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# Privacy, Surrogacy, and the Baby M Case

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# Privacy, Surrogacy, and the *Baby M* Case

ANITA L. ALLEN\*

## INTRODUCTION

The public is divided over what, if anything, constitutes an acceptable surrogate-parenting arrangement.<sup>1</sup> Family planners, adoption professionals, attorneys, legislators, and judges are debating the moral and legal status of trading parental rights for cash. The lack of accord is radical. The issues are seemingly intractable.

Normative debates about surrogacy sometimes depict it as a novel, sui generis problem of bioethics and contemporary values. But more often, the debates proceed as a search for agreement about the paradigms of social experience to which surrogacy-related roles and transactions are properly analogized.<sup>2</sup> Astonishingly, the proffered analogies equate surrogacy with the most sacred modes of human association and the most profane. One is asked to decide: Is the surrogate mother more akin to wet nurse or slave? Is she entrepreneur or victim? Are the men who purchase surrogacy services fathers or mere sperm donors? Are the childless men and women who seek to overcome the limitations of their anatomies employers or exploiters? Is the company or lawyer in the business of facilitating surrogacy a true friend of family life or a parasitic profiteer? Are surrogacy agreements legally binding commercial contracts or unenforceable commitments?<sup>3</sup>

The *Baby M* case has been a dramatic high point of the surrogate-parent-

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1. [S]urrogate mothering is now practiced when the female partner of a couple is infertile. A couple contracts with another woman, who agrees to be artificially inseminated with the husband's semen, to bear the child, and then to relinquish it at birth to be reared by the couple. The surrogate provides both the ovum and a uterine environment in order to enable the infertile couple to rear a child of the husband's blood.

Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 422 (1983).

In principle, surrogates' collaborators need not be couples and need not be married. The female seeking the aid of a surrogate need not be sterile, infertile, or disabled. In *Baby M*, medical dangers associated with multiple sclerosis were judged too severe by Elizabeth and William Stern to risk pregnancy. *In re Baby M*, 217 N.J. Super. 313, 337, 525 A.2d 1128, 1139 (1987), *aff'd in part, rev'd in part, remanded*, 109 N.J. 396, 537 A.2d 1227 (1988). Hereinafter, the trial court opinion will be cited as *Baby M, I* and the New Jersey Supreme Court opinion as *Baby M, II*.

2. The utility of the second approach is questionable. See R. UNGER, *THE HISTORY OF THE CRITICAL LEGAL STUDIES MOVEMENT* 8 (1986) ("Because everything can be defended, nothing can; the analogy-mongering must be brought to a halt.")

3. At least four states, Louisiana, Nebraska, Indiana, and Kentucky, have enacted legislation prohibiting the enforcement of surrogacy contracts. N.Y. Times, June 26, 1988, § 1, at 1, col. 6, 21, col. 1. The National Conference of State Legislatures reports that sixteen states have introduced

ing phenomenon. The New Jersey Supreme Court dealt commercial surrogacy a sharp blow when it unanimously reversed Superior Court Judge Sorkow's startling holding that the constitutional privacy rights of childless couples demand state validation and specific enforcement of surrogacy agreements.<sup>4</sup> Judge Sorkow's opinion had championed a state-enforced right to utilize surrogacy as a constitutionally protected privacy right.<sup>5</sup> Writing for the New Jersey high court, Chief Justice Wilentz countered that a natural father seeking exclusive custody has no coherent procreative privacy claim against his child's natural, though surrogate, mother.<sup>6</sup>

Does due regard for constitutional privacy mandate legal validation and enforcement of surrogacy agreements? Even before *Baby M*, this important question had been broached—sometimes directly, sometimes obliquely—by a handful of state courts<sup>7</sup> and a flock of law review commentators.<sup>8</sup> A few of these answered as Judge Sorkow answered—inadequately and wrongly in the

bills regulating surrogacy this year and eighteen states have introduced or carried forward bills from 1987 to prohibit surrogacy contracts. *Id.* at 1, col. 6.

4. *Baby M, II*, 109 N.J. at 411, 537 A.2d at 1234.

5. *Baby M, I*, 217 N.J. Super. at 338, 525 A.2d at 1168.

6. *Baby M, II*, 109 N.J. at 448, 537 A.2d at 1254.

7. See *Surrogate Parenting Assocs., Inc. v. Kentucky ex rel. Armstrong*, 704 S.W.2d 209, 212 (Ky. 1986) (surrogacy held not to violate Kentucky statute prohibiting buying and selling of babies); *In re Adoption of Baby Girl L.J.*, 132 Misc.2d 972, 978, 505 N.Y.S.2d 813, 817 (Sur. 1986) (surrogacy agreement not expressly prohibited by legislature and therefore allowed despite court's strong reservations); *Doe v. Kelley*, 106 Mich. App. 169, 174, 307 N.W.2d 438, 441 (1981) (state statute subjecting to court scrutiny any exchange of consideration in adoption proceedings, other than court costs, held not to violate constitutional right to privacy, and Michigan statutes prohibiting payment to surrogate mothers held constitutionally permissible), *cert. denied*, 459 U.S. 1183 (1983).

8. See, e.g., Bitner, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 236-237 (1985) (woman has constitutional privacy right to become surrogate); Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J.L. E MED. 243, 256 (1985) (courts should construe surrogacy contracts as revocable prenatal agreements allowing natural mother to keep child if she chooses, and should prohibit commercial surrogacy contracts); Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 82 (1982) (surrogacy agreement may work an estoppel against natural mother); Robertson, *supra* note 1, at 420 (judicially defining and articulating scope of right to procreative privacy would set court adrift in largely uncharted waters); Smith and Iraola, *Sexuality, Privacy and the New Biology*, 67 MARQ. L. REV. 263, 285 (1984) (discussing married and unmarried women's rights to artificial insemination); Note, *Surrogate Motherhood: the Outer Limits of Protected Conduct*, 4 DET. C.L. REV. 1131, 1141 (1986) [hereinafter Note, *Surrogate Motherhood: the Outer Limits*] (criticizing *Doe v. Kelley*); Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1284 n.5 (1985) [hereinafter Note, *Developing a Concept*] (proposing adoption of comprehensive surrogate parenthood statute); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1941-49 (1986) [hereinafter Note, *Rumpelstiltskin Revisited*] (assessing theoretical justifications for limiting alienability and rejecting paternalism analysis in favor of theory of centrality to values of personhood).

affirmative.<sup>9</sup> Judge Sorkow's constitutional privacy arguments are problematic for three main reasons.

First, and of central concern here, Sorkow's arguments purported to validate surrogacy agreements by appeal to the procreative and parental privacy rights of a childless man or couple. Before adopting the view that these privacy rights entitle childless men or couples to the enforcement of surrogacy contracts, one must examine the competing constitutional perspective that the *surrogate's* procreative and parental privacy rights validate or invalidate surrogacy agreements.<sup>10</sup>

This competing perspective undercuts the "breach of contract" rationale on which Judge Sorkow relied for specifically enforcing irrevocable surrogacy agreements against recalcitrant surrogate mothers. For, to the extent that one views privacy rights as fundamental and surrogacy arrangements as the exercise of a woman's procreative and parental privacy rights, one also should view a surrogate's power to alienate her privacy rights by contract as potentially limited.<sup>11</sup> Arguably, the state-imposed limitation on alienability

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9. See, e.g., cases cited *supra* note 7; Cohen, *supra* note 8; Coleman, *supra* note 8; Note, *Surrogate Motherhood: the Outer Limits*, *supra* note 8.

10. See Bitner, *supra* note 8, at 236-37 (woman has constitutional privacy right to become surrogate).

11. A central question raised by surrogacy is whether paternalistic (or other) grounds exist for treating fundamental procreative and parental privacy rights as commercially inalienable; or, if not, as alienable subject to limitation by a mother's post-natal right to change her mind. I contend that while the *Baby M* courts made constitutional privacy arguments, they paid insufficient attention to the alienability of such rights.

In the present context, "privacy" refers to an aspect of liberty. In liberal jurisprudence, norms of individual autonomy or self-determination are commonly said to underlie liberty's (and hence privacy's) value. See Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 467-69 (1983) (discussing the alienability of autonomy by positing hypothetical situation of voluntary slavery). In constitutional law, *fundamental* liberties including rights of privacy, protect what the United State Supreme Court deems to be our most important legally protectable interests.

Whether persons are at liberty to alienate fundamental liberties is a well-recognized conundrum. Feinberg is one of the only theorists to have addressed this puzzle in the context of constitutional privacy. See *generally id.* at 467-83 (discussing the alienability of the autonomous person's right to self-government); see also Part III-B of this article, *infra*. Feinberg's focus, however, was exceedingly general and his examples—voluntary slavery contracts and agreements to forego wealth—unrealistic. Nevertheless, his analysis of competing rationales, including paternalistic rationales, for limiting the alienability of fundamental rights is helpful.

Interference with the voluntary, self-regarding acts of a competent adult is often described as immoral paternalism, even when the interference is intended to further some defensible conception of that person's best interest. See *generally* J. FEINBERG, HARM FROM SELF (1986) (liberal theories of justified paternalism); D. VANDEVEER, PATERNALISTIC INTERVENTION (1986) (same). Thus, paternalistic laws have been criticized as immoral and inconsistent with the liberal conception of government.

Paternalism interests philosophers chiefly because of the simultaneously appealing and unappealing supposition that the highest regard for humanity requires that individuals be permitted to harm their own interests, so long as they act voluntarily and do not harm others. Cf. Brock, *Paternalism*

most consistent with a surrogate's procreative and parental liberty is one that invalidates her promises to abrogate custody and other parental rights unless these promises are subject to postnatal revocation. A state-imposed limitation of this sort would restrict contractual liberty, while expanding the surrogate's opportunities for effective reconsideration.

The second problem faced by Judge Sorkow's arguments for the validity of commercial surrogacy agreements relates to the first. He assumed that parental rights can be alienated prior to conception and childbirth. This assumption is shared by others, averse to paternalistic limitations on alienability, who maintain that among the fundamental privacy rights is a woman's freedom to hire herself out as a surrogate mother.<sup>12</sup> But if any privacy rights are constitutionally protected, parental privacy rights are. One cannot rightly conclude that prenatal agreements intending irrevocably to terminate parental rights are valid without first considering whether grounds exist for limiting the alienability of constitutional postnatal parental privacy rights. The highest respect for values of personal security might be such grounds.<sup>13</sup>

Third, the moral criticism engendered by commercial surrogacy casts a cloud over Judge Sorkow's constitutional privacy arguments. To be sure, privacy rights are workable and working components of the constitutional framework. However, privacy jurisprudence cannot be manipulated to accommodate every purpose related to reproduction and families.<sup>14</sup> To illustrate with extreme examples, constitutional privacy is no normative sanctuary for those who abuse children, rape their wives, or beat their spouses. Similarly, surrogacy inflicts emotional and dignitarian injuries and inevitably represents the "commodification" of human life and reproduction.<sup>15</sup> Like commercial adoption, it turns human infants into a precious commodity. Whether a parent agrees before or after childbirth to terminate

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and *Autonomy*, 98 ETHICS 550, 551 (1988) ("there are two central values [autonomy and individual well-being] at stake which in hard cases are in conflict and so must be balanced or traded off").

12. *Id.* For a discussion of restrictions on surrogacy as state paternalism, see generally Note, *Rumpelstiltskin Revisited*, *supra* note 8.

13. See Note, *Rumpelstiltskin Revisited*, *supra* note 8, at 1941-49 (assessing alternative grounds for limiting alienability and rejecting paternalist grounds in favor of grounds relating to values of personhood). But see Brock, *supra* note 11, at 561-62 (plausible personhood theories do not reject paternalism but rather balance paternalism against autonomy).

14. Must opponents of surrogacy "reconcile their arguments with the growing body of law recognizing a broad right to privacy and reproductive freedom"? Note, *Developing a Concept*, *supra* note 8, at 1295. Perhaps so. But reconciliation requires recognizing that couples *may* have privacy rights protecting surrogacy. It does not require concluding that they do have them.

15. See Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928-1936 (1987) (discussing implications of commodification and market-inalienability and choosing market-inalienability as "better non-ideal solution"); O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C.L. REV. 127, 142 (1986) (surrogate parenting raises commodification and inalienable rights issues).



parental rights in exchange for money, in the end a child has been commercially disposed and acquired.

Thus, the medical technology that brought commercial surrogacy into vogue is a step backward from what could be seen as post-Civil War America's progress toward the decommercialization of human worth. Surrogacy has other symbolically and materially retrogressive consequences. The pouring of private resources into surrogacy so that couples may adopt healthy white babies sends a message of rejection and despair to non-whites and the handicapped. Moreover, children bred of surrogacy arrangements, though glad to be alive, may be burdened with extraordinary feelings of indebtedness to their biological fathers and resentment toward their unknown natural mothers. All children may be burdened by special fears and insecurities in a society where their parents may obtain money for family necessities by giving away newborn siblings.

These concerns provide a basis for opposing surrogacy that is at least as compelling as the privacy rights thought to support the practice.<sup>16</sup> Indeed, opponents of surrogacy who contend that it is degradation, exploitation, slavery, baby selling, or racism believe that they have met the challenges posed by high regard for privacy rights and by liberal intolerance of mere moralism and paternalism.<sup>17</sup>

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16. A number of surrogacy's troubling consequences are underemphasized because they resist characterization in the traditional language of negative libertarian rights. Consider, for example, the consequences enumerated in the last paragraph, some of which Judge Posner dismisses as merely "symbolic" objections. See Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59, 70 (1987) (proposing commercial market in white babies).

17. Surrogacy has implications deeply relevant to womens' lives and economic opportunities. To start, permissive commercial surrogacy laws conjoined with public support for the practice could be expected to encourage women who need money to undertake the health and mortality risks of pregnancy and childbirth.

Judge Sorkow's now moot *Baby M* opinion stood for empowering women to use their reproductive capacities. But we should be reluctant to create new categories of dead-end employment for women. Millions of working women have already been shunted off into low paying, low esteem "female" jobs. Qualitatively better uses can be found for women's considerable resources.

Admittedly, surrogacy is temporary employment which could well serve the short-term needs of particular women. Surrogacy could allow a young woman to finance a year of college, graduate school, or travel. (Imagine, the *au pair* of the 1990s may be a surrogate mother, rather than a mere babysitter.) It could allow an office worker to finance a sabbatical. It could enable a single mother to start a nest egg or to cope with the economic consequences of spousal abandonment. It could enable a housewife to earn the down payment on a family home or to help stave off bankruptcy. It could provide a woman who did not want to rear a child an opportunity to experience pregnancy and childbirth.

But opportunities become imperatives in the lives of poor women. If surrogacy is a job, women in need will take it. Husbands, boyfriends, and their own sense of responsibility will inevitably pressure poor women into surrogacy. This problem becomes more acute as new forms of surrogacy become widely practiced. I have in mind the modes of surrogacy that will enable non-white women to serve as the gestators of white children on behalf of infertile whites. In the face of this prospect, it could be argued that it is no worse for the upper-middle class to hire poor, minority, and third-

This essay argues that constitutional privacy prohibits the validation and enforcement of irrevocable surrogacy agreements. My conviction is two-fold: 1) childless men and couples do not have privacy rights that entitle them to state enforcement of surrogacy agreements; and 2) by contrast, would-be surrogate mothers have constitutional privacy rights so strong as to limit their own capacities for alienating their procreative and traditional parental prerogatives. My purpose is to expose the broad parameters of defenses and the denials of this conviction.

In Part I, I explicate the dueling privacy arguments advanced in the two New Jersey *Baby M* opinions. These modest state court opinions point toward large questions about the nature and implications of individual privacy rights under the Constitution. I maintain that Chief Justice Wilentz misdiagnosed Judge Sorkow's fractured logic, but achieved a practical cure by ordering remand and partial reversal. Heavily relying on state law, the Chief Justice avoided direct confrontation with daunting (though basic) jurisprudential questions about the scope of constitutional privacy and the power of the individual to exercise and alienate her privacy rights.

In Part II, I consider the implausibility and implications of arguments for enforcing surrogacy agreements based solely on the constitutional privacy rights of the childless man or couple. I conclude that the arbitrary and ambiguous attributions of privacy rights that typify recent cases increase the risk of inadequate, unjust adjudication of surrogacy disputes. In Part III, I briefly consider the reasons for protecting fundamental privacy rights by imposing conditions of inalienability.

## I. TWO COURTS, TWO ANALYSES

### A. THE CONSTITUTIONAL BACKGROUND

In the sense intended here, the expression "privacy" denotes an aspect of liberty. It refers to freedom from public—that is, governmental—interference with decisionmaking respecting procreation, families, and other appropriately private matters.<sup>18</sup> The Supreme Court has held that individuals have a fundamental, constitutional right to this kind of privacy and has relied upon this right to invalidate a range of state laws deemed to obstruct auton-

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world women as highly paid surrogates, than to regularly employ those same women at minimum wage for childcare and housework that take them away from their own families. There is something to this maddening point, yet it falls short of justifying the more risky and personally momentous practice that carries significant emotional and material implications for others.

18. See *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 772 (1986) (Constitution embodies promise that certain private spheres of individual liberty will be kept beyond reach of government); *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (one meaning of constitutional privacy is freedom from government interference).

mous decisions relating to marriage,<sup>19</sup> procreation,<sup>20</sup> child rearing,<sup>21</sup> and education.<sup>22</sup> The Court has specifically held, however, that fundamental constitutional privacy rights may yield to compelling state interests.<sup>23</sup> Moreover, it has occasionally denied constitutional protection to what particular petitioners have contended also should be unregulated private conduct.<sup>24</sup>

The Court has not yet ruled on the constitutionality of surrogate-parenting agreements. Although many join me in speculating about what the Court would or should do, precedent does not press inexorably in any specific direction.<sup>25</sup> Neither, of course, does the bare text of the constitution provide any explicit guidance. These are important points. Without guidance from precedent or text, we are faced with the policy question of what human transactions a liberal democracy ought to tolerate and forbid in the name of privacy rights.

#### B. SOME STATE COURT PRECEDENTS

Before *Baby M*, a few other state courts had implied or asserted that con-

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19. See *Loving v. Virginia*, 388 U.S. 1, 12 (1966) (state statutory scheme forbidding interracial marriages violates due process because freedom to marry is fundamental).

20. See *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (because right to privacy in procreational decisions extends to minors, statute prohibiting sale of contraceptives to minors is unconstitutional); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (absolute prohibition of abortion violates right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (state statute forbidding use of contraceptives violates constitutional right to privacy); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (forced sterilization of recidivist criminal violates fourteenth amendment). *Skinner* was described in *Baby M* as the most pertinent Supreme Court procreative rights case. See *Baby M, II*, 109 N.J. at 448, 537 A.2d at 1254.

21. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (state statute presuming unmarried fathers are unsuitable and neglectful parents held unconstitutional).

22. See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (statute requiring education in public schools violates liberty to choose private education); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (statute forbidding teaching of any foreign language interferes with right of parents and teacher to choose how to educate children).

23. See *Roe v. Wade*, 410 U.S. 113 (1973) (abortion privacy not absolute because state has legitimate, compelling interest in maternal health and unborn life).

24. A recent example of this denial of constitutional protection was *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court held that states abridge no constitutional privacy rights by criminalizing the consensual sex acts that take place in the bedrooms of adult homosexuals. *Id.* at 192. However, the Court did not reach the issue of whether such criminalization violates the eighth amendment. *Id.* at 196 n.8.

25. See Robertson, *supra* note 1, at 420 (defining and articulating scope of right to procreative privacy will set Court adrift in largely uncharted waters). Neither predicting what the Court would do nor prescribing what it ought to do is an easy task in view of the controversies that surround the derivation of the general privacy right and its application to particular cases. See generally Allen, *Privacy, Private Choice and Social Contract Theory*, 56 CINCINNATI L. REV. 461, 461-68 (1987). The problem of predicting what the Court will do is even worse if Martha Minow is correct that the Court has simply invented "a tradition of constitutional protection for the families" out of cases in which conflicts distinct from the family versus the state were centrally at issue. Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959, 982 (1987).



stitutional privacy rights compel states to enforce the payment and parental rights termination provisions of surrogate-parenting agreements. A Michigan appeals court has emphasized that its state law leaves individuals free to enter into noncommercial surrogacy pacts.<sup>26</sup> The court hinted that this freedom might be required by constitutional privacy rights.<sup>27</sup> The Kentucky Supreme Court gave legal effect to commercial surrogacy contracts, suggesting in dicta that laws that prohibit paid surrogate mothering are unconstitutional violations of the procreative privacy rights of men who could not otherwise beget biologically-related children.<sup>28</sup> An ambivalent New York surrogate's court cited Kentucky's constitutional privacy argument and held that surrogate-parenting contracts are not void, but voidable "because the individual state's adoption statutes, which are designed to protect the best interest of the child, take precedence over any agreement between the parties."<sup>29</sup>

Similarly, in *Baby M*, Judge Sorkow concluded that, subject only to the court's determination of the best interests of the child, commercial surrogacy agreements must be enforced pursuant to the constitutional privacy interest of married couples who are medically unable to have children of their own.<sup>30</sup> Sorkow's analysis was unanimously rejected by the New Jersey Supreme Court, which held that commercial surrogacy agreements are contrary to public policy and unlawful under state adoption statutes.<sup>31</sup> Surrogacy contracts cannot eliminate the right a mother has under New Jersey law to change her mind about terminating her parental rights.

### C. THE SUPERIOR COURT'S OPINION

#### 1. Sorkow's Privacy Analysis

Judge Sorkow's opinion gave rise to many more uncertainties about the scope and requirements of constitutional privacy than it answered. The privacy analysis was described as mere "commentary."<sup>32</sup> Accordingly, the

26. *Doe v. Kelley*, 106 Mich. App. 169, 173, 307 N.W.2d 438, 441 (1981), *cert denied*, 459 U.S. 1183 (1983). *But see* *Yates v. Keane*, Nos. 9758, 5772, slip op. (Mich. Cir. Ct. Jan. 21, 1988) (surrogacy agreements void as contrary to public policy).

27. 106 Mich. App. at 441, 307 N.W.2d at 173. Plaintiffs' attorneys in the case included Noel Keane who argued that constitutional privacy rights protect decisions to participate in surrogacy arrangements. *See generally* N. KEANE, *THE SURROGATE MOTHER* (1981).

28. *Surrogate Parenting Assocs. Inc. v. Kentucky ex rel. Armstrong*, 704 S.W.2d 209, 212 (Ky. 1986).

29. *In re Adoption of Baby Girl L.J.*, 132 Misc. 2d 972, 976-78, 505 N.Y.S.2d 813, 816 (Sur. 1986).

30. *Baby M, I*, N.J. Super. at 338, 525 A.2d at 1166.

31. *Baby M, II*, 109 N.J. at 434-36, 537 A.2d at 1246-47.

32. The primary issue to be determined by this litigation is what are the best interests of a child until now called "Baby M". All other concerns raised by counsel constitute commentary. That commentary includes the need to determine if a unique arrangement be-

principal question before the court was not the privacy rights of the parties nor the legal status of the surrogacy agreement. Rather, the "primary issue" was the best interests of the child, *Baby M*.<sup>33</sup>

Judge Sorkow's loose and purportedly superfluous privacy analysis was an ambitious outline for legitimating commercial surrogacy by analogy to traditional modes of marital procreation. The fragmented analysis was served up as the central *ratio decidendi* for his opinion that the surrogate-parenting agreement between Mary Beth Whitehead and William Stern was "a valid and enforceable contract pursuant to the laws of New Jersey."<sup>34</sup>

The judge reasoned from two strands of case precedent—"fundamental family rights" developed since *Meyer v. Nebraska*,<sup>35</sup> along with a general "right of privacy" first recognized in *Griswold v. Connecticut*<sup>36</sup> and again in *Roe v. Wade*.<sup>37</sup> He argued that these two closely related lines of authority jointly prohibit states from invading the private sphere of procreative and family decisionmaking by enacting laws that invalidate commercial surrogacy contracts.<sup>38</sup> Judge Sorkow thus held that family and procreative privacy rights legitimate both private use of commercial surrogates and public validation and enforcement of surrogacy agreements.

Sorkow's opinion is confused by references to constitutional prerogatives

tween a man and a woman, unmarried to each other, creates a contract. If so, is the contract enforceable; and if so, by what criteria, means and manner.

*Baby M, I*, 217 N.J. Super. at 313, 525 A.2d at 1132.

33. *Id.*

34. *Id.* at 338, 525 A.2d at 1166. Consistent with the two New Jersey court opinions, Mary Beth Whitehead-Gould, now divorced and remarried, will be referred to as "Mary Beth Whitehead" or "Whitehead."

35. 262 U.S. 390, 399 (1923).

36. 381 U.S. 479, 485-86 (1965).

37. 410 U.S. 113, 152-53 (1973).

38. *Baby M, I*, 217 N.J. Super. at 385-87, 525 A.2d at 1164. States may interfere with fundamental privacy only "upon showing of a compelling interest." *Id.* at 387, 525 A.2d at 1165. Moreover:

[I]f one has a right to procreate coitally, then one has the right to reproduce non-coitally. If it is reproduction that is protected, then the means of reproduction are also to be protected. The values and interests underlying the creation of a family are the same by whatever means obtained. This court holds that the protected means extends to the use of surrogates. The contract cannot fail because of the use of a third party. . . . While a state could . . . and must regulate . . . reproductive contracts, it could not ban or refuse to enforce such transactions . . . without compelling reason. It might even be argued that refusal to enforce these contracts and prohibition of money payments would constitute an unconstitutional interference with procreative liberty since it would prevent childless couples from obtaining the means by which to have families. . . .

Legislation or court action that denies the surrogate contract impedes a couple's [fourteenth amendment] liberty that is otherwise protected. The surrogate who voluntarily chooses to enter such a contract is deprived of a constitutionally protected right to perform services.

*Id.* at 386-87, 525 A.2d at 1164-65.

that either are related to or synonymous with privacy. (He does not tell us which.) He referred to “a couple’s liberty,” by which he appears to have meant their privacy, as an aspect of fourteenth amendment liberty.<sup>39</sup> He also briefly referred to the surrogate’s “right to perform services,” which he also seems to have suggested has its basis in the fourteenth amendment.<sup>40</sup> He appears to have assumed that this right to perform noncoital procreative services is part of the fourteenth amendment liberty we call “freedom of contract” rather than the liberty we call “privacy.”<sup>41</sup>

Judge Sorkow also sketched an equal protection analysis that introduced constitutional values around which his ancillary privacy argument was shaped.<sup>42</sup> This equal protection of privacy argument was launched from the observation that sperm donation, a kind of “surrogate fatherhood,” is already universally permitted in the United States. He gave no explanation for his opaque assertion that a ban on female surrogacy denies equal protection to “the surrogate, whether male or female, and the unborn child.”<sup>43</sup>

Topping off his privacy and equal protection arguments, Judge Sorkow concluded that a surrogacy contract that is not contrary to a state’s public policy and that is entered into with “understanding and free will” may be enforced.<sup>44</sup> He added that specific performance is an appropriate remedy when a breaching surrogate mother refuses to surrender parental rights as agreed.<sup>45</sup> This latter conclusion is strikingly out of line with the common law doctrine that personal service contracts are not specifically enforceable—an indication of just how weighty the judge believed procreative privacy rights to be. In deciding to exercise his equitable discretion to specifically enforce the Whitehead-Stern contract on behalf of Mr. Stern, Judge Sorkow opined that Mrs. Whitehead “received her fulfillment” but “Mr. Stern did not,” and that “[m]onetary damages cannot possibly compensate the plaintiff

39. *Id.* at 387, 525 A.2d at 1165. Perhaps he intended to say that the fourteenth amendment protects freedom of contract in general and the right to privacy (whatever its textual basis) protects privacy-related contracts in particular.

40. *Id.*

41. *Cf.* *Lochner v. New York*, 198 U.S. 45 (1905) (fourteenth amendment limits ability of state to interfere with employment contracts).

42. A similar equal protection of privacy argument appeared in *Surrogate Parenting Assocs.*, 704 S.W.2d at 212.

43. *Baby M, I*, 217 N.J. Super. at 388, 525 A.2d at 1165.

The “surrogate father” sperm donor is legally recognized in all states. The surrogate mother is not. If a man may offer the means for procreation then a woman must equally be allowed to do so. To rule otherwise denies equal protection of law to the childless couple, the surrogate, whether male or female, and the unborn child.

*Id.* The reference to the unborn child here is mysterious. Sorkow may have viewed unborn children as third-party beneficiaries. *See id.* at 400, 525 A.2d at 1171 (“a third-party beneficiary need not be in existence . . . at the time of the contracting”).

44. *Id.* at 389, 525 A.2d at 1166.

45. *Id.* at 389, 525 A.2d at 1165.

for the loss of his bargain.”<sup>46</sup>

## 2. The Child’s Best Interests

Sorkow’s conclusion that the Whitehead-Stern surrogacy agreement was a legally valid, specifically enforceable contract was grounded in constitutional privacy. However, Baby M’s fate was determined by the best interests of the child, rather than by the logical entailments of constitutional privacy. Judge Sorkow superimposed this best interests analysis over his privacy analysis to decide which biological parent should be awarded custody. The judge determined that specific enforcement of the surrogacy contract, otherwise called for by law and equity, was also in the best interests of Baby M.<sup>47</sup>

Never was there a real contest between Mrs. Whitehead and Mr. Stern. Mary Beth Whitehead was severely criticized by the court as “unreliable, . . . manipulative, impulsive . . . exploitative, . . . [and] untruthful.”<sup>48</sup> By contrast, the Sterns were lauded as cooperative, stable, and rational in the face of crisis. They were praised as “credible, sincere and truthful people.”<sup>49</sup> Affluent, well-educated, competent, and warm, the Sterns presented the promise of an ideal nuclear family life in which Baby M would have every advantage.<sup>50</sup>

The trial court therefore terminated “all parental rights that Mary Beth Whitehead has or had in the child to be known as Melissa Stern,” curiously pointing back to the supplanted surrogacy agreement as an additional source of equity for the decision.<sup>51</sup> Mr. Stern was awarded sole custody, and the court’s termination of Whitehead’s maternal rights meant that, through legal adoption, Mrs. Stern could expect to replace Whitehead as Melissa’s legal mother.<sup>52</sup>

Judge Sorkow viewed his determination of the child’s best interests as necessary and overriding since any “agreement between parents is inevitably subservient to the considerations of the best interests of the child.”<sup>53</sup> One is thus led to conclude that, in theory, the Whiteheads would have been awarded custody of Baby M had the facts indicated they would have been better parents than the Sterns. One is also led to conclude that Mary Beth

46. *Id.*

47. *Id.* at 394-400, 525 A.2d 1167-72.

48. *Id.* at 396-97, 525 A.2d at 1169-70.

49. *Id.* at 398, 525 A.2d at 1170; *see also id.* at 394-98, 525 A.2d at 1167-70 (describing the Sterns).

50. Chief Justice Wilentz chastised the trial court for its harsh characterization of Whitehead and its overemphasis of the Sterns’ interest in educating the child. *Baby M, II*, 109 N.J. at 459, 537 A.2d at 1259.

51. *Baby M, I*, 217 N.J. Super. at 400, 525 A.2d at 1172.

52. *Id.* at 398-400, 525 A.2d at 1167-70.

53. *Id.* at 398, 525 A.2d at 1171.



Whitehead would have been awarded joint custody or visitation rights if the court had determined that the best interests of Baby M would have been served by access to both of her biological parents.

The overarching logic of his opinion renders Sorkow's privacy analysis and holdings supererogatory on the facts of *Baby M*. But Sorkow's logic did not rule out duties for a privacy analysis in principle. His privacy analysis supplied a rule, albeit short-lived, that surrogacy agreements are valid in New Jersey. Thus, under the precedent set by Sorkow's *Baby M*, a valid surrogacy contract should provide grounds in law and equity to resolve custody disputes in favor of the nonbreaching parent unless the child's best interests dictate otherwise.<sup>54</sup>

In the surrogacy context, however, it is difficult to imagine when a court following Sorkow's precedent would conclude that both biological parents are equally fit. Women who become paid surrogates are likely to have considerably less in the way of personal and economic resources than the affluent purchasers of their services. In addition, when a court turns to questions of character, the biological father, in search of a nuclear family, has a built-in cultural advantage. Regrettably, under traditional standards of female moral character,<sup>55</sup> the virtue of the surrogate is automatically thrown into question when she agrees to bear a child and give it up for cash. Furthermore, a surrogate's rationality is automatically questioned when she changes her mind about so momentous a matter as giving birth to a stranger's child and giving up her parental rights.

#### D. REEXAMINATION IN THE STATE SUPREME COURT

The New Jersey Supreme Court agreed with Judge Sorkow that awarding custody of Melissa to the Sterns was in the child's best interests.<sup>56</sup> Agreement ended there. The court went on to invalidate the previously validated Whitehead-Stern surrogacy agreement,<sup>57</sup> restore Mary Beth Whitehead's parental rights,<sup>58</sup> and remand for the purpose of determining the precise extent of Whitehead's newly established visitation rights.<sup>59</sup> The opinion was striking for its sweeping rejection of commercial surrogacy on a panoply of statu-

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54. *Id.* at 390, 525 A.2d at 1167.

55. Bearing a child is not what subjects the surrogate's character to attack. It is that she would do so outside of a traditional marriage and would command payment. *See generally* L. BANNER, *WOMEN IN MODERN AMERICA: A BRIEF HISTORY* 43, 51-91 (1984) (exploring traditional view that women are morally superior and ideally suited to life of self-sacrificial marriage and motherhood); C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (suggesting that moral expectations of and for women differ from those of and for men).

56. *Baby M, II*, 109 N.J. at 459, 537 A.2d at 1259.

57. *Id.* at 421-22, 537 A.2d at 1240.

58. *Id.* at 447, 537 A.2d at 1253.

59. *Id.* at 466-67, 537 A.2d at 1263.

tory and policy grounds;<sup>60</sup> for its efforts to rehabilitate Whitehead's character;<sup>61</sup> and for its strident normative defense of the prerogatives of natural parents and birth mothers.<sup>62</sup>

### 1. State Law and Policy

The basic argument of the supreme court was that private parties cannot lawfully utilize commercial service contracts to circumvent the requirements of state law and policy designed to protect the interests of natural parents and the best interests of children. The court found that the Whitehead-Stern surrogacy contract conflicted with: "(1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions."<sup>63</sup> The court further found the surrogacy contract in conflict with state policies that custody should be based on the best interests of the child rather than on private agreements,<sup>64</sup> and that neither natural parent has parental rights superior to the other.<sup>65</sup> The court concluded that, in view of these state statutes and policies, and because the trial court did not establish that Whitehead was an unfit parent, appeal to the surrogacy agreement and the child's best interests provided legally insufficient grounds for terminating Whitehead's parental rights.<sup>66</sup>

The court's decision was at least a partial victory for Whitehead. She did not get primary custody of her child, but she won visitation rights, much like the rights of a noncustodial divorced parent. The decision also was a partial victory for Mr. Stern. He was awarded the privilege of rearing his natural daughter in his own home. However, Whitehead's reinstatement made Mrs. Stern a significant loser. Unable to adopt Baby M, she was transformed into the true "surrogate" mother of a stepdaughter.

### 2. Constitutional Privacy

The state supreme court rejected both the constitutional privacy and equal protection of privacy arguments advanced by the lower court to validate surrogacy agreements. Unfortunately, however, the court scarcely treated the

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60. *Id.* at 421-22, 423, 425, 429, 434, 435-36, 437, 443-44, 537 A.2d at 1240, 1240-41, 1242, 1244, 1246, 1247, 1248, 1250.

61. Regrettably, the court sought to rehabilitate Whitehead at the expense of Mrs. Stern, whose motives for deciding against pregnancy were thrown unfairly, and needlessly, into question. *See id.* at 456, 537 A.2d at 1257-58.

62. *Id.* at 437, 537 A.2d at 1248.

63. *Id.* at 423, 537 A.2d 1240-41.

64. *Id.* at 437, 537 A.2d at 1248.

65. *Id.* at 435-36, 537 A.2d at 1247.

66. *Id.* at 445, 537 A.2d at 1252.

constitutional issues; it did little more than acknowledge that the parties had asserted constitutional privacy and equal protection claims. The court was apparently confident that New Jersey's limitation on commercial surrogacy was justified by strong state interests in child welfare and parental liberty. It seemed not to take seriously the possibility that fundamental constitutional rights require permissive commercial surrogacy laws and enforcement of irrevocable surrogacy agreements.

The right to procreate—"the right to have natural children, whether through sexual intercourse or artificial insemination"<sup>67</sup>—was identified by the court as the privacy right that Stern claimed for himself. The court narrowly construed this right as the right to be a biological parent, asserting that "the right of procreation does not extend as far as claimed by the Sterns."<sup>68</sup> The paternal right of procreation did not give rise to a contractually-based custody award because, the court reasoned, Whitehead could claim procreative rights also:

To assert that Mr. Stern's right of procreation gives him the right to the custody of Baby M would be to assert that Mrs. Whitehead's right of procreation does *not* give her the right to the custody of Baby M; it would be to assert that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation. . . .

There is nothing in our culture . . . or society that even begins to suggest a fundamental right on the part of a father to the custody of the child as part of his right to procreate when opposed by the claim of the mother to the same child.<sup>69</sup>

Thus, the court portrayed Stern's claim as contradictory. The court was wrong, however, in suggesting that Stern argued that his right to procreate gave him a right to custody solely because he was his child's father. Rather, Stern's argument was that he ought to be awarded custody because his child's natural mother had freely, knowingly, and irrevocably exchanged her parental rights for compensation.

Stern can be understood as having claimed that our culture, and its laws, ought to recognize a particularly broad right to procreation. This right includes the use of the services of a woman willing freely to bind herself by irrevocable contract to conceive through artificial insemination in the exercise of her procreative rights, and to give up her parental rights to the child

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67. *Id.* at 448, 537 A.2d at 1253.

68. *Id.* at 447, 537 A.2d at 1253. The court's remark leaves a great deal unclear. It could have been intended either: (1) as a rejection of a privacy right that would protect the use of a surrogate as well as the exclusive parental and child custody provisions of the surrogacy agreement; or (2) only as a rejection of the privacy right that would protect the exclusive parental and child custody provisions of the agreement.

69. *Id.* at 448-49, 537 A.2d at 1254.

so conceived. Essentially, Stern claimed that—insofar as they oppose state-enforced surrogacy—New Jersey state law and policy unconstitutionally restrained his procreative freedom.

The supreme court's state law emphasis, combined with its misinterpretation of Stern's argument as a contradiction, enabled it to avoid directly confronting several important implications of the exercise and alienation of constitutional privacy rights. These ideas, which I will pursue below in Parts II and III, are, first, that the Whitehead-Stern contract was the free exercise of constitutionally protected, procreative privacy rights by a childless man or couple; second, that the contract purporting to alienate Whitehead's parental rights was a free exercise of her procreative privacy rights; and finally, that the Whitehead-Stern contract was a mutual exercise of Mr. Stern's and Mrs. Whitehead's procreative and parental privacy rights. The state supreme court impliedly rejected these ideas, without explanation.

Holding that commercial and irrevocable surrogacy agreements are invalid, the court established that current New Jersey policy and statutes limit the alienability of procreative and parental rights. But *Baby M* did not carefully reconcile existing New Jersey limitations on alienability with the constitutional claims of men and women who want to participate in surrogacy arrangements. Nor did it foretell the extent to which future surrogacy legislation, liberalizing revocability and commercialization restrictions in New Jersey, would be subject to constitutional challenge by parties claiming relief from contract enforcement.

Taking its opinion as a whole, it is easy to account for the court's choice to avoid unnecessary, deep confrontation with the jurisprudence of constitutional privacy rights. In the first place, the court doubted that Whitehead entered the contract freely and with full information. Economic pressure may have made her agreement less than free.<sup>70</sup> Lack of knowledge about her eventual attachment to the child made her choice inadequately informed.<sup>71</sup> In addition, the court clearly viewed itself as reasserting its traditional interest in promoting child welfare and the family.<sup>72</sup> Finally, the court suggested that a specific performance remedy for breach of a surrogacy contract could excessively restrain liberty and violate the thirteenth amendment.<sup>73</sup>

The court noted briefly that Mary Beth Whitehead's constitutional privacy rights may have included maternal rights of companionship in addition to her basic procreative privacy rights.<sup>74</sup> The court seemed to imply that these rights, like her procreative rights, gave her valid custody claims necessarily

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70. *Id.* at 440, 537 A.2d at 1249.

71. *Id.* at 437, 537 A.2d at 1248.

72. *Id.*

73. *Id.* at 450-51, 537 A.2d at 1255.

74. *Id.* Is this a facile multiplication of privacy rights? I think not. See *Stanley v. Illinois*, 405



in competition with those of Stern. The court declined to explore Whitehead's companionship rights on the grounds that state law and policy, advancing compelling state interests, independently established them.

### 3. Equal Protection

In two short paragraphs, the New Jersey Supreme Court rejected Judge Sorkow's equal protection argument which had maintained that New Jersey must permit access to surrogacy services because state law already permits access to sperm donation.<sup>75</sup> To do otherwise, the trial court had argued, wrongfully discriminates against infertile females or female-infertile couples who wish to have children.<sup>76</sup> Recognizing that the equal protection clause imposes upon the states an obligation to treat like cases alike, the supreme court simply denied that utilization of a sperm bank by a male-infertile couple is relevantly similar to utilization of a surrogate by a female-infertile couple:

It is quite obvious that the situations are not parallel. A sperm donor simply cannot be equated with a surrogate mother. The State has more than a sufficient basis to distinguish the two situations . . . so as to justify automatically divesting the sperm donor of his parental rights without automatically divesting a surrogate mother.<sup>77</sup>

The court went on to suggest that such an equal protection analogy would be more appropriate in another situation made possible by new reproductive technologies: the contribution of a fertilized or unfertilized egg for implantation in another's uterus, which entails no long-term gestational services.<sup>78</sup>

## II. WHOSE PRIVACY?

Stepping back from the *Baby M* case, I would like to assess the doubtful proposition that the constitutional privacy rights of childless men or couples require state validation and enforcement of surrogacy agreements. My aims are to expose why this proposition is unpersuasive and to trace the implications of some alternative attributions of privacy rights.

### A. FOUR MODELS FOR PRIVACY-RIGHT ATTRIBUTION

An adequate general jurisprudence of surrogacy ideally would require that any judicial attribution of privacy rights in connection with surrogate parent-

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U.S. 645, 651 (referring to parental interest in the "companionship, care, custody, and management of his or her children").

75. *Baby M, II*, 109 N.J. at 449-50, 537 A.2d at 1254-55.

76. *Baby M, I*, 217 N.J. Super at 387-88, 525 A.2d at 1165.

77. *Baby M, II*, 109 N.J. at 450, 537 A.2d at 1254.

78. *Id.*

ing be nonarbitrary and unambiguous. At least four models of privacy-right attribution present themselves.<sup>79</sup> The procreative or family privacy at issue in a surrogacy case can be viewed as belonging to either: (1) the childless couple; (2) the biological father; (3) the contractual couple consisting of the surrogate and biological father; or (4) the surrogate mother.

Judge Sorkow acknowledged only one such model in the *Baby M* trial. Sorkow's constitutional privacy analysis attributed privacy protections only to the childless couple. Because he stated no reason for choosing to carry out the privacy analysis from the point of view of (1) rather than (2), (3), or (4), Sorkow's focus on the privacy of the childless couple is unambiguous, but arbitrary.

In another noted surrogacy case, *Doe v. Kelley*,<sup>80</sup> the core problem was ambiguity rather than arbitrariness. There, a married couple, a prospective surrogate mother, and other anonymous parties sought a declaratory judgment against the state attorney general and local county prosecutor affirming their claim that Michigan statutes prohibiting "the exchange of money or other consideration in connection with adoption and related proceedings . . . impermissibly infringe upon their constitutional right to privacy."<sup>81</sup> Plaintiffs John and Mary Doe planned to enter a commercial surrogate-parenting agreement with John Doe's secretary, Mary Roe. Under the terms of the contemplated agreement, the Does would have promised to pay Mary Roe \$5,000, over and above medical and employment benefits, to terminate parental rights to a child born as a consequence of artificial insemination with the sperm of John Doe. The court denied the requested declaration. Instead, it held that "[w]hile the decision to bear or beget a child [is] a fundamental interest protected by the right of privacy, . . . we do not view this right as a valid prohibition to state interference in the plaintiffs' contractual arrangement."<sup>82</sup>

The terse opinion in *Doe v. Kelley* was ambiguous inasmuch as it did not indicate whose privacy right to "bear or beget" it was referring to. The opinion identified the *plaintiffs*—including both the Does and Mary Roe—as as

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79. I leave open the possibility that there are other models of attribution.

80. 106 Mich. App. 169, 173-74, 307 N.W.2d 438, 441 (1981).

81. *Id.* at 170, 172, 307 N.W.2d at 439-40.

82. *Id.* at 173, 307 N.W. 2d at 441. The Michigan appeals court declined to uphold commercial surrogacy, but sanctioned good samaritan surrogacy, when it concluded that, although the adoption statute made it impossible to alter the legal status of the child, the statute did "not directly prohibit John Doe and Mary Roe from having the child as planned." *Id.* However, as observed by commentators and, five years later, by a New York court: "The net effect of the decision prohibits the use of surrogate mothers in the State of Michigan since few women other than perhaps a close family member would bear someone else's child without compensation." *In re Baby Girl L.J.*, 132 Misc.2d 972, 976, 505 N.Y.S.2d 813, 816 (Sur. 1986).

serting a constitutional right of procreative privacy, and acknowledged their fundamental right to "bear or beget."

Adding to the ambiguity, the court further stated that John Doe and Mary Roe were not directly precluded by the payment prohibition from having the child as planned.<sup>83</sup> This remark could mean that the constitutional procreative privacy of John Doe and Mary Roe, rather than that of the Doe couple (or the entire plaintiff group), was centrally at issue. Indeed, the United States Supreme Court has upheld procreative privacy rights for individuals, whatever their marital status, as well as for married couples.<sup>84</sup> If the precedent supports any surrogacy claim at all, there is no reason to believe it supports only a claim brought by married persons.

If the New Jersey experience is any indicator, courts are likely to view Solomonian decisions about child custody and the protection of the biological family as their special burden in surrogacy cases. Still, courts that deem privacy rights relevant must decide whether to assign such rights by reference to: 1) the motives for procreation, entailing recognition of the sperm donor and any mate as the bearers of relevant privacy rights; 2) the burdens and rights of pregnancy, entailing recognition of the surrogate as the bearer of relevant privacy rights; 3) the fact of procreation, entailing that the contractual couple is the bearer of relevant privacy rights.

### 1. The Childless Couple

Sorkow's one-sided privacy commentary was doubtlessly prompted by constitutional privacy arguments the Sterns raised on their own behalf.<sup>85</sup> Accordingly, the trial court appears to have set out with the narrow objective of tracing the implications of the constitutional privacy rights of married persons such as the Sterns. The court gave no consideration to the possibility that privacy rights might be attributed to the surrogate or shared between the surrogate and the biological father.

Sorkow's married couple oriented privacy argument was weakly defended by appeal to factually inapposite United States Supreme Court family and procreative privacy cases. Most strained was his appeal to the abortion rights case, *Roe v. Wade*.<sup>86</sup> His argument proceeded as a long leap from the premise that pregnant women have a right to obtain a medical abortion to terminate fetal life to the conclusion that infertile or medically at-risk women

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83. 106 Mich. App. at 173-74, 307 N.W.2d at 441.

84. *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972) (statute denying unmarried persons access to contraceptives violates equal protection and right to privacy).

85. Judge Sorkow noted that "[t]he proponents of this surrogate-parenting agreement argue that their right to enter such a contract is protected by a fundamental right to procreate. This right of procreation is bottomed on an individual's constitutional right of privacy." *Baby M, I*, 217 N.J. Super. at 384-85, 525 A.2d at 1163-64.

86. 410 U.S. 113 (1973).

and their spouses have a right to employ a third party to create a life.<sup>87</sup> This is far from straightforward analogical or deductive legal reasoning. Sorkow could have relied on *Roe v. Wade* more persuasively to argue that fertile women have a right of procreative privacy entitling them not only to abort, but also to create new life for reasons and purposes of their own, including surrogate motherhood.

Several important Supreme Court reproductive rights cases have been brought by or against professionals and entities providing procreative services. The Planned Parenthood cases<sup>88</sup> and the recent *Thornburgh v. American College of Obstetricians*<sup>89</sup> case make plain that the Court views personal procreative privacy rights as extending a mantle of immunity from state interference around certain professionals and entities selected by married couples or individuals to provide services. In this vein, one might view the personal privacy right at stake in *Baby M* as having belonged to the Stern couple or to Mr. Stern, with only *derivative* privacy protection extending to Mary Beth Whitehead and others "used" to facilitate noncoital procreation.

## 2. The Biological Father

A derivative privacy rights theory in the surrogacy context can be seen in operation in a recent Kentucky case which stressed the primacy of the biological father's privacy. *Surrogate Parenting Associates, Inc. v. Kentucky ex rel. Armstrong*,<sup>90</sup> an action commenced in 1981 by the Kentucky Attorney General to revoke a corporate charter, alleged that Surrogate Parenting Associates, Inc. (SPA) violated state adoption laws.<sup>91</sup> The trial court dismissed the complaint, holding that facilitation of surrogacy agreements between infertile couples and fertile women was not an illegal breach of corporate powers. An appeals court reversed, but the Kentucky Supreme Court reversed

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87. The judge asserted: "If the law of our land sanctions a means to end life then that same law may be used to create and celebrate life. . . . A woman and her husband have the right to procreate and rear a family." *Baby M, I*, 217 N.J. Super. at 386, 525 A.2d at 1664. The same argument has been made and criticized elsewhere. See Smith & Iraola, *supra* note 8, at 284 & n.127 ("it has been suggested by some commentators that since a woman has a right to terminate her pregnancy and to use contraceptives, a posteriori, the conduct required to bring about those procreative choices must also be protected").

88. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

89. 476 U.S. 747 (1986).

90. 704 S.W.2d 209 (Ky. 1986).

91. *Id.* at 210. According to the state attorney general, the firm violated two statutes prohibiting the "sale, purchase or procurement for sale or purchase of 'any child for the purpose of adoption'; . . . [the] filing for voluntary termination of parental rights 'prior to five (5) days after the birth of a child.'" In addition, SPA was accused of violating a third statute, which specified that "'consent for adoption' shall not 'be held valid if such consent for adoption is given prior to the fifth day after the birth of the child.'" *Id.*



the court of appeals' reversal.<sup>92</sup>

Citing *Carey v. Population Services*,<sup>93</sup> Judge Leibson, writing for the state supreme court, invoked the constitutional right of privacy to buttress his proposition that men, no less than women, should be permitted to rely on technology and the voluntary assistance of third-party surrogates for infertile or disabled spouses.<sup>94</sup> The court stated that "we recognize '[t]he decision whether or not to beget or bear a child is at the very heart . . . of constitutionally protected choices.'" <sup>95</sup> This right to decisional privacy of men who desire biologically-related children, the court argued, prohibits barriers to the "tampering with nature" necessitated when a man is "unable to conceive [a child] in the customary manner."<sup>96</sup>

The court's argument plainly was structured to derive part of its force from the unfairness of a system that would leave women with infertile spouses free to obtain artificial insemination through sperm banks, but would not permit men with infertile spouses to obtain the assistance of artificially inseminated surrogates. Essentially this same point appeared in *Baby M* styled as a constitutional equal protection argument.<sup>97</sup> The important point here is that the court's "men's privacy" analysis was the basis for its argument against termination of SPA's right to operate as a provider of surrogacy services. SPA impliedly was accorded constitutional privacy protection derived from the primary constitutional privacy of married men. Presumably, here too, the surrogate's privacy rights would be only derivative.

### 3. The Contractual Couple

Judge Sorkow did not take seriously the possibility of ascribing rights of private procreative decisionmaking to the contractual couple rather than the

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92. The Kentucky Supreme Court reasoned that the state statute and policy against the "buying and selling of children" were not violated because "in the surrogate parenting procedure . . . the agreement to bear the child is entered into *before* conception." *Id.* at 211. Furthermore, the court reasoned that the two statutes pertaining to voluntary termination of parental rights prior to five days after the birth were not violated because SPA "has freely acknowledged that the initial contractual arrangements regarding the mother's surrender of custody and termination of parental rights are voidable." *Id.* at 212. That is, the state statutes are overriding. Consequently, irrespective of the terms of the contract between the surrogate mother and the biological father, the mother is acknowledged to have a statutory right, which she may not contractually waive, to change her mind at any time within five days of the birth of her child. As explained by the court, "[t]he surrogate mother's consent given before five days following the birth of the baby is no more legally binding than the decision of an unwed mother during her pregnancy that she will put her baby up for adoption." *Id.* at 212-13.

93. 431 U.S. 678 (1977).

94. 704 S.W.2d at 212.

95. *Id.*

96. *Id.*

97. *Baby M, I*, 217 N.J. Super. 313, 387-88, 525 A.2d at 1165.

infertile married couple.<sup>98</sup>

Surrogacy agreements are joint ventures involving an extramarital decision to procreate. The cultural and individual meanings attached to biological parental ties, and the impetus to create them, contribute plausibility to the "right to procreative privacy" arguments. It is not self-evident that a contractual couple, primarily bound by written agreement, should not be deemed to exercise the same procreative privacy rights that married couples exercise under the protective mantle of their wedding vows. Simply by virtue of the biological ties they seek to forge, both parties share cognizable privacy interests in the decision to have a child and in that child's fate.<sup>99</sup>

It may be appealing in the abstract to focus on the contractual couple as a distinct unit to which our political morality attributes privacy. Such attribution, however, could be expected to have limited appeal to participants in practice. The contractual couple model of ascribing privacy rights works less well than the others to shield all the spouses (or other intimate partners involved) from feelings of guilt, envy, and betrayal that normally accompany extramarital pregnancies. These severe feelings, which might otherwise thwart persons from seriously considering providing or purchasing surrogacy services, can be lessened by premising the validity of surrogacy contracts on the marital couple's privacy or commercial rights.

In contrast to Judge Sorkow, the New Jersey Supreme Court chose to focus on the contractual couple's procreative privacy rights. It therefore rejected Mr. Stern's argument that his procreative rights demanded victory for him, arguing that Mrs. Whitehead, as Melissa's mother, possessed identical procreative rights.

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98. The judge quickly dismissed this possibility during his rejection of visitation rights for the maternal grandparents. "Mrs. Whitehead and Mr. Stern," he stated simply, "were never a family unit." *Id.* at 404, 525 A.2d at 1173.

99. Ironically, if surrogacy agreements are legal because they are considered marital procreative agreements instead of commercial deals, policy makers may be deprived of reasons to insist on the state's enforcement. Most of the agreements and undertakings of family life are not backed by the enforcement powers of the state. A wife owes her husband no contract damages if she makes a unilateral decision to abort. No injunction will issue against her to conceive, to abort, or not to abort. She will not be compelled to keep her word. Even the marriage commitment itself can be broken and a divorce obtained (nowadays, more or less unilaterally and on a no-fault basis). It is not plain why an agreement to provide a stranger the exclusive companionship of one's child should be specifically enforceable after a change of heart when an agreement to provide a person with the exclusive companionship of oneself as spouse is not. These facts of social life and family law may count against construing entry into surrogacy agreements as constitutionally protected private conduct giving rise to enforceable legal contracts. It may point toward viewing the promises that a woman makes to a man to carry and surrender a child as unenforceable personal plans or vows. See Jackson, *Baby M and the Question of Parenthood*, 76 *GEO. L.J.* 1811, 1818 (1988) (viewing such promises as statements of "prebirth intention to renounce parental interests").

#### 4. The Surrogate

Assuming that the constitutional right of privacy has a justificatory role to play in the surrogacy context, is the best argument the “women’s privacy” argument? The “women’s privacy” argument asserts that whether a woman’s motivation is to have her own child or to enter and fulfill the terms of a lucrative contract, she should be free from state interference with her choice to seek artificial insemination.

To be sure, the “men’s privacy” and “childless couple privacy” arguments, premised as they are on the desire to enjoy nuclear family life, pull at our heartstrings. The “women’s privacy” argument is without comparable sentimental appeal. Moreover, the “women’s privacy” argument ostensibly relies upon the principle that economically motivated choices respecting a woman’s body necessarily fall within the domain of constitutionally protected private choice. Widespread regulation and prohibition of commercial uses of the body, such as prostitution, render this principle doubtful. The United States Supreme Court has held that constitutional privacy does not include an absolute right to control one’s own body.<sup>100</sup>

Yet, viewing the surrogate mother as having only derivative rights to enter surrogacy agreements seems curiously artificial. Indeed, it appears necessary to strain to view a woman who conceives, gestates, and gives birth to a child as having only derivative privacy interests in freedom from state interference. After all, she alone has the right to decide whether to become pregnant and, under *Roe v. Wade*, she alone has the right to decide whether to obtain a medical abortion in the first trimester of pregnancy.<sup>101</sup>

From this vantage point it seems that the surrogate’s privacy right, far from being derivative in character, surely must be primary. The surrogate mother is more than an instrument of others’ procreative liberty; indeed, she is more than a “surrogate.” Surrogate motherhood is an exercise of procreative liberty. The entire surrogacy arrangement is possible only because of the surrogate’s capacity, willingness, and liberty.

In response, one could argue that the commercial character of the surrogate mother’s aims and motives necessarily takes her outside the realm of constitutionally protected privacy. And, since the sperm donor and his mate desire to add a biologically related child to their family, the surrogacy transaction is very much in the realm of their constitutionally protected privacy.

Initially, this perspective may appear to be supported by an analogy to female prostitution. The commercial nature of prostitution is often cited as the reason for its regulation and even criminalization. However, since a woman who is artificially inseminated is not a vendor of sexual arousal, there is

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100. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (woman’s right to abortion not absolute).

101. *Id.* at 164.

no reason to view her as a prostitute. Still, some may be persuaded by the general argument that constitutional privacy protections cannot be applied, except derivatively, on behalf of a party whose principal motivation is monetary gain, whether in relation to sex or procreation. This would mean that the sperm donor or couple, whose aim is to beget a biologically related child, can claim privacy rights against state interference, but the profit-seeking surrogate mother cannot, except perhaps derivatively.

It is orthodoxy, however, that neither the prostitute nor her client can claim constitutional privacy rights to be free from state interference. Their sexual relationship is characterized as commercial rather than personal or familial, and thus as not warranting the special protection of fundamental rights. In the case of the prostitute-client relationship, her lack of constitutionally protected privacy rights results in her clients' lack of such rights, even though a prostitute's clients subjectively may regard their encounters as personal, recreational sex.

This analogy to prostitution forces us, willy-nilly, to conclude that the sperm donor equally lacks legitimate claims to constitutional privacy. Tracing the analogy, one must conclude that because conception, gestation, and delivery are commercial services for the surrogate mother, the fact that the biological father views the transaction as begetting a child is irrelevant. Because money changes hands, neither sperm donor nor surrogate may claim constitutional privacy protection against state interference.

#### B. THE NEED FOR CAREFUL ATTRIBUTION

Where do these reflections leave us? *Doe v. Kelley* called upon constitutional privacy rights to limit state interference with good samaritan surrogacy, but did not indicate precisely whose privacy right does the limiting.<sup>102</sup> The court had no practical reason to dispel the troubling ambiguity, since it did not need to specify whose privacy rights limit state action to resolve the dispute between the adverse government and private parties to the litigation. The government defendant's interest was in having state adoption laws held applicable to surrogacy transactions. Its sole concern was that *no* plaintiff's privacy right be declared an obstacle to extending the adoption statutes. The private plaintiffs' interest was in having the constitutional privacy of *some* plaintiff declared an obstacle. To them, it made no practical difference whether the privacy rights of Mary Roe alone, Doe alone, the Doe couple alone, or the Roe-Doe couple imposed the limitation they sought to establish.

In other cases, however, courts will have good cause unambiguously and nonarbitrarily to pronounce whose privacy rights risk abridgement. One-

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102. 106 Mich. App. 169, 173-74, 307 N.W.2d 438, 441 (1981); see *supra* text accompanying notes 80-82.



sided and ambiguous ascription of privacy rights in the surrogacy context can mask the competing privacy interests which weaken a party's claim to be the rightful victor in a dispute. Courts relying upon privacy arguments must seek to acknowledge all the privacy claims, dispel all the ambiguity about who is asserting them, and then decide which claims to legitimate. This is especially important where, as in the *Baby M* case, a custody dispute arises between a surrogate mother and biological father, both of whom claim that their constitutional privacy rights—whether to procreative privacy or to the companionship of the child—entitle them to prevail.

Paying careful attention to privacy right attribution can expose the weakness in claims that particular parties are entitled to prevail in custody disputes. This is not to say that custody disputes in surrogacy cases can be resolved by simple attributions of privacy. Privacy in the constitutional sense suggests freedom from state interference. But the concept of privacy provides no neat adjudicative principle for resolving natural parents' child custody disputes. Even the concept of family privacy points toward no resolution, since it would beg important questions to select the childless couple rather than the surrogate and child as the relevant family whose privacy ought to be protected. Both sides seek public assistance to secure variously styled claims of privacy.

It is no wonder, then, that the New Jersey courts in *Baby M* sought refuge in the maxim of the child's best interests and other traditional standards. This approach to the resolution of custody disputes in surrogacy cases is very appealing and probably best where lawful or unlawful surrogacy agreements have gone awry. But courts need to be clear about their grounds for embracing or rejecting privacy-based claims to child custody and the enforcement of surrogacy agreements.

### III. THE APPEAL TO PRIVACY: SOME LIMITATIONS

It is time to consider the important matter of the contractual alienability of fundamental constitutional privacy rights. I do not intend to repeat the efforts of others who have analyzed surrogacy agreements in detail from the point of view of contract law<sup>103</sup> and inalienable rights.<sup>104</sup> I only want to highlight some respects in which alienability issues are a problem for constitutional privacy arguments for and against commercial surrogacy.

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103. See Martin, *Surrogate Motherhood: Contractual Issues and Remedies Under Legislative Proposals*, 23 WASHBURN L.J. 601 (1984) (focusing on surrogacy and Kansas contract law).

104. See Radin, *supra* note 15, at 1928-36 (surrogacy and alienability); Note, *Rumplestiltskin Revisited*, *supra* note 8 (same).

## A. IS A PROMISE A CONTRACT?

As explained in Parts I and II, a father's privacy claim against his child's natural but "surrogate" mother is plausible on one condition: if he assumes that she too has constitutional procreative and parental privacy rights and that in exercise of her privacy rights, she may commercially alienate, waive or otherwise abrogate the legal protection her privacy rights would normally afford. The father's argument must be that surrogates exercise their parental privacy rights by voluntarily promising to terminate parental rights in the children they are hired to carry. Out of respect for her right to exercise her privacy rights, her freedom of contract, and the father's equal rights and freedom, the surrogate's agreement to terminate parental rights should be validated and specifically enforced. So says the disappointed father.

The basic argument of disappointed fathers is that "a-promise-is-a-contract": intending to give up her parental rights and be bound by her word, the breaching surrogate mother freely made a promise to others who hired her in the exercise of their constitutional privacy rights. The surrogate entered a contract. The contracting parties did not intend the key parental-rights termination provisions to be revocable at will. In fairness, the surrogate is not to be permitted unilaterally to go back on her word by keeping the child. Why? Because she freely and knowingly promised; because she formed a contract; and because a court which refused to specifically enforce the contract in the face of her breach would abridge the constitutional procreative privacy rights of the childless party or parties.

"A-promise-is-a-contract" arguments in the context of surrogacy disputes attempt to marry the nineteenth-century will theory of contract<sup>105</sup> to the privacy jurisprudence of *Griswold v. Connecticut*.<sup>106</sup> This marriage could be expected to fail—for the former is an ailing geezer, the latter a winsome, but unformed ingenue. A court persuaded by so tenuous a union would force the surrogate to do what she once freely agreed to do for a childless couple that bought her services (the argument goes) in free exercise of its privacy rights and hers.

This potential use of the coercive power of government is cause for concern. Issues of contract enforceability and justice pose complexities even apart from questions of alienability. First, not all voluntary promises and written agreements are ipso facto legally enforceable contracts. Granted, business contracts are widely regulated and enforced. However, the mere

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105. "Will Theory" denotes the theory of contractual obligation and enforcement according to which voluntary agreements between rational persons ought to be enforced as expressions of a free will's intent to bind itself. See generally P.S. ATIYAH, PROMISES, MORALS AND LAW 17-28 (1981) (explicating and criticizing will theory); Fridman, *On the Nature of Contract*, 17 VAL. U.L. REV. 627-54 (1983) (defending version of will theory); C. FRIED, CONTRACT AS PROMISE (1981) (same).

106. 381 U.S. 479 (1965).

fact that money is paid out and businesses have been set up to facilitate surrogacy cannot be dispositive of whether surrogacy agreements should be enforced; at least not without begging important questions. Some reason must be given for treating surrogacy agreements as enforceable market instruments between commercial players rather than unenforceable personal commitments or family plans. Neither moral nor positive justice appears to require state enforcement of every serious promise.<sup>107</sup> Indeed, one of the most significant promises, the promise to marry, is freely revocable and largely unenforceable under present law.

Not even the most ardent contemporary will theorists maintain that courts should always hold a person to her word, whatever the consequences for herself and others, simply because she knowingly and freely chose to bind herself. Of course, a contract can legally bind us now to do what we will not want to do later. But contracts are not sacred. They can be contrary to law and good public policy.<sup>108</sup> Hence, arguments that the rights and interests of others, and the surrogate's own inalienable rights and interests, pose limitations on contract enforcement merit a concerned ear. Quite possibly, to force a woman to give up a child because she freely agreed to give it up prior to its birth is to bind her to her previously exercised free choice in the least appropriate of all contexts.

Moreover, this compulsion protects the private choice of the biological father at the expense of the reconsidered private choice of the surrogate mother. Perhaps this is as it should be; perhaps it is entirely fitting that the burden of temporal shifts in her preferences should be borne by the surrogate. In connection with his analysis of autonomy as the moral basis of constitutional privacy, philosopher Joel Feinberg has defended the widespread belief that earlier voluntary decisions ought normally to take precedence over later conflicting ones.<sup>109</sup> Feinberg has admitted, however, that an exception might be appropriate in rare instances in which a person undergoes a fundamental change of character that makes her a morally different self.<sup>110</sup> In these instances the free and voluntary choices of the "earlier self" ought not bind the "later self." Rejecting arguments suggesting that such metamorphoses are commonplace, Feinberg insisted that "[t]alk of the 'earlier self' and the 'later self' is only useful *façon de parler* . . . . All of our ordinary notions of responsibility, as well as such basic moral practices as promise-

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107. Why not? See generally M. BAYLES, *PRINCIPLES OF LAW: A NORMATIVE ANALYSIS* 170-92 (1987) (normative analysis of common law).

108. See *id.* at 186 ("The principle of collective good supports not using the law to enforce contracts contrary to laws and policies promoting or protecting collective goods.")

109. Feinberg, *supra* note 11, at 479. But see THE MULTIPLE SELF (J. Elster ed. 1986) (empirical and theoretical studies casting doubt on ordinary assumptions of human autonomy, rationality, consistency and the unity of self).

110. Feinberg, *supra* note 11, at 479.

making, presuppose a relation of personal identity between earlier and later stages of the same self.”<sup>111</sup> Feinberg may have been correct about “our” ordinary notions and moral practices. He may have been justified in offering them up as a benchmark in normative reasoning about hard cases. However, the root issue raised by concern over the enforceability of surrogacy agreements is not temporal shifts in preference but the logically prior one of whether persons should have the moral or legal power to make binding irrevocable surrogacy agreements in the first place.

Feinberg’s discussion of fictional and hypothetical cases in which autonomy is voluntarily alienated carries implications for the root issue.<sup>112</sup> His discussion can be read as an argument for a liberal, anti-paternalistic presumption of validity for all voluntary agreements. But such a presumption settles nothing about the surrogate who changes her mind. Feinberg himself stressed that no person can be obligated by voluntary agreement to act contrary to her moral obligations and responsibilities to third parties.<sup>113</sup> Moreover, Feinberg suggested in passing that morality may sometimes require that the wretched individual who suffers greatly from the consequences of her voluntary agreements be released by her obligor, as a merciful act of humanity.<sup>114</sup>

Thus, crucial for the case of the surrogate who undergoes a change of heart is whether the surrogacy agreement violates the surrogate’s obligation and responsibilities to third parties, such as to her child or to her community. And, if there is more to legal justice than a rights and obligations analysis of bilateral agreements can yield alone, the man who has a child by a recalcitrant surrogate should perhaps be denied the benefit of legal enforcement, for the sake of mercy or another virtue. Without legal enforcement of contract provisions that prenatally terminate a surrogate’s parental rights, natural mothers are mercifully spared the emotional agony of unwanted lost access to their children.

But where in the surrogacy debate is the burden of persuasion? Relying on the fact that private parties have documented their agreement in a writing styled as a legally binding contract, should courts presume *prima facie* legal effect? Or should courts instead expect those who would enforce surrogacy agreements to shoulder the onus of providing an affirmative rationale for doing so, acceptable to fair-minded skeptics?

How one responds to these questions may reflect one’s theory about the

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111. *Id.*

112. *Id.* at 464-83.

113. *Id.* at 475.

114. *Id.* at 482-83 (“to let the loser [who has gambled irrevocably with his own future in some way] sleep in his own bed or stew in his own juices—may be inhumane to such a degree that it cannot rightly be done”).



origins of contractual obligation. Proponents of the view that freely entered private promises are the principal moral basis of contract law may be inclined to place the burden of persuasion on surrogacy's opponents. Indeed, this conception of where the burden lies is consistent with the conclusion that surrogacy contracts are the invalid products of economic duress rather than free will.

The role of individual free will in the formation of legal obligation in modern life is easily exaggerated.<sup>115</sup> In a related vein, contract theorist P.S. Atiyah has argued that the will of a private individual cannot create a moral or legal obligation, except to the extent allowed by background entitlements prescribed by the social group.<sup>116</sup> Viewed in this light, the burden of persuasion may fall on surrogacy's proponents no less than on its detractors. Without the requisite background entitlements, "a-promise-is-a-contract" arguments, which stress the metaphors that minds met and free wills bound themselves in the exercise of privacy rights, carry no particular weight. Against this, one might respond that, as evidenced by existing moral conviction and legal practice, "our" social group in fact prefers earlier autonomous choices to subsequent, contradictory ones. The resulting debate takes the question of whether a natural father is entitled to specifically enforce the surrogacy contract against a natural (surrogate) mother, and turns it into an empirical and interpretive inquiry.

## B. INALIENABLE RIGHTS

Women have constitutional privacy rights protecting their interests in abortion and bearing and rearing children. It is necessary to consider whether justice permits alienation, especially commercial alienation, of some

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115. See Dawson, *Economic Duress*, 45 MICH. L. REV. 253, 262-67 (1947) (excessive emphasis on "the will" confused the undue influence doctrine).

116. See generally P.S. ATIYAH, *PROMISES, MORALS AND LAW* (1981). There is much in this book with which to disagree, starting with Atiyah's moral relativism and conventionalism.

Not only a positivist like Atiyah might suppose that individuals cannot create moral or legal obligations wholly on their own. A "natural law" theorist, for whom background rights are not conventional, could make a parallel argument that morality, and not the bare will of individuals, is the ultimate basis of contract law.

Are the express promises of Mrs. Whitehead of no legal import? According to Atiyah the role of explicit promises, such as those Mrs. Whitehead made to Mr. Stern, are to provide evidence of doubtful issues that bear on contractual obligation and to serve as admissions of her felt obligation. *Id.* at 184-95.

On the most abstract level, Atiyah could be expected to view the *Baby M* courts as having had to rely on what H.L.A. Hart called "rules of obligation" and "rules of recognition" to decide two concrete issues: first, whether Whitehead was entitled to make an irrevocable prenatal promise to give up a child, and, second, whether Stern was entitled to rely on Whitehead's promise. See H.L.A. HART, *THE CONCEPT OF LAW* 77-107 (1961) (positivist theory of what law is and how legal obligation can be recognized).

of these important rights through irrevocable prenatal parental-rights termination agreements.

The issue of the alienability of constitutional rights arose indirectly or not at all in the *Baby M* opinions. Chief Justice Wilentz did not address in general terms the power of the individual to waive the protection of constitutional privacy rights. However, his rulings regarding New Jersey law entailed, in effect, the proposition that parental rights are commercially inalienable, but are otherwise alienable subject to a reserved right of revocation. Judge Sorkow addressed the fundamental privacy rights alienability issue more directly when he held that the provisions in the Whitehead-Stern surrogacy agreement whereby Whitehead promised not to abort were void under *Roe v. Wade*. Having found that the protections afforded by abortion privacy rights are commercially inalienable, it is a little surprising that Sorkow did not go a further step. Nevertheless, before concluding that surrogacy agreements are valid and enforceable, he did not anticipate and meet the argument that agreements promising to terminate parental rights are void as unlawful alienation of procreative and parental privacy rights guaranteed by the Constitution as interpreted by the United States Supreme Court.<sup>117</sup>

The surrogate who is fighting the judicial validation of a prenatal parental-rights termination agreement has a complex response to “a-promise-is-a-contract” arguments. This response did not explicitly appear in *Baby M*, but obviously bears on the adjudication of surrogacy disputes. The argument relies on the concept of inalienability<sup>118</sup> and has a strong and a weak version, both of which may help the case of a surrogate who changes her mind during or after pregnancy.

The strong version is that the parental rights attendant to family and procreative privacy rights are commercially inalienable—that is, they cannot be exchanged for money—because they are of *fundamental*<sup>119</sup> importance to

117. My conjecture is simply that he recognized no United States Supreme Court precedent that applied as clearly to parental rights waivers as he thought the abortion precedents applied.

118. As explained by Margaret Jane Radin, “inalienability” is a central concept in our culture and “[y]et there is no one sharp meaning for the term.” Radin, *supra* note 15, at 1850. Its denotative meanings range from “nontransferable,” to “nonsalable,” to “nonrelinquishable by a rightholder,” to “incapable of being lost at all.” *Id.* at 1853. In the discussion that follows, two senses of “inalienability” are most pertinent, namely “nonrelinquishable by the rightholder” and “nonsalable.” I am inclined to group myself among those who believe that parental rights should be deemed both relinquishable and nonsalable. As Radin points out, characterizing rights as nonsalable “expresses an aspiration for noncommodification.” *Id.* at 1855 n.24. The desire for noncommodification of children is one reason for opposing all forms of profitable surrogacy. The noncommodification of the womb is another. Yet I think it is largely unproblematic that parental rights are deemed transferable and relinquishable under noncommercial conditions, as when a teenager gives up her child for adoption. Nor does it trouble me that parental rights can be lost, for example, by virtue of serious child abuse or persistent neglect.

119. See Feinberg, *supra* note 11, at 489 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973), for proposition that only fundamental

their possessors' best interests.<sup>120</sup> The strong version would support laws barring the satisfaction of women's own desires lawfully to hire themselves out as surrogates. The argument is thus paternalistic, though the paternalism may be virtuous.<sup>121</sup> For their own good (as policy makers interpret it), or in the interest of values that underlie their own rights (again, as policy makers interpret them), all women are denied a liberty which some women want.

The weak version is that a woman can commercially alienate parental rights, but not without reserving a postnatal opportunity to change her mind. To the extent that the aversion of childless couples to the risk of sudden revocation will reduce demand for surrogacy and thereby diminish opportunities to work as surrogates, the weak version also bars the satisfaction of women's own desires to work as surrogates. The weak version inalienability argument also is, in a sense, paternalistic.

The strong version or weak version argument, if convincing, could be utilized successfully by the regretful surrogate who discovers that she would very much like to mother a child she had previously agreed to give up. If the weak version inalienability argument is correct, the statutory right to a postnatal period of reconsideration guaranteed by the adoption laws of New Jersey and most other states is also a right of constitutional proportions.

Is either the strong version or weak version inalienability argument plausible? Should the implicit paternalism of these arguments be troubling? To trace an answer, it is necessary to focus on a particular normative conception of alienability.

Diana T. Meyers has argued that inalienable rights include these four: The right to life, the right to personal liberty, the right not to suffer gratui-

liberties constitutionally protected). According to Feinberg, "it is not simply by virtue of being primarily self-regarding that decisions involving marital sex and family planning fall within the zone of constitutional privacy. . . . Rather, the court . . . has circumscribed as 'private' those decisions that involve the most basic of self-regarding decisions." *Id.*

120. The strongest inalienability argument would maintain that a woman cannot alienate her parental rights at all—not even when she expects no monetary compensation. This would amount to an argument even against non-commercial voluntary adoption.

121. A paternalistic interference with liberty can be morally justified, morally unjustified, or morally obligatory, depending upon the circumstances. By "paternalistic interference" I mean any deliberate action undertaken for reasons referring to the presumed good, well-being, or better interest of the subject of paternalism, sometimes without his or her consent. One would be morally justified, if not obligated, in stopping a madman from swimming in an icy lake. However, I find no difficulty in failing to stop an experienced cold water swimmer who one knows to be sane and aware of the risks of practicing in an icy lake.

Mary Beth Whitehead (and her former husband) brought a suit against the New York clinic that arranged the *Baby M* contract, alleging that it had failed to exercise proper care in selecting her to serve as a surrogate. The lawsuit settled. *L.A. Times*, Feb. 7, 1988, at 2, col. 3. One way to understand the claim that Whitehead settled is as a plea for obligatory paternalism even in the face of an unyielding and ostensibly unflappable would-be surrogate.

tous pain, and the right to satisfaction of basic needs such as food, water, clothing, shelter, and medical care needed for survival.<sup>122</sup> The alienability of modes of personal liberty most concern us here. According to Meyers, to say that a right is inalienable is to say that it protects prerogatives essential to the security of free and responsible moral agents. There can be no obligation to give up or voluntarily renounce such rights.<sup>123</sup> Moreover, an inalienable right cannot be renounced; individuals cannot “dispense with the control over their lives which this [kind of] right would afford.”<sup>124</sup>

Adapting Meyers’s moral theoretic conceptions to constitutional law, we can see why freedom of contract should not include the freedom to bargain away certain constitutional rights. They are understood as being inalienable, in the interest of personal security. One should not be able to contract away, for example, the protection of vital personal liberties guaranteed by the thirteenth and fourteenth amendments.

The recalcitrant surrogate’s inalienability argument is premised on the commercial inalienability of parental rights that are implied by a general constitutional right of family and procreative privacy. Parental rights plausibly can be numbered among inalienable rights because they are a form of liberty linked to personal security. The surrogate’s strong version inalienability argument is that her own constitutional privacy prevents her from entering a valid and enforceable commercial surrogacy contract. The surrogate’s weak version inalienability argument is that her own constitutionally protected privacy rights are tied to essential personal liberty in such a way that they cannot be given up. Such privacy rights are construed to include both the right to terminate parental rights and the fullest opportunity for reflection about terminating parental rights consistent with the inalienable rights of others.<sup>125</sup> Hence, the surrogate who agrees prior to conception or childbirth to terminate parental rights upon the birth of a child simply lacks the moral and legal power to bind herself to such an agreement.

Obviously, this calls for a close analysis of the bases of inalienability claims in the surrogacy context. In the wake of *Griswold* and *Roe*, the respects in which values of personal security and liberty are at stake in a woman’s deci-

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122. D. MEYERS, *INALIENABLE RIGHTS* 53 (1985) (philosophical account of natural and inalienable rights).

123. *Id.* at 31-34. Meyers argued that renunciation of the inalienable moral rights that make our lives secure would render the institution of morality self-defeating. Therefore, inalienable rights must be understood to impose obligations of self-restraint on right-holders. Holders of inalienable rights thus lack moral powers of waiver or other voluntary renunciation. See generally Note, *Rumpelstiltskin Revisited*, *supra* note 8, at 1941-1949 (assessing competing theories of inalienability and defending rights central to personhood as inalienable).

124. D. MEYERS, *supra* note 122, at 15.

125. Those individuals who conceivably have inalienable rights that would constrain the surrogate’s right to change her mind surely include the surrogate-born child. But this assumes that there is an inalienable right to a stable environment soon after birth.



sion to abort have been well-articulated. Feminists have helped to provide a vocabulary of useful phrases to convey complex conceptions of what is at stake: free choice, self-determination, and control over one's own body. The respects in which values of personal security and liberty are at stake in a women's reconsidered choice to mother a child she has carried have not been well articulated. Legal theorists are unpracticed at serious, polemical defenses of "natural" motherhood—the kind of defenses that do not rely upon platitude, sentimentality, or sex-role stereotyping.

This is not to suggest that the value of mothering one's own child is more mysterious or ineffable than other exalted human experiences. Until recently, "natural" motherhood needed no serious defense.<sup>126</sup> For more than a century in the United States, it has been widely presumed that mothering one's own child is both a right and a duty. It appears that the New Jersey Supreme Court had its eyes on "the child's best interests" but also the rights of natural motherhood when it chided the lower court for separating Baby M from her natural mother during the pendency of custody litigation.<sup>127</sup>

A woman's security may be tied to the fate of her offspring in at least two distinct and evident ways. First, her security can be undermined by the feeling that she has lost control of a vulnerable being whom she has helped create and set loose into the world. A woman may come to regard her voluntary loss of control as a failure of responsibility and as deeply regrettable. Indeed, one reason the abortion right is so important to women is that their sense of responsibility often dictates that they should not carry a child to term unless *they personally* have the psychological and financial resources to care for it. Surrogate parenting is possible only to the extent that women are substantially free of the feelings of *personal* responsibility for their children.

Second, women often identify strongly with their children. This sense of identity can stem from awareness of the physical connection that characterizes the latter stages of pregnancy. It also can stem from knowledge of a genetic link. By virtue of biological ties, a woman may view her child as her link with the past, a part of her family, and her stake in the future.<sup>128</sup>

Because women's security can be so tied to the fate of their offspring, there is at least one good reason to treat parental privacy rights as commercially inalienable. A more permissive rule, one that allowed parental rights to be

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126. Poor and minority women have been subject to criticism from middle-class moralists who have questioned their fitness for the role of motherhood. See L. BANNER, *supra* note 55, at 103 (early efforts by black women's organization to challenge view that black women "naturally promiscuous").

127. *Baby M, II*, 109 N.J. at 466, 537 A.2d at 1263.

128. Indeed, this keen desire for biological kin is what Richard Stern said led him to seek the help of surrogate Mary Beth Whitehead. *Id.* at 8.

commercially alienated but subject to revocation as a matter of law, would have an analogous justification. This more permissive rule would preserve surrogacy as an option, at least nominally.

If the prenatal parental-rights termination provisions of surrogacy agreements are void as ineffective waivers of inalienable rights, the existence of surrogacy agreements provides no privacy grounds for awarding a disputed child to its biological father. Principles of estoppel and detrimental reliance derived from the common law of contracts have no normative power in the face of fundamental and inalienable privacy rights protecting the surrogate's parental status.<sup>129</sup> Despite her "breach" and the father's "good faith" and "reliance," her custody claims equal his.

Of course, whether commercial surrogacy ought to be a lawful option is an inquiry that the analysis of privacy claims only begins to answer. Inalienability rules are justified to the extent that they discourage the creation of monetary incentives for women to do what their basic well-being overwhelmingly demands that they do not do: prenatally promise, without recourse, to give up a child they may later want very much to keep.

My proposed account of why parental rights should be treated as inalienable, does not force us to conclude that women's rights to choose medically safe abortion or sterilization should be governmentally restricted for their own good—to give them opportunities to change their minds about motherhood. Issues of personal security and identity do not arise as acutely and concretely for contemporary American women choosing first trimester abortion or sterilization as they do for women who have actually carried and given birth to a child. The alienability restrictions I have described for surrogacy are motivated by the greater likelihood and severity of real and, in some respects, unique harms risked by surrogates.

#### IV. CONCLUSION

Neither courts, lawyers, nor legal commentators have succeeded in persuasively setting out a privacy case for surrogacy. Sorkow's *Baby M* opinion made much of the procreative privacy of childless married men and their spouses. It insisted that courts must respect privacy in the adjudication of surrogacy agreements and child custody disputes. Sorkow's *Baby M* opinion implied that if a would-be surrogate wants the right to change her mind and she is not provided with such a right by statute, then she must bargain for it. As the New Jersey Supreme Court would correctly point out, the "childless couple" oriented, "privacy right" based contract validation and enforcement policy urged by Judge Sorkow failed to accord equal deference to the procre-

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129. *But see* Coleman, *supra* note 8, at 100 (surrogate agreement may work estoppel against natural mother).

ative and parental privacy of the surrogate. As I have pointed out here, both *Baby M* opinions skirted the difficult question of the alienability of the constitutional privacy rights they invoked.

*Baby M* did not forge the needed link between privacy rights in procreation and families, on the one hand, and reproductive pacts with strangers on the other. Neither of the two *Baby M* courts grappled with the issues of alienability and inalienability that cloud ready understanding of what constitutional privacy should require. For this reason, *Baby M* did not much advance public understanding of whether those of us who have been unlucky in the natural lottery should be authorized to create incentives that tempt others to vend procreative capacities and fundamental parental rights.

Surrogacy arrangements may provide some men the only realistic means of having a biologically related child. They may provide some women the only realistic hope to mother a child. They may make marriages happier by giving couples their best shot at normalcy. Private commercial surrogacy arrangements may be necessary to create incentives for significant numbers of women to agree to conceive and carry children that they understand they must surrender. These facts offer bare utilitarian support for the practice of surrogacy. But they do not plainly make it a good and just idea.