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# Surrogacy: *Sorting Through The Alternatives*

Nadine Taub†

## INTRODUCTION

The *Baby M.* case<sup>1</sup> brought the issue of surrogacy to the forefront of public attention. Although *Baby M.* itself has been settled, legislatures throughout the United States are still formulating policies regarding surrogacy agreements, which are viewed as one "remedy" for the problem of infertility. Reacting to legislative responses is somewhat different than choosing a side in the *Baby M.* case. Therefore, when looking at legislative solutions, it is essential to identify the problem to be addressed. It is also important to consider all of the possible consequences of the policies proposed. And, to some extent at least, it is necessary to be alert to possible drafting problems. In this Article, I attempt to sift through the different types of proposals advanced in the wake of *Baby M.* from a feminist perspective which emphasizes both gender equality and reproductive choice.

This Article has three parts. First, it speaks generally about the need to address the pain of infertility in effective ways. Second, it considers two generic legislative approaches to the surrogacy phenomenon. Finally, it explains my reasons for advocating a middle ground, despite certain problems which that stance presents.

## I. PROBLEM OF INFERTILITY

Infertility is experienced as a serious problem. Currently one in six couples is estimated to be unable to become pregnant within a year of

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<sup>1</sup> *Matter of Baby M.*, 109 N.J. 396, 537 A.2d 1227 (1988).

unprotected intercourse.<sup>2</sup> While overall infertility rates have not grown since 1965,<sup>3</sup> there has been a marked increase in the demand for fertility-related medical services in recent years.<sup>4</sup> This increase reflects the medical profession's interest in providing such services, a greater consumer awareness of options, and the pain infertile couples feel when, to put it bluntly, "babies are in fashion."<sup>5</sup>

Although it is important to address the problem of infertility and its attendant frustration, surrogacy does nothing to cure or prevent infertility.<sup>6</sup> At best, surrogacy is an emotionally troublesome after-the-fact accommodation to the problem. It is a remedy available only to relatively affluent couples whose infertility can be attributed solely to the woman. Instead of focusing exclusively on surrogacy, we must mobilize the resources necessary to understand and eliminate the physical causes of infertility, impaired fecundity, and infant mortality. We must identify and reduce those social pressures and behaviors that create the expectation that one will have one's own biological family, as well as those factors that make it difficult to do so. And we must expand the range of options available to those unable to bear their own biological children by fostering an inclusive rather than exclusive definition of family.

There are many actions we can take to achieve these ends.<sup>7</sup> Some possible routes include providing basic health education and services to prevent the spread of sexually transmitted diseases that impair fertility; reducing infertility due to improper medical treatment by tightening informed consent, products liability and malpractice regulations; ensuring that sterilization is truly voluntary through stringent informed consent procedures and effective monitoring mechanisms; eliminating toxins in work and living environments, especially those that affect human reproductive functions, female or male; remedying the deplorable U.S. infant mortality rate through adequate nutrition and prenatal and neonatal care; making day care and family leaves available so that childbearing need not be postponed; and, finally, recognizing the significance of relating as aunts, uncles, godparents, special friends, and honorary kin to

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<sup>2</sup> Andrews, *Alternate Modes of Reproduction*, in *REPRODUCTIVE LAWS FOR THE 1990s* 362 (S. Cohen & N. Taub eds. 1989).

Information on the extent of infertility in the United States comes from surveys conducted by the National Center for Health Statistics. Some recent statistics based on a 1982 sampling of married couples show the prevalence of infertility among married couples. See Mosher, *Fecundity and Infertility in the United States*, 78 *AM. J. PUB. HEALTH* 181 (1988).

Infertility occurs with greater frequency among certain groups. For distinctions by race, see, e.g., Aral & Cates, *The Increasing Concern with Infertility: Why Now?*, 250 *J. A.M.A.* 2327, 2329 (1983); by level of education and age, see Mosher, *supra*.

<sup>3</sup> Mosher, *Infertility: Why Business is Booming*, *AM. DEMOGRAPHICS*, July 1987, at 42.

<sup>4</sup> Aral & Cates, *supra* note 2.

<sup>5</sup> See Hirsch, *In TV and Films, as in Life, Babies Are in Fashion Again*, *N.Y. Times*, Oct. 12, 1987, at B3, col. 2.

<sup>6</sup> Taub, *Surrogacy: A Preferred Treatment for Infertility?*, 16 *LAW, MED. & HEALTH CARE* 89 (1988).

<sup>7</sup> I explore these issues in greater detail in Taub, *supra* note 6.

children. Although the agenda is long, the effort is critical if we are truly concerned about the fact and frustration of infertility. Surrogacy alone cannot solve the problem.

## II. TYPICAL LEGISLATIVE RESPONSES

There are many variations in the legislation proposed in response to *Baby M.*<sup>8</sup> I focus here on generic approaches that represent the two ends of a permissive-restrictive spectrum. Although I consider their consequences for society generally, my concerns center on the implications of their terms and rationales for women's reproductive options and place in society.

### A. Permissive Approaches

At one end of the spectrum are approaches which permit surrogacy arrangements and put the state's contract enforcement machinery at the parties' disposal. Such schemes may be the result of decisional law<sup>9</sup> or legislation;<sup>10</sup> both make clear that surrogacy contracts neither violate public policy in general nor contravene specific statutory provisions such as those prohibiting "baby selling"<sup>11</sup> or precluding termination of parental rights in the absence of findings of neglect or abandonment.<sup>12</sup>

Under the contract model, questions remain even after it is established that ordinary contract principles apply, since duress, fraud or unconscionability can render the contract void.<sup>13</sup> Similarly, recognizing the enforceability of contracts leaves open the question of whether a party may be forced to comply with the contract via specific performance or whether relief is limited to damages.

In evaluating the permissive model, it is important to appreciate two points. First, increasing numbers of couples are seeking relief for the frustration of infertility. One possible solution is adoption. However, we must be wary of assuming that adoption will meet the needs of all infertile people. Adoption is not an alternative available to everyone. To begin with, not all adults are approved as adoptive parents, at times because their race, income, sexual preference or lifestyle are found unsuitable. And not all would be adoptive parents wish to adopt the

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<sup>8</sup> It is not the purpose of this Article to examine the existing or proposed surrogacy law, but rather to consider the wide range of possible legislation. For a helpful overview of legislation under consideration in state legislatures as of 1988, see M. FIELD, *SURROGATE MOTHERHOOD* 155-59 (1988). See also Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, HASTINGS CENTER REP., Oct./Nov. 1987, at 31.

<sup>9</sup> See, e.g., *Surrogate Parenting Assocs., Inc. v. Kentucky*, 704 S.W.2d 209 (Ky. 1986).

<sup>10</sup> See, e.g., New York State Assembly Bill A. 10851-A, § 123 (1988).

<sup>11</sup> See, e.g., Ark. H. 1989 (passed by legislature but vetoed by governor).

<sup>12</sup> See, e.g., NEV. REV. STAT. § 127.287(5) (1987).

<sup>13</sup> See *Amicus Brief: In the Matter of Baby M.*, 10 WOMEN'S RTS. L. REP. 7 (1987).

children that are available. Nor is adoption an alternative we expect fertile people in our society to pursue: why, then, is it assumed to be a fulfilling option for infertile couples?

Second, it is important to recognize the tremendous liberating potential of contract parenthood. Although current practice seems to revolve around attempts to replicate the conventional nuclear family, surrogacy offers a way to form nonmarital, same-sex and other new types of families. Such experimentation can be a valuable step in finding less oppressive and more satisfying family groupings.

Despite some pulls, I reject the pure contract model for two reasons. Initially, I am troubled by the inevitable imbalance in bargaining power between the parties. Given the limited employment, educational and other options available to many women, it seems almost inevitable that the intended parents will have greater social and economic resources than the prospective birth mother. This imbalance can only increase as embryo transfer from one woman to another makes the use of women of color for gestation of white fetuses more likely. Although, in the amicus brief filed by the Women's Rights Litigation Clinic in *Baby M.*, I urged the trial court to consider traditional defenses to contracts of adhesion,<sup>14</sup> I am skeptical about whether existing contract doctrines are sufficiently able to acknowledge and correct systematic imbalances of this sort.

More fundamentally, the decision to sever all ties with a child one has helped to bring into this world is sufficiently serious that one should be permitted to change one's mind. Simply put, a deal on this important matter should not be a deal. Let me make clear, however, that my concern is a one-way street. It is the decision to terminate ties and responsibility, not to assume them, that merits reconsideration. Thus, the biological mother should be allowed to reconsider her decision to relinquish the child, while the biological father should not be allowed to reconsider his decision to adopt the child.

My reason for taking this position differs from that given by many others who arrive at the same conclusion. Many opponents of surrogacy say that the woman simply cannot anticipate how she will feel after she experiences the pregnancy and thus cannot make an informed decision prior to birth.<sup>15</sup> As others have pointed out, however, the "risk of subsequent regret is the price we [are generally willing to] pay for our commitment to personal autonomy . . . in the face of uncertainty."<sup>16</sup> To hold that the uncertainty posed by pregnancy is *sui generis* such that a woman is incapable of knowing her mind prior to the experience both glorifies

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<sup>14</sup> *Id.* See also *In re Baby M.*, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987) (court found no contract of adhesion).

<sup>15</sup> Chavkin, Rothman, & Rapp, *Alternative Modes of Reproduction: Other Views and Questions*, in *REPRODUCTIVE LAWS FOR THE 1990s* 407 (S. Cohen & N. Taub eds. 1989).

<sup>16</sup> Schuck, *Some Reflections on the Baby M. Case*, 76 *GEO. L.J.* 1793, 1799 (1988).

pregnancy, as I will discuss later, and suggests that when it comes to her reproductive functions a woman is incapable of acting rationally.<sup>17</sup> I am unwilling to make this statement.

On the other hand, to insist that a promise is more important than caring relations, particularly caring relations with one's progeny, seems misguided. It is the importance of the decision, rather than the capacity of the decision-maker, which leads me to advocate allowing reconsideration of termination decisions. Loving and responsible involvement with others is much of what life is about. Such involvement should be encouraged, not discouraged. Thus, I reject the pure contract model.

In an attempt to make proposals more politically acceptable, the contract model is often combined with regulations. Many of the bills introduced in the wake of *Baby M.*, for example, make clear that surrogacy agreements will constitute valid contracts only if they meet specified conditions.<sup>18</sup> Many of these conditions are directed at the prospective birth mother, father and adoptive parents, essentially setting eligibility requirements for all of the parties.<sup>19</sup>

There are many forms which such restrictive conditions might take. The intended parents could be required to be a stable, heterosexual family unit, morally fit, and capable of meeting a child's material as well as emotional needs. Proposals might require the birth mother and the sperm donor to be screened for genetically and sexually transmitted diseases and other medical problems. All parties might be screened to assure their ability to consent. A prospective birth mother could be required to be married and already a parent. She and her spouse might be required to undergo psychological screening and counseling, perhaps at the intended father's request, to ensure they are capable of surrendering the child. Similarly, the intended parents could be required to undergo counseling regarding the consequences and responsibilities of parenthood under surrogacy arrangements. Intended adoptive mothers might be required to demonstrate infertility or serious risk to health associated with childbearing.

Another purpose of regulatory provisions might be to ensure informed consent. Several mechanisms could facilitate this goal, including cooling-off periods, requirements of legal counsel, particularly for the birth mother, contract formalities such as filing requirements and judicial review.

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<sup>17</sup> See generally Andrews, *Alternative Modes of Reproduction*, in *REPRODUCTIVE LAWS FOR THE 1990s* 380-87, 389-90 (S. Cohen & N. Taub eds. 1989) (discusses relative merit of various legal schemes for regulating the rights of the parties involved in surrogacy arrangements).

<sup>18</sup> See generally Andrews, *supra* note 8, at 31 (surveying state responses to surrogacy agreements).

<sup>19</sup> See, e.g., MODEL SURROGACY ACT § 4 (Draft 1988) reprinted in 22 *FAM. L.Q.* 123, 127-30 (1988) (prohibiting insemination when required examination reveals sperm and ovum would be from related parties, requiring the surrogate to be mentally and emotionally capable of entering into a surrogacy agreement).

Additional provisions might regulate decision-making during pregnancy. Proposals touching on this area might safeguard the woman's right to make health care decisions during pregnancy, including the determination whether or not to abort. On the other hand, the birth mother could be required to adhere to certain medical protocols, follow doctor's instructions or to submit to medical care when requested by the intended parents.

Regulatory schemes thus may modify the permissive market approach by mandating inclusion of certain contractual terms. Regulatory proposals often alter the operation of the market in institutional respects as well. Certain proposed bills recognize and enforce only those surrogacy agreements that have received judicial approval.<sup>20</sup> Others require licensed agencies to screen participants.<sup>21</sup>

I am even more skeptical about the regulations designed to enhance the acceptability of the contract model than I am about the unregulated model. I am dubious whether informed consent provides an adequate counterweight to the systematic power imbalances inherent in the parties' bargaining positions. Further, surrogacy's liberating potential is squelched by the imposition of marriage, heterosexuality, financial capability and other social and economic criteria on the parties. I fear that courts and agencies exercising the power to approve and disapprove particular agreements will tacitly impose these or similar restrictions. In short, the contract model, with or without regulatory modifications, fails to solve the surrogacy problem.

## B. Restrictive Approaches

Proposals at the restrictive end of the spectrum seek to rule out paid surrogacy. In their most extreme form, they criminalize making or receiving any payment in connection with parenthood contracts. Such legislation thus subjects birth mothers as well as brokers and sperm donor-fathers to criminal penalties.<sup>22</sup> More moderate restrictive statutes

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<sup>20</sup> See, e.g., UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, Alternative A, § 6, reprinted in 15 FAM. L. REP. 2012-14 (1989) (court hearing and approval of surrogacy agreement based on finding, *inter alia* after home study of intended parents and surrogate mother, that intended parents, surrogate and surrogate's husband, if any, meet the standards of fitness applicable to adoptive parents).

<sup>21</sup> See, e.g., MODEL SURROGACY ACT § 4(c), *supra* note 19, at 129-30 (licensed surrogacy agency responsible for determining whether prospective surrogate "appears to be suited to being a surrogate" and whether intended parents "appear suited to going through process of having a child through surrogacy and raising a child born of a surrogacy arrangement").

<sup>22</sup> See, e.g., New York State Assembly Bill A. 10851-A, § 123 *supra* note 10. Several problems inhere in a proscription this broad. First, as written, the bar on requesting, accepting, receiving or giving fees "in connection with" a surrogacy contract appears to make a woman a criminal for paying a lawyer to tell her whether or not it is illegal to enter such a contract. Similarly, it seems to make a criminal of a psychiatrist who discusses with a woman whether or not to agree to a surrogacy arrangement. More fundamentally, the provisions make a criminal of the very woman the statute purports to protect.

declare paid surrogacy agreements contrary to public policy, void and unenforceable, but do not make them illegal.<sup>23</sup>

Two major concerns appear to lie behind proposals restricting or outlawing paid surrogacy. The first is a concern for the dignity of women, and the second is a concern for what may be called the sanctity of life. While I share these concerns, I do not think that legislation outlawing or voiding paid surrogacy agreements adequately addresses either concern.

With regard to the "dignity of women" rationale, I have three qualms. First, the rationale glorifies pregnancy, and may restrict women's choices; second, it assumes that payment will devalue and lower respect for surrogate mothers; and third, it narrows the definition of dignity for women.

Initially, I am troubled by the special emphasis placed on pregnancy by legislation designed to protect birth mothers. Proposed New York legislation, for example, seeks to outlaw commercial surrogacy because, *inter alia*, "the characterization of gestation as a 'service' . . . depersonalizes women and their role in human reproduction."<sup>24</sup> Similarly, the New Jersey Supreme Court suggested in *Baby M.* that women are degraded by surrogacy agreements.<sup>25</sup> Such expressions reflect the view that much of the respect that is and should be accorded women is due to their unique role in reproduction; that is, in gestating the fetus. Approaches that bar enforcement of surrogacy contracts on the theory that a woman cannot know her mind before she experiences the pregnancy also isolate that experience from all others. Thus, the assumption that pregnancy is different from all other unknown experiences cannot help but glorify it.

Not all women can or do become pregnant, however, and the glorification of pregnancy contributes significantly to the trauma of infertility. Focusing on gestation denigrates both the many supportive and caring relationships that are not based on gestational bonding and also the many unique and important generative contributions made by women apart from their child-bearing.

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<sup>23</sup> See, e.g., the UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, *supra* note 20, Alternative B (approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association House of Delegates; not yet adopted by any state). Note that this type of statute may often seek to penalize brokers' fees. However, the attempt to criminalize brokers' fees presents serious drafting problems. For example, the Michigan statute provides that "[a] person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both." MICH. COMP. LAWS ANN. § 722.857 (West Supp. 1989). Under such a formulation, it is difficult to see how a professional consulted by any party prior to entering into a surrogacy agreement would not be subject to sanctions. It is likewise difficult to see how a provision could be written to achieve the desired end without having this undesired consequence.

<sup>24</sup> New York State Assembly Bill A. 10851-A, *supra* note 10, Statement of Purpose set forth in Governor's Program Bill Memorandum, at 3.

<sup>25</sup> *Matter of Baby M.*, 109 N.J. 396, at 442.



Further, approaches that foster a mystique about pregnancy constrict women's procreative choices. While the reality of pregnancy—with its joys and difficulties—cannot be denied, glorifying pregnancy makes it harder for women to choose to forego childbearing by making other types of relationships appear far less attractive. Women who do not experience gestation as bonding during pregnancy may come to question their adequacy as women. Moreover, suggesting that pregnancy is the major source of dignity for women may make it harder for fertile women to choose to forego conventional motherhood. The "choice" to give birth may be weighted unduly by the fear of missing out on life's most meaningful experience—one that cannot be matched either by rewarding work or by the gratification of becoming an adoptive mother, let alone an aunt, godmother, or other honorary kin.

The language used by proponents of restrictive approaches evokes rosy images of pregnancy as uniformly poignant, and as inevitably involving a fulfilling relationship with the developing child. Images of this sort are all too reminiscent of the official versions of motherhood that feminists correctly point out are used to "structure a woman's will to be a mother."<sup>26</sup> Protective legislation thus serves to heighten the pressure on women to undergo *in vitro* fertilization and other technologically intensive routes to motherhood.<sup>27</sup>

In sum, I am concerned about focusing on gestation as the crucial aspect of motherhood. I fear that emphasizing pregnancy in this way will both limit options available to women and place value judgments on the options remaining. Even if there are short-term advantages to privileging pregnancy, the risk is all too great that women will both be seen and see themselves primarily as babymakers. Their life chances will be constrained by this view of their primary role. Moreover, the focus on pregnancy may have definite costs to the role of men in childrearing. Although the glorification of pregnancy may be effective in defeating male claims to a child, it may also severely limit male willingness to share in childrearing and female ability to allow men to do so.<sup>28</sup>

<sup>26</sup> Corea, *What the King Can Not See*, in EMBRYOS, ETHICS AND WOMEN'S RIGHTS 88 (E. Baruch, A. D'Adamo, Jr. & J. Seager eds. 1988).

<sup>27</sup> Of course, the pressure to have one's own genetic children is also important here, but, as Michele Stanworth has suggested, that factor may be more important for men than for women. See Stanworth, *Reproductive Technologies and the Deconstruction of Motherhood*, in REPRODUCTIVE TECHNOLOGIES 22 (M. Stanworth ed. 1987).

<sup>28</sup> The emphasis on gestational as opposed to genetic contributions may also constrict reproductive freedom in other respects. Abortion is an obvious area in which women's reproductive choice is linked to the value placed on genetic ties. A woman's right to choose abortion has been justified in large measure by her right to bodily integrity: she cannot and should not be forced to sustain fetal life within her own body. This justification has limited value, however, in situations where fetal life may be sustained outside her own body either by artificial means or as a result of transfer to another woman's body.

For example, requirements that post-viability abortions be performed by means designed to result in live births, so long as there is no additional risk to the woman's health, do not interfere with a woman's bodily integrity. Nor would the bodily integrity of a woman seeking

My second qualm with regard to the "dignity of women" rationalization for prohibiting surrogacy agreements relates to the assumption that payment inevitably leads to disrespect for unique and important contributions, in this case gestation. Opponents of commercial surrogacy object to allowing financial considerations to be an explicit factor in determining a woman's procreative course and to characterizing gestation, a special physical function which only women can perform, as a "service." In their view, women are reduced to "gestators" or "incubators" once gestation is separated from the process of bearing and raising a child.<sup>29</sup> To me, this effect does not seem so automatic.

The relationship between payment and value in our society is, of course, a complex one. In the public sphere, money is closely linked to power and is the traditional way of demonstrating value. The general equation between money and value seems to hold whether or not unique physical attributes and abilities are involved. For example, the astronomical salaries baseball stars are able to command do not seem to depersonalize or imply disrespect for them. Nor do we respect an artist less because she accepts money for a painting. And although we may accord certain kinds of workers, such as artists and intellectuals (and perhaps teachers), less respect if they appear to be motivated solely by money, this does not seem to be true of other workers, such as doctors,

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a pre-viability abortion be offended by a requirement that her embryo be transferred to another woman, once successful embryo transfers early in pregnancy are routine.

In justifying a woman's right to choose abortion where bodily integrity is not at stake, it is essential to appreciate the moral and emotional baggage that accompanies genetic parenthood for women. Denying the importance of these claims and responsibilities in the surrogacy context makes it more difficult to assert the importance of such concerns in the abortion context. Does recognizing the importance of genetic contributions help men defeat women's choice in the abortion context? I would say so long as women still bear the brunt of childrearing and the stigma of surrendering for adoption, they get to decide, even where their bodily integrity is not at stake. The consequences of contributing to bringing a child into this world are not sex-blind. Women have traditionally been expected to bear that responsibility and have in fact borne it day in and day out. Their sense of responsibility endures even after adoption, perhaps because of the gendered expectation that women will meet the burdens of childrearing.

This relative devaluation of genetic ties may also have an unfortunate impact on women's health and autonomy in the egg donation context. According to the press, egg banks and egg embryo transfers have become a reality. See, e.g., *Clinic Plans Variation on Fertility Techniques*, N.Y. Times, July 19, 1987, § 4, at 26, col. 1 (discussing the establishment of an egg bank in a major medical center in Cleveland, Ohio); Brozan, *Rising Use of Donated Eggs for Pregnancy Stirs Concern*, N.Y. Times, Jan. 18, 1988, at A1, col. 1.

The major source of eggs in the past has been extra eggs produced by women undergoing *in vitro* fertilization. However, as women are increasingly able to freeze these extra eggs for their own future use, pressure on other women to donate has mounted.

Although donors are subject to risks resulting from hormone stimulation used to increase egg production and invasive techniques used to retrieve the eggs, women who are reluctant to donate may still be considered selfish. Arguments that focus exclusively on these negatives may be of limited value in cases involving tubal ligation, where few additional risks are involved, and where technological improvements diminish the risks in other contexts. Recognition of genetic links, then, may be important in enabling women to choose freely between donating eggs and resisting pressures to do so.

<sup>29</sup> THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATION, 84-85 (1988).

lawyers, and athletes. Workers in both of these categories are actually likely to vary in the extent to which they are motivated by money: therefore, women who bear children for pay should not be any more subject to automatic disrespect than other workers.

There is something suspicious about a society's sudden and vociferous concern with payment now that women propose to take compensation. I wonder whether people fear that rewarding the reproductive functions of a woman will separate them from her overall identity. The concern seems not to be that payment necessarily precludes dignity, but perhaps that a woman's special quality depends on her role as gestator and nurturer. The implication is that the identity of women as women will be compromised by the recognition that baby-making is performed in different ways for different reasons by different women. The fear is that women will become merely second-rate men. But is this the case? To what extent must women conform to their historical role to stave off threats, real though the threats may be, to their status?

Third, I am concerned that restrictive statutes fail to recognize other sources and components of dignity. Respecting a woman's autonomy seems at least as important as respecting her reproductive functions in according her dignity. Respecting a woman's decision-making capacity presupposes both that she is open to persuasion and that she is able, personally and legally, to assume responsibility for her actions. Thus, even though as individuals we might want to try to convince her not to undertake contract parenthood, I am not sure that the state should determine in all cases what she may do and require her to conform to that determination under threat of criminal penalty. It seems far more important—and effective—to expand opportunities available to potential surrogate mothers, and to attempt to reduce the desperation of those seeking to bear their own biological children.

I am far more sympathetic to the second argument, "sanctity of life," that by allowing "baby-selling" in the form of commercial surrogacy, society somehow devalues children and thus humanity. This concern has two components. First, there is the fear that in permitting the payment of money to obtain a child, society puts a price tag on human life. I am not sure how well founded this fear is. Although a romantic vision of children as the product of loving relationships may be appealing, it hardly conforms to reality, and such origins do not seem essential to a person's well being. What counts, it seems to me, is love and responsibility in relationships with the child; I seriously doubt that the transfer of money helps to predict whether or not these elements will be present. Nor am I sure that I can meaningfully distinguish money spent on surrogacy arrangements from the sums couples now invest to obtain children

through *in vitro* fertilization and other reproductive technologies.<sup>30</sup>

I find the second concern more compelling: there does seem to be something wrong with paying people to terminate their relationships with children whom they have helped to bring into this world. Because I believe that loving and responsible relationships are essential and want to encourage people to maintain such relationships, I think that a woman who enters a surrogacy agreement should be allowed to change her mind after the child's birth. But again, I am not sure payment is the crucial factor in determining the quality of a relationship. While some surrogate mothers maintain warm relations with the children they bear and the adoptive family, I do not suggest that this is true in all cases. Still, while it does little to ensure that a child will be supported by warm, loving relationships, a criminal proscription on commercial surrogacy clearly restricts the types of relationships children and adults can form.

It is far from obvious that children will automatically be better off when they result from surrogacy arrangements without compensation, and I am certain that the lack of payment does not ensure love and responsibility in conventional parenthood. Moreover, I am not sure that payment precludes warmth and responsibility in relationships. Will rewarding contract mothers for their services govern feelings and relationships in this context any more than my salary as a teacher governs the warmth and responsibility I feel for my students? What distinguishes contract parenthood from other activities? Once again, I am suspicious that our concerns about the sanctity of human life are only surfacing now that we are talking about paying women for their contributions to reproduction. After all, sperm donors have been paid for years. Society's unquestioning acceptance of this practice has not cheapened human life. In short, I fear that the proponents of restrictive legislation envision traditional, uncompensated motherhood as the only way to meet the needs of children and women.

In addition to the aforementioned concerns regarding legislation outlawing commercial surrogacy,<sup>31</sup> there is another issue only partially articulated by proponents of restrictive surrogacy laws: the severe imbalance of bargaining power between the women who are likely to bear the children and the people who are likely to adopt them. Any effective proposal will need to address this imbalance. But I seriously question whether legislation which makes a criminal of a woman who accepts a

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<sup>30</sup> To obtain a child via surrogacy contract, many couples, like the Sterns in the *Baby M.* case, pay \$10,000 to the surrogate and \$15,000 in broker's and other fees. The total cost to the contracting couple generally ranges from \$25,000 to \$45,000. Avery, *Surrogate Mothers: Center of a New Storm*, U.S. News and World Report, June 6, 1983, at 76. The expense of *in vitro* fertilization may be comparable. One attempt costs from \$3500 to \$5000, and most couples make several attempts. Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in *REPRODUCTIVE LAWS FOR THE 1990s* 50 (S. Cohen & N. Taub eds. 1989).

<sup>31</sup> See, e.g., New York State Assembly Bill A. 10851-A, *supra* note 10, Statement of Purpose.

payment—however small—and denies her access to the courts if she does not get paid is the best way to redress that power imbalance.

### III. A PROPOSED MIDDLE GROUND

My difficulties with both the permissive and restrictive ends of the spectrum lead me to advocate a middle ground with respect to surrogacy. Although contract parenthood has an important potential for expanding the ways in which people, particularly adults and children, can relate, its centerpiece is the notion that a progenitor should sever her ties and responsibility to her offspring. Yet the dangers are not clear enough to me to justify the restraints on personal liberty and societal experimentation which such prohibition entails. Thus, I would take a cautious approach that seeks to permit, but not promote surrogacy, to encourage repeated consideration of the decisions to relinquish, and to provide some counterweight to the inevitable inequalities in bargaining power.

As a legal scheme, this cautious approach would resemble an adoption model,<sup>32</sup> under which a woman's consent to relinquish her child would not be valid unless given after a designated period following birth.<sup>33</sup> Payment would not be precluded for the reasons already discussed. Payments made prior to the decision to retain rather than relinquish the child need not be returned, and substantial post-decision payments would be allowed, in order to reduce financial pressures on the birth mother's decision.

I want to emphasize my opposition to measures that would give courts or other institutions the power to approve or reject surrogacy agreements. Such bodies are poorly equipped to perform these functions, in light of their traditional perspectives, and denials of equal protection are too likely to result. Rather, I would rely on state statutes and decisional law (like those relied on in *Baby M.*) which make clear that parental rights may only be terminated post birth. The inability of would be adoptive parents to enforce a pre-birth commitment to relinquish a child largely mitigates the imbalance in the parties' bargaining position.

What impact would such a scheme have? It is difficult to predict the degree to which the uncertainty created would deter surrogacy. Interest

<sup>32</sup> Others have advocated similar models, although their precise proposals and their analyses differ in some respects from mine. See, e.g., M. FIELD, *supra* note 8.

<sup>33</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-107B (1989) ("[a] consent given before seventy-two hours after the birth of the child is invalid"); FLA. STAT. ANN. § 63.082(4) (West 1985) ("[t]he consent shall be executed only after the birth of the child"); KY. REV. STAT. ANN. § 199.500(5) (Michie/Bobbs-Merrill Supp. 1988) (no consent for adoption shall be held valid if given before the fifth day after the birth of the child); MASS. GEN. LAWS ANN. ch. 210, § 2 (West 1987) ("written consent shall be executed no sooner than the fourth calendar day after the birth of the child to be adopted"); NEV. REV. STAT. ANN. § 127.070.1 (Michie Supp. 1989) ("[a]ll releases for and consents to adoption executed by the mother before the birth of the child or within 72 hours after the birth of a child are invalid"). M. FIELD, *supra* note 8, at 182.

in the practice is apparently high despite lack of clarity in the law.<sup>34</sup> Permitting the birth mother to change her mind would certainly give the intended parents a strong incentive to get to know her well and to do as much as they can to ensure that she understands what she is getting into and that she is comfortable with the arrangements.

The major problem presented by such a scheme is the possibility of custody disputes: if the birth mother declines to relinquish the child and sever her parental rights, both biological parents are in a position to claim custody. Faced with the prospect of the prolonged uncertainty, bad feelings, and financial burdens such disputes entail, some commentators propose a presumption in favor of the mother, although the reasons given for this preference differ. Some argue that the relationship which the birth mother has already established with the child justifies a flat preference for her.<sup>35</sup> Others argue that a clear rule is necessary to forestall protracted and destructive litigation.<sup>36</sup> I am troubled by a preference for the mother, and in particular by a justification which focuses retrospectively on gestation alone.

The problem of competing parental claims is one with which feminists have been struggling for some time and in a variety of contexts.<sup>37</sup> Feminists generally wish to view parenthood in terms of responsible and caring relationships rather than exclusive ownership.<sup>38</sup> Disagreements among feminists often reflect differing opinions about what women may gain from encouraging male involvement as well as about the ways such involvement may come about.<sup>39</sup> Feminist approaches to competing parental claims have tried to treat both women and children fairly.

Given feminism's dual focus on women and children, the temporal focus for determining conflicting claims may be unclear. Should the decision-maker look to the past or to the future? From the child's perspective, the questions are prospective: what physical and emotional care will be forthcoming and what relationships—including ties with the past—will meet the child's future needs? In contrast, fairness from the woman's perspective may involve both recognition of the contenders'

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<sup>34</sup> *Mothers Denounce Surrogate Parenting at Hearing*, N.Y. Times, Dec. 11, 1988, § 1, at 81, col. 1.

<sup>35</sup> See, e.g., Hubbard, *A Birthmother is a Birthmother is a . . .*, SOJOURNER: THE WOMEN'S FORUM, September 1987, at 21. See also Chavkin, Rothman & Rapp, *supra* note 15.

<sup>36</sup> See, e.g., M. FIELD, *supra* note 8, ch. 9.

<sup>37</sup> Much of the concern has focused on custody disputes at the time of divorce. See generally H. KAY, SEX-BASED DISCRIMINATION 316-326 (1988). Debates have also centered on unmarried fathers' rights to forestall adoption without their consent, and on sperm donors' rights to maintain contact with their offspring. Less attention has been paid to the state's attempts to terminate parental rights, particularly of poor women. *Id.* at 359-375.

<sup>38</sup> See, e.g., Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988); Rothman, *Surrogacy: A Question of Values*, 8 CONSCIENCE 1, 2-3 (1987).

<sup>39</sup> Compare Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982); Bartlett and Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986).

past contributions and estimates of the likelihood of their future efforts. At times, feminists attempt to meld the two temporal perspectives by citing past performance and/or current relationships as a basis for predicting future performance. That may well be what the presumption's proponents intend when they seek to resolve competing claims in surrogacy cases by reference to the birth mother's gestational contribution and existing relationship with the child.<sup>40</sup> But although existing relationships and past contributions are often more helpful than expressions of intent, they may not always accurately predict future behavior.

There are additional problems with such a strong presumption for the birth mother. First, the exclusive focus on gestation fails to build on any sense of relationship or responsibility felt by the other participants in the reproductive process, who will see little point in altering their behavior. Moreover, decisional rules that focus exclusively on current bonds may be used to defeat the parental claims of vulnerable mothers in other contexts—as, for example, in cases where poor women have placed their children in foster care temporarily or where women in transition have temporarily left their children with the father.

The prospect of protracted custody litigation is genuinely troubling. The child's placement will be in limbo during the contest. Lengthy court proceedings will take a financial and emotional toll on all involved, and will pose particular difficulties for the party with fewer financial resources: usually the birth mother. Pitting the intentions and resources of the adoptive parents against claims based on an existing relationship with the birth mother will almost inevitably involve sex and class bias.<sup>41</sup>

A scheme which allows the birth mother to change her mind post birth may deter some litigation. Under such a scheme, whether or not she keeps custody, the birth mother can normally retain her parental rights, including the right to contact and visit with her child. As a result, intended parents who are unwilling to tolerate the birth mother as a presence in "their" child's life may decline to fight for custody.

Allowing the birth mother to change her mind may also enhance predictability of the outcome. Provisions which clarify the birth mother's situation may increase the likelihood that she will retain cus-

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<sup>40</sup> It is not clear that everyone who would give absolute superiority to maternal claims in custody disputes is focusing on future performance. Even some who would not always honor such claims may focus on past contributions. See, e.g., Gordon, *Reproductive Rights for Today*, 245 THE NATION, Sept. 12, 1987, 230, 232, stating

"Some feminists argue the absolute superiority of maternal claims in all custody disputes; I do not. It is not a question of the equal contribution of egg and sperm but of the difference between a genetic and a gestational relation to a future child. The latter is a far more burdensome and personal commitment and deserves greater recognition, although other factors might supersede it in some cases."

<sup>41</sup> For a discussion of economic and gender factors in custody battles following divorce, see, e.g., Polikoff, *supra* note 39; Sheppard, *Unspoken Premises in Custody Litigation*, 7 WOMEN'S RTS. L. REP. 229 (1982).

tody until she determines what she wants to do, thereby improving her chances of winning a custody fight. Close contests would only be probable where the birth mother surrenders the child and then seeks to regain custody. Such contests—whatever their number—will come at some cost; but when all is said and done, I think it is a cost we must accept.

Much of the pressure for an absolute preference is prompted by the dangers feminists correctly perceive in the use of open-ended rules for deciding parental disputes, such as custody. Like other parental disputes, surrogacy-related custody conflicts are likely to be permeated by sex and class bias. However, rigid preferences have their dangers too. Thus, seeking ways to identify and correct for bias<sup>42</sup> and trying to minimize conflict by maximizing the situations in which multiple relationships can be tolerated may be the best tacks in trying to chart a course between the romanticization of pregnancy and the reduction of woman to “vessel.”

#### IV. CONCLUSION

Attempting to formulate a policy to deal with surrogacy could be seen as a zero-sum situation for feminists. Alternatives at one end of the spectrum expand the options available to individuals at the risk of discouraging loving and responsible relationships and obliterating women's special identity. Alternatives at the other end of the spectrum preserve certain relationships and women's special identity at the cost of limiting individual liberty and reinforcing traditional constraints.

I value both individual liberty and the web of caring relations, and I see both benefits and dangers in women's special identity. Thus, it is not surprising that when faced with this Hobson's choice, I urge a middle ground in regard to surrogacy legislation. It is even less surprising that I urge feminists to redefine the problem and to seek more far-reaching and effective solutions to the fact and pain of infertility.

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<sup>42</sup> See, e.g., *Amicus Brief: In the Matter of Baby M.*, *supra* note 13.