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Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?

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SURROGATE MOTHERHOOD CONTRACTS IN LOUISIANA: TO BAN OR TO REGULATE?

Table of Contents

I. INTRODUCTION

With the rise of infertility among American couples desiring children,[1] there has been a response from the medical and scientific com-

1. It is estimated that approximately 12% of married couples in the United States are involuntarily childless. In about 40% of those cases the problem of infertility lies with the woman. The most common cause is tubal disease resulting from infection, endometriosis, or previous surgery. Dickey, The Medical Status of the Embryo, 32 Loy. L. Rev. 317 (1986). In addition, the availability of adoption as an alternative has decreased markedly over the last fifteen years, largely as a result of the legalization of abortion after Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973), and of increased societal tolerance of single parenthood.

munities to create solutions to the problem.[2] The result has been astounding growth in the development of new reproductive technologies that are capable of extending to the infertile couple the hope of having a child biologically related to at least one of the partners.[3] The response from the legislative and legal communities, however, has been neither immediate nor effective. Artificial insemination,[4] the most widely accepted of these new technologies,[5] is now regulated in at least twenty-eight states.[6] In vitro fertilization[7] is regulated to some extent[8] in many states.[9] Surrogate motherhood, the most recent and controversial of the new technologies, is not regulated at all.[10] As a result, parties who wish to contract for the creation of children are left with no definitive answers regarding their rights or status or those of the children they wish to create.

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2. These technologies include AIH (artificial insemination husband), in which the wife is inseminated by depositing semen from her husband into the vagina by means of a cannula or syringe; AID (artificial insemination donor), in which the semen is obtained through a third party, usually an anonymous paid donor; IVF (*in vitro* fertilization), in which an ovum and semen are combined in a glass dish in the laboratory, fertilization occurs, the resulting product is incubated until it reaches the two-eight cell stage, and finally the fertilized ovum is implanted in the uterus of the mother; and surrogate motherhood, whereby a party or couple contracts with a third party woman to be artificially inseminated, to carry a child to term, and to surrender it for adoption. Numerous variations on these themes are possible.

3. Generally, when an infertile married couple uses one of these methods, the resulting child will be biologically related to either the husband (surrogate motherhood using the husband's semen), the mother (AID), or both (IVF, AIH). Embryo transfer, in which the fertilized ovum is implanted in the body of a carrier, is a variation on surrogate motherhood and IVF. The scope of this article will be confined to the more typical surrogacy arrangement mentioned above.

4. AIH is used where the husband's sperm has decreased numbers or mobility. AID is most frequently used by married couples when the husband is sterile or unable to achieve intercourse. It has also been used by single women who wish to conceive. Comment, Artificial Insemination: A New Frontier for Medical Malpractice and Medical Products Liability, 32 Loy. L. Rev. 411, 413 (1986).

5. Artificial insemination has been used extensively in animals for centuries. The first successful application to humans is credited to the English surgeon Hunter in 1790. Id. at 411 n.5. The practice is generally accepted as an alternative means of conception.

6. Note, Surrogate Motherhood Legislation: A Sensible Starting Point, 20 Ind. L. Rev. 879, 883 n.27 (1987).

7. IVF is most frequently used by women with tubal disease, or older women, who are more likely to have menstrual cycles in which they do not ovulate. It also is used by some couples who are unable to achieve sexual intercourse and for certain types of male infertility. Dickey, supra note 1, at 319.

8. In some states the practice of *in vitro* fertilization is regulated in its entirety, including standards of care for the physician and facility. In others, it is regulated only indirectly by statutes forbidding or controlling research on or disposition of human embryos and fetuses. See La. R.S. 9:121-33 (Supp. 1988).

9. Id.

10. Note, supra note 6, at 879.

As a first step in addressing this situation, the Louisiana legislature in 1987 enacted Louisiana Revised Statutes 9:2713, making commercial surrogate motherhood contracts absolutely null and unenforceable in Louisiana.[11] A concurrent resolution was also passed, creating a legislative study committee to consider the issues involved in this developing area of the law and to recommend a future course of action for the legislature.[12]

Before a reasoned and reasonable decision can be made regarding legislation in the area of surrogacy contracts, there are numerous issues that must be carefully considered. In this article, several of those issues will be identified and analyzed. The purpose of this article is not to provide all the answers, though a course of action will be proposed. Indeed, some of the questions necessarily raised may not have answers. Such is the scope and the nature of the problem.

The article begins with an overview of the legal issues implicated by surrogate motherhood contracts and a brief statement of three possible legislative courses of action. The following sections will contain discussions of the judicial treatment of surrogacy, contractual issues, constitutional issues, and conflicts between surrogacy and existing law and social policy in Louisiana.

II. OVERVIEW

As a general proposition, it is pertinent to the analysis of any social issue to know where we have been, where we are, and where we might choose to go. Section III will look at where we have been, Sections IV-VI will examine in detail the questions about where we are, and

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11. La. R.S. 9:2713 (Supp. 1988) (enacted by 1987 La. Acts No. 583) provides:

> A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.
>
> B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.

While the scope of the statute is confined to commercial surrogate contracts, as defined therein, the concerns discussed in this article are intended to apply to the practice of surrogacy generally.

12. La. H.R. Con. Res. 2, Reg. Sess. 1987, HLS 87-590. The bill charges the committee with conducting "a comprehensive review of all aspects concerning surrogate mothering" and formulating "a policy to meet the needs of Louisiana citizens." The committee members are to include three members of the House Committee on Civil Law and Procedure, three members of the Senate Committee on Judiciary A, one representative from the Louisiana Medical Association, one from the Louisiana Bar Association, one from the Louisiana Catholic Conference, and one from the Louisiana Interchurch Conference.

Section VII will offer recommendations about where we should go in the law relating to surrogate motherhood as an alternative means of conception. Before embarking on such a detailed undertaking, however, a road map is in order.

A. Issues Implicated by Surrogate Motherhood Contracts

From its very inception, a typical contract to bear a child[13] raises substantial issues of contract law. Who may contract to obtain a child in this manner? Who may not? Who may be a surrogate and who may not? Serious questions arise regarding who are necessary parties to such an arrangement and the capacity of those parties to bind themselves to the obligations they are incurring. Assuming that those hurdles are surmounted and a contract is formed, the nature of the obligations involved creates a virtual maze of interlocking issues concerning enforceability.

The problems arising from accepted principles of contract law[14] are exacerbated by current interpretations of constitutional entitlement. Reasonable contractual provisions necessary for the protection of the parties and the clarification of their rights under the contract may be in direct violation of substantive due process and privacy rights as those concepts are presently understood.[15]

Another set of issues arises in the case of a breach of the surrogacy contract. Again, one encounters conflicting constitutional protections, some of which collide with accepted contractual principles. In addition, the nature of the obligations involved and the "object" of the contract[16] create unique difficulties regarding remedies, as well as enormous questions of social policy and ethics.

One of the most debated areas of the law as it pertains to alternative means of reproduction is that of constitutional analysis. With cases involving the right to marry,[17] to choose living arrangements,[18] and to

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13. For examples of surrogacy contracts, see In re Baby M., 109 N.J. 396, 537 A.2d 1227 (1988); N. Keane & D. Breo, The Surrogate Mother, ch. 13 (1981).

14. This article will present contractual issues encountered primarily as they pertain to the Louisiana Law of Obligations.

15. See infra text accompanying notes 165-79.

16. The "object" of these contracts is a child, with his or her own set of rights and legal uncertainties. Though the object may be the child, this alone does not make surrogacy contracts unlawful. It is, rather, how the nature of the contract is characterized that affects that determination. For example, if characterized as a sale, the contract would be unlawful by application of the criminal statutes forbidding the sale of minor children. See generally, Katz, Surrogate Motherhood and the Baby-Selling Laws, 20 Colum. J.L. & Soc. Probs. 1, 11 (1986); Note, Surrogate Motherhood: Contractual Issues and Remedies Under Legislative Proposals, 23 Washburn L.J. 601, 625 (1984).

17. Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673 (1978); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967). See infra text accompanying notes 163-64.

18. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977).

educate one's children,[19] the United States Supreme Court began fashioning an understanding of a fundamental right to make certain decisions in private, unfettered by governmental intrusion or control.[20] This privacy right was extended to procreational choices in the contraception[21] and abortion[22] cases. The procreational choices at issue in those cases, however, involved decisions to prevent or avoid conception, gestation, and childbearing. The most active debate as it relates to alternative procreational technologies now centers on the question of whether the Supreme Court intended to extend—or would so extend, given an appropriate case—constitutional recognition to an affirmative right to procreate.[23] This debate is complicated by suggestions that *Roe v. Wade*, the fountainhead decision that greatly liberalized the right to privacy in matters of reproductive choice, may soon be overturned.[24] The impact upon the law of such a turn of events is uncertain, but probably would be substantial.

A thorough examination of the issues relevant to any area of contemplated legislation necessarily must include consideration of how current law impacts directly or indirectly upon the subject in question. The inquiry must not end, however, with the identification of existing laws

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19. Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923).

20. "The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) (Brandeis, J., dissenting). Such a privacy right has been grounded variously in the due process clauses of the fifth and fourteenth amendments and in "penumbral" rights emanating from the enumerated guarantees of the Bill of Rights. See generally P. Kauper & F. Beytagh, Constitutional Law 1562 (5th ed. 1980).

21. Carey v. Population Services Int'l, 431 U.S. 678, 97 S. Ct. 2010 (1977); Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965). See also Poe v. Ullman, 367 U.S. 497, 522, 81 S. Ct. 1752, 1766 (1961) (Harlan, J., dissenting). See infra text accompanying notes 165-70.

22. Planned Parenthood v. Danforth, 428 U.S. 52, 96 S. Ct. 2831 (1976); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973).

23. See, e.g., Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 Va. L. Rev. 405 (1983) (proposing such constitutional protection does or will exist) [hereinafter Robertson, Procreative Liberty]. Cf. O'Brien, Commercial Conceptions: A Breeding Ground for Surrogacy, 65 N.C.L. Rev. 127, 139 (1986) (arguing that such protection would be an unwarranted extension of the right to privacy). See infra text beginning note 180.

24. In City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 103 S. Ct. 2481 (1983), Justice O'Connor, joined by Justices White and Rehnquist, dissented. This dissent has been characterized as a "new willingness on the part of the more conservative justices to readdress the privacy issues presented in *Roe* and its progeny." Note, Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act, 73 Geo. L.J. 1283, 1297 n.112 (1985). The addition of Justices Scalia and Kennedy may further effect a change in the analysis of privacy rights.

that may dictate or conflict with a possible course of action. Law is not created in a vacuum; rather, it reflects considerations of custom, social policy and ethics. These underlying policies must be the real focus of inquiry if the result reached is to be palatable to the social conscience.

Given the nature of the practices involved in surrogate motherhood contracts, several different Louisiana statutes, each concerned with a distinctive area of the law, might be drawn upon by courts in an effort to resolve the issues raised by such contracts. Statutes governing obligations in general, the marital relationship,[25] adoption,[26] and the sale of minor children[27] are implicated, at the least. An examination of the policies underlying existing laws, as well as other questions of social policy and ethics, must be carefully and thoughtfully pursued.

B. Potential Legislative Courses of Action

Surrogate motherhood contracts are currently unenforceable in Louisiana.[28] They are not, however, proscribed by law as no criminal sanctions are imposed on the participants. The result is that the current state of the law does not sufficiently dissuade parties from entering into such arrangements.[29] Their rights and status, and those of the child they create, are such as they would be in the absence of any contract. The outcome of any possible litigation pursuant to such an agreement is, therefore, highly speculative.

The legislature bears the responsibility for laying a foundation for the courts in deciding the rights of parties involved in a dispute. There are three possible courses of action the legislature might choose to pursue. It may:

1. Do nothing, an action that would leave the contracts unenforceable, but not illegal.
2. Make these contracts legal and enforceable.
3. Make these contracts illegal.

The first course of action may be the most attractive politically,[30] but it is certainly the least acceptable. This choice would leave prospective

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25. La. Civ. Code art. 98. See infra note 273.

26. La. R.S. 9:401-62 (1965 & Supp. 1988). See infra note 258.

27. La. R.S. 14:286 (1986 & Supp. 1988). See infra note 267.

28. La. R.S. 9:2713 (Supp. 1988).

29. The desire to obtain a child is a very strong motivating factor, as can be seen by the fact that parties continue to search for babies through clearly illegal channels, as in black market adoptions. The author does not suggest seeking to counter this motivation by the threat of criminal sanctions on prospective parents, but rather by seeking to remove the market through strong enforcement against the intermediaries. See infra text accompanying notes 299-302.

30. The issues raised by surrogate motherhood, as with other reproductive technologies,

parties to such a contract in exactly the legal quagmire that persons on both sides of the issues are trying to eliminate. The most important "party," the child, is the ultimate casualty in such a scenario. His legitimacy, inheritance rights, custody, and perhaps his very life are left open to the caprices of the parties and of an unguided judiciary. In addition, the current legislation in force is not without ambiguities and potential difficulties.[31]

The second course of action—making these contracts legal and enforceable—is that most frequently espoused by proponents of surrogate motherhood.[32] It is, however, only a preliminary step. The necessary and logical extension of this alternative is regulation of the practice. Exactly how and to what extent surrogate motherhood contracts should be regulated are questions which have been the subject of copious quantities of legal writings and debates.[33] Basically, regulatory schemes

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frequently arouse emotional and heated responses. The political touchiness of the subject is also readily apparent from the fact that, while legislation has been proposed in at least twenty-four states to date, at the time this article was prepared for publication no legislative body has yet taken a definitive stand on the subject. Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth, 39 Vand. L. Rev. 597, 664 n.342 (1986). Additionally, by leaving the practice untouched by legislative hands, the nagging constitutional issues are avoided.

31. Paragraph (B) of La. R.S. 9:2713 (Supp. 1988) provides that a surrogacy contract is "any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child." The provision apparently does not cover a gratuitous surrogacy contract (where no "valuable consideration" is paid). If such a surrogate changed her mind and wanted to retain custody, would the father be able to enforce the contract? Or would her change of heart perhaps constitute a "failure of cause"? It is not clear on what policies the legislature was basing its prohibition. Yet another problem arises in the case where the sperm is provided by a third party donor for the contracting couple. Relinquishment would then not be to the "contributor of the sperm." Would this contract be outside the purview of the statute?

32. See generally Robertson, supra note 23. Cf. Stark, Constitutional Analysis of the *Baby M.* Decision, 11 Harv. Women's L.J. 19 (1988) (purportedly pro-surrogacy contracts oriented but espousing complete freedom of choice for all parties at all stages of the surrogacy relationship, an approach which would leave the contracts unenforceable and therefore far less attractive); Garrison, Surrogate Parenting: What Should Legislatures Do?, 22 Fam. L.Q. 149, 160 (1988) (saying it is not practical to prohibit surrogacy, but that all "bright-line" approaches to regulation are untenable; suggesting, in the alternative, that legislatures "should focus on achieving compatibility with the family law principles governing parental agreements and custody/visitation rights and with the basic policy goals of the adoption statutes" by simply clarifying existing law and its applicability in the surrogacy context).

33. A detailed discussion of specific proposed legislation and model acts is beyond the scope of this article. For an excellent discussion of the proposed legislation in various states, see Note, supra note 6. See also Andrews, The Stork Market: The Law of the New Reproduction Technologies, 70 A.B.A. J. 50 (Aug. 1984); Katz, supra note 16. Two

proposed thus far[34] have taken a "streamlined," "detailed," or "moderate" approach.[35] The streamlined approach represents a minimalist attempt to regulate the interests of the parties. It goes little beyond the preliminary determination that surrogacy contracts should be legal and enforceable, and leaves many of the basic issues unresolved.[36] The detailed approach contains many of the same procedural requirements as are found in adoption proceedings, including psychological evaluations of the parties. Additional counseling requirements and fee controls are also included.[37] The chief criticism of this approach has been that it should not so closely parallel adoption[38]—a criticism that is largely unfounded, given that the ultimate act in a surrogacy arrangement is in fact the adoption of the child. The moderate approach calls for required contractual provisions lying between those of the other two approaches in scope, and allows parties to specify additional provisions as they desire.[39] These proposals too, however, leave some basic issues

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extremely thorough model surrogacy acts have taken very divergent paths. See Model Human Reproductive Technologies and Surrogacy Act, 72 Iowa L.Rev. 943 (1987); Draft ABA Model Surrogacy Act, 22 Fam. L.Q. 123 (1988). The Iowa model act called for mental and physical evaluations of all parties (surrogate and biological father and their spouses), required judicial pre-authorization of the contract, restricted the practice to cases where the intended (adopting) mother was medically unable to have a child, and allowed revocation of surrender by the surrogate within 72 hours after the birth. There were provisions for damages and specific performance was not permitted. By contrast, the ABA Model Act provided for evaluations of all parties, but provided for irrevocable consent and mandated specific performance after the birth of the child. While both sought to ensure availability and regulation of the practice, that published by the Iowa Law Review evidenced a stronger concern for the resulting children, while the ABA Model Act showed stronger regard for protecting the rights of the intended parents (the biological father and his wife).

34. For examples of legislation on the subject, see Ala. H.R. 593 (1982); Alaska H.R. 497 (1981); Alaska H.R. 498 (1981); Cal. Ass. Bill 3771 (April 6, 1982; amended May 18, 1982; amended June 17, 1982; amended Aug. 2, 1982); Conn. Comm. Bill 5316 (1983); Haw. H.R. 1009 (1983); Kan. S. 361 (1983); Kan. S. 485 (1984); Ky. H.R. 668 (1986); Md. H.R. 1552 (1985); Md. H.R. 1595 (1984); Mich. H.R. 4555 (1985); Minn. H.R. 534 (1983); Or. H.R. 2693 (1983); S.C. H.R. 3491 (1982). Note, supra note 6, at 891 n.60.

35. This classification scheme is adopted from Katz, supra note 16, at 44-48.

36. Examples of this approach are the bills introduced in Alaska and Rhode Island. Only basic provisions are required regarding compensation, presumption of paternity, and termination of parental rights. Alaska H.R. 498, 12th Leg., 1st Sess. (1981); R.I. Assembly 83-H 6132, Jan. Sess. (1983). Katz, supra note 16, at 44.

37. Examples of states that follow this approach include California, Connecticut, Hawaii, New Jersey, and South Carolina. Cal. Bill Ass. 3771, 1981-82 Reg. Sess. (1982); Conn. Ass. 5316, Jan. Sess. (1983); Haw. H.R. 1009, 12th Leg. (1983); N.J. S. 3608 (1983); S.C. H.R. 2098 (1982). Katz, supra note 16, at 45.

38. Katz, supra note 16, at 48.

39. Examples of this approach are, inter alia, the Kansas, Michigan, and New York proposals. Kan. S. 485, 1984 Sess. (1984); Mich. H.R. 4114 (substitute H-3) (1983); N.Y.

unresolved. Both the detailed and moderate proposals contain provisions that may run afoul of constitutional guarantees.[40]

Finally, surrogacy contracts may be made illegal as well as unenforceable. While this approach may seem harsh, it is grounded in a need to protect the parties, and is really the only feasible alternative to legal, regulated contracts.[41] No jurisdiction yet has chosen such an alternative, although this solution has been proposed in some states.[42] In England, commercial surrogacy agreements expose the parties to criminal penalties.[43] As will be shown below, this course of action is the one best supported by public and ethical considerations, and is the only meaningful response to the overwhelming assortment of issues raised by these contracts.[44]

III. Modern Judicial Treatment of Surrogacy Agreements

Perhaps the most uniform response to surrogacy contracts has come from several state Attorneys General. Opinions in at least four states have expressed the view that surrogate motherhood contracts are in violation of existing law and contrary to public policy.[45]

By contrast, in the few instances in which surrogate motherhood contracts have come before the courts, the results have been less than consistent. The opinions generated by these cases have done relatively little to clarify the legal status of the practice. The cases usually have been decided on very narrow technical grounds, avoiding whenever possible the central issue of the legality of surrogacy itself.

In *Doe v. Kelley*,[46] a married couple brought suit against the Michigan Attorney General, seeking a declaration that the state statutes

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Ass. 5537, 1983-84 Reg. Sess. (1983); N.Y. Ass. 6624, 1983-84 Reg. Sess. (1983). Katz, supra note 16, at 48.

40. Specifically, provisions which waive the surrogate's exclusive right to abortion and require consent of the surrogate's husband may be in conflict with Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973) and Planned Parenthood v. Danforth, 428 U.S. 52, 96 S. Ct. 2831 (1976), respectively. See infra note 171 and accompanying text.

41. As stated previously, alternative one is completely unacceptable, as it leaves parties undissuaded, unguided and unprotected. Illegality of the contracts, however, is a means of dissuading parties from entering into an unenforceable contract with very serious and permanent implications.

42. See Note, supra note 16, at 619 n.106.

43. Freeman, England: The Trumping of Parental Rights, 25 J. Fam. L. 91, 101 (1986-87) (discussing the Surrogacy Arrangements Act of 1985).

44. At this juncture, the author adopts the following disclaimer: "The objective of this Article is neither to depreciate the suffering of individual infertile couples nor to portray them as the unscrupulous predators of indigent surrogates." O'Brien, supra note 23, at 129 n.14.

45. Op. Ky. Att'y Gen. No. 81-18 (1981); Op. La. Att'y Gen. No. 83-869 (Oct. 18, 1983); Op. Ohio Att'y Gen. No. 83-001 (1983); Op. Okla. Att'y Gen. No. 83-162 (1983).

46. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

that prohibited payment in conjunction with adoption unconstitutionally infringed upon their fundamental right to procreate. The Does (a pseudonym) wished to contract with Mary Roe (also a pseudonym), John Doe's secretary, to be artificially inseminated with John Doe's semen, to carry the resulting child to term, and to relinquish it to them for adoption. Ms. Roe was to be paid the fee of $5,000 in addition to all medical expenses.[47]

The Michigan Court of Appeals affirmed judgment against the Does. In so doing, the court recognized an affirmative right to procreate, but concluded that it did not serve as a bar to the application of the particular state statute at issue. The statute, as characterized by the court, did not directly prohibit the Does from having a child through a surrogacy arrangement, but simply precluded their payment of consideration in conjunction with their use of the state's adoption procedures.[48] The court held that "[w]hile the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, we do not view this right as a valid prohibition to state interference in the plaintiffs' *contractual arrangement*."[49]

This opinion has been criticized as implying that "babyselling" statutes apply to a commercial surrogacy contract only if the sponsoring couple attempts to adopt the child.[50] Under this standard, if the couple simply took custody of the child without changing its legal parentage, the contract would arguably be lawful. However, such an alternative would leave the legitimacy and inheritance rights of the child open to serious question.[51] This criticism overlooks the fact that the *Kelley* court did not pass on any issues other than the narrow one before it. The court merely recognized a fundamental procreational right that did not preclude application of the state statute, without defining the limits of the right. Interpreted strictly and properly, *Kelley* simply does not stand for the proposition that a surrogacy contract is otherwise lawful under Michigan law as long as it does not violate that state's babyselling statute.

The *Kelley* court may also be criticized for leaping blithely over some difficult constitutional analysis in reaching its conclusion that the

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47. Id. at 172, 307 N.W.2d at 440.

48. Id. at 173-74, 307 N.W.2d at 441.

49. Id. at 173, 307 N.W.2d at 441 (citations omitted, emphasis added).

50. This criticism was advanced by Noel Keane, the Michigan attorney who has been at the forefront of surrogate motherhood practice in the United States. N. Keane & D. Breo, supra note 13, at 116-17. Mr. Keane was the attorney of record for the Does, as well as for the plaintiffs in Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985). See infra text accompanying note 53.

51. Note, Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements, 72 Iowa L. Rev. 415, 424 (1987).

existence of an affirmative right to procreate is a settled question. It is true that the holding of the case did not depend on this analysis, since the statute, as interpreted, did not conflict with the right recognized. However, the status of such a right is the central constitutional issue in the field of reproductive technology, and a more careful consideration was merited.[52]

Syrkowski v. Appleyard[53] is considered by some to be a small victory for the advocates of surrogate motherhood. In actuality, it was merely an exercise in applying the clear language of a statute. The Syrkowskis were an infertile couple who entered into a surrogate motherhood contract with Corinne Appleyard, a married woman. Five months before the birth of the child, Mr. Syrkowski instituted proceedings under Michigan's Paternity Act seeking an order of filiation naming him as the father of the child. Mrs. Appleyard, as a nonadversarial defendant, admitted Mr. Syrkowski's paternity and joined in his request. The Attorney General intervened, seeking accelerated judgment on the ground that the court lacked subject matter jurisdiction. He maintained that the Paternity Act was intended to apply only to a child born "out of wedlock" and that this child was presumed to be the legitimate child of Mrs. Appleyard and her husband.[54]

The circuit court granted the motion for accelerated judgment, and the court of appeals affirmed. The Michigan Supreme Court reversed, because the Attorney General and the lower courts had not applied the criteria supplied by the statute for the use of the presumption of paternity.[55] The husband of the mother must have consented to her artificial insemination in order for the presumption of his paternity to apply. In this case, Mr. Appleyard had filed with the court an affidavit of nonconsent at the time the Attorney General intervened.[56]

Syrkowski should not be viewed as an extension of the paternity laws to accommodate surrogacy contracts. The Michigan Supreme Court had little choice but to apply the statute as written. The trial judge looked beyond the language of the Paternity Act to the 1956 legislative history to find, not surprisingly, that the legislature had not intended to include surrogate motherhood contracts within the purview of the statute. The judge did not wish to go beyond the stated purpose of the

52. The court merely cited Carey v. Population Services, Int'l, 431 U.S. 678, 97 S. Ct. 2010 (1977) as dispositive of the issue, footnoting a list of U.S. Supreme Court cases dealing with the right to privacy. *Kelly*, 106 Mich. App. at 172-73, 307 N.W.2d at 440-41.

53. 420 Mich. 367, 362 N.W.2d 211 (1985).

54. Id. at 370-71, 362 N.W.2d at 212.

55. Id. at 372, 362 N.W.2d at 213.

56. Id. at 369, 362 N.W.2d at 212.

Act of "securing financial support for children born out of wedlock,"[57] because he did not wish to sanction surrogacy contracts, which he considered to be against public policy. The court of appeals affirmed this reasoning, saying the Act's "original purpose 'does not encompass the monetary transaction proposed in this case.' "[58] By overlooking the clear language of the Act, the lower courts exceeded their authority in looking to the legislative history.

The case does, however, point out some of the legal contortions in which parties are indulging—and which courts are allowing—in order to fit their surrogacy contracts within the parameters of existing law. The affidavit of nonconsent employed successfully by the surrogate's husband in *Syrkowski* is a device frequently resorted to by parties to these contracts.[59]

Another bit of legal subterfuge has been required for parties to avoid the criminal liability associated with babyselling laws. In *Surrogate Parenting Associates v. Commonwealth ex rel. Armstrong*,[60] the Attorney General of Kentucky brought suit against the plaintiff corporation, seeking to revoke its corporate charter on the ground that it had misused its corporate powers in a way detrimental to the state and its citizens.[61] Specifically, the Attorney General alleged that Surrogate Parenting Associates, Inc. (SPA), by its involvement in and solicitation of surrogacy contracts, violated the Kentucky statute prohibiting the purchase of a child. The trial court rendered judgment in favor of the corporation; on appeal by the Attorney General, the court of appeals reversed. The Kentucky Supreme Court reversed reinstating the trial court's judgment, though the court was divided on the issue.[62]

The SPA agreements that were signed by the parties specifically excluded the biological father's wife, the party who ultimately must adopt the child. This provided enough of a foundation for the supreme court to find that the contract did not involve the payment of consideration for an adoption in violation of the state law. In so doing, the court closed its eyes to the fact that the *policy* behind such statutes is the prohibition against payment for *termination of parental rights*; rather, the court placed its emphasis on the fact that the biological father, as the party to the contract, could not pay to adopt his own child.[63] The

57. Id. at 372, 362 N.W.2d at 213.

58. Id. at 373, 362 N.W.2d at 213.

59. The husband in *Syrkowski*, and in In re Baby M., 217 N.J. Super. 313, 345, 525 A.2d 1128, 1143 (Ch. Div. 1987) signed affidavits that they, in effect, "agreed not to agree" to the procedure, in order to circumvent the presumption of paternity.

60. 704 S.W.2d 209 (Ky. 1986).

61. Id.

62. Three justices concurred with the majority, one concurred in the result but not the reasoning, and there were two cogent dissents. Id. at 214.

63. Id. at 212.

court of appeals, on the other hand, accurately assessed the realities of the situation, stating: "[t]he infertile wife of the biological father is the *sine qua non* of this procedure." "Artful draftsmanship," the court further noted, that was "designed to nominally include only the biological father, the surrogate, and the surrogate's husband so as to avoid the purview of [the babyselling statute] must fail."[64]

The most notorious surrogate motherhood case to date is that of *In re Baby M.*,[65] which is also the most recent judicial pronouncement on the subject.[66] Drs. William and Elizabeth Stern entered into a surrogate mother contract with Mary Beth Whitehead and her husband Richard.[67] Mrs. Stern was not infertile, but suffered from a mild form of multiple sclerosis, which she was advised could be exacerbated to the point of becoming debilitating if she undertook a pregnancy.[68] Mrs. Whitehead was inseminated with Mr. Stern's semen and became pregnant. The Sterns and the Whiteheads maintained contact throughout the pregnancy.[69]

Late in the pregnancy, Mrs. Whitehead exhibited the first signs of ambivalence toward fulfilling her obligations under the contract when she delayed signing papers acknowledging Mr. Stern's paternity.[70] Upon the child's birth, this ambivalence became a determination not to relinquish the child born to her. Mrs. Whitehead informed the Sterns when they came to the hospital immediately after the birth that she "was not sure whether she could relinquish" the child.[71] This was the beginning of an ordeal for all the parties concerned that lasted for several months.

Mrs. Whitehead took the infant home from the hospital, after naming her husband as the father on the birth certificate, a breach of the surrogacy contract.[72] She had further breached the agreement by supplying a name for the child, a privilege reserved to Mr. Stern.[73] The Sterns picked up the baby from the Whiteheads' residence. However,

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64. Id. at 211.

65. 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987).

66. The case was argued before the New Jersey Supreme Court in September, 1987. A decision was rendered Feb. 3, 1988 and is reported in 109 N.J. 396, 537 A.2d 1227 (1988).

67. 217 N.J. Super. at 345, 525 A.2d at 1143. Elizabeth Stern was not a signatory to the contract, and Richard Whitehead signed an acknowledgement that he refused to consent to the artificial insemination of his wife. Id. These provisions were designed to avoid the legal conflicts with baby-selling and presumptions of paternity which were previously discussed. See supra note 59 and accompanying text.

68. 525 A.2d at 1139.

69. Id. at 1143.

70. Id. at 1144.

71. Id.

72. Id.

73. Id. at 1143.

the next day, Mrs. Whitehead telephoned, visited the child at the Sterns, and stated that she had been considering suicide if she had to give up the baby. Out of concern for Mrs. Whitehead's emotional health, the Sterns agreed to one week's custody of the child by the Whiteheads.[74]

Mrs. Whitehead took the child to Florida from New Jersey without the Sterns' knowledge. When she returned, slightly more than a week later, she informed the Sterns of her decision to keep the child.[75] She threatened to leave the country if confronted with court action. Some three weeks later, the Sterns obtained a court order directing Mrs. Whitehead to deliver custody of the infant to them. When the Sterns and the authorities came to serve the order, Mrs. Whitehead passed the infant out of a rear bedroom window to her husband. The following morning, the entire Whitehead family disappeared.[76]

What followed was three months of nomadic existence in Florida with the baby. The Sterns did not discover the whereabouts of the Whitehead family for 87 days. Ultimately, Florida authorities recovered the child from the home of Mrs. Whitehead's parents, and custody was transferred to the Sterns. All the parties returned to New Jersey, where pending litigation by the Sterns was pursued.[77]

The New Jersey Superior Court awarded custody of the baby to the Sterns and terminated all parental rights of Mrs. Whitehead.[78] The lengthy opinion was somewhat schizophrenic in its reasoning. The court framed the issue before it in terms of of what constituted "the best interests of a child" and stated that its consideration of all other issues constituted mere "commentary."[79] However, this "commentary" actually constituted the essential legal reasoning of the decision and included findings on the constitutionality and enforceability of the contract.

The trial court found a constitutionally protected right to procreate that includes the use of surrogates,[80] but held that a contractual provision granting the right of control over abortion to the contracting father was unconstitutional.[81] The court's position on the enforceability of other aspects of surrogacy contracts is less clear.

The ultimate basis for the enforcement of the Stern-Whitehead contract by the Superior Court was that, in the court's view, the best interests of the child so demanded.[82] It appears from the many pages

74. Id. at 1144.
75. Id. at 1145.
76. Id.
77. Id. at 1146.
78. Id. at 1175.
79. Id. at 1132.
80. Id. at 1164.
81. Id. at 1159.
82. Id. at 1170.

of the opinion devoted to expert testimony on the psychological evaluations of the parties that the court was, more accurately, finding that the child's best interests dictated a particular custody placement. The opinion even stated that "Melissa's best interests will be served by being placed in her father's sole custody."[83] The court ordered that the surrogacy contract be specifically enforced, but couched its reasoning in terms of the traditional standard for resolution of a custody dispute, "the best interests of the child." It is therefore not clear exactly what precedent the court was setting—one favoring enforcement of these contracts or one favoring abandoning the contract and treating the matter as a custody dispute between two biological parents. The ultimate standard employed by the court is, however, clearly that what is ultimately best for the child should be determinative.

On appeal, the New Jersey Supreme Court[84] also characterized the central issue as the custody of the child, but recognized that the lower court had muddied the waters on the contractual validity issue. In a very carefully reasoned opinion, the high court declared the contract void as violative of New Jersey law and public policy and affirmed the custody award to Mr. Stern, but voided Mrs. Stern's adoption and restored Mrs. Whitehead's maternal rights. The court found that the contract violated provisions of law forbidding payment for termination of parental rights and allowing revocation of consent to terminate parental rights.

Turning to considerations of policy, the court found that surrogacy contracts violate the public policy that natural parents have equal rights relative to their child. The parent-child link may be broken only upon voluntary abandonment of a child after its birth or a strong showing of neglect or unfitness as a parent. The court found that "[t]he Legislature would not have so carefully, so consistently, and so substantially restricted termination of parental rights if it had intended to allow termination to be achieved by one short sentence in a contract."[85] While the best interest of the child is dispositive of the issue of custody, the court held that it is not the sole determinative standard in termination of parental rights, and that the strong traditional, moral, and possibly constitutional interests of the parents must also be considered.

The court also made it clear that the payment to the surrogate violated the principles behind babyselling laws, pointing out that no payment was to be made if the pregnancy terminated before the fourth month, and that only 10 percent would be paid if the child was not born alive even at term. Any contention that surrogacy fees are paid

83. Id.
84. 109 N.J. 396, 537 A.2d 1227 (1988).
85. Id. at 1243-44.

for "services" would therefore be unpersuasive.[86] Recognizing the reality of economic coercion that it felt was common to babyselling and surrogacy, contrary to many proponents commentaries, the court stated that "one should not pretend that disparate wealth does not play a part."[87]

The opinion expressed strong concern over the fact that a woman can not make an "informed" decision to terminate her right to a child before it is even conceived, for she cannot possibly at that time know the strength of the bond she may feel toward that child. The court saw surrogacy contracts as "potentially degrading to women." Though there may be surrogates who would feel fulfilled by their surrogacy and would complete their obligations under the contract, the court stated that their interests in participating in such an arrangement could not negate the "potential for devastation" to other women.[88]

Regarding constitutional issues, the court found that the right of procreation claimed by the Sterns did not extend so far as to protect their rights under a surrogacy contract. Procreation does not include the care, custody, and companionship of the child created, and therefore the existence of a right of procreation cannot compel a custody determination.[89]

The court gave great consideration to the opinions of the guardian ad litem appointed to represent Baby M.'s interests at the outset of litigation. The guardian ad litem had recommended awarding custody to the Sterns, but suggested that retention of the biological mother's parental rights would also be in the best interests of the baby. The guardian recommended, however, that visitation be postponed until some future date after the child had had an opportunity to establish a stable life. The high court remanded to the trial court for a determination of this issue, as visitation had not been considered there due to the disposition of the termination issue.

It may be seen, then, that courts have been far from uniform in their resolution of surrogacy disputes and in their interpretations of existing law as it should apply to those disputes. Seeking to fit surrogacy within the framework of existing law does not, therefore, appear to be a realistic approach, especially when clarification of that framework is left to the courts.[90] It is for this reason that legislative action is necessary.

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86. Id. at 1241.
87. Id. at 1249.
88. Id. at 1250.
89. Id. at 1254.
90. Contra Garrison, Surrogate Parenting: What Should Legislatures Do?, 22 Fam. L.Q. 149, 160 (1988).

IV. Contractual Issues Raised by Surrogacy Contracts

Even assuming, for the sake of argument, that a surrogate motherhood contract is not contrary to existing law or social policy, the agreement by its very nature raises questions of contract law that are very difficult to resolve. Those questions include who are the necessary parties to the contract, what are their respective rights and remedies, and how the contract may be enforced.

A. Parties and Capacity

Who may be a party to a surrogacy contract? Who must be? Typically, the parties to a surrogate motherhood contract are the surrogate, her husband if she is married, and the biological (sponsoring) father.[91] Under some legislative proposals, the wife of the biological father, if he is married, must also be a party.[92]

Requiring the husband of the surrogate to be a signatory may present practical and even constitutional problems. It may be an unconstitutional infringement on the surrogate's privacy rights, in violation of the United States Supreme Court's decision in *Planned Parenthood v. Danforth*,[93] which held that consent for abortion may not be required from a pregnant woman's spouse or parent. Similarly, if an affirmative right to procreate were recognized, and included surrogacy, a woman presumably would be free to exercise it without her husband's consent. In some states the husband's consent is also the triggering element for the application of the presumption of his paternity, though in Louisiana his paternity is presumed solely due to his status as husband, and his consent to his wife's artificial insemination merely terminates his right to timely disavow the child.[94] However, excluding him or obtaining his affidavit of nonconsent is frequently mere artifice employed in an attempt to avoid the presumption.[95] Such a device would be ineffective in Louisiana except to preserve a right to disavow, and prudent counsel would probably go so far as to require the husband to execute a promise to disavow paternity. This raises the same policy issues as are implicated by the mother's pre-birth irrevocable consent to relinquish the child. Addition-

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91. For examples of fairly typical contracts, see N. Keane & D. Breo, supra note 13, at 275-306; Special Project, supra note 30, at 635 n.181.

92. See S.C. H.R. 3491 (1982). The Iowa Model Act, supra note 33, also requires the spouses of both genetic parents to sign as parties to the contract.

93. 428 U.S. 52, 96 S. Ct. 2831 (1976).

94. La. Civ. Code art. 188. It is noteworthy that at least one Louisiana court has held the legal (presumed) father to be an indispensable party to an avowal action by the biological father. See Durr v. Blue, 454 So. 2d 315 (La. App. 3d Cir. 1984). This would indicate the advisability of making the surrogates husband a party to the contract.

95. See supra notes 55-59 and accompanying text.

ally, the surrogate typically obligates herself to abstain from sexual relations with her husband during the period of time from first insemination with the sponsoring father's semen until pregnancy occurs.[96] This in effect binds her husband to a waiver of his marital rights,[97] and fairness would dictate that his consent be required,[98] if indeed the parties can legally alter or abrogate these rights.[99]

Restricting the availability of surrogacy to certain groups or classes of potential parties has certain advantages, but may raise constitutional challenges. For instance, some deem it desirable that only infertile married couples be permitted to contract with a surrogate to obtain a child.[100] This, however, would invite allegations of denial of equal protection based upon classifications of sexual preference or marital status.[101] The same problem also arises with requirements that the surrogate be a married woman. Some surrogacy proponents suggest that the surrogate should be unmarried, in order to avoid problems with the presumption of paternity.[102] However, a married surrogate or one who has successfully delivered at least one child has the attractive quality of a proven track record.[103]

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96. Some surrogacy contracts are by their provisions voidable if pregnancy does not occur within a specified length of time, usually 90-180 days. See supra note 91.

97. La. Civ. Code art. 98. See infra notes 272-77 and accompanying text.

98. In actuality, the husband is not legally bound by a contract to which he is not a party. If he therefore chooses to exercise his marital rights, the question for the surrogate becomes which contract is superior—her marriage contract or the surrogacy contract. If her husband does consent and/or is a party to the contract, it brings one back full circle to the presumption that the child born is the legitimate issue of the surrogate and her husband.

99. See Favrot v. Barnes, 332 So. 2d 873 (La. App. 4th Cir. 1976).

100. Other possibilities include infertile unmarried cohabitants, homosexual individuals or couples, single persons, and women who are fertile but wish to forego pregnancy for reasons of convenience, career, or aesthetics. See generally L. Andrews, The Stork Market, supra note 33, at 53; L. Andrews, New Conceptions 198 (1984); Graham, Surrogate Gestation and the Protection of Choice, 22 Santa Clara L. Rev. 291, 304 (1982).

Of proposed regulations in 11 states, 7 require a married biological father, 2 of those 7 require the couple to be infertile, and 4 allow an unmarried biological father. Note, Surrogate Motherhood Legislation: A Sensible Starting Point, 20 Ind. L. Rev. 879, 892 (1987).

101. See infra notes 217-43 and accompanying text.

102. Noel Keane prefers unmarried surrogates for this reason. N. Keane & D. Breo, supra note 13, at 49.

103. Co-founders Dr. Richard Levin and Katie Brophy of Surrogate Parenting Associates, Inc. in Kentucky prefer married surrogates. Regardless of her marital status, she must have delivered at least one live, healthy child. N. Keane & D. Breo, supra note 13, at 219; Wadlington, Artificial Conception: The Challenge for Family Law, 69 Va. L. Rev. 465, 476 n.47 (1983).

B. Enforceability and Remedies

In general, individuals are free to contract, and their agreements will have the force of law as between the parties.[104] This freedom is, however, subject to certain limitations. If the object or the cause of the obligation incurred by a party is unlawful, the contract is unenforceable.[105] Cause is unlawful when the enforcement of the obligation would produce a result that is prohibited by law or against public policy.[106]

Even absent the express statutory prohibition on surrogacy contracts,[107] surrogate motherhood contracts are potentially unenforceable if any portion thereof is in conflict with existing law or is deemed to be against public policy. Performance or enforcement of a surrogacy contract may require acts that are in conflict with several provisions of existing Louisiana law, including provisions regarding adoption and the sale of minor children.[108] Legislation permitting and regulating surrogacy contracts certainly could make such prohibitory laws inapplicable, but existing law represents policy choices that perhaps should not be discarded lightly.

Assuming that these contracts are legally enforceable, the practical enforceability of the agreements would still be open to serious question. As is true of any contract, questions of its enforceability only arise in the face of a breach by one or more of the parties. The nature of the surrogate motherhood contract and the types of breach to which it may fall prey present unique problems.

Unlike at common law, the preferred remedy in civilian theory for the breach of an obligation is specific performance.[109] In both systems, however, a respect for personal autonomy dictates that contracts for personal services will not, as a rule, be specifically enforced.[110] Whether one characterizes a surrogacy contract as one for services (a contract to do) or one for the conveyance of a child (a contract to give), there is little doubt that the performance involved is a highly personal one. For that reason, such contracts are probably not susceptible to specific performance. Faced with the occurrence of a breach, the chief concern

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104. La. Civ. Code art. 1983.

105. La. Civ. Code arts. 1966 (an obligation cannot exist without a lawful cause), 1971 (parties are free to contract for any object that is lawful).

106. La. Civ. Code art. 1968.

107. La. R.S. 9:2713 (Supp. 1988).

108. La. R.S. 14:286 (1985). See also Op. La. Att'y Gen. No. 83-869 (Oct. 18, 1983) (stating that surrogacy contracts are void and unenforceable as in violation of the criminal statute prohibiting sale of minor children).

109. La. Civ. Code art. 1986. See 2 S. Litvinoff, Obligations § 170, at 317-21, in 7 Louisiana Civil Law Treatise (1969).

110. 2 S. Litvinoff, supra note 109, at 318 ("*nemo praecise cogi potest ad factum*").

of the parties then becomes the issue of what other remedies may be available to them.

Another aspect of these contracts that presents problems regarding both remedies and enforceability is that they often transcend state boundaries. Frequently the contracting couple is located in one state, and the surrogate in another.[111] This can create uncertainty regarding the law applicable to the dispute, and special difficulties regarding custody of the child and its removal from the state of its birth.[112] Because surrogacy contracts touch upon several areas of the law—contracts and family law, for example—the resolution of these questions through conflicts of laws principles is complicated by uncertainty regarding which principles to apply. This uncertainty may best be resolved through federal regulation similar to the uniform acts regarding child support and custody.[113]

In addition, the autonomy of the surrogate is largely guaranteed as being within a constitutionally protected "zone of privacy."[114] One potential form of breach by the surrogate, that of terminating the pregnancy, is a matter of right, according to the United States Supreme Court decision in *Roe v. Wade*;[115] therefore specific performance of a contractual clause prohibiting abortion may not be available. Though most surrogacy contracts contain a provision that the surrogate will carry the child to term, such a clause would probably be declared invalid in the face of *Roe*.[116] Similarly, clauses granting to the biological father the right of demanding an abortion—usually after amniocentesis indicates the child is defective—could not stand.[117]

Other potential breaches of the surrogacy agreement are similarly difficult to remedy. It is convenient to consider these possible circumstances by the period of time during the performance of the contract in which they occur.[118]

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111. Note, Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act, 73 Geo. L.J. 1283, 1285, 1287; Special Project, supra note 30, at 666.

112. Note, supra note 111, at 1285. See also the jurisdictional discussion in the *Baby M.* trial opinion. In re Baby M., 217 N.J. Super. 313, 323-25, 525 A.2d 1128, 1132-33 (Ch. Div. 1987).

113. See, e.g., Uniform Parentage Act, 9B U.L.A. 287 (1973); Uniform Child Custody Jurisdiction Act, 9 U.L.A. 116 (1968). Federal regulation of surrogacy contracts has been proposed in some commentaries. Special Project, supra note 30, at 664.

114. Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965). See infra notes 165-67 and accompanying text.

115. 410 U.S. 113, 93 S. Ct. 705 (1973).

116. The *Baby M.* trial court struck such a provision as unconstitutional. 217 N.J. Super. at 375, 525 A.2d at 1159.

117. Such a clause would violate both *Roe* and *Danforth*. See infra note 171 and accompanying text.

118. See generally Lorio, In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation, 35 Sw. L.J. 973, 995-96 (1982); Note, supra note 16, at 609-17; Stark, Constitutional Analysis of the *Baby M.* Decision, 11 Harv. Women's L.J. 19 (1988).

The surrogate may breach prior to artificial insemination simply by changing her mind about her desire to participate in such an arrangement. This is one of the easier breaches to deal with, since it is likely that none of the parties will have yet significantly changed their position. The contract could not be specifically enforced, as the surrogate's privacy and bodily integrity are protected, and no court would order a party to become pregnant and bear a child.[119]

The surrogate probably would be liable for monetary damages, if any could be proved.[120] At this early point in the contractual relationship, the contracting father probably would not have advanced great sums of money.[121] The disappointment of the contracting father's or couple's expectations, however, may be great. In Louisiana, an award of non-pecuniary damages would be possible[122] because the object of the contract for the potential adopting couple would be a "sentimental" one.[123] The court would be confronted with the unpleasant task of valuing the potential life of a child and the potential parenting experience. The contract "price"[124] would arguably be an accurate starting point, although that may be more a reflection of the value to the surrogate of terminating her rights to the child than of the value to the contracting couple for acquiring the same. In addition, the couple would have an obligation to mitigate its damages.[125] This the couple most reasonably could do by finding another surrogate, especially if they have contracted through an agency. If the couple failed to make a reasonable effort to reduce their damages, the surrogate could demand that an award be reduced accordingly.[126]

A breach by the contracting couple at this time could more easily be compensated. The contract price would be a fair measure of damages to the surrogate, as her interest would be primarily a pecuniary one.[127] Mitigation would be more difficult for the surrogate.

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119. Keane, Legal Problems of Surrogate Motherhood, 1980 S. Ill. U. L.J. 147, 167 (1980).

120. Keane, supra note 119, at 167.

121. However, Noel Keane requires a $2,000 initial fee and waiver of attorney liability from the contracting father. Note, supra note 111, at 1283, 1285 n.10 (1985).

122. La. Civ. Code art. 1998. See generally Litvinoff, Moral Damages, 38 La. L. Rev. 1, 6-12 (1977).

123. La. Civ. Code art. 1998 comment (c).

124. An average figure for the fee actually paid to the surrogate is $10,000. Characterizing this sum as the "price" reflects the author's bias toward a conclusion that the true nature of the surrogacy contract more closely resembles one of sale than one for services.

125. La. Civ. Code art. 2002.

126. Id.

127. A gratuitous surrogacy contract could present its own peculiar difficulties regarding measure of damages as well as interesting questions related to cause and failure thereof.

A breach by the surrogate may occur between insemination and conception, usually in the form of her engaging in sexual intercourse with a fertile man.[128] While it presents no particularly intractable *legal* problems, the tragedy of this type of breach is that it usually is not alleged or discovered until after the birth of the child, whose paternity is then called into dispute.[129]

Proof of paternity should not be an especially difficult problem since increasingly accurate means are available for paternity testing.[130] Such testing is frequently mandated by the terms of the contract.[131] If the contracting father were shown not to be the biological father, his obligation to take custody of and support the child would cease. The surrogate may be liable for money damages for the father's emotional loss, and would be required to make restitution of any amounts already paid to her, including her medical expenses and legal fees.[132] The more serious problems presented by this type of breach are social. The contracting father and his wife, if he is married, probably will not want the child. The surrogate may also wish to be relieved of custody, especially if the child suffers from a defect of some kind.[133] The result is a child, quite possibly with special needs, who was created pursuant to contract and is now cast adrift into the social services system, where his chances of adoption are very slim.[134]

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128. Note, supra note 118, at 613.

129. Id. Mary Beth Whitehead alleged this type of breach in her efforts to keep the child, though she knew and the court later discovered that her husband had had a vasectomy several years previously. In re Baby M., 217 N.J. Super. at 328-29, 525 A.2d at 1135 (Ch. Div. 1987).

130. The HLA (Human Leucocyte Antigen) test can verify paternity with at least 97% accuracy. See La. R.S. 9:396 (Supp. 1988) for procedures for paternity determination.

131. See N. Keane & D. Breo, supra note 13; Special Project, supra note 30, at 635 n.181.

132. Special Project, supra note 30, at 659; Note, supra note 16, at 631.

133. This "worst-case scenario" materialized in the Malahoff-Stiver incident described at infra note 135. After paternity of the surrogate's husband was proved, they decided to raise the child. However, the potential harms this child may suffer upon learning of the disputes surrounding his birth are shameful.

134. Louisiana's Department of Health and Human Resources system handles 650-800 new "special needs" children each year. The Department's goal is to have an adoptable child in the foster care system awaiting placement for not more than two years. This goal is seldom met. In addition to the children for whom parental rights have already been terminated, there are 5500-6000 more children in the foster care system who are "potential" adoptees. Telephone conversations with Ms. Patsy Scott of DHHR's Office of Adoptions, 25 Jan. 1988.

If the child were a normal, healthy infant, and the surrogate did not wish to retain custody, the chances of adoption would be much greater.

It has been suggested in some proposals that the contracting father or couple be required to post a bond with the state at the inception of the contract to indemnify the state

In a notorious case involving such a breach, the surrogate and her husband maintained that they were not informed of the necessity to abstain from intercourse. The child was born with microcephaly, creating the potential that he would be severely retarded. The contracting father did not want the child and requested that medical treatment be withheld, the surrogate declared she felt no maternal bond with the baby, and all parties took their case to a public forum—the Phil Donahue Show. The results of the paternity test were announced over the air on national television—the surrogate's husband was the father.[135] The surrogate and her husband sued the intermediaries for failing to instruct them properly, and the biological father sued the surrogate for failing to produce the child he "ordered."[136] In such a situation, the question arises whether the surrogate who acted erroneously but in good faith could specifically enforce the contracting father's obligation to pay.

The surrogate might also breach the contract during the course of the pregnancy by means other than choosing to abort, with varying potential remedies available to the contracting father. She may fail to maintain an adequate standard of prenatal care or to follow contractually specified prenatal medical instructions.[137] Again, the contracting father or couple probably could not get specific relief, both because the surrogate's bodily integrity is implicated and because extensive judicial oversight of her behavior would be impracticable.[138]

In such a case, money damages may be awarded. The problem will be one of causation. Even if the child suffered some demonstrable harm, medical evidence linking that harm to the specific behavior of the surrogate is quite likely to be speculative.[139] This problem could, if contemplated by the parties, be addressed through a schedule of liquidated damages. This solution would still leave potentially difficult problems of proof, and does nothing to address the most serious problem—what to do with the child. It may initially seem unfair to require

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should the child become a ward, especially in the case of a child born with defects or special needs. Note, supra note 111, at 1297, 1304. Mr. Malahoff, for example, had stated that if the child, born severely retarded, were shown to be his, he planned to relinquish it to the state. Id. at 1297 n.110, see infra text accompanying notes 135-36.

135. Note, supra note 111, at 1283, 1285 (describing the Malahoff-Stiver incident).

136. Special Project, supra note 30, at 659 n.308.

137. Note, supra note 118, at 613. Some contracts specify that the surrogate may not drink, smoke, or use drugs, and that she must adhere to a given schedule of prenatal medical care. Note, supra note 135, at 1306.

138. Lorio, supra note 118, at 995. See generally Note, Constitutional Limitations on State Intervention in Prenatal Care, 67 Va. L. Rev. 1051 (1981).

139. Note, supra note 16, at 633. Most birth defects are spontaneous disruptions of the normal developmental process which are not easily traceable to specific causes. Those which are genetically traceable would be more related to improper screening than to improper conduct of the surrogate during pregnancy.

the contracting couple to take a defective child when they were probably powerless to stop or remedy the breach as it was occurring.[140] However, the obligation to take or at least support the child must be an ironclad one for policy reasons. In addition, while the surrogate's behavior may arguably have increased the statistical probability of some birth defect, a certain risk of such an outcome is inherent in every pregnancy[141] and is a risk that the adopting parents should be considered to have willingly assumed. The father would be equally powerless to control the mother's conduct whether she is his wife or a surrogate, because of her rights of privacy and bodily integrity. Therefore, the risk to him, of having a less than "perfect" child, should be considered to be the same in both circumstances.

It has been suggested in some commentaries that the child also may have remedies under the contract as a third-party beneficiary.[142] To institute a suit under this theory on behalf of the child, one must show that the child was an intended beneficiary under the terms of the contract requiring adequate prenatal care, rather than merely an incidental beneficiary thereof as a result of his link to the biological mother.[143] Representatives of the child may also bring an action in tort in the nature of a "wrongful life" action, although the viability of such a suit is uncertain in Louisiana.[144]

In addition to contractual remedies, the contracting father may have remedies in tort.[145] In the case of breach by abortion, the availability of a remedy under the contract is doubtful. If the surrogate constitutionally could not be prevented from exercising this option,[146] relief therefore could not be granted. The contracting father may choose to seek recovery through a wrongful death action,[147] though he may be

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140. Specific performance or injunctive relief at the time of the breach is not realistically possible. See discussion at supra note 138.

141. There is approximately a 3% probability that any pregnancy, even under "ideal" conditions, will result in a child born with an anomaly. N. Eastman & L. Hellman, Williams Obstetrics 1105 (12th ed. 1961).

142. Note, supra note 16, at 635.

143. La. Civ. Code arts. 1985 (contracts produce effects for third parties only when provided by law); 1978 (contracting party may stipulate a benefit for a third person called a third party beneficiary). See generally S. Litvinoff, The Law of Obligations in the Louisiana Jurisprudence 311-30 (1985) (distinguishing between third party beneficiaries and incidental beneficiaries).

144. See Comment, Wrongful Life: Should the Action Be Allowed?, 47 La. L. Rev. 1319 (1987). This author does not advocate the use of such a cause of action for the policy reasons presented so well in the cited comment.

145. Note, supra note 16, at 632-36. See also La. Civ. Code art. 2315.

146. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973).

147. See Danos v. St. Pierre, 402 So. 2d 633 (La. 1981) (allowing recovery for death of an unborn child due to a tortfeasor's negligence). It is uncertain whether such a suit

similarly limited by constitutional protections of the surrogate's decision to abort. In addition, the biological father's wife, even if she is a party to the contract, may not have standing to bring an action for the wrongful death of a child to which she was not biologically, and not yet legally, related.[148]

The surrogate may breach the agreement after the birth of the child by refusing to relinquish custody to the contracting father. This type of breach presents perhaps the thorniest issues regarding enforceability. As the constitutional protections that were operative in some of the types of breach previously reviewed are not implicated here, the solution is not as readily determinable.[149] Specific performance is a possibility, but the image of wresting a baby from its mother's arms is surely not a pleasant one for a court. The *Baby M.* trial court ordered specific performance, but essentially grounded its decision in a custody-type analysis of the best interests of the child.[150] Had the parties been different, the outcome may also have been.

Various proposals have been advanced for resolving this type of situation, ranging from suggestions that the surrogate be permitted to void the contract or to revoke her consent to relinquish the child[151] to suggestions that there should be a presumption against the surrogate based on the contract as evidence of abandonment.[152] Courts have also declared that the state's adoption laws are superior to the contract because of the state's compelling interest in protecting the welfare of

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would be successful in the case of an intentional tort (if indeed constitutionally protected abortion could legally constitute an intentional tort), where the fetus was in the first trimester of development. The fetus in *Danos* was 6-7 months gestational age, at which point viability is possible.

148. See Roche v. Big Moose Oil Field Truck Serv., 381 So. 2d 396 (La. 1980). In *Roche*, minor children who were in the legal custody of a couple in the process of adopting them could not recover for the wrongful death of their "father," as no final decree had issued. This would suggest the converse, that a prospective adoptive parent could not recover for the death of the child to be adopted. See also La. Civ. Code arts. 2315.1 and 2315.2.

149. But see Stark, Constitutional Analysis of the *Baby M.* Decision, 11 Harv. Women's L.J. at 45 (suggesting that specific performance in this situation raises Thirteenth Amendment questions).

150. In re Baby M., 217 N.J. Super. 313, 398, 525 A.2d 1128, 1170 (Ch. Div. 1987).

151. See Lacey, The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate, 22 Tulsa L.J. 281, 321 (1987). Bills in Hawaii, Connecticut, and Minnesota state that the court shall decide if the surrogate shall be permitted to keep the baby. The surrogate must show by clear and convincing evidence that it is in the child's best interest to remain with her. Note, supra note 100, at 898 & n.122.

152. Special Project, supra note 30, at 659.

children.[153] This approach would seem to dictate that the surrogacy contract not be enforced and that the child's placement be determined instead on the basis of a standard custody evaluation.

If custody is not awarded to the biological father, either through specific performance or a "best interests" custody resolution, money damages are not likely to be adequate. In addition, a problem inherent in any recovery against the surrogate—particularly in this situation where she will probably not be receiving her "compensation"—is that she is likely to be impecunious.[154] In the event that the biological father refuses to take custody, and the child is shown to be his, the surrogate could probably recover child support if she wished to retain custody.[155]

The contracting father or couple may also breach the surrogacy contract. This is most likely to occur after the birth of the child, either by a refusal to take custody of the child or a refusal to pay the surrogate. The obligation to pay the surrogate is perhaps the easiest provision of the contract to enforce and should present no difficult legal questions. However, it is not likely that specific performance of the obligation to adopt a child would be ordered,[156] though the biological father's duty to support the child could be enforced, based on his statutory obligations as a parent, rather than his contractual obligations.[157]

V. Constitutional Issues Raised by Surrogacy Agreements

It is generally within the realm of state law to decide questions and make policy choices regarding the health and status of persons and the

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153. In re Baby M., 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987); Surrogate Parenting Assoc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986). Cf. Note, Contracts to Bear a Child, 65 Cal. L. Rev. 611, 621 (1978) ("Since the central concerns of custody law would be equally well served by an award to either parent, reference to a *non-child-centered* criterion for decision is appropriate.") (emphasis added).

154. O'Brien, supra note 23, at 150.

155. Note, supra note 16, at 635; La. R.S. 46:236.1 (1986).

156. Lorio, supra note 118, at 996.

157. This presents some difficulty, depending upon the child's status regarding legitimacy. If the surrogate's husband did not consent, he may disavow paternity. The child would then be illegitimate. La. Civ. Code art. 188. If the biological father does not acknowledge the child, his obligation for support will rest upon a determination of his paternity. See La. R.S. 9:399 (Supp. 1988). It is possible for the state of Louisiana through the DHHR to institute proceedings to determine paternity. Upon finding that a man is the biological father, support may be ordered, even though the child has a presumed legal father, i.e. the husband of the mother. See La. R.S. 46:236.1 (Supp. 1988).

See generally the discussions of damages and specific performance in the Iowa Model Act, supra note 33. Specific performance was not permitted. In the case of a breach by the surrogate, the contracting couple was entitled to recover the fee paid as well as any health care expenditures, if the surrogate refuses to be inseminated, had a non-medically necessary abortion, or decided to keep the child. In the case of a material breach by the intended parents, the surrogate had the right to keep the child, to recover her fee and expenses, and to file for child support from the contracting couple. Section 6-106, Iowa Model Act, supra note 33.

enforceability of contracts. These decisions are, however, subject to constitutional limitations and are open to constitutional challenge. The proposed fronts of attack on regulation or prohibition of surrogate motherhood contracts are the due process and equal protection clauses of the fourteenth amendment.

A. Due Process and Privacy

The fourteenth amendment to the United States Constitution guarantees that no person shall be deprived of life, liberty, or property without due process.[158] Though early in the development of fourteenth amendment law it was construed simply as a procedural protection, the due process clause has evolved into a limitation on legislative power to interfere with substantive rights.[159] The nature and extent of the interests so protected are still being defined, but the idea is firmly established that "[t]here are, of necessity, limits beyond which legislation cannot rightfully go."[160]

Neither the fourteenth amendment nor any other provision of the Constitution specifically guarantees a right to privacy. Nonetheless, the right to freedom from governmental intrusion is very much a part of our cultural heritage and has been developing as a constitutional concept over much of the last century.[161] This protection from governmental intrusion was first an issue in the context of criminal procedural safeguards and was found to emanate from the fourth and fifth amendments.[162]

The developing law of substantive due process began to recognize a right to make decisions regarding certain traditionally personal matters with a minimum of governmental intrusion or control, though this freedom was not then couched in terms of a right to privacy. These protected liberty interests were centered around decisions concerning family, marriage and children.[163] In addition, marriage and procreation were declared to be "fundamental" rights in the equal protection case of *Skinner v. Oklahoma*.[164] These cases paved the way for the development of a right to privacy, a right that was finally explicitly formulated and refined in the contraception and abortion cases.

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158. U.S. Const. amend. XIV.

159. See generally P. Kauper & F. Beytagh, supra note 20, at 699-700.

160. Mugler v. Kansas, 123 U.S. 623, 661, 8 S. Ct. 273, 297 (1887).

161. Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572-73 (1928) (Brandeis, J., dissenting).

162. See, e.g., Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967); Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524 (1886).

163. Pierce v. Society of the Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923).

164. 316 U.S. 535, 62 S. Ct. 1110 (1942) (overturning a state statute requiring mandatory sterilization for certain types of convicted repeat offenders).

1. Contraception and Abortion Cases

In *Griswold v. Connecticut*,[165] the Supreme Court invalidated a state statute prohibiting the use of contraceptives by married persons. The Court enunciated the idea of a "zone of privacy" created not by any specific provisions of the Constitution, but by so-called "penumbras" emanating from the enumerated guarantees found in the Bill of Rights.[166] Notably, the Court seemed to ground its decision in a desire to protect marital privacy, finding the governmental intrusion at issue "repulsive to the notions of privacy surrounding the marriage relationship."[167]

This link between privacy in procreative decisions and the traditional marital relationship was apparently weakened by the Court's subsequent opinion in *Eisenstadt v. Baird*.[168] In this equal protection challenge to a Massachusetts statute permitting distribution of contraceptives to married persons but denying the same to single persons, the Court found no rational basis for a distinction based on marital status. In oft-quoted language that has led to much confusion and speculation regarding the nature of the procreative right, it stated that "if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[169]

It is not immediately clear from the *Eisenstadt* opinion whether the Court's concern was based upon the right to privacy, the right to intimate association, or practical considerations of the effects of an unwanted pregnancy or child. Nor is it clear whether the protected interest is as specific as access to contraceptives or as broad as freedom in sexual relationships.[170] One year later, the Court further expanded the notion of privacy without significantly clarifying its logical base. *Roe v. Wade*[171] stands for the proposition that the state does not have interests sufficient to outweigh a woman's right to terminate a pregnancy during the first trimester. The Court did not go so far as to recognize a right to "do with one's body as one pleases."[172] Indeed, while applying the usually fatal strict scrutiny analysis, the Court found that the state's interests

165. 381 U.S. 479, 85 S. Ct. 1678 (1965).

166. Justice Douglas found the privacy right emanated from guarantees in the first, third, fourth, fifth, and ninth amendments, applicable by the doctrine of incorporation through the fourteenth amendment.

167. 381 U.S. at 486, 85 S. Ct. at 1682.

168. 405 U.S. 438, 92 S. Ct. 1029 (1972).

169. Id. at 453, 92 S. Ct. at 1038.

170. See Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 528-29 (1983).

171. 410 U.S. 113, 93 S. Ct. 705 (1973); see also Planned Parenthood v. Danforth, 428 U.S. 52, 96 S. Ct. 2831 (1976).

172. *Roe*, 410 U.S. at 154, 93 S. Ct. at 727.

did become sufficiently compelling to warrant intrusion into this zone of privacy at some point during pregnancy.[173]

It was still unclear, however, exactly from where the right to this particular zone of privacy derived. The opinion explicitly stated the belief that the right to privacy is grounded in the fourteenth amendment,[174] but acknowledged that the only personal interests which may be thus protected are those which are " 'implicit in the concept of ordered liberty.' "[175] The Court indulged in an extensive examination of the historical treatment of abortion, apparently in an effort to justify its conclusion that such an interest is implicit in the Anglo-American concept of "ordered liberty."

In addition, after recognizing that the woman is not alone in her claims to life and liberty, as she is carrying another individual, the Court stated that "it is reasonable and appropriate for a State to decide that at some point in time another interest . . . becomes significantly involved."[176] It then went on, however, to substitute its own judgment on this policy issue for that of the state whose right to decide it had just acknowledged. Justice Rehnquist, in his dissenting opinion, likened this disposition to the more activist *Lochner* era of economic substantive due process.[177]

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173. The state's interest in protecting maternal health was deemed to begin with the end of the first trimester, while the interest in protection of fetal life began with the end of the second trimester. During the second trimester, the state could regulate to protect maternal health, and during the third trimester the state could prohibit abortion to protect the unborn child. Id. at 163-64, 93 S. Ct. at 731-32.

174. Id. at 153, 93 S. Ct. at 727.

175. Id. at 152, 93 S. Ct. at 726 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937)).

176. Id. at 159, 93 S. Ct. at 730. One commentator has said:

> In a sense, a pregnant woman and an unborn child each has her own kind of claim on the interests of life and liberty . . . . The proposition that a pregnant woman may unilaterally determine the fate of an unborn child is no easier to defend than the proposition that a state may unilaterally require a pregnant woman to carry an unborn child to its birth, especially when doing so poses no serious risk to her. How the matter is determined turns entirely on the choice one makes, *a priori*, about the nature of an unborn child. Given the Court's implicit assumption that a fetus is not close enough to being either 'life' or a 'person' to warrant its own constitutional protection, *Roe* is consistent with the constitutional interest in advancing the private sanctity of childbearing decisions. Without that assumption, *Roe* must simply be rejected.

Hafen, supra note 170, at 533 n.341.

177. 410 U.S. at 174, 93 S. Ct. at 737 (Rehnquist, J., dissenting). Rehnquist also pointed out that the Court in its historical analysis overlooked the fact that a majority of jurisdictions had proscribed abortion for approximately a century, indicating that the "right" to an abortion was perhaps not so implicit in our concept of ordered liberty as the majority would indicate.

It has also been suggested that *Roe* was the pinnacle of a privacy/substantive due

The right to privacy and the right of access to contraceptives and abortion were further secured in the cases that followed. In *Carey v. Population Services International*,[178] the Court struck down a New York statute forbidding the sale of contraceptives to minors. In *Planned Parenthood v. Danforth*,[179] it was held that consent for an abortion could not be required from a pregnant woman's parent or spouse.

2. *Is There a Fundamental Right to Procreate?*

It has been asserted that the *Skinner-Griswold-Roe* line of cases has established that there is a fundamental affirmative right to procreate that is within the protected zone of privacy.[180] If this view is correct, any efforts by state legislatures to regulate or prohibit the practice of surrogate motherhood would be subject to strict scrutiny and would therefore probably not pass constitutional muster.[181] Such an affirmative right is, however, an unwarranted extension of the right to privacy.[182] Moreover, even assuming that an affirmative right to procreate exists, its scope does not encompass the practice of surrogate motherhood. In addition, the Court has recently moved in the direction of limiting the expansive privacy rights that it granted during the last two decades.[183] If, for whatever reason, there is no fundamental right to procreate through the use of surrogacy, the state may regulate or even prohibit the practice. Essentially, there are two necessary inquiries: whether there exists an affirmative right to procreate, and, if so, whether there exists a right to do so through the use of surrogates.

Certainly the language in *Eisenstadt* regarding the "decision whether to bear or beget a child"[184] has fueled the controversy over whether there is an affirmative right to procreate.[185] However, it cannot be

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process curve which is now falling off with increasing rapidity, much the same fate encountered by economic substantive due process after the *Lochner* era. This would cut against *Roe* as a basis for any further extension of privacy rights such as would be necessary to find a fundamental right to procreate. See Hafen, supra note 170, at 523.

178. 431 U.S. 678, 97 S. Ct. 2010 (1977).

179. 428 U.S. 52, 96 S. Ct. 2831 (1976).

180. Robertson, Procreative Liberty, supra note 23; Special Project, supra note 30; Note, Reproductive Technology and the Procreation Rights of the Unmarried, 98 Harv. L. Rev. 669, 678 (1985).

181. Strict scrutiny requires that the state demonstrate a compelling interest which is served by the legislation, that the statute be necessary to achieve the state's compelling goal, and that it be narrowly tailored to achieve that end. This standard of review is seldom successfully met. See generally P. Kauper & F. Beytagh, supra note 20, at 876, 1085-90.

182. O'Brien, supra note 23.

183. See infra text accompanying note 207.

184. 405 U.S. at 453, 92 S. Ct. 1038.

185. See supra note 180.

contested that the contraception and abortion cases clearly dealt with the right *not* to procreate. If the affirmative converse exists, it must be logically inferable from the intent and reasoning of the Court in these and related cases.

In *Skinner*, the Court spoke of the right to procreate as being fundamental to the perpetuation of society and one of the most basic civil rights of man.[186] In context, though, the Court was only preserving the capacity to procreate, that is, protecting the petitioner's existing reproductive capability against permanent deprivation by the state. The opinion left intact the state's right to decide when and within what relationships that capacity could be exercised.[187] Consistent with this observation, some commentators have stated that the right to procreate arises out of the right to procreate naturally, suggesting that the unmarried[188] or infertile[189] may therefore not have this protected interest.

At least one author views the contraception and abortion cases as being spawned in and by an era of great social upheaval regarding the roles of women in society, and describes the Court as seizing the opportunity to alleviate the stigma and burden imposed upon women because of pregnancy and to protect their right to choose a childless lifestyle in a changing society more accepting of career women and childless marriages.[190] The Court is also said to have recognized the disproportionate share of the burden of procreation borne by women, as well as women's greater exposure to social harms from an unwed pregnancy. There may be some validity to this theory. Certainly the Court has responded to and even instigated social reform.[191] Further, the *Roe* opinion did state that the woman's right was worthy of protection because of the potential burdens involved in imposing upon her an unwanted pregnancy or child or the stigma of unwed motherhood.[192]

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186. 316 U.S. 535, 62 S. Ct. 1110 (1942).

187. Justice Goldberg stated in his *Griswold* concurrence that the constitutionality of Connecticut's laws against fornication and adultery was "beyond doubt." 381 U.S. at 498, 85 S. Ct. at 1689. Justice Harlan also stated in his widely respected dissent in Poe v. Ullman that

> the laws regarding marriage which provide both when the sexual powers may be used and *the legal and social context in which children are born and brought up* . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

367 U.S. at 546, 81 S. Ct. at 1778 (Harlan, J., dissenting) (emphasis added).

188. Robertson, Procreative Liberty, supra note 23, at 417.

189. Lacey, supra note 151, at 308-09.

190. Graham, Surrogate Gestation and the Protection of Choice, 22 Santa Clara L. Rev. 291, 307-15 (1982).

191. Consider, for example, Brown v. Board of Education, 349 U.S. 294, 75 S. Ct. 753 (1955) and its progeny.

192. 410 U.S. at 153, 93 S. Ct. at 727.

To the extent that this characterization of *Roe* and its progeny is valid, it would seem to militate against the notion that inherent in those opinions was an intention by the Court to ensure an affirmative right to procreate.

Nor can such an affirmative right be justified on the basis of the personal autonomy in procreational decisions that was protected by this line of cases. Individual autonomy is a supportable basis for protecting rights only so long as only the individual is involved. The right to have sex without procreating is one matter, but the right to procreate, with or without sex, is something else entirely. In the latter case, the rights of other individuals become implicated in the decisions being made. Even *Roe* recognized that at viability the state's interest in protecting the child justifies complete prohibition of abortion under some circumstances, despite the woman's fundamental right to privacy in choosing to abort.[193] Therefore, the autonomy and privacy interests recognized were necessarily limited in scope, and it cannot be assumed that they include an affirmative right to create a child.

In addition, given the language in *Eisenstadt* to the effect that if the right to privacy is to have any significance it must be the right of the individual, it could be safely assumed that an affirmative right to procreate must extend equally to both men and women. However, a man's right to procreate could not be of fundamental significance if it can be cut off by the unilateral decision of his partner to abort the child.[194]

Even if there is an affirmative right to procreate, reproduction through the use of a surrogate mother would not be found within the boundaries of the zone of protection.[195] Professor John Robertson of the University of Texas at Austin, referring to the *Griswold-Roe* line of cases, has stated that "[t]he principle underlying these holdings includes the right of a married couple to have children coitally. If so, it is difficult to see how noncoital, collaborative reproduction by married persons can be treated differently."[196]

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193. Id. at 163-64, 93 S. Ct. at 731-32.

194. See Planned Parenthood v. Danforth, 428 U.S. 52, 96 S. Ct. 2831 (1976).

195. Much has been written regarding the right to procreate as it relates to various reproductive technologies other than surrogacy. They are beyond the scope of this paper. See, e.g., Lacey, supra note 151; Lorio, supra note 118; Special Project, supra note 30; Robertson, Procreative Liberty, supra note 23; Robertson, Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. Cal. L. Rev. 942 (1986) [hereinafter Robertson, New Reproduction]; Note, In Vitro Fertilization: Third Party Motherhood and the Changing Definition of Legal Parent, 17 Pac. L.J. 231 (1985); Williams, Differential Treatment of Men and Women By Artificial Reproduction Statutes, 21 Tulsa L.J. 463 (1986).

196. Billig, High Tech Earth Mothering, 9 District Lawyer, July/Aug. 1985, at 56, 57 (quoting Prof. Robertson's testimony before the House Committee on Science & Technology, Subcommittee on Investigations and Oversight, Aug. 8, 1984.)

Robertson created the theory of breaking reproduction into its component roles—genetic, gestational, and social parenting—each of which he believes merits constitutional protection.[197] He further suggests that one has the right to procreate by participating in arrangements by which these components are shared among various parties.[198] However, this comes very close to espousing a theory of the right to do with one's body as one chooses, which was specifically rejected by the *Roe* Court.[199]

A right to procreate does not necessitate the state's ensuring that one has the means to do so. In *Maher v. Roe*,[200] the Court rejected the notion that because a woman has a fundamental right to a first-trimester abortion she has the right to receive public assistance to pay for it, even though the refusal to supply funding effectively deprives her of her only means of obtaining the procedure. As the Court stated in a later case, "[The state] need not remove those [obstacles] not of its own creation. Indigency falls in the latter category."[201] Nor is the inability to have children a creation of the state. Even if surrogacy contracts are prohibited, the government does not stand in the way of procreation—infertility does. One commentator observed that extending a right to procreate to the use of surrogates creates a right to be a parent when it has been established that there is no inherent right to adopt a child.[202]

It cannot be assumed that the right to procreate should include the right to do so by any means. One would not be likely to prevail with an argument of entitlement to procreate through extramarital intercourse. Substantive due process does not protect blindly even enumerated rights in the name of personal liberty. As an example, the protection of free expression is not predicated simply on the notion that restraining one from speaking freely improperly interferes with personal autonomy. Rather, free expression serves larger societal interests that ultimately benefit all individuals. Likewise, privacy rights must be linked to societal goals or interests larger than the autonomy of the individual involved. This is reflected in the notions of "looking to the collective conscience of the people"[203] and interests "implicit in the concept of ordered liberty."[204]

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197. Robertson, Procreative Liberty, supra note 23, at 408-10.

198. "One thinks of oneself as procreating whether one conceives without gestating or rearing, gestates without rearing or conceiving, or rears without conceiving or gestating. Procreative freedom includes the right to separate the genetic, gestational, or social components of reproduction and to recombine them in collaboration with others." Id. at 410.

199. 410 U.S. at 154, 93 S. Ct. at 727.

200. 432 U.S. 464, 97 S. Ct. 2376 (1977).

201. Harris v. McRae, 448 U.S. 297, 316, 100 S. Ct. 2671, 2688 (1980).

202. Lacey, supra note 151, at 309.

203. Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 332 (1934).

204. Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937).

If the attributes of procreation that first raised it to the level of a fundamental right are shared by surrogate motherhood, then the practice of surrogacy may be similarly protected.[205] *Skinner* and *Griswold* addressed the importance of privacy and procreative choice to marital intimacy and social stability. The abortion cases added considerations of bodily integrity, prevention of social stigma, and avoidance of the imposition of a parent-child relationship upon an unwilling party. The creation of children by contract serves few, if any, of these ends. Bringing a third party into the procreative relationship cannot be justified on a theory of marital intimacy, and the strain such an arrangement puts upon traditional notions of parenthood and family does little to further social stability. Rather than avoiding an unwanted parent-child relationship, surrogate motherhood has the potential of destroying the relationship of at least one parent with the child.[206]

The Court itself has recently given signs of narrowing somewhat the bounds of the right of privacy. It has on at least two occasions upheld prohibitions against homosexual acts on the ground that such acts were not within a recognized privacy interest. In *Bowers v. Hardwick*,[207] the Court through Justice White firmly rejected the argument that the *Griswold-Eisenstadt-Roe* line of cases implies a constitutional protection of sexual conduct of any kind between consenting adults.[208] He also indicated that the Court's fundamental privacy rights analysis had become too expansive, saying:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.[209]

If the Court characterized surrogacy as an unnecessary expansion of the right of married couples to procreate through natural means, it would probably not accord this practice the status of a fundamental right.[210] Given that the Court is now less likely to read new rights into the due

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204. Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937).
205. See generally Robertson, New Reproduction, supra note 195, at 956.
206. See infra text accompanying notes 278-81.
207. 106 S. Ct. 2841 (1986).
208. Id. at 2844.
209. Id. at 2846; see also Lacey, supra note 151, at 292.
210. Lacey, supra note 151, at 292.

process clause, it seems likely that surrogate motherhood would not receive constitutional protection.[211]

Even if there were a constitutional right to procreate which included the use of surrogates, or if the surrogate's privacy interest in procreating in this fashion were recognized, such protection need not and probably would not extend to the payment of surrogacy fees. Though it has been conceded by virtually all that prohibiting payment of surrogates would effectively eliminate the practice,[212] the government need not ensure the viability of commercial surrogacy. Lower courts have stated that the right to procreate does not include the payment of fees in connection with the transfer of parental rights.[213] In addition, the Supreme Court has held that states are under no obligation to fund elective abortions, even if the failure to do so destroys a woman's only meaningful chance of access to the procedure.[214] Notably, two of these cases[215] specifically permit local governmental policy choices indicating a "preference for normal childbirth."[216]

Given the foregoing analysis, the state's ability to regulate or prohibit the practice of surrogate motherhood should not be impaired seriously by potential constitutional challenges based on substantive due process and the right of privacy, or upon an affirmative right to procreate.

B. Equal Protection

The fourteenth amendment also provides that no state may deny to any person within its jurisdiction the equal protection of the laws.[217] Originally understood as a guarantee of impartial enforcement of the laws, this clause has become a guarantee that the law itself must be impartial.[218] Classifications of persons for the purpose of determining their treatment under the law must be justified. Generally speaking,

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211. There has been a growing dissent on the abortion cases decided since *Roe*. Justice O'Connor, for one, has suggested that the rationale employed in the *Roe* decision needs to be reexamined. Given this, and the recent addition of Justices Scalia and Kennedy, the future of procreative privacy rights is quite possibly limited.

212. Keane, supra note 119, at 153; Surrogate Parenting Assoc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 216 (Wintersheimer, J., dissenting).

213. Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981); In re Baby M., 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987).

214. Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671 (1980); Poelker v. Doe, 432 U.S. 519, 97 S. Ct. 2391 (1977); Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376 (1977).

215. *Poelker*, 432 U.S. 519, 97 S. Ct. 2391 (1977); *Maher*, 432 U.S. 464, 97 S. Ct. 2376 (1977).

216. *Poelker*, 432 U.S. at 521, 97 S. Ct. at 2392. These cases also raised equal protection challenges due to a wealth-based discrimination, which were rejected.

217. U.S. Const. amend. XIV, § 2.

218. "[T]he equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S. Ct. 1064, 1070 (1886).

deference is granted to legislative determinations of reasonable classification schemes, requiring only that the distinction be rationally related to the accomplishment of a legitimate government purpose. However, when the scheme is based upon certain classifications deemed to be "suspect," the law in question will receive some heightened level of judicial scrutiny.[219] In addition, if the law deprives a class of persons of a fundamental right, strict scrutiny will be invoked.[220]

Proposed regulation or prohibition of surrogate motherhood contracts has provoked allegations of discriminatory effect based on gender, wealth, and marital status. In addition, the claim of a fundamental right to procreate has raised the possibility of a requirement of strict judicial scrutiny of these proposed laws. In the sections that follow, the arguments surrounding claims of gender-based and marital status-based discrimination will be examined.[221] The arguments regarding procreation as a fundamental right were discussed in the previous section.[222]

1. Classification by Gender—AID and Surrogacy

Artificial insemination by donor (AID) is a generally accepted practice and receives some protection under the law.[223] In Louisiana, as elsewhere, a couple who chooses to procreate through the use of AID is aided by a rebuttable presumption of paternity in the husband of the mother, operative when he has given his consent to the insemination.[224] In states where the practice is more closely regulated, sperm donors are given the added protection of automatic severance of any parental rights or responsibilities.[225]

Proponents of surrogate motherhood contracts argue that a prohibition of this practice would amount to a deprivation of equal protection, in that infertile men (or their partners) are able to procreate through the use of AID but infertile women (or their partners) are denied the

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219. See generally P. Kauper & F. Beytagh, supra note 20, at 876; J. Barron & C. Dienes, Constitutional Law in a Nutshell 157-70 (1986).

220. See generally P. Kauper & F. Beytagh, supra note 20, at 876; J. Barron & C. Dienes, supra note 219, at 157-70.

221. The problems related to wealth arise chiefly because of the expense of surrogacy, and present a potential constitutional challenge when proposed or enacted legislation prescribes minimum fees for surrogates. The problems were addressed in the cases concerning the funding of abortions. See supra text accompanying notes 214-16.

222. See supra text accompanying notes 180-216.

223. See supra notes 4-6 and accompanying text.

224. La. Civ. Code art. 188.

225. See Cal. Civ. Code § 7005 (b) (1983); Conn. Gen. Stat. § 45-69j (1981); Mont. Code Ann. § 40-6-106 (2) (1987); Or. Rev. Stat. § 109.239 (1984); Tex. Fam. Code Ann. § 12.03 (b) (1986); Wash. Rev. Code Ann. § 26.26.050 (Supp. 1981); Wis. Stat. Ann. § 891.40 (2) (Supp. 1987).

same opportunity.[226] Equal protection analysis generally requires that the groups being compared, allegedly unfavorably, be similarly situated with respect to the law and that the parties be confined to their group by "immutable characteristics."[227] While gender is arguably an immutable characteristic, the groups just described are dissimilarly situated in at least two respects.

First, sperm donors and surrogate mothers are simply not analogous parties. There is ample reason to sever the parental rights and responsibilities of a sperm donor whose only link to the child he helps create is a few minutes spent in solitude contributing a specimen. He neither sees the child nor intends any relationship with it.[228] He takes no appreciable risk. The surrogate mother, by contrast, takes all the physical risk and spends nine months in intimate association with the child. Even given her intention to relinquish the baby at birth, she develops a relationship with the child during gestation that can be extremely powerful. There is more than sufficient justification for differential treatment, and for preventing a mother from irrevocably consenting to relinquish a child with whom she will become so involved over the course of the agreement.

Very little is likely to happen to the sperm donor between the time of his donation and the birth of his child, a child whose existence to him is purely hypothetical and probably never known. By contrast, what will happen to the surrogate between the time of her consent and the birth may be one of the most profound experiences of her life. Nor are these groups being denied equal access to the same or even very similar procedures. On the contrary, the procedures are totally dissimilar. The distinctions based on gender, which accord different treatment to sperm donors and surrogate mothers, are therefore rational. As the parties are not similarly situated in any meaningful respect, the gender-based equal protection challenge is unavailing. These distinctions may also be viewed as satisfying the intermediate scrutiny test of substantial relationship to an important state interest by protection of the parental relationship and provision for assuring legitimacy. Either way, the protests under this theory, while vocal,[229] are unpersuasive.

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226. Note, supra note 6, at 882; Lacey, supra note 151, at 309 & n.154; Note, supra note 180, at 669; Williams, supra note 195, at 471-83.

227. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 783 n.4 (1938).

228. In a California case which constituted an exception, the sperm donor and the mother were friends. The father succeeded in obtaining visitation privileges. This type of situation was contemplated by the authors of the Iowa Model Act, supra note 33. See Rules of Parentage § 2-102.

229. See Note, supra note 180; Lacey, supra note 151, at 309 & n.154; Williams, supra note 195, at 471-83.

In addition, the presumption of paternity that serves a necessary legal function illustrates a valid gender distinction. In the usual case, the mother of a child is obvious at birth.[230] The paternity required to legitimate the child may be less obvious. The presumption supplies the "fact" of identity of the child's father.[231] The presumption of maternity in the contracting father's wife that has been proposed by some surrogacy advocates[232] makes very little real sense, as there is no missing fact of identity of the child's mother.[233]

2. *Classification by Marital Status*

Proposed statutes that limit the use of surrogacy to married persons or prohibit it entirely have been challenged on the basis that they discriminate against unmarried persons who are unable or unwilling to procreate in any other way.[234] Proponents of such challenges frequently assert associational interests in protection of nontraditional families,[235] and allege that the state cannot arbitrarily elevate form over substance.[236] These challenges also may involve charges of discrimination based on sexual preference masked in a marital status classification.[237]

Again, a consideration of the situation of the parties and the state's justification for their differential treatment collapse to an extent into one analysis. While *Eisenstadt* and *Danforth* clearly establish the Court's willingness to extend to the married and unmarried alike the right to prevent parenthood, it is extremely difficult to imagine that the analogy would hold in a determination of the right to create children and families. Certain types of form traditionally have been upheld without a charge of sacrificing substance. Prohibitions against polygamy and homosexual marriage are not likely to fall soon.[238] The definition of family, it is

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230. In the case of embryo transfer, whole new questions arise as to who is the mother of the child—the genetic or gestational participant. This article is confined to the more "typical" surrogacy arrangement of AID plus a genetic/gestational mother.

231. In Louisiana, as in many other jurisdictions, this fact may be disproved by the use of medical tests. See La. R.S. 9:396 (Supp. 1988).

232. See Note, supra note 16, at 619.

233. It does solve some legal problems, chiefly the possibility of the natural mother claiming any legal rights to the child. This is essentially a policy issue.

234. Note, supra note 180, at 678-80; Lacey, supra note 151, at 307.

235. Note, supra note 180, at 678-80; Lacey, supra note 151, at 315. See also, Hafen, supra note 170.

236. Note, supra note 180, at 678-79.

237. See generally Lacey, supra note 151, at 299.

238. See La. Civ. Code arts. 88, 89 (formerly La. Civ. Code arts. 93, 88 (1870), respectively); Succ. of Chavis, 211 La. 313, 29 So. 860 (1947); Succ. of Thomas, 144 La. 25, 80 So. 186 (1919).

true, is changing.[239] The Court has recognized an atypical "family" unit's right to choose to live together.[240] However, there is a huge difference between choosing housing arrangements and bringing children into the world, whose interests the state has the right and responsibility of protecting.

Nor does the argument necessarily hold that because the state allows single persons to adopt,[241] it must recognize their right to form a family through surrogacy.[242] The state's justification in extending the right to adopt to single persons may have had more to do with meeting an existing need for adoptive parents than with recognizing unmarried persons' family rights. In addition, the Supreme Court has held that a state may by law give preference to married couples in the adoption context.[243] While reasonable minds could conclude that single parents are not a societal evil which must be discouraged, they could also agree that the state has sufficient interests in protecting or limiting children born through extraordinary means.

VI. Law, Social Policy, and Ethics

The final deliberation that must be undertaken in an examination of the issues involved in surrogacy agreements is how these contracts may conflict with existing law, social policy, and ethics. Assuming that they were made enforceable, these contracts potentially conflict with provisions of Louisiana law regarding adoption, paternity and legitimacy, the marital relationship, and the criminal sanctions against child-selling. Each of these will be examined briefly, with a general discussion of policy and ethical issues following.

A. Paternity and Filiation

If the surrogate is married, her husband is presumed to be the father of *all* children conceived or born to her during the marriage.[244] The husband may rebut this presumption upon proper proof in an action *en desaveu*,[245] timely filed.[246] If he has consented to her artificial in-

239. See Note, Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act, 73 Geo. L.J. 1283 (1985); Note, supra note 195; Wadlington, Artificial Conception: The Challenge for Family Law, 69 Va. L. Rev. 465 (1983).

240. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977).

241. All states currently permit unmarried persons to adopt. Note, supra note 180, at 669 n.5. See La. R.S. 9:422 (Supp. 1988).

242. Note, supra note 180, at 669-70.

243. Caban v. Mohammed, 441 U.S. 380, 391, 99 S. Ct. 1760, 1767 (1978).

244. La. Civ. Code art. 184.

245. La. Civ. Code art. 187.

246. La. Civ. Code art. 189. Suit must be filed within 180 days after the husband learned or should have learned of the birth, with the time limit suspended if he could not file suit for reasons beyond his control.

semination, he loses the privilege of disavowal.[247] It must be noted, however, that he is the presumed father *regardless of his consent*. Even if he did not consent, he is not compelled to exercise his right to disavow. He may choose to recognize the child as his own. This is obviously a potential problem in the surrogacy context. If a married surrogate refuses to relinquish custody of the child and the contract is unenforceable, it becomes necessary to identify who has parental rights relative to the child, what the nature and extent of those rights may be, and what action may be necessary to secure them.[248]

The policy most fundamental to this area of the law is the protection of the legitimacy of children.[249] For this reason, the presumption of legal paternity is "rigorously applied."[250] Nevertheless, the biological father of a child, not his legitimate issue, has rights which are worthy of at least some degree of protection.[251] Such a father may bring an "avowal" action to attempt to establish his paternity and thereby obtain some parental rights,[252] or may otherwise legally and formally acknowledge the child and institute proceedings against the mother to secure his parental rights. This does not, however, alter the legitimacy or the *legal* filiation of the child, who remains the presumed legal offspring of the surrogate's husband.[253] By contrast, it must be pointed out that

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247. La. Civ. Code art. 188.

248. See Sections 2-101, 2-102 of the Iowa Model Act, supra note 33, which provides that the birth mother is the presumed legal mother, and her husband is the presumed legal father—a rebuttable presumption similar to that operative in Louisiana; in addition, sperm donors may choose to be recognized and be granted parental rights, and in the face of two conflicting presumptions the court is directed to ascertain paternity according to "the weightier considerations of policy and logic, a discretionary standard that should be read in light of the intent of the parties . . . ." Id. comment to section 2-102.

249. Finnerty v. Boyett, 469 So. 2d 287, 293 (La. App. 2d Cir. 1985) (referring to "this state's strong and deeply-rooted policy of avoiding the bastardization of innocent children").

250. Hodges v. Hodges, 348 So. 2d 1284, 1285 (La. App. 4th Cir. 1977).

251. The United States Supreme Court has accorded biological fathers of illegitimate children limited protection under the due process clause of the 14th Amendment. The degree of protection has depended upon the level of actual involvement and participation by the father in the child's life. See Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983); Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760 (1979); Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549 (1978); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972). These due process rights were recognized in the Louisiana opinion in Finnerty v. Boyett, 469 So. 2d 287 (La. App. 2d Cir. 1985). It is unclear how the analysis would run in the case of a newborn child whose custody was disputed, as the biological father would not yet have had any opportunity to establish a relationship with the child.

252. Durr v. Blue, 454 So. 2d 315 (La. App. 3d Cir. 1984). See Comment, The Child With Two Fathers: Updating the Wisdom of Solomon, 46 La. L. Rev. 1211, 1212 (1986).

253. Finnerty v. Boyett, 469 So. 2d at 293-96.

> The process of filiation itself is one primarily establishing the biological fact of paternity. On the other hand, identifying children as legitimate or illegitimate

honoring the contract by recognizing only the biological father's paternity would confer upon the child illegitimate status, which is incompatible with the long history of public policy decisions avoiding the bastardization of children. Illegitimacy alone no longer precludes the child from inheriting. However, even with more accepting attitudes toward single parenthood, a child characterized as illegitimate still grows up carrying significant psychological burdens. The very word "bastard" is laden with negative connotations implying guilt on the part of the illegitimate rather than on the part of those who made him so.

If both fathers have recognized rights, it must be determined what type of rights each has and whose rights will prevail in a dispute regarding the child. While it has been determined that a "parent" has a paramount right to custody of his child when challenged by a nonparent,[254] a *biological* parent's rights will not necessarily prevail in a dispute with the child's *legal* parent.[255]

Surrogacy contracts are therefore particularly problematic regarding the paternity of the child. Honoring the agreement, particularly where the surrogate's husband did not consent, would bastardize the child. If the contract is unenforceable, or the legal presumption of paternity is applied for any reason, the child may be in the position of having dual paternity. Case law indicates that current prevailing law would probably award custody to the legal father—and hence to the surrogate—with the possibility of visitation by the biological father.[256] The ultimate determination of custody would be based on the child's best interest, but the rights of the legal parents have been recognized as paramount and would be protected absent a showing of conduct sufficiently egregious to merit forfeiture.[257]

B. Adoption and Consent

As in most jurisdictions, conflicts arise between the consent provisions of Louisiana's adoption statutes and the terms of the typical surrogate motherhood contract. The contract will call for irrevocable consent, given prior to the birth of the child.[258] However, under Louisiana

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> is a classificatory process based primarily on legal rules rather than on biological fact . . . [I]n the absence of a compelling argument to the contrary, we hold that allowing the father . . . to establish his child's true filiation does not bastardize the child, who remains the legitimate child of her [presumed] father.

Id. at 293.

254. Durr v. Blue, 454 So. 2d 315 (La. App. 3d Cir. 1984).

255. In re Murray, 445 So. 2d 21, 24 (La. App. 5th Cir. 1984).

256. Finnerty v. Boyett, 469 So. 2d 287 (La. App. 2d Cir. 1985).

257. Id. at 297.

258. Note, Contracts to Bear a Child, 66 Calif. L. Rev. 611 (1978); see also N. Keane & D. Breo, supra note 13.

law, voluntary surrender of a child for private adoption may not be executed prior to five days following the birth of the child.[259] In addition, the surrendering parent or parents may issue a revocation of their consent within thirty days after the act of surrender.[260]

The revocation does not, however, necessarily prevent the issuance of an interlocutory or final decree of adoption, if the court deems it in the child's best interests to proceed with the adoption. Such revocation will trigger a contradictory hearing to determine whether it is in the child's best interests to be returned to the surrendering parent or to permit the adoption to proceed.[261]

Even in the case of voluntary surrender to an agency for adoption, though the consent is irrevocable, the law provides that the surrender may only be of a child who "*was born* in wedlock or out of wedlock".[262] Thus it would seem that to allow the enforcement of the consent provisions of a typical surrogacy contract, which called for the surrender of a child *not yet* born, an exception must be made to the existing adoption law.

In addition, the statutes provide for an affidavit of fees and charges in connection with the adoption. The form of this affidavit provides for payment of certain specified charges, including medical expenses, attorney's fees, agency fees[263] and "other," with certification that no other fees or charges than those disclosed have been or will be paid.[264] Although on its face this provision may seem sufficiently liberal to accommodate surrogacy fees, the court may approve or disapprove the fees.[265] Additionally, the same statute provides that the fee information may be released by the court for the purposes of a criminal investigation pursuant to Louisiana Revised Statutes 14:286, the statute prohibiting the sale of children.[266]

C. *Sale of Minor Children*

It is a criminal offense in Louisiana to give or receive anything of value in exchange for the transfer of a minor child.[267] The offense is a misdemeanor, and violators may be fined an amount not exceeding one thousand dollars or imprisoned for not more than six months, or

259. La. R.S. 9:422, 427 (Supp. 1988).
260. La. R.S. 9:422.10 (Supp. 1988).
261. La. R.S. 9:429 (Supp. 1988).
262. La. R.S. 9:402 (Supp. 1988).
263. The "Agency" must be one approved and licensed by the Louisiana DHHR. La. R.S. 9:401(1) (Supp. 1988).
264. La. R.S. 9:424.1 (Supp. 1988).
265. Id.
266. La. R.S. 9:424.1(F) (Supp. 1988).
267. La. R.S. 14:286 (Supp. 1988).

both.[268] The statute makes an exception for the reasonable medical, living and legal expenses provided for in the adoption provision discussed above. In addition, the statute explicitly allows payment of these permitted expenses for a child not yet born.[269]

Clearly, Louisiana has chosen not to permit the exchange of a child for money. The Attorney General has also clearly stated that he considers the payment of a surrogate fee, above and beyond the actual living and medical expenses associated with the birth, to be a violation of this criminal provision.[270] He has further stated that the provisions of the criminal statute are violated where the intermediary is paid a fee if it is not an agency licensed by the State.[271]

D. The Marital Relationship

The marriage contract[272] in Louisiana creates mutual obligations between the spouses of fidelity, support, and assistance.[273] The obligation of fidelity is both a negative one—to refrain from adultery—and a positive one—to submit to each other's "reasonable and normal sexual desires."[274] It has been held that this positive obligation is a necessary ingredient of the marriage, deprivation of which may amount to grounds for separation from bed and board because of mental cruelty.[275]

A surrogate binds herself under the terms of her contract to abstain from sexual relations with her husband, if she is married, during the period of time prior to successful conception.[276] Her husband may well not be a party to the contract, in order to avoid the issues of paternity implicated by his consent to her artificial insemination.[277] As discussed earlier in this article, the issue then becomes whether the surrogate may legally so bind herself in the first instance, and if she can, is her husband bound by a contract to which he is not a party? May he enforce his marital rights?

E. Social Policy and Ethics

None of the problems outlined above are unresolvable. To the contrary—unlike many of the contractual issues involved, most of the

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268. Id.
269. La. R.S. 14:286(B) (Supp. 1988).
270. Op. La. Att'y Gen. No. 83-869 (Oct. 18, 1983).
271. Id.
272. See La. Civ. Code art. 86.
273. La. Civ. Code art. 98.
274. Id. comment (b).
275. Id. See also La. Civ. Code art. 138(3).
276. See supra text accompanying notes 96-98 & 128.
277. La. Civ. Code art. 188. See supra text accompanying notes 53-59 & 95.

conflicts between surrogacy contracts and the current scheme of Louisiana law could be remedied through legislation regulating such contracts and providing specific exceptions to the application of the above provisions. The moment of truth comes in deciding what we are trying to protect. The existing law represents a product of practical considerations and basic policy choices. Most of the structure serves some purpose. If that purpose is incompatible with surrogate motherhood contracts, a choice has to be made concerning which interests are more weighty.

One of the most compelling of state interests is the protection of its children, and one of our law's most basic assumptions is that children belong with their biological parents whenever feasible.[278] Adoption is an extraordinary remedy fashioned to provide an acceptable alternative when a child's biological parent or parents are unwilling, unfit, or unable to care for him. This characterization of adoption is not intended to cast it in an unduly negative light. It has been recognized, though, that adoptees are prone to particular problems related to their adopted status such as feelings of rejection and longing to know their biological identity.[279] For this reason, among others, state adoption procedures are designed to protect the welfare of the child, to allow a biological parent reasonable opportunity to revoke a surrender, and to not remove a child from his biological family unless strict statutory indicia are present.[280] These procedures also protect the interests of the parent or parents. A surrogate motherhood contract bypasses some significant safeguards built into the adoption system to protect both children and parents. Surrogacy is far less focused on the needs of the child than is adoption. It is, rather, "primarily to satiate the psychic and financial needs of adult parties."[281]

Given the best-case scenario, that all parties to the contract are satisfied with their roles and perform their contractual obligations, the child's interests are still not considered. Not only must he cope with the potential bereavement of adoption,[282] but also with the added realization that he was given up in exchange for compensation. As one commentator has phrased it, "[i]f the traditional family norm can be considered ideal (a presumption upon which many laws are based), then adoption is making the best out of a bad situation. Conversely, surrogacy creates, through extraordinary means, the bad situation."[283]

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278. Katz, supra note 16, at 11 n.44 (citing the Child Welfare League of America's Standards for Adoption Service).

279. Id. at 11-12; O'Brien, supra note 23, at 144 & n.152.

280. See La. R.S. 9:403-22.1 (Supp. 1988).

281. O'Brien, supra note 23, at 145.

282. Katz, supra note 16, at 11 n.46; Robertson, Procreative Liberty, supra note 23, at 425 & n.83.

283. Balhoff, Surrogate Motherhood and In Vitro Fertilization: The Case for Prohibition 7 (1987) (unpublished manuscript). The *Baby M.* court recognized the special

This position has been countered with the argument that to oppose surrogacy on these grounds is tantamount to a conclusion that the child would be better off never having been born. A ban on surrogacy would therefore have the undesirable effect of preventing these potential children's births.[284] Professor Robertson states that "[e]ven if there is a higher degree of confusion, unhappiness, or maladjustment in donor-assisted reproduction, a child would seem better off under this collaborative structure than not to exist at all."[285] This argument is putting the cart before the horse.

> A person before conception is a nonentity. He can have no interests except in the prospective sense. But such prospective interests are entirely dependent upon the inevitability of his existence. . . . Prohibition of reproductive means cuts off the prospects of existence, and thus the prospective interests. The contrary argument leads to folly. If we endow each sperm and each egg with the right to unite and become a person, the results would be interesting indeed.[286]

As one commentator has noted, such logic would lead inevitably to the conclusion that society would have difficulty justifying any method of birth control.[287]

Given the worst-case scenario, that there is a serious breach involving custody of the child, there are no winners. If the contract is enforced, a child is being removed from its biological mother without a showing of the statutory indicia normally required. She may be perfectly willing, fit and able to mother the child. On the other hand, if the biological father is denied custody, his parental rights are compromised. The child either loses one of his biological parents, or becomes the subject of a protracted custody battle.

It is also possible that involuntarily childless couples (or individuals) who do not have all the technological options available to them to produce a child of their own will turn to adoption of "special needs" children. There is enormous need for placement of these children,[288] and it has been observed that as the availability of "perfect" newborns has decreased and public awareness of these special children and the potential rewards of parenting them has increased, their placement has increased.[289]

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counseling the child would need in order to deal with the facts of her origin. In re Baby M., 217 N.J. Super. 313, 398, 525 A.2d 1128, 1170 (Ch. Div. 1987).

284. Robertson, Procreative Liberty, supra note 23, at 434.

285. Robertson, New Reproduction, supra note 195, at 1000.

286. Balhoff, supra note 283, at 8.

287. O'Brien, supra note 23, at 145.

288. See supra note 134.

289. Id.

While this type of adoption is certainly not for everyone, increasing its attractiveness as an option is a worthwhile social goal.

So basic is the notion of at least limited revocability of consent that courts have, even while upholding the validity of surrogacy contracts, held that consent provisions make those contracts voidable.[290] Proposed legislation includes provisions for revocability of the surrogate's consent,[291] despite the contractual uncertainty it creates for the parties. The requirement in the adoption statutes that consent may not be binding until five days post-partum—as well as the prohibition of compensation therefore—do not simply protect mothers who may be coerced fairly late in an undesired pregnancy. A mother could decide very early in pregnancy, without influence, to give up her child and could still not be bound by any consent given before five days after birth. Obviously there was a legislative policy choice made against permitting binding consent until pregnancy and childbirth were completed. There is no compelling or even convincing policy reason why surrogate motherhood should not be subjected to the same constraints.

The adoption and criminal provisions work together to prohibit the payment of consideration for the transfer of a child. Traditionally, babyselling laws have prohibited payment in connection with an adoption and are designed to prevent the coercion of an unwed mother in giving up her parental rights.[292] Proponents of surrogacy argue that the black market adoption rationale does not hold in the surrogacy context, because the mother decides, without coercion, to bring the child into being for the express purpose of giving it up.[293] The courts have been divided on the issue of applicability of these statutes to surrogacy contracts.[294] Those courts finding that the statutes are applicable and voiding payment of the surrogate or the contract in toto have done so on the basis of policy, finding that the policies behind babyselling apply to surrogacy.[295] Those courts finding the statutes inapplicable have usually done so on the basis of statutory interpretation and legislative history.[296]

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290. Surrogate Parenting Assoc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 213 (Ky. 1986); In re Adoption of Baby Girl L.J., 132 Misc. 2d 972 505 N.Y.S.2d 813, 817 (Fam. Ct. 1986).

291. Note, supra note 6, at 898 (discussing proposals in Michigan, Kansas, Connecticut, Hawaii, and Minnesota).

292. See generally, Katz, supra note 16, at 13.

293. Id. at 19; Special Project, supra note 30, at 641; Note, supra note 6, at 886-87.

294. See Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981); In re Baby M., 109 N.J. 396, 537 A.2d 1127 (1988). Cf. In re Baby M., 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987); Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986).

295. In re Baby M., 109 N.J. 396, 537 A.2d 1127 (1988).

296. Surrogate Parenting Assoc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986); *Kelly*, 106 Mich. App. 169, 307 N.W.2d 438.

Babyselling laws are premised upon two basic policies: first, that the economic inducement of a mother to part with her child is unconscionable, and second, that a child should not be treated as chattel.[297] Those proponents of surrogacy who maintain that no economic inducement to part with a child takes place are simply not convincing. A reading of the trial court opinion in *In re Baby M.* gives an accurate portrayal of the disparity of the economic interests represented in a typical surrogacy contract. The Sterns were quite comfortably, well-to-do professionals. The Whiteheads had a long history of severe economic troubles and, in fact, both of their mortgages were in foreclosure at the time the contract was signed.[298] The pressures of their existence were palpable in the opinion.

Neither may the second policy consideration be passed over lightly. In *Surrogate Parenting Associates v. Commonwealth ex rel. Armstrong*, the Supreme Court of Kentucky placed a great deal of emphasis upon the fact that the surrogacy agreement, unlike a baby-broker's agreement, is entered into before conception, rather than at a time when the mother is pregnant and possibly under economic duress.[299] The Kentucky Attorney General noted in his opinion the "long-standing legal principle and public policy that children are not chattel and therefore may not be the subject of a contract or gift."[300] Given a basic social policy prohibiting treating persons as property, it would seem that to make a person's very *creation* the subject of contract should likewise be prohibited. Such a practice is an even more egregious violation of this principle than merely paying for the right to adopt him.[301]

There will be unwed mothers who would desire to relinquish custody of their babies with or without payment. If payment of surrogates is allowed, why shouldn't payment of noncoerced pregnant mothers be allowed as well? The answer is simply that the free consent of particular individuals is not determinative in this context. The very process is exploitative of human beings, and for that reason is against public policy.

Many women, and men as well, fear that the practice of surrogacy will reverse the social gains women have made since the advent of

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297. Katz, supra note 16, at 17. See, e.g., People ex rel. Gill v. Lapidus, 202 Misc. 1116, 1118, 120 N.Y.S.2d 766, 769 (Sup. Ct. 1953) ("A child is not a chattel to be bought or sold, directly or indirectly".).

298. 217 N.J. Super. at 340, 525 A.2d at 1140.

299. *Surrogate Parenting Assoc.*, 704 S.W.2d at 211-12.

300. Op. Ky. Att'y Gen. No. 150 (1982).

301. It has been suggested that in the case of embryo transfer (where the surrogate provides only gestational services for the egg of the wife fertilized by the husband) the justifications for unenforceability of the contract do not exist, because the child "belongs" to the contracting couple. Note, supra note 196, at 239-40. While at first blush this seems innately fair, it raises troubling specters of the child as property and concepts of ownership.

contraceptives. Proponents like John Robertson argue that the separation of reproduction into component roles is freeing for women.[302] This reasoning is flawed in two respects. First, it overlooks the fact that for every woman who is "freed" another will be "trapped" into a role of reproducing for pay. This does not necessarily promote a responsible approach to alternative means of reproduction, as is seen in suggestions that women will benefit by using surrogacy for convenience as well as necessity.[303]

In addition, the dehumanization that inevitably results from the breakdown of traditional reproductive roles is hardly freeing for anyone. Robertson has said that "[i]f married persons have the right to have and raise children, it should follow that they have the right to enlist the support of physicians and others to obtain *reproductive factors* (sperm, eggs or uterus) that will enable them to do so."[304] This reduction of human reproduction, especially the intimacy and wonder of the carrying of a child, to the status of "factors" is offensive to many and frightening to some. It should at least encourage some thought regarding the ultimate destination at which we may arrive when we embark upon such a path.

While it is true that most change, even beneficial change, is met with some resistance, it must also be conceded that there is some validity to the idea of a "slippery slope."[305] Robertson points out that technological change should not be denied in our time because of perceived fears of the nature of future society, as "societies with such visionary techniques available may well have undergone social and normative changes that make such uses perfectly acceptable to them."[306] Perhaps such "social and normative change" is simply the reality of a slippery slope. We have an obligation to be responsive to the changing needs and capabilities of society. But we have a concomitant obligation to use our changing abilities wisely, including limiting them, because of our investment in that society of the future.[307]

The social policies implicated by the conflicts between surrogacy contracts on the one hand and marital obligations and paternity on the other represent disruptions to the legal structure we have chosen. These disruptions are necessary if the law is to accommodate surrogate moth-

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302. Robertson, New Reproduction, supra note 195, at 1026, 1029-32.

303. Id. at 1012 & n.244.

304. Billig, supra note 196, at 57 (quoting Prof. Robertson's testimony before the House Committee on Science & Technology, Subcommittee on Investigations and Oversight, Aug. 8, 1984) (emphasis added).

305. See Robertson, New Reproduction, supra note 195, at 1025.

306. Id. at 1026 n.300.

307. See generally Cahill, *In Vitro* Fertilization: Ethical Issues in Judaeo-Christian Perspective, 32 Loy L. Rev. 337 (1986).

erhood contracts. Before deviating so markedly from policy decisions already made, it must be recognized that to do so will call into question definitions of roles and relationships very basic to our social order. Such steps should be taken advisedly and slowly.

VII. Recommendations and Conclusion

The issues implicated by surrogacy contracts are many and diverse. Some could be adequately resolved through careful legislation, while others—particularly contractual considerations—are less easily managed. The most difficult issues to deal with objectively are those involving ethics, notions of morality and societal good, and policy choices that have been made collectively by the people over time, choices that have come to define our social and legal structure.

The legislature has been called to the front lines of a very heated debate, and charged with the responsibility of resolving the matter for the benefit of all the people. There are three courses of action open to it:

1. Maintain the status quo, keeping surrogate contracts legal but unenforceable.
2. Make surrogacy contracts legal and enforceable, with the concomitant necessity of reasonable regulation.
3. Make surrogate motherhood contracts illegal and unenforceable.

The recommendation of this article is that these contracts be made unlawful as well as unenforceable. The status quo is entirely unacceptable, since parties have insufficient disincentives against entering into an unenforceable contract the object of which is the creation of a child. These contracts are against the public policy and best interests of the people of this state. For the protection of all concerned, there needs to be disincentives sufficient to prevent formation of unenforceable surrogacy contracts. This can best be achieved by following the English example: making commercial surrogacy a criminal offense, but reserving sanctions against only the intermediaries and others who solicit and prepare the contract. No compelling purpose would be served by subjecting the parties in the most damaged position in the case of a disputed surrogacy contract, the parents, to criminal sanctions. In addition, equity would demand that those who profit most bear a proportionate risk.

In the event of a disputed contract where the custody of the child is at issue, both biological parents should be accorded the same rights and privileges under the law as they would enjoy in any custody dispute. Thus, the existence of the contract should not operate against either party, and the matter should be resolved "in the best interests of the child." Courts should be statutorily constrained to consider only those issues and types of evidence normally considered in a custody proceeding.

"They should not use the unique circumstances of the child's birth as a weapon against either parent."[308]

Of course, the bottom line in this analysis is that there are childless couples who will be deprived of one possible means of obtaining a baby who could satisfy their dreams and aspirations. There are also willing surrogates who would fulfill their contractual obligations without pause. Where, then, is the great harm in allowing the practice, if the greater number will never be litigated? The harm is in the damage to our perception of humanity, as well as the incalculable harm to those parties who do suffer a breach.

It is because "[t]here are, in a civilized society, some things that money cannot buy."[309]

Barbara L. Keller

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308. Graham, supra note 190, at 319.
309. In re Baby M., 109 N.J. 396, 537 A.2d 1127 (1988).