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THE ROLE OF CONTRACT PRINCIPLES IN DETERMINING THE VALIDITY OF SURROGACY CONTRACTS

June R. Carbone*

Contract principles, as pillars of the legal system, rest on a societal decision that the most effective way to govern certain types of relationships is to lend the imprimatur of the state to private agreements. Contract thus exerts its greatest influence over relationships where, as a society, we wish to encourage diversity and flexibility in the nature of the agreements to be enforced, and where we have confidence that the parties, left to their own devices, will reach acceptable bargains. Commercial agreements, at least those between parties with similar bargaining power, are perhaps the clearest expressions of socially desirable contracts. So long as there are no overriding social or ethical interests affecting parties beyond those involved in the bargain, society encourages commercial actors to protect their own best interests, and the discipline of the market ensures that, in the long run at least, they will. Enforcement of the private agreements arising from such bargains, therefore, offers an effective way to encourage productive exchanges.

If the influence of contract reaches its height in commercial agreements, however, it has traditionally reached its nadir within the family. The law has long refused to recognize the validity of many agreements concerning the family. "Meretricious" agreements were

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1. For a more extended discussion of the nature of contract and its relationship to marriage, see Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 CALIF. L. REV. 204 (1982).

2. This has not always been true. So long as tradition and traditional institutions were important in governing commercial relationships, contract was much less important. However, with the increasing rate of change over the last two centuries, and the increasing emphasis on innovation, flexibility, and diversity, private agreements have come into their own as a major form of governance. See F. Kessler & G. Gilmore, CONTRACTS: CASES AND MATERIALS 3-4 (2d ed. 1970).
void as against public policy, agreements between spouses were presumed to be lacking the proper legal intent, even antenuptial agreements faced an uphill battle for recognition. Far from encouraging diversity and flexibility, the law has fixed family relationships and obligations, treating these matters as too important to be left to the whims of individuals.

Nonetheless, the latter part of the twentieth century has seen a major assault on this last remaining bastion of status. The family no longer governs the major source of wealth within society as employment has replaced property as the most important source of income. The law now balances the interests of individual family members on a far more equal scale and, to an increasing degree, diversity and flexibility characterize intimate relationships generally and reproductive matters in particular. These changes suggest that contract will place an increasingly important, though as yet undefined, role in managing such private matters.

The debate now raging over surrogate mother contracts directly addresses the question of whether intimate matters such as those concerning human reproduction can be left to individual parties or whether private agreements in this sphere are suspect. Although the controversy concerns a variety of moral, ethical, and religious questions about the nature of human reproduction, the debate also involves more general questions about the appropriate sphere of private governance, for determining when the state should embrace and sanction private agreements and when it should not, and for separating out the different aspects of such contracts when the agree-


4. Balfour v. Balfour, 2 K.B. 571 (1919); Murray, supra note 3 § 20, at 33.


6. "Surrogate mother," "surrogacy," and other "surrogate arrangements" will be used to refer to arrangements where a man contributes sperm to a woman to whom he is not married for the purpose of conceiving a child to be raised by the genetic father and his wife. The man contributing the sperm will be termed the "genetic father" of the child to distinguish him from the husband of the genetic mother. The woman contributing the ovum and carrying the child to term will be termed the "genetic mother" to distinguish her from the would-be adoptive mother (the genetic father's wife). The term "genetic" will be used instead of "biological" to distinguish parents who contribute sperm or ovum to the child from parents who make other biological contributions, such as a mother, who, through the process of in vitro fertilization, carries to term a child conceived from the ovum of a different woman.
ments fall apart.
This article will examine contract principles as they are applied to surrogate motherhood, in an effort to provide a framework for answering these questions. First, the article will compare modern commercial with more traditional domestic agreements, concluding that the contract model is most appropriate where: (1) the contract primarily concerns the interests of the parties to the agreement with a minimal effect on third parties or society generally; (2) the parties to the contract are capable of reaching acceptable bargains; and (3) enforcement would not impose inordinate difficulties on the legal system. Second, the article will explore the reasons why contract has not traditionally served as a model for family relationships and will examine the extent to which those reasons are still valid. Third, the article will apply the contract model to surrogate agreements, attempting to define the societal and third party interests at stake, factors that might interfere with the ability of the parties to reach appropriate agreements, and the difficulties of enforcement. Finally, the article will critique the leading surrogate decision to date, examining the extent to which judicial reasoning in this area can be interpreted in terms of contract principles and the extent to which it rests on normative values alone.

I. CONTRACT PRINCIPLES AS A FRAMEWORK FOR ANALYZING THE VALIDITY OF SURROGATE AGREEMENTS

A. Defining an Appropriate Sphere for Contract: Historical Distinctions Between Domestic and Commercial Contracts

In determining which relationships will lend themselves to private agreement and which will not, it is instructive to begin with a comparison of modern commercial agreements and more traditional domestic ones. In undertaking such a comparison, the first, and perhaps most important difference is the degree to which the agreements implicate interests beyond those of the parties. Commercial agreements, e.g., contracts to sell salt, to engage an architect, to transport machinery, typically affect only the parties to the bargain.\(^7\) For gen-

\(^7\) Where commercial agreements have a substantial impact on others, contract is less useful and private agreements may be subject to regulation. For example, a contract to construct a factory may be subject to a variety of land use and environmental restrictions that override the agreement between the landowner and building contractor. Whether such a contract is treated as a private matter or as a matter implicating other parties depends on the societal framework for the handling of such matters. In frontier America, new construction may have been treated as entirely a private matter, affecting only the project's immediate neighbors. Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. 1953).
erations, the family, on the other hand, has been treated as a matter simply too important to be left to the wishes of its members. As Mary Ann Glendon has observed in her pioneering work on the role of the family, so long as land was the major form of wealth, the family was the basic governing unit in society. Ownership and authority over society's most productive assets thus depended on family relationships. Marriage, most often arranged by parties other than the principals, secured alliances, guaranteed legitimacy, and, particularly during the days of primogeniture, determined the right of succession. Individuals were not allowed to alter so fundamental a part of the social structure.

The second difference between commercial and domestic agreements concerns the equality of the parties. In commercial agreements, the parties are presumed equal. Where they are not, special


11. In feudal England neither husband nor wife had the power of testamentary disposition over land. Donahue, supra note 10, at 65. See also Professor Graham's observations that: illegitimacy had historically been used to assure that wealth and authority would pass only to the true biological heirs of males who controlled the devolving assets. . . . Requiring a woman to attach herself to one male provided assurance to that male that he was the father of any child borne by that woman.


12. Another way of expressing this is to say that private agreements will be allowed to govern only when flexibility and variety are more valued than certainty and stability. In a complex modern society, the variety of commercial agreements is virtually endless and the rate of innovation makes systematic regulation difficult. On the other hand, in dealing with family structure from feudal times through the days of Queen Victoria, society attempted to reinforce a relatively inflexible model of the family with fixed obligations among family members. Of course, the relative importance of these values may change over time. Thus, the wife's dower rights, which, in the early middle ages were determined by agreement at the time of the marriage, became fixed at no less than one-third by the fourteenth century. Donahue, supra note 10, at 77.
rules or regulations may protect the more vulnerable party. In the
domestic sphere, on the other hand, it is impossible to overstate the
hierarchical and inherently unequal view of family relationships that
flourished prior to the twentieth century.

To quote Jeremy Bentham:

But why is the man to be the governor? Because he is the
stronger. In his hands power sustains itself. Place the authority
in the hands of the wife, every movement must be remarked by
revolt on the part of the husband. This is not the only reason: it
is also probable that the husband, by the course of his life, pos-
sesses more experience, greater aptitude for business, greater
powers of application.

With that view of the appropriate relationship between husband and
wife—and similar views of the relationship between parents and
children—the idea of bargain was absurd. If man was to be the
"governor," there was no utility to agreement. The law sanctioned
his authority, with or without the consent of the governed. The wo-
man was viewed as in need of protection, not from her husband's
authority, but from her own foolishness.

Finally, and related to the other two distinctions, is the willing-
ness of the judiciary to intervene in disputes. In the commercial
sphere, at least over the course of the last century, courts have be-
come involved in all manners of commercial disputes. The barriers to
litigation erected by the common law rules of pleading, narrow defi-
nitions of liability in contract and tort, and limitations on third party
suits have come tumbling down. At the same time, the courts have

13. The classic example of this is consumer protection legislation. In societies of individ-
ual merchants such legislation is unnecessary. With the growth of large corporations such
protection has become commonplace. See F. KESSLER & G. GILMORE, supra note 2, at 9-12.

14. J. FLANDRIN, supra note 9, at 148-54; F. SHORTER, THE MAKING OF THE MOD-
ERN FAMILY 72 (1978); Olsen, The Family and the Market, A Study of Ideology and Legal
Reform, 96 HARV. L. REV. 1497, 1516 (1983); J.S. MILL, The Subjection of Women, ON
LIBERTY AND OTHER ESSAYS 194 (1926); M. GLENDON, supra note 8, at 111; Virginia Ry.
& Power Co. v. Gorsuch, 120 Va. 655, 91 S.E. 632 (1917); Prager, The Persistence of Sepa-
rate Property Concepts in California's Community Property System, 1849-1975, 24 UCLA


16. In invalidating antenuptial agreements that provided for the forfeiture of an inno-
cent wife's right to support, for example, courts were concerned about the possibility of the
husband's unequal bargaining power before the marriage and the prospect that the dependent
wife would become a ward of the state. Note, supra note 5, at 532-37.

17. See, e.g., the evolution of strict liability rules and the declining importance of privity
of contract described in Prosser, The Assault on the Citadel, 69 YALE L.J. 1099 (1960) and
Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791
(1966).
remained wary of becoming involved in disputes over which spouse is to take out the garbage and which is to do the dishes and wary of being held hostage to a vindictive spouse's desire to use the legal system to exact revenge. Whether or not such fears of a flood of litigation were realistic, the idea of judicial resolution of domestic disputes was both unpleasant to lawyers and judges and inconsistent with the simple, self-executing model of the family as a hierarchical structure vesting authority in the husband. 

Thus, in examining the differences between commercial agreements and domestic bargains, three differences emerge which define the limits of contract: (1) does the bargain implicate third party or societal concerns that override the interests of the parties to the contract? (2) is the relative bargaining power of the parties such that society has confidence in the outcome? and (3) does enforcement pose inordinate difficulties?

In dealing with commercial relationships, the predominant answer to these questions for the last century has been no. In the domestic sphere, the very idea of contract has been inconsistent with the idea of family for all three of the reasons described above. Status, not contract, has therefore governed the family.

18. For example, although most states recognize a marital duty of support, few courts will hear claims of inadequate support during an on-going marriage. See, e.g., Maguire v. Maguire, 157 Neb. 226, 238, 59 N.W. 336, 342 (1953); H. Kay, Sex Based Discrimination 190-91 (1980); M. Glendon, State Law and the Family 78-105 (1977); H. Clark, The Law of Domestic Relations 186 (1968); Shultz, supra note 1, at 232-36 and authorities cited therein. In addition, courts are reluctant to intervene in parental disputes over childcare so long as the parents remain married. See People ex rel. Sisson v. Sisson, 2 N.E.2d 660, 661 (N.Y. 1936); Kilgrow v. Kilgrow, 268 Ala. 475, 478, 107 So. 2d 885, 888 (Ala. 1959); Hackett v. Hackett, 150 N.E.2d 431 (1958), aff'd, 154 N.E.2d 820 (Ohio 1959); Glendon, Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies, 23 AMER. J. COMP. L. 1, 21 (1975).


20. For those subsets of commercial agreements where the answers are different, legislation, regulation, or contract doctrines such as unconscionability have limited the enforcement of private agreements. See F. Kessler, G. Gilmore & A. Kronman, Contracts: Cases and Materials 14-17 (3d ed. 1986).

21. H. Maine, Ancient Law 163-65 (1864). Agreements altering legally imposed obligations or relationships have traditionally been unenforceable. For example, most states continue to forbid marriages involving homosexual couples, incest, polygamy, underage parties, or marriages for a limited term. See H. Clark, supra note 18, §§ 2.8-2.15.
B. The Role of Domestic Contracts in the Modern Era

In applying the three criteria for determining the role of contract in the modern family, it is necessary to start with the transformation of marriage. The major reason for concluding that family agreements did not meet the first criterion, i.e., that they implicated interests transcending those of the parties to the agreement, was the role of the family in governing land at a time when land was the most important source of wealth and productivity. Land holdings, however, have long since given way to commercial ventures as the major source of productivity, and commercial ventures have evolved from small, family held enterprises to large corporate undertakings. Employment has replaced inheritance as the most important determinant of income and status.22

With the family no longer conferring social or economic authority, the justification for marriage has changed from social obligation to love and affection. Marriage is no longer seen as a hierarchical relationship in which the husband is given sole authority over the family holdings and its inferior and dependent members. Rather, it has become—at least as an ideal—a partnership between equals freely choosing to associate with each other.23 With this transformation, marital agreements now have their principal effect on the parties. They have far fewer implications for any broader set of societal concerns, with one notable exception—provision for childrearing.

The societal interest in children has both broad and narrow aspects. As a society, we transmit moral and cultural values through our childrearing practices. Our ability to preserve the values of our civilization depends on our ability to ensure their survival from one generation to another. Collectively, we therefore have an interest in fostering appropriate child care practices.

On a less cosmic plane, society also has an interest in avoiding the consequences of improperly caring for its children. To the extent we collectively provide aid for dependent children, for example, we have a financial interest in seeing that parents provide sufficient

22. M. Glendon, supra note 8, at 16.
child support. To the extent improperly cared for children contribute to crime, delinquency, or simply the underutilization of human resources, we have an interest in avoiding those results. In short, while the family as an institution is now far more concerned than in earlier times with the interests of putatively equal husbands and wives, society retains a substantial interest in the arrangements which concern provision for children.

Application of the second criterion, the relative bargaining positions of the parties, has also changed dramatically with the changing role of the family. The patriarchal model with its emphasis on male authority and its presumption of inequality is gone. In its place, the partnership ideal presumes that husbands and wives, and indeed, men and women generally, are equals capable of reaching appropriate bargains. To the extent agreements address the parties' relationship to each other, therefore, the law has become increasingly willing to enforce them. The modern debate centers not so much on the propriety of contracts between husbands and wives per se, as on the degree of regulation justified by many wives' continuing economic dependence on their husbands and by the different social conditioning afforded men and women. Finally, the courts are more willing to intervene in domestic matters. The traditional substantive basis for nonintervention, reinforcement of patriarchal authority, is gone. With the increasing frequency of divorce, the courts routinely decide cases involving the

24. For a discussion of the changing view of marriage as a single unit headed by the husband to a union of two independent, autonomous, and putatively equal actors, see Shultz, supra note 1, at 274-77.

25. See generally Shultz, supra note 1; L. Weitzman, The Marriage Contract (1981); Temple, Freedom of Contract and Intimate Relationships, 8 Harv. J. L. & Pub. Pol'y. 121 (1987); Mnookin & Kornhauser, Bargaining in the Shadow of the Law, 88 Yale L.J. 950, 954 (1979). In addition, the modern trend favors the regulation of pre-marital agreements governing property and support obligations upon divorce instead of a presumption that all such agreements made in contemplation of divorce are void as against public policy. The Uniform Premarital Agreements Act (UPAA) recognizes the validity of property and support obligations at death or divorce if they are in writing, do not otherwise violate public policy, are not unconscionable, and meet certain requirements concerning voluntariness, reasonable disclosure of the other party's financial obligations, and the like. See Uniform Premarital Agreements Act at Prefatory Note to Discussion Draft dated March 11, 1983, §§ 2, 3, and 6(a).

26. See L. Weitzman, supra note 25, at 246. Nonetheless, the debate appears to concern the appropriate degree of judicial supervision of such agreements rather than the validity per se of those agreements. See supra note 25. The courts are more likely to invalidate agreements altogether when a substantive concern, such as support for a completely dependent spouse or minor child, is at issue rather than when the issue is solely one of relative bargaining power. See, e.g., cases cited by Temple, supra note 25, at 130.
amount of support, division of property, and custody of the children. The courts, however, remain reluctant to intervene where such intervention might disrupt an ongoing marriage, where it conflicts with an important substantive interest such as the rights of parents over their children, or where it runs afoul of constitutional limitations such as the right to privacy.

Nonetheless, with all these changes, as well as the growing diversity in private relationships, the role of contract in governing family relationships is growing. Presumptive opposition is being replaced with case-by-case analysis, and regulation rather than prohibition is being used to overcome potential problems. Family matters, and, indeed, intimate relationships generally, are no longer a separate world into which contract and the courts dare not tread.


29. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). Cf. Skinner v. Oklahoma, 316 U.S. 535 (1942). A major component of this right to privacy is a right to be free from "offensive" government interference, such as mandatory sterilization, with a positive right. Professor John Robertson has written several articles in this area arguing for recognition of a constitutionally protected right of procreation. See Robertson, Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. Cal. L. Rev. 939 (1986) [hereinafter Robertson, Embryos]; Robertson, Procreative Liberty and the Control of Conception, Pregnancy and Childbirth, 69 Va. L. Rev. 405 (1983) [hereinafter Robertson, Procreative Liberty]. However, Professor Robertson's analysis confuses what is essentially a negative right, that is, a right to be free from particularly offensive government interference, such as mandatory sterilization, with a positive right, viz. a right to procreate, that justifies state sanction of private activities such as in vitro fertilization and surrogate agreements and, indeed, state intervention, if necessary to effect specific performance of at least the custody provision of surrogate agreements.

In discussing the issue of government interference in the area of procreation, it is important to distinguish objections based on the form of intervention necessary to accomplish specific performance of surrogate contracts from the validity of the agreement itself. A couple contemplating marriage, for example, might for religious reasons agree that neither of them will ever undergo or attempt to convince the other to undergo an abortion in the case of an unwanted pregnancy or the existence of serious birth defects. If the woman changes her mind, breach of the agreement might be grounds for divorce (or in states that consider fault in awarding spousal support, grounds for a lower support award), even though the courts would not enjoin her from proceeding with the abortion.

30. See Shultz, supra note 1; Temple, supra note 25.

31. See supra note 25.

32. Contracts concerning "intimate relationships" between unmarried couples have traditionally presented a different set of problems, such as the importance of public policy discouraging divorce and illegitimacy, and reinforcing traditional morality generally. See discus-
C. The Application of Contract Principles to Surrogate Agreements

The validity of surrogate agreements, like the enforceability of domestic contracts generally, depends on their place on the continuum between private interests and public concerns. To determine that place requires a return to the principles with which the article started: that is, definition of the concerns that transcend the interests of the parties to the agreement, evaluation of the relative bargaining positions of the parties in order to determine the validity of consent, and consideration of the difficulties enforcing such agreements would impose on society.

1. Societal and Third Party Interests

In addressing the first issue, definition of the concerns that transcend those of the genetic parents, it is helpful to separate the agreement to conceive the child from the agreement that the genetic father will have custody. Historically, the major focus of state efforts to ensure appropriate child care has been on the act of conception. With only married couples likely to have both the commitment and the resources to provide adequate care for their offspring, state regulation sought to discourage out-of-wedlock births by reinforcing traditional moral values, banning sexual relations outside of marriage, and stigmatizing illegitimate children and their unmarried mothers. In the modern era, there is less emphasis on the family as the exclusive source of financial security and a greater emphasis on individual autonomy and privacy. Accordingly, individual choice in reproductive matters has been accorded greater protection while the state attempts to enforce parental responsibility for child care more directly.


34. See Graham, supra note 11, at 310-14; Robertson, Procreative Liberty, supra note 29, at 405.

35. The history of artificial insemination is instructive in this regard. In many jurisdictions, a married woman’s use of artificial insemination was once equated with adultery and the resulting child was considered illegitimate. Since then, many states have enacted statutes authorizing artificial insemination, usually with a provision recognizing the mother’s husband as...
A contract that provides for the conception of a child through a surrogate arrangement is consistent with the state interest in ensuring that the child will be adequately cared for. In surrogate arrangements, the child is conceived through a process of artificial insemination unlikely to undermine the genetic parents' marriage. The genetic father is married, and he and his wife are committed to providing care for the child. The genetic mother's involvement in the process is neither accidental nor unintended.

Bestowing state sanction upon an unmarried couple's decision to beget a child which only one of them will raise is unsettling in light of the long history of state efforts to regulate conception. Yet, without the surrogate agreement, a father capable of providing a good family environment would be unable to have a child of his own. Thus, the overall intent of surrogate contracts is consistent with the legal father of the child. Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639, 641-43 (1983). See also Smith, A *Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary*, 17 J. FAM. L. 41 (1978-79). Ironically, such legislation poses legal problems in surrogate mother arrangements since laws designed to facilitate artificial insemination may recognize the genetic mother's husband, rather than the genetic father, as the legal father of the child. See Clark, *New Wine in Old Skins: Using Paternity-Suit Settlements to Facilitate Surrogate Motherhood*, 25 J. FAM. L. 483 (1986-87); Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373, 375-78 (1981); Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465 n.69 (1983) and accompanying text.

36. Of course, there is no guarantee that all men who would like to become fathers through a surrogate agreement are in fact fit parents able to offer a good family environment for the child. The state interest in insuring that children are properly provided for, as well as the child's interests, therefore, justify mandatory screening of prospective parents at least for basic fitness. See Wadlington, *supra* note 35, at 503-05.

Some scholars argue that it is inconsistent to require screening of parents entering into surrogate contracts when no screening is required before the conception of other children. See Robertson, *Procreative Liberty*, supra note 29, at 429-36 and Robertson, *Embryos*, supra note 29, at n.241. Such an argument misses the point. Screening of prospective parents in other contexts (e.g., unwed couples) is not imposed because it would be impractical and offensive, not because the interests of the children are any different. In the surrogate context, the child is conceived through use of artificial insemination, after a contract is signed, and usually after an agency has conducted minimal screening of the surrogate mother. A mandatory screening requirement would be relatively easy to administer, and no intrusion into intimate relationships would be involved.

Another issue concerns the appropriate scope of screening. The easiest form of screening to justify is screening for the type of unfitness that would justify removing a child from any set of parents. It is also easy to justify screening that would aid the surrogate mother's choice to enter or decline to enter into the contract. Beyond that, any further restrictions, such as a limitation of surrogate contracts to cases where the genetic father's wife is unfertile, would depend on the balance between the strength of the father's interest in genetically-related children versus the strength of the competing state interest. See Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, HASTINGS CENTER RPT. 31, 35 (Oct.-Nov. 1987).
traditional notions of family responsibility.\textsuperscript{37}

The degree to which the determination of custody, as opposed to the agreement to conceive the child,\textsuperscript{38} implicates interests beyond those of the genetic parents depends on the existence of a societal interest in having children remain with their mothers, rather than their fathers and in reinforcing maternal, as opposed to paternal, identification with offspring. In human reproduction, parental care is

\textsuperscript{37} A separate issue exists as to whether there continues to be some societal interest in discouraging the conception of children who will not be raised by their genetic mothers and fathers. The issue is posed most directly by the possibility of an infertile couple "commissioning" a child to be conceived for the purpose of adoption. Unlike the situation in traditional adoptions, the child would not have been conceived but for the adoption agreement. It is possible to oppose such adoption agreements on the grounds that: (1) the adoptive parents may be less committed to the child than genetically-related parents, particularly in the event of birth defects or adverse financial or marital circumstances; (2) adoption itself creates some difficulties for children and the conception of children solely for that purpose should therefore be discouraged; and (3) so long as other children remain available for adoption, new children should not be conceived who might make the existing children that much more difficult to place. For an excellent discussion of this issue, see Page, \textit{Donation, Surrogacy and Adoption}, 2 J. APPLIED PHIL. 161 (1985).

All three of the aforementioned concerns are also present in artificial insemination by donor (AID) cases without preventing widespread acceptance of the practice. Both the AID and the surrogate cases can be distinguished from the "pure" adoption cases in that the genetic parent's involvement alleviates the aforementioned concerns and provides an offsetting benefit by advancing that parent's interest in genetically-related offspring.

Nonetheless, there are some differences between AID and surrogacy. In most AID cases, the sperm donor is anonymous and the mother experiences the growing identification with the child that pregnancy and childbirth encourages. If the child is born with birth defects or if the mother's financial or marital circumstances change, there can be no dispute as to maternity and no readily available genetic father upon whom to cast blame or shift responsibility. In the surrogacy context, the not uncommon desire to deny responsibility, particularly in the event of a birth defect which can be traced to conditions during the pregnancy (e.g., a fall), the delivery, or the mother's genes, can give rise to many disputes.

The child's adoption anxieties should be approximately the same in AID and surrogacy cases though it should be easier to keep AID a secret if the parents wish to do so. Separation anxiety from the birth mother, on the other hand, will be a factor only in surrogacy cases, but the evidence as to how much of an impact that has on the child is unclear. Chambers, \textit{Rethinking the Substantive Rules for Custody Disputes in Divorce}, 83 Mich. L. Rev. 477, 527-38 (1984). Finally, the effect on hard-to-adopt children should be the same.

Accordingly, while surrogacy agreements are more like AID cases than like agreements commissioning a child for adoption by unrelated parents, they potentially pose additional difficulties for children. Whether those difficulties justify the banning of surrogacy agreements depends on the strength of the father's interest in having genetically-related offspring.

\textsuperscript{38} For one thing, direct state action to prohibit surrogate conception is unlikely given the offensiveness of the intrusion into such a private matter. \textit{See} discussion in Baby M, 109 N.J. at 396, 537 A.2d at 1227, concluding that the right to procreate is not implicated in these cases because the father is free to procreate as he wishes; rather, it is the custody determination that is before the courts. At most the state is likely to discourage surrogate agreements. \textit{See} Bard & Kurlantzick, \textit{Contracts After the Baby M Case}, Nat'l L.J., Apr. 25, 1988, at 13, distinguishing payment for conception from payment for custody or for the surrender of parental rights.
a prerequisite for survival. Yet, for virtually all of human history preceding the last thirty years, children were something that happened rather than something planned. Controlling reproduction required abstinence; abstinence within marriage was viewed as unnatural. For a married couple, therefore, "accidental" pregnancies might be a common occurrence, but once the pregnancy occurred, or at least once the pregnancy became visible, a variety of biological, sociological and psychological factors encouraged the mother's identification with the newborn child. This identification with the child tended to reinforce the parents', and to a much greater degree the mother's, commitment to care for the child.

Even with greater choice in modern reproductive matters, a long term commitment to the resulting children is still critical and far from automatic. It is therefore possible to argue that there is a societal interest in insuring mothers' commitment to their newborn children, and that anything that interferes with the sociological forces reinforcing that commitment, even if the interference is symbolic only, is harmful. Given this view, sanctioning the validity of surrogacy agreements would support the decision of a mother to beget and carry to term a child to whom she has no larger commitment. To sanction such agreements made before the birth of the child and in exchange for payment would compound the affront.

39. Lecture by M. Shultz, Professor of Law, Univ. of California, Berkeley, on "Varying Feminist Perspectives on Surrogate Motherhood," to the American Association of Law Professors, Annual Meeting, Section on Women in Legal Education (Jan. 8, 1988).

40. The father experienced growing identification with the child to a much lesser degree and, at least until relatively modern times, the mother's care was more important than the father's for infant survival. L. WEITZMAN, supra note 25, at 99-105.

41. To practice infanticide is merely to withdraw parental care. The form of the commitment necessary to insure survival, on the other hand, is quite varied. Wet-nursing practices, use of nannies, and even the use of foster parents during the child's early years may be consistent with a sufficient commitment to insure the child's survival and, in most cases, well-being.

42. Lisa Newton identifies the fear that the child will be taken away from its mother as the major source of opposition to surrogate motherhood. However, any fear that the mother will be exploited is less basic than the fear of maternal abandonment. See Newton, Surrogate Motherhood and the Limits of Rational Ethics, 9 LOGOS (1988).

43. In modern society, where the demand for babies available for adoption is high, as are the rates of child abuse and divorce, the long term commitment to the child may be more important than the commitment immediately after birth. Nonetheless, American society looks more to mothers than to fathers for both types of commitment, although the father's involvement generally becomes more important with older children. See L. WEITZMAN, THE DIVORCE REVOLUTION (1985), on custody and child support patterns following divorce.

44. Whether payment for the relinquishment of custody is offensive in itself is, in the-
Yet, aside from the symbolic, it is difficult to identify a societal interest that is in fact injured by surrogacy arrangements. The pregnancy is not accidental. Indeed, the parents conceive the child with far more advance thought, care and commitment than attends the conception of most children. The mother is not abandoning the child. She is simply agreeing that the child’s father, who can be screened for fitness, will have custody. Evidence assessing the importance of biological ties between mothers and their genetically related offspring is inconclusive. Moreover, other interests, including the father’s interest and the societal interest in promoting gender equality must be weighed against the symbolic injury to the maternal bond.

ory, a separate question. Without some societal interest in reinforcing maternal bonding, however, the issue of payment carries little weight. Compare, for example, the relative paucity of opposition to payment of sperm donors in artificial insemination cases. But see Radin, Market Alienability, 100 Harv. L. Rev. 1849, 1932-33 (1987) (arguing that commercial surrogacy might lead to the “comodification” of children, and that the major harm would be the differential rates women could command for their children); Krimmel, The Case Against Surrogate Parenting, 13 Hastings Center Rpt., Oct. 1983, at 35.

Similarly, the decision to relinquish custody before conception raises issues distinct from the decision to relinquish custody after birth. Since maternal bonding occurs after birth, the symbolic interference with the bonding process is much less, and any objection based on the uninformed nature of the mother’s consent disappears. Moreover, as a practical matter, the courts are unlikely to set aside a custody agreement between an eager father and a mother who asserts that she does not want custody. See infra notes 51 and 66.

45. Most surrogate contracts contain other provisions, including provisions for the severance of the mother’s maternal rights and adoption by the genetic father’s wife. Such provisions are less central to surrogate agreements than the issue of which parent will have custody of the child.

Custody agreements, even if otherwise enforceable, are usually subject to a “best interests of the child’’ standard. In practice, however, such agreements tend to be enforced unless the would-be custodial parent is unfit or the child’s interest in overriding the agreement is otherwise compelling. See infra note 51.

46. Chambers, supra note 37.

47. See Roberson, Embryos, supra note 29, at 1023. The father’s interest in being able to produce and raise genetically-related offspring is as difficult to assess as the societal interest in reinforcing maternal bonds. See, e.g., the New Jersey Supreme Court’s discussion of this issue in Baby M, 109 N.J. at 396, 537 A.D.2d at 1227.

48. It is arguable that in modern American society, reinforcing paternal identification with and commitment to children is more important than strengthening maternal identification and commitment. Parental care immediately following birth is less an issue today than the issue of parental commitment for the twenty or more years necessary to insure a productive adult. While men are statistically more likely than women to be able to provide appropriate education and a secure financial environment for the child, they are also more likely to be abusive parents and less likely to remain with the child through adulthood. Whatever the parental bonding immediately after birth, it is the paternal bond in later years that is most in need of repair.

In addition, it has been argued that equality for women depends on lessening the emphasis on maternal child care in favor of an ideal of shared responsibility. See, e.g., L. Weitzman, supra note 25, at 98-120. These authors would deny that the baby needs Mommy any more than Daddy and they would argue for gender-neutral custody presumptions. See also Elster,
Balancing these interests may be commonplace for legislatures, but such balancing raises issues which the courts, and perhaps lawyers generally, are not well suited to resolve. To conclude that the societal interest in maternal bonding overrides the parents' interests in being able to use surrogate agreements to advance their own ends depends on the importance given to maternal child care, the degree of symbolic injury surrogate agreements pose, and the importance of the offsetting interests in alleviating the problems arising from infertility and in promoting gender equality. In the absence of legislative guidance or clear societal consensus, the courts are left with little more than their own instincts to guide them.

Third party interests of the child are easier to define. It is difficult to argue on any level that the child has an interest in preventing conception. Therefore, the child's interests should be defined in terms of the custody agreement. In other contexts, children have a right to financial support and a right not to be placed in an unfit or abusive environment that overrides the interests of their parents and that justifies judicial review of any custody or support agreement.

Finally, it is also arguable that reinforcement of the maternal bond hurts both women and children to the extent that it convinces women who are not fully prepared or able to care for their children to keep them simply because it is too painful to give them up. In more traditional times, the importance of maternal bonding did not prevent strong social support for unwed mothers who chose to place their children for adoption. Reinforcement of parental bonding does not necessarily override all other interests.

See Robertson, Embryos, supra note 29, at 1013. Society, however, may have an interest in preventing conception on the grounds that the harm to children from such arrangements outweighs the benefits from their birth.

R. Mnookin, CHILD, FAMILY AND STATE 158-60, 469-72, 628 (1978); Boden v. Boden, 42 N.Y.2d 210, 366 N.E.2d 971, 397 N.Y.S.2d 701 (1977); Wadlington, supra note 35, at n.160. In other contexts, children also have a right not to be sold. The laws prohibiting baby-selling stem primarily from two concerns: (1) that the mother, who could place the child for adoption with a number of well-suited families, will choose a less suitable family because of the fee; and (2) that the financial incentive, together with the mother's emotional distress at the unwanted pregnancy, leaves her unusually open to exploitation.

The surrogacy context can be distinguished on several grounds. First, a child placed for adoption has an interest in being placed with the most suitable family available since the child will not, in any event, be placed with a genetically-related parent. A child born as a result of a surrogate arrangement has an interest in being placed with a suitable genetic parent, not the best of all possible adoptive parents. Second, with respect to the exploitation of the mother, she enters into the contract at a time when she is not pregnant. Her potential exploitation is thus reduced to the coerciveness of payment. See infra notes 60-62 and accompanying text. Finally, the genetic father's interests differ from those of an adoptive parent. Adoptive parents have no involvement with the particular child until shortly before receiving custody. Had there been no adoption agreement, the same child would still have been conceived and born to the same mother. On the other hand, in surrogate agreements the genetic father would not have agreed to the conception of the child but for agreement that he would have custody. The genetic father might harbor serious reservations about the genetic mother's suitability to raise his child. The
In the surrogate context, these rights justify prospective screening of the genetic father and his wife, denial of custody to unfit parents, and the enforcement of support obligations independently of the contract even in situations where both genetic parents oppose such measures. What the child does not have is the right to override his parents' determination of custody in order to choose one fit parent over the other. In a divorce in which custody is settled by agreement, for example, or in artificial insemination by donor (AID) cases, the child cannot challenge the custody determination simply because he or she would be better off with the other parent.

Even when a "best interests of the child" standard is applied, the child's interest, as a practical matter, in being able to choose between two fit genetic parents is generally less than the interest of his parents in being able to settle the matter between themselves. Ac-
cordingly, while the child's interests justify judicial review of any custody determination resulting from a surrogate contract, they do not justify rendering the contract void ab initio.\textsuperscript{54}

2. \textit{Equality of Bargaining Ability}

The second contract issue addresses the validity of the genetic mother's consent. This is a controversial issue and there are two basic objections to surrogate parenthood on these grounds. The first one concerns the question of whether a woman is capable of deciding in advance to give birth to a baby who will be surrendered to the custody of another or whether the process of carrying the baby to term will so inevitably affect her judgment as to make the initial decision suspect.

In an ordinary pregnancy, there are a whole set of forces that tend to reinforce a mother's identification with her unborn baby. There is the mother's awareness of biological changes, the happy anticipation of life with the newborn, and the reaction of friends and relatives to the prospect of a new child. Do these pressures suggest that no woman can give truly informed consent to an agreement to surrender custody of a child until after she has experienced the birth of that child? Or does the existence of these pressures favor a decision made before conception, i.e., a decision made at a time when the mother is not subject to the hormonal and emotional changes that accompany childbirth, as more dispassionate and therefore presumptively valid?

The answer depends less on contract notions about the nature of informed consent than on normative notions about the propriety of the decision. The very utility of contracts stems from their ability to lock in a decision and insulate it from subsequent changes. The fact

\textsuperscript{54} Unless the contract is void ab initio or the child is said to have an interest in remaining with his mother rather than his father, there should be no presumption against enforcing the agreement. Ordinarily, this means that the child is placed with the father rather than the mother pendante lite, and that the determination of the child's best interests should be made in the same manner as in other custody determinations preceded by parental agreement. See \textit{supra} note 51.
that one party later changes his or her mind is irrelevant, unless the reasons for the change affect the validity of the initial decision.\textsuperscript{55} Surrogacy contracts anticipate the range of conflicting emotions pregnancy and childbirth may induce in both parties and the contracts are therefore drafted to resolve custody issues in advance and to protect both parties from later changes in the other’s commitment to the child. The emotional nature of childbearing justifies efforts to ensure that the parties to the agreement are free from duress or coercion, that they fully understand the nature of the agreement, and that they are capable of making such a commitment.\textsuperscript{56} Beyond these efforts to insure that the bargaining process is free from what Arthur Leff called “procedural naughtiness,”\textsuperscript{57} the issue turns on the substance of the decision. Those who oppose surrogacy because of the affront to the maternal bond would condemn the mother's agreement to surrender the child. They therefore explain her willingness to enter into the contract in terms of her underestimation of the bonding process, and they view any subsequent decision to retain custody as natural and correct. These writers value a decision made after childbirth more highly than one made before precisely because it is influenced by the mother's greater attachment to the child.

Those who view surrogacy as an appropriate response to infertility problems, on the other hand, regard the first decision, that is, the decision to enter into the surrogate agreement, as presumptively

\textsuperscript{55} It is important to emphasize that, in contract terms, the only issue is the validity of the original surrogate contract. A later decision by the surrogate mother to retain custody may be perfectly rational without in anyway undermining the force of the original agreement. Construction contracts provide a useful example. A construction contractor may rationally agree to build a house for $100,000 and six months later, after labor costs have doubled, the contractor may equally rationally refuse to build the house for less than $160,000. The fact that the second decision is rational does not affect the validity of the agreement to build the house for $100,000 unless the circumstances causing the contractor to change his mind make the first agreement suspect. (e.g., the owner’s failure to describe a project accurately would justify invalidation of the agreement; an increase in the market price of labor would not affect the validity of the agreement because this is the type of risk the contractor assumed under the agreement.).

\textsuperscript{56} The fact that many people may be able to enter into a surrogacy agreement on the basis of an informed and rational decision does not mean that all volunteers are thus capable. Some women may be psychologically unable to make a realistic commitment to surrender a child in advance. Those who have not experienced childbirth may underestimate the changes that occur during pregnancy, such that their decision is, in fact, less than wholly informed. Psychological screening, pre-contract counseling, and requirements that surrogate mothers have experienced other pregnancies may be justified as a way of insuring that consent is informed and freely given.

correct. They agree that many mothers will experience conflicting emotions over the course of the pregnancy. But they conclude from that observation that changes in both the mother's and the father's commitments to the child are precisely the type of changes the contract was designed to guard against and that the appropriate solution is counseling and support for the surrogate mother in order to reinforce her promise to surrender the child. In both cases, conclusions about the utility and morality of surrogacy color discussion of the validity of consent.

The other issue concerning the validity of the surrogate's decision to enter the contract involves the matter of payment for her services. The standard fee for such contracts is $10,000. That is enough money to raise the possibility of poor women entering a contract they would otherwise never have considered, only because of the financial incentive. The risk is inherent. For most women, $10,000 is barely adequate to compensate for the physical and financial disadvantages of a pregnancy. For others, the amount is enough to override most other considerations.

To a large degree, resolution of this issue turns on the nature of human choice and the definition and value accorded to the idea of free will. Many writers, particularly those who have been influenced by a Marxian perspective, see human decisions as so inevitably influenced by social, economic, and cultural conditions as to make the exercise of free choice illusory. They would argue that because women have less access to well-paying jobs than men, because women have the primary responsibility for child care, further limiting their access to the labor market while increasing their financial needs, and because pregnancy is a socially encouraged condition for women, surrogacy has been made attractive and the $10,000 fee irresistible.

Those emphasizing protection of the woman's choice to enter surrogacy agreements tend to exalt individual freedom and autonomy either as a value in itself or as more likely to lead to better results in the long run. This group would therefore see a decision to enter into a surrogate contract because of the money involved as a perfectly valid choice absent duress or coercion stemming from a source other

58. If the contract to surrender custody is unenforceable, and the mother can make a legally binding decision to surrender the child only after the child is born, then counseling designed to reinforce her decision to surrender the child would be inappropriate because of the risk that it would unduly influence her subsequent decision to surrender custody.

59. For a discussion of Marxian theory, see Radin, supra note 44, at 1870-74, 1910-11.
than the payment of the fee.  

In the debate over surrogate motherhood, these different perspectives about the nature of human choice tend to become entangled with moral judgments about the mother's decision to surrender custody of her child. Those who view the mother's decision to surrender custody as unnatural or reprehensible explain her decision in terms of financial pressures "overcoming" her free will. Those who emphasize the benefit to infertile couples from surrogacy arrangements are more likely to view the mother's choice as a rational decision in which the financial payment makes more attractive an option which could be justified on nonmonetary grounds.

Contract principles offer no basis on which to reconcile or choose between these competing viewpoints. Rather, they impose certain minimum conditions for free consent: informed choice, freedom from overt coercion or duress, and sufficient screening to insure that women are not choosing to engage in conduct they view as immoral solely because of financial pressures. If those conditions are met, the debate shifts to the wisdom of the practice rather than the validity of consent.

3. Feasibility of Enforcement

The final element in the attempt to define the appropriate role for contract resolution of family law issues is the difficulty of enforcement. Surrogate disagreements are most likely to arise in a familiar context—custody disputes. The courts can limit intervention during the pregnancy without undermining the validity of the contract. Clauses concerning amniocentesis, abortion or prenatal care, for example, need not be specifically enforced and any damage claim can be resolved after the baby is born. The father can be obligated


61. See, e.g., S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 230 (1987). See also Radin's observation that "[w]e would normally view such commodification [selling oneself into slavery] as so destructive of personhood that we would readily presume all instances of it to be coerced." Radin, supra note 44, at 1910.

62. As part of the effort to insure valid consent, state regulation of surrogacy agencies would be appropriate. See generally Katz, supra note 50, at 13-15.

63. The ordinary remedy for breach of contract is money damages. In discussing custody, the question then becomes one not only of the validity of the contract, but also of the propriety of specific performance of the custody provision. See infra note 67.

64. Although in more traditional pregnancies, mothers have sometimes been forced to take precautions for the good of the fetus. See, e.g., Rush, Prenatal Caretaking: The Limits of State Intervention With and Without Roe, 39 U. FLA. L. REV. 55 (1987).
to support the child both by the contract and by more traditional support obligations so that in the event he breaches or the genetic mother obtains custody, there are mechanisms to determine the parents' respective contributions. The only important issue of administration concerns the resolution of custody disputes.

The degree of difficulty involved in custody determinations will depend on the clarity and certainty of legal and societal support for surrogate arrangements. If the law clearly recognizes the validity of surrogate contracts and there is broad support for that legal position, then problems of enforceability will be minimized. The genetic mother will be aware from the time she enters the contract that the father will have custody. There will be no uncertainty about the legal outcome, little incentive to contest it in court, and, depending on the degree of social approbation, reinforcement of her decision to surrender the child during the pregnancy. Any judicial determination will be relatively clear cut, since custody will go to the father unless he and his wife are shown to be unfit. This would be a difficult determination to make, particularly if there was effective screening before the contract was signed.

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65. Of course, for some women, such as Mary Beth Whitehead, a certain legal outcome could be an incentive to consider extra-legal means. See the trial court's description of Mary Beth Whitehead's efforts to flee to Florida to avoid surrendering custody in response to a court order. In re Baby M, 217 N.J. Super. Ct. 313, 525 A.2d 1128 (1987). The New Jersey Supreme Court ultimately characterized Mrs. Whitehead's actions as "merit[ing] a measure of understanding" because, "it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle." Id. at 396, 537 A.2d at 1227. Because the court viewed a surrogate mother's decision to retain custody as normatively valid, however, the court was unwilling to enforce measures such as mandated screening, counseling, and reinforcement of the contract's validity that would alleviate such difficulties. See infra text accompanying note 85 and supra notes 38-49 and accompanying text.

66. This is true even if a "best interests of the child" standard is applied to the custody determination. So long as the contract is viewed as presumptively valid, the inquiry should be framed in terms of whether the best interests of the child defeat the father's custody claim. (So long as the contract is valid, the mother cannot claim custody on the basis of her own rights to the child; however, she may support a claim on behalf of the child that the child would be better off with her.) The child should also remain with the father rather than the mother pendante lite unless some showing is made that the father is an unsuitable custodian. If the inquiry is so framed, it is difficult, as a practical matter, to show that the child would be better off with the mother rather than the father unless the father is shown to be unfit or there is a general presumption in favor of mothers over fathers. (If the latter were true, however, it would be grounds to invalidate surrogate custody agreements generally. See supra text accompanying notes 38-49.)

67. There is a separate argument, however, that even if surrogate contracts are not otherwise objectionable, the act of taking the child away from its custodial genetic parent is, and that the courts should therefore exercise their equitable discretion to deny specific enforcement of the custody provisions in surrogate agreements.
If, on the other hand, the validity of surrogate contracts is uncertain or the states give the genetic mother a period after the birth of the child in which to change her mind, the difficulties of administration will be compounded. During the pregnancy, the decision to surrender custody will be continuously open to reconsideration. After the birth, there will be a legally mandated period of uncertainty during which both sets of potential parents may be deepening their involvement with the child. Given the fact that the genetic father will generally have greater financial resources, he will have an advantage in securing competent counsel, and in establishing that he and his wife are better able than the genetic mother to provide for the child. Those advantages may persuade some surrogate mothers, like Mary Beth Whitehead, to resort to extralegal means. The greater the uncertainty concerning custody, the greater the likelihood that both parties will become attached to the child and the greater will be the incentive for dispute.

In its purest form, it is possible to make this argument without attaching any special importance to the maternal bond and without arguing that the contract is invalid. It is enough to assert that the physical act of removing a newborn baby from its custodial genetic parent is offensive, and that the state should not be a party to such an act unless the baby's health or well-being are threatened. This argument effectively distinguishes AID cases from surrogacy cases since in the case of artificial insemination, the baby is already with the party to receive custody under the agreement and all the state has to do is fail to intervene to vindicate the custody agreement.

However, the courts are routinely involved in custody determinations in divorce proceedings. Although the courts rarely remove infants from their mother's custody, judicial jurisdiction and supervision are essential to the orderly administration of divorce. Similarly, judicial willingness to enforce custody agreements in surrogacy contracts is central to the efficacy of the practice. As such, judicial distaste for such matters must be balanced against the other interests at stake.

In line with this debate, a Michigan court recently held that surrogacy contracts may be characterized as contracts for personal services and that specific performance would therefore violate the thirteenth amendment. Yates v. Keane, Nos. 9758, 9772 (Mich. Cir. Ct., Jan. 21, 1988). This may be true to the extent the father seeks to enforce the contract provisions requiring the mother to carry the baby to term. The custody provision, however, requires state intervention similar to state intervention in other types of custody disputes. No "personal services" by the mother are required for the relinquishment of custody.


69. For example, the decision of the New Jersey Supreme Court in the Baby M case may exacerbate some of the potential disputes. The New Jersey Supreme Court outlawed surrogacy fees and custody agreements without prohibiting the practice of surrogacy altogether. In any future surrogacy cases, no decision of the mother to surrender the child to the father will be binding until after the child's birth, and the child will ordinarily remain with the genetic mother pendente lite. At the same time, there will be no basis for the termination of either party's parental rights, and should the father claim custody, the issue will be resolved in accordance with a "best interests of the child" standard. While the fact that the baby has been
Accordingly, while enforcement difficulties do not necessarily justify banning all surrogate agreements, they may justify invalidating those which, because of other limitations on the freedom of the parties to contract, contain no enforceable custody provisions. In that case, surrogate contracts should be void ab initio rather than voidable at the genetic mother's option. The father would be on notice that the contract is meaningless and that custody will ordinarily go to the mother unless she voluntarily surrenders the child or is shown to be unfit. This should have the practical effect of deterring surrogate arrangements.\footnote{70}

II. JUDICIAL APPLICATION OF CONTRACT PRINCIPLES TO SURROGACY AGREEMENTS

Contract principles do not necessarily pose obstacles to the enforcement of surrogacy agreements. The objectives of the surrogate contract are consistent with overall state family policy, the child is adequately provided for (or where that is not the case, the traditional limitations on contract ensure that the baby's interests are protected), there is no inherent objection to allowing the parties to resolve custody, and the difficulties of administration are manageable once the validity of the practice has been sanctioned.

Nonetheless, the central question in determining whether to recognize these contracts is the question underlying any decision to adopt a contract model of governance: is this a matter best left to individual arrangements or is it one where individual choice is suspect? In discussing this issue, the courts may confuse the narrower questions determining contract validity with the judges' view of the morality of the practice. The recent decision by the New Jersey Supreme Court in \textit{In re Baby M},\footnote{71} the leading case to address the validity of the practice, is illustrative.

In this case, William Stern and Mary Beth Stern with respect to Baby M, on the basis of a comparison between the two parents' respective family lives, personalities and character. \textit{See Baby M, 109 N.J. at 457, 537 A.2d at 1258.} The recent decision by the New Jersey Supreme Court in \textit{In re Baby M},\footnote{71} the leading case to address the va-

\footnote{70} In the absence of a valid agreement, custody presumptions are ordinarily administered in a way that favors mothers over fathers, at least in the case of infants. \textit{See supra} note 66; \textit{Weitzman & Dixon, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce, 12 U.C. DAVIS L. REV. 473 (1979).} Moreover, courts invalidating the custody provisions in surrogate contracts may well establish a structure for determining custody that favors mothers' claims. \textit{See supra} note 69 and \textit{infra} notes 85-89 and accompanying text.

However, if commercial surrogacy is not outlawed, some prospective fathers may place greater pressure on surrogate agencies to screen prospective mothers more carefully to disqualify those likely to have difficulty surrendering custody of the children.

\footnote{71} 109 N.J. 396, 537 A.2d 1227 (1988). In this case, William Stern and Mary Beth

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lidity of surrogate contracts to date, provides a case in point.

In declaring the surrogate contract provisions concerning payment and custody to be unenforceable, the New Jersey Supreme Court invoked all three of the contract principles described above. First, the court argued that the contract implicated interests transcending those of the parties to the contract, viz., state policy encouraging children to “remain with and be brought up by both of their natural parents,”72 and the interests of the child.73 New Jersey, however, applies such a state policy only in conflicts between adoptive and genetic parents.74 It does little to discourage out-of-wedlock births. Indeed, state legislation facilitates artificial insemination by donor arrangements.75 Furthermore, in the Baby M decision itself,

Whitehead entered into a surrogacy contract. The contract provided that Mrs. Whitehead would become pregnant through artificial insemination using Mr. Stern's sperm, that she would carry the child to term, bear it, and after the child was born, deliver the baby to the Sterns and then do whatever was necessary to terminate her maternal rights so that Mrs. Stern could adopt the child. Mr. Stern agreed to pay Mrs. Whitehead $10,000 after the delivery of the child and, in a separate contract, to pay $7,500 to the Infertility Center of New York City. Id. at 411-12, 537 A.2d at 1235.

"Baby M" was born on March 27, 1988, and Mrs. Whitehead delivered her to the Sterns on March 30. The next day, however, she went to the Sterns, told them how much she was suffering without the child, and asked if she could have the baby for a week. Concerned that Mrs. Whitehead might attempt suicide, the Sterns agreed. Mrs. Whitehead subsequently refused to surrender the child to the Sterns and fled with her husband to Florida when presented with a court order awarding the Sterns custody of Baby M pendente lite. Four months later, the Sterns located the Whiteheads in Florida. Pursuant to a Florida court order, the police removed Baby M from her grandparents and returned her to the Sterns. Baby M has remained with the Sterns since that time. Id. at 415-16, 537 A.2d at 1236-37.

The trial court determined that the surrogacy contract was valid, but that the custody provision would not be specifically enforced unless that remedy were in the best interest of the child. The court then concluded that the child's interests were best served by her remaining with the Sterns, severing Mrs. Whitehead's parental rights, granting sole custody to Mr. Stern, and permitting adoption by Mrs. Stern. Id. at 417, 537 A.2d at 1237-38.

Mrs. Whitehead appealed the decision and the New Jersey Supreme Court granted direct certification. Id. at 419, 537 A.2d at 1238.

72. Id. at 435, 537 A.2d at 1247.
73. Id. at 437, 537 A.2d at 1248.
74. The court noted that this policy was the first stated purpose of New Jersey's previous adoption act, N.J. STAT ANN § 9:3-17 (West 1976 & Supp. 1987) (repealed 1977). The court concluded that while the policy was "not so stated in the present adoption law . . . [it] remains part of the public policy of this State." Baby M, 109 N.J. at 435, 537 A.2d at 1247.

In invoking this policy, the supreme court condemned the termination of Mrs. Whitehead's parental rights and the adoption by Mrs. Stern as inconsistent with state adoption statutes. Id. at 423-34, 537 A.2d at 1241-46. The termination and adoption issues, however, are distinct from the validity of the contract provisions governing custody. See Bard & Kurlantzick, supra note 38, at 30. Nonetheless, the court also relied heavily on this declaration of state policy to state the contract as a whole void as against public policy. Baby M, 109 N.J. at 434-38, 537 A.2d at 1246-47.

the court recognized the validity of noncommercial surrogacy agreements even though they too guarantee "the permanent separation of the child from one of its natural parents."76 Missing from the opinion was any discussion of the arguments identified above defining a state interest in maternal bonding or in opposing surrogate conception.77

Similarly, in discussing the "contract's total disregard of the best interests of the child," the court observed that "[t]here is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the custodial parents, of Mrs. Stern as adoptive parent, their superiority to Mrs. Whitehead, or the effect of the child on not living with her natural mother."78 Yet, the court raises

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76. Id. at 431, 537 A.2d at 1246. Ironically, the New Jersey Supreme Court also found that the "surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child." Id. at 435, 537 A.2d at 1247. The conclusion is ironic because if there is no state interest or interest of the child's favoring placement with the mother, then there is no reason not to allow custody to be settled by private agreement. See supra notes 38-49 and accompanying text.

If the court were serious about this argument, it would mean that a custody agreement at divorce placing children with their mother would be void as against public policy because it favored the mother over the father.

77. The court clearly bases a large part of its decision on the importance of the maternal bond. See Baby M, 109 N.J. at 435, 437-39, 441-42, 450, 459-60, 537 A.2d at 1247, 1249, 1254-56, 1259, 1261. Yet, the court, rather than make an effort to establish a state policy favoring maternal, as opposed to paternal, bonding, insists that state policy favors equality. See supra note 76. The court also fails to present any social science or medical evidence establishing the importance of the child's bond with the genetic mother as opposed to the genetic father and his wife, with whom the baby will ordinarily establish a "maternal" bond shortly after birth.

78. Id. at 437, 537 A.2d at 1248.
these concerns solely as grounds for objecting to Mrs. Whitehead’s surrender of parental rights for a fee without acknowledging that AID and noncommercial surrogacy agreements violate the child’s interests in an identical manner. The court appears to invoke state policy and the interests of the child only to protect the mother’s right to change her mind.

Even the court’s discussion of the issue at the heart of its opinion, the validity of the surrogate mother’s consent to the contract, is not so much an inquiry into the nature of consent as an inquiry into the morality of surrogacy. The court characterizes commercial surrogacy agreements as “taking advantage of the woman’s circumstances ( . . . the need for money) in order to take away her child,” and concludes that “[w]hatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transactions.” The court further observes that, even if payment were not an issue, “the natural mother is irrevocably committed before she knows the strength of her bond with the child. She never makes a totally voluntary, informed decision, for

79. In both AID and non-commercial surrogacy cases, there is no greater inquiry to determine the fitness of either the custodial parents, or the adoptive parent, or their superiority to the other genetic parent, so this distinction is presumably an inappropriate one. AID cases, of course, raise the issue of the child living with its “natural mother,” rather than its “natural father,” but the Baby M court asserts the equality of mothers and fathers’ interests in their children. See supra note 76.

However, the larger issue is the degree to which the child’s interests can be protected without requiring the invalidation of the surrogacy agreement. It is possible to mandate screening of the genetic father and his wife, and even an otherwise valid custody agreement would be unenforceable if it placed the child in an unsuitable environment. See supra notes 36 and 51.

80. Baby M, 109 N.J. at 439, 537 A.2d at 1249. In discussing the reasons for concluding that surrogacy arrangements violate the baby-selling laws, the court makes several weak arguments that fail to define why payment in itself is harmful. First, the court argues that surrogacy would not survive without payment while adoption would. Id. at 438, 537 A.2d at 1248. This merely indicates that mothers who produce children for adoption do not do so for money—they do so either accidentally or inconveniently.

Second, the court argues that “the use of money in adoptions does not produce the problem—conception occurs, and usually the birth itself, before illicit funds are offered. With surrogacy, the ‘problem,’ if one views it as such, . . . is caused by and originates with the offer of money.” Id. The difficulty with this argument is that there is no “problem” (i.e., no unwanted child).

Third, the court argues that in “surrogacy, the highest bidders will presumably become the adoptive parents regardless of suitability.” Id. However, the child’s interest is in being placed with a fit genetic parent, and screening can disqualify unsuitable couples. See supra notes 36-49.

quite clearly any decision prior to the baby’s birth is, in the most important sense, uninformed. . . .”81 Moreover, the court states that “[p]utting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy.”82

Implicit in the court’s analysis is its presumptive disapproval of any mother’s decision to surrender her child. The court therefore assumes that the mother consented to the surrogacy agreement only because the financial incentive overcame her better judgment. In contrast, the court thinks that “it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle” and it therefore treats decisions made after the birth of the child, when the biological, psychological, and sociological forces encouraging identification with the child are at their height, as presumptively valid and free from outside influence.83

Finally, the state supreme court opinion emphasizes the difficulties in enforcing surrogate contracts, difficulties that the court identifies as arising from the mother’s inevitable identification with the child, her pain if she surrenders the child, the genetic father’s and adoptive mother’s disappointment if she does not, and the necessarily disruptive effects of a battle for custody.84 Because the court views a surrogate mother’s decision to keep the child as normatively valid, it is unwilling to recognize measures, such as counseling or a custody presumption favoring the father, that might alleviate the enforcement difficulties.85

At the same time, the court minimizes the difficulties that arise from the invalidation of the custody provisions. In dealing with future custody disputes arising from surrogate agreements, the court declares that a best interests of the child standard will be applied both to valid surrogacy agreements undertaken without a fee and to illegal commercial agreements. In applying the standard *pendante lite*, the court declares that:

When father and mother are separated and disagree, at birth, on custody, only in an extreme, truly rare, case should the child be taken from its mother *pendante lite*, i.e. only in the most

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82. *Id.* at 440, 537 A.2d at 1249.
83. *Id.* at 459, 537 A.2d at 1259.
84. *Id.* at 434-35 nn.8-9, 468-69, 537 A.2d at 1246-47 nn.8-9, 1264.
85. *See supra* note 65.
unusual case should the child be taken from its mother before the dispute is finally determined by the court on the merits. The 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 lesser, if any, bond with the father—all counsel against temporary custody in the father. A substantial showing that the mother's continued custody would threaten the child's health or welfare would seem to be required.86

The court then asserts that in making the final custody determination "it would be inappropriate to establish a presumption . . . in favor of any particular custody determination. . . ."87 However, the court further states that "[t]his does not mean that a mother who has had custody of her child for three, four or five months does not have a particularly strong claim arising out of the unquestionable bond that exists at that point between the child and its mother; in other words, equality does not mean that all of the considerations underlying the 'tender years' doctrine have been abolished."88 The court concludes, in other words, that in spite of legislative assertions of equality, that a strong presumption exists in favor of granting custody to the mother.

The New Jersey Supreme Court wrote the Baby M opinion with the obvious intent of deterring future surrogacy agreements.89 As a result, if surrogacy survives in New Jersey, it will be with conflicting incentives for choice of a surrogate mother. The father's best hope of securing a child through a surrogacy arrangement lies either with careful screening to disqualify women unlikely to surrender the baby after birth or by choosing women unlikely to provide a family environment meeting the best interests of the child standard. For despite the New Jersey Supreme Court's efforts, the custody award to the Sterns clearly leaves the custody determination in the hands of the trier of fact,90 not with the mother.91 Therefore, even a

87. Id. at 453 n.17, 537 A.2d at 1256 n.17.
88. Id.
89. For example, the court observed that "all parties concede that it is unlikely that surrogacy will survive without money." Id. at 438, 537 A.2d at 1248. The court then concluded that "[o]ur declaration that this surrogacy contract is unenforceable and illegal is sufficient to deter similar agreements. We need not sacrifice the child's interests to make the point sharper." Id. at 454, 537 A.2d at 1257.
90. Indeed, the Baby M court found that "the trial court's decision awarding custody to the Sterns . . . should be affirmed since 'its findings . . . could reasonably have been reached on sufficient credible evidence present in the record.' " (citations omitted) Id. at 457, 537 A.2d at 1258.
91. In an ordinary custody dispute between a divorcing or unmarried couple over an
contract voidable at the mother's option and perfectly legal under the Baby M ruling offers no certainty as to the determination of custody.

Thus, while the court couches much of its discussion in terms of contract principles, its interpretation and application of those principles depends on conclusions derived from normative standards. The validity of the court's decision, therefore, turns on the propriety of using a moral basis for invalidating private agreements in the absence of legislative action, and on the validity of the court's moral judgments.\textsuperscript{82}

The relationship of the parents in a surrogate agreement is entirely different. Fathers are ordinarily motivated to enter into surrogate agreements because they are in long-term, relatively stable marriages that have failed to produce a child. The fathers generally are able to offer a good family environment and parents who are prepared to care for the child immediately after birth. Surrogate mothers, on the other hand, are usually willing to consider a surrogate arrangement because they are financially unable or otherwise unwilling or unprepared to have a child they intend to raise themselves. If the surrogate mothers are married, the husbands may have no commitment to child. Precisely because all of the parties enter into surrogate arrangements with the expectation that the genetic father and his wife will have custody, there is every reason to believe that surrogate fathers will, on average, be able to offer a better family environment for the child than surrogate mothers.

The matter of bonding, on the other hand, is a matter of opportunity. While both parents are usually present preceding a divorce or the dissolution of other relationships, only one set of parents will be allowed to care for the child following a surrogate birth. Once the bonding has occurred, the child may well have an interest in remaining with that parent on the basis of the bonding alone.

Accordingly, in the surrogacy context, there is much less reason to believe that the child's interests will be served by placement with the mother than in other custody disputes. In addressing the child's interests, the issue is not solely one of mother versus father, but one of genetic father plus adoptive mother versus genetic mother plus adoptive father. To argue for a presumption in favor of the genetic mother and her husband, therefore, requires not that the child have an interest in maternal bonding over paternal bonding, but that the child have an interest in bonding with its genetic mother and her husband rather than bonding with its genetic father and his wife. In other words, the child must have an interest in bonding with the woman who carried it to term. The Baby M opinion clearly rests its custody "advice" on such a conclusion, but without examining the basis for preferring bonding with biological mothers.

For an excellent discussion of these issues, see Note, \textit{Redefining Mother: A Legal Matrix for New Reproductive Technologies}, 96 \textit{Yale L.J.} 187 (1986).

\textsuperscript{82} Indeed, the New Jersey Supreme Court recognized the "inevitable confrontation with the ethical and moral issues involved," and the possibility of legislative action. Baby M, 109 N.J. at 469, 537 A.2d at 1264.
III. CONCLUSION

In defining the appropriate ambit of private choice in reproductive matters, surrogate agreements present a particularly difficult situation because surrogacy does not lend itself to half-hearted measures. Unlike "surrogate fatherhood," surrogate motherhood is not self-enforcing. In the more common cases where artificial insemination is used because of the husband's infertility, the genetic father may never know who the mother is; he may never know that a child has been conceived. Even if he knows, and wishes to contest custody, the mother will have physical possession, paternity may be difficult to prove and for all practical purposes, the law recognizes a presumption in favor of mothers over fathers. Accordingly, all the courts have to do is fail to intervene to vindicate a contract providing for surrogate fatherhood. With surrogate mothers, on the other hand, the mother has physical possession of the baby and, without recognition of the validity of the surrogate contract, a reasonable expectation that the courts will grant her custody. For a genetic father to enter into a surrogate arrangement with any confidence in the certainty of the outcome, the law must sanction the validity of surrogate agreements.

Accordingly, the law cannot treat surrogate agreements as a matter of private choice while remaining equivocal about the morality of the practice. Either the law must embrace these individual agreements to provide for the creation and custody of a child or the law should declare them void ab initio, clearly defining the public policy at stake in the process. Uncertainty and dispute compromise the interests of society, the child and the parties to the agreement to a far greater extent than the contracts themselves ever could.

93. See supra note 64.
94. In the absence of legislative action, there may be questions of paternity and legitimacy in AID cases, but there is no question that the mother will have custody. Black, supra note 35, at 375-78.
95. Even then, the contractual determination may be overridden by the "best interests of the child." See supra notes 50-53.