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# Surrogate Motherhood: The Legal Issues

Martha A. Field

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# SURROGATE MOTHERHOOD—THE LEGAL ISSUES\*

MARTHA A. FIELD\*\*

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\*\* Professor of Law, Harvard University. Thanks to Professors Phillip Areeda and Mary Joe Frug for helping me avoid some mistakes concerning contract law. I am also grateful to two wonderful research assistants, Deborah Kravitz and Valerie Sanchez.

## INTRODUCTION

The surrogate motherhood practice is a relatively recent phenomenon. Perhaps in the past persons unable to have children sometimes persuaded sisters, friends, or strangers to have a baby for them,<sup>1</sup> but over the past few years the practice has become much more widespread, and has turned into an industry.<sup>2</sup> As the practice of surrogate motherhood has "come out of the closet" and been extensively publicized during the past few years, it has come to seem a more legitimate and available alternative to persons wanting babies, especially infertile couples. Others hearing about the possibilities of surrogate motherhood decide that the job of a surrogate might be a good way to earn a substantial sum of money.<sup>3</sup> And as the practice increases, the problems that inhere in it become more obvious and increasingly find their way into the courts.

Many variations are possible, but the paradigmatic case of surrogate motherhood involves a couple who want a child but discover they cannot have their own biological child because the wife is infertile.<sup>4</sup> In the past the only recourse in such a situation

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1. In biblical times, Abraham and Jacob had women have babies for them because their wives were infertile. These children, however, did not consider the infertile wife to be their mother. See *Genesis* 16:2, 30:3.

2. Contract surrogacy emerged around 1976. An estimated 500 children have been born in the United States from surrogate arrangements since then. Of these 500 contracts, 495 have been carried out without incident. See Krautheimer, *The Ethics of Human Manufacture*, *THE NEW REPUBLIC*, May 4, 1987, at 17, 19.

There are currently about a dozen surrogacy centers in operation throughout the country to which persons can apply if they want to employ a surrogate or if they want to serve as a surrogate. While rates vary, the center generally makes a substantial sum of money each time it engineers a surrogacy contract. See generally Lacayo, *Whose Child is This?*, *TIME*, Jan. 19 1987, at 56, 57.

3. A poll conducted by the Gallup organization interviewed 766 adults by telephone on January 7 and 8, 1987. The poll asked: If you wanted a child but could not have one because of fertility or other health problems, would you consider having a child by a surrogate mother? Thirty-five percent of the respondents answered yes. Women were also asked to answer the following question: Surrogate mothers are paid about \$10,000 to bear a child for another couple. If you were a young woman in good health, would you consider bearing another couple's child? Fifteen percent answered yes. *Surrogate Mothers: A Newsweek Poll*, *NEWSWEEK*, Jan. 19, 1987, at 48 [hereinafter *Newsweek Poll*].

4. There are no serious empirical studies concerning surrogacy. One derives a fairly consistent picture, however, from the voluminous writing that is available on the subject. Many newspapers—including the *New York Times*, the *Boston Globe* and the *Los Angeles Times*—have published articles describing and evaluating different aspects of surro-

would have been adoption, and that still is the most obvious and commonly used method of obtaining a child. Adoption, however, is notoriously more difficult today than it has been in the past.<sup>5</sup> Moreover, a couple who feel it important to have a biological

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gacy continually during the past year, while the *Baby "M"* case has been pending in New Jersey, *In re Baby "M,"* 217 N.J. Super. 313, 525 A.2d 1128, cert. granted, 107 N.J. 140, 526 A.2d 203 (1987), and there are also a great many other articles on the subject of surrogacy. Readings I have found especially helpful include Krautheimer, *supra* note 2; Lacayo, *supra* note 2; Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641 (1984); Kantrowitz, *Who Keeps Baby "M"?*, NEWSWEEK, Jan. 19, 1987, at 44; Slovenko, *Obstetric science and the developing role of the psychiatrist in surrogate motherhood*, 13 J. PSYCH. & L. 487 (1985); Bowal, *Surrogate Procreation: A Motherhood Issue in Legal Obscurity*, 9 QUEENS L.J., 5 (1983); Mellown, *An Incomplete Picture: The Debate About Surrogate Motherhood*, 8 HARV. WOMEN'S L.J. 231 (1985); Blakely, *Surrogate Mothers: For Whom Are They Working?*, Ms., Mar. 1983, at 18; Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. RPTR. (BNA) 3001 (Jan. 29, 1985); Rushevsky, *Legal Recognition of Surrogate Gestation*, 7 WOMEN'S RTS. L. RPTR. 107 (1982); Peterson, *Baby M Case: Surrogate Mothers Vent Feelings*, N.Y. Times, March 2, 1987, at B1, col. 2 [hereinafter Peterson]; Goleman, *Motivations of Surrogate Mothers*, N.Y. Times, Jan. 20, 1987, at C1 [hereinafter Goleman]; Rovner, *Ethical Choices in Reproductive Technology*, THE WASHINGTON POST WEEKLY OF MED., HEALTH & FITNESS, Sept. 9, 1986, at 15; Note, *Surrogate Motherhood and Baby Selling*, 20 COLUM. J. L. & SOC. PROBS. 1 (1986) [hereinafter *Baby Selling*]; O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N. C. L. REV. 127 (1986); N. KEANE & D. BREO, *THE SURROGATE MOTHER* (1981) [hereinafter KEANE & BREO]. On the current situation concerning adoption, see generally NATIONAL COMMITTEE ON ADOPTION, *ADOPTION FACTBOOK* (1985) [hereinafter *ADOPTION FACTBOOK*]; *Frontline: Desperately Seeking Baby*, (WGBH television broadcast, March 3, 1987) [hereinafter *Frontline*] (discussing private adoptions); W. MEEZAN, S. KATZ & E. RUSSO, *ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS* 165-66 (1978) [hereinafter MEEZAN, KATZ & RUSSO].

5. There is a shortage in this country of healthy, white newborns available for adoption. This shortage results from the prevalence of contraception and abortion and from many unmarried mothers deciding to raise their own children.

In 1982, the year for which the best statistics are available, there were 141,861 adoptions. Of these 91,141 were adoptions by relatives. The remaining 50,720 were unrelated adoptions. Of those 17,602 were unrelated adoptions of healthy infants, 5,707 were unrelated adoptions of children adopted from other countries, 14,005 were unrelated adoptions of children with special needs, and 9,591 were adoptions of children by foster parents. (These four categories are not mutually exclusive.) See *ADOPTION FACTBOOK*, *supra* note 4, at 102. In 1984, two million couples competed for the 58,000 children placed for adoption (a 35-to-1 ratio). See Wilson, *Adoption, It's not Impossible*, BUSINESS WEEK, July 8, 1985, at 112.

An exacerbating factor is that many couples are delaying the start of their families, so infertility may not be discovered until a couple is in their thirties. Couples who ultimately decide to adopt, especially if they have taken the time to undergo infertility treatments, come to discover that they are too old to be acceptable to conventional adoption agencies, which prefer couples under 35. See Lorio, *supra* note 4, at 1642 n.4; Kantrowitz, *supra* note 4, at 47.

connection with their child may prefer to find a surrogate mother, because that way their child will share the husband-father's genes.<sup>6</sup>

In the paradigmatic case, the surrogate mother is a woman in her twenties who has previously had children.<sup>7</sup> Many surrogate mothers are married and live with their husband, or their husband and children, while others are single women.<sup>8</sup> When a surrogate motherhood arrangement is made, the woman who has agreed to be the surrogate mother is inseminated with sperm from the man of the infertile couple. This procedure can be done either by artificial insemination<sup>9</sup> or by sexual intercourse. The mother agrees that after she bears the child so conceived, she will turn the child over to the infertile couple. The expectation is that the couple then will adopt the child as their own and the surrogate mother will give up all parental rights.

The remainder of this paper will deal with the problems this arrangement poses for the three principal actors—the infertile couple and the surrogate mother—and also for the child and for society at large. It will assess how the legal system should address the problems and also whether it should allow, encourage, prohibit, or discourage the practice of surrogate motherhood. For convenience and readability, I shall sometimes refer to the infertile couple as John and Diane and to the surrogate mother as Mary.

The most dramatic problem that can and does arise in such arrangements is when the mother, Mary, decides that she wants

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6. The father in the much-publicized *Baby "M"* case is said to have felt "compelled" to continue his family's bloodline which was threatened with extinction because, aside from his parents who were also no longer alive, all other living relatives had been killed in the Holocaust. Hanley, *Reporter's Notebook: Grief Over Baby M*, N.Y. Times, Jan. 12, 1987, at B1, col. 2; *In re Baby "M"*, 217 N.J. Super. at 335, 338, 525 A.2d at 1138-39.

7. See Kantrowitz, *supra* note 4, at 47 (A statistically typical candidate is a 25 year old Christian married woman with a high school education and at least one child). See also, Slovenko, *supra* note 4, at 503, stating that women who have been pregnant before are much better candidates for surrogate motherhood, and that some psychiatrists believe that they are the only ones capable of giving "informed" consent.

8. One well known surrogacy center reports it does not require that the surrogate be married, but it does require that she have at least one biological child living with her. See Mellow, *supra* note 4, at 238.

9. Artificial insemination is the process by which male sperm is introduced into a female patient with a needleless syringe. Williams, *Differential Treatment of Men and Women by Artificial Reproduction Statutes*, 21 TULSA L. J. 463, 464 (1986).

to keep the child that she is carrying. She may decide shortly after becoming pregnant that she wants to keep her child; she may decide late in pregnancy; she may decide at birth or after the child is born. The ultimate issue in all such cases is whether the woman bearing the child will be able to keep the child or whether the infertile couple for whom she agreed to bear the child have a right to the child.

One reason the situation is difficult is that all the actors may be very sympathetic people,<sup>10</sup> and in this conflict they all have very sympathetic positions. By changing her mind, the mother is showing maternal feelings for her baby that are surely not reprehensible. It is true that she had promised to give up the baby, but her change of heart seems more understandable than dishonorable. John and Diane, on the other hand, have been trying for a long time to have a child, and now they are excited and happy that this child is to be theirs. They have justifiably relied on the agreement that Mary made with them. And half of the baby's genes have come from John.

How is the law to respond to this kind of problem? A jurisdiction may actively regulate or prohibit the practice of surrogate motherhood,<sup>11</sup> but even if its laws are silent on the subject,

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10. Persons who apply to be surrogate mothers, according to psychologists, are likely to be people with a high degree of empathy for others. Many of them feel the pain of the couple who is unable to have children and are motivated not only by money, but also by a desire to help.

As one pregnant surrogate expressed, "I'm not going to cure cancer or become Mother Teresa, but a baby is one thing I can sort of give back, something I can give to someone who couldn't have it any other way." Kantrowitz, *supra* note 4, at 48 (quoting Lisa Walters, a 32-year old Grantsburg, Wis. housewife and mother of two). Another woman decided to become a surrogate when she was working for three obstetricians who specialize in infertility: "I saw the disappointment and the anguish that accompanies infertility. . . . It was so unfair." *Id.* at 46-47 (quoting Becky McKnight, a 35-year-old Los Angeles mother of three).

Surrogate motherhood applicants may also be compensating for an experience in their past such as being adopted themselves, giving up a child for adoption, or having an abortion. Goleman, *supra* note 4, at C1. See also Kantrowitz, *supra* note 4.

11. In fact, few jurisdictions have any specific rules, although many are considering them and debating which rules to adopt. In Britain, a surrogate mother was permitted to repudiate the contract as being against public policy. *A. v. C.* [1985] F.L.R. 445 (Eng. Ct. App. 1978). A report of Britain's Committee of Inquiry into Human Fertilisation and Embryology suggested that:

Legislation should be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals

disputes unavoidably come to the courts. If, for example, Mary does not turn the child over at birth, then John and Diane, if they are unable to persuade her to change her mind, have several alternatives: (1) Though sad, they may accept her decision, and litigation will be avoided. (2) They may come to court to ask its help in transferring the child to them. (3) They may instead employ self help and steal the child from Mary. If they do that, Mary is likely to seek the courts' help in getting the child back and in preventing such incidents in the future.

As courts face disputes concerning the parenthood and custody of the child, how is the judge to decide the issue in a jurisdiction whose laws are silent concerning the subject of surrogacy? While it might appear that the problem is the absence of applicable law to draw upon in such a situation, the real problem is an excess of available bodies of law.

Several different bodies of law arguably are applicable, and the various possibilities lead to different results. Contract law might govern the agreement between the parties and it might support enforcement of the bargain. On the other hand, existing laws against selling babies might render the agreement illegal, and might even suggest that the parties to such an agreement could be subject to criminal sanctions. Or a court might look to laws governing adoption in order to compare the rights of the birth mother with those of the would-be adoptive parents.

As an alternative to relying upon the contract, the biological father can attempt to obtain custody under the laws that govern the rights of a biological father who is not married to the mother

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or couples who wish to utilise the services of a carrying mother; such legislation should be wide enough to include both profit and non-profit making organizations.

DEPT OF HEALTH & SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, Chairman: Dame Mary Warnock, July 1984, at 85 [hereinafter Warnock Report]. Subsequently, in 1985, commercial surrogacy arrangements were banned in Britain. Surrogacy Arrangements Act, 1985, ch. 49.

In the United States, the Ethics Committee of the American Fertility Society, in its study of the problem, expressed dismay at the lack of empirical evidence on surrogacy and found it could not make firm conclusions about whether surrogacy should be permitted without that evidence. Ethics Committee, *Ethical Considerations of the New Reproductive Technologies* 67S (1986) [hereinafter Ethics Committee]. One member of the committee, in dissent, believed that surrogacy should be made illegal forthwith. *Id.* In New York State, the State Senate Judiciary Committee recommended that surrogacy contracts should be "legal and enforceable." N.Y. Times, Jan. 4, 1987, at 26.

of a newborn baby; or the biological mother instead could find this law advantageous, depending upon the facts and circumstances of the various parties<sup>12</sup> and also upon the uncertainties of how this law will be interpreted and will develop. Finally, state provisions specifically applicable to the rights and obligations of sperm donors could govern in cases where the surrogate has been artificially inseminated. A judge is not, of course, limited to choosing between existing bodies of law,<sup>13</sup> but at least initially, the judge may confront the problem by inquiring which of these bodies of law is most appropriate.

#### SURROGACY VIEWED THROUGH THE LENSE OF CONTRACT LAW

It would most benefit the would-be adoptive couple for surrogacy contracts to be enforced like any others—like contracts for ordinary commercial services or for the exchange of a chattel. It is arguable that, because conceiving and delivering a baby and turning it over is involved, contract law should not apply or should apply differently than when a transaction involves barter of a simple chattel or commercial services.<sup>14</sup>

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12. In one surrogate motherhood case in which the mother decided to keep her child, for example, the adopting couple retreated from litigation reportedly because the wife was formerly a transvestite. *Noyes v. Thrane*, No. CF7614 (L.A. Cty. Super. Ct. 1981). See *Surrogate Mother Sues in L.A. Court to Keep Her Unborn Baby*, L.A. Times, Mar. 21, 1981, at 1-1-1; Galen, *Surrogate Law: Court Ruling*, NAT'L L. J., Sept. 29, 1986, at 1.

13. If he or she conceives of surrogate motherhood as an altogether novel situation, the judge may consider it more appropriate to mold some new law to meet the needs of this new and different situation.

14. Often proponents of surrogacy contracts depict the contract as one for services and not for exchange of a baby, in order to avoid the problem that laws forbid the exchange of a child for money. See, e.g., Frug, *The Baby M Contract*, 119 N.J.L.J. 337-38 (1987) ("[I]f she actually gives up her child at birth, [the surrogate mother]. . . is not selling a child but selling the use of her womb.").

Although personal service contracts are traditionally not enforceable by specific performance, see CORBIN ON CONTRACTS §§ 1184, 1204-10 (1951) [hereinafter CORBIN], that rule may not help the mother after she has completed her personal service of conceiving and giving birth to the child; traditionally the rule could not be invoked to prevent transfer of a completed object, such as an art work that had been commissioned and already is completed. Describing the contract as one for personal services would, however, aid the mother who changed her mind before conception. It would also aid a woman who changed her mind after conception and before birth and who wants to abort the fetus. Even apart from any stipulation in the contract, however, a pregnant woman retains the right to abortion. See *infra* note 56-58 and accompanying text.

Moreover, despite the traditional rule that specific performance can be ordered once the personal service is complete, a mother might argue that turning over her

The ultimate issue society must face in deciding whether and how contract law applies is whether it wants to prohibit these contracts or, at the other extreme, whether it wants to enforce them. Even if it avoids these extremes, it must decide whether to encourage or discourage them. Each state can decide for itself what policy to pursue with respect to surrogacy, and one would expect different policies to be adopted in different jurisdictions.<sup>15</sup>

Existing law does not dictate the outcome. It will be decided, by legislators or courts, according to their perceptions of appropriate policy. The most forceful argument against surrogacy arrangements is that they violate public policy—that the balance of interests is such that society should either invalidate the contracts or make them unenforceable. Moreover, existing laws prohibiting babyselling could be interpreted to encompass surrogacy arrangements. Reasons of public policy will probably also govern whether that interpretation is adopted.

#### A. *Are the Contracts Illegal?*

The important issues are those of policy. Under traditional contract law, surrogacy arrangements would appear to be enforceable. But contract law makes exceptions for exploitation or unconscionability, and it is not foreign to contract law for public policy to dictate that the parties' bargain not be followed, or

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child—severing her connection with her baby—is such a uniquely personal act that it cannot be forced upon her, under reasoning similar to that which prevents courts from enforcing personal service contracts. See RESTATEMENT (SECOND) OF CONTRACTS § 367 comment a (1981) [hereinafter RESTATEMENT CONTRACTS] (describing the rationale behind personal service contracts and stating specific performance will not be ordered where compulsion is against public policy) I owe this last suggestion to Professor Mary Joe Frug.

15. One result is that persons living in states where surrogacy is not legal will not be denied the use of surrogates but will still be able to use the services of agencies and surrogate mothers who live in states where it is legal. This lowest common denominator phenomenon—allowing the state with the least restrictive rules effectively to control the nation—is common in family law, where the lowest age for marriage, the least restrictive consanguinity rules concerning marriage, the lowest requirements for divorce, etc. can often be used by persons from all jurisdictions.

Many jurisdictions allow adoption only to resident prospective parents, but others allow out-of-staters to adopt; some allow out-of-staters to adopt special needs children but not others, or allow out-of-staters to adopt independently but not through an agency. For a complete survey of the varying practices, see ADOPTION FACTBOOK, *supra* note 4, at 76-85.

that it not be binding. The policy questions that must be resolved here are: Should surrogate motherhood arrangements be viewed as illegal under babyselling provisions? If not, should state legislatures enact statutes prohibiting surrogate motherhood contracts? If surrogate motherhood contracts are to be prohibited, should those few that are genuinely entered into for no compensation, other than payment of expenses, also be prohibited, or should voluntary surrogacy be treated differently from surrogacy for a fee?<sup>16</sup>

### 1. Babyselling

Most surrogate contracts involve payment of a substantial sum of money to the surrogate mother, in addition to her medical and perhaps living expenses during the pregnancy. Most contracts specify what monetary compensation will be paid to the woman for her services in bearing the child. The fees paid range anywhere from a couple of thousand up to a hundred thousand dollars.<sup>17</sup> The price contracts most commonly specify at this time is ten thousand dollars. On the other hand, advertisements of persons offering to be surrogate mothers, or searching for surrogate mothers, often mention a much higher price.<sup>18</sup> One reason contracts frequently describe the arrangement as one for services is the parties' desire to avoid condemnation as a babyselling arrangement. A parent's surrender of a child for a fee—baby selling—is a crime in all states.<sup>19</sup> In addition, many states have

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16. The Ethics Committee of the American Fertility Society preferred that surrogates not receive payment "beyond compensation for expenses and their inconvenience" but recognized the necessity of allowing payment. See Ethics Committee, *supra* note 11, at 67S.

17. The fee can vary in accordance with the surrogate mother's intelligence and attractiveness. Mellown, *supra* note 4, at 234. The problem has been characterized as "determining a Saks Fifth Avenue price tag for one woman as opposed to a K-Mart price tag for another." *Id.* at 234-35, n.20 (quoting Brief for the Attorney General, *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981) (citing to Blakely, *supra* note 4, at 18)).

18. The Boston Magazine recently ran an advertisement by a couple seeking a "tall, trim, intelligent woman between the ages of 22 and 35" to be a surrogate mother for them, and offering \$50,000. See BOSTON MAGAZINE, Aug. 1985, at 285. Prices also can run low; recent litigation involved a Mexican woman in San Diego paid \$1500 as a surrogate, who was fighting to keep her child. See Scott, *Pair Duped Her on Surrogate Mother Pact, Woman Tells Court*, L.A. Times, Feb. 20, 1987, §1, at 22, col. 1.

19. See Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 Fam. L. Rep. (BNA) 3001 (Jan. 29, 1985).

enacted so-called "Baby Broker Acts," which limit or prohibit compensation of intermediaries in connection with the transfer of a child.<sup>20</sup>

Obviously the issue whether the contracts should be viewed as void because they have an illegal purpose—the selling of babies—depends upon more than construction of the particular words used in the particular state's law. One can easily imagine arguments that surrogacy contracts do violate laws against selling babies—because consideration is paid to the mother to have and turn over the child—or arguments that these contracts are different from the babyselling at which the statute is aimed—because the baby is not yet born, indeed is not even conceived when the arrangement is made. Logic will not select for a judge which approach to follow; instead the judge will be heavily influenced by her or his views concerning whether the state ought to prohibit these contracts or whether instead the contracts serve a socially legitimate purpose.<sup>21</sup> Similarly a legislature must address the normative issue in deciding how to regulate these arrangements, if at all.

## 2. Contracts Reciting Lack of Compensation

Seemingly in order to avoid babyselling charges, some contracts recite that no compensation (beyond medical expenses) is to be paid. It is not believable that such a declaration is true in very many cases. If the mother is not to be compensated for her services, why has she agreed to perform them? Research does indicate that in addition to monetary compensation there are many motives that contribute to a decision to become a surrogate mother, but most of the time money is an important part of the decision.<sup>22</sup>

There are, of course, circumstances in which it is easier to believe a recital of no compensation. Some surrogate arrangements involve a sister or a good friend; and a few surrogate

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20. Rushevsky, *supra* note 4, at 115.

21. As suggested previously, one argument against the banning of surrogacy arrangements in a liberal society is that they can be an "act of love and generosity." Krautheimer, *supra* note 2, at 19. See also *supra* note 10.

22. One commentator notes that while surrogates can be motivated by non-financial factors such as altruism and self-fulfillment, see *supra* note 10, most women become surrogates for the money. Bowal, *supra* note 4, at 8-9.

mothers might simply be empathetic with the dilemma of a childless couple who are strangers and might seek to help, perhaps partly for psychological reasons of their own. Surrogates do often report that they enjoy pregnancy; that attitude would contribute to their willingness to serve.

Nonetheless, it is the unusual case where the surrogate is not paid and, as those who work with surrogate mothers acknowledge,<sup>23</sup> the primary motive for persons who enter the arrangement is usually monetary. Although there may be isolated cases where the consideration is in fact limited to medical expenses, it seems likely that even in those instances where the contract says there is no other consideration, some other payment has passed or is intended to pass. Sometimes as contested custody cases develop, it becomes clear that this is the case.

In jurisdictions in which surrogacy is illegal—either as babyselling or in its own right—recitals in the contract that no compensation has been paid will have limited effectiveness. If neither party questions the contract, and all wish to perform according to its terms, the recital may enable the contract to escape the jurisdiction's prohibitions. But if either party desires to back out of the surrogacy contract, that party will be permitted to show that the recital is false and that the contract is therefore illegal.<sup>24</sup>

Those few instances where it can actually be maintained that the surrogate was not to be paid for her services, however, would be the most obviously enforceable contracts under traditional contract law.<sup>25</sup> Those contracts alone do not risk running

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23. See Mellow, *supra* note 4, at 234, 237-38.

24. Cf. CORBIN, *supra* note 14, §§ 130, 586.

25. The unpaid woman might argue that she has received no "consideration" that would make her promise binding. But under traditional contract doctrine, giving sperm, paying or promising to pay medical expenses, and promising to adopt the child would all be consideration. See RESTATEMENT (SECOND) CONTRACTS § 79 and comments. See also *id.* §§ 71(2), 72, 75, 78 (1981).

It is interesting that the crime of babyselling most commonly requires that the perpetrator receive something of more obvious market value—not just paying expenses that would not even be incurred except in service of the contract, or the donation of sperm which is of little value to the recipient. While the father's promise, or detriment, or reliance could constitute consideration, or persons found to be performing as surrogates for their own satisfaction and not for valuable reward could be deemed to receive consideration, see RESTATEMENT (SECOND) CONTRACTS § 32 comment b(4), that kind of consideration would seemingly not support a charge of babyselling. Much less is necessary, then,

afoul of statutes prohibiting the selling of babies the way contracts paying substantial sums to the mother do.<sup>26</sup>

### 3. Should Surrogacy Contracts Be Prohibited on Grounds that they Exploit Women and Commercialize Childbearing?

One of the most fundamental social problems that surrogate motherhood contracts involve is the exploitation of women.<sup>27</sup> It is difficult to assess with any confidence whether surrogacy contracts are exploitative and whether exploitation is a valid reason for prohibiting these arrangements.

If childless persons or couples are to pay a considerable sum

to constitute binding consideration than is necessary to constitute exchange in a typical babyselling offense.

It is in the gulf between the two standards—consideration and valuable exchange for purposes of babyselling—that surrogate contracts would still be enforceable, in a jurisdiction that decided to punish surrogacy arrangements under its babyselling laws.

26. This is a strange result indeed when one contemplates that the volunteer mother who decides she wants to keep her child will be forced to give up her child while the similar mother who was paid will keep her child because her contract is unenforceable.

27. Another commonly discussed "social problem" is that surrogacy challenges the sanctity of the traditional family unit. The difficulty apparently is that one of the genetic parents will not be part of the child's family unit. This problem underlies the opposition of the Roman Catholic Church to "any role for a third party in donating or in gestating the child." Since the same church supports adoption, an obvious contradiction in reasoning exists. Krautheimer, *supra* note 2, at 19.

On October 1, 1987, however, the complications that surrogacy could bring to traditional family structure were dramatically illustrated, as a surrogate mother in South Africa gave birth to her own grandchildren. They were triplets. Pat Anthony had served as a surrogate for her daughter Karen, bearing the children conceived by Karen's ova being fertilized by Karen's husband's sperm and implanted. Mrs. Anthony, both grandmother and mother to the children, is recognized as the legal mother in South Africa, even though she has a weaker case for motherhood than the kind of surrogate we have been discussing, who provided the egg as well as the incubation.

Karen, the egg-donor, legally has three new siblings. But all plan for Karen and her husband to adopt the children, so she will become their mother instead of their sister. And in a cartoon welcoming their birth, one triplet claims to be the others' uncle. *Boston Globe*, Oct. 2, 1987, at 1, col 3-4; *CBS News*, Oct. 1, 1987.

A less esoteric problem may be the reaction of the surrogate's older child or children to their mother giving away the baby. See Peterson, *supra* note 4. Since there almost invariably are older siblings, see *supra* notes 7 & 8 and accompanying text, surrogacy arrangements may in this way be destructive to existing children and to their security in their families.

Moreover, if surrogacy came to be widely practiced not only by infertile couples but also when fertile women simply did not desire to undergo pregnancy themselves, there is a risk that it would create an underclass of women used as breeders. Some, of course, might see as a benefit of surrogacy the option it would give well-to-do women to free themselves from pregnancy and childbirth.

to a woman to conceive and bear a child for them, does that constitute exploitation? Certainly the usual situation will involve a couple of considerably greater financial means than the woman who agrees to be the surrogate.<sup>28</sup> Should the surrogate be prohibited from entering into the agreement even if it is appealing to her? Arguably she should be able to make a living this way, rather than by performing some kind of work that is much more distasteful to her. Indeed if a woman is well paid for her work, making for example \$50,000, in addition to expenses—an amount which many find not unreasonably large for performing as a surrogate mother—and if this is an amount that it might take her 3-5 years to earn in other work that is available to her, the appeal of the surrogacy arrangement may be quite understandable.<sup>29</sup>

A difficulty with assessing whether this does or does not involve exploitation that the law should be concerned with preventing is that generous payment for the arrangement in some sense makes the arrangement less exploitative. But in another sense, the more money that is offered, the harder it is to resist for persons who do not have other means of livelihood, or other means to make substantial sums of money.

Should the law protect persons against being tempted into surrogacy arrangements by offers of money? Arguments that it should rest largely upon a conviction that bearing and having a baby is such a personal and almost sacred thing that it should be held outside of the marketplace. A system of agencies reaping profits by arranging for surrogate mothers, and surrogates earn-

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28. The costs incurred by a hiring party range upward from \$25,000. The magnitude of the expense renders surrogacy available primarily to the affluent. Kantrowitz, *supra* note 4, at 46.

One author suggests that reproductive technology, including surrogate motherhood, is the first step toward a "developing ideology [in which] we are learning to see our children as products, the products of conception." B. ROTHMAN, *THE TENTATIVE PREGNANCY: PRENATAL DIAGNOSIS AND THE FUTURE OF MOTHERHOOD 2* (1986) [hereinafter *TENTATIVE PREGNANCY*]. Rothman also states that "when we talk about the buying and selling of blood, the banking of sperm; the costs of hiring a surrogate mother, we are talking about bodies as commodities. . . . The new technology of reproduction is building on this commodification." *Id.*

29. Some women have had three children as surrogates. See Mellown, *supra* note 4, at 236 n.33; Peterson, *supra* note 4.

Some persons who, in their 20s, enthusiastically performed as surrogate mothers, feel great regret and guilt as they become older. See Peterson, *supra* note 4, at B1, col. 2.

ing substantial fees by having babies,<sup>30</sup> commercializes childbearing to the detriment of us all.

A similar kind of protection of persons not financially well-off is involved in our laws against babyselling or childselling. Those laws reflect a judgment that we do not want a society in which persons having extreme financial difficulties are tempted to barter away a child or children, if they are lucky enough to have one attractive enough to produce a generous offer from a well-to-do person.<sup>31</sup> Just as poor persons are not permitted to sell their children to meet their financial needs,<sup>32</sup> perhaps they should also be prohibited from contracting to use their bodies to produce a child for someone else.

Similarly, our laws against prostitution prohibit women from selling their bodies in exchange for money—partly to protect against their exploitation, partly to defend a concept of a society where sex is sufficiently personal that it is not available for hire.<sup>33</sup> With respect to all of these arrangements—prostitu-

30. Some contracts provide for partial payment in the event of miscarriage. *60 Minutes*, CBS, Sept. 20, 1987.

31. It may not be in the interest of the *particular* child to prevent this arrangement (depending on the characteristics of both the selling and the buying parents, and upon the character of the child's relationship with her or his natural parents). It *is* in the interest of children and families *in general* for the state to foster a sense of security about them and to remove temptation by not allowing sales of family members for money.

32. During the 18th and 19th centuries, poor French women "often sold not only their bodies, but, as their charms began to fade, even their teeth—to be made into dentures for the wealthy elite." Rovner, *supra* note 4, at 15.

Today an issue somewhat analogous to surrogacy is often discussed as a possibility—persons selling organs that others vitally need, like a kidney, for an enormous fee. Often in discussions of surrogacy, persons pose the question whether such sales of organs should be allowed, encouraged, or outlawed. While certain analogies with surrogacy obviously exist, including the ethics of having such a practice that is available only to the wealthy, one might find more of an affirmative state interest in allowing the sale of organs, since presumably it makes possible life for someone who is already in existence. While there is a state interest in preserving lives in being, there is no similar interest at this point in time in encouraging more births.

The American Fertility Society has taken the position that surrogacy should be seen as rent (for the womb) in order to get around the rule "that the purchasing of organs. . . is inappropriate because of the potential for abuse." Ethics Committee, *supra* note 11, at 67S. While the womb may be rented, however, the egg surely is sold.

33. With prostitution, our society has made the same judgment that it has with babyselling—that it should not be allowed—at least in theory, although enforcement here is substantially unsuccessful, and prostitution, unlike babyselling, remains very common. See generally *Baby Selling supra* note 4; see also Erbe, *Prostitutes: Victims of*

tion, childselling, and surrogate motherhood—there is a similar issue of whether it is not too protectionist to use the law to prohibit such arrangements, when the arrangements are satisfactory to the persons who enter them. Why should women not be allowed to use their bodies—or sell their children—to make money rather than engage in other work, if that is what they want?<sup>34</sup> It is patronizing to women, and dangerous to their rights, for government or society to consider it its role to protect them from doing what they want to do.<sup>35</sup>

On the other hand, there may be some types of things that we as a society do not want to have measured in terms of money. Society may want to do what it can to help others to keep these in a personal sphere that is distinct from the commercial; indeed it may even force them to do so, to the extent that it can. On this basis one can see the grounds for an argument that surrogate motherhood contracts should be illegal, just as prostitution and babyselling are, although reasonable persons would disagree about just how compelling such an argument is.

On the issue of whether surrogacy is to be prohibited, John and Diane would argue that any harm is sufficiently speculative, that any prohibition is sufficiently questionable in view of the woman's own eagerness to enter into the arrangement, and that arguments for prohibition do not outweigh the obvious benefit that the arrangement provides. For there is a clear benefit to John and Diane from the arrangement, and to other couples like them, who may not be able to obtain a baby, and surely will not be able to obtain a baby with whom they have any biological connection, without a surrogate motherhood arrangement.

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*Men's Exploitation and Abuse*, 2 L. AND INEQUALITY 609, 624-25 (1984). While proposals to legalize prostitution have been presented to many legislatures, laws against child selling have not been the subject of decriminalization attempts. *Id.* Erbe, *supra*.

One surrogate mother recounts that a woman in her congregation labeled her "a high-class hooker." Her response: "Mary was a surrogate for God." Kantrowitz, *supra* note 4, at 46 (quoting Jenny Cassem, a 28-year-old California mother of five). *Cf.* Rushevsky, *supra* note 4, at 112 n.39 (claiming prostitution is unlike surrogacy because of an absence of immorality in surrogacy arrangements).

34. "The right to be a prostitute is as important as the right not to be one. It is essentially the right to set the terms of one's own sexuality, plus the right to earn a good living." Griffin, *Wives, Hookers, and the Law*, 10 STUDENT LAWYER 13, 7 (1982).

35. On this theory, a National Association of Surrogate Mothers has been formed to promote surrogate motherhood and to protect their right to play that role. *See* N.Y. Times, Nov. 13, 1986.

If surrogacy were prohibited, criminal penalties might attach to parties who entered into them. At any rate, a court would not enforce the contracts even when both parties were ready and willing to perform.<sup>36</sup>

*B. Are Surrogacy Contracts Constitutionally Protected?*

At the other extreme from being illegal, are surrogate motherhood contracts constitutionally protected, so that the state must allow them to be made and must lend its enforcement mechanisms to them at least on a par with other contracts? An extreme version of John and Diane's argument would maintain that any state interference with their surrogacy arrangement is unconstitutional. The right to procreate is a "fundamental right" protected by the United States Constitution. John, or John and Diane, are exercising this right in the principal way available to them, given her infertility.

A common form of this argument is that the state denies John, or John and Diane, equal protection of the laws in viola-

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36. For example, a Kentucky court in *In re Baby Girl*, 9 Fam. L. Rep. (BNA) 2348 (Ky. Cir. Ct. Mar. 8, 1983), denied a petition that would allow a surrogate mother and her husband to terminate their parental rights, establish the alleged biological father's paternity, and transfer legal custody of a child to her biological father.

And in England, couples who have arranged for the pregnancy of a surrogate mother and agreed to adopt the child have had difficulty obtaining custody of the child from the English courts even when the surrogate mother is ready and eager to complete the transaction. In one recent case, for example, local authorities obtained a "plan of safety order" to assume state protective custody over a child born to a surrogate mother a few hours after the birth in London, and before the child was handed over to the biological father. The biological father, an American who had arranged through an agency in the United States for the conception of the child, had to commence wardship proceedings to obtain custody. The surrogate mother took no part in the proceedings. The court granted the biological father's motion for wardship, finding that the biological father and his wife "are devoted to each other . . . are both professional people, highly qualified . . . [with] a very nice home in the country and another in town. . . [and] are both excellently equipped to meet the baby's emotional needs." See *In re C*, 1985 Fam. L. Rep. (BNA) 846. Earlier, the Warnock Commission in England had recommended that surrogacy be prohibited, see Warnock Report, *supra* note 11. After this case, and partly in reaction to Americans arranging such contracts, commercial surrogacy was banned in Britain. It is now a criminal offense to broker surrogacy contracts, punishable by imprisonment. Surrogacy Arrangements Act, 1985, ch. 49. See Krautheimer, *supra* note 2, at 19. See also *Syrkowski v. Appleyard*, 122 Mich. App. 506, 333 N.W.2d 90 (1983) *rev'd* 420 Mich. 367, 362 N.W.2d 211 (1985) (the trial court and the appeals court were prepared to utilize existing laws to prevent execution of surrogacy arrangements that all parties were ready to perform, but the Michigan Supreme Court reversed).

tion of the fourteenth amendment when it does not allow them to reproduce through a surrogacy arrangement. Equal protection doctrine provides that the state may not draw arbitrary distinctions between persons who are similarly situated, and requires substantial reasons for any such distinction that interferes with persons' fundamental rights.

John and Diane might contend that it is discriminatory to prohibit surrogacy and thereby limit having children, at least children to whom they are biologically connected, to couples who can have children naturally. The argument that the state has drawn an arbitrary line between couples it will permit to have children is difficult to sustain, partly because it is not the action of the state that has made Diane infertile. In one sense, the state has one rule for all: that all can have children naturally but not for hire, and that rule is probably not vulnerable as a matter of equal protection. Even though Diane and John are hurt by that rule, it is not unreasonable for the state to distinguish between pregnancy achieved naturally and pregnancy for hire, if they are substantially different things.

A more common equal protection argument attacks antisurrogacy legislation because it treats even couples who are infertile differently from each other. The state allows couples in which the man is unable to reproduce to have the biological child of one of them through artificial insemination. Since that couple can arrange to have a baby to whom the mother is biologically connected, it violates equal protection, the argument runs, for the state to prohibit an arrangement whereby a couple could have the father's biological child when it is the wife who is infertile.

The problem with this argument too is that what one kind of infertile couple must do to obtain the child they desire is significantly different from what the other type of couple must do. The state would not be preventing the couple from arranging to have the child of the father because of any purpose of interfering with their ability to have a child, but rather because of the burden such an arrangement places upon the surrogate mother. It is reasonable for the state to differentiate between surrogacy and artificial insemination in this respect because so much more is required of the surrogate mother than is required of the se-

men donor.<sup>37</sup> While the surrogate mother must be inseminated, artificially or naturally, become pregnant, bear the child for nine months and undergo labor and delivery, all the semen donor must do is masturbate and ejaculate into a clean container and hand over his sperm. The sperm donor will typically not even know whether his donation resulted in offspring or not. The differing burdens on the sperm donor and the surrogate mother are reflected also in the amount of consideration usually paid: While the surrogate mother's recompense is generally in the thousands of dollars, the semen donor would receive \$50 or \$100 for one specimen.<sup>38</sup>

This difference gives the state adequate reason to distinguish between artificial insemination and surrogacy, even though the resulting rule harms couples where the wife is infertile much more than couples where the husband is. A judge need not agree with a distinction to find it constitutionally valid. The judge need only believe that reasonable persons could make the judgment. One may reasonably believe that as a matter of policy the correct course is to make surrogacy arrangements available to couples who need them, but it is extremely difficult to sustain an argument that the opposite course would violate the constitutional guarantee of equal protection of the laws.<sup>39</sup>

One can make what is essentially the same argument through use of the due process clause. The due process clause, as it has been interpreted during the past thirty years,<sup>40</sup> protects

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37. A closer comparison would be between a male sperm donor and a female egg-donor, although that comparison is also tenuous, as the process of donating an egg is much more intrusive than the giving of sperm. In egg donation, an oocyte is removed through a surgical technique in which the immature eggs are drawn out through a hollow needle inserted into the patient's abdomen. See Saltarelli, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 SYRACUSE L. REV. 1021, 1026-27 (1985).

38. It is true that there are some analogies between sperm donation and surrogate motherhood, and that some of the same arguments can be made against them. Some would argue, for example, that payment for sperm also constitutes commercialization of procreation. One author recounts the story of a sperm donor who, learning that conception was accomplished by his sperm, refused to take a fee because to do so would make him feel like a prostitute. W. FINEGOLD, *ARTIFICIAL INSEMINATION* 34 (1976).

39. The trial judge in *Baby "M"* did, however, rest in part on the equal protection argument. *In re Baby "M"*, 217 N.J. Super. at 387-89, 525 A.2d at 1165-66.

40. While one might question whether the due process clause is properly interpreted as conferring substantive rights, it is likely that the fourteenth amendment was intended to confer some such rights through its privileges and immunities clause. That provision

the right to procreate, recognizes it as a right of considerable importance, and would not allow the state to burden it unreasonably. The due process argument does not have to rely upon the weak analogies to artificial insemination, or to couples who have children naturally, that the equal protection argument requires, and hence the argument is a preferable one. While escaping those analogies, the due process argument incorporates the same points that the right to procreate is very important to John and Diane and that it is important that they have available this means of exercising it. John and Diane must also maintain in order to succeed, that the state does not have good reasons for prohibiting surrogacy contracts, which are entered into between willing parties.

The chief difficulty that the couple will have in prevailing with the due process argument is in showing that the state's reasons for prohibiting surrogacy are so insubstantial in comparison to the importance of the right to John and Diane and others like them, that the state should not be permitted to prohibit the arrangement, even if its legislature so desires. In any event, the factors to be weighed in a due process analysis are the same as when a policy choice is being made in the first instance. The ultimate questions are: whether the arrangement does real harm; whether it is the kind of harm the state should or is entitled to protect against; and whether the harm outweighs the needs of persons like John and Diane.

The same questions then control, whether we think of the issue in constitutional terms or simply ask what a judge should decide in the absence of legislative guidance, or what a legislature should decide concerning the legality of the contracts. The main differences between the constitutional framework and the

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of the fourteenth amendment was rendered meaningless however when the Supreme Court, which was hostile to the new amendment, first construed that provision in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); the subsequent interpretation of the due process clause, and later the equal protection clause, to perform the function originally intended for the privileges and immunities clause may be justified on the basis that it respects the original understanding of the amendment, if not of the particular clause.

In any event, the ninth amendment to the Constitution might be deemed to protect the right to procreate. It is likely that having children is a right that the Framers considered important and basic and one that they supposed would not be taken from the people by government.

others are: (1) if the courts decide that due process protects John's, or John and Diane's, right to enter into this kind of contract, the courts' view will prevail no matter what the state legislature does—even if it enacts an explicit statute to the contrary; and (2) accordingly, the benefits-harms balance must be much clearer to sustain the ruling if it is to be based on the Constitution than if it is to be decided simply as a matter of policy. A judge who thought it was a close question whether the harms of surrogacy arrangements outweigh the needs for and benefits of such arrangements, might find as a matter of common law, or interpretation of existing legislative provisions, that such arrangements were permissible, but she or he would not find that a clear legislative declaration prohibiting such arrangements was unconstitutional. The judge would need much greater certainty concerning the unreasonableness of the burden on persons like John and Diane in order to rest the decision on constitutional grounds.

At any rate, whether we are looking at reasonableness under the due process clause or what a lawmaking body should opt for as a matter of policy, it is necessary to inquire whether there are other elements as well that should be weighed in the harms-benefits balance. Besides the interests of the parties to the contract, the interests of the child might seem very important. In fact those interests would be dominant if they were coherent and ascertainable. In a sense, the agreements are certainly in the child's interest because it is the agreement that produces the child; in a sense, it gives the particular child the opportunity for life. But this interest is not really relevant because when the contract is entered, the child has yet to be conceived. From that perspective, there is no child's interest to protect.

Moreover, from the perspective of the child who has been born, whether it would be best to remain with the surrogate mother varies with the facts and circumstances of the case. The rule best serving the child's interest is a rule that discourages custody contests; probably the way best to achieve this objective is by adopting a clear rule stating a strong presumption for one parent or the other. Beyond the desirability of avoiding litigation, it would be hard to generalize which parents would best suit the child.

Besides the interests of the parties which we have discussed,

societal reasons could play a role. But we in this country, now at least, are not suffering from inadequate population; as a society we do not need more babies. There are no affirmative reasons for the state to promote surrogacy arrangements other than to fulfill the wishes of persons like John and Diane. Fulfilling their wishes could be a sufficient reason, of course, depending upon the strength of their interest and upon the balance with the other interests at issue.

One possible argument against allowing surrogate motherhood is that the availability of that arrangement would cut back on the adoption of existing babies. Perhaps if John and Diane and others like them were unable to employ a surrogate to have a child for them, they would go about getting a child in some other way—and in a way that would be much more beneficial to society. They might decide to adopt a child already in existence, or a child who will be born in any event, and who is in need of a home. Fulfilling their parental urges in that way, they would perform an important service to the child and to society.

It is true that adoption is not as easy today as it has been in the past and that there is a definite shortage of healthy newborns available for adoption in this country, especially healthy white newborns.<sup>41</sup> But there are some babies needing to be adopted, born in this country as well as elsewhere.<sup>42</sup> Moreover, there is available in this country a supply of children with special needs<sup>43</sup> who could benefit enormously from being taken

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41. See ADOPTION FACTBOOK, *supra* note 4, at 102.

42. At times it has appeared that there were not available in this country newborn infants of any race, but recent reports suggest that in some cities black newborns have been abandoned by their natural parents and are languishing unclaimed without the prospect of adoptive parents. Moreover, there are babies available in other countries, and many couples or would-be single parents who have not been successful with adoption agencies here have managed to obtain a newborn from abroad. ADOPTION FACTBOOK, *supra* note 4, at 28 (intercountry adoption is rapidly increasing, and in 1984 over eight thousand foreign born children were placed in this country). Ellis, *The Law and Procedure of International Adoption: An Overview*, 7 SUFFOLK TRANSNAT'L L.J. 361 (1983) (since 1976, an average of 5000 children per year have entered the United States as immigrant orphans. *Id.* at 361 n.1). See Bolick, *The Adoption Option*, THE BOSTON MAGAZINE, Oct. 1986, at 152.

43. Based on statistics from 1982, healthy infants comprise about one-third of all unrelated adoptions, and that figure includes some adoptions of healthy infants from other countries. ADOPTION FACTBOOK, *supra* note 4, at 102. The National Committee on Adoption then qualifies their statistics by calling them a "minimum" or "conservative" estimate. *Id.* at 103.

into a family, and who have been adopted in greater numbers as the supply of "normal" babies has dwindled. Of course, many couples who would like to have a child would not be prepared as an alternative to take on a special needs child. Nonetheless, society might make a judgment that *some* such couples would make that choice, thereby benefitting both children in need and society. Accordingly, a state might decide that it is best for couples like John and Diane not to be permitted to create another baby by contract, when at least a few of those couples otherwise might decide to take on a child in need.<sup>44</sup>

John and Diane would argue that the chance to have a "normal" child, and to have a child as biologically connected to them as possible, is not afforded by the possibility of special needs adoption, or even adoption of healthy newborns. And while it may be more socially beneficial to adopt an existing child than to conceive a new one, the same is true for fertile couples, who nonetheless can reproduce without any restriction by the state.

And so we come back to the same arguments and balancing judgments that we have seen already in the policy debate and the constitutional debate. The state, if it wants to uphold the prohibition, must contend that pregnancy for hire is sufficiently distinct from other pregnancy that it need not be treated the same.<sup>45</sup> John and Diane, in support of surrogacy arrangements,

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44. There is also concern that allowing surrogacy would result in the widespread selling of unwanted babies that would otherwise be available for adoption. See N.Y. Times, Feb. 24, 1987, at B2, col. 1 (quoting National Committee for Adoption).

45. Perhaps we are temporally in the midst of a shift; we may soon move to a time when it does not seem valid to distinguish between pregnancy by natural parents and pregnancy for hire and the litigation to determine whether or not surrogacy agreements should be respected may be an important step in this development. That norms are changing is apparent. A few years ago the debatable issue instead of surrogacy would have been whether it is qualitatively different for a state to allow and encourage child-birth for persons who are married but not for others, or whether equal protection requires that the married and unmarried be treated alike for these purposes. By now it is fairly well established that unwed parenthood is constitutionally protected against discrimination, under the equal protection and due process clauses. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis in original). *Cord v. Gibb*, 219 Va. 1019, 254 S.E. 2d 711 (1979); *Andrews v. Drew Municipal Separate School Dist.*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976). *But see Hollenbaugh v. Carnegie Free Library*, 578 F.2d 1374 (3d Cir. 1978), *cert. denied*, (with dissenting opinions), 439 U.S. 1052 (1978).

must argue that the state should not deprive them of the way they can most closely approximate what others do without any limit or regulation: having a child or children with their own biology. In order for the state to prohibit this, there should have to be some real and discernible evil, which has not been demonstrated here.

A final factor that could play a part in the benefits-harms balance concerns the effects of prohibition. Any legislation prohibiting surrogacy would not altogether stamp out the practice. If a state wanted to regulate surrogacy—for example by licensing the mothers and screening them to determine such things as their motivation and psychological stability or to predict whether they would be willing ultimately to surrender the child or by regulating the amount of compensation<sup>46</sup>—then it would seem unwise to prohibit surrogacy and thereby drive it underground. On the other hand, it is difficult to think of state regulations that would sufficiently cut back on the difficulties of the unregulated system. If there were not particular regulations that it seemed useful and important to enforce,<sup>47</sup> then it might be worth criminalizing (or otherwise prohibiting) surrogacy, since it is clear that a prohibition of surrogacy would reduce its incidence, it would keep at least some arrangements from occurring.<sup>48</sup> The current situation of persons coming to see surrogacy

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46. But which is preferable—high compensation or low compensation?

Occasionally it is suggested that the state should regulate surrogacy contracts by prohibiting any payment at all for them (other than out-of-pocket costs like medical expenses). See *supra* note 16. I agree that even if surrogacy-for-money were illegal it might seem proper to allow surrogacy by volunteers. Making the contract they enter enforceable is another question, however. See *supra* note 26.

Most proponents of surrogacy would view surrogacy-for-hire as what they are fighting for and would consider a prohibition of payment as substantially equivalent to a prohibition of surrogacy.

47. Some of the factors for screening discussed above, in particular regulations concerning the health of the mother and predictions of her willingness to go through with the arrangement, occur even in the absence of state regulation, since it is in the interest of the contracting couple to satisfy themselves in these regards to the greatest extent possible.

One kind of regulation that the state might enforce, and that adopting couples might not, is rules concerning the permissible age for surrogate motherhood. Even if a state were to allow surrogacy, it might prohibit teenage women from becoming surrogates—or even women under the age of 25, for example.

48. The degree to which surrogacy would be reduced would vary with the stringency of any sanctions and with the extent of efforts to detect the existence of the arrangements that persisted. But no matter how vigorous the enforcement, it seems likely that

as the easy solution to the infertility-adoption problem, by contrast, encourages more and more persons to try this solution rather than other possibilities. A state could reasonably find that even though it could not eradicate surrogacy arrangements, cutting back on them was a sufficient reason to make the contracts illegal.

So far we have been discussing whether or not states should make illegal surrogate motherhood contracts for compensation, either under existing legislation prohibiting babyselling, or under new legislation aimed at surrogacy. To criminalize surrogacy contracts, or otherwise make them illegal, is a solution to the problem at one end of the spectrum of possibilities. A jurisdiction should adopt this solution if it believed it clear that the contracts were more harmful than beneficial and if it was not concerned with driving underground those surrogate arrangements that would continue to be made, because it had no particular regulation it wanted to impose upon the contracts anyway.

### C. *Are Surrogacy Contracts Enforceable?*

At the other end of the spectrum, a legislature or judge might believe that surrogacy contracts should be enforceable like any other contract. This is the view of surrogacy contracts that apparently is most prevalent among laypersons in our country today,<sup>49</sup> and in our hypothetical, that John and Diane would prefer and that Mary must argue against. But there is a middle position—that the contracts are unenforceable, at least by specific performance.

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some surrogacy arrangements would remain.

Another effect of prohibiting surrogacy would likely be to increase the price of the surrogacy arrangements that would remain.

49. See *Newsweek Poll*, *supra* note 3. The Poll asked respondents "who should get custody of Baby M—the natural mother or the couple who paid her to have the baby?" Of all women polled: 61% thought that custody should be granted to the couple who paid to have the baby; 22% thought that custody should be granted to the natural mother; and 17% did not know who should get custody. Of all men polled: 58% thought that custody should be granted to the couple who paid to have the baby; 28% thought that custody should be granted to the natural mother; and 14% did not know who should get custody.

Similarly, a survey of television viewers produced a 70% response that "a contract is a contract" and that the adopting couple should receive custody rather than a surrogate mother who changed her mind at birth. *Miller's Court* (channel 5, Boston, television broadcast, Feb. 22, 1978).

It is important to distinguish between the possibility of criminalizing or otherwise prohibiting surrogate motherhood contracts and another possible solution of simply not enforcing them over the surrogate mother's objection. Under this middle position, if parties enter into a surrogacy arrangement and all parties remain willing to go through with the arrangement, then there is no legal barrier to its performance; the state will not interfere with this arrangement between willing parties. But if the mother changes her mind about parting with her child, the state will not put its force behind the agreement, and her baby will not be removed from her because of a document that she signed before the baby was conceived.<sup>50</sup>

This paper takes the position that if surrogacy arrangements are not to be illegal as a matter of public policy, then rather than treating surrogacy contracts just like any other contract, the law should make the arrangement performable or not at the option of the mother. The justifications for such a position bear some similarity to the arguments for illegality, but in this context they are even stronger. The argument for unenforceability relies upon the same special role of procreation and other things in a sphere of personal and fundamental rights. There are some things so visceral and personal that one should not judge a person's positions on them, or change of position, by the same yardstick of rational agreement as bargains made in the workplace, and having a baby is one of those things.<sup>51</sup>

Our laws concerning prostitution and childselling show we consider sex and the rearing of one's children also to be in the same realm where we as a society would like to maintain a line between the commercial and the personal: even if a state decided to decriminalize prostitution, we would not expect it to enforce contracts to engage in prostitution when the prostitute had changed her mind.<sup>52</sup> Nor would it enforce contracts to sell babies over the objections of the natural parents.<sup>53</sup>

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50. In our hypothetical this position would be favorable to Mary but not to John and Diane.

51. See O'Brien, *supra* note 4, at 150 ("A court will decline. . .to direct specific performance when an order to perform—to deliver over the child to the contracting couple—would introduce compulsion into close personal relationships.").

52. This example, but not the childselling one, is explainable under the standard contract doctrine that personal service contracts are unenforceable. See *supra* note 14.

53. Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (courts should refuse to enforce pri-

Indeed even contracts to marry are not specifically enforceable.<sup>54</sup> A promise to marry may be as certain and explicit as a promise to be a surrogate; there may exist at least as great expectations and disappointment if one of the parties has a change of mind. Yet it seems unimaginable today for the law to award specific performance, largely because this is an area society wishes to maintain as a personal one.<sup>55</sup> Similarly it seems unimaginable that the law would enforce a contract to undergo an abortion, an area in which the Constitution gives the mother a right to choose;<sup>56</sup> instead the right would be held to be inalien-

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vately negotiated racially restrictive covenants, leaving such covenants to stand when all parties to a transaction agree to them but leaving them unenforceable against any party who disagrees). By analogy, even if a jurisdiction does not decide to make surrogacy arrangements illegal in order to enforce society's sentiments on the commercialization of baby producing, that does not mean that it has to or should enforce surrogacy contracts.

54. At times actions for breach of promise to marry have been enforceable, first as a tort and then as a contract, but they were only enforceable by actions for damages and not by specific performance. Specific performance was not available, even though the breach of promise action was seen as vindicating an important social policy, and not simply the private interests of the parties. *See generally* S. GREEN & J.V. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS §§ 2.02-.03 (1984) [hereinafter GREEN & LONG] in which the authors state:

A basic argument in support of the action is related to society's interest in the preservation of marriage, that '[t]he law is justified in enforcing performance of the contract because on its faithful performance the interest of society depends more than upon the faithful performance of any other type of contract.'

*Id.* (citation omitted). It is difficult to sustain any similar argument concerning the preservation of the right to hire a surrogate.

55. Some states today apparently retain actions for breach of promise to marry, but they are never specifically enforceable. Indeed even damage actions are rare in those jurisdictions that still seemingly allow them. By the 1930s, most states had abolished or sharply limited breach of promise actions, but Illinois still retains a statute allowing it, ILL. ANN. STAT. ch. 40, §§ 1801-1810 (Smith-Hurd 1980) (limiting damages to actual damages and eliminating recompense for mental or emotional distress), and at least seven states (Georgia, Hawaii, Kansas, Nebraska, North Carolina, Texas, and Washington) retain a common law action for breach of the promise to marry. *See* GREEN & LONG, *supra* note 51, at § 2.03 nn.29-39. Therefore, "[a]lthough the breach of promise action is an ancient one, not frequently filed today and probably overlooked, the theory that every wrong deserves a remedy and the ingenuity of lawyers in fashioning new and recycled causes of action and defenses" explains the fact that, especially in the cohabitation context, the breach of the promise to marry action has not completely disappeared. *Id.* at § 2.03.

56. *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52 (1976) (holding unconstitutional a state's requirement that a woman can obtain an abortion only with the consent of her spouse). If a woman can waive her right to choose about abortion in a contract, then why doesn't her marriage contract with her husband constitute an agreement not to abort their fetus without his consent, at least when a state by statute so provides? Even an explicit antenuptial contract in which the wife-to-be agrees to share the abortion deci-

able,<sup>57</sup> and she could not give up the right to make her own decision.<sup>58</sup>

This is not to say that the state can, or should strive to, maintain some absolute line between the personal and the commercial. One can marry for money. Or a couple may decide not to have an additional child because they cannot afford it. But the line between natural pregnancy and pregnancy for hire is sufficiently distinct and sufficiently reasonable for a state to be permitted to use it if it makes a judgment that it wants to use it in attempting to delineate a personal sphere that is separate from the commercial one.

Even in areas other than the personal, it is not foreign to contract law for contracts to be enforceable or not at the option of one of the parties. The Restatement of Contracts recognizes voidable contracts,<sup>59</sup> contracts that are unenforceable as against public policy,<sup>60</sup> and option contracts<sup>61</sup> as valid contracts in which one of the parties has the right to decide whether to proceed.<sup>62</sup> Unilateral contracts in traditional contract law may or may not be performed at the option of one party.<sup>63</sup> The law's

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sion with her husband would probably not be enforced against her wishes.

57. See Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987); Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986 n.101 (1982) (noting the distinction between "inalienability rules" and "property rules").

58. Sometimes surrogacy contracts do contain a provision either committing a woman not to obtain an abortion, or committing her to obtain an abortion in certain circumstances. In the *Baby "M"* case, for example, the contract provided that Mary Beth Whitehead would undergo amniocentesis, and if the results indicated genetic abnormalities, an abortion would be performed if the natural father requested it. *In re Baby "M"*, 217 N.J. Super. at 345, 525 A.2d at 1143.

It does not seem likely that a court would enforce any such restriction upon the woman's right to choose, and the trial court in *Baby "M"* held the provision unenforceable. It would be most uncomfortable to allow the father in a surrogacy situation to obtain greater rights by contract and by the payment of money than a husband has, or would be permitted to acquire by agreement with his wife, even if he is prepared to raise the child himself.

59. RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

60. *Id.* at §§ 8, 178-79.

61. *Id.* at §§ 25, 45, 87.

62. *Id.* at § 78, 79.

63. CORBIN, *supra* note 14, §§ 21, 152, 157. In traditional nomenclature, a contract is unilateral as opposed to bilateral if a promise is given in exchange for an actual performance by the other party instead of in exchange for a promise. Classic examples of unilateral contracts, which the second Restatement calls acceptable only by performance, RESTATEMENT (SECOND) CONTRACTS §§ 30, 32, are "If you walk across Brooklyn Bridge, I'll pay you \$30," or "If you paint my house, I'll pay you \$1000."

recognition of one party's power to decide whether or not to perform rests sometimes on the parties' intent to create such an option, as for example in the case of unilateral contracts where an offer is acceptable only by performance and at the option of the offeree; accordingly they are not directly helpful to the surrogacy example, where both parties promised to perform and seemingly expected those promises to be mutually binding.<sup>64</sup>

With respect to voidable contracts and contracts that are unenforceable as against public policy, however, the option to avoid the agreement is imposed on grounds of policy independent of the agreement. Well known categories of voidable contracts are those induced by fraud, mistake, or duress, or those where one party is an infant. But even apart from such categories, a contract can be unenforceable or voidable on grounds of public policy that the court derives either from relevant legislation or from "the need to protect some aspect of the public welfare."<sup>65</sup>

Sometimes a case is made that surrogacy contracts should be voidable on grounds of mistake (because in the particular case the mother did not understand the extent of the attachment she would form to the child she carried) or duress (because of the particular mother's modest financial circumstances, for example), but a better approach would be to consider surrogacy contracts in general voidable for reasons of public policy such as those discussed above.<sup>66</sup> Under this analysis public policy considerations would render all surrogacy contracts performable or not at the option of the mother. Only if the surrogate did perform, and turned the child over to the father, would the contract terms be given effect.

In addition to a characterization of the contract that would

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64. If the approach I suggest were followed, however, and surrogacy contracts were made voidable, parties would come to know that surrogacy contracts were not mutually enforceable, and the option would more frequently reflect the contracting parties' intent. In those circumstances, the unilateral contract characterization, or the characterization as an offer intended to be acceptable only by performance, would become more appropriate. See also *infra* note 90.

65. RESTATEMENT (SECOND) OF CONTRACTS § 179 (1981). One example the Restatement gives is "judicial policies against . . . impairment of family relations . . ." *Id.* subsection (b).

66. See *supra* text accompanying notes 27-36, 41-44 and note 26 and accompanying text.

allow it to be performed or not at the option of one party, doctrines associated with the remedy of specific performance could have the same effect. Specific performance is discretionary with the court<sup>67</sup> and it may not be ordered when it seems unfair, creates unreasonable hardship, or when the bargain reflects an inadequate exchange,<sup>68</sup> or when it is in violation of public policy.<sup>69</sup>

In addition to law in arguably analogous areas where contracts are or would be considered unenforceable, or unenforceable by specific performance, the law of adoption could quite directly support an argument that the mother cannot commit herself to part with her baby before the baby is born (let alone before the baby is conceived!). Adoption differs from surrogacy arrangements in two obvious respects: (1) the mother has already become pregnant (usually unintentionally) by the time any issue of adoption presents itself; and (2) the baby as a rule does not have any biological connection to the father of the adopting couple.<sup>70</sup>

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67. RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981).

68. *Id.* at § 364.

69. *Id.* at § 365.

70. One suggestion occasionally made for regulating surrogate motherhood contracts relies on removing the biological connection; it would allow sperm banks to perform "surrogacy arrangements" in which couples could arrange for others to have a child for them but one that was not biologically related to them. This alteration of our current surrogacy scheme would greatly lessen legal complications that currently accompany surrogacy; it would be much clearer that the woman bearing the child could change her mind.

Such a change would, however, also remove one of the distinctive features of the typical surrogacy arrangement that makes it most appealing to most of the couples who now enter into it. Just as the father can argue that surrogacy arrangements should not be prohibited because of their importance to him (and his wife) in allowing them to come as close as they can to having a child in the way that fertile couples do, he could also argue that it hurts his (and his wife's) interests to remove the possibility of having a child of his own biology. Indeed it is having a child with his own biology that makes the surrogacy arrangement more attractive to them than any other ways that may be available of obtaining a newborn child.

One would suspect that couples desiring to utilize surrogate motherhood arrangements would far prefer a rule that the arrangement would fall through if the mother changed her mind before or at birth, than a rule that the husband's sperm could not be used to inseminate her. In the first instance, the couple would protect itself as best it could by attempting to select a mother (either personally or through a lawyer or agency) who seemed happy with the arrangement and unlikely to change her mind. In the latter situation, there would be no way that the couple could legally use the arrangement to obtain a child who shared the biology of the father.

## SURROGACY AND LAWS GOVERNING ADOPTION

In an adoption situation, states generally in this country do not bind a mother to give up her child because of a consent to adoption or a contract with prospective adoptive parents that was executed before the child was born.<sup>71</sup> Different states pursue this policy of reserving the natural mother's rights in different ways: some have statutes expressly prohibiting a parent from executing enforceable prebirth consent to adoption;<sup>72</sup> others have accomplished the same result by judicial decision.<sup>73</sup> But the effect is the same, and if this policy were carried over to surrogacy arrangements, it would effectively support the surrogate mother's right to decide whether or not to keep her child after the child is born.

Surrogacy arrangements are sufficiently similar to other adoption arrangements that the same rule should apply. In the adoption context, allowing the mother to change her mind can result in great disappointment for the would-be adopters. Of course, if no couple has yet been selected as the parents who would adopt, there is no problem of shattered expectations. Increasingly in this country, however, adoption is not being arranged through agencies, where even those who eventually succeed in obtaining a healthy newborn often have waited for four

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71. ADOPTION FACTBOOK, *supra* note 4, at 76-85. That source lists the State of Washington as an exception. *Id.* at 85.

72. See, e.g., ARIZ. REV. STAT. ANN. §§ 8-107 (1986-87) (A consent given before seventy-two hours after the birth of the child is invalid.); FLA. STAT. ANN. § 63.082 (West 1985) (The consent shall be executed only after the birth of the child.); KY. REV. STAT. ANN. § 199.500 (Michie/Bobbs-Merrill 1986) (No consent for adoption shall be held valid if given prior to the fifth day after the birth of the child.); MASS. ANN. LAWS. ch. 210, § 2 (West 1986) (Written consent shall be executed no sooner than the fourth calendar day after the date of birth of the child to be adopted.); NEV. REV. STAT. § 127.070 (1986) (All releases for and consents to adoption executed by the mother before the birth of a child are invalid.); VA. CODE § 63.1-225 (1986) (The consent of a parent for the adoption of his or her child placed directly by the parent shall not be valid unless the child is at least ten days old at the time the parental consent is signed).

73. Some, for example, construe the act of adoption necessarily to imply the existence of a child to adopt. See, e.g., *Anonymous v. Anonymous*, 439 N.Y.S.2d 255, 260 (1981); *In re Adoption of R.A.B.*, 426 So.2d 1203, 1205 (Fla. App. 1983); *Korbin v. Ginsberg*, 232 So. 2d 417, 418 (Fla. 1970) ("[Adoption] is a personal relationship created between one capable of adopting and one capable of being adopted, and it necessarily requires that both the adopting parent and the adopted child be living at the time such relationship comes into being by judicial decree."); *In re Adoption of Kreuger*, 448 P.2d 82, 86 (Ariz. 1969).

or five years.<sup>74</sup> Instead, persons increasingly are turning to private placements.<sup>75</sup>

Private placements can occur a number of different ways but a common pattern is for the couple who wants to adopt to meet the birth mother prior to the birth of the child. A private adoption can be initiated by either the birth mother or the adopting couple themselves—through advertising, for example—or either of the parties may turn to a private adoption service which specializes in bringing together pregnant women unable to keep their baby and couples who want to adopt. Either way, the birth mother herself often selects the couple who will adopt—based upon photographs and write-ups or upon personal interviews. (Indeed, one of the attractions of the arrangement for the mother may be that she feels less guilt at abandoning her offspring when she participates in selecting a loving home.) And in a great many cases, the adopting couple get to know the woman who is to bear their child, eagerly await her due date, and even participate in the delivery as her labor coach.

Like John and Diane, the couples who arrange for private adoption of a baby who has not yet been born have usually tried

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74. Adoption and Foster Care, 1975: *Hearings Before the Subcomm. on Children & Youth of the Senate Comm. on Labor & Public Welfare*, 94th Cong., 1st Sess. 6 (1975) (three to seven year waiting period); *Frontline*, *supra* note 4 (three to seven years). Some commentators suggest that the long waiting period results from adoption agencies charging below market price for their services. See Landes & Posner, *The Economics of the Baby Shortage*, 7 J. L. STUD. 323, 326 (1978).

75. Private placements or independent adoptions are illegal in many jurisdictions, for example, Massachusetts, Connecticut, Delaware, Michigan, Minnesota, Rhode Island, Virginia, and others. See ADOPTION FACTBOOK, *supra* note 4, at 76-85. Other jurisdictions disfavor private placements. See *infra* note 87. Even so, private placements comprise a substantial percentage of all adoptions nationally. In 1982, of the 50,720 unrelated adoptions that took place, 19,428 were arranged by public agencies, 14,549 were arranged by private agencies, and 16,743 were arranged by individuals. ADOPTION FACTBOOK, *supra* note 4, at 102. Private for-profit agencies are also illegal in California, Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Montana, New Hampshire, New Jersey, New York, Rhode Island, Texas, Utah and others. *Id.* at 76-85.

In California, eighty per cent of all adoptions are private adoptions. *Frontline*, *supra* note 4 (discussing private adoptions in California and focusing particularly on one private adoption agency run by Mark and Bonnie Gradstein).

Where private placement is prohibited, it still is often allowed between relatives. For example, Connecticut, Delaware, Georgia, Massachusetts, Michigan and Minnesota all prohibit private placement by natural parents, except in the case of family placement within the third degree of kinship. ADOPTION FACTBOOK, *supra* note 4, at 76-85. See also MEEZAN, KATZ & RUSSO, *supra* note 4, at 165-66.

for some time to have a child of their own, and then have tried to adopt by other means. After they are selected as the adopters-to-be, they become very emotionally invested in the offspring they are expecting. If the birth mother changes her mind and does not give them the baby after all, they experience severe disappointment and grief.

Sometimes the private adopters, like those in a surrogacy situation, have also invested money because of the promise of a child. While it is forbidden to pay for a child, it is generally permissible to underwrite the birth mother's expenses, and in some jurisdictions the living expenses during pregnancy are includible as well as strictly medical expenses; if so, a substantial sum may be involved.<sup>76</sup>

Yet all recognize the right of the birth mother to undergo a change of heart. The expectant adopters very much hope it will not occur, and in the vast majority of cases the birth mother carries through her plan to place her baby for adoption, just as the vast majority of surrogate mothers give up their child without resisting their agreement. But if the mother does change her mind, all the would-be adoptive couple can do is either give up on becoming parents or try again.

It is true that the sensible and self-protective way for the expectant adopters to behave throughout the pregnancy is to tell

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76. The estimated cost of a typical adoption through this method is \$25,000. Pierce, *supra* note 4. As noted above, some statutes provide for the birth mother's living and medical expenses. See, e.g., FLA. STAT. ANN. § 63.212(1)(d) (West 1985) which states:

If a child is being adopted by a relative within the third degree or by a stepparent, or is being adopted through the Department of Health and Rehabilitative Services, an agency, or an intermediary, nothing herein shall be construed as prohibiting the person who is contemplating adopting the child from paying the actual prenatal care and living expenses of the mother of the child to be adopted, nor from paying the actual living and medical expenses of such mother for a reasonable time, not to exceed 30 days, after the birth of the child.

Some states allow payment only for the birth mother's medical expenses and hospital charges. See Taylor, *Conceiving for Cash; Is it Legal?: A survey of the laws applicable to surrogate motherhood*, 4 N.Y.L.S. HUM. RTS. ANN. 413, 425 n.50 (1987). For a case holding that adoptive parents may *not* pay living expenses for 13 weeks before and 5 weeks after birth, which totalled almost \$8,000, see *In re Adoption of Anonymous*, 501 N.Y.S.2d 240 (1986)(construing N.Y. DOM. REL. LAW § 115(7)).

If, after giving birth, the birth mother changes her mind about turning over the child, she is liable to repay any money that has been paid to her, *Gordon v. Cutler*, 471 A.2d 449 (Pa. Super. 1983). Situations will undoubtedly arise, however, where, the mother's financial situation it makes it unrealistic to expect that the repayment will ever be made.

themselves that there is a chance that the adoption will not work out and that they should not be too confident. In fact they, like other couples, could lose the child through a mishap in pregnancy or at birth, as well as by the mother changing her mind about keeping the child.<sup>77</sup> But all this, of course, is easier said than done. The couple are disappointed in very much the same way that John and Diane are in our hypothetical. And the position of the mother is very similar in one situation and the other. Each woman may have had her medical expenses paid. Each made an agreement, oral or written, to give up her child to particular parties at birth. Each one, when faced with the reality of a pregnancy or a baby, has found herself unable to go through with the agreement she made. Just as we recognize and respect her change of heart in the situation where she arranged for adoption after becoming pregnant, so we should respect that same change of heart when she arranged before becoming pregnant to turn the baby over to a particular family.

The parallels between the plight of the would-be adopters in the private adoption scenario and the situation of John and Diane in our hypothetical case are obvious. In both situations the adopting couple's expectations are severely disappointed. In both they are left with the unhappy alternatives of trying a similar arrangement again or giving up their dreams of having a child. The unrelated adopters know from the outset that their arrangement will fall through if the mother changes her mind, and I suggest that lawmakers<sup>78</sup> clearly place the adopters in the surrogacy situation in the same position as other adopters; they then would have the same knowledge that their arrangement was dependent upon the continued acquiescence of the mother, and they would have the same incentives to guard emotionally against the mother's change of heart as well as other possible mishaps.

Is the dilemma of the would-be adoptive couple considerably worse because the husband donated his sperm to produce this child? The decisive question is whether the differences that exist between John and Diane and the typical private adopters

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77. Despite any contractual provision to the contrary, the mother could also decide to have an abortion. See *supra* notes 56 & 58 and accompanying text.

78. These could either be legislators addressing the problem or judges interpreting existing provisions of adoption and contract law.

make it inappropriate to look to adoption law in the surrogacy context. The basic difference, of course, is that John and Diane have participated in the creation of the baby in question and that the baby is linked biologically to John as well as to the surrogate mother. The father knows that the child he will not get after all has his genes—the child is his biological son or daughter. If John does not gain custody, he will have the knowledge that there is such a child in the world that he is prevented from bringing up (just as the biological mother will if he does get custody).<sup>79</sup>

Should these differences between the would-be adopters in the surrogacy situation and the would-be adopters in a private adoption situation call for different results? While they do distinguish John from the typical would-be adoptive father, I do not believe that the differences from the ordinary private adoption situation are sufficient to sustain radically different rules concerning whether a contract is enforceable against the mother. If it is inappropriate in the private adoption context to make binding an agreement to give up one's child for adoption that is made before the child is born, then it is inappropriate in the surrogacy context to make binding an agreement to give up one's child for adoption that is made before the child is born or conceived. (This is not to say that the father's biological ties to the child are irrelevant. As I will discuss they may be relevant in other contexts—after he receives custody, for example, or after the surrogate contract is put aside and he seeks to gain custody on another basis.)

One sensible approach would allow the mother to change her mind while she was pregnant, at birth, or before she turned the baby over to the adopting couple. Once she turned over the baby, however, she would have performed her part of the bargain and the contract would be complete and binding.

A rule that the natural mother is bound once the adopting couple takes custody of the child is advantageous both to the adopting couple and to the child. It is especially after the couple has received the newborn baby and has started to care for her

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79. The situation might be psychologically easier for the father because he knows that it is not his fault that he is not his child's custodian. The biological mother who was held to her contract might feel guilt that she ever agreed to give up her child.

that they bond with her and experience her as a real daughter and not simply as an idea. While it may be sensible to ask the adopting couple to be prepared for the possibility that the adoption will fall through before they receive the child, it would be destructive to ask them not to form a parent-child bond once the baby is in their household; after all, a paramount aim of all of this law is to provide for the child as loving and stable a home as is possible, and the first year of the child's life is important to the formation of the parent-child bond.

Moreover, it is best for a baby's custody not to be changed back and forth, whether she is to live with her natural parent(s) or with an adoptive family. It is in the best interests of the child to have a clear rule as to who her proper custodian is and to have a rule that prevents her from being transferred back and forth between parties who disagree concerning their parental rights.<sup>80</sup> If the mother had a right to change her mind concerning whether she wanted to be the parent after the adopting couple had taken custody of the baby, or if the rule for who was the appropriate custodian was less clear than a rule turning on whether the child had yet been surrendered for adoption, the resultant conflicts could result in frequent transferrals back and forth as a custody dispute wended its way through the state's appellate system, a process that often takes a period of years. The instability and uncertainty that would result would be destructive to the child as well as difficult for all of the parents concerned.

Accordingly, there is a need for a clear cut-off to the natural mother's right to claim her child, and there is much to be said for choosing as the line the moment that the mother surrenders the child to the physical custody of the adopting couple. Different rules of course would apply to involuntary surrenders—when, for example, a mother hands over her child under court order. (This rule does not therefore directly decide the celebrated *Baby "M"* case.) A clear definition of the natural mother's rights would prevent some involuntary surrenders from occurring.

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80. I am referring to situations where the child is shifted back and forth because custody is not shared and no custody arrangement is agreed upon, and not to situations of joint custody, where parents have agreed or courts have decreed that the parents should share custody.

If a jurisdiction was concerned that the mother have a period after birth in which to reflect upon her decision and feel comfortable about it, then it could impose a waiting period after the child's birth during which the mother cannot surrender the child for adoption; various states have such a requirement, with a waiting period ranging from 3 to 10 days.<sup>81</sup> Whether with or without a waiting period, a rule making the surrender of the child to adopting parents the determinative event would give the mother time to assess how she feels about adoption—during the pregnancy and for a short time thereafter. A clear line might help her to accept that when she parts with the baby the parting is final, and that the intelligent thing for her to do at that point is to direct her attention and energies elsewhere. Indeed many parents who are certain they want to place their child for adoption decide to make it easiest for themselves by never seeing the child after the child is born.<sup>82</sup>

The argument for this as the time for termination of the natural mother's rights to rescind the contract applies equally in the context of surrogacy and in the context where the mother has decided to let another couple adopt because she cannot raise her child. (It does not apply when the natural mother has turned her baby over to an agency but the baby has not yet been placed with a family for adoption; in that situation it makes sense for a natural mother to have much greater discretion to change her mind and herself provide a home for her baby; absent unfitness, she should be able to reclaim her baby at any time.)<sup>83</sup>

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81. See, e.g., ILL. ANN. STAT. ch. 40, § 1511 (Smith-Hurd 1980) (No consent or surrender shall be taken within the 72 hour period immediately following the birth of the child.). Other states also impose a waiting rule which establishes a time period following birth during which parental consent to adoption and/or surrender of a child is not valid: Alabama (72 hours); Massachusetts (4 days); Kentucky (5 days); Virginia (10 days). See *supra* note 72.

82. A rule that imposed a waiting period of a few days would not interfere with this choice. For a few days, the baby could stay in the hospital. If the natural mother felt confident she was going through with the adoption, she could consent for the adopters to spend time with the newborn without violating a prohibition of surrendering the child before the waiting period expired.

An *extended* waiting period before the mother is permitted to surrender the child would *not* be a wise policy. It would prevent even the mother who knows she is willing to give up her child from placing her, with the result that the child must be placed in foster care. When this solution is required, it is both expensive for the state and destructive to the child who should be permitted to start her life with her permanent family.

83. The rule turning on surrender of the child should apply when the child has been

A problem with following the time-of-surrender line for surrogacy arrangements is that it may not fit comfortably with a particular jurisdiction's policy concerning the rights of natural mothers who place their child for adoption. While there basically is no explicit law concerning the rights of a mother to change her mind in a surrogacy arrangement, every jurisdiction has had to cope repeatedly with the issue within the more common adoption situation, and each jurisdiction has a rather explicit law—be it statutory or judgemade—concerning the time at which the mother's consent to adoption becomes irrevocable. In some jurisdictions the cut off line is similar to the one I have suggested: some have the rule that once a natural mother has surrendered her child for adoption, she retains no right to revoke her consent to adoption<sup>84</sup> unless she can show that her consent was obtained by coercion, fraud, or duress.<sup>85</sup>

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turned over to the adoptive couple; the reasons for it do not apply with anywhere near equal force where the child has been turned over to the adoption agency or placed in foster care or another temporary setting and not yet placed with the couple who are to adopt. Nonetheless the law often does not distinguish between these two different situations in assessing whether the mother has a right to change her mind. Indeed in some states it is *more* difficult for a mother to revoke consent in situations where the baby is still in a temporary placement than in some situations where the baby is with her permanent family. By statute they make a parent's surrender of a child to an approved agency "valid and binding," but allow parents who have *privately* placed their child with an adoptive couple to revoke at any time prior to final judgment of adoption (months later). See, e.g., N.J. STAT. ANN. §§ 9:3-41, 9:3-46(a) (West 1987-88); A.L. & B.L. v. P.A. & M.A., No. A-2452-85T1, Slip Op. (N.J. Super. Ct. App. Div. Nov. 21, 1986). See also note 87 *infra*. In the agency context the child may still be in temporary care when the parent changes her mind, so there is less interest in preventing the natural mother from having her child. One can understand the reason for the state's rule (the agency affords more protection against overreaching in convincing the mother to give up her child than the unsupervised independent adoption situation) while still observing that it does not accord with the best interests of the child.

Surrogacy is more closely analogous to the more difficult situation where the mother revokes her consent after the child has been placed with the couple who are to adopt.

84. See, e.g., *In re Santore*, 28 Wash. App. 319, 623 P.2d 702 (1981); *In re Adoption of Trent*, 229 Kan. 224, 624 P.2d 433 (1981). See generally, 2 Am.Jur.2d, Adoption, § 45. See also Note, *Irrevocability of Consent to Surrender of a Child for Adoption: C.C.I. v. The Natural Parents*, 398 So. 2d 220 (Miss. 1981), 2 Miss. C. L. REV. 423 (1982) (biological parents were not entitled to revoke their consent to the surrender of the child to an adoption agency).

85. The issue of what constitutes coercion, fraud, or duress of course can greatly affect the meaning of this rule. Most parents surrendering their child for adoption are operating under some sort of coercive circumstances, so a broad interpretation of those terms could effectively undercut the import of the rule which, more than any other, seems to make the moment of surrender a moment of finality. In *Sims v. Sims*, 30 Ill.

In other states, however, quite a different line is drawn. At the opposite extreme, some states adhere to the rule that the natural mother has an absolute right to demand the return of her child, until entry of the final adoption decree;<sup>86</sup> jurisdictions differ as to when that decree can issue, but 6 months or a year are common periods of time. And, as a middle position, many jurisdictions place the right of the mother to regain custody after surrender but before final adoption in the discretion of the court, which will in each case decide upon the facts whether revocation of the surrender is warranted.<sup>87</sup>

While in one sense it is appealing to assimilate adoption in a surrogacy context to a state's adoption laws generally, some of the rules concerning the mother's ability to change her mind are

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App. 3d 406, 332 N.E.2d 36 (1975), for example, the court held that duress existed as a matter of law when a 16-year-old mother had consented to the adoption of her child only after her parents had said they would not fulfill their legal obligation to support her during her minority unless she surrendered the baby. In *In re Adoption of Giambrone*, 262 So.2d 566 (La. App. 1972), the parents of a 20-year-old mother refused to let her return to their home, where she had been living, with the baby. But the court held that was not duress within the meaning of the consent requirement. In *Huebert v. Marshall*, 132 Ill. App. 2d 793, 270 N.E.2d 464 (1971), a court found duress where a mother consented to give up her eight-day-old infant only after the father lost his job and told the mother he was going to leave her. *But cf. In Re Surrender of Minor Children*, 344 Mass 230, 181 N.E. 2d 836 (1962) (no principle of law requires that surrenders be held valid only if executed free from emotions, tension, and pressures caused by the situation).

86. See, e.g., *Hendricks v. Curry*, 401 S.W.2d 796 (since consent to adoption can be withdrawn at any time before an adoption decree is entered, the acts of a parent in consenting to and delivering a child for adoption are done with the reserved legal right to withdraw consent at any time before entry of an adoption.).

87. See, e.g., *Scarpetta v. Spence-Chapin Adoption Service*, 28 N.Y.2d 185, 321 N.Y.S.2d 65, 269 N.E.2d 787 (1971); *Warner v. Ward*, 401 S.W.2d 62 (Ky. 1966) (because mother was distressed when she consented to adoption, judge permits her to withdraw her consent prior to the final adoption decree).

Moreover, some jurisdictions have a different rule concerning the effect of surrender for agency adoptions and for private placements, usually making private placements less certain—more revocable—than agency adoptions. See *v. Baber*, 377 A.2d 628 (N.J. 1977). See also Louisiana (irrevocable through agency, 30 days for independent adoption); North Carolina (30 days in agency relinquishment, 3 months non-agency); Texas (public agency and some other agencies are irrevocable; otherwise 60 days); Tennessee (30 days with agency, 90 days for independent placement); Georgia (birth mother has permanent right to revoke independent placement!); ADOPTION FACTBOOK, *supra* note 4, at 76-85.

In one sense it is actually less appropriate for private placements to be revocable, in that the baby is virtually always with the adopting couple after surrender, while in the agency adoption situation the agency or a foster home may still have physical custody of the child. See *supra* note 83.

quite troublesome and seem calculated to produce extreme problems for the courts, for the child, and for the parties—particularly the adopting parents. One recent case in California, this one involving a private adoption, dramatically illustrates the problem. The Catanzero family adopted an infant at birth; they took her home from the hospital. It was a private adoption, arranged through a lawyer and “adoption counselor,” and the Catanzeros never met the birth mother. Under California law concerning private adoption, the adoption is final only when the birth mother signs the adoption papers six months after the birth. In this case at the end of the six month period the birth mother was nowhere to be found, so the final papers were not signed. It was when the child was 11 months old that the Catanzeros found themselves in court, defending their custody of their daughter, and in a 15-minute hearing losing custody to the birth mother.<sup>88</sup> The birth mother had not informed them that she wanted the child until the child was more than eight months old.

Because a rule that a natural mother can change her mind about adoption after the adoptive family has been given physical custody of the child seems as inappropriate for agency adoption or private adoption as it is for surrogacy arrangements, one might argue that the rule should be changed for all categories of adoption. One might conclude that if a court lacks power to make that change for adoption generally, the proper course is to assimilate the rules for surrogacy to those that prevail for adoption. If only the legislature can change the rule—if it is an explicit statutory rule, for example—then it should change the statute with respect to all categories of adoption at once. While there is a certain logic to that argument, a court that was con-

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88. See Frontline, *supra* note 4.

The Catanzeros did eventually win back the child. The original court had held for the mother on the ground that she “did not know what she was doing” when she gave up the child. According to California law, the mother who has not signed the final consent papers has a right to reclaim the child, unless it can be proved that she intentionally abandoned the child. Needless to say, this standard is flexible, but it does state a presumption for custody by the natural mother of the child. A couple in the position of the Catanzeros could not predict with any confidence in a case like this that they could prove intentional abandonment and that they would retain custody.

In a situation like this a judge may be very much influenced by his own impressions of which of the parties would make the better parents. *Cf. In re Baby “M”*, 217 N.J. Super. at 315, 525 A.2d at 1131.

vinced of the potential for damage in a rule leaving continuing discretion in the natural mother might latch onto the differences in surrogacy and the other adoptive situations to create a strict cut-off for surrogacy, even if it felt disabled from doing that more generally.

Although it would be stretching, a court might reason that the genetic connection of the father with the child is particularly relevant when the father and his wife take physical custody; it may possibly ease or speed the process of bonding when the child and the new parents get together. Either under some such rationale, or simply upon a preference for a rule that the natural mother's rights end when she gives up the child, the court might thereby make a different rule for surrogacy than the rule established in that jurisdiction for adoption generally.

While I have spoken of the ideal rule as one that would terminate the mother's rights when she hands physical custody over to the adoptive couple, a legislative rule that drew another clear line and that created only a very short period of uncertainty after the adopters took custody would not be objectionable. Presumably, all could live with a period of uncertainty, dependent upon the birth mother's continuing resolution, for a period of a week or less. (But if the birth mother did not affirmatively assert her right during that period, it would have to be cut off in order to avoid problems like that in *Catanzero* where the mother could not be located.) The objection is to any period for the natural mother to revoke that would result in any lengthy uncertainty after the adoptive couple have physical custody of the child.

#### SURROGACY, ADOPTION, AND VOIDABLE CONTRACTS

If surrogacy contracts are to be legal at all, the above analysis would support treating them as contracts that are voidable because of considerations of public policy. As discussed above, there are other occasions in contract law in which voidable or option contracts are recognized, and the developed case law with respect to such contracts could appropriately apply to surrogacy contracts.<sup>89</sup> Under this approach, the father in a surrogacy arrangement would be bound at least by the time the mother be-

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89. See *supra* text accompanying notes 60-69.

came pregnant, but she would not be bound until she turned over the child.<sup>90</sup>

A possible criticism of this proposal is that it seriously undercuts surrogacy arrangements while purporting to allow them. If in practice giving the mother the option to change her mind made the contracts sufficiently unattractive to couples like John and Diane that they no longer wanted to use them, then it would seem pointless to allow the contracts in this form. The critique does not, however, seem well taken. While John and Diane would doubtless prefer a fully enforceable contract, making the contract depend upon the mother's continued agreement would not seem seriously to limit the appeal of surrogacy arrangements.<sup>91</sup>

Under either a unilateral or a voidable contract approach, the surrogate "contract" in a sense amounts to a statement of intent on the part of the mother that she is willing to have a baby for the contracting couple and to give it up after it is born. There is every reason to believe that when women enter into such arrangements they do and will intend to perform; what experience there is shows that the overwhelming majority of surrogates do perform the contract without any resistance.<sup>92</sup> That does not mean that these mothers do not feel grief at parting with their offspring; they do. But they know when they enter the

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90. Traditionally unilateral contracts were not binding on either party until performance was completed, but in order to prevent hardship to the offeree who commenced performance, the rule was changed making them enforceable by the performing party and irrevocable by the offeror "as soon as the offeree has started to perform the act." L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 37 (2d ed. 1965). The RESTATEMENT OF CONTRACTS abandons the "unilateral contract" terminology but also provides that the offeror would be bound when performance commences. See RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981).

The "voidable contract" characterization seems more appropriate for surrogacy, however, since the option to avoid is imposed for reasons of policy and not as a reflection of the parties' intent. Under that characterization, the offeror (but not the offeree) would probably be bound from the signing of the contract. The contractor who changed his mind about giving his semen would, however, benefit from the arguments against enforcing contracts in a very personal realm that were discussed as arguments for the surrogate who wishes to withdraw. See *supra* note 14 and text accompanying notes 35, 51-58. Moreover, the unilateral contract characterization or the option contract characterization could soon come to be appropriate for surrogacy. See *supra* notes 63 & 64.

91. This would be particularly true if the jurisdiction had a clear rule that the father would not be liable for support. See *infra* notes 103-105 and accompanying text.

92. See *supra* note 2.

arrangement that giving up the baby is what is expected of them; they generally do not feel they have the means to take care of the baby themselves; and most of them, accordingly, are satisfied that the course they want when the child is born is to turn the child over to the couple for whom they bore her. If current experience is any guide, therefore, the rule that the surrogate has the right to change her mind will not produce a change of mind in many cases; but when it occurs, the legal rights—at least the rights under the contract<sup>93</sup>—will be clear.

Will this situation of surrogate mothers volunteering in good faith to perform and being generally prepared to stick with their agreement persist under a regime that clearly gives them the right to change their mind? Or will a mother's clear options under that regime put her in a position of power vis à vis the adopting couple that she might be able to misuse? Although that issue deserves examination, it is difficult to imagine very many instances of a person fraudulently entering into a surrogacy arrangement. What would a woman have to gain by volunteering as a surrogate when she knows she will change her mind and keep the baby for herself?<sup>94</sup>

One thing the woman would obtain by making the promise is the sperm of the husband in the adopting couple. She surely would not obtain that absent the surrogacy arrangement, for the only reason he is willing to give it to her is so that he can have a child that is biologically his. But it is difficult to see this as an incentive on her part to defraud him. While his sperm is very special to him (and maybe also to his wife) because it enables him to have a child with whom he is biologically connected, it seems unlikely it would be very special to her or any more desirable than sperm she might easily obtain without any surrogacy promise.<sup>95</sup>

The other possible incentive for a women to enter a surrogacy arrangement fraudulently, knowing that she intends to change her mind, is payment—payment of her fee and also of

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93. See *infra* text accompanying notes 102-59.

94. The obvious possibility of becoming a surrogate to get support from the father is discussed *infra* text accompanying notes 156-161. I conclude, however, that the father should not, in these circumstances, be obligated to assume the usual responsibilities of a natural father.

95. One can be inseminated artificially without great expense.

her medical and other expenses. Of course the only payment she will receive if she does revoke is whatever passes prior to her change of heart; if she has an absolute right to revoke prior to the delivery of the child to the adopting couple, it would be wise to reserve payment of the greater part of the fee until that time, and presumably that would be common practice (or even is today). But medical and some living expenses would probably be paid before the completion of performance—they would probably be paid as they accrued. The surrogate would be liable to repay if she backed out on the deal but she might count on the adoptive couple not pursuing her for the expenses, particularly if her ability to repay is questionable and if the expenses are not terribly significant in amount.

It does not make sense, however, to think of many persons volunteering as surrogates because they really want a baby for themselves but want some chump to pay their medical expenses. Although a woman might expect thus to get her bills paid, she probably could get insurance for less than the lawyers' fees she risks incurring, and the avenue of insuring herself is likely to involve her in much less pain and suffering.<sup>96</sup> While one can hypothesize a woman profiteering from entering into a fraudulent agreement to be a surrogate—knowing that she plans to pull out at the last minute—it does not seem likely that any significant number of women would enter these arrangements as a means of cheating the contracting couple out of either medical expenses or sperm.

Even if surrogate mothers do have a right to revoke, a contracting couple setting up a surrogacy arrangement should be able to assure themselves that they were entering an arrangement where they had a good chance of obtaining a baby, although they would not have a certainty of success. At the interview stage, they would want to discover not only whether the prospective surrogate mother was healthy and a person who genetically they would want to conceive and bear their child, but also whether she was sincere and sufficiently comfortable with her choice that it seemed likely she would go through with the

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96. In addition, many women unable to foot the medical bills for childbirth could enlist the financial support of Medicare or Medicaid which pays the costs of childbirth for the poor in many states.

deal. Even without a rule allowing a mother to revoke, such an interview—and perhaps a more thorough psychological study—is considered necessary, and is arranged either by the contracting couple or, more commonly, by an agency that arranges surrogacy contracts.<sup>97</sup>

I do not think therefore that giving the mother the option to change her mind is likely to create a wave of women entering into these contracts pretending that they are willing to be surrogates but really intending to produce a child for themselves. But I do not think that the solution I prefer of giving the mother the ability to revoke is problem-free. Even apart from the obvious problem of the hardship it can impose on the would-be adopters, there are other difficulties with giving the mother power to decide whether or not to abide by the contract, and there are also problems with having a period in which it is legally uncertain who will be the parents of the child.

The first difficulty is that the period where the mother can change her mind creates, or rather exacerbates, an opportunity for extortion.<sup>98</sup> If the agreed price in the contract is \$10,000, and

97. Even if the rule were that the adopting couple had legal rights to enforce a contract when the mother changed her mind, this kind of assessment before entering a contract would be necessary; even if the adopting couple had legal rights they would necessarily want to avoid litigation if possible.

For a description of the screening process at Surrogate Parenting Associates, one of the better known surrogate centers see Mellown, *supra* note 4, at 239. The author reports that as well as testing for disease and selecting persons on the basis of the couple's requests for specific racial and physical characteristics,

the prospective mother. . . undergoes psychiatric interviews and a battery of intelligence and basic personality tests. The testing is designed to analyze the surrogate mother's ability to surrender her child after delivery, and to reveal personality disorders or low intelligence. The intensity of the screening process varies.

. . . The results of these tests . . . are sent to the couple who may accept or reject the woman.

*Id.* (citations omitted).

In the Baby "M" case, the Infertility Center of New York had received a psychological report on Mary Beth Whitehead in April 1984 which stated that Mrs. Whitehead "expects to have strong feelings about giving up the baby at the end." In the report, the psychologist suggested that those feelings be explored "in somewhat more depth." The Center failed to inform the Sterns of the report, a fact that Mr. Stern has complained of during the trial. Hanley, *supra* note 9, at B2, col. 5.

98. Few instances of extortion by surrogate mothers have been publicized. Two are reported in KEANE & BREO, *supra* note 4. In one case, the surrogate mother is said to have refused to fulfill her part of the surrogate agreement after she learned that other surrogates were receiving compensation in addition to pregnancy-related expenses. After

Mary has a legal right to back out, what is to prevent her, after John and Diane have developed expectations that they are about to become parents, from tripling her price?

While this is a genuine and to some degree unsolvable problem, it is not entirely the result of giving the mother a legal right to revoke, and it also is not entirely preventable by any rule that is adopted. Even in the uncertain situation of the law today, the mother could engage in the same conduct, threatening to resist enforcement of the contract unless the price were raised. Or she could threaten abortion during pregnancy unless her demands were met. Indeed the same possibilities for extortion exist today in the private adoption situation; while one might say the would-be adopters are less committed because neither of them has any biological link to the child, in fact the emotional commitment and level of expectation may also be very great and the couple who wants to adopt might easily be willing to make a substantial payment under the table in order to assure the success of their arrangement.

Perhaps the most effective way to prevent this possibility in the surrogacy context would be to give absolute rights to the adopting couple once the contract was executed, or as soon as the child was conceived, and allow them specifically to enforce the contract exactly as written. While that approach lessens possibilities for extortion, it does not eliminate them, and in my judgment, for the reasons discussed above, a solution that treats the baby like any other chattel one sells in the market place is not worth its costs.<sup>99</sup>

There is then nothing that the law can do that will absolutely prevent possibilities of extortion. Even if surrogacy were

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learning this, the surrogate is said to have demanded \$7,500 to fulfill the contract. The surrogate reportedly also threatened to abort the fetus, and to refuse to relinquish the child after birth. The book also reports another case involving a surrogate mother who demanded that the child's father and his wife pay for drugs and alcohol.

99. Moreover, even this extreme solution would not be entirely effective. The natural mother could still threaten abortion. Even in the unlikely event that the option to decide upon abortion were legally removed from her, *see supra* notes 56-58 and accompanying text, she would in fact have power to obtain an abortion and inform the couple only later—so the threat of so acting could be the basis for extortion. And even apart from abortion, if there was anything that the mother had power to do that would make obtaining the baby difficult for the adopting couple, like changing her residence and being difficult to locate, she could threaten so to act and use the threat as a basis for raising the price she would be paid.

outlawed and efforts were put into enforcing the prohibition, some persons nonetheless would be willing to enter the arrangement; they could charge a great deal for their services initially, and after they became pregnant, they could raise their price. Such possibilities are inherent when the mother has something that the would-be adopters want very much—fertility, and later, a fetus, then a child, that the infertile couple very much want to have turned over to them.

Perhaps the best that the law can do to prevent the mother from being able to use her position of power over the disposition of the baby to extort additional money would be to make clear that any such demand for a greater amount than was specified in the contract would constitute extortion or an attempt to traffic children contrary to state law, and if discovered would be prosecuted vigorously. The mother making such a threat would run the risk that the couple rather than agreeing to her demands would report her to the authorities. This might serve as a deterrent, but even if it did convince some who otherwise might extort to content themselves with the original agreement, it would not work perfectly. Presumably some still would take the risk, gambling correctly on the likelihood that the adopting couple would rather pay the elevated price than lose the baby.

A second problem from the contract being voidable arises in the somewhat unusual situation when no one wants the baby. I will discuss this problem in the context of two rather different situations that might plausibly arise: (1) The mother gives birth to the child and is prepared to go through with the arrangement, but the couple that agreed to adopt have changed their minds either because they have become pregnant; or because they have separated; and (2) The mother, who has always fully intended to go through with the surrogacy contract, gives birth to a child, but during the birth process, the child suffers oxygen deprivation and the prognosis is that she will be at least mildly retarded; the couple who had agreed to adopt concludes that they do not want to adopt a retarded child and would rather try again through another surrogacy arrangement.

The first case is the easier of the two because the interests of the child are not as strongly implicated. If the child is a healthy newborn and neither the birth mother nor the couple who had planned to adopt want to provide a home for her,

someone else will accept the baby with enthusiasm. The contract problem must still be resolved, because the mother presumably would still want her fee. If it has not yet been paid, she might go to court saying that she wants to collect; she performed her part of the bargain; and it is not her fault that the couple changed their minds. Should the contract be enforced against them?

Some would find it inherently unfair for John and Diane to be bound by the surrogacy contract when Mary is not and for Mary alone to have the option to withdraw. Others would point out that Mary never indicated the intention to withdraw from the contract and did all that was expected of her, and would allow her by an offer to surrender the child to make the contract a binding one. They also would point out that this result fits with the traditional treatment of voidable, unenforceable, or option contracts, and with the current treatment of unilateral contracts; there it has not been considered troubling that only one party has the option to withdraw; a standard resolution of those contract situations is that one person the option whether to perform.<sup>100</sup>

Of course, some contracts are unenforceable by *any* party; policy considerations would determine whether that resolution controlled here, and some would argue as a matter of policy that mutuality of obligations is the fairer course. Unless one is enthusiastic about surrogacy arrangements, it is difficult to get too upset about the unfairness that would thus be visited upon the surrogate mother in this hypothetical. Since the baby can be well cared for even without the surrogacy arrangement, there is no compelling case for enforcing it so that the surrogate mother would be able to get her \$10,000 and absolutely to count upon an arrangement that we do not permit the adopters to count on and that we do not approve of as a matter of social policy. Although contract doctrine is available to protect the surrogate mother here, the contrary resolution—making the surrogate mother take the risk that she will not be paid in the unlikely event that the adopters change their minds—would not seem objectionable as a matter of policy. If the risk deterred some women from entering into surrogacy contracts, so much the better.

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100. See *supra* text accompanying notes 59-66 and note 90.

Allowing the adopters to withdraw from the contract would be difficult not because of the first situation, involving a healthy and adoptable baby, but because of the second example, involving a handicapped and presumably much less adoptable baby. In this situation the interests of the child, which after all should be the paramount interests here, are to have a home or at least a family; the child will suffer greatly from any uncertainty concerning who are her legal parents and who should at least take responsibility for her placement and her care, and that uncertainty would inevitably flow from a system giving all parties to the contract an opportunity to renounce it after birth.

In this situation, there is a strong policy argument that the couple who had promised to adopt should not be permitted to withdraw from the contract if the mother attempts to turn the child over to them; this is especially defensible if there was not any indication before the baby was born that the mother herself had second thoughts about the contract. Except for the handicap there is every likelihood that the adoption would have taken place; in the vast majority of cases the surrogate mother complies with the contract without resistance, and there was nothing to indicate that would not be the case here.

There does not seem any particular equity in allowing the couple, who participated in the creation of this baby, to assure themselves a perfectly healthy newborn and to be able to reject a newborn who does not meet their specifications, a privilege natural parents do not share. Since every likelihood was that the adoptive couple would achieve their ends with the contract had there been no difficulty in the birthing process, and since they are probably in the better position to cope with the problems of caring for a handicapped child, if only financially, it seems best from the point of view of social policy, and also from the point of view of the baby, to lay the problem at their door. After all, if the surrogate mother had every intention of going through with the contract, as we have hypothesized, she probably is in a position where she never had the resources even to take care of a healthy child and did not make that part of her plans. The couple on the other hand had the commitment and the expectation that they would receive a child, and the financial resources

to handle that responsibility,<sup>101</sup> and they should not be permitted to withdraw at the expense of the child just because the child is born with a handicap.<sup>102</sup>

CUSTODY CONTESTS INDEPENDENT OF THE SURROGACY  
CONTRACT—SURROGACY AND LAWS GOVERNING THE LEGAL  
RIGHTS OF UNWED PARENTS OF A NEWBORN CHILD

Even if the suggested view prevails, so that a contract is not enforceable when the mother decides before surrendering the child that she does not want to part with her, there is still some question what are the rights and obligations of the parties in the absence of the contract.

In the classic adoption context, where the expectant parents have no biological relationship with the child, the expectant parents clearly have no legal rights to enforce any understanding to acquire a child who in fact has never lived with them. There is one respect in which the surrogacy situation is considerably more complicated: If the adoption does fall through, still in the

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101. The adoptive couple in a private placement situation would be vulnerable to much of this policy argument, but would probably be treated differently because (1) they did not participate in the creation of the child; and (2) a contract, if any exists, plays much less of a role in their relationship with the birth mother. If they do get the baby from the mother, it will be because of an understanding they have with her but probably not on the basis of a contract. There is nothing to prevent her even from giving the baby to another couple; they probably have no enforceable rights to the child as against anyone.

The adopting couple in a surrogacy arrangement by contrast are proceeding on the contract, though a voidable, option, or unilateral contract. Even though the surrogate mother is not bound to perform, when she does turn the baby over, the contract will define their mutual rights and obligations. Moreover, if the surrogate mother decides to give the baby to anyone other than the couple with whom she contracted, they probably have a right to claim the baby as against anyone in the world other than the natural mother, because of the father's biological connection. See *infra* note 115.

102. Of course a better system still might be that, at least in the case of a handicapped child with extraordinary expenses, the state would subsidize the expenses or otherwise help out the parents. In the absence of such a system generally, however, it is difficult to see why the state should pick up the expenses of children whose parents decided by contract to create them and then were disappointed by a handicap.

The state does to some extent help out parents of handicapped children, most importantly by providing a free appropriate education for these children as well as others, even though their education may be more expensive. See *Education for the Handicapped*, 20 U.S.C. §§ 1401-1461 (1982 & Supp. III 1985) (originally enacted as Act of Apr. 13, 1970, Pub. L. No. 91-230 tit. VI, 84 Stat. 121, 175-88) especially subch. II, Assistance for Education of All Handicapped Children, 20 U.S.C. §§ 1411-20.

surrogacy context the biological father may be able to claim a right to the child because of his biological connection. His inability to prevail on the contract (either because the mother is not bound by it or because surrogacy contracts generally are considered illegal in that jurisdiction) is not necessarily determinative of whether he has any rights to custody or visitation, or, indeed, any obligation to support his offspring.

One variable that may affect whether the contracting father has rights independent of the contract is whether or not the surrogate was inseminated artificially. Most states by statute provide either that sperm donors have no rights or obligations in the offspring that their sperm produces, or that they are not the natural father of the child so produced. In many states, however, the provisions do not apply when the insemination was privately accomplished rather than being performed through a doctor.<sup>103</sup> Seemingly sperm donors could have the parental rights and obligations<sup>104</sup> of an unwed parent in that situation.<sup>105</sup> Some state

103. See, e.g., *Jourdan C. v. Mary K.* 179 Cal. App. 3d Supp. 386; 224 Cal. Rptr. 530 (1986). As of 1985, twenty-seven states had special provisions concerning artificial insemination. Several state statutes are modelled after § 5 of the Uniform Parentage Act, and they provide that when artificial insemination is performed in accordance with statutory requirements, the sperm donor will not be treated as the natural father. See Bick-Rice, *The Need for Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L. J. 1055, 1062 n.80 [hereinafter Bick-Rice] (discussing California, Colorado, Illinois, Minnesota, Montana, Nevada, New Jersey, Washington and Wyoming as examples of such statutes). Section 5(a) of The Uniform Parentage Act provides in part:

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with the semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

UNIF. PARENTAGE ACT § 5(a), 9A U.L.A. 579, 592-593 (1979).

It further provides, in § 5(b):

The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

*Id.* The California, Wyoming and Colorado statutes omit the term "married" in subsection (b) of their respective statutes.

There also are statutes dealing with artificial insemination in nineteen other states. At least ten of the nineteen states require a doctor to perform the insemination in order for the statute to apply. Most make the child the legitimate child of a married couple consenting to the insemination. See generally, Bick-Rice, *supra*, at 1055-1064 for a review of current provisions concerning artificial insemination. Most do not further stipulate that the donor has no rights in or responsibilities to the child, but the provisions they do contain would be expected to have exactly that effect.

104. While sperm donors have occasionally won parental rights, and taken on con-

courts might hold, moreover, that provisions blocking parental rights and obligations of sperm donors have no application when the insemination purported to be part of a surrogacy arrangement, reasoning that the statutes were not intended to cover situations where the parties intended the father to have parental responsibilities.<sup>106</sup> In those situations where the father is not

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comitant obligations, it is an open question whether a mother could force financial responsibility upon a semen donor who seeks to disassociate himself from the child. In *Jourdan C. v. Mary K.*, 179 Cal. App. 3d Supp. 386, 224 Cal Rptr. 530 (1986), the court held that the purpose of CAL. CIV. CODE § 7005(b) is to permit individuals to donate semen, for the purpose of artificial insemination, without fear of liability for child support. It did, however, confine its limitation of liability to instances where the insemination was performed through a doctor. See *Bick-Rice*, *supra* note 90, at 1058-62, 1066-67 (discussing the legal dilemma of a sperm donor when there is no statute insulating him from responsibility and concluding that when there is no such statute, the outcome of litigation is often conflicting and uncertain).

105. California has declined to apply its provision that a sperm donor is not the natural father of offspring conceived by artificial insemination, when the insemination was not accomplished pursuant to the statutory requirement of a physician's supervision. The court did not apply it, for example, in *Jourdan C. v. Mary K.*, 179 Cal. App. 386, 224 Cal. Rptr. 530 (1986), where the semen donor wished to assert paternal rights. In that case the natural mother was raising the child with another woman rather than with a man. In *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977), the donor was willing to assume the responsibilities of a father, and the inseminated mother, who was not married, was not permitted to resist this overture. It may have been relevant in that case that the mother and the donor did have a personal relationship, and had considered marrying each other, even though they accomplished the insemination artificially (without the aid of a doctor) because they did not want to have intercourse prior to marriage.

106. Some states also permit the nonpaternity statute to be avoided if the parties have agreed in writing to paternity, as they will have in the surrogacy context. A New Jersey statute provides, for example, that, given written consent and a doctor's supervision, the semen donor is to be treated in law as if he were not the father of a child conceived "[u]nless the donor of semen and the woman have entered into a written contract to the contrary." N.J. STAT. ANN. § 9:17:44 (West 1985). The law in the state of Washington is substantially similar. See WASH. REV. CODE ANN. § 26.26.050 (1986).

In *Sherwyn v. Department of Social Services*, 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985), the California court of appeals expressed "grave doubts" about the applicability in the surrogacy situation of state statutes (1) presuming paternity in the husband of the surrogate mother if neither the mother nor her husband challenge his paternity; and (2) denying the status of natural fatherhood to a sperm donor in a surrogacy arrangement. The lower court had applied the provisions in the context of a surrogacy arrangement, and had upheld the constitutionality of the statutes so applied. Both discussions of the issue are of interest, but the court of appeals ultimately decided the case on other grounds; it vacated the trial court's judgment for failure to present a justiciable controversy.

At the other extreme from decisions and statutes protecting and enforcing contracting fathers' intent to acquire parental rights, are cases prohibiting fathers in surrogacy arrangements from using existing laws to establish paternity, even when the surrogate mother does not oppose them. See *In re Baby Girl*, 9 Fam. L. Rptr. (BNA) 2348

barred by special provisions governing sperm donors—either because the insemination was natural or because no special provision applies—then it would appear that the law concerning the rights of a biological father who is not married to the mother of their child would apply.<sup>107</sup>

Under this law, the rights and obligations of the biological father might vary according to whether the mother has a husband. Traditionally the rule has been that a child born to a wife during a marriage is presumed to be the child of that marriage;<sup>108</sup> that presumption may either be rebuttable or conclusive. Often even when the presumption is rebuttable, only the mother or the mother's husband is allowed to attack it;<sup>109</sup> a putative father can challenge the presumption in only a minority of states. Consequently in order for a putative father—including a biological father who was party to a surrogacy arrangement—to establish his paternity, he must in many states have the cooperation of the surrogate mother or her spouse.

In recent years the rule has, however, been subject to constitutional attack, and the attacks have sometimes been successful.<sup>110</sup> Reasons for some courts' change in position include the

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(Ky. Cir. Ct. Mar. 3, 1983) and *Syrkowski v. Appleyard* 333 N.W.2d 90 (Mich. App. 1983), discussed *supra* note 36.

107. Of course a state that prohibited surrogacy contracts could, if it wished, deny the father any right to the child, as a means of strengthening its prohibition of the contracts by creating a situation in which there is no way the father could derive the intended benefit from the arrangement.

108. See GREEN & LONG, *supra* note 51, at 271 concluding:

At common law, there was also a strong presumption that a child born to a married woman was the child of her husband. At one time, this presumption could only be rebutted by proof of the impotency or physical absence from England (*beyond the four seas*). Though modified by statute, this presumption has also been accepted in American jurisdictions.

*Id.* (citations omitted).

In keeping with the state's demonstrated interest in legitimizing children, twenty-four states by statute expressly extend the presumption of legitimacy to children born as a result of consensual artificial insemination. Coleman, *Surrogate Motherhood: Analysis of the Problem and Suggestions for Solutions*, 50 TENN. L. REV. 71 (1982).

109. See *infra* note 111. Historically the rule was designed both to preserve family integrity and to provide a means of indemnifying the state for the expenses of child support. One court observes: "The chief purpose of the Elizabethan Poor Law of 1576, the progenitor of modern paternity statutes, was not the protection of the child but the indemnification of the parish for the expenses of the child's support." Dept. of Social Serv. *ex rel* Sandra C. v. Thomas J. S., 100 A.D.2d 119, 130, 474 N.Y.S.2d 322,330.

110. One claim is that the right to assert paternity of one's biological child is protected by the due process clause of the United States Constitution; there must be open

progress in the effectiveness of paternity testing;<sup>111</sup> and a greater

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some avenue by which a putative father can establish his paternity. Due process claims often rely upon *Stanley v. Illinois* 405 U.S. 645 (1972), but they go much further than *Stanley*, which (1) protected the right of a natural father who had lived with his children throughout their lives; and (2) dealt only with his protection vis a vis the state, not suggesting any rights in him to act against the wishes of the natural mother. In *Stanley* the mother had died, Stanley had lived with his children, together with the mother, all their lives, and the state was threatening to remove the children from him to place them in the custody of the state. The Court asserted that the state statute eliminating him was based upon a conclusive presumption that unwed fathers are unfit parents and held that in these circumstances Stanley must be given a hearing concerning his fitness before being separated from his children.

Although *Stanley* is not strong authority for the proposition, later cases do suggest that putative fathers generally have a due process right, although a limited one. In *Caban v. Mohammed*, 441 U.S. 380, 385 n.3 (1979), the Court spoke of a procedural due process right, flowing from *Stanley*, but it did not reach the substantive due process argument that natural fathers have a right to maintain a parental relationship with their child unless they are unfit, because it decided the case on the basis of the equal protection clause. In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court accorded the unmarried father some degree of constitutional protection, but very little. Nonetheless, *Lehr* is consistent with a view that each state must provide some avenue by which paternity may be asserted.

The United States Supreme Court has not squarely faced the issue whether a state legislature could constitutionally make the judgment that in cases where the unwed mother was married and her husband acted as natural father to the child, it is in the child's best interests to accept that as the child's nuclear family, and to prevent third persons from asserting claims of paternity.

State courts divide upon the question whether it remains constitutionally permissible for a putative father to be prohibited from claiming paternity with respect to a child born to a married woman whose husband acts as natural father. Some courts hold that it is constitutional to bar the unwed father in those circumstances. *See, e.g.*, *Petitioner F. v. Respondent R.*, 430 A.2d 1075, 1078-79 (Del. 1981); *P.B.C. v. D.H.*, 396 Mass. 68, 72, 483 N.E.2d 1094, 1097 (1985), *cert. denied* 106 S.Ct. 1286, (1986); *A. v. X, Y, and Z*, 641 P.2d 1222, 1227 (Wyo. 1982), *cert. denied*, 459 U.S. 1021 (1982). *See also* *Market v. Behm*, 394 N.W.2d 239 (Minn.App. 1986).

Some courts, however, have found a due process right in putative fathers to procedures to establish parental rights. *See* *Thornberry v. Superior Court of Arizona, Mohave Cty., ex rel Hunter*, 146 Ariz. 517, 707 P.2d 315 (1985). Other courts have construed their statutes to permit a putative father to try to establish rights, in order to avoid the constitutional issue. *See* *Slawek v. Stroh*, 62 Wis.2d 295, 215 N.W.2d 9 (1974); *Pritz v. Chesnut*, 106 Ill. App. 3d 969, 436 N.E.2d 631 (Ill. 82). *See also* *R. McG. and C. W. v. J. W. and W. W.*, 615 P.2d 666 (Colo. 1980) (finding that a statute allowing paternity proceedings to be instituted by a child, her mother and her presumed father, but not by a putative natural father, impermissibly discriminates according to gender and violates the federal equal protection clause and also the equal rights provision of the Colorado constitution).

111. It now is possible to determine with substantial certainty whether or not a particular person is the biological father in most cases. In earlier days paternity proceedings would often cast a shadow over paternity without ever resolving paternity issues. The reason for the change lies in recent developments in bloodtesting. Even 20 years ago,

recognition of parental interests of the unwed father in the law generally.<sup>112</sup>

Accordingly, while there may be a presumption that the child is the child of the marriage when the surrogate is married, it may not apply today—or it may not apply conclusively—depending upon the jurisdiction. If the mother is not married, or if her jurisdiction has no conclusive presumption, or even if it does and the biological father mounts a successful constitutional attack on the conclusive presumption, then the problem will remain of the need to determine the respective rights of the biological mother and the biological father without regard to any contract between them.

Until recently the law was relatively clear that when an unwed mother had a child, the right to custody lay with her.<sup>113</sup> Of course she could be deprived of custody if she was unfit, as can any parent or set of parents, but unfitness is very strictly defined. Absent unfitness, the unwed mother was the custodian of her child; the unwed father had no claim to custody against her.<sup>114</sup>

In recent years this principle has undergone some change,

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blood testing for paternity was quite primitive, but today use of HLA tests in combination with the many other available blood tests yields very persuasive proof. See note, *Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage*, 36 Vand. L. Rev. 1578, 1591 (1983).

112. See *infra* text accompanying notes 115-32.

113. See *Ex parte Devine*, 398 So.2d 686 (Ala. 1981) (tender years presumption). At common law it was the father rather than the mother who had the right to custody, and all other rights over the children; the change in favor of the mother occurred around the middle of the 19th century. *Id.* (discussing the history).

114. Even *Stanley*, where the mother had died, is consistent with this traditional view of the unwed father's rights. But *Stanley* gave some right to the father after the mother's death. This notion of layers of rights, rather than equal rights, has a certain appeal. It allows for clear rules, in an area where clear rules are badly needed. It also provides maximal security for the child—not eliminating potential caretakers, but lining them up in a clear order of priority.

Even a donor of semen for artificial insemination might have rights *after* the inseminated woman and her spouse. For example, if the person inseminated was a single woman, and after her child was born she died or became unfit so that her child had been taken away from her, the sperm donor might have rights against the rest of the world, though not against the mother. If he knew of this situation and asserted his rights, and if he was fit, he might have a right to custody against the rest of the world because of his biological tie (although in some states he would have to grapple with language in state statutes cutting off his parental rights, by saying that they were not designed to cover this situation). As a practical matter most artificial sperm donors do not know about the future fate of their sperm, and they do not assert interests in pursuing parental rights.

and the law is much more uncertain than it has been in the past. Today there are two different realms of uncertainty for the unwed parents who seek to battle out in court their legal rights to their offspring. The first uncertainty is what the law is; the second is how whatever principle is accepted will apply to them, given their facts and circumstances, or given the facts and circumstances about themselves that they can establish in court.

#### A. *Recent Cases Concerning the Rights of the Unwed Father*

In *Caban v. Mohammed*,<sup>115</sup> the mother and father had lived together for more than five years; two children had been born to them, and both parents had lived together with the children until they were 2 and 4 years old respectively. Caban was listed as the father on the children's birth certificates. During the period they lived together, both the mother and the father had been important caretakers for the children.

After the mother and father separated, and each married, the mother consented to adoption of the children by her husband, and the father opposed the petition asking that he be the custodial parent and that his wife be permitted to adopt.<sup>116</sup> New York law at the time gave the unwed mother the power to consent to or veto adoption and did not give the father either right. The United States Supreme Court, in a 5-4 decision,<sup>117</sup> held that it violated the equal protection clause of the fourteenth amendment for a state to apply an absolute preference for the mother

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115. 441 U.S. 380 (1979).

116. For nine months after the mother and father separated, the children lived with the mother and her husband. The children were then sent to Puerto Rico with their maternal grandmother. The mother and her husband were to join them after they raised some money. When the father visited the children in Puerto Rico, he took them back to New York in his custody, and then the custody-and-adoption battle started between the parents. During most of the period when they were separated and before the mother remarried, the children had lived with their maternal grandmother in Puerto Rico.

The children were five and seven respectively when the petition for adoption was heard; three years had passed since their natural parents' separation.

In New York, like most jurisdictions, adoption altogether severed the parental tie with the other biological parent. In *Caban*, when the New York courts passed upon the adoption, the natural father found himself faced with the prospect of losing all ties with the two children he had fathered and raised for two years, only three years prior. *Id.*

117. Justice Powell wrote for the Court. Justice Stevens dissented, joined by Chief Justice Burger and Justice Rehnquist. Justice Stewart dissented in a separate opinion. *Id.*

over the father of an illegitimate child.

Four years later in *Lehr v. Robertson*,<sup>118</sup> however, the Court made clear that equal protection does not require identical treatment of the mothers and fathers of illegitimate children; it held that fathers who have not participated in their children's upbringing do not share the right to equal treatment and have no constitutional right to prevent the mother's husband from adopting the child. The Court indicated that unwed fathers need not be treated on an equal plane with fathers who are married to the mother of their children, pointing out that "[t]he institution of marriage has played a critical role . . . in defining the legal entitlements of family members" and that "state laws almost universally express an appropriate preference for the formal family."<sup>119</sup> It said that there was a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility;" that an actual relationship explained *Caban*, not a mere biological connection.<sup>120</sup> While the potential to develop an actual relationship deserves some degree of constitutional protection,<sup>121</sup> it is not on the same level as the protection due a developed parent-child relationship.<sup>122</sup>

Even in *Caban v. Mohammed* itself, there were clear signs that the Court was not creating a model of pure equality, either between all unwed parents or between married and unmarried fathers. The Court explicitly left open the question: What are the rights of the unmarried father at the time his offspring is born? The answer to that question would be very important to

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118. 463 U.S. 248 (1983).

119. *Lehr*, 463 U.S. at 256-57. The Court also pointed out that the father had not offered to marry the mother; this was not a case where he was willing to formalize the relationship and legitimize the child but the mother stood in the way of that course. *Id.* at 252, 263.

120. *Id.* at 259-60.

121. In this case the Court held the Constitution was satisfied by the state's provision for putative fathers to register their claim to paternity, which would entitle them to receive notice and an opportunity to be heard if there was a proceeding to adopt the child. Mr. Lehr had not known of the procedure for registration, but nonetheless it was held that the existence of that procedure adequately protected his inchoate relationship with his child and that there was no constitutional requirement that he be afforded notice of adoption proceedings or an opportunity to be heard even though both the child's mother and the judge who approved the adoption knew of his attempt to establish his paternity before adoption was ordered. *Id.* at 265.

122. *Id.* at 259-63; 266-68.

Mary, John and Diane if they were litigating on a theory of the rights of the unwed father, instead of litigating as parties to a surrogate motherhood contract.<sup>123</sup>

The unconstitutionality that the Court found in *Caban* was that New York law distinguished solely on the basis of gender between unmarried mothers and fathers, a distinction the state had defended before the Supreme Court on the ground that mothers generally have closer relationships with their children than fathers do.<sup>124</sup> The Supreme Court pointed out that such differences as the New York statute assumes do not invariably exist, and it contrasted this case, where the mother and the father had both fully participated in the upbringing of their children, with an earlier case in which it rejected an unwed father's constitutional claim when "he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."<sup>125</sup>

The most significant argument the Court had to contend with in *Caban* in holding this gender-based classification unconstitutional was the argument that the state's law fulfilled an important state interest in promoting the adoption of illegitimate children and thereby legitimating them. Allowing both natural parents equally to veto an adoption would result in the children

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123. Of course parties to a lawsuit can argue both theories, in the alternative. JAMES & HAZARD, CIVIL PROCEDURE 155-56 (3d ed. 1885). A plaintiff in John's position would want to argue the validity of the contract, but if he lost on that theory, he would want to argue that he is the better parent and that the child's custody should be decided on that basis.

Before arguing he was the better parent, the father could argue that the mother was unfit, if he was in a position to sustain that argument. Since unfitness is very strictly defined being the standard by which the state deprives a parent or parents of custody against their will even if there is no other family to adopt them—it seems wrong for the father to make this argument when he does not have compelling evidence that the mother should not be allowed to raise her children. He should use the same evidence instead on the issue whether he is the better parent. A father who makes an unwarranted unfitness argument risks losing public sympathy and increasing sympathy for the natural mother.

124. Comparing the actual parents, it appeared that the father was and had been just as involved with his children as their natural mother was. The mother's case was weakened by sending the children to live with their grandmother; they had not lived with their mother for more than a year when *Caban* removed them to New York. *Caban*, 441 U.S. at 386, 388-89, 391, 394.

125. *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (discussed and quoted in *Caban*, 441 U.S. at 389 n.7).

remaining illegitimate. The Court found that state interest “an important one”—serving the interests of the child because it would “remove the stigma under which illegitimate children suffer”<sup>126</sup>—but the Court said the state could not accomplish that end by as irrational a distinction as that between natural mothers and fathers. Justice Stevens’ powerful dissent in *Caban* focussed upon the importance of this state interest in promoting legitimation.<sup>127</sup>

Finally, the Court met the objection that it can be difficult to identify and locate unwed fathers, by suggesting that for *older* children the state *could* differentiate between unwed parents as long as the distinctions between them were not gender-based. For an obvious example, the state can distinguish between unwed parents who live with their child and those who do not, even if those who live with their child are much more likely to be unwed mothers than unwed fathers. Moreover, the Court said specifically that it expressed no view as to whether even a gender-based line could be drawn between the mothers and the fathers of *newborn* children, because the question was not before it.<sup>128</sup>

Justice Stevens in his dissent discussed primarily the situation surrounding newborns, saying that the overwhelming majority of adoptions involve infants, and claiming that the Court’s own rule was limited to “adoptions of older children’ . . . [where] the father has established a substantial relationship with the child and is willing to admit paternity.’ ”<sup>129</sup> In his discussion, he emphasized the differences that exist between mothers and fathers at the moment that a child is born.<sup>130</sup>

It is those differences that exist at birth that would be relevant if we were to embark upon a custody contest between John and Mary after she repudiated the surrogacy contract and he asserted rights as an unwed biological father. What Justice Stevens suggested, and what much of the Court’s language in *Caban* and *Lehr* would support, is that it would be permissible, perhaps even appropriate, for the state to have a rule favoring

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126. *Caban*, 441 U.S. at 391.

127. *Id.* at 402-03, 407-08, 410 n.20, 412, 414-15.

128. *Id.* at 392 n.11, 416 (Stevens, J., dissenting).

129. *Id.* at 413.

130. *Id.* at 404-06.

mothers as custodians at this stage. At this moment in time, the mother has a relationship with the child. She has borne the child for nine months, has given birth to her, and most probably has the capability of breast-feeding her.<sup>131</sup> The father, however, has yet to establish a relationship with the child, other than his own expectations and his biological connection.

True, the father's comparative lack of relationship is not the father's *fault*; on the contrary, it seems to be beyond his control and biologically determined.<sup>132</sup> Does that mean that he should not be treated the same as the fathers who failed to establish a relationship with their child whom the Court discussed in *Caban*, or is the existence or nonexistence of the relationship the determinative factor rather than the presence or absence of fault? In *Lehr* also it appeared that it was not the fault of the father that he had not established a relationship with his child; according to the dissenters, the mother had prevented the father from seeing their son for the first two years of their son's life. Nonetheless, because the mother had a continuous bond with her child, she was permitted by consenting to his adoption by her husband to cut off the natural father's rights.

There is certainly something to be said for equality between natural parents even when the parents are not in a de facto family relationship. The main thing to be said against it is that any rule emphasizing equality, at least equality between parents in the awarding of custody of newborns, seems to lead us in the direction of custody contests over who is the better parent. The rules I would suggest following for the awarding of custody of newborns whose parents do not constitute a family tend to favor the mother as custodian. As I shall explain, this is not so much because mothers are particularly deserving, or because fathers do not merit protection, but rather because the best interests of

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131. Many authorities believe that breast feeding is the preferred course for both the baby's physical and psychological development. See, e.g., K. PRYOR, *NURSING YOUR BABY* (1963); A. GESELL, *INFANT AND CHILD IN THE CULTURE OF TODAY* 71 (1974) (concluding that "breastfeeding may well constitute a fundamental requirement, not merely a method of choice. To be sure, the newborn can survive without breastfeeding, but only with certain very definite deprivations.")

132. It is different from a simple preference for the mother, however, in that a couple who together conceived a child that was incubated outside of the mother would be on an equal footing under this test. On those facts there would be no preference for the mother even at the moment of birth.

children require having a clear presumption as to who their caretaker will be.

### *B. Custody Contests to Determine Who Is the Better Parent*

Any presumption that is established need not necessarily be gender-based. Just as the Supreme Court struck down the gender-based presumption involved in *Caban v. Mohammed*, several states have invalidated a "tender years presumption" that historically was part of the law governing custody awards between parents, and that preferred the mother as the custodian of children "of tender years."<sup>133</sup> But rather than examine all the facts and circumstances of vying parents, several states have replaced the historical presumption for the mother with another presumption that is stated in gender-neutral terms. One of the most enthusiastically received of the proposed new presumptions is the presumption for the primary caretaker, a presumption that usually will favor mothers, who more often than not are the primary caretakers of their children but, when children other than newborns are the subject of custody disputes, one that would in fact favor a father who takes primary responsibility for caring for the children.<sup>134</sup>

In *Garska v. McCoy*,<sup>135</sup> a leading case establishing the presumption for the primary caretaker as the custodian of the chil-

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133. See *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981) (several courts have abandoned the tender years doctrine, although the presumption still exists in 22 states).

134. One of the pathbreaking opinions advocating this approach to resolving custody disputes is *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) (Neely, J.). See also *Derby v. Derby*, 31 Or. App. 803, 571 P.2d 562 (1977), modified on other grounds, 31 Or. App. 1333, 572 P.2d 1080 (1977), rev. denied 281 Or. 323 (1978).

In *Garska v. McCoy*, the court looked to the following list of criteria in asking who was the primary caretaker:

- (1) preparing and planning meals;
- (2) bathing, grooming, and dressing;
- (3) purchasing, cleaning, and care of clothes;
- (4) medical care, including nursing and trips to physician;
- (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;
- (6) arranging alternative care, i.e. babysitting, day-care, etc.;
- (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning;
- (8) disciplining, i.e. teaching general manners and toilet training;
- (9) educating, i.e. religious, cultural, social, etc.;
- and (10) teaching elementary skills, i.e. reading, writing and arithmetic.

*Garska*, 278 S.E.2d at 363.

135. 278 S.E.2d 357 (W. Va. 1981) (Neely, J.). See also *supra* note 134 and accompanying text.

dren, the court explained that "[t]he loss of children is a terrifying specter to concerned and loving parents: however, it is particularly terrifying to the primary caretaker parent who, by virtue of the caretaking function, was closest to the child. . . . Since the parent who is not the primary caretaker is usually in the superior financial position," that parent has better resources to fight a drawn out custody battle if no presumption is to be operative; the primary caretaker will either lose custody through an inability to litigate, or she may be tempted to trade the custody of the child for reduced child support or alimony payments, a trade which will not benefit the child.<sup>136</sup> "Since trial courts almost always award custody to the primary caretaker parent anyway, establishment of certainty in this regard permits the issues of alimony and support to stand upon their own legs and to be litigated or settled upon the merits of relevant financial criteria, without introducing into the equation the terrifying prospect of loss to the primary caretaker of the children."<sup>137</sup> The court also relied upon the propositions that "in the average [custody] proceeding intelligent determination of relative degrees of fitness requires a precision of measurement which is not possible given the tools available to judges;" and also "there is an urgent need . . . for a legal structure upon which [parents] may rely in reaching a settlement."<sup>138</sup>

Another, and perhaps even more appealing, way in which the court might have defended its presumption is that the child in all likelihood would be more upset and grieved by the loss of the primary caretaker than by the loss of the other parent, who by hypothesis the child sees less and who does less for the child—at least less that the child is aware of. The court did say that of course its rule called for an exception if the primary caretaker fails to provide emotional support, routine cleanliness, or nourishing food,<sup>139</sup> and the court also recognized that its presumption would not provide any guidance in families where par-

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136. Several studies have shown that fathers are often advised by their lawyers to litigate for custody even if they do not desire it in order to reduce the level of the support they will be required to pay. Note, *Lawyering for the Child*, 87 YALE L.J. 1126, 1131 n.21 (1978).

137. *Garska*, 278 S.E.2d at 360.

138. *Id.* at 361.

139. *Id.*

ents divide roles sufficiently that there is no primary parent who performs "the lion's share of the child raising."<sup>140</sup> On the other hand, in a great many cases its rule would achieve a clear result that parties could take into account in settling their case or that a court could apply without protracted litigation: Custody of the child will go to the primary caretaker parent as long as that parent is fit and as long as the child is not old enough to formulate and express a contrary desire.<sup>141</sup>

The primary caretaker presumption bears similarities to another suggested rule that many psychologists and experts in family law defend and that has been put forth most thoroughly by Goldstein, Solnit, and Freud in a series of books:<sup>142</sup> the presumption for continuity of care. That presumption might favor a primary caretaker in a situation in which both parents had been living together and with the child up until the moment of litigation. That presumption is most commonly discussed, however, when the issue is whether to move the child to a new placement, thereby severing the custodial relationship that the child is accustomed to. Goldstein, Solnit and Freud warn against changing from a successful custodial relationship, out of a desire to produce something "even better." They emphasize also that the "psychological parent" is the important figure to the child—the person who takes care of the child's needs on a daily basis—and that this relationship is more important to preserve than any biological connection.

These presumptions are often used in custody contests. How would they apply in a contest between unwed parents arguing over who should be the custodian of a newborn?<sup>143</sup>

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140. It may be that families where both parents are caretakers are those where it is most important, because of both parents' prior relationship with the child, that both relationships be preserved, and where it might even make sense in some circumstances for them to share custody.

141. The primary caretaker rule also has the virtue of avoiding some of the class bias so evident in other tests of the better parent for custody. See *infra* note 147 and accompanying text.

142. J. GOLDSTEIN, A. FREUD, AND A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); *BEFORE THE BEST INTERESTS OF THE CHILD* (1979).

143. The presumption might apply in the same way in a dispute between married parents who do not live together or who are separating and who both want custody of their newborn child. In any event, an unmarried father should not be in a better position to claim custody of his biological child than a married father. One can easily imagine arguments that the unmarried father should not be treated as well, especially where he

If the tests are applicable at all to parents disputing over a newborn, it appears that the mother would at that moment in time be the primary caretaker and the person with whom the child has the greatest relationship to continue. Not only has the mother given the most of herself to the child (granted, not by choice but by biological necessity), but the mother is also far more familiar to the child than is the father. The child has listened to her heartbeat, for example, for months before birth. Some psychologists believe that the child knows the mother from birth in a way the child knows no other person and that it is disruptive and even traumatic for the child to part with her mother at that stage.<sup>144</sup> Moreover, the mother's ability to breastfeed the baby invites her to continue her close physical relationship with the child in a way that the father is unable to duplicate.

This analysis suggests that while presumptions like primary caretaker or continuation of ongoing relationships leave room for either parent to become custodian in many cases, they would apply in the case of a newborn invariably to award custody to a mother who herself had borne the child, as long as the mother was fit.

From the point of view of fairness to the father, the rule has obvious shortcomings, since there is nothing he could do or could have done (at least without continuing his relationship with the mother for a longer period) that would put him in a position of equality with the natural mother. But unless the father has a more satisfactory presumption to suggest,<sup>145</sup> there is a compelling argument for a presumption operating to resolve the bulk of custody contests rather than making courts decide on

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has not offered to marry the mother.

144. E.g. Ainsworth, Object Relations, dependency & attachment: a theoretical review of the infant-mother relationship, *Child Development* 40, 969-1025 (1969); Ainsworth, The Development of Infant-Mother Interaction Among The Ganda, in B.M. Foss (ed.), *Determinants of Infant Behavior II* (1963); J. Bowlby, *Maternal Care and Maternal Health and Deprivation of Maternal Care* 59 (1966); Bowlby, *Foreword to Determinants of Infant Behavior* (B.M. Foss, ed.) (1961); Bowlby, *The Nature of The Child's Tie to his Mother*, *Int. J. Psycho-Anal.*, 39, 350-73 (1978). See also *supra* note 131.

145. John's argument would be that a presumption in favor of the party who would have custody under the contract would be more fair because at least the parties agreed to this result at one point in the past. This argument is troublesome, however, as it would allow unwed fathers who entered surrogacy contracts to have much clearer rights to custody of newborns than even fathers married to birth mothers would have.

the basis of all the facts and circumstances which of two persons would make the better parent.

Two problems with custody contests were referred to above: (1) the importance of any large monetary disparity between the parents, which gives an advantage to the parent with the longest purse for litigation—an advantage that parent may use either to obtain custody for himself or to negotiate a settlement that will leave child support unreasonably low; and (2) the difficulty of proving in court which parent would be better when both meet the criterion of fitness.

There always are problems in determining on the basis of a judicial hearing which of two fit parents would be the better custodian. A great deal depends not upon the reality outside the courtroom but upon the impression the parties make in court, the strength of the psychiatric testimony they produce, how well they prompt the child, etc., etc. For example, a person with less experience of the world, or of having to present herself in a good light, or a person very nervous coming to the forum where her motherhood may be taken from her, may make a very bad impression even though she is impressive in her home and in her role as a mother.

In the surrogacy situation, there are several factors that exacerbate the usual problems and that make even more troublesome the spectre of two biological parents battling out the custody issue on the basis of who will be the better parent. First, in the surrogacy situation, there are likely to be significant wealth and class differences between the would-be adopters and the surrogate mother and her family. Frequently in custody contests the question arises how the law is to measure the attributes of one particular set of parents against another, and which factors a court should take into account.<sup>146</sup> Surrogacy arrangements are likely to involve the troublesome question whether and how factors associated with wealth and influence, or the superior educa-

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146. Should a court take into account the religious practices of the parties, for example, or would that involve the state in establishing or penalizing religion in violation of the first and fourteenth amendments to the United States Constitution? See Quiner v. Quiner, (Cal. Ct. App., 2d Dist. 1967), reprinted in AREEN, FAMILY LAW 444-51 (2d ed. 1985). Should the court evaluate the parties' lifestyles, and exercise a preference for the one that is the most mainstream, or does that violate the parties' rights to privacy and to equal protection?

tion of one of the parties, should properly be counted into the equation when a judge assesses the best interests of the child.<sup>147</sup> These are awkward questions in our system. In one sense a judge may believe that the child will be better off in the more well-to-do household; but to take factors like wealth into account carries some of the same connotation discussed before of commercialization and sale of the having and raising of children. Moreover, it raises an additional spectre—that of the poor or uneducated being deprived of their children in order to benefit the wealthy and established.

The likely existence of these disparities that it is troublesome for the law to address and that are especially likely to exist in a surrogacy situation is made worse because it is especially likely in a situation involving a newborn that there will not be much evidence besides the position and lifestyles of the competing parents. At the outset, when the suit is brought, neither biological parent has had much experience parenting this newborn child; and indeed neither may have had experience parenting at all.<sup>148</sup> We all know that it is not always predictable who will take to parenting and who will not. In custody contests involving newborns, the inquiry would be even more speculative than usual, and the judge would have very few direct facts to rely upon.<sup>149</sup>

Of course during the litigation, one parent or another will have custody of the child, so that parent will be building a relationship upon which a judgment could pass. Indeed that parent (and that parent's family) will be building with the child the kind of psychological relationship that it arguably will be harmful to the child to have disturbed if the judge's finding goes for the other parent. It is indeed this fact that lays the foundation

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147. "[T]he whole sorry business of surrogate motherhood is riddled with economic bias. It's rife with messages about buying and selling children, about who can 'afford' to have them." Goodman, *The word that's not mentioned in the Baby M case*, Boston Globe, Feb. 17, 1987, at 15, col. 4-5.

148. Even if the evidence shows that the surrogate mother is doing a fine job raising her other child, how is her mothering to be compared with the nonexistent parenting of the father and his wife?

149. Not only is there less evidence available on which to make a disposition, there is also less need here for a custody dispute than there may be when an older child is involved. An older child may have views and feelings about the outcome that should be heard and taken into account. A newborn, of course, is not scarred by a custody battle between her parents in the way an older child who is aware of the proceedings can be.

for the most compelling reason why we should not set up a system where the custody of newborns will turn on comparative fitness of the child's biological parents.

If we were to have a system turning upon the general comparative qualities of the parties as parents, and if (as seems necessary) a temporary disposition is to be made at the outset on the basis of less than a full hearing, then is a judge making a final disposition to take into account facts that transpired and relationships that formed during the period when the temporary order was in effect? There are serious problems either way we decide this question. If the judge takes into account that during this period the child has bonded with her custodians, that they have become her psychological parents, and that it would be detrimental to the child to alter the placement she has adjusted to, then the temporary disposition seems to have effectively determined the entire controversy. That does not seem fair to the parent who was denied temporary custody on the basis of less than a full hearing concerning the factors the law says are determinative. If on the other hand the judge determines it would not be fair to build the permanent disposition off of the temporary one, because that gives too great an advantage to the winner of the temporary order, then the child runs the risk of having to sever a parental relationship that is important to her and to start over with another parent or parents; it is this loss of the psychological parent that many persons think is seriously detrimental to the psychological development of the child.

The best solution to the dilemma is to have a clear rule governing who will be the custodial parent. Such a rule would serve best by encouraging parents not to litigate at all. If it is clear under the law who will win any custody battle, it seems likely that many of those battles will not come into court. Furthermore if a judge knows what the law is and it is clear how it applies on the facts of any particular case, the judge can apply that rule and have it govern an initial, temporary disposition, as well as a later one. That would solve the dilemma of whether to count in the period of temporary custody whichever way that question is resolved.<sup>150</sup>

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150. If one believes that the events that take place during the temporary disposition *should* be taken into account in a final custody decree, the fact that the rule is clear and

It is important, then, to have a clear rule as to who the custodian should be. Any clear rule or presumption could serve this purpose.<sup>151</sup> One such clear rule is a rule awarding custody to mothers, as long as they are fit. That rule, however, if made in those terms, is unconstitutional gender-based discrimination. Although arguments could be framed for many possible presumptions, the presumption for the primary caretaker and the presumption for the continuation of a successful placement seem most beneficial to the child. And in the context of disputes involving newborns, these presumptions would appear invariably to favor the woman who has borne the child.<sup>152</sup>

### C. Problems Concerning Visitation and Child Support

One important difference between proceeding upon a theory of contract or adoption, and proceeding through the model of a custody dispute between unwed parents, is that visitation and child support are concomitants of a custody dispute, but would not arise under a typical surrogacy arrangement<sup>153</sup> or under the laws of adoption.<sup>154</sup> There are significant differences in the re-

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easy to apply and can be applied correctly at the outset makes it unobjectionable that the temporary disposition in fact controls the whole case. The only problem with the temporary disposition being controlling would be if it differed from the final disposition. And if one believes that the events taking place during the temporary custody should *not* play a part in the final disposition, a clear and easy-to-apply rule is also helpful, because it is important to the child that the final disposition come out the same as the initial one.

151. Of course if it is an ironclad rule and not a presumption, it will lead to even greater certainty. But it may nonetheless be better to have a presumption and to have some flexibility to adjust the outcome to the needs and equities of the particular case.

All rules have depended upon a finding that the parent awarded custody is fit, for example, so parties always can litigate the issue of fitness. But it is difficult for a parent to prevail when in order to do so he must prove the other parent actually unfit, and the likelihood of losing would presumably deter many from litigating if fitness were the only issue, unless they have a strong case.

152. Nonetheless there would not be an absolute correlation with gender. *See supra* note 132.

153. Of course parties could contract that there would be visitation, or even that the surrogate mother would pay support. The latter provision seems most unlikely, and the former one is not the norm. Instead, parties usually opt to cut off the surrogate mother entirely, just as adopting parents have classically replaced the natural parents, cutting off natural parents by adoption.

154. The traditional model is that the natural parents are altogether cut off and replaced by the adoptive parents, who are the only parents with any parental rights. Traditionally, unrelated adoption almost always involved anonymity between the natural family and the adoptive family, and the child also was not permitted to know about her

sult, therefore, even if John and Diane (the natural father and his wife) could successfully claim custody under a custody-battle approach. For one thing, Diane would not be permitted to adopt the child without the natural mother's consent; instead Mary the Surrogate would remain the mother, and Diane would become a stepmother. Moreover, the natural mother would have rights of visitation, which the court would arrange and order if the parties could not reach agreement concerning them and which might be either minimal or considerable, amounting in effect to a sharing of custody. And in several jurisdictions, the natural grandparents also would have rights of visitation.

The same pattern would apply if the natural mother received custody under the custody dispute approach. The father (and perhaps his parents) would be entitled to visitation rights. Moreover, the law concerning the obligations of unwed fathers would seem to render him liable for child support, if the natural mother opted to enforce this obligation against him.<sup>155</sup>

If the father who has contracted for a baby and hoped to receive custody of the child conceived with his sperm is not permitted to enforce the contract and obtain custody, and also cannot prevail as the better parent for the child because the mother is not unfit and at the time of litigation has a closer relationship with the child than he does, it seems quite harsh to hold him to support the child for eighteen years. Indeed the best course for the father to take, if surrogacy arrangements are to remain legal though not specifically enforceable, is to pick the surrogate carefully, to hope that she goes through with the arrangement, but if she does not, to give up and try again through another surrogate

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biological roots. This process is undergoing change, both through private adoption, where the parties often (though not invariably) meet or know about each other, and also through efforts of adoptees to acquire a right to find out about, or even to meet, their natural parents.

Sometimes in private placements today, the parties arrange for the natural mother to retain some rights to visit the child, or at least to meet the child and know the child as she is growing up. There is nothing to prevent these arrangements if the parties desire them, but they still are far from the norm. See Garrison, *Why Terminate Parental Rights?*, 35 STAN L. REV. 423 (1983) and *The best of both open and closed adoption worlds: a call for reform of state statutes*, 13 J. LEGIS. 292 (1986).

155. Mothers can be liable for child support as well as fathers, cf. *Orr v. Orr*, 440 U.S. 268 (1979). However, it seems unlikely that the father in a surrogacy arrangement would be seeking support from a surrogate mother, because the father is likely to be much wealthier than the mother.

or adoption. This course is obstructed if the father incurs a large and longstanding liability with the failed surrogacy arrangement.

While our instinct may be to exempt from support obligations the father who wants to put the unfortunate transaction behind him, existing law may prove problematic. In other situations where the father could say the equities required not holding him responsible—where the mother deceived him into impregnating her, for example—courts have held that the father remains liable. Two rationales seem most important to this rule: (1) Child support is for the benefit of the child and not the mother; it would be wrong to make the child suffer and be deprived of the support of her other parent because of the conduct of the mother, even if it is questionable. (2) It would not be satisfactory to have a rule that turned upon the equities of the impregnation, because there is rarely hard and convincing evidence upon which a court could confidently decide this question, and efforts to do so would involve the court in many private details of persons' lives that it would be best for it to avoid.<sup>156</sup>

In *In re Pamela P. v. Frank S.*<sup>157</sup>—the most well-known case involving deception—the reviewing court, for these reasons, overturned a ruling of the family court that was an attempt to protect the child's needs and also pay some heed to the equities between the parties: The lower court had ruled that the father should be liable for support only if the mother was not able to shoulder that burden herself and would otherwise be dependent upon welfare benefits to support the child.

While accepting the correctness of applying usual child support rules even where there is testimony that the mother deceived the father into impregnating her<sup>158</sup>—an approach that

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156. See, e.g., *Stephen K. v. Roni L.*, 105 Cal.App.3d 640, 164 Cal. Rptr. 618 (1980)(father deceived into impregnating has no cause of action in tort because "claims such as those presented . . . arise from conduct so intensely private that the courts should not be asked nor attempt to resolve such claims").

157. 88 A.D.2d 865, 451 N.Y.S.2d 766 (1982), *aff'd* 59 N.Y.2d 1, 462 N.Y.S. 819, 449 N.E.2d 713 (1983), *reversing* 110 Misc. 2d 978, 443 N.Y.S.2d 343 (Fam. Ct. N.Y.C. 1981)(father who was tricked into impregnating a woman is not liable for child support as long as the mother's income is sufficient to meet "the child's fair and reasonable needs").

158. Although the issue of pregnancy-by-deception is raised extremely frequently in paternity suits, it is invariably a losing issue. See, e.g., *Hughes v. Hutt*, 9 Fam. L. Rept. (BNA) 2278 (Pa. Super. Ct. 1983); *In re K.A.Y.*, 10 Fam. L. Rept. (BNA) 1195 (Wisc. Ct. App. 1983).

ideally would encourage potential fathers to take some responsibility for birth control rather than make it solely the responsibility of their partners—I conclude that the usual child support rules should not apply in the situation of the broken surrogacy contract. One reason they may not apply in some jurisdictions is that sperm donors are shielded from child support suits. (In those jurisdictions fathers would also usually lose any right to litigate against a fit mother for custody.) But even when there is no such statute, the balance of equities, and the possibility that the wisest course for all concerned is for the father to accept the disappointment and turn his attentions elsewhere would argue for an exception to the usual support requirements imposed on unwed fathers, or a modification like that imposed by the lower court in *Pamela P.* imposing liability only if the child lives in poverty without it. While I am sympathetic with the ruling of the reviewing court in *Pamela P.*—that it is not worth having court battles over how and why someone became pregnant in order to weed out a few cases where the mother consciously deceived the father—the same type of issue would not arise in surrogacy cases. It is clear how the pregnancy occurred; the facts and the plan are set out in a contract between the parties, a contract that the mother decided not to perform. If the mother, who has decided to keep the child after all, has the capability adequately to support the child without the father's assistance, and if the father wishes to cut his ties with the biological child who was the product of the broken agreement, then the mother and her family should provide the sole support, even though the child might be better off with additional money from the natural father coming in.

This suggestion leaves us in the position that we are not content simply to fit surrogacy arrangements into existing laws. It shows there is a need for some special law specific to surrogacy contracts, even if in general we try to address the problems these contracts raise by applying law that is already developed.<sup>159</sup> (Moreover, if the opportunity to impose support upon

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159. Similarly in the adoption discussion in jurisdictions where rules allowed the natural mother to revoke after the baby had been placed in an adoptive home, I suggested that an exception could be made for surrogacy. There, however, it seemed that the rule proposed for surrogacy was the rule that ought to govern all adoptions. In this case, by contrast, I would not disrupt the general rule holding unwed fathers other than sperm

the father clearly exists, that would complicate the analysis of whether a mother might have something to gain by entering a surrogacy arrangement with the real intent of pulling out when the time came to surrender the child.)

This new twist in the law would apply only in those circumstances in which the father made the decision that the course he should take is to put behind him the situation that produced his biological child. While one can sympathize with a father who in these circumstances feels he has to make that decision, one can as readily imagine a different reaction—a feeling by the biological father that he wants to maintain contact with his offspring and know her as she grows up, even though he is not permitted to be her custodian. If the father does choose to take this course, he should be entitled to visitation rights on the same terms as other fathers who are not married to the mother of their child. And a father who opts to take that course should be liable for support on the same basis as other unwed fathers are. Similarly, a fit surrogate mother who loses custody of her child (as can happen in a jurisdiction that chooses to resolve these matters by comparative fitness contests) should have visitation rights on the same basis as other unwed parents deprived of custody.

#### CONCLUSION

In sum, good arguments can be made that surrogacy contracts should be altogether prohibited, but if they are not they should not be subject to specific performance. Instead, the natural mother should have the right to renounce the contract (and pay back any money she has received under it) up until the time she turns the child over to the couple who arranged for the conception. Once the child moves into the home of the natural father and his wife, however, the contract takes full effect, and the rights of the mother to claim the child terminate.

If the mother rejects the contract, the biological father should not be able to prevail in a custody dispute with her as long as she is a fit parent, which almost always will be the case.

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donors responsible for child support without regard to the circumstances of the conception.

The rule proposed for fathers in the surrogacy context is similar to rules sometimes applied to semen donors. *See supra* notes 104 and 105.

Instead of disputing with the mother, the father should accept that the adoption did not go through and turn his attentions to arranging another adoption, through a surrogacy arrangement or otherwise. If he elects to develop and maintain a relationship with the biological child that he produced through his agreement, he has the right to do so, and the relationship he then develops will receive even constitutional protection, equivalent to that afforded other noncustodial fathers. If he does opt to develop such a relationship, he also becomes liable for child support.<sup>160</sup>

These rules avoid the spectre of child being taken from mother and the maternal bond severed because of a contract. Moreover, they are clear and specific. It is extremely important to have clear and specific rules in this area, enabling persons to know their rights and to avoid litigation as much as possible and enabling any litigation to be swift and easily resolved. I believe that under this approach surrogate motherhood contracts will continue to be executed and performed and that they will not be substantially deterred.<sup>161</sup> But even if they were deterred, that would not be good reason for abandoning these rules.

There is no reason for society to *encourage* surrogacy contracts. Given society's interests in discouraging commercialization of sex and childbearing, preventing exploitation of women, and encouraging the adoption of existing children, appropriate positions for jurisdictions to take towards surrogacy range anywhere between *prohibition* of surrogacy contracts and *tolerance* of them. As jurisdictions adopt provisions concerning surrogacy, I would expect them to divide in various ways between these strategies but not deliberately to promote surrogacy or to be disturbed if some of the regulations they adopt from a balancing of

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160. Moreover, the father should not have the right to change back and forth. Once he takes on the responsibility to act as a natural father towards the child, he should be bound to continue that responsibility, as other natural fathers are, until the child reaches majority. The child should not be subject to the father taking on and then renouncing responsibilities, as other things in the father's life make the child more or less convenient for him.

161. If the father were required to be liable for child support, the deterrence would be much greater, although surrogacy arrangements would still be entered into by couples willing to take their chances on selecting a surrogate willing to perform. Women wanting to be mothers, however, might be correspondingly encouraged to enter the arrangements fraudulently.

the various needs result in discouraging some persons from entering into surrogacy arrangements.

