2001

A Civil Liberties Analysis of Surrogacy Arrangements

Lawrence O. Gostin

Follow this and additional works at: <https://scholarship.law.edu/jchlp>

Part of the [Health Law and Policy Commons](#)

Recommended Citation

Lawrence O. Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, 17 J. Contemp. Health L. & Pol'y 432 (2001).

Available at: <https://scholarship.law.edu/jchlp/vol17/iss2/5>

This Comment is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Journal of Contemporary Health Law & Policy (1985-2015) by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

“© 1988, Reprinted with permission of the American Society of Law, Medicine & Ethics. May not be reproduced without express written consent.”

L. Gostin, “A Civil Liberties Analysis of Surrogacy Arrangements,” *Law, Medicine & Health Care*, 16 (1988): 7-17.

CIVIL LIBERTIES

A CIVIL LIBERTIES ANALYSIS OF SURROGACY ARRANGEMENTS

Larry Gostin

Proponents of surrogacy arrangements¹ assert that a married couple's right to “procreative autonomy” includes the right to contract with consenting collaborators for the purposes of bearing a child. The right to “genetic continuity” and to rear offspring are all part of the right of reproductive choice for the contracting father and his partner.²

Critics of surrogacy arrangements similarly cite “reproductive autonomy” as the basis for their claim that women cannot be compelled by contract to use their bodies in particular ways—either to forgo the right to abortion or to be “fetal containers.” The right to autonomy over her own body and to rear the offspring she has borne are all part of the mother's reproductive freedom.³

Both proponents and critics of surrogacy arrangements, therefore, claim that their positions maximize freedom and liberty. Each position, of course, focuses on the autonomy of the party the commentator favors; the analysis is invariably outcome-determinative, without enunciating a neutral civil liberties framework. Neither proponents nor critics define clearly what the “right to procreate” entails, or what resolution is warranted when there is a conflict. What is absent from the debate, and what I wish to offer, is a civil liberties analysis of surrogacy arrangements.

In this essay I come to the following conclusions based upon a civil liberties analysis. First, surrogacy arrangements cannot be prohibited or criminalized. Second, the state cannot ban the exchange of money for surrogacy services, provided the money is paid for conception, gestation, and birth. Money, however, cannot be paid on condition that the

gestational mother waive her parental rights over the child. Third, contractual provisions that require the gestational mother to waive her parental rights or her rights to privacy and autonomy are void and unenforceable. Fourth, when the child is born, both the gestational mother and the genetic father are the legal parents. If the gestational mother declines to relinquish her parental rights and a custody battle ensues, custody of the child should be determined under a “best interests” standard.

Non-specific performance of the surrogacy agreement is not an elegant result from the perspective of contract law. It also creates risks for those who enter into surrogacy arrangements. It does not foreclose the practice of surrogacy, but would encourage those considering this path to think carefully before planning to bring a child into the world using this method of reproduction. There would be no guarantee that the gestational mother would, after birth, waive her parental rights. If she refused to do so, however, the genetic father and she would find themselves in no worse position than that of any two parents involved in a custody dispute.

I want to enunciate the positions taken in this essay very clearly because they are, to some extent, contrary to the elegant decision of the New Jersey Supreme Court in the Baby M case.⁴ The New Jersey Supreme Court treated that surrogacy arrangement as a simple custody matter, as I do. However, the court went further by banning, if not criminalizing, commercial surrogacy.

Where Reproductive Freedoms Coincide

The parties in a surrogacy arrangement have substantial civil liberties interests: the rights to privacy in making an intimate personal decision about reproduction; the right to autonomy in decisions affecting the health and welfare of the mother and the offspring; and the right to association with future offspring. In this section I will demonstrate the human and constitutional interests at stake in surrogacy arrangements. I will argue that if a private consensual arrangement promotes happiness and contentment for both parties, and involves the exercise of constitutional rights to privacy and autonomy, then the state should not interfere with these arrangements in the absence of a clearly demonstrated harm to the child. This civil liberties analysis balances the strong reproductive rights that the gestational mother and genetic father have individually and collectively, on the one hand, with the government’s speculative interests in protecting the unborn child, on the other. I conclude that the state has no sufficient ground for banning or

criminalizing surrogacy arrangements.

What interests do constitutional rights to privacy place beyond the reach of government? The Constitution's promise of privacy and autonomy enfold a constellation of intimate sexual, social, and family relationships, including bodily integrity, personal choice, and future association with offspring. Privacy is a "sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality."⁵

The U.S. Supreme Court has enunciated a fundamental right "whether to bear or beget a child."⁶ Citizens have a privacy right to decide whether, how, and when to bear a child. *Griswold*,⁷ *Loving*,⁸ and *Zablocki*⁹ defined that right within the marital relationship. The Court in *Griswold* regarded marriage as "an association . . . a harmony of living . . . a bilateral loyalty, not a commercial or social project." In *Eisenstadt*¹⁰ and *Carey*¹¹ the Court extended *Griswold* to non-married couples, using unequivocal language in its defense of interpersonal relationships. Contraception, it stated, concerns "the most intimate of human activities and relationships"¹²; a couple is "an association of two individuals each with a separate intellectual and emotional makeup."¹³

The Constitution's promise of privacy protects not only human relationships but also the right to decide whether to conceive and to carry a fetus to term. *Roe v. Wade*¹⁴ concerned the potential detriments to pregnant women of being made to carry an unwanted fetus to term—the medical and psychological harm of having to bear and, possibly, to raise the child, and the distress of having their own choices about their bodies overridden by the state. Later, in *Akron*¹⁵ and *Thornburgh*,¹⁶ the Supreme Court refocused its thinking on abortion, describing it as the woman's private informed choice, which is for her and her physician alone to make.

The contraception cases decided by the Supreme Court also concern the right to make choices about future offspring. In *Griswold v. Connecticut*,¹⁷ the first privacy case decided by the Court, the state had imposed a criminal penalty upon a physician for advising and prescribing contraception to a married couple, despite the fact that pregnancy would have jeopardized the woman's health. The Court overturned the statute, noting that there was a "zone of privacy created by several constitutional guarantees."¹⁸ By criminalizing the use of contraception the government had exerted a "maximum destructive impact" upon privacy.¹⁹

Finally, the Supreme Court has held that natural parents have a constitutionally protected interest to rear their child.²⁰ The "fundamental liberty interest" in the care, custody, and management of the child extends even to the unwed father.²¹ A father's interest is constitutionally protected when he "act[s] as a father toward his children."²² It is difficult for any

unwed father to demonstrate his parental attachment to a newborn. But a father's desire to reproduce and his financial and emotional attention to the welfare of the fetus help create a meaningful paternal involvement.

Surrogacy arrangements, then, deserve constitutional protection because of the private relationships and procreative intention of the parties, the woman's control over her own body, and the rights of genetic parents to association with their child.

The gestational mother has a particularly strong right of privacy and autonomy, founded upon several factors: her experience of artificial insemination, the changes in her body, her emotional commitment, her nurturing of the fetus for nine months, and the labor and pain of giving birth. The fact that she did not originally intend to keep the child does not dispose of this complex constitutional and social issue. Her bonding and identification with a baby born of her own body is an understandable and real human experience.

Supporters of surrogacy contracts ask the gestational mother to alienate herself from the child she is carrying, to become a dispassionate incubator for the growing fetus. The gestational mother's claims to control her own body and to be involved in the parenting of her child cannot be so easily trivialized. Her physical and psychological burdens deserve respect beyond the artificial confines of a sterile contract.

The genetic father and his partner use the surrogacy arrangement for the purpose of having a child, implementing their personal decision to procreate and to obtain the right to intimate association with the future offspring. The genetic father has a deep desire to reproduce and to care (usually tenderly) for a child. It is the father's intention to procreate that begins the process of reproduction; without his desire to reproduce, there would be no conception and birth. He has demonstrated by his personal decision to enter into the arrangement that he has paternal feelings and desires similar to those of a father in a conventional relationship. His psychological commitment and human desire to raise and care for a child entitles him to be treated as a parent and to assert a privacy right consistent with that status.

It is true that the donation of sperm does not involve the intensely private sexual and social relationship of conventional reproduction. Nor does a man have an unqualified right to use his power in the marketplace to inseminate a stranger for a fee. The principle enunciated in *Griswold*, that privacy protects an intimate sexual and social relationship but not a commercial project, is apt to demonstrate that the genetic father's privacy rights are not without limit.

Critics would either ban or criminalize surrogacy because of the greater

stake the gestational mother brings to the arrangement.²³ This weighing of human interests in favor of the gestational mother may have meaning where there is a discernible conflict of interests. But the logic of those who would ban surrogacy falters considerably when the interests of both contracting parties coincide—as they usually do. In such cases the gestational mother’s constitutional interests militate against state restrictions on surrogacy, not in favor of them.

Balanced against the powerful individual and collective interests in surrogacy arrangements are the undocumented and speculative interests of the state. Some persuasively argue that the state has a compelling interest in protecting the child.²⁴ But surrogacy arrangements do not pose any clear harm to children. There is the academic argument that no matter how maltreated or unwanted a child may be, she is better off than never having been born.²⁵ This is not a powerful argument because the state may well have a legitimate interest in preventing the birth of babies whom no one will want or care for. There are, however, no data to demonstrate that children born as the result of surrogacy contracts are worse off by any measure—that they suffer more neglect, abandonment, and physical abuse, or that they receive less nurturing and love.

The *Baby M* court acknowledged that the long-term effects of surrogacy contracts are not known, only “feared.”²⁶ The court noted that the child might suffer from the knowledge that she was born as a result of a commercial transaction, and that the natural father and gestational mother might suffer when they “realize the consequences of their conduct.”²⁷ The fact is that children are often born in adverse circumstances. Children can thrive when there is only one parent to love them. The infant born of a surrogacy arrangement is not necessarily disadvantaged, for she has a genetic father, an adoptive mother, and a gestational mother who may each come to treasure her. The *Baby M* court, moreover, is wrong to suppose that the parents will invariably, or even frequently, regret their decision. In the majority of cases the parties see the arrangement as in their own best interests. The hurt and human sadness evident in the *Baby M* case should not be used as a benchmark to judge all surrogacy arrangements.

Others point to the irreconcilable problems posed when the surrogate’s baby turns out to have a physical deformity or a genetically inherited disease, or to be mentally retarded.²⁸ Men who sign surrogacy agreements, it is suggested, want perfect babies in their own images, and would be more likely to reject an imperfect child. It is true that surrogacy arrangements appear to stack the deck against an imperfect child, since neither party has any clear stake in the child. The gestational mother is invited not to think of the baby as her own. The contracting father has a

certain image of how the child should be. He will be less likely to bond with the infant if he has not seen it growing in a woman he loves, seen it being born, or had a relationship with it in the early days and weeks of its life. While the possibility of both parents disclaiming responsibility for an imperfect child is an understandable concern, no data, again, are available to support it. Many handicapped infants are abandoned, and it is not at all certain that surrogacy arrangements would have any significant impact on the rate of abandonment.

Those who would ban or criminalize surrogacy have a heavy burden to explain why they would allow the state to stifle an activity that fulfills a human need without imposing any tangible harm on others.

Families in our society take many different forms, and a great deal of latitude in "private ordering" should be encouraged. Tolerance of diversity among families, and in the way they are formed, is part of a rich civil liberties tradition. Society should not be too quick to judge those who, for whatever reason, use surrogacy as a method of reproduction.

The New Jersey Supreme Court in the *Baby M* case found "no offense to our current laws where a woman voluntarily and without payment agrees to act as a 'surrogate' mother, provided that she is not subject to a binding agreement to surrender her child."²⁹ However, it found that the constitutional right to procreate does not extend as far as claimed by the parties to a surrogacy arrangement. "The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that."³⁰ The court suggested that Mr. Stern and Ms. Whitehead had not been deprived of the right to procreate as defined, because Baby M is their child.³¹ It may be true that these two people were not denied their constitutional right to procreate. However, the decision of the court to ban, or even criminalize, commercial surrogacy will obstruct, or certainly chill, the procreative rights of persons using this method of reproduction in the future. Had the New Jersey Supreme Court come to this decision previously, it is clear, Baby M would not have been born.

The New Jersey court held that the payment of money as part of a surrogacy agreement is contrary to state law and policy. Commercial surrogacy is "illegal, perhaps criminal, and potentially degrading to women."³² In the following section I examine the question of whether the payment of money should change a legal, possibly constitutionally protected, activity into an unlawful, possibly criminal, enterprise.

The State Should Not Permit the Payment of Money in Return for a Binding Waiver of Parental Rights

If parties have a privacy right to enter into surrogacy arrangements, should there be any bar to the exchange of money? I will argue that payments that are made expressly on condition that the gestational mother agree to a binding termination of her parental rights are tantamount to the purchase of a baby and should be prohibited. However, the state should not ban payments to the woman for the conception, gestation, and birth of the child.

Legal and ethical objections to surrogacy often turn on the payment of money to the gestational mother and to a third-party broker. The British, as their media vividly expressed, were revolted by the idea of paying a price for a human being. The Surrogacy Arrangements Act 1985, which was hastily enacted before the Warnock Committee³³ presented its report to the government, prevents third parties (i.e., brokers) from deriving financial benefits.³⁴ The act does not expressly ban payments to the gestational mother.

The most articulate voice in the United States for banning commercial surrogacy has been the New Jersey Supreme Court. In the *Baby M* decision it stated:

This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition of payment of money in connection with adoptions exists here.³⁵

Treating a child as a commodity is unconstitutional and contrary to public policy. The Thirteenth Amendment to the Constitution prohibits involuntary servitude, or the buying and selling of human beings. The Pennsylvania Supreme Court, for example, held that certain payments by adoptive parents that appeared to be for the child were unconstitutional. The state constitution declared that all people are born with inalienable rights, including the right not to be bought or sold.³⁶

State statutes make it a criminal offense to pay to adopt a child. Surrogacy contracts are markedly similar to paid adoption. In both cases the payment is for delivery of a baby: there is no substantive difference between paying a woman to gestate a child and then to deliver it, and paying a woman to deliver an already "produced" child. Both use a brokerage mechanism—an adoption agency or a surrogacy broker.³⁷ It was on the basis of the state adoption statute that the Supreme Court of New Jersey found the *Baby M* contract to be unlawful. The court saw the same conflict with public policy as exists in private adoptions for money.

There is the “inducement of money,” the “coercion of contract,” and the “total disregard of the best interests of the child.”³⁸

A Gestational Mother Has the Right to Be Paid for Her Services

If paying for the termination of parental rights is wrong, is it also wrong to compensate the gestational mother for her services in being artificially inseminated and carrying the fetus to term? I argue, firstly, that banning payment for gestational services would deprive the woman of the right to be paid for valued labor. Secondly, it is important to get beyond the term “baby-selling.” Rather, we should ask what harms would accrue from paying a woman for gestational services, and how those harms can be minimized. Finally, a flat prohibition on the payment of money would chill the practice of surrogacy so thoroughly as to be a *de facto* ban. This would deprive the parties of their reproductive rights as surely as a prohibition on payment for other reproductive services such as contraception or abortion.

A human being has a right to contract with another to be paid for the performance of services, even highly personal services. The “women’s work” of conception, gestation, and birth is arduous, and has a high social worth. For the state to prohibit payment for such work would deprive women of compensation for valued labor. They are entitled to economic gain for the physical changes in their bodies, the changes in lifestyle, the work of carrying a fetus, and the pain and medical risk of labor and parturition. Critics of surrogacy assert that it enslaves the woman. But performing personal services and labor in exchange for money is not equivalent to slavery. There is no slave-master relationship, no involuntary peonage, and no entitlement to control any human being.

Some advocates claim that paying women to provide reproductive services exploits poor or uneducated women, who are “coerced” by the marketplace into selling their intimate personal services.³⁹ As the *Baby M* court put it: the “essential evil is . . . taking advantage of a woman’s circumstances.”⁴⁰ This is analogous to prostitution, which is a criminal offense.

A woman’s decision to sell her intimate services may well constitute an indignity for all women and may well mean that she is allowing herself to be exploited. Nonetheless, that choice is not for the state or the body politic but for the woman alone to make. As the American Civil Liberties Union policy on prostitution states, “whether a person chooses to engage in sexual activity for purposes of recreation, or in exchange for something of value, is a matter of individual choice, not for governmental

interference.”⁴¹ A woman has a privacy right to determine how she will use her own body, and whether or not she will seek compensation. The state may not approve of the decision she makes, but it has no right to override it. It is particularly paternalistic to assume that the state can dictate a woman’s choice because it knows better than she what is in her interests as a human being.

The *Baby M* court states that the “evils inherent in baby bartering are loathsome for a myriad of reasons.”⁴² However, examination of those reasons shows they are neither loathsome nor uncorrectable-and that they are not caused by money changing hands. It is important to get beyond the charged term “baby-selling” to examine what harm would accrue to the child, the parties, or society.

I have already referred to the lack of any demonstrable evidence that the baby in a surrogacy arrangement is harmed by any objective measure. There is no indication that the potential harm is any greater than the risk we already tolerate in other births. We do not, for example, restrict the reproductive freedoms of unwed mothers or “conventional” families with a history of child neglect, drug or alcohol abuse, or congenital disease such as AIDS.

Most commentators concede that there is not enough evidence of potential harm to the children to justify banning commercial surrogacy. Rather, they argue that the commercialization of reproduction degrades humankind.⁴³ All personal attributes (e.g., sex, race, height, eye color, intelligence) would be given a dollar value. This is also a speculative argument, since it does not rely on any tangible injury to the parties or to society. The “commodification” argument assumes that it is morally wrong to pay money for reproductive services. It is not for government to judge the morality of payment by a genetic father and his partner, particularly when it is the only way a couple can reproduce. Further, parents in a surrogacy arrangement want children for reasons probably no less humane or understandable than those of parents who reproduce by conventional means. Conventional parents, like surrogate parents, have children for many reasons, some for love, some for money, and some because they have a certain image of the offspring they would like to have. There is no “ideal” reason for choosing a mate and having a baby.

Finally, there is no evidence for the “slippery slope” argument that commercial surrogacy will lead to market values being placed on particular genetic traits. As conceived here, surrogacy would be carefully regulated and non-enforceable by the courts-hardly a strong encouragement to a free marketplace for babies.

The remaining reasons given by the *Baby M* court for banning commercial surrogacy are eminently correctable. The court was

concerned that there is “no counseling, independent or otherwise, of the natural mother, no evaluation, no warning”⁴⁴ and that the genetic father knows “little about the natural mother, her genetic makeup, and her psychological and medical history.”⁴⁵ The same can be said of any private adoption. The legislature has ample regulatory power to require counseling, as well as social, medical, and psychological reports. The law, then, can require all that is necessary to ensure full information and the fitness of the parties to enter into the surrogacy arrangement.

The New Jersey Supreme Court’s other criticisms of surrogacy can also be rectified by adherence to the civil liberties principles set out in this essay. The court was concerned that the gestational mother is irrevocably committed “before she knows the strength of her bond with her child.”⁴⁶ The court’s ruling that the gestational mother’s contractual waiver is void means that she is free to change her mind and to contest custody under a “best interests” standard. The parties to a surrogacy agreement as envisaged here are in much the same position as unwed parents who have a custody dispute. The evils of surrogacy do not arise because of the exchange of money, but because of the contract’s irrevocable waiver. Voiding that contractual provision would eradicate much of the social concern over surrogacy.

The final argument against banning the payment of money is that it would thoroughly chill the practice of surrogacy. A ban on payment will virtually ensure that the would-be parents’ individual and collective reproductive rights are never expressed. Payment for services in our society has become so essential that prohibiting compensation would virtually ban the practice. “All parties concede that it is unlikely that surrogacy will survive without money.”⁴⁷ One need only contemplate the prospect of banning payment for other reproductive services, such as contraception or abortion, to understand the barrier it would pose to continuation of surrogacy arrangements.

The Difference Between Paying for Gestational Services and for the Termination of Parental Rights

I have drawn a civil liberties distinction between payment for a binding agreement to terminate parental rights and for gestational services. The distinction is supported by the analysis in the following section, stating why a woman should not be bound by an agreement to terminate her parental rights. If the distinction is accepted, it provides guidance on how surrogacy arrangements can be structured so as not to involve the purchase of a child.

Surrogacy contracts are equivalent to “baby-selling” if they essentially offer payment for the delivery of an uncluttered title to the child. The state could block this approach by proscribing payment of any fee contingent upon termination of the woman’s parental rights, while allowing periodic payments throughout the pregnancy to compensate the woman for her services and health care expenses.

It will be argued that structuring a contract as payment for services rather than for delivery of the child is a “nice” legal distinction, but that this nonetheless remains merely a pretense for baby-selling. After all, when a person pays for labor, he or she is really paying for the commodity that the labor produces. The genetic father is not interested in the gestational mother’s childbearing experiences. He wants, and believes he is paying for, her baby. The New Jersey Supreme Court had

no doubt whatsoever that the money is being paid to obtain an adoption and not . . . for the personal services of Mary Beth Whitehead. . . . It strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money.⁴⁸

That is true when a gestational mother can be compelled by contract to give up her baby. It is not true, however, where she is entitled to maintain her parental rights. The issue is not what a contracting father wants or what a private broker promises, but what the law will allow. If the law does not allow payment in exchange for the child, and if the courts will not enforce any contractual provision in which the woman waives her parental rights, then the distinction between payment for the baby and payment for gestational services is real, and not a pretense. The surrogacy contract would provide no entitlement to the child.

The Supreme Court of Kentucky, in *Surrogate Parenting v. Com. Ex Rel. Armstrong*,⁴⁹ considered whether a valid constitutional distinction could be drawn between payment for gestational services and payment for the child. The court held that payments to the woman under a surrogacy contract were for her services, not the baby. The woman could not be forced by the contract to forgo her parental rights; therefore, there was no selling of the baby. This decision is consistent with the civil liberties arguments presented here, except for the manner in which payment was actually made:

[A] portion of the fee is paid in advance for the use of her body as an incubator, but a portion of the payment is withheld and is not paid until her child is delivered unto the purchaser, along with the equivalent of a bill of sale, or quit claim deed, to wit-the

judgment terminating her parental rights. How can it be denied that this last payment is in fact payment for the baby?⁵⁰

A civil liberties theory of surrogacy would avoid this inconsistency by prohibiting payments under a contract in exchange for the waiver of the parental rights of the gestational mother.

A Gestational Mother Cannot Waive Her Rights to Determine Her Own Lifestyle, to Have an Abortion, or to Parent Her Child

One simple way to determine parental rights over the child born of a surrogacy agreement is to grant them to the father. After all, the gestational mother signed a contract in which she probably made a series of promises about her lifestyle, medical treatment, and, most importantly, parental rights over the child.⁵¹ Many surrogacy contracts provide for specific performance of these promises.⁵² Why shouldn't the gestational mother be compelled in a court of law to fulfill her contractual obligations?⁵³

The legal question of whether a person can waive⁵⁴ privacy and parental rights are unsettled. There is a strong presumption against waiver of constitutional or fundamental rights.⁵⁵ A person cannot waive constitutional rights unless she does so knowingly, voluntarily, and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences."⁵⁶ This "voluntariness and knowledge" standard might be applied in individual cases to show that the gestational mother did or did not make a fully informed choice when she signed the contract.

There are some rights, however, that cannot be irrevocably waived—that is, the person can change her mind even after she has agreed to waive her rights.⁵⁷ For example, criminal defendants cannot irrevocably waive the right to be present at trial in a capital case,⁵⁸ to raise a plea of incompetence to stand trial,⁵⁹ or to assert a privilege against self-incrimination.⁶⁰

Advance waiver of a constitutional right is particularly troublesome, because the person cannot foresee all the circumstances that will affect a future decision. Therefore, some rights can be waived only at the time they could be invoked. A federal Court of Appeal refused for this reason to recognize a woman's waiver of her due-process rights when signing a foster-care contract, because the relationship the foster parent sought to protect did not exist at the time she signed the contract.⁶¹

The courts, therefore, have been highly suspicious of advance waivers of fundamental rights. However, there has been no specific judicial guidance on whether the courts would refuse, on constitutional grounds,

to enforce the various promises that are often made in surrogacy contracts.⁶² I will argue that to hold a woman to a promise to waive her human rights sometime in the future diminishes her constitutional entitlements. I am not suggesting, however, that a gestational mother cannot waive the exercise of her rights at the time they have to be invoked. She can choose not to avail herself of her right to an abortion or to conduct her life the way she pleases. A gestational mother can also decide not to assert her parental rights when the child is born or, preferably, after a period of time following the birth. This is analogous to state adoption statutes that allow a woman who has agreed to relinquish her parental rights over her baby to change her mind any time before the baby is born. In most states the mother has a grace period after birth in which she can still decide to keep the child.

The rights of a gestational mother to make future decisions about her body, lifestyle, and an intimate future relationship with her child are so important to her dignity and human happiness that they should be regarded as inalienable. First, consider the contractual provisions that seek to deprive the gestational mother of her right to make decisions about her medical treatment and lifestyle: restricting or prohibiting smoking, use of alcohol or drugs (prescription as well as recreational), sex or other "strenuous" activity, and abortion; or requiring regular prenatal examination, amniocentesis, and abortion if the baby is likely to be severely handicapped.

The rights to choose one's lifestyle and medical treatment are among the most private aspects of human life. The government itself cannot restrict these activities unless it demonstrates that the person is incompetent or that there is some compelling health purpose.⁶³ No such health purpose exists in surrogacy, particularly where these activities take place in private and do not affect the public. Since the government cannot reach into this intensely private domain, it is difficult to envisage a private party having the power to do so based upon a contractual obligation.

The genetic father will point to the potential harm to the fetus as the rationale for intervention. This makes the mother and fetus into adversaries, locked in a conflict over whose health and well-being will prevail.⁶⁴ While courts recently have been prepared to intervene in cases of immediate and substantial threat to the fetus (e.g., to require a Cesarean delivery),⁶⁵ the government does not have a general right to control how a pregnant woman lives her life or the medical treatment she chooses. It would be unconscionable if pregnant women could have private decisions forced on them in ways that would be wholly unimaginable for others. Pregnancy, although it entails another life to consider, should not become a license for denying women their basic right

to be left alone to make the health decisions they choose.

Neither government nor a private party has the right to dictate deeply personal choices to the gestational mother, even if they have extracted a promise in exchange for money. Just as important is the deep invasion of privacy involved in monitoring and possibly enforcing the gestational mother's compliance with her promises. There is no lawful and ethical way to determine how a gestational mother is behaving within her own home. Various monitoring and enforcement methods themselves pose threats to individual privacy and autonomy-e.g., testing blood for alcohol or drug use. And to compel submission to a medical procedure such as a gynecological examination, amniocentesis, or abortion is tantamount to a battery-an unconscionable violation of the woman's bodily integrity.⁶⁶

There has not been much caselaw in these areas. However, an analysis of the Supreme Court's abortion decisions indicates that choices affecting privacy and autonomy are for the woman alone to make. In *Planned Parenthood v. Danforth*⁶⁷ the Supreme Court held that a husband does not have the right to veto his wife's decision to seek an abortion. "Since the State cannot regulate or proscribe abortion . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion."⁶⁸ In *Belotti v. Baird*⁶⁹ the Supreme Court also invalidated a state statute that required a woman to get her parents' consent to an abortion.⁷⁰ As neither husbands nor parents can overrule a woman's decision to get an abortion, the courts would be highly unlikely to give this right to the father in a surrogacy arrangement.⁷¹

The second major right that surrogacy contracts seek to deny the gestational mother is her choice to assert parental claims over her child. Natural parents have parental rights over their children unless there is a judicial finding that their behavior is seriously detrimental to the child's interests. Decisions about parenthood, like treatment and lifestyle decisions, are essential to dignity and future happiness. These rights may seem abstract and unimportant before they need to be invoked. The gestational mother signs the contract because, at the time, she may have no interest in having a baby herself and she sees the arrangement as offering financial compensation for work performed.⁷² Yet once the gestational mother is faced with the actual decision, her rights become of utmost importance. Understandably, the gestational mother's feelings may change once she has nurtured the fetus, given birth to a human being whom she recognizes as part of herself and then holds, cares for, and comes to love. Any parent who has experienced birth and the discovery of the infant's unique human qualities and character cannot help but appreciate the possibility of such changes in feelings, judgment, and outlook.

Irreversible decisions about child-rearing, then, ought not to be forced on any mother nine months before her rights have any real meaning. The decision to give up one's own child for a lifetime is an awesome responsibility to place on any human being.

Proponents of surrogacy repeatedly assert that to hold these personal rights inalienable is indefensibly paternalistic, and disparaging of the decision-making capacity of women.⁷³ To hold the parental right inalienable, they suggest, is to degrade women by implying they need to be protected from their "irrational" or "whimsical" impulses, and that they cannot understand the import of relinquishing a child.

These arguments show an almost willful blindness to the true meaning of paternalism and to the reasons why fundamental rights should be inalienable. It is paternalistic to make a decision for another person because you believe you know better than she what is in her true interests. To hold the parental right inalienable is not paternalistic at all. Rather, it respects the woman's final decision regarding her bodily integrity and future associations. The principle of inalienability indicates that the woman controls her own destiny and cannot be prevented by contract from making the decision herself when it becomes important.

This argument is not gender-based. There are certain things that we can contract about—property, goods, and services. But there are other things so important to human flourishing and self-respect that they should not be specifically enforceable by contract, whether the subject is male or female. We do not call patients "fickle," for example, if they decide to withdraw their previously given consent to a medical procedure. It is insulting to suggest that because the law allows gestational mothers to withdraw consent to a waiver of parental rights, the women are indecisive or need protection.

Determining Custody Within a Civil Liberties Framework

When a child is born of a surrogacy arrangement, the woman who gave birth to the child is the legal mother unless she relinquishes her parental status through adoption. The man who entered into the agreement and who donated his sperm is the legal father. Termination of the parental rights of the gestational mother or the genetic father can be judicially determined only under statutory criteria in each state. Most states will not terminate parental rights unless it is demonstrated that the parent is unfit; a mere showing that it would not be in the child's best interests to live with a parent is insufficient to terminate the parent's wider parental rights, including visitation.⁷⁴

The two genetic parents in a surrogacy arrangement may each want custody of the child. If one of them declines to waive a claim to the child and a dispute ensues, who should have custody? And by what standard should the question be determined?

Custody determinations are potentially so harmful to the child that many believe the law should intervene with a clear rule favoring the genetic father or the gestational mother.⁷⁵ Undoubtedly, custody battles should be avoided wherever possible because of the potential trauma to the child. But a judicial determination becomes necessary when each parent seeks custody over the child, and it is not obvious in every case which placement would be in the child's best interests. The adoption of an automatic rule foreclosing the parental rights of the man or the woman would be iniquitous. First, "bright line" rules deter deeper inquiry into the best interests of the child in each case. Using sex as a proxy for a thoroughgoing assessment of the child's interests would not serve those interests well. Second, the parental interests of either the father or the mother would not be respected. Natural parents have substantive and procedural due process rights to assert a claim to custody before a court.⁷⁶ A "clear rule" would determine which parent could exercise the fundamental right of association with one's children by presumption, rather than by individual findings of fact. Third, a "clear rule" amounts to a rigid form of discrimination based upon gender. Whether a court uses the contract to favor the father or sees the woman's unique reproductive capabilities as a reason to favor the mother,⁷⁷ it is really using the parents' sex, rather than a best-interests standard, to determine custody. This would permit custody to be based on status criteria traditionally used to discriminate against individuals.

These reasons against a clear rule are all based upon strong civil liberties principles, which should not be abridged except for compelling reasons. Both sides in the surrogacy debate argue that there are compelling reasons for a clear rule in their favor. I have already shown why there should not be a paternal presumption based upon the surrogacy contract. Nor should economic status be the sole determining factor for assessing a child's best interests. Economic status usually favors the father-particularly in a surrogacy arrangement, which virtually guarantees a marked disparity in the wealth of the mother and the father. Material advantage is not an important measure for the best interests of the child, and has a discriminatory effect on women. The "best interests" test is designed to help the child become a "well integrated person who might reasonably be expected to be happy with life."⁷⁸ The court should not be concerned with the kind of "idealized life that money can buy."⁷⁹

Advocates of the rights of the gestational mother say she has

contributed most to the surrogacy arrangement. Her nine months of gestation not only make her deserving of the child but also put her in a much better position to form a bond and to care for the child.⁸⁰ It is argued, moreover, that the present law on parentage already provides a clear preference for the gestational mother. A woman who gives birth to a child is held legally responsible for its welfare, whereas sperm donors cannot assert a parental claim over any child born by use of their sperm.

The comparison between a genetic father who simply donates sperm and one who enters into a surrogacy agreement is inapt, however. Once a donor gives his sperm to a bank in return for a fee he has completed his "transaction"; he has no intention to reproduce and has not committed himself to, or prepared for, the responsibilities of parenthood. Moreover, once the man has donated his sperm he knows nothing further of its use. In short, he has not acted like a father and has no ground for asserting the rights of a father. By contrast, a genetic father in a surrogacy arrangement initiates the whole procreative process. His psychological, emotional, and financial investment in planning the birth, care, and nurturance of the child may be considerable. He acts like a father in the sense that he has an intent to procreate and desires a relationship with the child.

The Supreme Court in *Stanley v. Illinois*⁸¹ held that an unwed father is entitled to notice and a hearing before a court determines that he has no right to custody of his child. Subsequent cases, involving foreclosure of parental rights through adoption rather than denial of custody,⁸² do limit the principle enunciated in *Stanley*. Those cases suggest that a father acquires due process rights only when he "act[s] as a father toward his children."⁸³ Thus, an unwed father who visited and supported his child only irregularly had no constitutional right to a hearing.⁸⁴ Conversely, where the father established a relationship by living with, caring for, and supporting the child, he did have due process rights.⁸⁵

Most troubling about the *Stanley* line of cases is that the Court appears to be concerned with the custodial, personal, and financial relationship the father actually established. The father's intent and good-faith efforts to establish a relationship with his child are insufficient. In *Lehr v. Robertson*,⁸⁶ the putative father had taken every opportunity to establish a relationship with his child. He lived with the mother for two years until the birth and visited the child in the hospital every day; he never ceased in his efforts to locate the child after the mother concealed her; and he offered financial support. The Court, nonetheless, held that he had no right to a hearing before termination of his parental rights.

In a surrogacy arrangement the genetic father ought not to be foreclosed from a hearing on the best interests of the child. He had the paternal intention to procreate, and he may have done all that he could to

prepare for the child and to seek a relationship with her. We should not automatically assume that it is always in the best interests of the child to remain with the mother.

Civil liberties principles, therefore, require that such factors as sex and economic status should not become proxies for assessing an individual child's best interests. Neither factor is a good predictor of the ability to parent well-although both should be considered, to the extent strictly relevant to the child's best interests.

Custody should also be determined without regard to the existence of the surrogacy agreement. The fact that the mother entered into a surrogacy agreement should not be held against her in determining custody; she has not neglected, abandoned, or adversely affected her child in any way. A woman is no less able to parent her child because she originally decided to surrender her legitimate claim as its true mother. This conclusion is consistent with the civil liberties approach taken here that contractual provisions requiring an irrevocable waiver of parental rights should be void. To use a surrogacy agreement against the gestational mother in a custody dispute would inhibit the exercise of her constitutional right to associate with her child.

Conclusion

The approach to custody taken in this essay is simple and consistent with current law and practice. If the surrogacy arrangement goes as planned, as so many have in the past, then the child will grow up with parents probably as stable and secure as the parents of any conventionally born child. I also treat surrogacy arrangements that break down in the same way as the law treats marriages that break down or births out of wedlock. None of these cases of parents tugging at their child for custody are happy ones. Yet none create insurmountable obstacles to the future well-being of the child. So long as the law treats the child as a person wanted by both parents and sensitively allocates parental rights and responsibilities, including custody, there is every reason to believe that the child can, and will, flourish.

References

I want to warmly acknowledge the contribution of the members of the Special Committee on Surrogate Parenting, which I chair for the American Civil Liberties Union. The committee formed the core of analysis on this essay. The members of the ACLU Surrogacy Committee

are Leslie Harris, Joan Mahoney, Wendy Williams, and Susan Wolf. Stacey DeBroff is staff liaison to the committee.

1. There are three distinct roles that are potentially involved in a surrogacy arrangement: the woman who gestates the child and who gives birth (whom I will refer to as the gestational mother); the woman who donates an egg without bearing the baby (the egg donor is usually, but not necessarily, the gestational mother); and the man who provides the sperm (whom I will refer to as the genetic father).

2. See, e.g., John Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth," *Virginia Law Review*, 69 (April 1983): 405; John Robertson, "Surrogate Mothers: Not So Novel after All," *Hastings Center Report* (October 1983): 28.

3. See, e.g., George Annas, "Pregnant Women as Fetal Containers," *Hastings Center Report* (Dec. 1986): 13; George Annas, "The Baby Broker Boom," *Hastings Center Report* (June 1986): 30.

4. *In re Baby M*, 217 N.J. Super. 313 (1987), *rev'd in part*, 525 A.2d 1128, 1988 W L 6251, Slip Op A-39-87, decided Feb 3, 1988.

5. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

6. *Carey v. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010, 2016 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

7. *Griswold v. Connecticut*, 85 S. Ct. 1678 (1965).

8. *Loving v. Virginia*, 388 U.S. 1 (1967).

9. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

10. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

11. *Carey v. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010 (1977).

12. *Carey v. Population Services International*, 97 S. Ct. at 2016 (1977).

13. *Eisenstadt v. Baird*, 92 S. Ct. at 1038 (1972).

14. 410 U.S. 113 (1973).

15. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

16. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

17. 85 S. Ct. 1678 (1965).

18. 85 S. Ct. at 1682.

19. *Id.*

20. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). See *Myer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

21. *Stanley v. Illinois*, 405 U.S. 645 (1972).

22. *Stanley v. Illinois*, 405 U.S. at 650 (unwed father is a parent whose existing relationship with his children must be considered); *Caban v. Mohammed*, 441 U.S. 380 (1978) (statute that prevented unwed father, but not unwed mother, from vetoing adoption of natural child was unconstitutional when the father had a relationship with the children comparable with the mother's).

23. See George Annas, "Pregnant Women," *supra* note 3, at 13.

24. *In re Baby M*, slip op A-39-87 (1988); Angela Holder, "Surrogate Motherhood: Babies for Fun and Profit," *Law, Medicine & Health Care*, 12 (1984): 115.

25. John Robertson, "Procreative Liberty and the Contract of Conception, Pregnancy and Childbirth," *Virginia Law Review*, 69 (1983): 405, 416.

26. *In re Baby M*, slip op A-39-87, p. 51.

27. *Id.*

28. H.T. Krimmel, "The Case Against Surrogate Parenting," *Hastings Center Report* (Oct. 1983): 35.

29. *In re Baby M*, slip op. A-39-87, p. 5.

30. *Id.*: 62.

31. *Id.*: 62-68.

32. *Id.* 4.

33. *Report of the Committee of Inquiry in Fertilisation and embryology* (London: H.M. Stationery Office, Cmnd 9314, 1984).

34. D. Brahms, "The Hasty British Ban on Commercial Surrogacy," *Hastings Center Report* (Feb. 1987): 16.

35. *In re Baby M*, slip op. A-39-87, p. 46.

36. *In re Baby Girl D*, 517 A.2d 925 (1986).

37. Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review*, 100 (1987): 1849 at 1928-29.

38. *In re Baby M*, slip op. A-39-87, p. 21.

39. Radin, *supra* note 37, at 1849.

40. *In re Baby M*, slip op A-39-87, p. 48.

41. ACLU Policy #262.

42. *In re Baby M*, slip op A-39-87, p. 26.

43. Radin, *supra* note 37.

44. *In re Baby M*, slip op A-39-87, p. 44.

45. *Id.*: 46.

46. *Id.*: 45.

47. *Id.*: 47.

48. *Id.*

49. 704 S.W.2d 209 (Ky. 1986).

50. Dissenting opinion of Vance, J., 704 S.W. at 214. The contract in the Baby M case was structured in much the same way.

51. See Brophy, "A Surrogate Mother Contract to Bear a Child," *Journal of Family Law*, 20 (1982): 263.

52. See Note, "Developing a Concept of the Modern 'Family': A Proposed Uniform Surrogate Parenthood Act," *Georgetown Law Journal*, 73 (1985): 1283.

53. Two very strong articles by members of my committee add weight to the argument. See Susan Wolf, "Enforcing Surrogate Motherhood Agreements: The Trouble with Specific Performance," *New York Law School Human Rights Annual*, vol. 4; Joan Mahoney, "An Essay on Surrogacy and Feminist Thought," *Law, Medicine & Health Care*, 16 (1988): 81.

54. "Waive" means to forgo the exercise of a right. I will distinguish between a current waiver, which takes place at the time the right could have been invoked, and a future waiver (or alienation), which is a promise now to waive a right in the future. See "Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers," *Harvard Law Review*, 99 (1986): 1936, 1941.

55. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (courts must indulge in every reasonable presumption against waiver of fundamental rights); *Glasser v. U.S.*, 315 U.S. 60, 70 (1942) (same presumption applies to rights enumerated in the Bill of Rights).

56. *Brady v. U.S.*, 397 U.S. 742, 748 (1970) (waiver of right to trial). See *Boykin v. Alabama*, 393 U.S. 238 (1969); Rubin, "Toward a General Theory of Waiver," *UCLA Law Review*, 28 (1981): 478, 487.

57. See Lawrence Tribe, *American Constitutional Law* (1978), 469; Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State," *University of Pennsylvania Law Review*, 132 (1984): 1293.

58. *Diaz v. United States*, 223 U.S. 442, 455 (1912); *Lewis v. U.S.*, 146 U.S. 370, 372 (1892).

59. *Pate v. Robinson*, 383 U.S. 375, 384-85 (1966).

60. *Stevens v. Marks*, 383 U.S. 234, 244 (1986).

61. *Rivera v. Marcus*, 696 F.2d 1016, 1206 (1982). But see *Reimche v. First National Bank of Nevada*, 512 F.2d 187 (9th Cir. 1975); *In re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1 (1960).

62. The New Jersey Supreme Court refused to enforce the Baby M contract on statutory, not constitutional, grounds.

63. The Supreme Court has on numerous occasions decided that a

person has the right to physical autonomy unless there is a strong countervailing state interest, such as public health (*Jacobson v. Massachusetts*, 197 U.S. 11 [1905]), or the life of a viable fetus (*Roe v. Wade*, 410 U.S. 113 [1973]). See Larry Gostin, "The Future of Communicable Disease Control: Toward a New Concept in Public Health Law," *Milbank Quarterly*, 64, Supp. 1 (1986): 79–96.

64. See Nancy Rhoden, "Cesareans and Samaritans," *Law, Medicine & Health Care*, 15 (1987): 118–25.

65. *Jefferson v. Griffin Spaulding County Hospital Authority*, 274 S.E.2d 457 (Ga. 1981). See V.E.B. Kolder, J. Gallagher, and M.T. Parsons, "Court-Ordered Cesarean Deliveries," *New England Journal of Medicine*, 316 (1987): 1192–96.

66. Ruth Macklin, "Is There Anything Wrong with Surrogate Parenting?: An Ethical Analysis," *Law, Medicine & Health Care*, 16 (1988): TK.

67. 428 U.S. 52 (1976).

68. *Id.*: 69.

69. 443 U.S. 622 (1979).

70. See *Jones v. Smith*, 278 So.2d 339 (Fla. 1973), *cert. denied*, 415 U.S. 958 (1973) (denying an illegitimate child's potential father the right to prevent the mother from having an abortion); *Ponter v. Ponter*, 135 N.J. Super. 50, 342 A.2d 574 (Ch. Div. 1975) (denying husband the right to prevent wife from undergoing sterilization).

71. Coleman, "Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions," *Tennessee Law Review*, 50 (1982): 71, 85; Lawrence Tribe, "The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Independence," *Harvard Law Review*, 99 (1985): 330, 336.

72. Phillip Parker, "Motivation of Surrogate Mothers: The Initial Findings," *American Journal of Psychiatry*, 140 (1983): 117–18.

73. McConnell, "The Nature and Basis of Inalienable Rights," *Law and Philosophy*, 3 (1984): 25, 41; Radin, *supra* note 37, at 1898; Robertson, "Procreative Liberty," *supra* note 2.

74. *Baby M*, slip op A-29-87.

75. Statement of Margaret Radin and Alexander Capron at a hearing on surrogate parenting before the Senate Committee on Health and Human Resources of the California Legislature, Dec. 11, 1987.

76. See *infra*, notes 81–86.

77. For an excellent discussion of the importance of a woman's unique reproductive capabilities in assessing gender discrimination, see Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special

Treatment Debate,” *Review of Law & Social Change*, 13 (1984): 325–80.

78. *In re Baby M*, slip op A-39-87, p. 81.

79. *Id.*

80. The gestational mother’s early bonding to and nurturance of the baby is likely to result in her being granted temporary custody. *In re Baby M*, p. 84. These concerns weigh in favor of both a relatively short period after birth during which the mother can decide whether or not she wishes to retain her parental status and, if she does, an accelerated custody trial.

81. 405 U.S. 645 (1972).

82. *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983).

83. *Lehr v. Robertson*, 463 U.S. 248 (1983).

84. *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983).

85. *Caban v. Mohammed*, 441 U.S. 380 (1978).

463 U.S. 248 (1983).