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ENFORCING SURROGATE MOTHERHOOD AGREEMENTS: THE TROUBLE WITH SPECIFIC PERFORMANCE

SUSAN M. WOLF *

INTRODUCTION

When a surrogate mother¹ decides that she wants to keep the baby, what should we do? Probably the most common response is that we should enforce the surrogacy contract in specific performance by compelling the surrogate to surrender the child and all parental rights—"a deal is a deal." Indeed, the trial court in *Baby "M"* did just that.²

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1. A surrogate mother may be gestational only, if another woman (such as the woman expecting to rear the child) contributes the egg. See The Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY AND STERILITY 58(S) (Supp. 1, 1986). Most surrogates, however, are both genetic and gestational, see *id.*, as was Mary Beth Whitehead, the surrogate in the Baby "M" case. *In re Baby "M,"* 217 N.J. Super. 313, 344-45, 525 A.2d 1128, 1143, cert. granted, 107 N.J. 140, 526 A.2d 203 (1987). I focus in this article on the surrogate who is in that most common category.

2. *Baby "M,"* 217 N.J. Super. at 398, 525 A.2d at 1170-71. The court awarded specific

Certainly, there is much to commend the "deal is a deal" approach. It is in many ways the simplest answer to the dispute, simpler than worrying about whether the surrogate asserts the kind of maternal claim that ought to be recognized. Creating a rule of specific enforcement yields great predictability—parties to a surrogacy contract will know that their agreement will be enforced by its terms. The rule also vindicates the sanctity of contract; having given your word, you are bound to go through with your promise. The facts of the *Baby "M"* case have surely added to the enthusiasm for this rule—by enforcing the contract in specific performance, the trial court could with one fell blow vindicate the sanctity of contract, award the child to the educated professional people (like many of "us"), and punish Mrs. Whitehead for flouting the court's authority.³ There are, in short, many reasons—some seemingly dispassionate matters of doctrine and policy preference, others not—for responding to the complexity and emotionality of the dispute with a curt "a deal is a deal" and so requiring specific performance.

It is an easy and in many ways a profoundly satisfying response, but—this article suggests—a wrong one. The contract should indeed be deemed enforceable; the analysis below merely pauses to review the reasons why. The focus here is on the mode of enforcement, and the folly of using the full and extraordinary powers of the state (complete with police enforcement, contempt, and jail) to wrest a child from a fit⁴ and desiring mother and terminate her parental rights.

Part I of this article presents the context for the problem of how to enforce surrogacy agreements—the crossroads at which society stands in deciding how to view all of the new collaborative forms of reproduction. Part II explores the allure of specific performance as the means of enforcement. Part III lays out the arguments for rejecting it. Part IV sets forth an alternative approach that I claim better negotiates the shoals on which specific

performance after finding that to be consonant with the child's best interests. *Id.* at 390-98, 525 A.2d at 1166-70. See *infra* pp. 396-98.

3. See *infra* text accompanying note 62.

4. Obviously, in some cases there might indeed be a showing that the surrogate is unfit. However, the hard case for the question of whether and how to enforce a surrogacy contract is the case in which the mother is fit and the only reason for removing the child is the surrogacy agreement itself.

performance founders.

I. THE CONTEXT FOR THE QUANDARY

We have arrived at a pivotal moment with regard to not only surrogacy but also the other forms of third-party genetic and gestational collaboration in the reproductive process. Do we permit them? If so, on what terms?

There are many types of collaborative reproduction. Surrogacy itself has two forms: by far the more common—and the one I focus on here—in which the surrogate is both genetic and gestational, as in the *Baby "M"* case, and purely gestational surrogacy in which the egg is not the surrogate's but the wife's or a donor's. There are, of course, other reproductive techniques involving third-party collaboration: artificial insemination with donor sperm (AID)—the oldest and most familiar of all of these techniques; *in vitro* fertilization (IVF) with donor sperm, donor eggs, or both; and embryo transfer (ET) in which a female collaborator is inseminated with the husband's sperm (or perhaps a donor's) and the fertilized egg is then transferred to the wife for gestation.⁵ Given so many potential collaborators in the reproductive process, plus the intermediaries who may broker the arrangements, the looming question is how to deal with the various agreements among them when they break down, and what limits or structure we should impose. Will we go the route of treating these as purely commercial arrangements and impose the law of the marketplace, or somehow develop a body of law more tailored to the subject matter—children, reproduction, and parental relationships?

Of all the forms of third-party collaboration, surrogacy poses that question in starkest terms and is the most problematic. It is the only form of collaboration involving nine months of gestational collaboration. A sperm or egg donor collaborates for a much more limited period of time and at the end of the donative act parts with gametes, not a child. Sperm donation is often

5. Throughout this article I refer to the people seeking to use surrogacy or other forms of reproduction as a "couple" and as a "husband" and "wife." However, clearly a single person, two unmarried people, or people of the same gender could use various collaborative forms of reproduction. My terminology is in part a matter of ease in keeping the players straight, and in part keyed to the facts of the *Baby "M"* case, in which the people using surrogacy were a husband and wife.

likened to surrogacy, but in fact the counterpart to sperm donation is egg donation. There is no male collaboration comparable to surrogacy. Biology—at least until we figure out how males can perform the gestational function—enforces an asymmetry.

Surrogacy—in particular, genetic and gestational surrogacy—is also the form of collaboration that looks, and is, most like simply reproducing rather than collaborating. A surrogate who is genetic and gestational goes through all of the acts that a traditional mother does, except that the mode of fertilization is artificial insemination and she parts with the child after birth.⁶

It is not surprising, then, that surrogacy is the most controversial of the collaborative reproductive techniques. Numerous state legislatures have been grappling with conflicting legislative proposals.⁷ A bill has been introduced in Congress to ban commercial surrogacy.⁸ The Vatican has called for a ban.⁹ In some countries bans have been enacted.¹⁰ In this country, conference after conference becomes the scene of fierce disagreement, and the battle rages.

II. THE ALLURE OF THE SIMPLE SOLUTION

For every problem, there is a solution that is short, simple and wrong.

—H.L. Mencken

In the whirlwind of debate over surrogacy—and especially over what to do when the surrogate wants to keep the child—there is something enormously appealing about simply enforcing the contract as written. It is a kind of haven in the storm. Part of the appeal is obvious: Competent adults agreed to these terms; we will simply make them go through with their

6. Indeed, a traditional mother may also conceive through artificial insemination and give up the child after birth.

7. See, e.g., N.Y. Times, Jan. 26, 1987, at A34, col. 1.

8. H.R. 2433, 100th Cong., 1st Sess. (1987).

9. Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, ETHICS & MEDICS (Supp. Apr. 1987).

10. See Brahams, *The Hasty British Ban on Commercial Surrogacy*, 17 HASTINGS CENTER REP. 16 (Feb. 1987); Singer, *Making Laws on Making Babies*, 15 HASTINGS CENTER REP. 5 (Aug. 1985) (Victoria, Australia); *Health Ministry Forbids Surrogate Motherhood*, Associated Press (May 17, 1987) (available through NEXIS) (Israel).

promises. Moreover, the contracting couple¹¹ relied on the surrogate's performance—the husband invested his sperm; the couple are ready and eager; the crib is set up and waiting. When a couple engage a surrogate, it is claimed, they should be able to count on the outcome; otherwise, few will take the risk.

More reasons are offered: Warning potential surrogates that their initial commitment is irrevocable will appropriately discourage those who cannot discharge the weighty obligation. Without ironclad guarantees to prospective users of surrogacy, the practice will dwindle and this fledgling industry will fail.¹² In any case, as the arguments run, there is no adequate remedy to compensate the couple for the loss of the child—they must have the child him- or herself.¹³

These arguments, and others like them, are often recited. There is nothing surprising about any one of them. I respond to them below in Part III. Yet these supposed reasons are in some sense the superficial justifications, not the deep and powerful draw. They are the arguably good reasons; it is far from clear that they are the real reasons.

Enforcing the contract in specific performance has more than a doctrinal appeal or policy advantage; it has a profound allure. The allure lies in the relief this solution seems to offer from harrowing conflicts awakened in us by surrogacy itself. This section explores three of those conflicts. My contention in this section is that enforcing the contract in specific performance is appealing because it seems to resolve those conflicts. But it does not. It merely denies a part of the problem rather than integrating the pieces to produce a true resolution.

Among the conflicts that surrogacy provokes are three particularly fundamental ones. The first is that surrogacy arrangements challenge the boundary between the commercial and per-

11. Throughout this article I refer to the couple awaiting the transfer of the child from the surrogate as the "contracting couple." Often, as in the *Baby "M"* case, only the husband is actually a party to the contract, to avoid conflict with the statutes prohibiting payment in connection with an adoption. See *infra* notes 40-41 and accompanying text. This technicality is without consequence for my argument, so for simplicity's sake I refer to the "contracting couple" herein.

12. A leading practitioner in the field of surrogacy, however, has argued to the contrary. Speech by Noel P. Keane addressing the Association of the Bar of the City of New York, May 18, 1987.

13. See *Baby "M,"* 217 N.J. Super. at 389, 525 A.2d at 1166.

sonal.¹⁴ The dispute over the child pits two conflicting paradigms against one another, so that those who see the surrogate mother as performing services or producing a good pursuant to contract deny her other identity as a mother.¹⁵ Second, recognizing the parental claims of all involved in this kind of dispute—the surrogate mother and the contracting couple—is profoundly confusing. Once we see the surrogate mother as a type of mother, we are cast adrift—without a clear gut sense of who we should favor for the role of parent. This then raises a spectre: children who are the products of the new collaborative reproductive technologies beginning life despite deep confusion about who should be seen as the parents. Third, we are in a period of substantial confusion over whether the body, including the reproductive cells and uterus, should be considered property that can be bought or rented in the marketplace. A surrogate's sale or rental of her body and its reproductive services is particularly troubling because it seems to commodify the resultant child as well.

Our deepest anxieties over how these issues should be resolved have much to teach us about the way in which contractual and equitable principles should be melded in resolving these disputes. I conclude that we ought to recognize both the commercial and personal dimensions of the dispute rather than dichotomizing them. Moreover, we have already passed the point of limiting a child's parents to two. Although novel parental ar-

14. I use the term "personal" to designate that realm ordinarily conceived as being non-commercial and exempt from commercial principles of conduct. Cf. Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354-55 (1982) (discussing the public/private distinction, the most private being parents); Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (contrasting those activities and things that we consider to be in the market realm from those we consider outside that realm, and analyzing where and how that line should be drawn). This includes the "familial" but is not limited to it—a single person with no family may nonetheless engage in personal activities.

15. Some of the debate over the *Baby "M"* case has proceeded as if the surrogate is something other than a parent. See, e.g., William Handel, *Crossfire*, Cable Network News, Aug. 27, 1986 (claiming that the surrogate is not a mother). References to the surrogate mother as simply a womb for rent also treat her as something other than a parent. Compare such rejection of the personal side of surrogacy and exclusive focus on the commercial, with the claim that "lawyers divide life into the 'professional' and the 'personal'" and that this can lead to a "disregard of complex and nuanced realities that don't fit into neat legal categories," Gewirtz, *A Lawyer's Death*, 100 HARV. L. REV. 2053, 2055-56 (1987).

rangements involving more than two adults may still be unsettling, we should not falsely focus our discomfort with this on surrogacy disputes by regarding the surrogate mother as an extra person who is something other than a parent. Resolving these disputes requires recognizing that the surrogate mother is, indeed, one of several people with parental claims to the child. Finally, although we are in a transitional period, working out our conclusions about the treatment of the body as property and, indeed, about the purchase in some senses of children, enforcing the contract as a purely commercial one goes too far in the commodification of children.

A. *The Commercial versus the Personal*

When a surrogate mother decides she wants to keep the child, what was supposed to be a commercial relationship to the child has become a personal one. The surrogate mother was supposed to conceive, carry, and give birth, but form no bond to the child. She was to produce and then absolutely surrender the child, pursuant to an arm's length contract with a stranger for a fee.¹⁶ When the rare surrogate¹⁷ discovers that despite her intent she has bonded to the child, a relationship that was supposed to be the commercial one of producer/product has become one of the most personal and intimate—mother/child.

Surrogacy challenges the boundary between the commercial and the personal—both where the boundary is and where the boundary should be as a matter of law. There are some realms so personal that the law does not apply ordinary commercial contract standards. Promises to marry are an example; although

16. Although this article focuses on the enforcement of surrogacy arrangements when there is a contract involved, surrogacy may also proceed without a contract, without a fee, and between people who are not strangers. See L. ANDREWS, *NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS* 185-86 (rev. ed. 1985) [hereinafter *NEW CONCEPTIONS*] (reporting use of family members or an acquaintance); N.Y. Times, Apr. 9, 1987, at A1, col. 1 (reporting a mother carrying her infertile daughter's offspring); M. WARNOCK, *A QUESTION OF LIFE* 42-43 (1984) (referring to surrogacy with no money involved, such as when a sister is used); N. KEANE & D. BREO, *THE SURROGATE MOTHER* 268-70, 275 (1981) (unpaid volunteer surrogates).

17. Of the hundreds of surrogacies reported, the surrogate has changed her mind and decided to keep the child in only a handful of cases. See, e.g., *A. v. C.*, [1985] F.L.R. 445 (Fam. & C.A. 1978); *NEW CONCEPTIONS*, *supra* note 16, at 193, 209, 212 (reporting instances in which a surrogate changed her mind).

at one time, breach gave rise to a cause of action, many states by statute now refuse to enforce such promises at all.¹⁸ Closer to the surrogacy case would be contracts to surrender parental rights, contracts to give up a child for adoption, and custody agreements. Here the courts will sometimes provide enforcement, but only by applying modified contract standards.¹⁹ Some of the modifications are articulated in statute;²⁰ some flow from the courts' *parens patriae* duty to protect the interests of children.²¹

Our laws on relinquishing parental rights already reject the simple application of commercial standards and, instead, impose more protective procedures. By statute in a number of states, a parent cannot agree to relinquish parental rights or surrender a child for adoption until a certain length of time has elapsed after the child's birth.²² Once given, consent to give up the child

18. S. GREEN & J. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS §§ 2.02-2.03 (1984 & Supp. 1987).

19. See, e.g., GREEN & LONG, *supra* note 18, at 311 n.692 and statutes cited therein (termination of parental rights); N.C. GEN. STAT. § 48-11 (Supp. 1985) (revocation of consent to adoption); DEL. CODE ANN. tit. XIII, § 909 (1986) (same); *In re Sarah K*, 66 N.Y.2d 223, 487 N.E.2d 241, 496 N.Y.S.2d 384 (1985), *cert. denied sub nom.*, *Kosher v. Stamatis*, 475 U.S. 1108 (1986) (same); *A.L. v. P.A.*, 213 N.J. Super. 391, 514 A.2d 494 (1986), *cert. denied*, 107 N.J. 110, 526 A.2d 181 (1987) (same); Unif. Adoption Act, 9 U.L.A. 8, 19 (1979) (revocation of consent to adoption and to termination of parental rights); *Ford v. Ford*, 371 U.S. 187 (1962) (court may modify custody decree based on changed circumstances); *Crocker v. Crocker*, 195 F.2d 236 (10th Cir. 1952) (custody contract will not be binding if detrimental to child's best interest); *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984) (explanation of basis for court's willingness to allow change in custody); N.Y. SOC. SERV. LAW § 383(5) (McKinney 1983) (custody award based on child's best interests); Unif. Marriage and Divorce Act § 409, 9A U.L.A. 628 (1987) (modifiability of custody decree); GREEN & LONG, *supra* note 18, at 226 (courts may always modify custody agreements); Hollinger, *Informed Consent Needed for Specific Performance*, N.J.L.J., Feb. 26, 1987, at 32, 33.

20. See, e.g., N.C. GEN. STAT. § 48-11 (Supp. 1985 & Supp. 1986); DEL. CODE ANN. tit. XIII, § 909 (Supp. 1986); N.Y. DOM. REL. LAW § 115(b) (McKinney Supp. 1987); KY. REV. STAT. ANN. § 199.500(5) (Michie 1982 & Supp. 1986); see also GREEN & LONG, *supra* note 18, at 311 n.692 and statutes cited therein.

21. See, e.g., *State ex rel. O'Sullivan v. Heart Ministries, Inc.*, 227 Kan. 244, 607 P.2d 1102, *appeal dismissed sub. nom.*, *Heart Ministries, Inc. v. Kansas*, 449 U.S. 802 (1980); *Olson v. Olson*, 175 Mont. 444, 574 P.2d 1004 (1978); *Sheehan v. Sheehan*, 38 N.J. Super. 120, 118 A.2d 89 (1955).

22. GREEN & LONG, *supra* note 18, at 311 n.693 and statutes described therein; Hollinger, *supra* note 19, at 33 n.11 ("no state holds a biological mother to a pre-birth contract to surrender her child," noting that a possible exception is Wyoming); NEW CONCEPTIONS, *supra* note 16, at 207 ("In Kentucky. . . the law provides that a woman may not consent to terminate her parental rights or give her child up for adoption until five

can be revoked with greater or lesser ease, depending on the state.²³ At one extreme, some states allow consent to be revoked at will;²⁴ at the other extreme, only fraud or duress will suffice.²⁵

In the adoption context the purchase of a child is widely forbidden,²⁶ though as I indicate below, this prohibition is less complete than it may seem at first. This is an effort to banish commercial motives so that the decision to surrender the child is not a commercial one. Nor do we apply strict commercial principles to custody agreements—various considerations will trump the language of an agreement; a court can modify a custody agreement whenever it is in the best interests of the child.²⁷

As a matter of morality, too, rather than law, there is a line we commonly draw between the commercial and personal arenas. One basis for condemning at least commercial if not all surrogacy is that childbearing is not an act that should be undertaken on a commercial basis. It should be done only for love, not money, with the intent to cherish, not relinquish, the child.²⁸

days after the baby's birth."); *cf.* *Anonymous v. Anonymous*, 108 Misc. 2d 1098, 439 N.Y.S.2d 255 (1981) (consent of mother to terminate parental rights prior to birth of child is void *ab initio* since child must be born before consent is valid under N.Y. DOM. REL. LAW § 11-1(c)).

23. See Hollinger, *supra* note 19, at 33; see also *supra* notes 19-20.

24. See, e.g., *Small v. Andrews*, 20 Or. App. 6, 530 P.2d 540 (1975) (absent estoppel, mother absolutely entitled to withdraw consent to adoption at any time prior to decree); *In re D.L.F.*, 85 S.D. 44, 176 N.W.2d 486 (1970) (because unwed mother revoked her consent promptly, she did not lose her rights); *Hendricks v. Curry*, 401 S.W.2d 796 (Tex. 1966) (since child was not found to be abandoned or neglected, mother allowed to revoke her valid consent to adoption at any time before decree entered); *In re Adoption of Gunther*, 416 Pa. 237, 206 A.2d 61 (1965) (because child was not abandoned, mother may revoke consent before final adoption decree).

25. See, e.g., *Anonymous v. Anonymous*, 23 Ariz. App. 50, 530 P.2d 896 (1975) (mother's misunderstanding of finality of her signature on consent to adoption; only fraud or duress will suffice under ARIZ. REV. STAT. ANN. § 8-107); *In re Adoption of Child*, 114 N.J. Super. 584, 277 A.2d 566 (1971) (consent to adoption irrevocable, barring fraud or some overriding equitable consideration).

26. See *NEW CONCEPTIONS*, *supra* note 16, at 294-95 (listing statutes in 24 states prohibiting payment in connection with an adoption); Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J. L. & SOC. PROB. 1, 8 n.34 (1986) (listing twenty-four states that have enacted baby-broker acts to combat black market adoptions).

27. See, e.g., *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984); *Sheehan v. Sheehan*, 38 N.J. Super. 120, 118 A.2d 89 (1955); *cf.* *Ford v. Ford*, 371 U.S. 187, 193 (1962) (welfare of infant is paramount concern).

28. See Callahan, *Surrogate Motherhood: A Bad Idea*, N.Y. Times, Jan. 20, 1987, at A25, col. 2.

The point is not the precise location of the line between the personal and commercial, which can certainly be debated, but the fact that there is a line at all. Surrogacy—especially when a surrogate turns around and claims the child—provokes profound disagreement because it is not clearly on one side or the other. There is a commercial agreement to produce and surrender a child; to that extent the surrogate's relationship to the child as well as to the contracting couple is a commercial one. But the surrogate is also the child's genetic and gestational mother; if the surrogate cares for the child for some time after birth, she will be to that extent also a rearing mother. This aspect of her relationship to the child is distinctly non-commercial and personal.

To claim that the surrogate is not a mother at all²⁹ and that we should simply force her to carry out the acts she has promised—as we might in more ordinary commercial contexts—is to miss the problem, the dual character of surrogacy. Much of the debate on what to do when the surrogate changes her mind rests on a failure to see this dual character. Should we simply enforce the contract—"a deal is a deal"—or ignore the contract and treat the case as a custody dispute? The problem is often posed as this choice—either contract or custody.³⁰ This springs from an inability to see the commercial and personal dimensions simultaneously. The dichotomy between contract and custody is a false one—the dispute partakes of both. The solution must do justice on both counts.

B. Multiple Parents

Current reproductive technologies raise the possibility that four or more people might be involved in the production of one child: the sperm donor, the egg donor, the gestating woman, and one or more people to rear the child.³¹ Each might have a claim to parental rights, as indeed might the spouses of at least some

29. See *supra* note 15.

30. See, e.g., Will, *The Natural Mother*, Washington Post, Jan. 22, 1987, at A21; *Mother Can't be Ignored in the case of Baby M*, Philadelphia Inquirer, Nov. 9, 1986, at 6-E.

31. See Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 1002 (1986) [hereinafter *Procreative Liberty*].

of these participants. In comparison, the scenario of the surrogate mother versus the genetic father and his wife seems simple. Yet surrogacy is among the reproductive methods that makes for a disturbing proliferation of collaborators in reproduction. That proliferation poses a challenge: As the reproductive process becomes divided into segments and apportioned among various participants, it becomes harder for the observer to find guidance in her head or heart as to who should get the child if the arrangement breaks down.

To proliferate the number of participants is to push our capacity for understanding and empathy to the limit. It is not obvious how to compare the different claims that could be made. This proliferation, moreover, fundamentally challenges some of our usual notions of identity. Traditional reproduction involves only two people who between them play all the roles. When a child has different genetic and rearing parents, sorting out the child's identity becomes more complex. We are no longer clear whose child this "really is" or should be. Faced with this confusion, the temptation is great to pull back and simply deny the fact that the surrogate is a mother asserting a maternal claim. Contemplating other reproductive collaborations can reinforce this. If surrogacy can generate three parental claims, other reproductive arrangements will be able to generate more. Given this potential, the impetus is to maintain that only the contracting couple really qualify as parents and the surrogate is merely the contractual producer. She is asserting a claim as a usurper, not as a real parent—her attempted coup should be crushed.

Yet it is chastening to realize that in more usual disputes over children we have already recognized that more than two people may lay parental claims to one child. Indeed, even grandparents may now assert claims. Thus, ordinary disputes can themselves present a confusing proliferation of parental claims. We should not single out surrogacy for the unique response of denying the parental nature of one of the claims.

C. The Body as Property

When people enter into a paid surrogacy arrangement, body parts—and even more troubling, perhaps whole bodies—are on the block. When the surrogate is to be both genetic and gesta-

tional, the contracting couple is buying the surrogate's reproductive services and egg. Debate goes on over whether the couple are buying a child as well.

In other realms, there has already been an explicit and developed discussion of the propriety of treating body parts as property.³² But the treatment of body parts as property remains confused. In the field of organ transplantation, the debate about the propriety of payment for solid organs such as kidneys has resulted in a statutory ban.³³ Yet we allow payment for blood plasma, and indeed sperm is bought and sold—sperm donors receive a small fee for donating to a sperm bank and users pay for impregnation with that sperm.³⁴ Recent litigation has raised the question of whether a person has property rights in valuable cells cloned from an excised tumor.³⁵

Outside the realm of reproduction, the debate about whether to allow the treatment of the body as property focuses on several concerns: protecting people from commercial incentives that might overwhelm their interest in bodily integrity; preserving the quality of the body-parts supply by eliminating a monetary incentive that appeals especially to those with low quality parts; avoiding the creation of a group of people whose function is to supply "spare parts" for those of greater financial means; and preventing the treatment of people as mere means and not ends. What public policy these concerns advise when

32. See Murray, *Gifts of the Body and the Needs of Strangers*, 17 HASTINGS CENTER REP. 30 (Apr. 1987); Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP. 28 (Oct. 1986); Royston, *Cell Lines From Human Patients: Who Owns Them? A Case Report*, 33 CLINICAL RESEARCH 442 (1985); Wagner, *The Legal Impact of Patient Materials Used for Product Development in the Biomedical Industry*, 33 CLINICAL RESEARCH 444 (1985); Caplan, *Blood, Sweat, Tears, and Profits: The Ethics of the Sale and Use of Patient Derived Materials in Biomedicine*, 33 CLINICAL RESEARCH 448 (1985); Prottas, *Encouraging Altruism: Public Attitudes and the Marketing of Organ Donations*, 61 MILBANK MEMORIAL FUND Q. 278 (1983); R. SCOTT, *THE BODY AS PROPERTY* (1982); Note, *The Sale of Body Parts*, 72 MICH. L. REV. 1215 (1974); R. TITMUSS, *THE GIFT RELATIONSHIP* (1971).

33. 42 U.S.C.A. §§ 273-74e (West. Supp. 1986).

34. See NEW CONCEPTIONS, *supra* note 16, at 154, 156-57; *For One Man, Acting as a Donor Has Been Awkward but Gratifying*, Wall St. J., Apr. 2, 1987, at 31, col. 5; Dunstan, *Moral and Social Issues Arising from A.I.D.*, in *Law and Ethics of A.I.D. and Embryo Transfer*, CIBA FOUNDATION SYMPOSIUM 17 (1973). *But see* WARNOCK, *supra* note 16, at 27-28 (raising concerns about payment to donor).

35. See Culliton, *Mo Cell Case has its First Court Hearing*, 226 SCIENCE 813 (1984); *see also* Sun, *Scientists Settle Cell Line Dispute*, 220 SCIENCE 393 (1983).

applied to surrogacy is debatable. But commerce in body parts in the context of surrogacy raises even more issues than in other contexts such as organ transplantation for one clear reason: the spectre of baby-buying.

At the heart of commercial surrogacy lies a dilemma. On the one hand, if we allow it at all, then we are permitting surrogates to sell reproductive goods and services and to alienate their parental rights. On the other hand, because of the nearly universal prohibition on baby-buying, at the point of the final surrender of the child we have to draw a line and declare that the child itself is not being bought. At least one commentator has noted with discomfort this required turnabout.³⁶

The usual resolution of this dilemma is to point out that surrogacy can easily be distinguished from those practices that legislatures meant to prohibit in passing the baby-selling statutes.³⁷ Those statutes were, of course, a response to the black market in babies.³⁸ The prohibition protects the poor and unwed mother whose willingness to care for her child may be overcome by her financial neediness.³⁹ The surrogate is in a different situation from the unfortunate mother who finds herself trapped in a pregnancy neither planned nor affordable. The surrogate decides whether to accept the money and give up the child before the child is ever conceived. The surrogate can just walk away from the offered deal, none the worse. She has the freedom of choice.

Nor need surrogacy return us to an era of black-market babies. Agreement is widespread—though not universal—that surrogacy, if permitted, should be regulated by the state. It is the unregulated, not the regulated, practice of surrogacy that threatens a return to unscrutinized and uncontrolled traffic in children. Regulation, on the other hand, could standardize practices, mandate accountability, and drive the unscrupulous out of business.

Moreover, in the surrogacy context it is the child's father himself who is paying. It is often argued that a father cannot

36. See Annas, *Baby M: Babies (and Justice) for Sale*, 17 HASTINGS CENTER REP. 13 (June 1987).

37. See, e.g., *Surrogate Parenting Associates v. Com. ex rel. Armstrong*, 704 S.W.2d 209, 211-12 (Ky. 1986).

38. See Katz, *supra* note 26, at 8-9.

39. See *Surrogate Parenting Associates*, 704 S.W.2d at 211-12.

buy his own child; he is paying for the surrogate's services, not the child as a commodity.⁴⁰ Indeed, surrogacy agreements are often drawn, as in *Baby "M,"* to exclude the wife of the contracting couple, in order to avoid running afoul of the baby-selling statutes' prohibition of payment in connection with an adoption.⁴¹

All of these arguments as to why commercial surrogacy does not violate the baby-selling statutes are fine as far as they go. But they leave one in an odd position: conceptualizing the "thing" being sold purely as the surrogate's services (and perhaps body parts)—*not* the baby. The child is plucked from the picture. By lopping off a part of the problem, we are left focusing only on the questions (albeit substantial) of how to handle the surrogate's trafficking in her own body parts and services. If we want to get tough and enforce her commercial agreement in specific performance, so be it.

Yet this ignores the question of whether that kind of enforcement carries us too far down the road toward the commodification of children. It is too simple and mechanical to rely on the easy exercise of distinguishing the baby-selling statutes to allay our fears about commodification. It would be wiser to look beyond that exercise, recognizing that surrogacy is new territory not contemplated by those statutes. We need to acknowledge and explore the extent to which surrogacy *is* the payment of money for children, and then answer the policy and legal question of whether we should tolerate and specifically enforce it.

The baby-selling statutes are, after all, only one clue to this society's view of the matter. A rule against the sale of people has other roots in this country as well—the abolition of slavery. At one time one could indeed buy and sell people. The thirteenth amendment⁴² is the constitutional rejection of slavery, the legal side of a broader cultural rejection.

Yet our public policy on baby-selling is complex. The prohibition against baby-selling has not been construed as a blanket condemnation of the payment of any money in connection with adoption. Paying the gestational mother's expenses is allowed;

40. See, e.g., *Baby "M,"* 217 N.J. Super. at 372, 525 A.2d at 1157.

41. *Id.* at 374, 525 A.2d at 1158.

42. U.S. CONST. amend. XIII.

paying the private adoption agency's fee is allowed; paying the lawyer who handles the legal necessities is allowed.⁴³ What may appear at first reading to be the banishment of all payment from the transaction is something narrower: the destruction of a black market in babies. Simply paying money to acquire a child cannot be baby purchase or many adoptions would fit the mold as well; so would every purchase of sperm for artificial insemination; so would paying for *in vitro* fertilization at a clinic; and so would agreeing to an adjustment in alimony to secure custody of a child.

It will not work simply to distinguish the baby-selling statutes and then ignore the question of how far we want to go in the commodification of the child in surrogacy. Our policy and attitudes toward paying money for a child are more complex and ambivalent.⁴⁴ It is necessary to recognize straightforwardly that surrogacy involves not only commerce in body parts and services, but to some extent the payment of money for a child. In then determining whether we will tolerate surrogacy, and what methods of enforcement should apply to surrogacy agreements, concerns about the commodification of the child remain in the equation rather than dropping out.

The answer to all three of the conflicts I have considered in Part II lies not in avoiding our ambivalence but accepting it. Surrogacy does involve the marketing of body services and parts and to some extent the payment of money for a child despite the societal ambivalence; the surrogate's relationship with the child is simultaneously commercial and personal; and all of the multiple collaborators in producing a child have genuinely parental claims to assert.

43. See Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59, 60, 71-72 (1987); Charvey, *The Rebirth of Private Adoptions*, 71 A.B.A. J. 52, 54 (June 1985); Myers, *Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy over Grey-Market Adoptions?* 18 DUQ. L. REV. 629, 638 (1980); GREEN & LONG, *supra* note 18, at 66.

44. Cf. Posner, *supra* note 43, at 72 ("[W]e have legal baby selling today; the question of public policy is not whether baby selling should be forbidden or allowed but how extensively it should be regulated.").

III. THE PROBLEM WITH SPECIFIC PERFORMANCE

In the above section, I have tried to show the allure of responding to a surrogate who wishes to keep the child by enforcing the contract in specific performance. Having discussed why that response is a quick and inadequate fix for a problem whose complexity should not be avoided so readily, I want to formulate here more precisely the problem with specific performance. First, however, the reasons for enforcing the contract at all must be acknowledged.

A. *Why Enforce The Contract At All?*

As stated in the Introduction, the focus of this article is not on the pros and cons of allowing surrogacy but rather on the means of enforcing the agreement. Yet it is necessary to pause and at least acknowledge the reasons why the question of how to enforce arises.

Many will debate in the years ahead whether surrogacy should be allowed, discouraged, or banned. Infertility, however, is with us and the number of couples suffering from it is substantial.⁴⁵ Surrogacy offers the only way for couples with some forms of infertility to have a child with a genetic relationship to at least one of them. Many couples, whether rightly or wrongly, appear to value that genetic connection and prefer surrogacy to adoption. Hence there is a demand for surrogacy, and one likely to persist.

A ban on surrogacy would probably drive the practice underground, not effectively eradicate it, and the children produced would pay the heaviest price. Produced outside the law, through a practice conducted by unregulated intermediaries, they would be a new class of black-market babies. A ban would also leave consumers and surrogates who illicitly participated in the practice unprotected from each other and the intermediaries.

Aside from these pragmatic concerns, serious doubts have been voiced about the constitutionality of a ban.⁴⁶ If the rights

45. NEW CONCEPTIONS, *supra* note 16, at 2 ("Today, 15 percent of all married couples are infertile.").

46. Robertson, *Surrogate Contracts Not Against Public Policy*, N.J.L.J., Feb. 26, 1987, at 332; *Procreative Liberty*, *supra* note 31, at 961 & n. 69, 1002-03, 1013.

of privacy and procreative liberty extend to the use of third-party reproductive collaborators, there may be a constitutional right to utilize surrogacy, though the state still could, of course, regulate the practice to protect compelling state interests.⁴⁷

It might be argued that surrogacy should be tolerated, but the contracts not enforced.⁴⁸ It is important to see precisely what this would mean. The courts could not stay out completely: When a dispute erupts between a surrogate and the contracting couple over who gets the child, a court cannot and should not avoid deciding the issue. In any dispute over parental rights the state and the courts have an unavoidable responsibility to protect the interests of the child and to settle the question of who has parental responsibility. But refusing to enforce the contract at all would make the contest purely a custody and parental rights dispute. John Robertson has suggested that this would infringe the couple's constitutional right to procreative liberty.⁴⁹ Beyond the constitutional argument, withholding enforcement altogether would leave the parties with little incentive to perform their obligations if their initial motivation for entering into the agreement should begin to fray at the edges. Avoiding the expense and bother of litigation would remain an incentive backing up the original commitment, but there would be little else. No party would have any good reason to count on the other to perform. Thus some type of enforcement is needed.

B. Against Specific Performance

One common argument against enforcing in specific performance the surrogate's agreement to give up the child⁵⁰ should

47. See *Procreative Liberty*, *supra* note 31, at 959-62.

48. Of course, if one assumes that the right to rear a child cannot be willingly alienated by a surrogate before the child's birth as a matter of constitutional law, see Annas, *supra* note 36, then one does not reach the enforcement question that I wish to focus on. One simply gives the surrogate an absolute opt-out.

49. See *Procreative Liberty*, *supra* note 31, at 1014-15; Robertson, *Surrogate Mothers: Not So Novel After All*, 13 HASTINGS CENTER REP. 28, 32-33 (Oct. 1983) [hereinafter *Not So Novel*]; see also *Baby "M,"* 217 N.J. Super. at 384-88, 525 A.2d at 1163-66.

50. This is in contrast to the argument against specific enforcement of a surrogate's contractual promise not to abort. See *Baby "M,"* 217 N.J. Super. at 375, 525 A.2d at 1159. On abortion, the argument is based on the constitutional right recognized in *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. See also Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986) [hereinafter

be dismissed from the start. That is the argument that the contract should be regarded as one for services, and specific performance is not available to enforce a contract for services.⁵¹ This is often recited as a matter of hornbook law.⁵²

The argument fails for several reasons.⁵³ First, the courts usually will not enforce a contract for services in specific performance because they will not force the parties to remain in the relationship ordained by contract once that relationship has gone sour. Secondly, the courts will not award a remedy that cannot be enforced; commanding the rendering of services is a problem because of the difficulty in monitoring the quality and adequacy of the performance. In the classic example, when an opera singer refuses to perform, the remedy is not to force her out on stage.⁵⁴ Instead, it is to exact damages, and perhaps to enjoin her from singing elsewhere that night.

The problem is that once a surrogate has given birth and produced the child neither of these reasons for avoiding specific performance applies. At that point, enforcing her surrender of the child does not lock the parties into an ongoing relationship. Indeed, quite the opposite is the case—it is the basis for severing their relationship. Moreover, the adequacy of performance is easy to monitor; all that is demanded is surrender of both the child and parental rights. Therefore, the basic rationale for withholding the remedy of specific performance when a ser-

Rumpelstiltskin] (arguing that the right to abort is inalienable, but not necessarily the right to rear the child). *But see* Annas, *supra* note 36, at 15 (arguing that rearing rights are inalienable pre-birth). Also, pre-birth performance of the surrogacy agreement would be services that should not be compelled for the hornbook reasons discussed in the text. *Cf. Not So Novel, supra* note 49, at 33 (the surrogate's promise not to abort should not be enforced in specific performance "because of the difficulty in enforcing or monitoring the order [to continue the pregnancy];" the surrogate should pay damages instead).

51. *See, e.g.,* Haddon, *Contract Cannot Be Specifically Enforced*, N.J.L.J., Feb. 26, 1987, at 31, 31-32; Frug, *Breach Remedy Limited to Restitution*, N.J.L.J., Feb. 26, 1987, at 33, 34.

52. *See, e.g.,* Haddon, *supra* note 51, at 31-32 n.10.

53. I am indebted to Dean Norman Redlich for suggesting this.

54. On the usual unavailability of specific performance as a remedy for a breach of contract for personal services see 5A A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW, § 1204, at 400-01, § 1206, at 412, § 1208, at 415 (1964); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1450, at 1045-46 (3d ed. 1968); RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981). *But see* Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 356-57 (1978) ("Occasionally, an employment or construction contract will also be specifically enforced." (footnotes omitted)).

vice contract is breached does not apply. Indeed, the trial court judge in *Baby "M"* concluded that the contract was one for services but enforced it in specific performance anyway.⁵⁵

Moreover, a surrogate's refusal to surrender the child looks very much like a refusal to deliver the end product of her now largely completed services, rather than simply a refusal to perform the services that would produce the product. Thus the arguments against enforcing a promise of services in specific performance would seem not to apply.

The advocates of the position that surrogacy contracts are purely service contracts have been forced into that position by the desire to avoid seeing the child as in any way a product⁵⁶ to be transferred. In part, that desire has been based on the fear that the contrary view would place surrogacy in violation of the baby-selling statutes, because then the fee paid would be for the purchase of a child, not a fee for services. As I have argued above, however, surrogacy is easily distinguished from the scenario addressed by the baby-selling statutes, without changing the fact that a surrogacy contract is in part an agreement to produce and surrender a child for a fee.

Having established that the usual argument against specific performance does not work, why not go ahead and treat surrogacy as an ordinary commercial transaction, forcing the parties to live up to their deal?

1. Commodification and Use of the Child

There are a number of reasons to look skeptically upon specific performance as the contractual remedy. One reason is that the "object" in dispute is no object at all, but a child. I have suggested that surrogacy does involve some commodification of the child, as does any arrangement involving payment that re-

55. See *Baby "M,"* 217 N.J. Super. at 372, 398, 525 A.2d at 1157, 1170-71.

56. Calling a child a "product" offends our sensibilities. Cf. Radin, *supra* note 14, at 1859, 1870, 1925, 1927-28 ("we do not fear relinquishment of children unless it is accompanied by market rhetoric"); Frankel & Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U.L. REV. 99, 101 (1987) (objecting to "describing the adoption system in the language of economics—'market,' 'commodity'"). Yet there is presently no good alternative term that respects the child's humanity, while acknowledging that the child has been produced for a fee pursuant to a contract and now, after birth, is supposed to be surrendered. Perhaps we need to invent a new term.

sults in obtaining a child. But we can and should limit the extent of commodification. The mere fact that an agreement exists between private parties to transfer the child does not mean that when a court is called upon to remedy a breach of that agreement, the right answer is to enforce what is written on the piece of paper. Courts that deal with matters affecting the welfare of children have an unavoidable responsibility to inquire into what will serve the child's interests and welfare, over and above whatever private agreements exist. If a surrogacy contract were instead a contract for the sale of a widget or a toaster, then enforcing the agreement in standard commercial terms would be appropriate and would serve the public good. But a child is not a widget. Even if the grounds for specific performance were otherwise present, the fact that the contract concerns a child means that unthinking enforcement of the contract serves neither the child's nor the public's good.

In the *Baby "M"* case, the trial court concluded that specific performance and the child's interest pointed to the same resolution. It may be tempting to generalize from that a rule of specific performance for all surrogacy contracts. Yet it is easy to imagine cases in which that rule would be more troubling: What if the contracting couple separate and divorce during gestation while the surrogate's home and marriage remain intact? What if both members of the couple have entered into the contractual arrangement with the surrogate, but the father dies before the birth? What if it is the couple and not the surrogate who flout the court's authority, lie, attempt to run off with the child, and threaten the child's life? In none of these cases is specific enforcement of the surrogate's promise to surrender the child so appealing. Indeed, it is interesting to ponder the unlikely⁵⁷ but conceivable scenario in which the class characteristics of the surrogate and couple are reversed—the surrogate is a pediatrician married to a chemist, while the contracting father is a sanitation engineer with a history of alcoholism married to a tenth-grade dropout. The enthusiasm for specific performance might not run nearly as high.

In the *Baby "M"* case, the court purported to temper the

57. It is unlikely because surrogacy costs about \$20,000. See KEANE & BREO, *supra* note 16, at 269.

remedy of specific performance by conditioning award of that remedy on its serving the child's best interests. Yet, in application, this offered little modification. To the extent the inquiry into "best interests" altered the picture at all, it converted the child from a commodity to a pawn. The child was awarded as would vindicate the court's outrage and reward the couple's good behavior.

Although there are many possible definitions of "best interests," the judge in the *Baby "M"* case used a nine-point test:⁵⁸

(1) "Was the child wanted and planned for?"—This always favors the contracting couple since it is they who wanted and contracted for the child.

(2) "What is the emotional stability of the people in the child's home environment?"—The *Baby "M"* judge found the surrogate's panicked attempts to keep the child to be damning. To the extent a surrogate's change of heart about surrendering the child results in desperate attempts at the time of the birth to hold on to the child, it counts against her. This point too will favor the contracting couple.

(3) "What is the stability and peacefulness of the families?"—Depending on circumstances in the two families, this theoretically could weigh in either direction. The judge in the *Baby "M"* case criticized the surrogate for being "thoroughly enmeshed" with the child and "impulsive." If that means bonded to the baby and desperate to hold on to her, this factor will favor the couple, since bonding can be expected between a mother and child.

(4) "What is the ability of the subject adults to recognize and respond to the child's physical and emotional needs?"—The *Baby "M"* judge here noted that the surrogate was emotionally over-invested in the child while the couple was not. This may really mean that the surrogate was fighting an uphill battle to hold on to the child while the couple felt less threatened or were holding back emotional investment until the resolution of the case. To that extent, this factor will usually favor the contracting couple.

(5) "What are the family attitudes towards education and

58. *Baby "M,"* 217 N.J. Super. at 392-98, 525 A.2d at 1167-70 (with the nine sentences quoted below in text).

their motivation to encourage curiosity and learning?"—This will always favor the more educated parties. That will almost inevitably be the contracting couple, because they are the buyers, likely to be more affluent.

(6) "What is the ability of the adults to make rational judgements?"—The *Baby "M"* judge found the surrogate to be impulsive in crises. To the extent this gives a black mark to any surrogate who changes her mind about surrendering the child upon bonding at birth, this factor again systematically favors the couple.

(7) "What is the capacity of the adults in the child's life to instill positive attitudes about matters concerning health?"—This theoretically could favor either side. Yet here again in *Baby "M,"* class differences came to the fore: The fact that the wife of the contracting father was a pediatrician counted in her favor, in contrast to the surrogate who had no profession or occupation outside the home and care of her other children.

(8) "What is the capacity of the adults in the baby's life to explain the circumstances of origin with least confusion and greatest emotional support?"—Here the *Baby "M"* judge faulted the surrogate for, among other things, showing little empathy for the couple. Yet it is hard to imagine how any surrogate who had bonded to the child, then had her forcibly taken away at the couple's behest, would show much empathy. At the same time, the court credited the couple with a willingness to seek advice from professionals (like themselves) on how and what to tell the child. This, too, may be a reflection of class differences. If the surrogate's lack of empathy for the couple and the couple's willingness to consult professionals figure largely in this calculation, this point too may systematically favor the couple.

(9) "Which adults would better help the child cope with her own life?"—The *Baby "M"* judge faulted the surrogate who changed her mind with having difficulty coping in a crisis. He credited the couple, whose single goal throughout had been to obtain the child, with showing "no aberration." This point will also tend to favor the couple.

The court in *Baby "M"* after pursuing the nine points, went

on to examine the "climate" offered by each family.⁵⁹ The court stated that it was "satisfied . . . that Mrs. Whitehead is unreliable as far as her promise is concerned. She breached her contract without regard to her legal obligations."⁶⁰ Any surrogate who changes her mind will fail on this point. The judge also reiterated that she was "too enmeshed" with the child.⁶¹ A surrogate who bonds with the newborn and fights to keep her will probably fail on this score as well. The court again emphasized the educational and economic differences that will almost always also favor the couple.

"Best interests" is supposedly modifying and correcting a specific enforcement remedy here. It is important, however, to see what a *Baby "M"*-style "best interests" consideration does and does not accomplish.

To the extent that under the "best interests" rubric the judge faults the surrogate for breaching her contractual obligations, the "best interests" consideration provides no modification at all to specific enforcement. The judge merely reinforces the conclusion that failing to surrender the child is an adequate basis for forcing the surrogate to do so. The same goes for other points in the "best interests" analysis that rely on the structure of the conflict over the child to favor the couple systematically (for instance, the couple, not the surrogate, planned for the child; the surrogate is desperately attached to the child emotionally, lacking empathy for the couple). It is not obvious that any of these considerations have much to do with the question of which placement will be better for the child once the storm of litigation is concluded and the business of living a life is at hand. If "best interests" were to serve as a real check on specific enforcement, the focus in the evaluation would not be on a reiteration of the structure of the dispute in litigation, but on what the rest of life for this child would be like in each of these two families.

The question of whether class concerns—education, money, and the like—should figure in answering that question is a broad topic for another day. Others have explored the questions of how

59. *Id.* at 395-98, 525 A.2d at 1169-70.

60. *Id.* at 396, 525 A.2d at 1169.

61. *Id.* at 396, 525 A.2d at 1170.

class and life style should weigh in "best interests" determinations. Suffice it to say that in the surrogacy context, if "best interests" is supposed to function as a corrective to specific enforcement, considering class differences will almost always simply reinforce rather than modify the specific performance remedy. Because the couple will nearly always be more privileged than the surrogate, both this piece of the "best interests" calculus and specific enforcement will point toward the couple. It is, of course, a good question whether the better educated, more monied family necessarily offers a better placement for the child.

I have thus far considered the court's examination of the surrogate's breach of her contractual obligations, the structure of the dispute, and class differences. Equally troubling is the fact that the *Baby "M"* judge counted the surrogate's disobedience of the court as another strike against her in the "best interests" calculation.

Mrs. Whitehead testified to what she chose to, exercising a selective memory, intentionally not recalling or outright lying on the witness stand. . . . This fundamental inability to speak the truth establishes a tarnished Whitehead environment.

. . . The judgement-making ability of Mrs. Whitehead is sorely tested. One outstanding example was her decision to run away in the face of a court order. While she claims fear of the system made her do it this court sees it, minimally, as a disregard of her legal and civic obligation to respond to a court's order, and, maximally, as a contempt of the court order. . . .

. . . [Mr. and Mrs. Stern] have obeyed the law.⁶²

While the surrogate's behavior may well have amounted to contempt and understandably angered the court, to pack this too into a consideration of whether the child's "best interests" militate against specific performance is surely packing in too much. We are here not talking about a corrective to specific enforcement based on the child's interests, but an outrage based on the interests and authority of the court. We may also be talk-

62. *Id.* at 396-98, 525 A.2d at 1169-70.

ing about some kind of balancing of the equities: The quotation above contrasts the couple's clean hands with the surrogate's soiled ones. The focus, however, is not on the child.

The "best interests" modification to specific performance, as the *Baby "M"* judge applied it, is really no modifier at all. It is a reiteration of some of the reasons why the judge is inclined to award specific performance in the first place: The surrogate breached her promise, she angered the court, the equities favor the couple in the court's view, and the couple is of a higher class.

Yet even if the "best interests" calculus were drastically improved to center genuinely on which placement would best serve the child, difficulties would remain. First, any "best interests" analysis applied to a newborn child is problematic. The child has no history with either family, so neither family has any track record with that child to examine. Moreover, in a surrogacy context, the competing families are likely to be quite different from one another, unlike a couple who once formed a family unit. The child's interests, consequently, are bound to be enormously speculative and the comparison of families will turn into a comparison of apples and oranges. Thus in most cases the child's "best interests" will provide little, if any, guidance.

In any case, the excessive commodification of the child entailed by specific enforcement remains troubling even if "best interests" is supposed to function as a corrective.

2. Ignoring Parental Claims

Specific performance also ignores the fact that the surrogate's claim is a parental one. One could argue that her parental claim means that the current laws on custody, adoption, and termination of parental rights apply.⁶³ The *Baby "M"* judge rejected this, reasoning that the legislature did not have surrogacy in mind when it enacted those statutes.⁶⁴ The underlying question in any event is whether those laws or the policies they embody ought to apply to surrogacy. If the answer to either is yes, then specific performance cannot serve as the remedy.

Some would argue for the strict enforcement of surrogacy

63. The surrogate argued this in *Baby "M."* This position prevailed in *Surrogate Parenting Associates v. Com. ex rel. Armstrong*, 704 S.W.2d 209, 212-13 (Ky. 1986).

64. *Baby "M,"* 217 N.J. Super. at 372-73, 375, 525 A.2d at 1157-59.

contracts as if we were writing on a clean slate with no experience with mother/child bonding and the process of consent to adoption, no history of wrestling with how to handle the mother who feels driven at birth to keep her child or concludes after consenting to adoption that she has made a mistake. They would ignore the tradition of legislation that crafts a solution to accommodate in some humane way both the mother attached to her child and the awaiting couple whose hopes of getting that child are disappointed. Yet the slate is not clean. The law already recognizes what everyone knows as a matter of common sense: A parent can be unexpectedly smitten with profound connection to the newborn child at birth, and a parent who tries (for whatever reason) to give a child away, can find it impossible to go through with the parting.⁶⁵

In many states, the statutory law on terminating parental rights and adoption recognizes that the time around the birth of a child is a period when even a mother who was previously determined to surrender her child may change her mind.⁶⁶ Psychologists and other students of the phenomenon recognize birth as a time of mother/child bonding.⁶⁷ A mother who has gone through an entire pregnancy determined to give up the baby, may at birth bond anyway and find it impossible to surrender the child. In a number of states the law prohibits an effective agreement to surrender the child until a certain number of days after the birth.⁶⁸ This allows a mother time to bond with the child and to reconsider any prior decision to give the child up.

65. Even the law on contracts much more ordinary than surrogacy contracts recognizes that in some cases it is too harsh to hold people to performance of their prior agreement. The law provides cooling-off periods for some kinds of contracts, such as door-to-door sales contracts. There is a recognition that in some circumstances the willingness to enter into an agreement will later be overcome by a realization that the agreement was ill-advised, and the reasonable and humane policy is to allow the time for people to change their minds and free themselves of the contractual obligation.

66. See, e.g., IOWA CODE ANN. § 600A.4 (2)(d) (West 1981) (requiring 72-hour waiting period after child's birth before parents' execution of a written release of custody); KY. REV. STAT. ANN. § 199.500 (5) (Michie/Bobbs-Merrill 1982 & Supp. 1986) (five-day waiting period); MASS. GEN. LAWS ANN. ch. 210, § 2 (West 1987) (four-day waiting period before written consent to adoption allowed); S.D. CODIFIED LAWS ANN. § 25-5A-4 (1984 & Supp. 1987) (five-day waiting period).

67. See Cohen, *Surrogate Mothers: Whose Baby Is It?* 10 AM. J. L. & MED. 243, 260-62 (1984) and sources cited therein; Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 344-46 (1982) and sources cited therein.

68. See, e.g., NEW CONCEPTIONS, *supra* note 16, at 207; *supra* note 66.

Moreover, in many states, even after a mother has crossed that bridge and consented to adoption, she can revoke her consent for a limited period of time.⁶⁹ The consequences of her revocation may not be that she automatically keeps the child—it may instead trigger a judicial hearing to decide that question.⁷⁰ The point is that the law already allows for the fact that a mother may bond with the child at birth or change her mind about giving the child up for adoption.

Moreover, parental rights are not terminated against the will of the parent, absent a showing that he or she is unfit.⁷¹ There are elaborate protections to prevent termination on a lesser showing.

In a surrogacy case, unlike a usual termination of parental rights or adoption, the awaiting couple has more than disappointed expectations; the male has a genetic connection to the child. But the point is that he is not the only parent. The surrogate is a parent as well. To embrace specific enforcement is to reject that reality, and ignore entirely an elaborate set of policy determinations we have already made about how parental rights should be severed.

3. Awarding Extraordinary Relief to Sever Parental Ties

The remedy of specific performance is an extraordinary equitable remedy, placing the full power of the state behind the enforcement of the affirmative order. If the surrogate fails to comply with the order, a contempt citation, police enforcement, and jail stand waiting. Because specific enforcement involves the state to such an extraordinary degree and commits the state to backing a private contract with public force, the remedy is an unusual one subject to limitations.

It is hornbook law that specific performance is not available when the contractual promise is contrary to public policy.⁷² The previous section discusses the public policy embodied in the statutes on adoption and terminating parental rights. A contract that summarily eliminates a surrogate's parental claim despite

69. See *supra* notes 23-25.

70. See, e.g., N.Y. DOM. REL. LAW § 115-b (McKinney Supp. 1988).

71. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re P.*, 648 P.2d 1364 (Utah 1982).

72. See WILLISTON, *supra* note 54, § 1429, at 867.

her change of heart at birth and contemplates no remedy other than specific performance is obviously at odds.

Specific enforcement commits the state with all of its coercive powers to stand behind some of the most troubling aspects of a surrogacy arrangement—the surrender of a child in a commercial arrangement, the discouragement of bonding and love between a mother and child, and the treatment of a woman giving birth as if she were simply producing a product to be handed over. The symbolism of maximal state enforcement of these aspects is disquieting, especially when there is an alternative.

IV. AN ALTERNATIVE

The choice need not be between specific enforcement and no enforcement at all. There is another option—enforcement in damages, the usual remedy for breach of contract. Indeed, before the *Baby "M"* case, a number of legal commentators concluded that the courts would not order specific enforcement in such a scenario; there was also some suggestion that an award of damages might be appropriate.⁷³

A. Damages

A surrogacy contract embodies the intent of the parties and by the time of birth all have acted in reliance upon it. Breach of the surrogacy contract should generate a right to the return of the surrogacy fee since the surrogate has failed to complete the expected services by surrendering the child. The contract may also generate a right to damages for expenses incurred in reliance that cannot be mitigated. What further damages the awaiting couple suffers will depend on who gets the child.

Some will argue, as indeed the court stated in *Baby "M,"*⁷⁴

73. See Cohen, *supra* note 67, at 260 ("Commentators have noted that courts would not be likely to take a child from a natural mother who breaches a contract." (footnote omitted)); *Rumpelstiltskin*, *supra* note 50, at 1936 n.4 ("without an authorizing statute, courts would not likely grant specific performance," citing references); cf. *Not So Novel*, *supra* note 49, at 33 (a court could order a surrogate to relinquish the child, depending on whether the court found the surrogate's or couple's interest in rearing the child to be greater; but if the surrogate prevails, the couple should have other remedies, including perhaps money damages); *Procreative Liberty*, *supra* note 31, at 1015 (acknowledging case for damages but recommending specific performance for purely gestational surrogacy).

74. *Baby "M,"* 217 N.J. Super. at 389, 525 A.2d at 1166.

that damages are an inadequate remedy—that only the child herself will do.⁷⁵ It is undoubtedly true that damages supply only limited recompense for a child. Yet there are many circumstances in which we make do with damages even though they are a form of relief that is less than entirely satisfying to the claimant, because there are competing values at stake. When a valuable and perhaps irreplaceable employee breaks an employment contract, for example, the remedy is not to force the employee to stay. The only way to fully cure the inadequacies of damages in the surrogacy context is to insist on specific performance. This article is an attempt to argue that the costs of that approach are too great.⁷⁶ As a societal matter, we must opt for the imperfections of damages rather than the profound problems of specific enforcement.

B. Custody

A damages award can be coupled with one of two different resolutions of the custody and parental rights issues: (a) surrogates could be able to opt out of actual performance absolutely, paying damages but retaining the child, with fathers relegated to noncustodial rights, if anything; or (b) when a surrogate wishes to keep the child, a judge could determine the parental rights issues case by case, with the surrogate liable for unmitigated damages. I favor the latter.

Both resolutions have pros and cons. The primary disadvantage of the former is that it sacrifices the custodial portion of the father's parental claim at the very least. The disanalogy with adoption is relevant. As noted above, many states prevent a woman's commitment to give up the child until after birth and an opportunity to bond. But that absolute right to opt out of surrendering the child occurs when the would-be recipients have no parental claims of their own. Given the criticisms above of failing to recognize the parental nature of the surrogate's claim,

75. On the need for specific performance to enforce entitlements to unique goods, see Kronman, *supra* note 54, at 355-65; Schwartz, *The Case for Specific Performance*, 89 *YALE L.J.* 271, 272 (1979).

76. *Cf.* Radin, *supra* note 14, at 1934 n.293 (the alternative to making surrogacy market-inalienable "is to create an incomplete commodification" of surrogacy; then "women who change their minds should not be forced to perform," though there should be "a reasonable time limit during which [the surrogate] must make up her mind").

it would be ironic and inconsistent to summarily reject the claim of the father.

The main disadvantage of the second alternative is that when a surrogate wishes to keep the child, it will trigger a court battle and uncertainty for a period of time as to parental rights and relationships. More *Baby "M"* cases would hardly seem desirable.

Yet as legislatures set the standards to be applied and ground rules for such disputes, the likelihood of another case as time-consuming and demanding as *Baby "M"* will diminish. The *Baby "M"* judge had little to guide him.

Still, any uncertainty and any battle over custody and parental rights imposes psychological and other costs on all involved, including the child. The problem is that there is no good alternative. Specific performance avoids the uncertainty and simplifies the battle, but it ignores the surrogate's parental claim and has the additional problems this article suggests. At the other extreme, allowing the surrogate to opt out and retain the child in all cases seems to ignore the father's parental investment and claim. In between, there is the position that allows a judge to determine—as in other, non-surrogacy contexts—the array of issues presented: custody, termination of parental rights, and related issues. The middle solution treats both parties' claims as parental ones. It also avoids the excessive commodification of the child that specific performance is prone to produce.

If a judge is to determine the parental rights issues, I turn first to the custody dispute and the central question of what standard the judge is to apply. The usual standard applied to custody disputes is "the best interests of the child."⁷⁷ Yet, as my previous discussion of "best interests" has suggested, if both sides can supply adequate parenting and fit homes, and the child is a newborn who could flourish with either, focusing on "the best interests of the child" without considering the strength of competing parental claims provides no resolution. In order to eke out an answer using that standard, a judge would have to resort to comparing two fit homes to see which was

77. Compare J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

"best"—perhaps more affluent or "best" by some other questionable standard.⁷⁸

When a court is deciding between two traditional parents who conceived and raised the child together before parting, the "best interests" standard will be dispositive by itself since the court will be able to examine the child's history with each parent. Moreover, the parental claims are likely to be similar in some fundamental sense, because the essence of each will be that the parent has established a relationship with the child. Yet when a surrogate decides at the birth that she wishes to keep the child, often neither of these will be the case. As I have indicated, "best interests" will probably not be decisive. In addition, the parental claims will most likely be quite different from one another. The male's parental claim will tend to be based in his genetic connection to the child and expectations of custody. The surrogate's claim will tend to derive from her genetic connection, nine months of gestation, and the experience of giving birth to the child. In individual cases there may be added factors (if, for instance, the father actually *is* beginning an interactive relation-

78. Cf. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (Summer 1975) ("[T]he determination of what is 'best' or 'least detrimental' for a particular child is usually indeterminate and speculative. . . . [E]ven if accurate predictions were possible in more cases, our society today lacks any clear-cut consensus about the values to be used in determining what is 'best' or 'least detrimental.'"); Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 862 (1985) ("The broad judicial discretion in custody determinations, redeterminations, and visitation orders, when combined with ignorance or prejudice, leads to decisions which both rely on and reinforce prevailing stereotypes concerning gay and lesbian parents." (footnote omitted)).

Of course, if one assumes that removing a newborn from the gestational mother to another parent is harmful to the child, then a "best interests" analysis would resolve the custody question without resorting to a comparison of competing parental claims. The mother would then win custody, whether the analysis is denominated a vindication of the "primary caretaker" or some other version of "best interests." Cf. *Garska v. McCoy*, 278 S.E.2d 357 (W.Va. 1981) (primary caretaker awarded continued custody). In this article, however, I do not make that assumption. In addition, because a dispute over custody and parental rights to a child borne of surrogacy ought to be resolved very quickly after the child's birth—and is more likely to be after the Baby "M" case (see *infra* p. 404)—I also do not assume in this article that the very young infant's "best interests" will dictate maintaining the custody that is established pending resolution of the dispute. On both points, compare Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 531, 561 (1984) (for a child less than five or six months, experts would probably not be as concerned about separating the child from the primary caretaker).

ship with the child, the court will want to take that too into account). But in most instances when a surrogate is seeking to retain the newborn, the claims will have their root in these reproductive connections.

The competing parental claims are thus more disparate than when parents conceived and initially reared the child together, both forming a relationship with the child. Indeed, they are so disparate that to ignore the difference altogether and award the child on the basis of affluence or some other like factor under the guise of "the best interests of the child" seems a positive injustice. After all, if what is at stake is the parental rights of the litigants, then a substantial difference in their parental claims is highly relevant. Indeed, there is little else relevant, if both parental placements would serve the child's interests.

Thus, in a surrogacy case, when the surrogate mother wishes to keep the child the court should apply a dual standard: "the best interests of the child" to take account of any gross disparities in what each family offers the child and to eliminate either or both homes if unfit, and then—in cases where "best interests" fails to resolve the question—a comparison of competing parental claims to determine which parent has the stronger claim to custody. Applying this dual standard would mean that if the homes offered by the competing parents showed no gross disparity in appropriateness for the child, and the surrogate was genetic and gestational and perhaps already beginning to rear the child, she would probably have a stronger claim than the father who was simply genetically related to and awaiting the child.

There are several issues that this proposal raises. First, because a man cannot gestate a child, the father and his wife would usually lose out in comparison to a genetic and gestational surrogate, if both were fit families and "best interests" were indecisive. This asymmetry adheres in the reproductive process. The biological reality is that only the woman carries the child within her for nine months, gives birth to the child, and is susceptible to mother/child bonding. For his part, the man goes through the act of contributing his sperm, and months of what can surely be keen expectation and psychological preparation with his wife. Yet he does not have the same kind of intimate

physical connection with the child as the surrogate does.⁷⁹ These differences mean that in an individual case the court is likely to find that it is the mother who has begun a relationship with the newborn, is more involved, and has greater immediate responsibility.

Some would question whether such a standard amounts to the reinstatement of the "maternal preference" or "tender years presumption"—doctrines that inclined courts to award custody of very young children to mothers on the assumption that this was best for the child, until the presumptions became subject to widespread criticism.⁸⁰ But the reason for permitting a standard that will usually allow the genetic and gestational mother to win has nothing to do with a theory that women make better parents to young children. Indeed, the comparison of parental claims occurs when the child's "best interests" are not decisive; I assume that the competing families could parent equally well. The reason is, rather, that when each offers parallel nurturing and "best interests" produces a draw, the genetic and gestational mother's parental claim is likely to be stronger at birth⁸¹—as a result of

79. See, e.g., Cohen, *supra* note 67, at 260-64; cf. Caban v. Mohammed, 441 U.S. 380, 397-99, 404-17 (1979) (Stewart, J., and Stevens, J., dissenting) (the unwed mother and father are not similarly situated with respect to the newborn or infant).

Because the reproductive asymmetry will mean that the surrogate will often win custody, the father may decide that he wants nothing to do with the child—that he seeks no relationship and should be exempt from any support obligations. Cf. Field, 4 N.Y.L.S. Hum. Rts. Ann. ____ (1987) (arguing that the father should be able to opt out of a parental relationship with child and then not be liable for support). Because this is an article on the inappropriateness of specific performance when both parents want the child, I am focusing on the scenario in which each desires to continue a parental relationship. In such instances, the fight is not over being excused from parental obligations but obtaining access to the child, through custody, visitation, and the continuation of parental rights.

80. But see Klaff, *supra* note 67. See generally Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 Fam. L. Rep. (BNA) No. 49, 4049, 4063-64 (Oct. 20, 1981) (listing states in which the tender years doctrine is rejected, is used as a tie-breaker, is "in effect but may be subordinated to best interest of the child," or "is in effect and gives preference to a 'fit' mother, other factors being equal").

81. See *infra* note 84 discussing *Lehr v. Robertson*, 463 U.S. 248 (1983).

Recognition of the biological asymmetry may lead some to suggest that a surrogate mother should be gestational only; she should have no genetic connection to the child. I am grateful to Arthur Caplan for first pointing this out to me. The rationale is that this would probably reduce still further the already small number of surrogate mothers who change their minds and wish to keep the child. It might also reduce the strength of the surrogate's claim to the child. Both parents would still have a claim to assert, but you would not have the scenario in which both have a genetic claim and the surrogate addi-

gestation, birthing, and the attendant bonding she is likely to have begun a relationship and involvement.

Some might object, then, that such a standard amounts to sex discrimination, since only women can gestate. The argument over whether pregnancy can constitutionally serve as a basis for preferential treatment and over what theory of sex-based equality properly handles real biological differences between the sexes has been pursued at length elsewhere.⁸² In the surrogacy context, if one accepts my prior arguments against resolving the fight over the child by resort to specific enforcement, and accepts that the interests of the child by themselves often will not resolve that fight, there seems little alternative to comparing the parental claims.⁸³ Considering gestation and birthing, as I have indicated, allows one to consider fully which parent is already beginning a relationship, is more involved with, and has more immediate responsibility for the newborn. To rule those factors off the course would penalize the parent with greater involvement and assume that women should be considered just like men in their relationship to a newborn.⁸⁴ Moreover, one could

tionally has one relating to gestation.

82. See, e.g., Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 Rev. L. & Soc. Change 325 (1984-85). A full exploration of the problem of preferential treatment for pregnancy is beyond the scope of this article.

83. Cf. Chambers, *supra* note 78, at 499-503 (arguing that not only the child's interests, but also the parents' interests should be considered, and citing types of disputes in which that already occurs); Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. Rev. 1, 28 (1980) ("[P]arents also have rights of their own that, insofar as they do not impinge on the rights of children, deserve recognition. Childrearing is one of the ways in which many people fulfill and express their deepest values about how life is to be lived.").

84. Compare *Lehr v. Robertson*, 463 U.S. 248 (1983), in which the Supreme Court determined that the mere biological link between an unmarried father and child does not merit the same constitutional protection as the parental relationship between mother and child. The Court noted: "The mother carries and bears the child, and in this sense her parental relationship is clear." *Id.* at 260 n.16 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

Taking biological differences into consideration may offend a theory that we should try to avoid legal recognition of such differences. See Williams, *supra* note 82. However, I would argue that it passes muster under theories of equality focusing on the impact of a rule on the task of achieving societal freedom from gender discrimination. See Law, *supra* note 82. As I argue in text, to decide parental rights with respect to the newborn by ignoring key disparities in the parental claims would work a positive injustice to the adult whose involvement with and responsibility for the child are greater at birth, usually the mother. It would pretend that women are like men in their relationship to the

argue that considering an existing parent/child bond, in order to maintain rather than breach it, bears a substantial relationship to important state interests in protecting parent/child relationships.

Another objection is that this scheme might be taken to provide an incentive to couples wishing to use a genetic and gestational surrogate to find a woman who would clearly be an unfit parent. Then if she were to change her mind about relinquishing the child, they would be surer of getting custody. Unfortunately, that is the incentive structure we now have. Contracting couples have no assurance of getting custody if a surrogate wishes to keep the child. Before the *Baby "M"* case, there were legal scholars who anticipated that in such a case the court would not take the child away from the birth mother and award the child to the couple.⁸⁵ Thus the couple's best assurance of ending up with the child has been to pick a surrogate who a court would find to be an unfit parent. It has been quite feasible to act on that as well, because there has been no regulation mandating that a potential surrogate meet any particular requirements.

Despite the incentive and latitude to choose surrogates who would be unfit parents, probably few couples have done so. There are counter-incentives that provide a check: the desire to choose a woman who has already had children, who has a family, and who seems psychologically stable—in order to maximize the chance that she will enter into the arrangement with a sense of what to expect, to minimize the chance that she will later wish to keep the child, and to assure that she has a secure and supportive context in which to experience the pregnancy and birth. Some couples may even feel that a woman with a family and psychological stability may have a better genetic complement to pass on to the child and may offer a better gestational environ-

newborn. By ignoring the special features of a woman's relationship, such an approach would, in effect, be penalizing.

One could argue that instead of considering biology at all in comparing parental claims, the court should consider only ultimate issues of who has begun a relationship with the child, is more involved, and has more responsibility. Yet an acknowledgement of the reproductive events and an inquiry into what they have yielded in the particular case seems an intrinsic part of making that ultimate determination.

85. See, e.g., Annas, *Contracts to Bear a Child: Compassion or Commercialism?* 11 HASTINGS CENTER REP. 23, 24 (Apr. 1981); *Rumpelstiltskin*, *supra* note 50, at 1936 n.4 (citing references).

ment for the fetus *in utero*.

Those checks on the incentive to use an unfit parent as a surrogate are likely to remain. If state legislatures supply the needed regulation of surrogacy, we will have additional checks. State law should require that the professionals involved in surrogacy arrangements perform adequate screening of prospective surrogates.⁸⁶ It is hard to imagine how a blatantly unfit mother would qualify to be a surrogate if the screening for surrogacy were professionally responsible.

Another objection to the standard I propose rests on concerns about predictability. The argument is that no couple will engage a genetic and gestational surrogate if she can change her mind for some period after birth and keep the child. Yet hundreds of couples have already used the procedure⁸⁷ despite the expectation by a number of legal scholars before *Baby "M"* that a surrogate could change her mind and keep the child. Nonetheless, writing that view into law may indeed encourage some surrogates to change their minds and discourage some couples from using a genetic and gestational surrogate.

The curb on the surrogate's changing her mind, however, is the possibility of damages awarded against her and the expense of defending the suit. As for the couple, the only way of guaranteeing them that they will end up with the child despite the surrogate's change of mind is by rejecting the arguments I have made above against enforcing the deal in specific performance.

C. *Beyond Custody: Terminating Parental Rights*

When a surrogate changes her mind, the court will have to decide more than the contract and custody issues—the court will also have to decide whether the parental rights of the party who does not get custody should be terminated. My discussion above about fundamental anxiety over the proliferation of adults involved in a single reproduction who can assert parental claims suggests that there will be a strong impetus to exclude all but two adults from the role of parent by terminating any others'

86. Some of the legislative proposals have so required. See, e.g., Note, *Surrogate Motherhood: Contractual Issues and Remedies under Legislative Proposals*, 23 WASHBURN L.J. 601, 628 & n.157 (1984) (Kansas bill).

87. See *NEW CONCEPTIONS*, *supra* note 16, at 6.

parental rights.

Yet as I have argued above there should actually be a strong presumption against terminating the parental rights of fit and desiring parents. This suggests that the current standards for terminating parental rights should apply. Using those standards the courts already resolve cases involving unmarried parents, parents who never expected to rear a child together, and parents who cannot cooperate. It is true that we have very little data with which to speculate about the effect on the child of having the constellation of parental figures that a failed surrogacy arrangement would produce if parental rights were terminated on neither side. Yet there are a number of ways to protect the child from ill effects short of terminating parental rights entirely—adjustments in custody and visitation rights, perhaps even suspension of parental contact for a time, if necessary. In the absence of that data, then, adherence to the traditional standard would seem in order.

CONCLUSION

Until legislation on surrogacy is enacted, when a surrogate decides she wishes to keep the child a court will be forced to resolve the dispute without specific legislative guidance. I recommend above an approach the court should consider. Such legislation is needed, however, to allow rapid, consistent, and societally acceptable resolution of that dispute, and to regulate the entire practice of surrogacy. My arguments suggest that legislation ought to provide that, for a limited period after the birth, a surrogate can give notice that she wishes to keep the child. This should trigger a prompt judicial proceeding to determine the parental and contractual issues as recommended above.

There are a number of proposals for legislation on surrogacy in the various states;⁸⁸ different bills recommend different ways of handling the scenario of the surrogate who changes her mind.⁸⁹ The passion of public debate on these proposals and on the *Baby "M"* case itself is a critical clue suggesting the scope of issues that legislation on surrogacy must resolve. This is sound and fury signifying something of importance—that in surrogacy,

88. See N.Y. Times, Jan. 26, 1987, at A34, cols. 1-2.

89. See *id.*

and specifically in the scenario of the surrogate mother who changes her mind, we have hit bedrock issues on which society is deeply conflicted. That realization counsels neither denial in the form of overly simplistic specific performance solutions, nor paralysis in a refusal to legislate.

Many agree that we need legislation, but go on to propose legislation that fails to do justice to the issues involved. Any proposal that essentially enforces a specific performance solution is a wrong and overly simplistic answer. It is a response that fails to do justice to the genuine complexities discussed above—the simultaneous commercial and personal character of surrogacy, the treatment of the body as property and danger of going too far in the commodification of the child, and the proliferation of reproductive collaborators with parental claims. Rather than acknowledging and reconciling these complexities, the specific performance proposals treat surrogacy as simply commercial, commodify the child excessively, and reject out of hand any proliferation of parental claims.

We should not ignore the personal, non-commercial, human side of surrogacy with a solution that is commercial and inhumane. As we embrace reproductive techniques involving donor gametes, embryo transfer, and surrogacy—the techniques of collaborative reproduction—we need not banish humanity from the reproductive process. It is easy to react in fury to human frailty in a surrogate. But as she breaks an agreement, she loves her child. Surely that is a frailty demanding compassion.