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THE SURROGATE MOTHER CONTRACT: IN THE BEST INTERESTS OF SOCIETY?

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> Mary Beth Whitehead is a "factor for conception and gestation that the [Stern] couple lacks." Surrogates serve as "alternative reproductive methods."
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> The Honorable Harvey R. Sorkow, Trial Judge, Superior Court of New Jersey, Chancery Division, *In the Matter of Baby M*
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> Mary Beth Whitehead is a "surrogate uterus."
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> Dr. Lee Salk, Expert witness for the Sterns, *In the Matter of Baby M*
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> "Oh what a power is motherhood, possessing/A potent spell. All women alike/Fight fiercely for a child."
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> Euripides, *Iphigenia in Aulis*

I. INTRODUCTION

On March 31, 1987, Judge Harvey R. Sorkow upheld, for the first time, the validity of a surrogate mother contract in his decision, *In the Matter of Baby M.*[1] In broad and sweeping language, the judge deemed the contract between the natural mother, Mary Beth Whitehead, (termed the surrogate, pursuant to the contract language) and the natural father, William Stern, specifically enforceable. Judge Sorkow thus terminated Whitehead's parental rights to the child she bore and permanently denied her claims for future custody or future visitation. Creating new law, the judge held that baby selling and adoption laws do not pertain to surrogacy contracts and that such agreements are not in contravention

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1. 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

of the public policy of New Jersey. Enforcing the surrogate contract, the judge utilized a hybrid standard incorporating traditional contract analysis (the two parties voluntarily entered the agreement and were to receive consideration involving $10,000 for Whitehead and the services of carrying and bearing a child for Stern) with a test determining the best interests of the child, the latter of which is routinely applied in traditional custody cases. The case arose when Whitehead decided to keep the baby at birth and refused the $10,000. Deciding Whitehead could not renege on the bargain, the judge found that Stern's right to procreate noncoitally was protected under the fourteenth amendment's guarantees of privacy and equal protection; Whitehead's concomitant right to raise her child was denied.

The breadth and novelty of the *Baby M* decision, the reliance on the "best interests" standard and the immediate termination of Whitehead's parental rights ensured in depth legal scrutiny from the New Jersey Supreme Court. In a ninety-five page unanimous ruling issued on February 3, 1988, the court leveled a sustained and withering attack on surrogate parenting and held the surrogate contract invalid as violative of both the statutory law and public policy of New Jersey and restored the surrogate mother's parental rights.[2] The justices condemned surrogate parenting as illegal baby selling which was "perhaps criminal, and potentially degrading to women."[3] In an eloquent opinion written by Chief Justice Robert N. Wilentz, the court was also equally critical of the handling of the case and its parties by the trial judge. The court was particularly sympathetic toward Mary Beth Whitehead. Although the court opined it was not illegal for a woman to volunteer to serve as a surrogate, she must do so without payment, and must be given the right to change her mind after the birth and to assert her parental rights. The court refrained from finding a constitutional prohibition against surrogacy, thus allowing the possibility for the legislature to render the practice legal.

Notwithstanding the New Jersey Supreme Court's relentless attack on commercial surrogate parenting, the legal debate as to such arrangements continues. The question of whether adoption law should properly govern surrogacy contracts was debated at length during the 1988 American Bar Association's National Conference

2. In the Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).
3. *Id.* at 411, 537 A.2d at 1234.

on Birth, Death, and Law in Philadelphia, held subsequent to the New Jersey Supreme Court decision. Further, the Association has adopted model legislation which offers the options of regulating surrogate agreements or rendering them void. Moreover, the *Baby M* decisions have spurred legislative activity in a number of states, such as Nebraska, which sought to render all surrogacy contracts void, and New York, which sought to regulate and enforce surrogate contracts. It is clear that all possible legislative solutions will confront constitutional challenges by opponents or proponents of surrogacy. Justice Robert L. Clifford of the New Jersey Supreme Court stated in his questioning of the Sterns' attorney that the validity of surrogate contracts and the concomitant loss of maternal rights is truly "an important, basic, arguably fundamental, cosmic issue."[4] It is an issue which appears to cloud the traditional political and ideological divisions found in society. Positions of lawmakers appear to be formulated on the basis of the dictates of their individual ethical standards rather than on the stance of a particular party. It is an issue which has gained unusual allies; both renowned feminists and religious groups filed *amicus*, or friend of the court, briefs in opposition to surrogacy.

The purpose of this article is to engage in a broad based comprehensive analysis of the legal and ethical questions raised by the surrogate mother contract. The article will first review the facts of the *Baby M* case and the significant aspects of both the trial court's and New Jersey Supreme Court's opinions. The impact of the *Baby M* decision will be assessed with respect to the posture adopted by the American Bar Association, other states' case law and legislative enactments, and the decisional and statutory responses of other countries. A historical analysis of surrogacy and the development of a mother's right to the custody and companionship of her child will then be discussed. Finally, a survey of the additional arguments which have been raised in opposition to the surrogate mother contract will be reviewed. Most importantly, the purpose of this article is to address the numerous legal and ethical issues raised by the surrogate mother contract and to provide persuasive argument for courts, legislators and commentators who will consider whether to permit or prohibit the practice of surrogacy, to regard such contracts as voidable, or to flatly ban them as void on the basis that such contracts are inimical to the best interests of both the child and society.

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4. Sherman, *N.J. High Court Faces Solomonic Baby M Choice*, Nat'l L.J., Sept. 28, 1987, at 8, col. 3.

II. BABY M

A. *Facts of the* Baby M *Case*

On February 6, 1985, William Stern[5] with Mary Beth and Richard Whitehead entered into a Surrogate Parenting Agreement[6] prepared by the Infertility Center of New York.[7] Pursuant to that agreement, Mary Beth, the surrogate mother,[8] would be artificially inseminated with Mr. Stern's sperm, carry the child to term, and relinquish the child to the Sterns after giving birth. She agreed not to form a parent-child relationship with any child she might conceive. Further, she would permit a termination of her parental rights, thus allowing Mrs. Stern to adopt the child and the Sterns to have sole custody of the child. Mr. Whitehead promised to do what was required to rebut the presumption of paternity under the Parentage Act.[9] In exchange, the Whiteheads would be paid $10,000 for Mary Beth's services, plus expenses. The agreement stated that its sole purpose was to enable William Stern and his

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5. *Baby M*, 109 N.J. at ___, 537 A.2d at 1269 (1988). As observed by the New Jersey Supreme Court, Mrs. Stern was a nonparty to the surrogate parenting agreement "presumably . . . to avoid the application of the baby-selling statute to this arrangement." *Id.* at 412, 537 A.2d at 1235. Section 9:3-54 of the New Jersey Revised Statutes provides that no person shall pay, give or agree to give any money in connection with a placement for adoptions, except for fees of an approved agency or for medical and hospital expenses related to the birth or illness of the child.

6. *See* Surrogate Parenting Agreement, set forth as Appendix A in *Baby M*, 109 N.J. at 470-74, 537 A.2d at 1265-69.

7. The Infertility Center of New York (ICNY) is a private for profit business which was founded by Noel Keane, a Michigan attorney and the self-proclaimed father of surrogate motherhood. *See* N. KEANE & D. BREO, THE SURROGATE MOTHER 27 (1981). In a separate contract, Mr. Stern agreed to pay $7500 to ICNY. In exchange, ICNY would bring the surrogate mother and the infertile couple together, conduct evaluations of the surrogate by its professionals, prepare the agreement and provide legal counsel selected by ICNY. Further, ICNY agreed to arrange the insemination and the legal proceedings that would terminate the surrogate mother's rights and grant adoption to the wife. *See* Agreement, set forth as Appendix B in *Baby M*, 109 N.J. at 476-78, 537 A.2d at 1271-73.

8. As observed by the New Jersey Supreme Court, a woman in the position of Mary Beth Whitehead, the natural mother, is "inappropriately called the 'surrogate mother.' " *Baby M*, 109 N.J. at 411, 537 A.2d at 1234. As argued by Harold J. Cassidy, attorney for the Whiteheads, such a term is a denigration of her role, inasmuch as the child was conceived with her ovum, and she carried and gave birth to the child. Cassidy correctly suggests that it is Mrs. Stern who sought to become the surrogate. *See* Brief for Appellant, at 2 n.2 in *Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

9. N.J. STAT. ANN. §§ 9:17-43(a)(1)-44(a) (West Supp. 1990) states that where a married woman, with the consent of her husband, is artificially inseminated with another's sperm, the husband will be deemed the parent of the resulting child.

infertile wife to have a child biologically related to Mr. Stern.[10]

The contract imposed many other obligations and restrictions upon Mary Beth, including undergoing medical and psychological evaluations. The psychological assessment indicated that Mary Beth might experience difficulty in relinquishing her child and suggested that further inquiry with respect to this issue be conducted; Whitehead, however, was merely informed she had passed psychological scrutiny.[11] Mary Beth was required to undergo amniocentesis and was prohibited from obtaining an abortion if the fetus was deemed genetically or congenitally defective, unless Mr. Stern demanded otherwise. The Whiteheads assumed all risks associated with conception, pregnancy and childbirth, and their compensation was structured to reflect those risks. Thus, if a miscarriage were suffered prior to the fourth month, no money would be received; the occurrence of a miscarriage subsequent to the fourth month, the death of the child, or the stillborn birth of the child would reduce the compensation to $1,000.[12] The sole legal consultation the Whiteheads received with respect to the surrogate agreement was a one hour review of the contract terms conducted by an attorney who had an agreement with the Infertility Center to act as counsel for surrogate candidates.[13]

During the birth of the baby on March 27, 1986, Mary Beth decided she could not give up her child.[14] She made her acute distress known to the Sterns, but did relinquish the child to them on March 30, 1986, notwithstanding her "powerful inclinations to the contrary."[15] That evening Mary Beth became deeply disturbed,

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10. Mrs. Stern was not, in fact, infertile. She and Mr. Stern believed that she might have multiple sclerosis and that a pregnancy might precipitate serious debilitation. Medical authorities contacted subsequent to the commencement of litigation assessed the risk as minimal. *Baby M*, 109 N.J. at 413, 537 A.2d at 1235.

11. *Id.* at 437, 537 A.2d at 1247-48. The psychological report observed that Whitehead "may have more needs to have another child than she is admitting" and concluded that "except for the above reservations, Ms. Whitehead is recommended as an appropriate candidate." *See* Brief for Appellant, at 9 n.14 in *Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) (citing psychological evaluation).

12. *Baby M*, 109 N.J. at 424, 537 A.2d at 1241.

13. *Id.* at 436, 537 A.2d at 1247.

14. ICNY encouraged Mary Beth to refer to the baby as Mr. Stern's child. When queried about her feelings during the pregnancy, she testified, "[i]t was just being the mother . . . I was trying not to think of those feelings, but it overpowered me." Record at 61-12 to 61-14. Moreover, Mary Beth testified that going through delivery, seeing and holding the baby, and knowing it was her child, convinced her she could not give up her baby. Record at 65-11 to 65-15.

15. *Baby M*, 109 N.J. at 414, 537 A.2d at 1236.

crying hysterically and inconsolably over the loss of her baby. She pleaded with the Sterns for one more week with her child at her home. The Sterns reluctantly assented.[16] On April 12, 1986, Mrs. Whitehead informed the Sterns she could not part with her child.[17] After consultation with Noel Keane, an attorney and founder of the Infertility Center, the Sterns commenced legal proceedings to regain possession of the baby and enforce the surrogacy contract. The trial court, with the Honorable Harvey R. Sorkow presiding, on Mr. Stern's *ex parte* application,[18] signed an order on May 5, 1986, directing Mrs. Whitehead to deliver the child she was nursing to Mr. Stern. The police, the process server, and the Sterns entered the Whiteheads' home to execute the order. The Whiteheads fled with the child to Florida where Mrs. Whitehead's parents lived, residing in numerous places to avoid apprehension. On July 31, 1986 Florida law enforcement officials, pursuant to a court order obtained under the Uniform Child Custody Act (premised on the May 5, 1986 *ex parte* order), forcibly removed the baby from the maternal grandparents' home and transferred custody to the Sterns.[19]

B. *Trial Court's Opinion in* Baby M

> "The contract is not illusory" the judge said. "Mrs. Whitehead was anxious to contract. This court finds that she had changed her mind, reneged on her promise, and now seeks to avoid her obligations." A visitor from Mars would be surprised to discover that Mary Beth Whitehead was a mother and the article in dispute her child.
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> After the birth, she changed her mind. Sorkow was unmoved: "The bargain is for totally personal service." Here is a judge who would have used contract law to uphold Shylock's demand for a pound of flesh.
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> Richard Cohen, Philadelphia Inquirer, April 2, 1987

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16. *Id.* at 415, 537 A.2d at 1236-37.

17. In the mater of Baby M, 217 N.J. Super. 313, ___, 525 A.2d 1128, 1145 (Ch. Div. 1987) *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

18. Mr. Stern alleged, in support of the *ex parte* order, that Mrs. Whitehead had breached the surrogacy contract and had threatened to flee from New Jersey to avoid his obtaining custody of the child. *Baby M*, 109 N.J. at 415-16, 537 A.2d at 1237. Barbara Cohen, in *Surrogate Mothers: Whose Baby Is It?* 10 AM. J. L. & MED. 243, 260 (1984), observed that commentators have indicated courts would not be likely to take a child from a natural mother who breached a surrogacy contract. Yet in the *Baby M* case, the court ordered just such an action before holding a hearing, conducting an investigation, or determining substantively that the child's health or welfare was threatened.

19. *Baby M*, 109 N.J. at 416, 537 A.2d at 1237.

In a fifty-eight page decision rendered on March 31, 1987,[20] Superior Court Judge Harvey R. Sorkow upheld for the first time the validity of a surrogate mother contract. In so doing, Judge Sorkow regarded adoption laws as inapplicable to surrogate contracts, finding that when the adoption statutes were passed, surrogacy was not a viable procreation alternative and was thus unknown.[21] In a few brief paragraphs, significant issues regarding the rights of the child, the potential emotional and economic exploitation of the surrogate mother, Mary Beth Whitehead, and the denigration of human dignity were brushed aside. Judge Sorkow distinguished surrogacy from adoption in that coercive, exploitative elements were lacking where the surrogate makes her decision prior to her pregnancy.[22] His response to the assertion that money was being paid for the surrender of a child was: "[the] biological father pays the surrogate for her willingness to be impregnated and carry *his* child to term. At birth, the father does not purchase the child. He cannot purchase what is already his."[23] He dismissed summarily as "insensitive and offensive to the intense drive to procreate"[24] the argument that an elite economic group would utilize a lower economic group of women as breeders.

The lower court then turned to New Jersey standard contract law to determine that the surrogate contract was valid. Stressing the anticipated "joy that only a newborn can bring," the court concluded that specific performance was the appropriate equitable remedy.[25] In his decision, the judge found that the right to procreate noncoitally is protected under the fourteenth amendment guarantees of privacy and equal protection, citing the legality of sperm

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20. *Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

21. *Id.* at ___, 525 A.2d at 1157.

22. *Id.*

23. *Id.* (emphasis added). Judge Sorkow, citing with approval an article by Noel Keane, *Surrogate Motherhood*, So. ILL. L.J. 147 (1980), observed that the adverse pressure and exploitation of the unplanned pregnancy is not present. *Id.*

24. *Baby M*, 217 N.J. Super. at ___, 525 A.2d at 1158.

25. The court indicated that a surrogate mother could renounce the contract until the time of conception—until that point she would be subject only to monetary damages. After conception, only specific performance could adequately redress the loss suffered by the adoptive parents. *Id.* at ___, 525 A.2d at 1159. The only exception to this new rule of law was that the clause prohibiting abortion, except as determined by the male promisor, was deemed violative of the guidelines set forth in Roe v. Wade, 410 U.S. 113 (1973). *Id.*

donation as justification for the recognition of surrogacy.[26] The lower court, thus, equated the effort and experience inherent in sperm donation with gestation in the womb. The court then devoted the remainder of its decision to assessing whether specific enforcement of the contract comported with the "best interests" of the child according to New Jersey custody law. The court concluded by terminating Mary Beth Whitehead's parental rights, awarding permanent custody to Stern and immediately conducting the adoption proceeding at which Stern's wife adopted the child.

Judge Sorkow's opinion was notable not only for the immediacy of his decision to terminate all maternal rights and allow adoption of the child by Mrs. Stern, but also for the harsh and contemptuous manner in which he treated Mrs. Whitehead. Many legal scholars, including those who supported the conclusions, stated that the judge was "unnecessarily brutal" in his criticism of Mrs. Whitehead.[27] He was scathing in his analysis of her character, terming her "manipulative, impulsive, and exploitive. She is also for the most part, untruthful, choosing only to remember what may enhance her position, or altering the facts about which she is testifying."[28] He further found her "too enmeshed with this infant child and unable to separate her own needs from those of the child."[29] Somewhat inconsistently, while he deemed her a good mother for her older children, he concluded she would not be a good custodian for Baby M.[30] Judge Sorkow also emphasized the disparate educational attainments of the Whiteheads (only Mr. Whitehead gradu-

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26. *Id.* at ___, 525 A.2d 1164-65.

27. Bird, Baby M *Ruling's Boldness May Invite Appellate Attack*, 119 N.J.L.J. 581 (Apr. 9, 1987).

28. *Baby M*, 217 N.J. Super. at ___, 525 A.2d at 1170. Judge Sorkow cited Mary Beth Whitehead's impulsive behavior, her dropping out of high school and her flight to Florida in violation of his *ex parte* court order to justify removing her newborn child from her home. *Id.* at ___, 525 A.2d at 1168, 1170.

29. *Id.* at ___, 525 A.2d at 1170.

30. *Id.* The court consistently criticized Mrs. Whitehead for her conduct, yet did not criticize the Sterns for the same conduct. The court criticized Mrs. Whitehead for continuing "to reject any role Mr. Stern played in the conception. She chooses to forget that but for him there would be no child." *Id.* at ___, 525 A.2d at 1169. The court did not similarly chastise Mr. Stern for minimizing *Mrs. Whitehead's* contributions in the surrogate arrangement. Rather, the court and some proponents of surrogacy view the male's right to have a child as paramount and the mother's interest in that child as clearly subordinate. As observed by one commentator, the premise of surrogate motherhood is the traditional and oppressive female role it reinforces. *See* Annas, *Fairy Tales Surrogate Mothers Tell*, 16 LAW MED. & HEALTH CARE 27, 31 (1988). Further, the court denounced Mrs. Whitehead for her "fawning use of the media to her own narcissistic ends" while failing to comment at all on the interviews conducted by the Sterns. *Baby M*, 217 N.J. Super. at ___, 525 A.2d at 1168.

ated high school) and the Sterns (both of whom have doctoral degrees in the sciences) and concluded that there was a reduced emphasis on education in the Whitehead home.[31] Judge Sorkow concluded his opinion by vowing to use the court's total authority to attain stability and peace in the child's life. Whitehead's lawyers then sought to take the case directly to the New Jersey Supreme Court.[32]

C. *New Jersey Supreme Court Opinion*

> There are, in a civilized society, some things that money cannot buy. . . . There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love or life.
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> We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of

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31. 217 N.J. Super at ___, 525 A.2d at 1168. As the New Jersey Supreme Court noted in New Jersey Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 603, 512 A.2d 438, 444 (1986): "It is not a choice between a home with all the amenities and a simple apartment, or an upbringing with the classics on the bookshelf as opposed to the mass media, or even between parents providers of vastly unequal skills." The *amici* brief submitted by the Women's Rights Litigation Clinic at Rutgers Law School, the New York State Coalition on Women's Legislative Issues and the National Emergency Civil Liberties Committee argued that the lower court's decision was so infused with sex-based and class-based stereotypes that it constituted a violation of Mary Beth Whitehead's rights to equal treatment and fundamental fairness. The New Jersey Supreme Court in *Baby M* criticized the trial court's emphasis on the Sterns' interest in the child's education as compared to the Whiteheads', stating:

> That this is a legitimate factor to be considered we have no doubt. But it should not be overlooked that a best interests test is designed to create not a new member of the intelligentsia but rather a well integrated person who might reasonably be expected to be happy with life.

Baby M, 109 N.J. at 406, 537 A.2d at 1260.

32. Pending the outcome of the appeal, the court granted continuation of limited visitation to Mrs. Whitehead. On appeal, numerous *amicus curiae* briefs were filed which represented the views of the following organizations: American Adoption Congress, Catholic League for Religious and Civil Rights, Communications Workers of America, AFL-CIO, Concerned United Birthparents, Inc., Concerned Women for America, Eagle Forum, National Legal Foundation, Family Research Council of America, United Families Foundation, Judicial Reform Project, The Foundation on Economic Trends, Hudson County Legal Services Corporation, and National Center on Women and Family Law, Inc., Committee for Mother and Child Rights, Inc., Origins, National Association of Surrogate Mothers, The National Committee for Adoption, Inc., National Infertility Network Exchange, New Jersey Catholic Conference, Odyssey Institute International, Inc., RESOLVE, Inc., Rutherford Institute, Women's Rights Litigation Clinic at Rutgers Law School, The New York State Coalition on Women's Legislative Issues, and the National Emergency Civil Liberties Committee. It should be noted that only two of these groups proffered support for the surrogate mother contract.

> the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women.
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> It seems to us that given her predicament, Mrs. Whitehead was rather harshly judged—both by the trial court and some of the experts. She was guilty of a breach of contract, and indeed, she did break a very important promise, but we think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there?
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> New Jersey Supreme Court, *In the Matter of Baby M*, February 3, 1988

The New Jersey Supreme Court, in a unanimous opinion written by Chief Justice Robert N. Wilentz, reversed virtually the entire decision of the lower court and relentlessly attacked commercial surrogate mother contracts.[33] As observed by one commentator,

> Whether it was the stinging condemnation of the practice under the current statutory or regulatory frameworks, or whether it was the equally scorching criticism of the trial court's handling of the case, and of the parties for that matter, the court's holdings constitute the strongest critiques to date that any body—legislative, judicial, or other—has made of the practice.[34]

The opinion of the New Jersey Supreme Court is notable for both the severity with which it regarded surrogacy contracts and the compassion it afforded its participants, particularly the much maligned Mary Beth Whitehead.

While the court recognized the intense longing of an infertile couple to have children, it also recognized the compelling nature of the relationship between a natural mother and her child. Declaring that the natural mother was inappropriately called the surrogate mother,[35] the court invalidated the surrogacy contract as violative

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33. *Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

34. Dunne & Serio, *Surrogate Parenting After* Baby M: *The Ball Moves to the Legislature's Court*, 4 TOURO L. REV. 161, 163 (1988).

35. The term "surrogate mother" denies that the surrogate is the birth mother or mother. It serves to diminish and demean the mother's contributions by according her the status of a carrier of the father's child. The mother is dehumanized and perceived as the incidental means to the father's achievement of paternity. Thus, Judge Sorkow viewed Whitehead as an "alternative reproductive method." *Baby M*, 217 N.J. Super. at ___, 525 A.2d at 1164. Dr.

of both New Jersey law and public policy. The court then voided both the termination of the natural mother's rights and the adoption of the child by the wife/stepparent. However, the court did grant custody to the natural father, believing such custody to be in the best interests of the infant. The court did not render voluntary surrogacy without payment illegal, nor did it find a constitutional prohibition against the practice, thereby affording the state legislature an opportunity to legalize it in the future.[36]

The court's review and analysis of the surrogacy contract rendered the entire agreement invalid and unenforceable as violative of New Jersey statutory provisions prohibiting the use of money in connection with adoption,[37] state laws mandating proof of parental

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Lee Salk, witness for the Sterns, testified that Mrs. Whitehead was a "surrogate uterus." Record at 14-14 to 14-18; *see also* Record at 11-13 to 11-24. The trial court's perspective is reminiscent of the now discarded Aristotelian theory of human reproduction, wherein women merely served as the passive incubator of the active male principle's seed. *See* G. COREA, THE MOTHER MACHINE 221 (1985); *see also* HUNTER COLLEGE WOMEN'S STUDIES COLLECTIVE, WOMEN'S REALITIES, WOMEN'S CHOICES 63-64 (1983). The first surrogate mother in this country, Elizabeth Kane, initially disclaimed any rights to, or attachment for, the child she was carrying, stating she was simply "growing" it for the father. She later repudiated her role and urged that surrogate motherhood be banned by law because of the unexpected damage it did to surrogate mothers, their children and their families. *See* E. KANE, BIRTH MOTHER: THE STORY OF AMERICA'S FIRST LEGAL SURROGATE MOTHER (1988). Noel Keane, in articulating his views or surrogacy, makes it clear that the surrogate mother has to realize she is carrying the child of the natural father and his wife. Barron, *Views on Surrogacy Harden After* Baby M. *Ruling*, N.Y. Times, Apr. 2, 1987, at A1, col. 3. One of the most frequently quoted commentators on the surrogate contract, George J. Annas, observes that the phrase "surrogate mother" originated in Harlow's monkey studies in which newborn monkeys were separated from their natural mothers and placed with surrogate mothers, inanimate cloth covered or wire monkeys, to test their responses. He adds that the surrogate mother contract regards the natural mother as an inanimate object. *See* Annas, *Fairy Tales Surrogate Mothers Tell*, 16 LAW, MED. & HEALTH CARE 27-28 (1988).

36. *Baby M*, 109 N.J. at 411, 537 A.2d at 1235; *see infra* note 93 (The New Jersey Bioethics Commission in May 1990 recommended to the New Jersey legislature that surrogate contracts be illegal and that penalties be applied to strongly discourage the practice.). Gratuitous surrogate motherhood, as noted by the New Jersey Supreme Court, is unlikely to survive inasmuch as money is impliedly the primary motivation for the surrogacy. *Baby M*, 109 N.J. at 438, 537 A.2d at 1248. In permitting gratuitous surrogacy, the New Jersey Supreme Court apparently felt the dangers indigenous to the commercial surrogate contract would be obviated, including violation of baby selling laws, irrevocability of the mother's consent to adoption and the economic exploitation of women. Gratuitous surrogacy, however, still encompasses serious risks of harm, such as the separation of the child and the natural mother and the concomitant psychological consequences. *See infra* notes 126-50 and accompanying text (discussion of the psychological problems severance of parental ties may cause in natural mothers and their children); *see also* Comment, *Where Do The Children Go?--Surrogate Mother Contracts and the Best Interests of the Child*, 22 SUFFOLK U.L. REV. 1187, 1212 (1988); Wilson, *Surrogate Motherhood—A Form of Maternal Prostitution—Merits Blanket Condemnation*, N.Y. ST. B.J. 32 (Dec. 1988).

37. N.J. STAT. ANN. § 9:3-54(a) (West Supp. 1990).

unfitness or abandonment as a requisite to the termination of parental rights or the granting of an adoption,[38] and state laws making surrender of custody and consent to adoption revocable in private placement adoptions.[39] The court forcefully refuted the Sterns' contention that payment was solely for Whitehead's services and not for the adoption by noting that "they would pay nothing in the event that the child died before the fourth month of pregnancy, and only $1,000 if the child were stillborn, even though the 'services' had been fully rendered."[40] The court further observed that "[i]t strains credulity to claim that these arrangements touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money."[41] In contrast to adoption which seeks to promote the best interests of the child, the court stated that surrogacy places a child without regard to the child's or the mother's interest. The suitability of the adoptive parents is not a concern; rather, the highest bidder can become the parents.[42]

The court noted that in *Sees v. Baber*,[43] it had determined that in an unregulated private placement, no termination of parental rights would exist without proof that parental obligations had been forsaken. Absent a strong showing of abandonment or neglect, parental rights will not be terminated. Thus, a contractual agreement to abandon one's parental rights is regarded as unenforceable. Finally, with regard to statutory grounds, the court deemed the contract clause encompassing the irrevocable consent by the mother to surrender the child and terminate her parental rights in conflict with those laws that provide irrevocable consent only with an approved agency; consent in a private placement adoption is "not only revocable but, when revoked early enough, irrelevant."[44]

The New Jersey Supreme Court's decision in this case further served to strongly and forcefully affirm the significance of the mother-child relationship in its enunciation of the public policies violated by the surrogate contract. Those fundamental policies in-

38. *Id.* § 9:2-13(d); *see also id.* § 9:3-48(c)(1).
39. *Id.* §§ 9:2-14, 9:2-16.
40. *Baby M*, 109 N.J. at 424, 537 A.2d at 1241.
41. *Id.* at 425, 537 A.2d at 1241.
42. *Id.* at 438, 537 A.2d at 1248.
43. 74 N.J. 201, 377 A.2d 628 (1977).
44. *Baby M*, 109 N.J. at 434, 537 A.2d at 1246.

cluded that the mother-child relationship be maintained and not severed where possible, that determinations regarding custody and adoption be conducted in accordance with the child's best interests and not pursuant to contractual terms, that the rights of natural parents be deemed equal concerning their child[45] and that the sur-

45. The statutes governing rights of married parents to the custody of a child confirm that such rights, in the absence of misconduct, shall be equal and that the father shall not have preference over the mother as to the award of custody. N.J. STAT. ANN. § 9:2-4 (West Repl. Vol. 1976). Moreover, New Jersey extends this statutory policy equally to every child and to every parent, regardless of the marital status of the parents by virtue of the Parentage Act. *Id.* § 9:17-40. In contrast, the New Jersey judiciary strictly enforced the general common law principle that granted the father preference over the mother regarding custody and control of his children upon separation or divorce. State v. Stigall, 22 N.J.L. 286 (1849). As the sole parent with the paramount right to the children, the father, without the consent of the mother, could apprentice the children out as laborers and appoint in his will a testamentary guardian for the children other than his living wife. *Stigall*, 22 N.J.L. at 288.

The Act of March 20, 1860, ch. 167, N.J. Laws 437, materially altered the presumption regarding paternal custody. This Act provided that children, under the age of seven years, should be transferred to or remain in the custody of their mother unless she had a character and habits rendering her an improper guardian for her children. It is significant to note that the tender years doctrine set forth in this statute did not deny or erode the primary right of the father to the ultimate custody of the child, nor was the law based on any recognition of women's rights; rather, it was premised upon the cultural ideology about the nurturing capacities of the mother. Thus, in Bennett v. Bennett, 13 N.J. Eq. 114 (1860), the court felt compelled to deliver custody of all the children under the age of seven to the mother until they attained such age as to invoke the father's entitlement of custody.

A statute passed on February 21, 1871, endeavored to address the inequities of the common law rule and the 1860 statute by equalizing the rights of parents with respect to custody and making the father's right to appoint testamentary guardians and to apprentice children contingent upon the mother's consent. Act approved Feb. 21, 1871, ch. 48, 1871 N.J. Laws 15. The enactment of the 1871 statute represented the first time New Jersey law deemed men and women, in the absence of misconduct, as equals with respect to custody. See LATOURETTE, *Ann Hora Connelly 1824-1880* in PAST AND PROMISE: THE LIVES OF NEW JERSEY WOMEN (1990) for a historical discussion of the development of the 1871 law. This statute abolished the preference afforded the father and arguably also eliminated the preference accorded mothers with respect to custody of children of tender years. In *Baby M*, 109 N.J. at 453 n.17, 537 A.2d at 1256, n.17, the New Jersey Supreme Court stated that, under the 1871 statute, both the father's superior right to the children and the mother's right to custody of children of tender years were eliminated. *But see* Landis v. Landis, 39 N.J.L. 274 (1877) (the New Jersey Supreme Court held that the 1871 statute did not expressly or impliedly repeal the 1860 statute and its tender years doctrine and awarded custody of the children under seven years of age to the mother pursuant to the authority of the Act of 1860).

Whether or not the 1871 statute is construed as eliminating the tender years doctrine, the doctrine has persisted because of prevailing views regarding the necessity and benefits of a mother's care for a young child. *Baby M*, 109 N.J. at 453 n.17, 537 A.2d at 1256 n.17; Esposito v. Esposito, 41 N.J. 143, 145, 195 A.2d 295, 296 (1963); The New Jersey Supreme Court indicated in *Baby M* that while it would be inappropriate to utilize a presumption in determining custody, "equality does not mean that all of the considerations underlying the 'tender years' doctrine have been abolished. *Baby M*, 109 N.J. at 453, 537 A.2d at 1256 n.17. Thus, in view of the "unquestionable bond" that exists between a mother and her baby, the

render of a mother's right to her child be conducted under the most careful of circumstances. In this regard, the court noted that the psychological report which indicated Mary Beth Whitehead might experience difficulty in relinquishing her child was not shown to her. It was apparent to the court that the "profit motive got the better of the Infertility Center. . . . To inquire further . . . might have jeopardized [their] fee."[46]

Finally, the court concluded that while differences between adoption and surrogacy exist,[47] the evil indigenous to both is that a woman's circumstances (an unwanted pregnancy or the need for money) may render her susceptible to exploitation and the taking away of her child.[48] The court bluntly concluded that in surrogacy, "[w]hatever idealism may have motivated any of the participants, the profit motive predominates, permeates and ultimately governs the transaction."[49] In response to the often proffered point that

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court suggested that a mother who has custody of her child for several months will have a particularly strong claim for custody. *Id.* The bond between mother and child to which the New Jersey Supreme Court referred has been the subject of scientific research which has examined the nature of the attachment and the consequences of a severance of the bond. *See* J. BOWLBY, ATTACHMENT AND LOSS: VOLUME III, (1980) and M. KLAUS and J. KENNELL, PARENT-INFANT BONDING (1982). *But see* Younger, *What the* Baby M *Case Is Really All About*, 6 LAW & INEQUALITY 75, 81 (1988) (disputing the existence of a bond between a biological mother and her young and asserting that the court's acceptance of this bond bodes ill for women, as it appears to portray them as "slaves to their biological destinies").

It is significant to note that under the 1871 statute, which afforded men and women equal rights to the custody of their children, the "happiness and welfare of the children" was enunciated as the standard for determining custody, a rule which remains to this day. N.J. STAT. ANN. § 9:2-4 (West Repl. Vol. 1976). According to one commentator, this section of the 1871 statute justifies continued application of the tender years doctrine to custody decisions. The equality of parental rights assumes a secondary importance with the primary focus on the right of the child to a parent's custodial care. In this view, courts have continued to apply the tender years doctrine by deeming it a factor relevant to the happiness and welfare of the child. *See* Note, *Tender Years Doctrine*: In the Matter of Baby M, 40 RUTGERS L. REV. 1345, 1348 (1988).

It should also be noted that the court implicitly rebuked Judge Sorkow for his issuance of the *ex parte* order forcibly removing the infant from Mary Beth Whitehead, stating that only the most extreme cases would justify removing a child from its mother *pendente lite*, in light of the child's and mother's need to strengthen their bond. *Baby M*, 109 N.J. at 462, 537 A.2d at 1261. One commentator and one *amicus* brief suggest that the cultural notions inherent in the tender years doctrine have been validated by modern child development theory and modern biological science. *See* Grosman, *Recent Developments in Custody Law*, 127 NEW JERSEY LAW. 27 (1989); Brief of Gruter Institute *Amicus Curiae*; *see also* Note, *Tender Years Doctrine*: In the Matter of Baby M, 40 RUTGERS L. REV. 1345 (1988).

46. *Baby M*, 109 N.J. at 437, 537 A.2d at 1247-48.

47. *Id.* at 438, 537 A.2d at 1248.

48. *Id.* at 439, 537 A.2d at 1249.

49. *Id.* One commentator, Richard H. Nakamura, Jr., provides insight into the manner in which surrogate businesses are conducted. Many proponents of surrogacy adopted a morally

Mrs. Whitehead knowingly agreed to the surrogacy arrangement, the court dismissed her consent as irrelevant. It reflected its understanding of a "process that engages the most profound and subtle of human feelings,"[50] stating "[t]here are, in a civilized society, some things that money cannot buy. . . . There are . . . . values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life."[51]

The court concluded its analysis with a discussion of the relative parenting rights of the parties. In the absence of any finding by the trial court that Mary Beth Whitehead abandoned or substantially neglected her parental duties or was deemed unfit, the court concluded she was entitled to retain her rights as a mother.[52] Moreover, the retention of her constitutional right to the companionship of her child did not serve to deprive Mr. Stern of his right to procreate, which is simply the right to have natural children, whether through sexual intercourse or artificial insemination.[53] Further, the court disagreed with Stern's contention that he was denied equal protection of the laws because the state statutorily[54] grants full parental rights to a husband whose wife, with his consent, has borne

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beneficient posture, assuring proper screening, counseling, and careful selection for the benefit of the infertile couple. The facts in the *Baby M* case, however, reflect a less ideal situation. Some lawyer surrogate brokers such as Katie Brophy of Louisville, Kentucky, view advertising as unprofessional. Others, do in fact advertise. One such broker, William Handel of Los Angeles, stated at a 1984 health law symposium, that he prefers advertising in the L.A. Times, but has utilized TV Guide, a radio station and several magazines. Some surrogate brokers, including Handel, exercise caution and restraint in selecting adoptive couples, excluding those who simply do not want to be concerned with a pregnancy; others do not. Noel Keane has stated that his initial interview with a couple takes a substantial amount of time. However, Rochelle Sharpe, a reporter for Gannett News Service, indicated in one article that Keane signed up clients after only a twenty minute interview. Moreover, she asserted that he waived a couple's psychiatric exam by stating he knew by talking to them they were not "loony tunes." Sharpe, *Surrogate Mother Program Under Attack*, Detroit News, Nov. 2, 1986, at 4B, col. 3. Another writer, Anne Taylor Fleming, reported that Keane pairs surrogates with adoptive couples in Saturday morning matchups, where potential surrogates parade through rooms occupied by the couples, in order to facilitate a match. According to Fleming, Keane subtly pressured couples not to pass up promising candidates. Fleming, *Our Fascination with* Baby M, N.Y. Times Magazine, Mar. 29, 1987, at 33, 35. For a full discussion of these issues, see Nakamura, Jr., *Behind the 'Baby M' Decision: Surrogacy Lawyering Reviewed*, 13 Fam. L. Rep. (BNA) 3019 (June 2, 1987).

50. Kempton, *Baby M's Mother Made Her Point*, Philadelphia Inquirer, Feb. 6, 1988, at A7.

51. *Baby M*, 109 N.J. at 440-41, 537 A.2d at 1249.

52. *Id.* at 447, 537 A.2d at 1253.

53. *Id.* at 448, 537 A.2d at 1253.

54. N.J. STAT. ANN. § 9:17-44 (West Supp. 1990).

a child resulting from a sperm donation.[55] As the court observed, the claim of an equal protection violation in this instance is one to be raised by Mrs. Stern, in that she is in the same position as the infertile husband in the statute.[56] Moreover, the court concluded that no parallelism existed between a sperm donation and a nine month pregnancy.[57]

In its discussion of custody, the court endeavored to cast a sharply different perspective on the conduct and character of Mary Beth Whitehead. The court extended a generous measure of compassion to her, in striking contrast to that proffered by the trial court, the experts or the guardian *ad litem* appointed by Judge Sorkow.[58] The court observed that while she did break a very important promise,

> . . . [W]e think that it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there? We do not know of, and cannot con-

55. *Baby M*, 109 N.J. at 449-50, 537 A.2d at 1254.

56. *Id.* at 450, 537 A.2d at 1254.

57. *Id.* The court reasoned that a sperm donor can be readily distinguished from a surrogate mother, "even if the only difference is between the time it takes to provide sperm for artificial insemination and the time invested in a nine-month pregnancy—so as to justify automatically divesting the sperm donor of his parental rights without automatically divesting a surrogate mother." *Id.* The New Jersey artificial insemination statute, N.J. STAT. ANN. § 9:17-44, upon which Mr. Stern premised his equal protection argument, treats the consenting infertile husband of an artificially inseminated wife as if he were the natural father of the child conceived. The statute is patterned after the MODEL UNIFORM PARENTAGE ACT § 5, M.U.P.A. 287, 301-02 (1987) which has been adopted by several other states, including Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Nevada, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. *See* Comment, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L.J. 721, 735, n.76 (1988); Bartlett, *Surrogate Parenthood: Finding a North Carolina Solution*, 18 N.C. CENT. L.J. 1, 10 (1988); and Andrews, *Surrogate Motherhood: Should the Adoption Model Apply?* 7 CHILDREN'S LEGAL RTS. J. 13, 14 (1986). The constitutionality of the automatic divestiture of a sperm donor's parental rights pursuant to a state artificial insemination statute is presently being challenged in Crouch v. McIntyre, 98 Or. App. 462, 780 P.2d 239 (1989), *cert. denied*, 110 S.Ct. 1924 (1990). In this case, the United States Supreme Court let stand an Oregon Court of Appeals decision permitting an unmarried sperm donor the opportunity to prove his sperm was given to an unmarried female friend conditioned on their agreement that he assume a parental role. The woman denied such an agreement was made. The Oregon artificial insemination statute provides that a donor of semen has no legal right to act as a parent unless he is the mother's husband. OR. REV. STAT. § 109.239 (Repl. Vol. 1990).

58. The guardian *ad litem* for Baby M, attorney Lorraine Abraham, initially recommended against termination of Whitehead's parental rights, but suggested a five year suspension of visitation. She later amended that recommendation to suggest no visitation until the child attained maturity. The court found her initial recommendation unusual, nearly bordering on termination. *Baby M*, 109 N.J. at 465-66, 537 A.2d at 1262-63.

> ceive of, any other case where a perfectly fit mother was expected to surrender her newly born infant, perhaps forever, and was then told she was a bad mother because she did not.[59]

Moreover, although the court disapproved of her conduct violating a court order, it recognized that her action merited a measure of understanding.

> We do not find it so clear that her efforts to keep her infant, when measured against the Sterns' efforts to take her away, make one, rather than the other, the wrongdoer. The Sterns suffered but so did she. And if we go beyond suffering to an evaluation of the human stakes involved in the struggle, how much weight should be given to her nine months of pregnancy, the labor of childbirth, and the risk to her life, compared to the payment of money, the anticipation of a child, and the donation of sperm.[60]

The court disputed the portrait of Mary Beth Whitehead as a selfish, grasping individual indifferent to the needs of Baby M and her other children. There is "not one word in the record [to] sug-

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59. *Id.* at 459, 537 A.2d at 1259. It is interesting to note that one of the leading proponents of surrogate contracts, California attorney William W. Handel, would make precisely that "inconceivable" argument. Mr. Handel, in a question and answer session that was part of a presentation at the Third Annual Whittier Health Law Symposium on March 24, 1984 responded to the queries: 1) what happens if a surrogate changes her mind; and 2) is the surrogate agreement an enforceable contract:

> MR. HANDEL: Well, as a practical matter, we probably would not sue on the contract because the contract would probably be tossed out in the first 30 seconds. There would probably be a summary judgment, so what we would do is we would use a noncontract basis cause of action, and that is intentional infliction of emotional distress. That is what we feel is the strongest protection that the couple has, and it allows us, in California particularly, to utilize that in our program.
>
> Now, needless to say, we have never had that problem. In meeting Dawn and meeting other surrogates, that is the risk that we feel less afraid of than almost anything else. Not only are these women very strong, independent women who know exactly what they are doing, it takes someone with, in our opinion, very dubious moral values who can get pregnant, who has already gotten pregnant and has children of their own and have met a couple, to look at them and say, "I'm going to keep your baby," particularly when it is the husband's sperm and the intent of this whole process would take the baby back into their arms.
>
> The few times surrogates have changed their minds in other programs throughout the country, there has been no screening or the surrogates have been verifiable crazy and they did not meet the couple, and it is more nebulous. They are not disappointing that particular couple.

See Sherwyn, *Attorney Duties in the Area of New Reproductive Technologies*, 6 WHITTIER L. REV. 799, 809 (1984).

60. *Baby M*, 109 N.J. at 459-60, 537 A.2d at 1259.

gest that her change of mind and her subsequent fight for her child was motivated by anything other than love."[61] Finally, the court mandated that upon remand to a trial court[62] for purposes of deciding visitation, Mary Beth be regarded as the natural and legal mother, that she not be penalized due to the surrogacy contract, and that her own interest in visitation as well as the child's be considered.[63]

D. *Impact of the* Baby M *Decision*

> This court is unable to concur in the determination . . . that payments pursuant to a surrogacy contract do not violate the law of this State. My analysis [of statutes and policy of this State] leads me to the conclusion, as stated by the New Jersey Supreme Court in *Baby M,* that the contract at Bar provides for "the sale of a child, or, at the very least, the sale of a mother's right to her child." . . . Such contracts are, therefore, void under the law of the State of New York as it exists at present.
>
> The Honorable Carolyn E. Demarest, Family Court Judge, New York, *In the Matter of the Adoption of Paul*, January 22, 1990

> Maybe this whole garbage that you shouldn't be able to buy babies should be looked at—hard—by the ABA.
>
> Donald Reisig, Michigan attorney and advocate for surrogate motherhood at the ABA National Conference on Birth, Death and Law, quoted by Craig R. McCoy, *Despite the Latest Ruling, the Legal Debate Rages On*, Philadelphia Inquirer, February 5, 1988.

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61. *Id.* at 460, 537 A.2d at 1260.

62. The court remanded the matter to a different trial judge, citing the original trial judge's potential "commitment to [his] findings" and the fact that the original trial judge "has already engaged in weighing the evidence." *Id.* at 463, 537 A.2d at 1261 n.19.

63. The visitation order entered by Superior Court Judge Birger M. Sween on April 6, 1988, provided that immediate, unsupervised, uninterrupted, liberal visitation with her biological mother would be in the best interests of Melissa Stern (Baby M). *Baby M*, 225 N.J. Super. 267, 542 A.2d 52 (1988). The court noted that the Sterns' testimony offered no evidence supporting their fears that Melissa's relationship with her mother would adversely affect her or their parent-child relationship. Interestingly, the court observed that "[n]either the Sterns nor their expert seemed able to comprehend this is no longer a termination of parental rights or adoption case and it no longer matters how Melissa was legally conceived. She and her mother have the right to develop their own special relationship." *Id.* at ___, 542 A.2d at 53.

One day subsequent to the issuance of the New Jersey Supreme Court opinion in *Baby M,* its chief protagonists, Gary N. Skoloff, attorney for the Sterns, and Harold J. Cassidy, attorney for the Whiteheads, continued to vociferously debate the merits, or lack thereof, of the surrogate contract at an American Bar Association Conference on Birth, Death, and Law in Philadelphia.[64] Many legal experts concurred with Cassidy who termed the decision the "death knell" for commercial surrogacy.[65] Arguments advanced for the precedent setting value of the decision included that the opinion presented a thorough and complete analysis of the issues, and the New Jersey Supreme Court was nationally recognized as a leader with regard to medical ethical issues.[66] Brokers in the surrogate business countered that the decision would be construed narrowly and have no substantial influence beyond its jurisdiction and would potentially increase their business.[67]

It is significant to note that New Jersey's most vocal advocate for surrogacy, Skoloff, concurred with his adversary to the extent that he was pessimistic regarding the future of surrogate agreements.[68] Two years after the New Jersey Supreme Court decision it is apparent that such pessimism was well founded. The impact of the *Baby M* decision can be discerned in actions taken by legal

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64. McCoy, *Despite Latest* Baby M *Ruling, Legal Debate Rages On,* Philadelphia Inquirer, Feb. 5, 1988, at B1.

65. Bird, Baby M *Decision Leaves Surrogacy's Future in Doubt,* 121 N.J.L.J. 233, 260 (Feb. 11, 1988).

66. *Id. But see* Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood,* 5 J. OF CONTEMP. HEALTH L. & POL'Y 21, 29 (1989) (the author terms the *Baby M* opinion "nothing short of an intellectual disaster." Judge Posner in the United States Court of Appeals for the Seventh Circuit, derided the *Baby M* court's rationale as representative of a hostility to the marketplace and a fear of novelty. *Id.* at 31. Contending that he had been falsely charged as an advocate of "baby selling," the judge justified the surrogate arrangements because of the demands of the marketplace. This economic commodities-oriented analysis appears to minimize sensitivity to issues such as ethics and the humanity of those involved. Judge Posner states, for example, that a child born of a surrogate contract is "much like that of a baby whose mother dies during the baby's infancy and whose father then remarries." *Id.* at 23. Further, Judge Posner apparently perceives no distinction between a sperm donation and a surrogate pregnancy and disputes the notion that surrogate motherhood is another form of baby selling:

> What she sells is not the baby but her parental rights, and in this respect she is no different from a woman who agrees in a divorce proceeding to surrender her claim to custody of the children of the marriage in exchange for some other concession from her husband—or from a sperm donor who receives cash, but no parental rights, in exchange for his donation.

Id. at 28.

67. Bird, *supra* note 65, at 260.

68. *Id.*

professional associations and advisory groups, state legislatures and judiciary, and international bodies and courts of law.

1. Legal Professional Associations and Advisory Groups

The decision had an immediate impact upon the deliberations of the American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws. The Family Law Section of the ABA, of which Gary N. Skoloff served as an officer, in the summer of 1987, had endorsed a model surrogacy act that would treat surrogate mother contracts as enforceable and would strengthen the legal position of the father. The ABA House of Delegates at its February 1989 mid-year meeting, however, defeated the model act in favor of a uniform act approved by the National Conference of Commissioners on Uniform State Laws on August 4, 1988, which provided two options for lawmakers:[69] the first option declared surrogacy contracts void as violative of public policy; the second option upheld and provided guidelines for the contracts, focusing upon, and delineating the rights of, children born pursuant to these arrangements.[70] The act, entitled Uniform Status of Children of Assisted Conception Act, was originally drafted subsequent to Superior Court Judge Harvey Sorkow's decision to uphold the surrogate contract, and it had solely provided for strict regulation of the surrogacy arrangement. After the New Jersey Supreme Court decision, however, the model legislation was amended to also give states the option to make surrogate contracts invalid.[71]

2. State Legislatures and Judiciary

With respect to state judicial and legislative actions, the *Baby M* decision has had a compelling effect. Several of the early decisions relating to surrogate parenting did not directly address the validity

69. *Surrogacy Act Passed*, 75 A.B.A.J. 128 (1989).

70. The text of the act approved by the National Conference of Commissioners on Uniform State Laws entitled "Uniform Status of Children of Assisted Conception Act" is set forth in 15 Fam. L. Rep. (BNA) 2009 (Feb. 21, 1989).

71. Bird, *Uniform Law Commission Splits*, 122 N.J.L.J. 605 (Sept. 8, 1988). For discussions of other proposals for regulating surrogacy arrangements, see Greco, *Parental Guidance Suggested: A Proposal for Regulating Surrogate Parenthood*, 22 COLUM. J.L. & SOC. PROBS. 115 (1989); Note, *Developing a Concept of the Modern 'Family': A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283 (1985); and Bezanson, Kurtz & Hovenkamp, *Model Human Reproductive Technologies and Surrogacy Act*, 72 IOWA L. REV. 943 (1987).

of the surrogate mother contract.[72] In cases in which the courts did address the merits of the surrogacy issue, the analyses focused upon the pertinent adoption and baby selling statutes, and the results were not consistent. In *Doe v. Kelly*,[73] for example, the Michigan Court of Appeals broadly interpreted the state's baby selling statutes to prohibit the payment of consideration to surrogate mothers.[74] In this case, a married couple and the surrogate mother challenged the constitutionality of such statutes as being violative of their right to privacy.[75] While concurring that the right to bear and beget a child represents a fundamental right of the parties, the court held that application of the statutes did not deprive them of that right.[76] The couple was permitted to have the child as planned, but they were prohibited from making payment for the child to the biological mother.[77]

The public policy aspect of surrogate parenting was addressed in an adoption case, *Miroff v. Surrogate Mother*,[78] decided by an In-

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72. In Syrkowski v. Appleyard, 122 Mich. App. 506, 333 N.W.2d 90 (1983), *rev'd*, 420 Mich. 367, 362 N.W.2d 211 (1985), the Michigan Attorney General sought to prevent the biological father of a child born pursuant to a surrogate arrangement from establishing his paternity under the Paternity Act. The Attorney General argued that the Act did not encompass surrogate arrangements. The trial court refused to issue an order recognizing his paternity, deeming surrogate contracts violative of public policy. The Michigan Court of Appeals affirmed, concluding that the Paternity Act sought to provide support for illegitimate children and should not be employed to effectuate a surrogate contract. The Michigan Supreme Court reversed the lower courts, finding that the father's petition was within the subject matter jurisdiction conferred by the statute and that he could establish his paternity regardless of the surrogate context in which his paternity arose. *Syrkowski*, 420 Mich. at ___, 362 N.W.2d at 214. Similarly, in Sherwyn v. California State Dep't of Social Servs., 173 Cal. App. 3d 55, 218 Cal. Rptr. 778 (1985), the court did not deem it necessary to address the merits of the surrogate contract, as the case did not present a justiciable controversy. The court regarded the plaintiffs (two attorneys who represented parties in surrogate contracts and who challenged the constitutional validity of the application of paternity and adoption legislation as applied to surrogacy) as lacking standing. *Id.* at ___, 218 Cal. Rptr. at 782.

73. 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983).

74. *Id.* at ___, 307 N.W.2d at 441.

75. The facts of this case indicated that the wife of the biological father was infertile due to a tubal ligation and that the biological mother was employed as the father's secretary. *Id.* at ___, 307 N.W.2d at 440. Differences in the economic status of the parties prompt some critics of commercial surrogacy to assert that surrogacy will be used as a vehicle for economic exploitation of the poor by the rich. *See* Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1930 (1987). The New Jersey Supreme Court in *Baby M* noted that while the Sterns were not rich, nor the Whiteheads poor, their disparate wealth played a part in the surrogate arrangement. The court regarded it as unlikely that upper income women would serve as surrogates for low income infertile couples. In the Matter of Baby M, 109 N.J. 396, 339-40, 537 A.2d 1227, 1249 (1988).

76. *Doe*, 106 Mich. App. at ___, 307 N.W.2d at 441.

77. *Id.*

78. 13 Fam. L. Rep. (BNA) 1260 (Oct. 2, 1986).

diana superior court in 1986. In this case, a guardian *ad litem* challenged the validity of the surrogate contract, which was not in dispute by any of the parties to the agreement. The court's condemnation of the contract as a violation of public policy was premised on its conflict with the prohibitions against baby selling and with adoption statutes which limit the expenses for which a mother can be reimbursed.[79] Moreover, the court held the surrogate's agreement to indemnify the father for any child support he might be ordered to pay was a "blatant attempt to void the court's authority to enter a support order should custody be awarded to the biological mother."[80] While declaring the prenatal contractual consent to adoption void, the court did approve the adoption in view of the surrogate mother's reaffirmation of her consent. As in

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79. *Id.*

80. *Id.* A few states have addressed the issue of a biological father's responsibility to a child produced under a surrogate mother contract, where the natural mother obtains custody. The Indiana court in *Miroff* clearly indicated that it was empowered to enter a support order against the biological father in such a case. The Nebraska statute which declares surrogate parenthood agreements void and unenforceable, sets forth the responsibilities of the biological father to a child born of such an arrangement to include all rights and *obligations* imposed by law with regard to the child. NEB. REV. STAT. § 25-21, 200 (1988). See *infra* note 93 for further discussion of the Nebraska statute. In Great Britain, a surrogate mother was permitted to retain custody of the twins she bore pursuant to a privately negotiated surrogacy arrangement which included payment. The mother's effort to have the court compel the biological father to pay maintenance was deemed historic. However, she withdrew her claim one year after filing. *See Surrogate Mother Drops Claim*, Press Ass'n Ltd., Oct. 26, 1989 (NEXIS, PANEWS file); *see also infra* note 110 (discussion of the British case).

The artificial insemination statutes (*see supra* note 57) which automatically divest the sperm donor of parental rights and responsibilities, should provide no immunity from parental obligations for the biological father in a situation where a surrogacy contract has been declared void and the surrogate mother obtains custody. Crouch v. McIntyre, 98 Or. App. 462, 780 P.2d 239 (1989) (discussed *supra* note 57), challenges the automatic divestiture of a sperm donor's rights pursuant to a state artificial insemination statute. The United States Supreme Court in *Crouch* upheld an Oregon appellate court decision allowing an unmarried sperm donor the opportunity to prove his sperm was given to an unmarried female friend in exchange for parental rights to the resulting child. The *Crouch* decision and logic would suggest that where a surrogate mother contract is rendered void and the surrogate mother is awarded custody, the biological father could be ordered to pay child support, irrespective of both the marital status of the surrogate mother and the existence of a statute governing artificial insemination. The artificial insemination statutes appear to contemplate the situation wherein an anonymous sperm donor is divested of all rights and protected from all obligations with regard to the child produced. They would further appear to protect the natural mother and her spouse, if any, from unwanted intrusion by the anonymous donor. Clearly, in *Crouch* and in surrogate mother contract arrangements, the sperm donor is known, intends to serve in a parental role and has agreed to do so, and provides sperm premised on those intentions. Such an identifiable donor has a right to enjoy parental privileges and a concomitant and equal duty to fulfill parental responsibility. A known donor is distinguishable from the anonymous donor who donates sperm with the understanding that absolutely no rights or responsibilities will be visited upon him.

Doe v. Kelley,[81] the court ordered that the surrogate mother could not be paid any sums in connection with the adoption.[82]

In contrast, two cases decided in Kentucky and New York, upon which surrogate advocates have relied, narrowly construed baby selling and adoption laws as inapplicable to the surrogate mother contract. Particularly noteworthy is the effect the *Baby M* decision has had in these two states. In *Surrogate Parenting Association v. Armstrong*,[83] the Kentucky Supreme Court held that the surrogate contract and its concomitant payment of consideration clause did not violate baby selling laws because the surrogate contract was not contemplated by the legislature when it drafted these statutes. The court rather tenuously distinguished baby selling from commercial surrogacy, focusing on "fundamental differences" regarding the timing of the events. The court stated that baby selling statutes are intended to prevent baby brokers "from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child."[84] Inasmuch as surrogate parenting involves an agreement *prior* to conception, the court apparently felt the financial pressures attendant to baby selling were irrelevant.[85] The court did find the agreement voidable under the state's adoption consent statutes which prohibit termination of parental rights prior to birth, but did not find the surrogacy contract illegal per se.[86]

Similarly, the New York Surrogate's Court in *In re Adoption of Baby Girl L.J.*[87] decided that baby selling laws did not prohibit payments to a surrogate mother pursuant to the contract terms.[88]

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81. 106 Mich. App. at ___, 307 N.W.2d at 441.

82. 13 Fam. L. Rep. (BNA) 1260 (Oct. 2, 1986).

83. 704 S.W.2d 209 (Ky. 1986).

84. *Id.* at 211.

85. It could be argued that the "offensive financial pressure of baby selling is even more pronounced with commercial surrogacy" inasmuch as the surrogate mother's sole motive is the financial gain. *See* Comment, *What Money Cannot Buy: Commercial Surrogacy and the Doctrine of Illegal Contracts*, 32 ST. LOUIS U.L.J. 1171, 1202 (1988). Moreover, the New Jersey Supreme Court was clearly not indifferent to the argument that finances will influence the course of surrogacy arrangements. "This is the sale of a child, or at the very least, the sale of a mother's right to her child . . . Almost every evil that prompted the prohibition of the payment of money in connection with adoption exists here." The court further observed, "it appears that the essential evil is the same, taking advantage of a woman's circumstances (the unwanted pregnancy or the need for money) in order to take away her child, the difference being one of degree." *Baby M*, 109 N.J. at 437-39, 537 A.2d at 1248-49.

86. *Armstrong*, 704 S.W.2d at 213.

87. 505 N.Y.S.2d 813 (N.Y. Surr. Ct. 1986).

88. This contract involved a private placement adoption wherein the biological father and

Consistent with the Kentucky court, the New York court deemed the timing of the preconception contract crucial in distinguishing the transaction from baby selling.[89] Further, the court stated that existing statutes did not address the legality of commercial surrogate arrangements and that it was the legislature's role to discourage or encourage such practices.[90] The court did, however, express "strong reservations about these arrangements both on moral and ethical grounds."[91]

The impact of the *Baby M* decision can be assessed in terms of the different steps taken in Kentucky and New York subsequent to the New Jersey Supreme Court ruling. Kentucky is one of several states which has enacted anti-surrogacy laws since the New Jersey decision.[92] Kentucky's statute prohibits any person from making or

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his wife contracted to pay the artificially inseminated surrogate mother $10,000 for the child. The natural mother did not contest the adoption. *Id.* at 814. *But see* Yates v. Keane, No. 887-9758-NC, (Mich. Cir. Ct. Jan. 21, 1988). In *Yates*, Judge Timothy Green voided a surrogate contract, stating such agreements are contrary to public policy. Further, Judge Green expressed concern for the potential exploitation of children resulting from the payment of money to surrogate mothers. In this case, the surrogate mother, Laurie Yates of Michigan, sued for custody of the twins she bore pursuant to a surrogate contract arranged by lawyer Noel Keane. Initially, the court allowed the twins to live with Yates and her husband. Custody was later amended to give the children to the biological father (Huber) and his wife two weeks of every month. One week prior to the custody trial, Yates settled the case, surrendered custody of the twins to the Hubers, waived any claim to the original $10,000 payment and was permitted six supervised visits per year with the twins. Her attorney claimed Yates settled because she realized that she and her husband would be unable to provide financially for the children in the manner the Hubers could. *See* Moss, *Michigan Surrogacy Fight Ends*, A.B.A.J., July 1, 1988 at 30.

Yates and her husband are, however, still maintaining a lawsuit against Noel Keane, with regard to alleged fraudulent or innocent misrepresentation in connection with the surrogate contract. Their request for a list of all Keane's clients who had entered into surrogacy agreements and a list of all surrogates who had served as such was upheld by the Court of Appeals of Michigan, which reversed a lower court's holding. Yates v. Keane, 184 Mich., App. 80, 457 N.W.2d 693 (1990). An unpublished ruling issued by Superior Court Judge Victor Pfau, Marion County, Indiana on October 2, 1986, declared that in an adoption proceeding, a surrogate mother should not accept money since she would be guilty of baby selling. The court also stated that a surrogacy contract is void inasmuch as a woman cannot consent prebirth to adoption. In this case, the woman did not object to the father taking custody. *See* Bird, *supra* note 65, at 259.

89. *Adoption of Baby Girl L.J.*, 505 N.Y.S.2d at 817.

90. *Id.* at 818.

91. *Id.* at 817.

92. Prior to the New Jersey Supreme Court decision in *Baby M*, three states had legislation which addressed the issue of surrogacy. Nevada and Arkansas have statutes authorizing surrogate parenting, but without specific enabling legislation. Nevada's statute, for example, prohibits the payment of money or the offer of anything of value to the natural parent in return for consent to, or cooperation with, adoption. NEV. REV. STAT. § 127.287(I) (Cum. Supp. 1989). This provision does not apply "if a woman enters into a lawful contract to act as a surrogate, be inseminated and give birth to the child of a man who is not her husband."

assisting in making a surrogate agreement. The law voids any contract entered into that contravenes this provision. Any contract that would compensate a woman for being artificially inseminated and would terminate her parental rights to a child born in accordance with the arrangement is clearly prohibited.[93]

Id. § 127.287(5). Nevada statutes also state that pre-birth consents to adoption, and those within seventy-two hours after birth are invalid. *Id.* § 127.070.

The Arkansas artificial insemination statute originally denoted that a child born by means of artificial insemination to an unmarried woman shall be the child of the woman giving birth except in the case of a surrogate mother, in which case the child shall be that of the intended mother. ARK. REV. STAT. § 9-10-201 (1987). The statute was amended in 1989 to enlarge the definition of a surrogate mother to include both married and unmarried women. It also expanded the class of legally recognized parents of a child born to a surrogate mother to include biological father and his wife, the biological father alone if he is unmarried, and the woman intended to be the mother where the surrogate mother was artificially inseminated with an anonymous donor's sperm. *Id.* § 9-10-201. Louisiana passed the first legislation on surrogacy. It provides that such agreements are null and void and unenforceable as contrary to public policy. LA. REV. STAT. ANN. § 9:2713 (West Cum. Supp. 1990).

93. KY. REV. STAT. ANN. § 199.590(3) (Michie/Bobbs-Merrill Cum. Supp. 1990). This statute was passed after Surrogate Parenting Ass'n, Inc. v. Armstrong, 704 S.W.2d 209 (1986), was decided. In *Armstrong*, the Kentucky Supreme Court narrowly interpreted baby selling statutes to exclude surrogacy contracts from their prohibitions. *See supra* text accompanying notes 83-86.

It should be noted that subsequent to the *Baby M* decision, five other states have passed legislation which, in varying degrees, expresses opposition to the surrogate mother contract. Michigan enacted a law in 1988 making surrogacy contracts void and unenforceable and barring payment to the natural mother beyond medical costs incurred. MICH. COMP. LAWS ANN. § 722.851-.863 (West Cum. Supp. 1990). Further, the Michigan statute declared that violation of the statute would be a felony, punishable by a fine of up to $10,000 for the parties to the contract, and up to $50,000 or imprisonment for the broker in the arrangement. The criminal penalties were challenged as violative of the rights to privacy and parenthood by the American Civil Liberties Union, representing three couples who wished to use a surrogate due to the wife's infertility and by two women who wished to bear children for a fee. The Michigan Attorney General has since retreated from his position of bringing criminal prosecutions. *See* 123 N.J.L.J. 436, (Feb. 23, 1989). In addition to its aggressive posture with regard to rendering surrogate contracts void, the Michigan law is notable in that it invalidates several forms of surrogacy, including cases where the surrogate mother is naturally or artificially inseminated and where an implantation of an embryo not genetically related to the surrogate mother occurs. MICH. COMP. LAWS ANN. § 722.853 (West Cum. Supp. 1990). Nebraska passed a law declaring surrogate parenting agreements void and unenforceable. The Nebraska statute is distinctive in that it specifically sets forth the responsibilities of the biological father to a child born pursuant to a void surrogate contract. These include "all the rights and obligations imposed by law with respect to such child." NEB. REV. STAT. § 25-21, 200 (Cum. Supp. 1988). Indiana has passed legislation declaring surrogacy agreements void. IND. CODE ANN. § 31-8-2-1 and -2 (Burns Cum. Supp. 1990). Moreover, the law provides that the agreement shall not serve as evidence in any court determinations involving custody, visitation, child support, or related issues. IND. CODE ANN. § 31-8-2-3 (Burns Cum. Supp. 1990). Florida enacted a statute outlawing commercial surrogacy and permitting only gratuitous surrogate arrangements, although allowing payments for all reasonable expenses of the surrogate mother. FLA. STAT. ANN. § 63.212(1)(i) (West Cum. Supp. 1990).

In New York, the *Baby M* decision had a different legislative

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The most recently enacted statute prohibiting surrogate arrangements and one of the most far reaching is that of Arizona. That law prohibits any person from entering into, inducing, arranging, procuring, or otherwise assisting in the formation of a surrogate parentage contract. Further, the statute succinctly sets forth the parentage of the child, stating that the surrogate mother is the legal mother and is entitled to custody of the child, irrespective of whether the surrogate agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial insemination. ARIZ. REV. STAT. ANN. § 25-218 (West Cum. Supp. 1989). Thus, pursuant to Arizona law, the gestational surrogate who is not biologically related to the child to whom she gives birth would be accorded the same legal status and rights as the traditional surrogate in a "Whitehead-Stern" arrangement.

In marked contrast to the enactment of the Arizona legislature regarding a gestational surrogate's status as the mother, is the recent California decision of Johnson v. Calvert, where California Orange County Superior Court Judge Richard N. Parslow, Jr. ruled that the gestational mother had no rights with regard to the baby she bore for an infertile couple. *See* Gewertz, *Infant's Genetic Parents Win Rights over Surrogate Mother*, Philadelphia Inquirer, Oct. 23, 1990 at 1-A, col. 1. The surrogate mother who had agreed to bear the genetically unrelated baby for a fee of $10,000, had sought custody of the child and sought to be deemed the boy's legal mother. Johnson asserted that she and the baby had developed an unexpected, deep emotional attachment during the pregnancy. In upholding the surrogate contract in which she had agreed to carry an embryo conceived through in-vitro fertilization utilizing the Calverts' sperm and egg, the court held that a gestational surrogate acquires no parental rights to the child she carries. Moreover the judge opined that there was "nothing wrong with getting paid for nine months of what I understand to be a lot misery." *Id.* at 8-A.

The *Johnson* decision represents the first time a court has decided the rights of a gestational surrogate pursuant to a surrogate mother contract. For those who oppose commercial surrogacy in any context, the case sets disturbing precedent. Although the gestational surrogate is not biologically related to the child she bears, the situation cannot be so readily distinguished from the *Baby M* case. The gestational surrogate arrangement is not exempt from the dangers indigenous to the more traditional commercial surrogate mother contracts. As in its traditional counterpart, gestational surrogacy demeans the role of gestation, of protecting, nurturing and delivering a human child; it fosters the creation of a breeder class of women whose parental rights can be waived contractually; it promotes the sale of a child and it may prove psychologically detrimental to the surrogate mother's other children, the biological parents and the child itself. *See infra* notes 127-65 and accompanying text.

Although the *Johnson* case is the first to establish a gestational surrogate's status, a small but emerging trend toward gestational surrogacy is becoming evident. On July 18 and July 28, 1990, for example, two California women served as gestational surrogates for a Venezuelan couple who were unable to have children. After each woman was implanted with four embryos created by in-vitro fertilization of the wife's eggs and the husband's sperm, one woman delivered three children and the other then delivered one child. The birth mothers relinquished the children to the couple in exchange for a fee of $10,000. *See* Lawson, *New Birth Surrogates Carry Couples' Babies*, N.Y. Times, Aug. 12, 1990, at 1.

Although the New Jersey Supreme Court in *Baby M* left open the possibility that the New Jersey legislature could alter the statutes within constitutional limits to permit surrogacy contracts, the legislature has not done so. *Baby M*, 109 N.J. at 411, 537 A.2d at 1235. In May 1990, the New Jersey Bioethics Commission, a state panel established to issue guidelines to the legislature on complex health and medical issues, presented a report to the governor and lawmakers with preliminary recommendations regarding surrogate contracts. The report suggests that surrogate contracts be deemed illegal and that possible penalties be applied to strongly discourage the practice. Martello, *N.J. Panel Discourages Surrogates*,

effect. During the *Baby M* trial, state Senator John Dunne introduced legislation in the New York state senate to regulate surrogate contracts.[94] The legislation required strict scrutiny of surrogate mothers and mandatory prior approval from the state superior court for all surrogate parenting contracts. Subsequent to the Supreme Court decision in *Baby M*, the bill died, and there has been no concerted effort to revive it.[95]

Of more significance is the recent New York Family Court decision *In the Matter of the Adoption of Paul.*[96] In this case, the family court judge directly disputed the analysis in *In re Adoption of Baby Girl L.J.*[97] of the applicability of New York's baby selling statutes to the surrogacy contract. The *Paul* court cited with approval the analysis and conclusion reached by the New Jersey Supreme Court in *Baby M* and found the New Jersey court's characterization of the surrogacy contract as "illegal and perhaps criminal" baby bartering, a compelling one.[98]

In *Paul*, the surrogate mother sought judicial consent to the adoption of her son by the biological father with whose semen she had been artificially inseminated.[99] Despite the obfuscation of the contract language,[100] the court clearly discerned that the surrogate

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Philadelphia Inquirer, May 23, 1990, at B5, col. 1.

On the national level, several bills have been introduced to ban commercial surrogacy pursuant to the federal government's authority to regulate interstate commerce. Rep. Thomas Luken (D-Ohio) introduced the first bill, H.R. 275, 101st Cong., 1st Sess. (1989), which would criminalize commercial surrogacy as would the bill, H.R. 576, 101st Cong., 1st Sess. (1989), sponsored by Rep. Robert Dornan (R-Calif.). On the first anniversary of the *Baby M* decision, a bill to ban paid surrogate mother contracts was introduced by Rep. Barbara Boxer (D-Calif.) and Rep. Henry J. Hyde (R-Ill.). This bill also imposes a criminal penalty of up to five years in prison and a $50,000 fine, but the penalty is directed solely at the broker arranging the surrogacy agreement. The bill, moreover, declares a surrogate mother agreement unenforceable.

94. S. 1429-A (1987).

95. Dunne observed that "the development of a regulatory policy, as opposed to one advocating prohibition of the practice or nullification of the enforceability of a surrogate parenting contract, has thus far been the minority perspective." Dunne & Serio, *Surrogate Parenting After* Baby M: *The Ball Moves to the Legislature's Court*, 4 TOURO L. REV. 161, 182 (1988).

96. 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990).

97. 505 N.Y.S.2d 813 (N.Y. Surr. Ct. 1986).

98. 550 N.Y.S.2d at 817.

99. *Id.* at 815.

100. The contract stated, for example, that the $10,000 payment is not to be construed as a fee for termination of parental rights or for a consent to surrender the child. Further, the contract stated that the sole purpose of the conception was to provide a child for the father without any consideration other than concern for the best interests and welfare of the child. *Id.* at 815-16.

mother was to receive $10,000 in consideration for her surrender of parental rights.[101] Thus, the court deemed it necessary to determine whether the contract was valid or whether the surrogate must "foreswear acceptance of the benefit of the bargain and . . . assure this Court that such surrender [was] truly voluntary and [was] motivated by her concern for the best interests of her child and not the promise of financial gain."[102]

Observing that none of the proposed legislative bills on surrogacy had passed, including that of state senator John Dunne, the court looked to the state adoption laws for guidance. The court concluded that remuneration to a mother for surrender of the child for adoption violates adoption laws and New York's policy against trafficking in children.[103] The court then held it would accept the surrogate's surrender and termination of parental rights contingent upon the receipt of sworn affidavits from both parties that no compensation would be proffered or accepted in exchange for the child.[104]

3. International Bodies and Courts of Law

Internationally, the issue of surrogate mother contracts has been addressed by legislation, case law and governmental reports.[105] Other countries have responded with determinations similar to those made by the states in this country. Prior to the *Baby M* decision, the positions on surrogacy enunciated by various countries or provinces were not uniform. They were, however, generally critical of commercial surrogacy. For example, the 1984 study of the Ontario Law Reform Commission recommended legislation to permit and enforce surrogacy contracts with stringent medical standards

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101. *Id.* at 816.

102. *Id.*

103. *Id.* at 817.

104. *Id.* at 818-19. The decision is also noteworthy for its analysis of the "very significant difference" between sperm donation and surrogate motherhood:

> . . . [A] sperm is merely a gamete, potentially capable, if successfully joined with an egg, of creating an embryo which must then survive gestation to birth while the "surrogate" mother is supplying a life-in-being, having provided, not only the egg, but protection and nourishment during gestation and having delivered a human child capable of independent survival.

Id. at 818. *See supra* note 93 (discussion of statutes which broadly define surrogate mothers to include those mothers who give birth to a child who is not genetically related).

105. *See* 25 J. FAM. L. 1 (Oct. 1986) (review of legislative and judicial responses to the issue of surrogacy in Europe).

and court supervision.[106] In contrast, surrogacy for money was made a crime via legislation in the Australian state of Victoria in that same year.[107]

Even prior to *Baby M*, England vehemently opposed commercial surrogacy. In 1985, the Surrogacy Arrangements Act was passed, to be applicable throughout the United Kingdom.[108] The Act bans commercial surrogacy and sets forth criminal penalties for intermediaries who recruit, advertise and negotiate surrogate mother arrangements on a commercial basis.[109] Surrogates and adoptive parents are exempt from criminal liability, and private surrogate arrangements are not illegal.[110]

Passage of the Surrogacy Arrangements Act was prompted by a national furor arising when a British woman, who had been commissioned by an American agency to serve as a surrogate, gave birth in early 1985 to a child for a foreign couple at a fee of $7,200.[111] The facts of the surrogacy arrangement became public when the surrogate mother sold her story to one of Britain's popular newspapers.[112] The child's birth drew the full scrutiny and con-

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106. Starke, 63 AUSTRALIAN L.J. 303 (May 1989) (citing Ontario Law Reform Commission, *Options on Surrogate Motherhood* (1984)).

107. *Surrogacy: Wrong Mother, Wrong Babies*, The Economist 27, 63 (U.S. Ed. Apr. 20, 1985).

108. *See* 13 Fam. L. Rep. (BNA) 1260 (Mar. 31, 1987) (discussion of Surrogacy Arrangements Act).

109. *Id.*

110. For example, in March 1987, Sir John Arnold, president of the Family Division, High Court, permitted a surrogate mother to retain custody of her five month old twins, born as a result of artificial insemination in a surrogacy arrangement. *See* Dean, *British Surrogate Mother May Keep Twins*, Manchester Guardian Weekly, Mar. 22, 1987, at 8, col. 3. The surrogate mother had approached the couple directly and offered her services in order to help them and to provide a better financial future for her family. *Id.* She changed her mind after the birth of twins and sought the right to keep them. *Id.* The court held that the strong maternal link between the mother and the children should not be broken, irrespective of the intellectual quality and environment of the couple's home. *Id.* Moreover, the court stated that there was nothing shameful in the surrogacy agreement, inasmuch as the surrogate freely offered herself. *Id.*

111. The surrogate mother, Kim Cotton, has authored a book in which she unsparingly reveals the details of the surrogate arrangements and her artificial inseminations. *See* COTTON & WINN, BABY COTTON—FOR LOVE AND MONEY (1985). In an interview, she explained that she sought the surrogacy arrangement in order to refurbish her home and to serve a good cause in providing an infertile couple with a child. *See* Toynbee, *How Will Baby Cotton Feel When She Learns That Her Unknown Mother Did Not Give Her Up Sadly, Out of Necessity, But Gladly For Money*, Manchester Guardian Weekly, July 14, 1985, at 19.

112. Kim Cotton was reportedly paid $22,000 by the British tabloid, the Daily Star, to tell her very public story. The agreement included the guarantee that Cotton would pose for a photograph where she was kissing the baby after it was born. *Id.*

demnation of the press and widespread public disapproval over the payment of money for a child. The child remained in the hospital while the High Court determined custody. Justice Latey awarded custody to the couple, regarding them as a devoted, affluent pair who would provide a good home.[113] The judge noted that his decision did not address the moral and ethical implications of the surrogacy issue.[114]

The Federal Republic of Germany has consistently criticized the surrogate mother contract, premising its objections on both the commercial aspect of baby bartering and the unlawful private placement of children for adoption.[115] In 1985, two German courts rendered decisions which voided the enforceability of the surrogate contracts.[116] In the Berlin Court of Appeal, it was held in a case similar to *Baby M* that a pre-birth surrender agreement could not deny the surrogate mother's right to custody of her child.[117] In the Regional Appeal Court of Hamm, the court faced a surrogate mother impregnated by her husband, rather than the intended father. The court held that the latter was entitled to repayment of monies paid pursuant to the surrogate contract, as the contract treated the child as merchandise, and hence was void.[118]

Subsequent to the *Baby M* decision, the international arena has witnessed the promulgation of regulations and recommendations banning commercial surrogacy. Israel has rendered surrogate motherhood illegal pursuant to regulations promulgated by the Health Ministry. Acknowledging the influence of the *Baby M* case,

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113. Stewart, *Baby With Price on Head Stirs Outrage Over Surrogate Mothers*, Reuters N. Eur. Serv., Jan. 17, 1985 (NEXIS, REUTER file).

114. *Id.*

115. "German law strictly limits the institutions that are allowed to arrange adoptions and forbids this activity to any other group. It objects to surrogacy because this arrangement is a creation of life by a father who wishes a minimum of procreative responsibility and a mother who wishes a minimum of postbirth responsibility. German law finds this creation of babies for the purpose of putting them up for private adoption objectionable." Schwartz, Book Review, 89 COLUM. L. REV. 347, 362 (1989).

116. *See* 13 Fam. L. Rep. (BNA) 1260 (Mar. 31 1987).

117. *Id.*

118. More recently, a West German court ordered the closure of a Frankfurt surrogate motherhood center on the grounds that it violated Germany's adoption laws and social values. *See West German Court Orders Closure of Surrogate Mother Centre*, Reuter Libr. Rep., Jan. 6, 1988 (NEXIS, LBYRPT file). The German surrogate brokerage business denied that its purpose was to promote surrogate motherhood, and instead claimed its purpose was to offer advice about opportunities for surrogacy in the United States. *Id.* As noted by Schwartz, the German agency was a branch of the business of the surrogate broker who arranged the *Baby M* contract. *See* Schwartz, *supra* note 115, at 361.

the Ministry deems surrogacy an unethical and unacceptable practice.[119]

A forcefully worded report on surrogate motherhood prepared by the New South Wales Law Reform Commission recommended that surrogacy contracts be void, that commercial surrogacy be prohibited pursuant to criminal sanctions, that the surrogate mother be presumed to be the legal mother of the child, and that an adoption be granted to the commissioning couple only when the child's best interests mandate such a result.[120] In language that echoed the rationale of the New Jersey Supreme Court in *Baby M*, the report stated:

> While the Commission has sympathy for this view namely, the provision of children for the infertile, we regard the disadvantages of the practice to be so great as to outweigh even the needs of the infertile. We cannot accept that it is in the child's interest to be conceived and born for this purpose. *The process denigrates the position of women in society and the process of childbirth.* It lends credence to the view that children may be used as a means to an end and employs the services of professional medical and health care workers to assist.[121]

Thus, the legal response of the international community to the surrogate issue has generally been one of advocacy for the prohibition of commercial surrogacy, for reasons identical to or consistent with the philosophy enunciated by the New Jersey Supreme Court in *Baby M.*

III. SURROGATE MOTHER CONTRACTS ARE NOT IN THE BEST INTERESTS OF THE CHILD, THE MOTHER OR SOCIETY

> Confronting her infertility problems, Sarah suggested to her husband Abraham that he cohabit with her slave woman, Hagar, in order that "it may be that I shall be builded up through her."
>
> Genesis 16:2
>
> NEGROES FOR SALE—A Negro woman 24 years of age, and

119. *See* Health Ministry Regulations, Israel (1988).

120. Starke, *supra* note 106, at 305 (citing New South Wales Law Reform Commission, *Surrogate Motherhood* (1989)).

121. *Id.* at 304. (emphasis added).

> two children, one eight and the other three years. Said Negroes will be sold separately or together as desired.
>
> Advertisement cited in J.M. McPherson, *Battle Cry of Freedom: The Civil War Era*

Proponents of the surrogate mother contract, endeavoring to cloak their baby bartering arrangements in the respectability of antiquity, often refer to the biblical story of Sarah and Abraham as evidence of the historical precedent it affords. In that story, Sarah remedies her infertility by having a slave woman, Hagar, serve as a surrogate mother and give birth to a son Ishmael, although without a fee and through natural means.[122] Sarah later becomes fertile and gives birth to a son, Isaac.[123] Indeed, a superficial assessment of this reproductive collaboration would lead one to the conclusion that the arrangement was an expedient and successful one. A further examination reveals, however, that many of the problems attendant to the *Baby M* situation were present. The story of Hagar, rather than serving as support for surrogacy, serves instead as an insight regarding the serious repercussions such a practice entails.

Hagar, a slave, was regarded solely as a gestational instrument by virtue of her status, as was Mary Beth Whitehead by virtue of the contract. The Bible indicates that Hagar, once pregnant, was not content to confine herself to the strictures of her role, in that she viewed herself as an important figure, proudly proclaiming her motherhood and thus, alienating Sarah. Similarly, Mary Beth Whitehead experienced an unforeseen maternal bonding with her child and found that she could not adhere to the framework of the contractual terms. The results were disastrous for both: Sarah ultimately ordered the banishment of Hagar and Ishmael[124] and Mary Beth encountered the wrath of the Sterns, the psychiatric experts and Judge Harvey R. Sorkow. The story of Sarah, Abraham and Hagar, rather than serving as encouraging precedent, should be employed as alarming notice to those advocating surrogacy who argue that the child does not belong to the mother, and who contend that a surrogate is simply the carrier, or "a postman delivering a

122. Genesis 16:2.
123. Genesis 21:2.
124. Genesis 16:6.

very special parcel."[125] The story of Hagar illustrates that surrogacy encompasses unforeseen consequences and that the price to be borne by the child, mother, and society, in order to satisfy the need of an infertile couple, may be enormous.

One of the costs of surrogate mother contracts to the child and the natural mother is an enduring psychological harm, which may be incurred as a result of the severance of parental ties. Courts have long recognized the severity of the harm sustained by parents associated with relinquishment of parental rights. Numerous decisions by the United States Supreme Court have established the fundamental parental right to continued companionship, care, custody and management of the child[126] and the grievous loss suffered by the severance of those parental ties.[127]

In *Meyer v. Nebraska*,[128] the Court held that the rights of parents to maintain ties with their children is "a privilege long recognized at common law as essential to the orderly pursuit of happiness."[129] In *May v. Anderson*,[130] the Court stated that parental rights are "far more precious . . . than property rights."[131] Finally, in *Lassiter v. Department of Social Services*,[132] the Court stated that termination of parental ties with children imposes "a unique kind of deprivation" and that a "parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one."[133] Moreover, Justice Stevens in the *Lassiter* dissent regarded the loss of a parental relationship with a child as more grievous than the loss of personal liberty by incarceration.[134] Dissenting Justices Blackmun, Brennan and Mar-

125. Majendie, *Surrogate Mother Motivated by Both Love and Money*, Reuters N. Eur. Serv., July 18, 1985 (NEXIS, REUTER file) (quoting British surrogate Kim Cotton).

126. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982).

127. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

128. 262 U.S. 390 (1923).

129. *Id.* at 399.

130. 345 U.S. 528 (1953).

131. *Id.* at 533.

132. 452 U.S. 18 (1981). In this case, the United States Supreme Court held that the due process clause of the fourteenth amendment does not mandate appointment of counsel to an indigent parent in every parental status termination proceeding, even though the parent's interest is an extremely important one. Justices Blackmun, Brennan and Marshall joined in dissenting vociferously, as did Justice Stevens, individually, noting that the unique importance of a parent's interest in the care and custody of his or her child cannot constitutionally be terminated unless accompanied by representation of counsel, as mandated by the due process clause.

133. *Id.* at 27.

134. *Id.* at 59.

shall observed that the interest of a parent in his or her child "occupies a unique place in our legal culture" and that parental rights are "more significant and priceless than 'liberties which derive merely from shifting economic arrangements.' "[135] The New Jersey courts have similarly held that "it is difficult to consider many consequences of greater magnitude than the loss of one's children."[136]

Psychological studies addressing surrender of a child for adoption uniformly conclude that the consequences to a mother who surrenders a child can be severe. Contrary to the assumption that the birth mother forgets the child and commences a new life,[137] studies have documented that the women experience grief, mourning, and a sense of loss that persists for periods up to thirty years or longer.[138] The research suggests this sense of loss experienced by the birth mothers, is similar to that of women who experience the death of a baby prior to, or after birth.[139] The mothers react to the loss of their children as if they had lost a part of themselves.[140] Moreover, the studies demonstrate that mothers who relinquish children to adoption confront serious social problems, encompassing difficulties such as marital dysfunction and infertility.[141] The surrogate mother contract and its accompanying relinquishment of the child encompass minimally the same risk of harm to the mother.

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135. *Id.* at 38 (citations omitted).

136. Crist v. New Jersey Div. of Youth and Family Servs., 128 N.J. Super. 402, 416 (1974), *aff'd*, 135 N.J. Super. 573 (App. Div. 1975).

137. Pannor, Baran & Sorosky, *Birth-parents Who Relinquished Babies for Adoption Revisited*, 17 FAMILY PROCESS 329, 331 (1978).

138. SOROSKY, BARAN & PANNOR, THE ADOPTION TRIANGLE (1978); WINKLER & VAN KEPPEL, RELINQUISHING MOTHERS IN ADOPTION (1984). The Winkler study involved approximately 2,000 Australian women who had relinquished a first child for adoption and later experienced a negative and enduring sense of loss for periods of up to 30 years. A further study concerned with the ramifications of relinquishment by the mother indicated that birth mothers who surrender experienced:

> recurring dreams concerning the loss of the baby, with contrasting themes of traumatic separation and joyful reunion being most common, and they all experienced an involuntary curiosity, when seeing a stranger with a small baby, about whether this was the baby they had relinquished. When there was "enough" physical resemblance to support this slim and desperate possibility, they would follow the baby as if to visually retrieve it.

Rynearson, *Relinquishment and its Maternal Complications: A Preliminary Study*, 139 AM. J. PSYCHIATRY 338, 339-40 (1982).

139. *See* WINKLER & VAN KEPPEL, *supra* note 138.

140. *Id.*

141. Deykin, Campbell & Patti, *The Post-Adoption Experience of Surrendering Parents*, 54 AM. J. ORTHOPSYCHIATRY 271, 276 (1984).

Increasingly, courts are recognizing that the severance of parental ties impacts negatively upon the child as well. As observed by the New Jersey Superior Court in a recent decision involving termination of parental rights,

> A final separation from a biological parent is a harm in itself . . . [the child] would feel a sense of loss if her relationship with her natural mother was terminated. Experts are increasingly concerned about the seriousness of this loss and are recognizing the need for continued contact with a biological parent, even a flawed parent.[142]

The trial court in *Baby M* failed to recognize that the unnecessary separation of a child from its natural parent is inimical to the best interests of a child.[143] In another New Jersey Supreme Court case *In re Adoption of Children by D.*, the court refused to permit termination of a natural father's parental rights in favor of adoption by a stepfather. The court stated that "[t]he child's relationship with the parent is of such significance that all doubts are to be resolved against its destruction."[144] The New Jersey Superior Court has stated, "the child's profound need to know who her parents are, where they came from, the conditions under which they could not take care of her, is not addressed by the [existence of] a psychological parent."[145]

The courts' recognition that the child's best interest is served by maintaining a relationship with a natural parent is consistent with psychological studies that show adoptees confront psychological risks of harm. Several studies indicate that adoptees are more prone to psychopathology than other members of the population, and that they, therefore, are commonly seen in consultation and treatment.[146] Common problems experienced by adoptees include low self-esteem and insecurity resulting from the severance from the natural parent, as well as identity and genealogical confu-

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142. *In re* J.E.D., 217 N.J. Super. 1, ___, 524 A.2d 1255, 1262 (App. Div. 1987).

143. *See* Sorentino v. Family and Children's Soc., 74 N.J. 313, 378 A.2d 18 (1977); *In re* Adoption by J.J.P., 175 N.J. Super. 420, 419 A.2d 1135 (App. Div. 1980).

144. 61 N.J. 89, ___, 293 A.2d 171, 173 (1972).

145. *In re* J.E.D., 217 N.J. Super. at ___, 524 A.2d at 1262-63 (citing Fanshel, 12 N.Y.U. REV. L. & SOC. CHANGE 501, 503 (1983-84)).

146. Blotcky, Looney & Grace, *Treatment of the Adopted Adolescent: Involvement of the Biologic Mother*, 21 J. AM. ACAD. CHILD PSYCHIATRY 281 (1982); Simon & Senturia, *Adoption and Psychiatric Illness*, 122 AM. J. PSYCHIATRY 858 (1966); Nickman, *Losses in Adoption: The Need for Dialogue*, 40 PSYCHOANALYTIC STUDY OF THE CHILD 365 (1985).

sion.[147] It is significant to note that several studies conclude the child experiences these problems even where the child is separated from only one natural parent and is raised by the other.[148]

The child of a surrogate mother arrangement will suffer not only the harms indigenous to the severance of parental ties in the adoption situation, but will also confront a risk of harm unique to the surrogacy contract.[149] As the New Jersey Supreme Court in *Baby M* noted:

> The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct.[150]

Surrogate mother contracts pose an additional risk of grievous harm to the child born of such an arrangement: the risk of rejection by both the natural mother and the biological father. That horrifying prospect has, in fact, already occurred. In January 1983, a surrogate mother, Judy Stiver, gave birth to a child afflicted with a severe congenital disorder. The contracting father, Alexander Malahoff, disclaimed paternity and refused to assume responsibility for the child's care. A paternity test determined that Mr. Stiver was the father of the child.[151] Mr. Malahoff has now commenced suit against Mrs. Stiver for breach of contract and the Stivers have filed claims, asserting that Mr. Malahoff invaded their privacy by

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147. Sorosky, Baran & Pannor, *Adoption and the Adolescent: An Overview*, 5 ADOLESCENT PSYCHIATRY 54 (1977); Nickman, *supra* note 146.

148. *See* SOROSKY, BARAN & PANNOR, *supra* note 138; MCKUEN, FINDING MY FATHER: ONE MAN'S SEARCH FOR IDENTITY 14 (1976); *amici* brief submitted by American Adoption Congress in *Baby M.* Further, the growing movement for open adoption records clearly reflects the adoptees' need to know about their origins. SOROSKY, BARAN & PANNOR *supra* note 138, at 155-56.

149. In adoption, one can accept that the severance of parental ties with the mother is intended to resolve a difficult situation, and the focus is clearly on what is best for the child and the natural mother. In the Matter of Baby M, 109 N.J. 396, 425, 537 A.2d 1227, 1242 (1988). Surrogacy, in contrast, purposefully creates the severance of the mother and child relationship, gives little thought to the psychological repercussions for mother and child, and directs its focus to the needs of the biological father and his wife.

150. *Id.* at 441, 537 A.2d at 1250.

151. Stiver and Malahoff appeared on "The Phil Donahue Show" where the results of the paternity tests were announced.

publicizing the incident and that the child's condition was caused by a virus transmitted by Malahoff's sperm.[152] Surrogacy is a situation, notes one commentator, where the usual assumption of responsibility for procreative choices is not applicable.[153] Parental irresponsibility is inherent in a situation where a sperm donor orders a child from a woman with whom he has no intention of accepting parenthood; the woman becomes pregnant with an intention of surrendering her child.[154] As observed by another commentator:

> The birth of a handicapped infant can be traumatic for the most devoted loving parents. Disappointment, denial and grief may make it difficult for any parent to respond to the needs of the child. When a handicapped infant is borne into a family, however, emotional or custodial abandonment are generally not considered to be options . . . surrogacy arrangements increase the risk that biological parents will feel it is acceptable to abandon infants after they have been born.[155]

This parental lack of accountability may also be provoked when a child does not meet the buyer's expectations.[156] But as one commentator observes, this danger of parental irresponsibility is "always present in a surrogacy arrangement. When babies are ordered in the way that expensive products are, they may be treated more like objects than like developing beings with their own needs."[157]

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152. *See* Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, 70 A.B.A.J. 50, 56 (Aug. 1984).

153. Schwartz, *supra* note 115, at 364.

154. *Id.*

155. Areen, *Handicapped Child Becomes Damaged Goods*, 121 N.J.L.J. 317-18 (1988).

156. *See Rejected Boy's Twin Sister Now Also With Surrogate Mother*, L.A. Times, May 27, 1988, at 2, col. 4. In this instance, a surrogate mother gave birth to twins, a boy and a girl, pursuant to a $10,000 contract. The contracting couple refused to accept the boy saying a doctor had counseled against adding more than one child to their family because of added stress. Although the couple did initially take the girl, the surrogate mother assumed custody of both children.

157. Schwartz, *supra* note 115 (citing Note, *Developing a Concept of the Modern Family: A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1304 (1983)). *See also* In the Matter of the Adoption of Tessa Annaleah Reams, 52 Ohio App. 3d 52, 55 N.E.2d 159 (1989). In this case, the surrogate mother could not become pregnant from the commissioning father's sperm so she was artificially inseminated with the sperm from another man, not her husband. The case illustrates the complexities of determining parental responsibility in surrogate situations, especially when, as here, the commissioning couple divorced, and each sought custody of the child. The mother of the child has also brought an action seeking permanent custody. Ohio *ex rel.* Dispatch Printing Co. v. Solove, 52 Ohio St. 3d 6, 556 N.E.2d 439 (1990).

Another argument that has been raised regarding the sale and purchase of children is that

The surrogate mother contract makes commodities of children and mothers, reducing children to the status of sought after goods and mothers into the requisite means to satisfy the need of men and their infertile wives to procreate. From a historical perspective, surrogate mother contracts represent a regression for both women and children into the past common law era when both women and children were deemed chattel-property of the husband and father.[158] The father, in a case of separation or divorce, received custody of the child irrespective both of his own character and of the welfare of the child.[159] The mother in accordance with the Aristotelian theory of human reproduction was merely the "passive incubator of his seed"[160] or, in Judge Sorkow's view, the "means of reproduction."[161] Even married women had no rights to the custody and companionship of their children until the late 19th century.[162] The common law era afforded mothers some stat-

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such a contract is void under the thirteenth amendment to the United States Constitution which declares that neither slavery or involuntary servitude shall exist within any part of the United States. The trial court judge in *Baby M* refuted the applicability of the thirteenth amendment to the Whitehead-Stern contract, stating that Mr. Stern was not paying for the surrender of the child, but rather Whitehead's willingness to be impregnated and carry his child to term. In the Matter of Baby M, 217 N.J. Super. 313, ___, 525 A.2d 1128, 1157 (Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). *See also amici* Brief of Odyssey Inst. Int'l, Inc., (filed in the appeal of *Baby M*, which argued that the Whitehead-Stern surrogate mother contract was for the sale and purchase of a child, and hence void under the thirteenth amendment). Commentators have noted that the slavery analogy is a telling one. Specific enforcement of surrogacy contracts results in the involuntary destruction of family units, which is what many Americans deemed most repulsive about slavery prior to the Civil War. *See* Annas, *supra* note 35, at 30; Smith, *Wombs for Rent, Selves for Sale?* 4 J. CONTEMP. HEALTH L. & POLICY 23, 33-34 (1988); Stone, *Neoslavery—'Surrogate' Motherhood Contracts v. The Thirteenth Amendment*, 6 L. & INEQUALITY 63, 73 (1988). *See also* Doe v. Keane, 658 F. Supp. 216 (W.D. Mich. 1987) (where a surrogate mother whose child suffered a premature birth and subsequent death, alleged *inter alia*, that defendant Noel Keane's acts violated the thirteenth amendment. The claim was dismissed for failure to state a claim upon which relief could be granted, as the thirteenth amendment does not allow for independent, private causes of action.

158. *See supra* note 45 (discussion of parental rights to children) *see also* SACHS & WILSON, SEXISM AND THE LAW, 149 (1979); WORTMAN, I WOMEN IN AMERICAN LAW, 64 (1st ed. 1985).

159. WORTMAN, *supra* note 158.

160. *See supra* note 35 and accompanying text.

161. 217 N.J. Super. at ___, 525 A.2d at 1164. This view of a surrogate mother as a gestational instrument comports with the fictional vision of the future in *The Handmaid's Tale* (1986) by Margaret Atwood. In the book, a select group of women, the handmaidens, are chosen to be surrogate mothers and are compelled to produce children for others, based on Biblical precedent. The natural mother, who loses all rights to her child at birth, states: "We are containers, it's only the inside of our bodies that are important." ATWOOD, THE HANDMAID'S TALE 96 (1986). *See supra* notes 122-24 and accompanying text.

162. *See supra* note 45 and accompanying text (discussion of women's rights to the custody of their children).

ure with regard to their relationships with men, in that the prevailing cultural ideology concluded that the role of mother was a noble one, essential to the well being of society.[163] Now, long after the Mendelian genetic science has clarified the equal genetic contributions men and women make to human reproduction, the surrogate mother contract would deem a surrogate only a substitute uterus and "not the mother but someone who carried the child."[164] Reproductive engineers, observes one commentator, will turn procreation into a commodity wherein women are used for the fruit that they bear.[165]

Surrogate mother contracts serve to deny women rights to their children's custody and companionship, deny the child the right to a continued relationship with the natural mother, contemptuously denigrate and demean the role of mother, affording her no recognition of her contributions, her effort or her significance to the child, and deny the humanity of those involved. Surrogate mother contracts, indeed, serve no one but the broker and the buyer, at a cost which should not be borne by any society.

IV. CONCLUSION

The underlying thrust of adoption laws and termination of parental rights statutes is a recognition that the interests of the child and the mother must be considered to be of primary importance. The maintenance of the parental tie with the natural parent is deemed in the best interests of the child, irrespective of the mother's socioeconomic status or level of mastery of parenting skills. The loss of parental rights is acknowledged in the law as one more grievous than the loss of freedom. The surrogate mother contract, whose very name serves to denigrate the mother and reduce her to a gestational instrument, skews these priorities and focuses solely on the need of the commissioning couple. It disregards the best interests of the child; it is indifferent to the deprivation experienced by the mother. The termination of parental rights has been

163. *See* CONWAY, THE FEMALE EXPERIENCE IN 18TH AND 19TH CENTURY AMERICA 35, 116 (1985); *see also* DORENKAMP, MCCLYMER, MOYNIHAN & VADUM, IMAGES OF WOMEN IN AMERICAN POPULAR CULTURE 2-3 (1985).

164. *See* 120 N.J.L.J. 330 Aug. 13, 1987). (The Sterns' lawyer in *Baby M*, Gary N. Skoloff, scoffed at the argument raised by a New York law school professor that the thirteenth amendment should apply to surrogacy cases, "insisting that Whitehead was not the mother, but someone who carried the child.")

165. ANDREA DWORKIN, RIGHT-WING WOMEN 187 (1983).

characterized by one member of the New Jersey Supreme Court as a fundamental, cosmic issue. The surrogate mother contract accords it no more sensitivity than the transfer of title of a product from a seller to the buyer.

The thrust of the prohibitions against baby selling is to recognize the essential integrity of a human being, and that no need of the buyer, however compelling, can justify such a denigration of human dignity. Surrogacy arrangements mask their true intentions via the employment of obfuscatory language which maintains a pretense of purchasing services rather than buying a baby.

The only needs addressed by the surrogacy mother contract are the need of an infertile couple to have progeny and the need of a broker to have a profit. No need, pain, or desire of infertile couples, however intensely felt, however understandable, can justify the denigration of children and mothers, the purposeful blurring of distinctions between people and products, the denial of profound issues about human relationships, the blatant disregard of the best interests of children and their mothers, the infliction of such grievous harm upon others, and the destruction of the rights of others. There are, indeed, some things which money cannot buy.[166]

166. *Baby M*, 109 N.J. at 440, 537 A.2d at 1249.