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Baby M Reconsidered

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Surrogate mothering, although often classed with such new reproductive technologies as *in vitro* fertilization and embryo transfer, is in fact not new. In Biblical times, barren Sarah sent her handmaiden, Hagar, to bear a child for Abraham. Surrogacy can be achieved, moreover, with no more “technology” than a turkey baster. Why, then, is surrogacy so controversial? A major reason is that surrogacy depends on treating procreation, an activity traditionally viewed as an integral aspect of family life (and family law), as a service to be purchased in the marketplace and governed by the rules of contract law. Thus surrogacy forces us to confront the differences between two of our most fundamental institutions—the family and the market.

The confrontation is discomforting because we seldom compare the two institutions. We are accustomed, for example, to thinking of the market as our basic institution for the distribution of goods and services. But the family performs distributive functions as well. Indeed, the family is the primary institution in our society for distributing goods and services from adults to children.

Despite some overlap in functions, there are major differences between the market and the family. Both social custom and the law have treated the two institutions as entirely separate. In the nineteenth century, the differences between the two were linked to gender. Women were considered responsible for the family, or the domestic sphere as it was termed, while men dominated the public sphere, which included government as well as the market.

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2. *Genesis 16:2*.
4. I will use the term “the family” rather than “families” in this essay in order to maintain linguistic symmetry with “the market.” The term, however, should not be understood to mean that I envision only one model of family life. On the contrary, I use the phrase simply as shorthand for the many different kinds of families in our society, including divorced couples with joint custody of one child, single parents, and childless couples who are not married.
Although the twentieth century has rejected formal gender barriers between the family and the market, fundamental differences remain. The nature of the relationships favored by each institution, for example, is radically different. The market envisions autonomous individuals trading at arm’s length. Children do not easily fit into this model because they generally are not yet autonomous. Moreover, self-interested behavior is not only acceptable in the market but also is assumed to benefit society. In the family, by contrast, relationships are premised on caring as much as on self-gratification. Thus, although parents are expected—indeed required by law—to provide children with the basic goods and services needed to survive and grow, children are not obliged to repay their parents. Furthermore, procreation, which the marketplace would treat as a mere service to be distributed, is traditionally characterized—along with the nurture of children—as a primary purpose of the family.

Economic theory of market relationships is far more developed than any secular theory of family relationships. Although pieces of such a discipline are scattered through sociology, psychology, and moral philosophy, as well as economics itself, there is no counterpart to the discipline of economics that is devoted to analyzing the relationships of family members. As a result, when an issue such as surrogacy implicates both the domain of the market and that of the family, the sheer weight of market theory threatens to overwhelm the less systematic thought available about family relationships.

This generally undeveloped state of secular thinking about family life becomes particularly problematic in the case of surrogacy because it exposes our failure to resolve a number of even more basic questions concerning human reproduction. We have never really decided, for example, what obligations a parent owes to a child, when the law should intervene to enforce those obligations, and whether enforcement should be accomplished by punishing the parent or by removing the child. We also have not resolved whether competent adults should be free to reproduce without legal interference, or whether such freedom should be contingent on the use of their own bodies rather than parts (e.g., sperm, ova, or wombs) of the bodies of others in the reproductive process.

7. Although parents may not demand repayment, they may demand obedience. See Roe v. Doe, 29 N.Y.2d 188, 193-94, 272 N.E.2d 567, 570, 324 N.Y.S.2d 71, 74-75 (1971) (father need not pay college expenses of daughter who moves out of college dormitory against his wishes).


The difference in theoretical sophistication is magnified in law. Contract law is the fundamental building block of the relationship between law and the modern economy. Countless appellate opinions (built principally on the briefs of lawyers paid by businesses), legal treatises, and articles devoted to contract law all attest to its importance in law and society and contribute to its conceptual complexity. Family law, by contrast, is practiced primarily in the trial courts by lawyers paid by individuals. Because appeals from trial court decisions are expensive to pursue, and because family matters rarely involve large amounts of money, relatively few family cases ever reach the appellate courts. Family law thus rests on a slim body of appellate opinions that tend to be brief, non-analytical, and generally supportive of whatever the trial court has done. Family law also has suffered from its rather atheoretical commentary. As a result, family law provides remarkably little guidance on such fundamental issues as what obligations parents owe to their children.

Virtually the only legal authorities that provide any guidance are statutes dealing with child abuse and neglect. These statutes evolved, with remarkably few changes, from the English poor laws of the sixteenth and seventeenth centuries which directed that children be removed from poor parents and put to work or apprenticed. The system was brought to this land by the colonists and perpetuated with little change for almost two centuries. It was not until 1874 that children were removed from their parents in order to protect them from physical abuse. It was well into the twentieth century before we abandoned the policy of taking children away from their parents simply because they were poor. Only then did poverty become a defense to


Several areas of legal scholarship—torts, contracts, criminal law, first amendment law, antitrust, and tax come readily to mind—have found a kind of maturity as scholarly disciplines by working to define their fields, to generalize about their subjects, and to develop theories to explain their subjects. . . . [T]he striking fact about family-law scholarship is the rarity of attempts to go beyond the specific. *Id.* at 1039-41.

11. *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 894-96 (1975) (describing Elizabethan program of poverty relief under which children of poor were put to work or apprenticed).


14. M. Katz, *In the Shadow of the Poorhouse* 124-29 (1986). The first mothers’ pension legislation was passed in Missouri and Illinois in 1911. The idea spread quickly so that by 1931, 200,000 children in every state except Georgia and South Carolina lived in homes supported in part by mothers’ pensions. *Id.* at 128. The Federal government did not adopt this approach until 1935 with the passage of the first Aid to Dependent Children legislation. *Id.* at 129.
a government allegation of child neglect. The only "principle" embodied in pre-modern child abuse and neglect statutes, in short, was what tenBroek labeled the "dual system," which separated children from poor parents and left other parents free to do as they wished. Unfortunately, ever since society rejected the notion of separating children from poor parents, it has paid little attention to the difficult issue of what types of parental (mis)conduct should justify legal intervention in a parent-child relationship.

The paucity of legal guidance concerning (1) what obligations parents owe to children and (2) when the state should intervene to enforce those obligations became apparent when courts were first asked to decide the legality of surrogacy arrangements. The only law that seemed on point was state legislation prohibiting baby selling. Because these statutes were passed before the modern interest in surrogacy developed, the question of whether they prohibit payments to surrogate mothers could not be resolved by resort to legislative intent. As a result, the answers provided by different courts turned on the policy of the beholders—that is, on whether or not the judges thought surrogacy was a good idea.

What some judges and legal commentators overlooked, however, is that even if the baby selling statutes do not apply to surrogacy arrangements, courts still must resolve the difficult issue of whether to encourage such arrangements by enforcing the underlying contract. To place the issue in an institutional context, judges must choose whether to follow contract law or family law. They must determine whether the market's ethic of individualism or the family's ethic of altruism will shape the issue of surrogacy. Under a contract law analysis, the issues are whether the arrangement between the parties satisfies the requirements for an enforceable contract and, if so, how the contract is to be interpreted, applied, and enforced. Under a

16. The Volume on Abuse and Neglect, prepared as part of a nineteen volume series on the law affecting children by a Joint Commission appointed by the Institute of Judicial Administration and the American Bar Association, provides an example of the relatively underdeveloped state of the law in this area. The volume is one of only two in the series not approved by the ABA House of Delegates at its 1979 Midyear Meeting. See American Bar Association, 1979 Midyear Meeting, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES (Feb. 12-13, 1979). Since 1979, the House of Delegates has taken no further action on The Volume on Abuse and Neglect. See American Bar Association, 1980 Midyear Meeting, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES (Feb. 4-5, 1980).
18. Professor Frances Olsen first used the terms "individualism" and "altruism" to contrast the ethic of the marketplace with the ethic of the family. Olsen, supra note 5, at 1521.
family-law analysis, the purported contract is unenforceable, and the issue is one of custody, to be decided according to the best interests of the child.

Several considerations suggest that there is nothing wrong with surrogacy, or with legal recognition of surrogacy contracts. There are the undeniably strong claims of infertile couples. Their desire for "treatment," including resort to surrogacy agreements, cannot lightly be dismissed. Mark Lappé, for example, has asserted that "[w]hen we speak of justification for medical practice, we are talking simply about a universal obligation to relieve suffering. And childlessness is a particularly acute form of such suffering." These claims have broad support. A majority of Americans polled about the decision of the New Jersey Superior Court in Baby M\textsuperscript{20} to enforce the surrogacy contract believed that surrogate mothers should be bound by surrogacy contracts.\textsuperscript{21}

Recognition of surrogacy contracts also seems a natural extension of the general trend in family law toward privatization of family issues. Consider, for example, the dramatic change in the law of divorce during the past eighteen years. In 1970, California adopted the first statute permitting divorce without proof of fault, thereby shifting primary authority from the court to the couple to determine whether a marriage should end. By 1985, every state had adopted, at least in part, a no-fault approach to divorce.\textsuperscript{22} Similarly, courts have long held that civil authorities have no business interfering in an ongoing marriage.\textsuperscript{23} Ultimately, the United States Supreme Court held that decisions concerning procreation and child rearing in an ongoing marriage are protected by the constitutional right of privacy against governmental interference.\textsuperscript{24}

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20. In re Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), aff’d in part, rev’d in part, remanded, 109 N.J. 396, 537 A.2d 1127 (1988). This article was submitted for publication after the decision of the trial court in In re Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987) [hereinafter Baby M, I], but several months prior to the decision of the Supreme Court of New Jersey, 109 N.J. 396, 537 A.2d 1227 (1988) [hereinafter Baby M, II]. Its assessment of the trial court decision is presented here because it can illuminate the subject of surrogacy for other jurisdictions. Relevant parts of the opinion of the New Jersey Supreme Court are summarized in footnotes to the article.
21. Sixty-nine percent of the 1,045 adults interviewed by phone said surrogate mothers should have to abide by the agreements they had signed. Poll Shows Most in U.S. Back Baby M Ruling, N.Y. Times, Apr. 12, 1987, § 1, at 39, col. 1.
23. See McGuire v. McGuire, 157 Neb. 226, 237-38, 59 N.W.2d 336, 342 (1953) (court refused to entertain wife’s suit for maintenance because husband and wife were living under same roof, marriage relationship was continuing, and husband was legally supporting wife).
24. Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978) (state statute requiring individuals with prior child support obligations to obtain court order to marry violates fundamental right to marry); Roe v. Wade, 410 U.S. 113, 153-64 (1973) (state statute criminalizing abortion except as life-saving procedure on behalf of mother violates due process clause of fourteenth amendment; prior to viability, woman’s decision to terminate pregnancy protected by right of privacy); Eisenstadt v. Baird,
It would be a mistake, however, to conclude that recognition of surrogacy contracts is a minor extension of the general trend toward more private ordering of family matters. None of the decisions that have been turned over to individuals (e.g., decisions to divorce, to determine by premarital contract payment of alimony and division of property in the event of divorce, to use contraceptives, to obtain an abortion) has involved the encouragement of procreation outside of marriage. Moreover, the state has long had an obligation to protect the most vulnerable members of society—particularly infants—as part of its parens patriae responsibility. Thus parents may make binding decisions concerning alimony and property when they divorce, but any agreements they make concerning child support are subject to state scrutiny, and will be rejected if they fail to provide for the basic needs of the child.

There are also moral and pragmatic problems raised by surrogacy itself. Surrogacy increases the risk that the children involved may be abandoned at


26. See, e.g., Guille v. Guille, 196 Conn. 260, 263-64, 492 A.2d 175, 177-78 (1985) (child's right to parental support independent of contract between parents regarding rights and duties toward each other; thus minor children permitted to open and correct judgment of dissolution by deleting provision of parents' separation agreement which precluded modification of custody and support); Husband B. v. Wife H., 451 A.2d 1165, 1169-70 (Del. Super. Ct. 1982) (court must weigh all factors affecting child's interests and modify child support with purpose of advancing those interests; decision reversed and remanded because of trial court's rigid application of contract principles prohibiting modification unless impossibility of performance or unfairness at inception); Essex v. Ayres, 503 So.2d 1365, 1366-67 (Fla. Dist. Ct. App. 1987) (parents may not by contract impair obligation to support minor child; when agreement was never scrutinized or approved by court, parent permitted to modify amount of support upon showing that amount agreed upon inconsistent with best interests of child, and that other parent able to pay); Conces v. Conces, 16 Ill. App. 3d 835, 836, 306 N.E.2d 890, 891 (1974) (no agreement between parties on question of child support can bind court; within court's discretion to modify support order to make its approval only temporary and order subject to review after six months); Clement v. Clement, 506 So.2d 624, 626 (La. Ct. App. 1987) (regardless of consideration given for agreement, permanent waiver by custodial parent of right to compel payment of child support unenforceable because not in child's best interests); Tammen v. Tammen, 289 Minn. 28, 30-31, 182 N.W.2d 840, 841-42 (1970) (court not bound by agreements between parents affecting right of minor child to support, but controlled by welfare of child; within court's discretion to modify original decree when growth in parent's income and professional standing warranted revision); Clayton v. Muth, 144 N.J. Super. 491, 492, 496, 366 A.2d 354, 354, 356-57 (Ch. Div. 1976) (although agreement of parties should be given great weight, it may be modified in best interests of child; substantial change in circumstances of custodial parent warranted modification); Tiokasin v. Haas, 370 N.W.2d 559, 564-65 (N.D. 1985) (court not bound by stipulation between parents regarding custody and care of child if not in child's best interests; within court's discretion to reject stipulation relieving parent of support obligation when court determined continued payments necessary).
birth by both biological parents. The child who best illustrates this risk is not Baby M, but Christopher Ray Stiver, born four years ago in Michigan with a strep infection and suffering from microcephaly, a congenital disorder usually associated with mental retardation. The physicians in attendance at the birth were forced to obtain a court order to treat the child's infection when Alexander Malahoff, the ostensible father, refused to consent to treatment. Later, Malahoff denied paternity and responsibility for the child.

A similar problem arose in 1986 when a woman contracted to become a surrogate mother for her sister. The surrogate had a history of drug abuse that was not known to her family. She was not screened, therefore, for the HIV antibody. A test conducted after she was artificially inseminated with her brother-in-law's sperm showed positive results. The contracting couple was not told. At birth the child tested positive for the HIV antibody. Both the surrogate mother and the contracting couple refused custody of the child.

The birth of a handicapped infant can be traumatic for the most devoted, loving parents. Disappointment, denial, and grief may make it difficult for any parent to respond to the needs of the child. When a handicapped infant is born into a family, however, emotional and custodial abandonment are generally not considered to be options. But as the above-described cases suggest, surrogacy arrangements increase the risk that biological parents will consider it acceptable to abandon less-than-perfect infants after they are born.

The reasons are not hard to identify. First, at a theoretical level, one parent in any surrogacy arrangement is supposed to view the child as a mere commodity, one that is to be transferred (abandoned) at birth. The surrogate mother will be able to comply comfortably with the terms of the contract only if she does not permit herself to become emotionally attached to the child. If the child is a healthy, desirable infant, the surrogate mother who develops an attachment may have trouble keeping her end of the bargain, 27.

27. I.e., the man who contracted to have the surrogate mother bear a child using his sperm.

28. The results of blood tests to determine paternity were announced to the parties on the Phil Donahue television show. The tests revealed that the husband of the surrogate was the father of the child, but the potential risk to most children conceived pursuant to such arrangements remains. See J. Areen, P. King, S. Goldberg & A. Capron, Law, Science and Medicine 1313-14 (1984) (discussing events reported in Peterson, Legal Snafu Developing Around Case of a Baby Born To Surrogate, N.Y. Times, Feb. 7, 1983, at A10, col. 1).


30. The resolution of the Stiver-Malahoff dispute illustrates that adults who have a family relationship with one another are likely to respond differently to the birth of a handicapped child than are adults united only by a surrogacy contract. When the Stivers discovered that Mr. Stiver, and not Alexander Malahoff, was the biological parent of Christopher Ray, they immediately declared that they would take the baby home and raise him. Peterson, supra note 28, at A10, col. 1.
and may precipitate the kind of bitter custody battle exemplified by the Baby M case. If the child is physically or mentally handicapped, there is a real danger that both parents will view the child as a commodity and thus abandon the infant emotionally and—if permitted by the law to do so—physically and financially. The surrogate mother will do so because that is what she is supposed to do; the father (and his spouse, if any) will do so because he is likely to feel that as a purchaser he has the right to reject “damaged goods.” Treating children as commodities, as surrogacy does, thus poses significant risks to the children conceived.

Second, the experience of the parents in a surrogacy arrangement typically will be different from that of parents who conceive and experience pregnancy together. The surrogate mother is to conceive the child for others. She is also to go through the pregnancy prepared to give up at birth the child she is carrying. The biological father in a surrogacy arrangement usually will not be involved in the day-to-day experiences of the surrogate mother as the pregnancy alters her shape and her life. Indeed, the surrogate may be married to another man. In other words, the biological parents are likely, from the beginning, to have a very different relationship to the developing fetus, and, of course, to each other, than they would have if they were members of the same family.

Baby M is thus fortunate, at least in comparison to the Michigan infant and the AIDS infant, to be such a desirable child that adults are fighting to be her parents. Nevertheless, it is important not to overlook the difficulty she may experience as the subject of a bitter custody dispute, both now and in the years to come.

Professors Schuck and Seidman each have argued that it is not appropriate to consider risks to the children of surrogacy arrangements because, no matter how onerous the life any particular child may experience, that life is still better than not having been conceived at all. The argument that any life is

31. Surrogate mothers differ from mothers who place their child for adoption at birth because only surrogate mothers have deliberately conceived the child to be given away. The language that has evolved to describe surrogacy underscores its unique aspects. The surrogate mother is also the child’s biological mother, yet we do not call her “mother” but “surrogate” to underscore the role she has agreed to play.

32. Reports from a growing number of adults who were the subjects of custody disputes in childhood have been published in recent years. For example, see Lindstrom, My Mother Ingrid Bergman, Good Housekeeping, Oct. 1964, at 80.

33. Schuck, Some Reflections on the Baby M Case, 76 Geo. L.J. 1793, 1800-01 (1988) (objections to surrogacy based on risks to children conceived is unintelligible unless one can predict the most dire and inexorable consequences; no plausible basis for such a prediction since majority of surrogacy arrangements satisfy all parties); Seidman, Baby M and the Problem of Unstable Preferences, 76 Geo. L.J. 1829, 1832 (1988) (unless one takes the view that surrogacy is so detrimental to the child that it would prefer non-existence, it is hard to avoid conclusion that enforcement of surrogacy contract maximizes social welfare).
better than no life at all has great force once a person is born. If the Michigan child attempted to sue either of his biological parents for “wrongful conception,” for example, the Schuck-Seidman argument presents a good reason to deny recovery.

It is quite another matter, however, to invoke as a general defense of surrogacy the interests of hypothetical persons (in this instance, the interests in life of children who have not yet been conceived). First, this principle of concern for hypothetical persons calls into question a broad range of private choices, public policies, and laws. Use of any contraceptive technique or measure, for example, means some persons who hypothetically might have been conceived, will not be conceived.

Indeed, by extension, the Schuck-Seidman argument leads to a world in which everyone has a moral duty to conceive all possible hypothetical persons, from puberty to menopause or death. Even if the reach of the principle is limited so that individuals are not forced to bear as many children as possible, it means that couples should never delay the conception of children—however compelling the reasons for delay—because, as a matter of biology, any delay means that the hypothetical child who might have been conceived at an earlier point in time will never be conceived. The principle of concern for hypothetical persons not only leads to absurd consequences, it is often self-contradictory.

If, for example, Baby M had not been conceived, Mrs. Whitehead might have conceived another child by another man. Either way, some hypothetical child would not have been conceived. On a larger scale, although rejection of surrogacy contracts means that some hypothetical persons will never

34. There is an extensive philosophic literature on hypothetical or future people that demonstrates the hazards of judging the morality of action on the basis of the interests of people not yet conceived. See, e.g., Adams, Existence, Self-Interest, and the Problem of Evil, 13 Nous 53, 57-58 (1979) (since almost every action or social decision affects which particular individuals will be born, future generations not treated unjustly by present generation acting in a way that would prevent their existence); Parfit, On Doing the Best for Our Children, in ETHICS AND POPULATION 100 (M. Bayles ed. 1976) (ethics of population control extraordinarily difficult since population decisions based on effect on future people result in different people being born, while policies best for existing people may lower quality of life for future persons); Schwartz, Obligations to Posterity, in OBLIGATIONS TO FUTURE GENERATIONS 3 (R. Sikora & B. Barry eds. 1978) (no obligation extends indefinitely or even terribly far into future to provide widespread, continuing benefits to descendants). D. Parfit, REASONS AND PERSONS (1984), provides a good general discussion of this issue.


[Assume there is] a pill that, when taken just before sexual relations, has two effects. It heightens the pilltaker’s sexual pleasure a tiny bit and insures that any child conceived would be mildly handicapped. As pausing to take the pill would change who is conceived, and as existence with a mild handicap is not bad on the whole, no one would be rendered worse off if a prospective parent not using contraceptive devices were to take the pill before sex. But, surely, taking it would be wrong.

Id. at 98.
be conceived, recognition of surrogacy contracts means that other hypotheti-
cal persons will never be conceived. Thus, the principle of concern for hypo-
thenical persons surely is not a viable principle for evaluating the morality of
surrogacy. From society's point of view, the choice is between a world with
some indeterminate number (x) of children at risk for bitter custody battles
or even abandonment because they were conceived pursuant to surrogacy
and a world with another indeterminate number (y) of children not con-
ceived pursuant to surrogacy. It is a complex choice, but surely one in which
the risks to children conceived pursuant to surrogacy are central.

Professor Schuck also asserts that consequentialist reasoning does not bear
on the intrinsic morality of surrogacy. Various forms of utilitarianism, how-
ever, are consequentialist moral theories, and they can be applied to analyze
surrogacy. It is also possible to construct a deontological argument against
some surrogacy arrangements. A Kantian, for example, might hold that con-
ceiving a child solely for the purpose of earning money violates Kant's Cate-
gorical Imperative, because it involves treating a rational being (or at least a
being that will in the future become a rational being) as a means only, rather
than as an end.\textsuperscript{36} The point is that the objection to surrogacy based on risks
to the children of surrogacy arrangements, whether labeled a matter of mo-
ernity or of policy, ought not to be dismissed as incoherent or self-evidently
wrong. Viewed from society’s standpoint, it is entirely appropriate to seek to
enhance the quality of the lives of children who are in fact conceived,
through a variety of means such as setting minimum ages for marriage and
encouraging family planning. By this measure, the risks that surrogacy poses
to the quality of the lives of children conceived of surrogacy arrangements
may be unacceptably high.

A second problem with surrogacy is the risk it presents that economically
vulnerable women may as a class be exploited. Those who would rename
surrogacy “womb rental” implicitly suggest that it is appropriately analo-
gized to property rental. Surely we should be cautious about an analogy that
implies women can be viewed as property. Other analogies may be more apt.
Michael Walzer, for example, has noted that “the words \textit{prostitution} and
\textit{bribery}, like \textit{simony},\textsuperscript{37} describe the sale and purchase of goods that . . . ought
never to be sold or purchased.”\textsuperscript{38} I suggest that surrogacy is better analo-
gized to the items on the Walzer list than to property rental.

It was concern with exploitation that led a majority of the Warnock Com-
mittee, established in the United Kingdom in 1982 to examine “the social,
ethical and legal implications of recent and potential developments in the

\textsuperscript{36} For an example of just such an argument, see \textit{id.} at 100-03.
\textsuperscript{37} Simony is the sale or purchase of ecclesiastical offices.
\textsuperscript{38} M. W\textsc{alzer}, \textsc{spheres of justice: a defense of pluralism and equality} 9 (1983).
field of human assisted reproduction," to condemn surrogy arrangements. The Committee explained:

The moral and social objections to surrogy have weighed heavily with us. In the first place we are all agreed that surrogy for convenience alone, that is, where a woman is physically capable of bearing a child but does not wish to undergo pregnancy, is totally ethically unacceptable. Even in compelling medical circumstances the danger of exploitation of one human being by another appears to the majority of us far to outweigh the potential benefits, in almost every case. That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved. It is therefore with the commercial exploitation of surrogy that we have been primarily, but by no means exclusively, concerned.40

It is one thing to identify moral and policy objections to surrogy—or at least to some surrogy arrangements—and quite another to decide what position the law should adopt. Three possible positions have emerged. First, the law might honor surrogy contracts, subject only to the limitations of traditional contract law (e.g., prohibiting fraud or duress). The decision of the trial court in Baby M exemplifies this position, although Judge Sorkow attempts to cloak the holding in the protective garb of the “best interests of the child” standard of family law.41 The second position would be to reject recognition of any surrogy contracts as contrary to public policy. This is the position I advocate in this essay. There is also an intermediate position, endorsed by Professor Schuck among others, which asserts that any risks to children and poor women posed by surrogy can be eliminated by a system of appropriate regulation.42

To the extent Professor Schuck means that unregulated contracts (such as the contract in the Baby M case) should not be recognized or enforced by courts, we are in agreement. But I am not persuaded by his argument that it is possible to cure the problems of surrogy with regulation. He may be right that statutory “cooling off” periods or mandatory contract provisions43 could protect poor women from economic exploitation. Such provisions, however, are unlikely to protect surrogate mothers from emotional pain, or from the kind of bitter custody fight exemplified by the Baby M case. I

42. Schuck, supra note 33, at Part III.
43. See id. at 1805-06.
doubt, moreover, that risks to the children conceived can be reduced and possibly eliminated by "a clear delineation of [the] legal rights and obligations" of the participants. Even if a legislature passed a rule, for example, that surrogate parents must accept delivery of any child conceived pursuant to a surrogacy agreement no matter how disabled the child, it is not clear how that agreement could be enforced. Would we demand that a couple keep a child they clearly do not want? The law does not force even biological parents to do that. The law can enact rules, it is true, and enforce them by appropriate civil or criminal sanctions. But if the parties involved do not want to be related, it often will be impossible for the law to create, by the strength of its own mandate, caring family relationships, or even relationships in which the child will be safe from physical or emotional harm.

The one option foreclosed to the courts is to take no position on surrogacy at all, at least when disputes like the Baby M case are presented to them. State legislatures, by contrast, have chosen to do just that. Although the subject has been widely discussed for more than eight years, and many law review articles have recommended legislation and even proposed model acts, by 1988 only one state had enacted legislation on surrogacy. In July 1987, Louisiana declared that surrogacy contracts "shall be absolutely null and shall be void and unenforceable as contrary to public policy." On balance, the risks surrogacy poses to the children conceived and to the surrogates involved persuade me that surrogacy should not be encouraged. Because legal recognition of surrogacy contracts—even recognition limited to regulated contracts—would do just that, recognition should be denied. Some would go further and make surrogacy illegal. But taking that step would require the state to begin to police intimate conduct in a way that undoubtedly would be unacceptably intrusive. Recall that surrogacy can be accomplished at home with a syringe. An intermediate step, which would not intrude upon purely private reproductive conduct but would discourage

44. See id. at 1808 n.61.
46. Peterson, States Assess Surrogate Motherhood, N.Y. Times, Dec. 13, 1987, § 1, at 42, col. 4. There has been a flurry of legislative activity following the New Jersey Supreme Court's 1988 decision in Baby M. Indiana, Kentucky, Louisiana and Nebraska have prohibited enforcement of surrogacy contracts. Nevada and Arkansas have approved such contracts subject to judicial review. Malcolm, Steps To Control Surrogate Births Rekindle Debate, N.Y. Times, June 26, 1988, at 1, col. 6, 21, col. 1. Michigan has not only outlawed commercial surrogacy contracts, it has made it a crime to assist in making such a contract. Violators may be punished with up to five years in prison or fines of up to $50,000. Participants to such a contract are guilty of a misdemeanor, punishable by one year in prison or a fine of $10,000. Surrogate Parenthood Banned, N.Y. Times, June 28, 1988, at A20, col. 5.
surrogacy, particularly when it involves the economic exploitation of poor women, would be to criminalize the acts of third parties who promote surrogacy arrangements for financial gain. Private individuals could make surrogacy agreements without penalty, but courts would not enforce the agreements. Rather, they would resolve any disputes over the custody of the child within the framework of family law.

The Parliament of the United Kingdom, inspired by the work of the Warnock Committee, has adopted legislation regulating surrogacy that is quite close to this proposal. As recommended by the Committee, the British law discourages surrogacy by making it a crime for an agency or an intermediary of any kind to arrange surrogacy agreements.\textsuperscript{48} Private surrogacy agreements arranged directly by the participants, however, are permitted in the sense that the parties are not subject to criminal sanctions. The legislation thus draws a distinction between truly private arrangements concerning procreation made between consenting adults and artificially constructed arrangements spawned by the marketplace.

The line drawn, however, is not complete. The Warnock Committee recommended legislation that would prohibit recognition and enforcement of even private surrogacy contracts. In the end, Parliament did not legislate on the validity of such contracts, thus leaving the issue to the courts.\textsuperscript{49} It would be most consistent with the legislative goal of rooting out commercialization of childbearing for courts in the United Kingdom to refuse to honor such contracts. Because surrogates would not be assured that courts would enforce the contracts, generally only surrogates who were motivated by non-commercial motives (e.g., the grandmother in South Africa who recently

\textsuperscript{48} WARNOCK REP., \textit{supra} note 40, at § 8.18; United Kingdom Surrogacy Arrangements Act, Ch. 49 (1985). The Act provides in pertinent part:

(1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—

(a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,

(b) offer or agree to negotiate the making of a surrogacy arrangement, or

(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements; and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.

(2) A person who contravenes subsection (1) above is guilty of an offence; but it is not a contravention of that subsection—

(a) for a woman, with a view to becoming a surrogate mother herself, to do any act mentioned in that subsection or to cause such an act to be done, or

(b) for any person, with a view to a surrogate mother carrying a child for him, to do such an act or to cause such an act to be done.

\textsuperscript{49} The only British case to wrestle with this issue held, in contrast to the New Jersey Superior Court, that when there is a custody dispute involving a surrogate mother, custody should be decided according to the welfare of the child rather than on the basis of the surrogacy contract. \textit{See In re P}, 2 Fam. 421 (1987) (surrogate mother of twin boy and girl awarded custody of twins in dispute with surrogate father and his wife despite their superior economic resources).
bore triplets for her daughter and son-in-law)\textsuperscript{50} would proceed.

For these same reasons, I believe Judge Sorkow erred in upholding the contract in \textit{Baby M}. The contract should have been found to violate public policy.\textsuperscript{51} Honoring such contracts encourages surrogacy, thereby commercializing relationships previously based on personal intimacy, and will place more children and poor women at risk in the future.

A close look at the specific contract at issue in the \textit{Baby M} case provides independent justification for holding that particular contract void as against public policy. Under the terms of the contract, Mary Beth Whitehead was entitled to have $10,000 deposited by William Stern in an escrow account with the Infertility Center of New York pending delivery of the child.\textsuperscript{52} She was obliged to “assume all risks, including the risk of death, which are incidental to conception, pregnancy, childbirth, including but not limited to, postpartum complications.”\textsuperscript{53} William Stern was entitled to (1) all interest accruing in the account; (2) cessation of the contract with no compensation to Mary Beth Whitehead if the child miscarried in the first four months;\textsuperscript{54} and (3) a test of the fetus before the twentieth week of pregnancy, and if the fetus is “genetically or congenitally abnormal,” abortion “upon demand of WILLIAM STERN.”\textsuperscript{55} His duty was (1) to pay Mary Beth Whitehead $1,000 if her pregnancy ended after the fourth month in stillbirth, miscarriage or mandated abortion (or $10,000 upon surrender of the child); (2) to pay all medical expenses not covered by Mary Beth Whitehead’s insurance; and (3) to pay $7,500 to the Infertility Center for administrative work.\textsuperscript{56} The Infertility Center received the nonrefundable $7500 payment in advance.\textsuperscript{57} The Center was entitled to keep the money even if Mary Beth Whitehead did not become pregnant or abide by her contract to surrender custody. Thus, if Mrs. Whitehead were compelled to undergo an abortion at the direction of Mr. Stern, she would receive only $1000, while the Center would still receive $7500.

As Murray Kempton has observed, it appears that both Mary Beth Whitehead and William Stern have suffered for making this agreement, although “[t]heir mistake was no more than a failure to anticipate the dictates of the


\textsuperscript{51} On February 3, 1988, the Supreme Court of New Jersey held that the surrogacy contract in \textit{Baby M} conflicted with the public policy and the law of the State of New Jersey. \textit{Baby M, II}, 109 N.J. at 411, 537 A.2d at 1234.

\textsuperscript{52} \textit{Id}. app. A at 471, 537 A.2d app. A at 1266.

\textsuperscript{53} \textit{Id}. app. A at 472, 537 A.2d app. A at 1267.

\textsuperscript{54} \textit{Id}.

\textsuperscript{55} \textit{Id}. app. A at 472-73, 537 A.2d app. A at 1267-68 (capitalization in original).

\textsuperscript{56} \textit{Id}. app. B at 476, 537 A.2d app. B at 1271.

\textsuperscript{57} \textit{Id}.
human heart." The one party that did take account of human sentiment was the Infertility Center, and it insulated itself against a change of feeling "with a calculation so cold as to embarrass a social order that licenses as a service works like these."

The most fundamental problem with this particular contract was not so much the economic exploitation of the surrogate mother, Mary Beth Whitehead, by the infertile couple, the Sterns, but rather the exploitation of both Mrs. Whitehead's economic need and the Stern's desire for a child by the Infertility Center. That they were exploited is confirmed by the fact that the Infertility Center's own psychologist expressed reservations about Mrs. Whitehead's suitability as a surrogate because of her "tendency to deny her feelings." The Infertility Center never communicated that reservation to the Sterns or to Mrs. Whitehead. Surely, such a contract violates public policy.

Several difficult issues—albeit issues of less general significance—remain. First, there is the matter of who should have been given custody of Baby M. Although one might take offense at the biases apparent in Judge Sorkow's opinion (e.g., he objected to the fact that Mary Beth Whitehead "dominates the family," and concluded that she is "impulsive" because she dropped out of high school), there is much in the judge's opinion supporting his decision to grant custody to the Sterns. Perhaps sensing that his recognition of the contract might not be sustained on appeal, Judge Sorkow carefully specified at the beginning of the opinion that the decision rests entirely on the "best interests of the child," the traditional standard for custody determinations. Thus, even if the contract was overturned on appeal, Judge Sorkow put his decision vesting custody in the Sterns beyond challenge. The Sterns' claim was strengthened by the fact that Baby M has been with them during the pendency of the appeal; thus, continuity of care would be maintained by leaving Baby M with them.62

59. Id.
60. It is also noteworthy that the Center's psychological test results revealed that Mary Beth Whitehead might not be able to relinquish the child. Baby M, I, 217 N.J. Super. at 343, 525 A.2d at 1142. Nonetheless, they certified her as a suitable surrogate, presumably because the pressure for profit overrode professional reservations.
61. Id. at 382, 525 A.2d at 1162.
62. Mary Beth Whitehead and her husband subsequently brought suit against the Infertility Center and its founder Noel Keane alleging that she had been improperly counseled. The suit was settled in 1988. It was reported that the Center agreed to pay between $30,000 and $40,000. Judge Accepts Settlement in a Baby M Suit, N.Y. Times, Mar. 2, 1988, at B3, col. 1.
64. Id. at 392-93, 525 A.2d at 1168.
65. Id. at 323, 525 A.2d at 1132.
66. See generally J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973). On appeal, the New Jersey Supreme Court independently concluded that
Even if it was appropriate according to family law's traditional "best interests of the child" standard for Judge Sorkow to grant custody to the Sterns, the issue of visitation remained. Undoubtedly the weakest part of Judge Sorkow's opinion was his decision to terminate the parental rights of Mary Beth Whitehead. When he terminated her parental rights, Judge Sorkow did not use the standard normally followed with respect to termination—i.e., the standard embodied in the state neglect statute. Rather, he rested the termination on the parens patriae power, which he termed a "viable independent standard for termination of parental rights." He could not cite any prior cases for this assertion. Presumably that is because there is no justification for a court to create an alternative basis for terminating parental rights when a fully developed administrative framework has been established and funded by the state legislature to oversee this difficult step.

Awarding custody to the Sterns would be in the best interests of Melissa ("Baby M"). Baby M, II, 109 N.J. at 459, 537 A.2d at 1259. The supreme court added that the trial court had judged Mrs. Whitehead "rather harshly." Id. The court also criticized Judge Sorkow's emphasis on the Sterns' comparatively greater interest in Melissa's education than that of the Whiteheads', explaining that the best interests test is "designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life." Id. at 460, 537 A.2d at 1260. Even allowing for these differences, however, the supreme court found that "Mary Beth Whitehead's family life, into which Baby M would be placed, was anything but secure—the quality Melissa needs most." Id. at 461, 537 A.2d at 1260.

Although emphasizing "security," the New Jersey Supreme Court stated that the trial court's decision to award custody pendente lite to the Sterns was "irrelevant" to its disposition of the case. Id. at 462, 537 A.2d at 1261. It is not clear whether the court meant that continuity of care is irrelevant. The court also ruled that when a separated father and mother disagree, at birth, on custody, "only in an extreme, truly rare, case should the child be taken from its mother pendente lite." Id. The court explained that "[t]he probable bond between mother and child, and the child's need, not just the mother's, to strengthen that bond, along with the likelihood, in most cases, of a significantly less, if any, bond with the father—all counsel against temporary custody in the father." Id. If continuity of care is an important consideration in awarding custody, the standard for awarding custody pendente lite announced by the supreme court will give surrogate mothers a significant advantage in New Jersey in future custody disputes.

On appeal, the New Jersey Supreme Court held that Mrs. Whitehead is entitled to visitation, but remanded to the trial court determination of the timing and the extent of such visitation. Baby M, II, 109 N.J. 466, 537 A.2d at 1263. The outcome on remand is discussed infra at note 78.


Baby M, I, 217 N.J. Super. at 399, 525 A.2d at 1171.

On appeal, the New Jersey Supreme Court held that "under our laws termination of parental rights cannot be based on contract, but may be granted only on proof of the statutory requirements." Baby M, II, 109 N.J. at 444, 537 A.2d at 1251. In addition to the state neglect statutes, the court considered state statutes providing for the termination of parental rights in a private adoption. N.J. STAT. ANN. §§ 9:2-18, 9:3-48(c). The court found nothing in the record that would justify terminating Mary Beth Whitehead's parental rights. The court wrote:

It is not simply that obviously there was no 'intentional abandonment or very substantial neglect of parental duties without a reasonable expectation of reversal of that conduct in the future,' N.J.S.A. 9:3-48(c)(1), quite the contrary, but furthermore that the trial court never found Mrs. Whitehead an unfit mother and indeed affirmatively stated that Mary Beth Whitehead had been a good mother to her other children.
Moreover, the United States Supreme Court has made clear that parental rights are constitutionally protected.\textsuperscript{71} Thus any termination of parental rights must meet fairly rigorous due process standards. Citing for support one of the relevant Supreme Court decisions, \textit{Santosky v. Kramer},\textsuperscript{72} Judge Sorkow asserted that due process requirements had been satisfied in this case merely by “notice to defendants, their appearance and active participation.”\textsuperscript{73} This is a complete misreading of \textit{Santosky}. Under \textit{Santosky}, due process requires that the state must support its allegations that the child is “permanently neglected” by at least clear and convincing evidence before it may sever completely and irrevocably parents’ rights in their natural child.\textsuperscript{74} Judge Sorkow never found that such evidence had been provided. In addition, \textit{Santosky} was decided in the context of a termination proceeding that had followed the quite elaborate statutory procedures established by New York for terminating parental rights. Those procedures required, among other things, that the state first remove the child on a temporary basis for one or two years, during which time the parent must fail “for a period of more than one year . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so.”\textsuperscript{75} Obviously, no comparable procedures were followed with respect to Mrs. Whitehead. Finally, it is not clear that the notice given to her satisfied even the minimal due process standard acknowledged by Judge Sorkow: there is no reported case in New Jersey in which a disputed custody proceeding resulted in the termination of all parental rights of a biological parent.

Although terminating parental rights in a private custody proceeding is unprecedented, courts sometimes take a roughly equivalent step of denying visitation to a biological parent. Even that step, however, is taken only in the most extreme circumstances. In New Jersey, for example, the courts have held that visitation may not be denied a biological parent unless “it clearly and convincingly appeared that this was one of those exceptional cases where visitation would have caused physical or emotional harm to the children, or

\begin{itemize}
  \item \textsuperscript{71} See Santosky v. Kramer, 455 U.S. 745, 753, 769 (1982) (because parent has fundamental liberty interest, protected by due process clause, in care, custody, and maintenance of child, state intervention to terminate parental rights must be accomplished by procedures meeting requirements of due process clause, including proof by clear and convincing evidence); Stanley v. Illinois, 405 U.S. 645, 651-58 (1972) (because parent has cognizable and substantial interest protected by due process clause in companionship, care, custody, and management of child, unwed father entitled to hearing as to his fitness before children could be taken from him in state dependency proceeding).
  \item \textsuperscript{72} 455 U.S. 745 (1982).
  \item \textsuperscript{73} Baby M, I, 217 N.J. Super. at 399, 525 A.2d at 1171.
  \item \textsuperscript{74} Santosky, 455 U.S. at 769.
  \item \textsuperscript{75} N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983).
\end{itemize}
where it was demonstrated that the noncustodial parent was unfit.\textsuperscript{76} One federal court has held that the constitutional protection accorded a noncustodial parent to visit his children is "roughly comparable to the interests of a parent and child in a viable nuclear family."\textsuperscript{77}

If it seems odd that Mary Beth Whitehead should end up with substantial visitation rights\textsuperscript{78}—it is worth remembering that the problem may not be the standards of family law, but surrogacy itself. The child of a surrogacy arrangement is conceived with the understanding that he or she will be separated from at least one biological parent for life.\textsuperscript{79} We have enough experience with adopted children to know that many grow up with a strong need to know more about their biological parents, with some spending enormous time and resources trying to obtain records to aid in their search.\textsuperscript{80} Some states have developed elaborate adoption information registries in response to this need.\textsuperscript{81} Children conceived through surrogacy may have the same need.

To assert that the problem in surrogacy cases is the same as the one being faced in adoption cases, however, is to ignore a vital distinction. Adopted children were not conceived for the purpose of being adopted. Surrogacy deliberately establishes among biological parents, an adoptive parent, and a child, a set of relationships that is fraught with peril for all those involved, both at the birth and throughout the life of the child. It is this set of relationships that the law should discourage by refusing to honor surrogacy contracts. Moreover, when custody disputes arise following surrogacy, it is the altruistic ethic of family law that should guide the court, not the ethic of self-gratification of the marketplace and contract law.

\textsuperscript{77} Franz v. United States, 707 F.2d 582, 602 (D.C. Cir. 1983) (upholding constitutional right of non-custodial parent not to be permanently and totally separated from children pursuant to witness protection program without due process).
\textsuperscript{78} On remand, a trial court ordered that Mary Beth Whitehead-Gould is to have unsupervised visitation one day each week between the hours of 10:30 and 4:40 p.m. commencing immediately. Starting in September 1988, the weekly visitation is to be increased by one additional day every other week. Beginning April 1989, the additional biweekly visitation days will be expanded to two days and Melissa may remain overnight with her mother. The court also allocated holiday visits, and provided that Melissa is to spend one two-week summer vacation period with her mother beginning in 1989. \textit{In re Baby M}, 225 N.J. Super. 267, 271-74, 542 A.2d 52, 54-55 (Ch. Div. 1988).
\textsuperscript{79} It is technically possible to use the egg of a woman other than the surrogate. This was done, for example, in the South African case mentioned earlier. \textit{See supra} note 50. In such instances the surrogate would not be the biological mother, but only the gestational mother. Far from strengthening the arguments for surrogacy, however, such technological splintering of parental roles, dividing the traditional mother into three parts (the biological mother, the gestational mother, and the social or adoptive mother) only increases the risks of inadequate parenting for the child and of exploitation of poor women.
\textsuperscript{80} \textit{See In re} Roger B., 84 Ill. 2d 323, 326, 418 N.E.2d 751, 752 (1981) (plaintiff searched for biological family for three years).
\textsuperscript{81} \textit{See} N.Y. PUB. HEALTH LAW § 4138 (McKinney 1985).