Once established, the joint committee appointed a panel of experts. The panel issued its report in 1990. (See chapter 5 for a discussion of the impact of this report.) In that document, entitled *Commercial and Noncommercial Surrogate Parenting,* the majority of panel members concluded that (1) it is illegal to pay for surrogate arrangements; (2) in a surrogate agreement, the sperm donor is considered the legal father; (3) the birth mother is considered the natural mother; and (4) surrogacy contracts are void.[48] Unlike the recommendations issued by New York's Task Force on Life and the Law, these conclusions were not endorsed by all members of the panel. Six dissenting members advocated a regulatory approach to surrogate parenting. In their minority report, these panelists recommended that "legislation relating to surrogate parenting activities would be useful as a matter of public policy. Rather than proposing legislation which involves criminal sanctions for the purpose of restricting and punishing those involved in surrogate parenting, the Minority recommends that statutes be enacted which clarify the legal nature of surrogate parenting agreements and provide that, in the rare cases of dispute, decisions shall be made in the best interests of children."[49] The Joint Committee

on Surrogate Parenting declined to adopt its own panel's recommendations. It took no action on the views expressed by either the majority or the minority.[50]

At this point, significant differences between California's and New York's responses to surrogacy started to take shape. California lawmakers' increased attention to surrogate motherhood in the immediate aftermath of Baby M was not sustained either quantitatively or qualitatively. Compared to New York, the overall response by the California legislature was less dramatic. Between 1981 and 1992, a total of eleven bills that pertained to surrogate parenting were introduced—nearly half the number introduced in New York. Of this total, eight bills were directly related to surrogate contracts, two had implications for surrogacy, and one set up the Joint Committee on Surrogate Parenting to study the issue. Six legislators account for all eleven bills. Furthermore, two legislators, Senator Diane Watson (D) and Assemblywoman Mojonnier, sponsored or co-sponsored five of these eleven bills, and four of the eight bills introduced post–Baby M. Therefore, not only did the California legislature respond to a lesser extent than the New York State legislature (as measured by the number of bills introduced), but California's response also was less diffuse—fewer legislators were responsible for the total number of bills. Moreover, as the next section explains, after 1988, legislative interest in surrogate motherhood remained strong in New York, while concern seemed to wane in California. Finally, sentiment about surrogacy remained largely negative in New York, whereas the limited response in California returned to being more open toward the practice.

Post–Baby M Legislative Interest: 1989 and Beyond

In New York, legislative interest in surrogate motherhood did not die down after the torrent of Baby M–stimulated bills introduced in the 1987–88 session. The task force's report, published in 1988, seems to have supplied legislators—particularly those who were against surrogate parenting—with new momentum. In the 1989–90 legislative session, five Assembly members introduced legislation on surrogate parenting. All five bills declared surrogacy contracts void and unenforceable, including the Governor's Program Bill sponsored by Assemblywoman Weinstein and Senator Marchi, in their respective legislative houses. This version of their bill added a pro-

vision for criminal sanctions to be imposed on third-party intermediaries who arranged surrogacy contracts.

Another five bills were introduced in the Assembly in the 1991–92 legislative session. Four of the five were against surrogate parenting, and three of these four were identical versions of bills submitted earlier by the same legislators. The Governor's Program Bill was again introduced, but this version eliminated the criminal sanctions that many had found troublesome. This revised bill, A 7367/S 1906, eventually passed both houses—unanimously in the Senate and with cross-party support in the Assembly—and was approved by Governor Cuomo. The one bill that tried to regulate rather than ban surrogacy appeared at the end of the session, two weeks before the Weinstein/Marchi bill passed through both houses. This bill was the work of Assemblymen J. Oliver Koppell (D) and Michael Balboni (R), two of the strongest advocates for surrogacy in the New York legislature. It seems to have been these legislators' last-minute attempt to prevent antisurrogacy legislation from being passed in New York. Koppell and Balboni proposed an identical version of this regulatory bill once again, in 1993, after the Governor's Program Bill against commercial surrogacy had been signed into law. Like most of its predecessors, the Koppell-Balboni regulatory bill died in the Assembly Judiciary Committee.

The Governor's Program Bill had been introduced by Weinstein and Marchi three times, in three different versions, before it finally passed through the legislative process successfully. Assemblyman Koppell was probably partly responsible for the bill's slow progress into law. In addition to being a vocal and adamant supporter of surrogate parenting, Koppell was chair of the Assembly Judiciary Committee, the body responsible for weighing the merits of Weinstein's anti–commercial surrogacy bill. Koppell's powerful position as chair probably resulted in the additional hearings and reports that were deemed necessary before the bill was allowed to pass out of committee. Scholars of New York State politics have noted the effect of who holds leadership positions in the New York State legislature on the fate of bills: "[T]he individual volition of one man in a key position within the existing legislative setup can delay, over several years, the consideration and enactment of legislation desired by millions."[51]

Continuing legislative interest and the persistent efforts of Weinstein, Marchi, and others kept surrogate motherhood on the political agenda in New York, spurring various state bodies to prepare documents on the is-

sue. (See chapter 5 for a detailed discussion of these and other government reports.) One, *Contract Motherhood: Ethical and Legislative Considerations,* produced by the Legislative Commission on Science and Technology in 1991, did not endorse specific legislation, but its closing section implied opposition to laws that would make surrogate contracts enforceable.[52] Another report, published a year later by the New York State Department of Health, much more clearly backed a ban on surrogacy and also drew considerably more public attention. That study, *The Business of Surrogate Parenting,* according to the foreword, was an investigation "triggered by a desire to increase public awareness and scrutiny of surrogate parenting and, ultimately, to avoid the personal tragedies that have attended several instances of surrogate parenting." The report avoided endorsing specific legislation, but it did favorably review the recommendations of the Task Force on Life and the Law that called for legislation that would make surrogate contracts void and unenforceable.[53] Significantly, *The Business of Surrogate Parenting* came out just before the New York legislature considered the third version of the Governor's Program Bill sponsored by Weinstein and Marchi, and the New York press gave the document wide coverage.[54] In June, just over a month after the publication of the Department of Health's report, the Weinstein/Marchi bill passed unanimously in the Senate and by a nonpartisan 104–39 vote in the Assembly. Less than a month later, Governor Cuomo signed the bill, validating a law that declared surrogate contracts void and unenforceable, prohibited the receipt of payment in connection with a surrogate parenting contract, and instructed the courts that a birth mother's participation in a surrogacy contract would not affect her parental rights in a custody dispute.[55]

Meanwhile, on the other side of the country, legislators in California were developing a different reaction to the newly discovered social problem of surrogate motherhood. After the initial surge of bills in the 1987 and 1988 sessions, only two more were introduced into the California legislature in the four-year period between 1989 and 1992. Of these two, only one, AB 2100, opposed surrogate parenting. Introduced by Assemblywoman Mojonnier, this bill was similar to AB 3200, which she had introduced a year earlier. AB 3200 prohibited and criminalized the practice of surrogacy and was drafted by attorney Sharon Huddle, a founding member of the National Coalition against Surrogacy.[56] In 1988 AB 3200 did not make it through the Assembly Judiciary Committee initially. How-

ever, Mojonnier and Willie Brown (D), the former leader of the California Assembly, were political allies. Brown's political maneuvering helped ensure that the bill passed when it was put on the Assembly floor as an emergency measure.[57] Brown's influence did not extend to the Senate, however. Mojonnier's bill died there, in the Judiciary Committee. In 1989 Mojonnier's bill did not even pass in the Assembly.

The California legislature's generally unsuccessful efforts to formulate a policy approach to surrogacy left another branch of the government—the judiciary—without legislative guidance regarding this new social issue. When surrogacy disputes ended up in the California state courts, judges had little recourse other than to apply existing laws, despite their poor fit. One case, *Johnson v. Calvert,* garnered a considerable amount of media attention in 1990. (See chapter 4 for a discussion of the media coverage of this case.) Anna Johnson, a black woman, was the gestational surrogate for a baby that was the genetic product of the sperm of Mark Calvert (a white male) and the egg of Crispina Calvert (a Filipina female). After a custodial dispute arose, the Calverts litigated for enforcement of contract. The Superior Court trial judge awarded custody to them and denied visitation to Johnson. Judge Richard Parslow's written opinion compared Johnson to a foster mother, whose role is to provide "care, protection and nurture" to the child while its "natural mother" is unavailable.[58] He ruled the contract legal and not contrary to public policy. A court of appeal declined to rule on the contract, but it did address custody, ruling that Johnson had no parental rights because she was not the natural (i.e., genetic) mother.[59] In 1993, the state's supreme court upheld the lower court's decision, although using a standard of intentionality to break what they saw as equal legal claims—gestational and genetic motherhood.[60] The high court's ruling marked the first time in U.S. history that surrogacy had been declared enforceable and not contrary to public policy.

As the Johnson-Calvert dispute wended its way through the California court system, the judges involved implored the state legislature to fill the legal vacuum. For instance, Judge Parslow urged the state legislature to pass a law permitting surrogate parenting but to regulate the practice so that all parties would be protected.[61] He believed the legislature "better equipped to deal with this sort of problem . . . than the courts."[62] His opinion was seconded by Fourth District Court of Appeal Judge David Sills, who wrote, "We join our colleague on the trial bench who, in de-

livering his decision, underscored the urgent need for legislative action. . . . To the extent these issues present questions of law they are matters for legislative resolution subject to constitutional restraint. They should not be settled by the judiciary applying its own ideas of what is good 'public policy.'"[63] In *Johnson v. Calvert,* the California Court of Appeal conceded it was acting in "unchartered *[sic]* territory" and urged the legislature to take action on the issue "so that both parents and children can face the future with certainty over their legal status."[64]

The Johnson case renewed Senator Diane Watson's interest in regulating surrogate motherhood. (See also chapter 5's discussion of Watson's role in championing prosurrogacy legislation.)[65] Watson had been chair of the Health and Human Services Committee that sponsored hearings on surrogacy in 1987; in 1988 she had introduced her own bill to regulate surrogate motherhood arrangements (she was the only legislator to do so that year), but the legislation did not make it out of the Judiciary Committee. In 1991, Senator Watson introduced SB 937, another regulatory bill. SB 937 resembled Watson's 1988 bill, as well as the legislation Assemblyman Roos had introduced in the early 1980s, prior to Baby M.

Watson's bill, known as the Alternative Reproduction Act of 1992, was one of the most extensive regulatory bills on surrogacy introduced in any state at the time.[66] It provided for the legality and enforceability of surrogacy contracts, as well as medical evaluations, separate legal counsel, reasonable monetary compensation, limitations on advertisements for surrogates or ovum donors, inheritance rights, maintenance of records, custodial rights and responsibilities, and psychological counseling.[67] This was a very different policy approach from the one that was being pursued simultaneously in New York. Whereas New York legislators continued to push for a ban on commercial surrogacy, the response that emerged in California in the early 1990s indicated a willingness to accept the practice as long as it was properly regulated.

Watson's bill was passed by both the Assembly and the Senate, by 49–19 and 22–12 margins, respectively. Both votes crossed party lines. SB 937 was sent to then-Governor Pete Wilson (R), who later vetoed it. According to people closely involved with the bill, Wilson was responding to pressure from Catholic campaign contributors and prolife groups when he vetoed SB 937. (See chapter 5.)[68] There was not enough support in the legislature to override the veto. In 1993, Senator Watson again introduced a regula-

tory surrogacy bill, SB 1160. This bill never got out of the Senate Judiciary Committee, partly because of differences between it and SB 937 and partly because the governor's veto undercut the earlier legislative momentum.[69]

These events have left California with no specific legislation on surrogacy. Despite their many pleas, California judges must continue to make decisions about surrogate parenting arrangements without legislative guidance. In the California Fourth District Court of Appeal's decision, *In re the Adoption of Matthew B.* (1991), the court noted pointedly, "It is, of course, for the Legislature to consider these important questions and provide answers through legislative action."[70] In the meantime, California judges rely on the legal precedent established by the 1993 California Supreme Court decision in the Johnson case, which recognized surrogacy contracts as valid and used the intention of the parties as a key determinant.[71] Reliance on this legal precedent has created a more positive environment for those who arrange surrogacy contracts in California, as the intention of the parties favors the enforcement of the original contract, at least in the case of gestational surrogacy.[72] California's lack of legislated social policy on surrogate parenting and its growing acceptance of the practice thus seem to reflect the trends nationally with regard to legislative responses (or lack thereof) to the problem of surrogacy.

Nevertheless, the courts continue to call for legislation. For instance, using nearly identical language, in the decisions handed down in *In re the Marriage of Moschetta* (1994) and *In re Jaycee B. v. The Superior Court of Orange County* (1996), California Court of Appeal justices wrote, respectively, "Once again the need for legislative guidance regarding the difficult problems from surrogacy arrangements is apparent," and "Once again, the need for legislation in the surrogacy area is important. We reiterate our previous call for legislative action."[73] As of 2005, only one additional bill had been introduced in the California legislature since Watson's last attempt in 1993. This legislation, introduced in 2001, used intent as the legal standard to establish parent-child relationships, and, like most similar bills in state legislatures across the country, it died in committee.

This chapter has provided a descriptive account of the legal responses to and opinions about surrogate motherhood. In brief, while most other nations have responded to surrogacy by quickly enacting laws prohibiting

the practice, the response in the United States has been less quick and more ambivalent and varied. Hesitancy regarding surrogate parenting is apparent in the lack of national legislation, in the inability of the majority of states to pass laws on the issue, and in the history of legislation in the minority of states that have enacted laws specifically on surrogacy. In these last two groups, which include New York and California, further evidence of the lack of consensus about surrogate motherhood is provided by the diversity of laws that have been proposed and enacted on the issue. By exposing the degree and types of legislative reaction to surrogacy, this chapter has shown how this problem was defined and responded to in the institutional setting of legislative politics. As with other social problems, the emergence of surrogacy as a publicly perceived social problem was connected to other social issues and controversies of the time. Subsequent chapters will turn to these cultural debates in order to understand why surrogate motherhood emerged as a social problem, what explains the United States' seemingly unique response to the issue, and how this case of reproductive politics sheds an important light on the interests and issues that are at stake in the twenty-first century.