NOTES

GESTATIONAL SURROGACY: UNSETTLING STATE PARENTAGE LAW AND SURROGACY POLICY

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INTRODUCTION

Recent advances in reproductive technology have made it possible for two women to share the role of biological mother. This possibility, embodied in the practice of gestational surrogacy, raises a question which the parentage laws of most states do not answer: how should maternal rights be determined when one woman supplies an ovum, another gestates and gives birth to the child, and both claim right to a legal mother and child relationship? That question lies at the heart of this Note. The answer is important: It determines

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the rights and obligations of individuals involved in disputed gestational surrogacy agreements; it is key to evaluating state policy regarding the validity and enforceability of surrogacy contracts in general; and it bears on related questions raised by various forms of assisted reproduction.[1]

The issue of parental rights is particularly pressing in the surrogacy context because of the tremendous stakes riding on a determination *after* a child is born. The need for prospective guidance and retrospective fairness calls for the development of law along carefully reasoned lines. In a number of ways, surrogacy law to date has not heeded this call.

Before that claim can be explained, some groundwork must be laid with respect to basic terms and concepts. A brief survey of collaborative arrangements will familiarize the uninitiated reader with the forms and benefits of the practices discussed. The Note will then survey the current landscape of surrogacy law to set the stage for a critique of its treatment of gestational surrogacy and maternal rights.

Collaborative reproduction arrangements offer hope to many otherwise infertile people who long for children to enrich their lives and carry their family lineages into the future. Artificial insemination with donor sperm (AID), a practice that originated in animal husbandry as early as the eighteenth century, came into widespread use in the 1960s as a remedy for human infertility in this country.[2] A recent study by the Congressional Office of Technology Assessment estimated that 32,500 babies are born each year as a result of AID conception.[3] Although AID is primarily used by heterosexual couples as a remedy for male infertility, the method is also used by single women and lesbian couples wishing to conceive children. AID achieves fertilization without sexual intimacy using technology no more sophisticated than a syringe. Re-

1. Any discussion of surrogacy is difficult to confine. The topic intersects a rich variety of legal and policy issues touching on family relationships, biomedical ethics, and even property law. This Note deals directly only with surrogacy policy and the underlying question of how parental rights should be allocated between maternal collaborators at the time of the child's birth. Nevertheless, my arguments have implications for other issues such as the legal status of extracorporeal gametes and embryos and, less directly, for family rights determinations at points of family reconfiguration after a child's birth. These issues are tremendously complex in themselves, and I have avoided the temptation to wade where I am not prepared to swim. Readers interested in the important task of weaving surrogacy principles into the larger fabric of rules governing changing patterns of social and biological relationships are advised to look beyond this Note. Interesting starting points include: Margaret A. Somerville, *Weaving "Birth" Technology into the "Value and Policy Web" of Medicine, Ethics and Law: Should Policies on "Conception" be Consistent?*, 13 NOVA L. REV. 515 (1989); CLIFFORD GROBSTEIN, SCIENCE AND THE UNBORN (1988); Katharine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

2. THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 19 (1988) [hereinafter TASK FORCE].

3. Walter Wadlington, *Baby M: Catalyst for Family Law Reform?*, 5 J. CONTEMP. HEALTH L. & POLICY 1, 3 n.6 (1989) (citing OFFICE OF TECHNOLOGY ASSESSMENT, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY-BACKGROUND PAPER, OT-BP-BA-48 (1988)).

cently, the technology required to harvest and transfer eggs has become widely available, providing a remedy for the woman who is unable to produce healthy eggs but has the capacity to gestate and give birth. AID and egg donation are referred to collectively as "gamete donation."

Surrogacy is another collaborative practice that serves as a remedy for female infertility[4] and a way for single men or gay couples to procreate. The term "surrogacy" encompasses two distinct arrangements: surrogate motherhood and gestational surrogacy.[5] A "surrogate mother" supplies the egg from which the child develops. Ordinarily, conception occurs by means of artificial insemination using the intended father's sperm. The surrogate mother then carries the pregnancy to term, and following the birth, relinquishes the infant to the intended parent(s). In contrast, a "surrogate gestator" carries and delivers a child to whom she is genetically unrelated. The embryo which is implanted in her uterus may have been conceived in the genetic mother's womb, through ordinary intercourse or AID, in which case it is washed from the womb by a process called lavage and then implanted in the surrogate. Alternatively, it may have been conceived using in vitro fertilization (IVF) — the combining of egg and sperm in a laboratory petri dish.[6] Technology aside, the major difference between these two practices is the fact that a surrogate mother supplies the egg whereas a surrogate gestator does not.[7] Thus, gesta-

4. Surrogacy arrangements are usually employed by infertile couples whose infertility results from the woman's inability to become pregnant or to carry a pregnancy successfully to term; however, such arrangements may be sought for other reasons. For example, the prospective mother may have a health condition that makes pregnancy and childbirth unusually risky. For a fuller discussion of reasons why people seek surrogacy, see PETER SINGER & DEANE WELLS, MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION 98-99 (1985).

5. For a general overview of surrogacy arrangements, see TASK FORCE, *supra* note 2, at 23-26.

The terminology of surrogacy can be confusing, even for those well versed in the subject; there is no generally accepted lexicon. A variety of terms are used to refer to the possible collaborative roles and arrangements. I have selected those terms which I believe best distinguish and characterize these practices. I use the terms "surrogate gestator" and "genetic-intended parent" to refer to the primary participants in the typical gestational surrogacy arrangement. These terms convey both biological and contractual aspects of arrangements in which the surrogate carries the genetic child of the parent(s) who contracted for her services.

Two other points regarding terminology require mention here. First, the common nontechnical words that are available to describe family relationships in the brave new world of collaborative reproduction and nontraditional family structures are woefully inadequate. I have attempted to minimize both ambiguity and awkward phrasing; nevertheless, the reader will likely find some of both. Second, I have used the words "agreement," "contract," and "arrangement" in conjunction with "surrogacy" to refer to the joint undertakings of parties involved. The slight variation in meaning has little significance with respect to the arguments set forth. Rather, the choices reflect varying emphasis on either the legal formalities or social aspects of surrogacy.

6. *See* TASK FORCE, *supra* note 2, at 21.

7. Although the technology employed to achieve conception is different — AID in the case of surrogate motherhood and embryo implantation (sometimes called embryo transfer or embryo adoption) in the case of gestational surrogacy — the technology has little bearing on the legality of the arrangements. Both AID and embryo implantation are legally acceptable when employed to impregnate a woman who intends to raise the child.

tional surrogacy arrangements may contemplate that the child will be reared by its genetic mother (the "genetic-intended" mother), but a surrogate mother arrangement is always initiated with the understanding that the genetic mother will not rear the child.

Collaborative reproduction may be undertaken on a "commercial" or "noncommercial" basis. Commercial arrangements provide for compensation sufficient to result in net economic gain to the collaborator (thus providing a monetary incentive to provide these services). Noncommercial arrangements do not entail compensation in excess of expenses. It should be noted that the term "gamete donation" is used whether the gametes are indeed "donated" or, as is more often the case, sold.[8]

The American public's response to surrogacy stands in sharp contrast to its general acceptance of gamete donation. National news coverage of the New Jersey case, *In re Baby M*,[9] drew public attention to surrogacy in 1987. The *Baby M* case arose when Mary Beth Whitehead, a surrogate mother employed by William and Elizabeth Stern, repudiated her contract after giving birth and finding herself unable to part with her new daughter. Mr. Stern, the child's biological father, sought to enforce the surrogacy contract, and a pitched battle over parental rights ensued. The trial court ordered enforcement of the contract, terminated Mrs. Whitehead's parental rights, and authorized adoption of the baby by Mr. Stern's wife.[10]

On appeal, the New Jersey Supreme Court reversed, holding that the contract, which entailed a $10,000 fee for "surrogate services and expenses" payable upon surrender of the child to Mr. Stern, was invalid. The contract was found to conflict directly with state laws "prohibiting the use of money in connection with adoption; . . . requiring proof of parental unfitness or abandonment before termination of parental rights . . . ; and . . . mak[ing] surrender of custody and consent to adoption revocable in private placement adoptions."[11] The court proceeded to treat the case as a custody dispute between two natural and legal parents having equal rights in relation to the child.[12] Following an analysis of the child's best interests, the court awarded custody to Mr. Stern and remanded for determination of Mrs. Whitehead's visitation rights.[13]

Baby M precipitated an intense national debate and a flurry of legislative activity. Since 1987, seventeen states have enacted legislation dealing with surrogate parenting arrangements.[14] Thirteen of these statutes make commer-

8. Despite federal law prohibiting payment for human tissue donation, 42 U.S.C. § 274(e) (1984), sperm donors are often paid. TASK FORCE, *supra* note 2, at 19.

9. *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

10. *Id.* at 1237.

11. *Id.* at 1240.

12. *Id.* at 1256.

13. *Id.* at 1256, 1263.

14. ALA. CODE §§ 26-10A-33 to -34 (Supp. 1991); ARIZ. REV. STAT. ANN. § 25-218 (1991); ARK. CODE ANN. § 9-10-201 (Michie 1991); FLA. STAT. ch. 63.212 (1991); IND. CODE §§ 31-8-21-1 to -3 (Supp. 1991); KY. REV. STAT. ANN. §§ 199.590, 199.990 (Michie/Bobbs-

cial surrogacy either void or illegal, and therefore unenforceable,[15] and eight criminalize participation in, or facilitation of, such arrangements.[16] During the 1991 legislative sessions, at least seven states considered bills that would have restricted commercial surrogacy arrangements.[17] Noncommercial arrangements have been statutorily proscribed in only one state,[18] and these arrangements may be protected by the federal constitutional right to privacy in reproductive matters.[19] However, a prohibition of compensated arrangements effectively makes surrogacy unavailable.[20]

Challenges to state legislation prohibiting commercial surrogacy are likely to fail it they are based on interference with the fundamental constitutional rights of procreation and reproductive privacy. Despite Supreme Court decisions protecting access to the means of effectuating reproductive choices,[21] state courts and numerous commentators have concluded that the Fourteenth

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Merrill 1991); LA. REV. STAT. ANN. § 9:2713 (West 1991); MICH. COMP. LAWS §§ 722.851-.863 (Supp. 1991); NEB. REV. STAT. § 25-21,200 (1989); NEV. REV. STAT. § 127.287 (1991); N.H. REV. STAT. ANN. §§ 168-B:1-32 (1991); 1992 N.Y. Laws 308 (McKinney 1992); N.D. CENT. CODE §§ 14-18-01 to -07 (1991); UTAH CODE ANN. § 76-7-204 (1992); VA. CODE ANN. §§ 20-156 to -165 (Michie 1991); WASH. REV. CODE ANN. §§ 26.26.210-.260 (West 1992); W. VA. CODE § 48-4-16 (1992); *see* Appendix for a summary of statutory provisions.

15. ARIZ. REV. STAT. ANN. § 25-218; FLA. STAT. ch. 63.212; IND. CODE §§ 31-8-2-1 to -3; KY. REV. STAT. ANN. §§ 199.590, 199.990; LA. REV. STAT. ANN. § 9:21713; MICH. COMP. LAWS §§ 722.851-.863; NEB. REV. STAT. § 25-21,200; N.H. REV. STAT. ANN. §§ 168-B:1-32; 1992 N.Y. Laws 308; N.D. CENT. CODE §§ 14-18-01 to -07; UTAH CODE ANN. § 76-7-204; VA. CODE ANN. §§ 20-156 to -165 (stating that only compensation provisions are unenforceable); WASH. REV. CODE ANN. §§ 26.26.210-.260.

16. ARIZ. REV. STAT. ANN. § 25-218; FLA. STAT. ch. 63.212; KY. REV. STAT. ANN. §§ 199.590, 199.990; MICH. COMP. LAWS §§ 722.851-.863; N.H. REV. STAT. ANN. §§ 168-B:1-32; 1992 N.Y. Laws 308; UTAH CODE ANN. § 76-7-204; W. VA. CODE § 48-4-16 (1992).

17. Georgia, Maine, Maryland, Massachusetts, Nevada, New Jersey, Oregon, and Pennsylvania. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, SURROGACY CONTRACT BILL INTRODUCTIONS 1991 LEGISLATIVE SESSIONS (1991).

18. ARIZ. REV. STAT. ANN. § 25-218.

19. As the task force convened by the governor of New York to develop recommendations for public policy on surrogate parenting found, "it is possible that noncommercial surrogate [mother] arrangements in which all the parties voluntarily comply with their obligations could not be prohibited, because the discrete decisions encompassed by the arrangements are protected" by the constitutional right to privacy. TASK FORCE, *supra* note 2, at 62-63; *see also* Doe v. Kelley, 307 N.W.2d 438, 441 (Mich. Ct. App. 1981), *cert. denied*, 459 U.S. 1183 (1983) (suggesting that plaintiffs' surrogate mother arrangement would have been protected by the right to privacy in deciding whether to bear or beget a child but for its commercial aspect). Given the inroads that recent Supreme Court decisions have made on privacy protection, these conclusions may no longer be valid. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

20. According to the New Jersey Supreme Court, "all parties [to the *Baby M* case] concede[d] that it is unlikely that surrogacy will survive without money. Despite the alleged selfless motivations of surrogate mothers, if there is no payment, there will be no surrogates, or very few." *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988); *see also* Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 347 n.151 (indicating that empirical evidence supports the conclusion that prohibiting payment in excess of medical expenses will nearly eliminate the practice of surrogacy) (citing Philip J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117 (1983) (89% of potential surrogates surveyed reported that they required a fee for their services)).

21. *See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678 (1977).

Amendment offers commercial surrogacy arrangements little or no protection from state intervention.[22]

Even in states that have not enacted legislation prohibiting or invalidating commercial surrogacy contracts, such arrangements are now legally tenuous.[23] In the absence of statutory guidance, state courts may hold commercial surrogate mother agreements unenforceable as violative of state policies against baby selling, and may view the arrangements as attempts to circumvent state laws regulating adoption and termination of parental rights.[24] Al-

22. *See, e.g., Kelley*, 307 N.W.2d 438 (stating that although the right to privacy may protect the parties' acts in entering into and carrying out a surrogate mother arrangement, it does not bar the state from prohibiting payment therefor); *Baby M*, 537 A.2d at 1253 (holding that the trial court erred in finding that the right to procreate encompassed the right to employ a surrogate); TASK FORCE, *supra* note 2, at 61 (arguing that surrogacy is distinguished from constitutionally protected reproductive acts by its commercial, contractual, and non-private aspects); Alexander Capron & Margaret Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW, MED. & HEALTH CARE 34 (1988) (stating that the Fourteenth Amendment does not impose an affirmative duty on the part of government to enforce commercial reproductive arrangements). *But see, e.g.*, John Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, 16 LAW, MED. & HEALTH CARE 18, 19 (1988) (arguing that restrictions on noncoital means of reproduction, including surrogacy, are subject to the same level of scrutiny as restrictions on coital reproduction by married couples).

Equal Protection arguments alleging discriminatory treatment of surrogate mothers as compared to sperm donors (who are allowed to sell their genetic material) have also been rejected. *See, e.g., Baby M*, 537 A.2d at 1254 ("A sperm donor simply cannot be equated with a surrogate mother . . . . even if the only difference is between the time it takes to provide sperm . . . and the time invested in a nine-month pregnancy."); MARTHA FIELD, SURROGATE MOTHERHOOD 48 (1988) ("It is reasonable for the state to differentiate between surrogacy and artificial insemination because so much more is required of the surrogate mother than is required of the semen donor.").

23. This picture is quite different from the outlook six years ago. *See, e.g.*, Avi Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1 n.1 (1986) ("[S]urrogate motherhood could become exceedingly popular and widespread in the relatively near future as a viable alternative for infertile couples who want to obtain children.").

24. *See Kelley*, 307 N.W.2d 438 (finding that the surrogate mother contract disclosed a desire to use the state's adoption code to change the child's legal status; the contract violated a state statute prohibiting the exchange of valuable consideration in connection with an adoption); *Baby M*, 537 A.2d 1227 (holding that the commercial surrogate mother contract violated a state statute prohibiting the exchange of valuable consideration in connection with an adoption, as well as statutory requirements for voluntary termination of parental rights); *In re* Baby Girl, 9 Fam. L. Rep. (BNA) 2348 (Ky. Cir. Ct. 1983) (holding that the voluntary termination of the parental rights of a surrogate mother and her husband in order to transfer custody to the biological father did not fall within the statutory purpose of the state termination statute designed to enable placement of children with licensed child-placing agencies). *But cf.* Surrogate Parenting Associates v. Commonwealth, 704 S.W.2d 209 (Ky. 1986) (holding that a surrogate mother agreement was voidable, but not illegal; since surrogate could not be forced to relinquish parental rights, voluntary relinquishment in exchange for valuable consideration did not violate a state statute prohibiting the sale or purchase of a child); *In re* Baby Girl L.J., 505 N.Y.S.2d 813 (1986) (finding that a surrogate mother agreement did not constitute baby selling).

At least 24 states have adopted laws prohibiting payment of compensation over and above expenses in connection with adoption or the termination of parental rights; a number of these states do not even permit expense reimbursement. *See* John Mendler, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1290

ternatively, a trial court decision to *enforce* a surrogate mother agreement over the objection of the surrogate could be viewed on appeal as "state action" within the meaning of the Fourteenth Amendment,[25] and held to violate a constitutional requirement of proof of unfitness before involuntary termination of parental rights.[26]

Legal roadblocks may arise even when all parties seek to abide by the contract. For example, in order to establish the paternity of the intended father, it may be necessary to overcome a presumption of paternity in the surrogate's husband. Many state parentage statutes would permit a court hostile to surrogacy to preclude establishment of paternity in the intended father.[27]

The public debate and legislative responses have tended to paint surrogacy with a broad brush, ignoring important differences between the surrogate mother model and gestational surrogacy. With a few exceptions, the anti-surrogacy statutes enacted in recent years appear to reach gestational surrogacy as well as surrogate mother arrangements.[28] Only Virginia's statute provides for different treatment of surrogate mother and gestational surrogacy arrangements.[29]

(1985). For a general discussion of these "baby broker" acts and their underlying policies, see Katz, *supra* note 23, at 6-18.

25. Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of a racially restrictive deed covenant involves "state action" within the meaning of the Fourteenth Amendment).

26. The Supreme Court has strongly implied such a requirement, at least with respect to "natural" families. *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring) ("If a state were to attempt to force the breakup of a natural family, over the objection of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the state would have intruded impermissibly on 'the private realm of family life which the state cannot enter.' "). *Accord* Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Santosky v. Kramer, 455 U.S. 745, 760 n.10 (1982).

27. *See* discussion of state paternity rules *infra* notes 62-65 and accompanying text; *see also* Syrkowski v. Appleyard, 333 N.W.2d 90, 94 (Mich. Ct. App. 1983), *rev'd*, 362 N.W.2d 211 (1985) (finding by both the trial and appellate courts that a biological father's filiation petition related to a child born to a married surrogate mother fell outside the statutory purpose of the state's Paternity Act passed to secure financial support for illegitimate children; the Michigan Supreme Court subsequently disagreed).

28. Six statutes clearly reach gestational surrogacy: ARIZ. REV. STAT. ANN. § 25-218; FLA. STAT. ch. 63.212; IND. CODE §§ 31-8-21-1 to -3; MICH. COMP. LAWS §§ 722.851-.863; VA. CODE ANN. §§ 20-156 to -165; WASH. REV. CODE ANN. §§ 26.26.210-.260. Five do not distinguish the practices and could be read to encompass both: NEB. REV. STAT. § 25-21, 200; NEV. REV. STAT. § 127.287; N.H. REV. STAT. ANN. §§ 168-B: 1-32; N.D. CENT. CODE §§ 14-18-01 to -07; UTAH CODE ANN. § 76-7-204. Five refer to surrogate motherhood or artificial insemination and thus appear technically to exclude gestational surrogacy although it is not clear that such exclusion was intended: ALA. CODE §§ 26-10A-33 to -34; ARK. CODE ANN. § 9-10-201; KY. REV. STAT. ANN. §§ 199.590, 199.990; LA. REV. STAT. ANN. § 9:2713; W. VA. CODE § 48-4-16.

29. VA. CODE ANN. §§ 20-156 to -165. The Virginia statute gives a surrogate the right to terminate a surrogacy agreement up to 180 days following the last assisted conception if she is also the genetic mother. A surrogate mother who exercises this right will be the legal mother of the child and her husband will be the legal father. Further, if a surrogacy agreement is not

This Note argues that gestational surrogacy and surrogate mother arrangements require different legislative and dispute resolution approaches despite their commonalities. It is true that the practices share a number of features condemned by opponents of surrogacy: both entail reproductive collaboration among persons who are not married or involved in a sexual relationship; in both instances, the surrogate undertakes the pregnancy intending not to raise the child, and fulfillment of the agreement severs whatever bonds exist between her and the infant at the time of the child's birth; and concerns about commercial exploitation of women's reproductive capacities may be raised by both forms of surrogacy.[30] These factors bear on the policy question as to whether states should permit or prohibit the practice of surrogacy. Unfortunately, commentators and legislators have tended to conflate that policy question with a related, but separate issue: How should parental rights be allocated among reproductive collaborators once a surrogate pregnancy (lawful or unlawful) has been undertaken? Some opponents of surrogacy, focusing on Mary Beth Whitehead's dilemma, have argued for legislation recognizing the woman who gives birth as the child's legal mother in all circumstances. They argue that this would protect surrogates from class-based discrimination in custody determinations and discourage the formation of surrogacy arrangements. Several of the surrogacy statutes presently on the books would employ this "birth mother" maternity rule for both surrogate mother and gestational surrogacy arrangements. As a matter of social policy, surrogacy may be proscribed and sanctions imposed if there are compelling reasons to do so; contorting parentage law in order to achieve this result indirectly is unnecessary and illegitimate.

I will argue that the failure to distinguish between issues of regulatory policy and parental rights has been compounded by a failure to take into account, with respect to the parental rights issues, the different biological relationships at stake in the two forms of surrogacy. These failures have led to the adoption of unnecessarily restrictive policies concerning gestational surrogacy and, in some jurisdictions, parentage rules that are both unwise and unconstitutional. In these respects, surrogacy law has failed to heed the call of reason and fairness.

This Note describes the genesis of this failure in the assumption that all surrogates are entitled to parental rights. I will argue that this assumption is

judicially pre-approved in accordance with the statute, a surrogate mother will automatically be deemed the legal mother.

A surrogate gestator has no right under the statute to terminate the contract and obtain parental rights. If the intended mother is the genetic mother, she will be the legal mother whether or not the agreement is judicially pre-approved. The only situation in which the surrogate gestator would be deemed the legal mother is where the agreement does not conform to the statute and the intended mother is not the genetic mother of the child.

30. These concerns are also raised by gamete donation but in that context they have not presented serious obstacles to acceptance. An interesting issue which this Note does not address is the special cultural significance attributed to pregnancy and birth that justifies such different legal treatment of gamete donation and surrogacy.

unwarranted and that a genetic-intended mother, and not the surrogate gestator, should be accorded legal mother status in relation to a child born as a result of a gestational surrogacy arrangement. I will also explore the implications of these conclusions for state policy regarding the permissibility and enforceability of gestational surrogacy contracts.

Part I of this Note analyzes the policy underpinnings of state surrogacy law and concludes that restrictive laws have been shaped around two core objections. First, commercial surrogacy violates state policies against "baby selling." Second, forcing a surrogate mother to surrender her child in the absence of proof of unfitness as a parent would violate the surrogate's parental rights under the federal constitution and state law. These objections are premised on the recognition that, in biology and law, a surrogate mother is in all respects the child's mother.

State parentage laws determine the legal relationships established between mothers and children ("maternity rules") and fathers and children ("paternity rules"). Part II-A, questions whether an assumption of parental rights on the part of surrogate gestators is justified and concludes that it is not. State parentage laws generally assume "natural motherhood" — one woman providing the ovum then gestating and giving birth to the child. Gestational surrogacy splits biological motherhood between two women, creating ambiguity in the law. States whose law is indeterminate as to maternal rights in this context must amend their parentage laws to clarify the issue. In doing so, they must take into account constraints imposed by the federal constitution and state law. Sections B, C, and D discuss the relevant principles and the basis for my conclusion that full maternal rights should be recognized in genetic-intended mothers, but not in surrogate gestators. At the same time, I acknowledge the gestator's substantial interest and discuss the rationale for, and advisability of, granting to the surrogate a lesser right to some continuing involvement in the child's life.

Part III explores the implications the previous conclusions with respect to parental rights hold for state policy governing the permissibility and enforceability of commercial gestational surrogacy agreements. Given a genetic maternity rule, states that wish to discourage such arrangements must enact meaningful prohibitory statutes with significant penalties, since mere unenforceability of surrogacy contracts may not deter genetic-intended parents who need not depend on the legal process to obtain full parental rights. However, if a genetic parent will rear the child, the arguments against commercial surrogacy lose most of their force, so a blanket prohibition is probably unjustified.

My conclusions are compatible with the decision reached by a California trial court in *Johnson v. Calvert*,[31] a case involving gestational surrogacy that received national media coverage in 1990. The case began when Anna John-

31. Johnson v. Calvert, No. X 63-31-90 (Cal. Super. Ct. Nov. 21, 1990) (a copy of the unreported decision is on file with the author). For media coverage, see, e.g., Rorie Sherman,

son sued for custody of the child she was carrying pursuant to a written agreement with Mark and Crispina Calvert, a married couple who had conceived the embryo through in vitro fertilization using their own gametes.[32] The Calverts filed a cross complaint.[33] On October 22, 1990, the trial judge announced his decision in the consolidated actions, holding the contract valid and enforceable based on the following core findings: (1) the Calverts were the "genetic, biological and natural" parents;[34] (2) Ms. Johnson's relationship to the child was "analogous to that of a foster parent providing care, protection and nurture during the period of time that the natural mother, Crispina Calvert, was unable to care for the child,"[35] and; (3) "a surrogate carrying a genetic child for a couple does not acquire parental rights."[36] The court rejected a suggestion that both the gestator and the genetic mother should be recognized as "natural mothers" and accorded legal parent status, stating that such a rule would lead to confusion and conflict in the rearing of the child and so would not be in the child's best interests.[37]

As to the validity of surrogacy agreements generally, the court found that gestational arrangements are not void or against public policy. However, the court noted that surrogate mother arrangements raise issues not present in gestational surrogacy because the surrogate mother "is in all respects the mother of the child," suggesting that greater protective measures may be necessary in that context.[38]

If these conclusions are correct, different legislative and dispute resolution approaches to the two types of surrogate parenting arrangements are appropriate, and perhaps required, at least when the intended (rearing) mother is also the child's genetic mother. If, as I argue, the federal constitution protects a genetic-intended mother's fundamental interest in a mother and child relationship with her offspring, then states must amend their parentage laws, and in some instances, their surrogacy statutes, to reflect that interest.

I
GROUNDS OF STATE LAW PROHIBITING OR DISCOURAGING SURROGATE MOTHER ARRANGEMENTS

The most pervasive argument against surrogacy is that the practice constitutes "baby selling." Taken literally, this charge is wholly fictitious: one cannot sell what one does not own. Because our legal system does not recognize property rights in people, parents cannot "sell" their children in the prop-

Surrogacy Again Rears Its Head, NAT'L L.J., Oct. 8, 1990, at 3; *Surrogate Mother Sues for Baby's Custody*, N.Y. TIMES, Aug. 15, 1990, at A22.

32. Johnson v. Calvert, No. X 63-31-90, at 3-4.
33. *Id.*
34. *Id.* at 4-5.
35. *Id.* at 5.
36. *Id.* at 7.
37. *Id.* at 9-10.
38. *Id.* at 14-15.

erty sense of the word. Therefore, the objection to surrogacy on the ground that it involves baby selling must pertain to the sale and purchase of parental rights — the only rights in a child that a parent could possibly sell.

The thirteen state statutes that restrict surrogacy[39] reveal a common factual premise — that surrogacy entails a transfer of parental rights — and a policy judgment that parental rights should not be bought or sold. This is apparent in the reach of the statutes and in the different treatment accorded commercial and noncommercial arrangements. Most statutes reach only those agreements that require a surrogate to relinquish parental or custodial rights and thus appear to permit arrangements that do not involve the transfer of parental rights.[40] Nine of the thirteen statutes afford different treatment to commercial and noncommercial arrangements, generally voiding or criminalizing participation in the former, and ignoring or regulating the latter.[41]

State statutes that facilitate surrogacy to some extent also show that the question whether surrogacy involves a sale of parental rights was a central policy consideration.[42] Four states amended their baby selling statutes to explicitly exclude surrogate mother agreements.[43] This action would not have been necessary unless legislators believed that the statutory proscription of baby selling might otherwise be deemed applicable.

Arkansas avoided the problem of legitimating the sale of parental rights by giving the surrogate none to sell. The legislature amended the state's paternity statute, creating an exception in the case of surrogate motherhood to the presumptions usually operative when a child is conceived by means of artificial insemination. Ordinarily the child would be deemed, for all legal purposes, the child of the woman who gave birth and her husband, if she has one; however, "in the case of a surrogate mother, . . . the child shall be that of: (A) The biological father and the woman intended to be the mother if the biological father is married; or (B) The biological father only if unmarried; or (C) The

39. ARIZ. REV. STAT. ANN. § 25-218; FLA. STAT. ch. 63.212; IND. CODE §§ 31-8-21-1 to -3; KY. REV. STAT. ANN. §§ 199.590, 199.990; LA. REV. STAT. ANN. § 9:2713; MICH. COMP. LAWS §§ 722.851-.863; NEB. REV. STAT. § 25-21,200; N.H. REV. STAT. ANN. §§ 168-B:1-32; N.D. CENT. CODE §§ 14-18-01 to -07; 1992 N.Y. Laws 308; UTAH CODE ANN. § 76-7-204; VA. CODE ANN. §§ 20-156 to -165; WASH. REV. CODE ANN. §§ 26.26.210-.260.

40. The ten statutes that address only those agreements requiring the surrogate to relinquish parental or custodial rights are: ARIZ. REV. STAT. ANN. § 25-218; FLA. STAT. ch. 63.212; KY. REV. STAT. ANN. §§ 199.590, 199.990; LA. REV. STAT. ANN. § 9:2713; MICH. COMP. LAWS §§ 722.851-.863; N.H. REV. STAT. ANN. §§ 168-B:1-32; 1992 N.Y. Laws 308; UTAH CODE ANN. § 76-7-204; WASH. REV. CODE ANN. §§ 26.26.210-.260.

41. FLA. STAT. ch. 63.212; KY. REV. STAT. ANN. §§ 199.590, 199.990; LA. REV. STAT. ANN. § 9:2713; MICH. COMP. LAWS §§ 722.851-.863; NEB. REV. STAT. § 25-21,200; N.H. REV. STAT. ANN. §§ 168-B:1-32; VA. CODE ANN. §§ 20-156 to -165; WASH. REV. CODE ANN. §§ 26.26.210-.260.

42. ALA. CODE §§ 26-10A-33 to -34; ARK. CODE ANN. § 9-10-201; FLA. STAT. ch. 63.212; NEV. REV. STAT. § 127.287; N.H. REV. STAT. ANN. §§ 168-B:1-32; VA. CODE ANN. §§ 20-156 to -165; W. VA. CODE § 48-4-16.

43. Alabama, Nevada, North Dakota, and West Virginia.

woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination."[44]

Florida, New Hampshire, and Virginia have made noncommercial arrangements legal and enforceable providing they comply with statutory requirements.[45] Concerns regarding the sale and termination of maternal rights are also apparent in these statutes. All three states prohibit payment in excess of expenses and make some provision for rescission if the surrogate has a change of heart about relinquishing parental rights.[46]

State court decisions holding surrogate mother agreements void and unenforceable provide further evidence that restrictive policies stem from a belief that commercial surrogacy involves an impermissible sale of parental rights. At the outset of its *Baby M* opinion, the New Jersey Supreme Court noted the inappropriateness of the "surrogate mother" label and observed that the surrogate was in all respects the child's mother.[47] The court characterized the arrangement as "the sale of a child, or, at the very least, the sale of a mother's right to her child."[48] The court made it clear that the sale and involuntary termination of the natural mother's parental rights were the core findings which led them to invalidate the contract by stating that it found "no offense to our present laws where a woman voluntarily and without payment agrees to act as a 'surrogate' mother, provided that she is not subject to a binding agreement to surrender her child."[49]

Cases from Michigan and Kentucky also reveal judgments that the sale of parental rights is impermissible. Prior to the enactment of Michigan's surro-

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44. ARK. CODE ANN. § 9-10-201.

45. FLA. STAT. ch. 63.212; N.H. REV. STAT. ANN. §§ 168-B:1-32; VA. CODE ANN. §§ 20-156 to -165.

46. Florida and New Hampshire provide for a period of time following the birth (seven days and seventy-two hours, respectively) during which the surrogate may rescind her agreement to relinquish parental rights. Virginia affords surrogate mothers 180 days following the last assisted conception in which to repudiate the contract. Gestational surrogates are not granted this right, but if a contract is not judicially pre-approved, Virginia gives both surrogate mothers and surrogate gestators the option of keeping the child.

47. *In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988).

48. *Id.* at 1248. The qualification of the court's finding of child selling appears to acknowledge the fact that, because our legal system no longer recognizes property rights in people, parents cannot "sell" their children in the property sense of the word. All that parents can sell in relation to a child is the legal rights that arise from the parent and child relation, e.g., the rights to the child's custody, companionship, and estate. Nevertheless, the terms "baby selling" and "child selling" pervade both the public debate and state court decisions concerning the legality of surrogacy arrangements.

For a thorough exploration of the differences between surrogate mother arrangements and the black-market adoptions that state child selling statutes were designed to prevent, see Katz, *supra* note 23. Katz concludes that these differences are sufficient to justify legalization, regulation, and enforcement of surrogate mother arrangements. *Id.* at 52-53. Although I disagree with the conclusion as to surrogate mother arrangements, many of the arguments Katz makes for legalization apply with more force to gestational surrogacy.

49. *Id.*

gacy statute, the Michigan Supreme Court in *Doe v. Kelley*[50] held that sections of the Michigan adoption code were constitutionally applied to preclude payment of consideration to a surrogate mother in conjunction with use of the state's adoption procedures. Subsequently, a Michigan trial court held in *Yates v. Keane* that surrogacy agreements are contrary to public policy and therefore void and unenforceable, expressing "concern for the potential exploitation of children resulting from surrogacy arrangements that involve the payment of money."[51] Taking a somewhat different tack, the Kentucky Supreme Court, in *Surrogate Parenting Associates v. Commonwealth ex rel. Armstrong*,[52] held that, under existing law, the surrogate could not be forced to terminate her parental rights; therefore, payments under the contract were for her services and not her rights. The arrangement did not, therefore, fall within the scope of the state's adoption statute which proscribed the sale or purchase of children.[53] The Kentucky legislature subsequently brought commercial surrogacy arrangements explicitly within the scope of its statute proscribing certain practices in connection with adoption.[54]

The foregoing analysis demonstrates that two core judgments underly the invalidation of commercial surrogacy contracts by state legislatures and courts. First, that such arrangements involve an exchange of parental rights for money that violates public policy and state law. Second, that enforcement of a surrogacy contract over the surrogate's objection entails an impermissible termination of parental rights. Both of these judgments assume the existence of parental rights in the surrogate. The question remains whether, as the *Johnson v. Calvert*[55] court found, the absence of a genetic relationship between the surrogate and the child she carries leads to different conclusions with respect to surrogate gestators.[56]

50. Doe v. Kelley, 307 N.W.2d 438 (Mich. Ct. App. 1981), *cert. denied*, 459 U.S. 1183 (1983).

51. Yates v. Keane, Nos. 9758, 9772 (Mich. Cir. Ct. Jan. 21, 1988) (unreported trial court opinion discussed by the court in *Baby M*, 537 A.2d at 1251).

52. 704 S.W.2d 209 (Ky. 1986).

53. *Id.* at 212-213.

54. Larry Gostin, in his article, *A Civil Liberties Analysis of Surrogacy Arrangements*, essentially endorses the Kentucky Supreme Court's analysis. He argues that if existing law does not permit enforcement of a waiver of parental rights, then a surrogacy contract provides no entitlement to such rights on the part of a commissioning parent. Payments under the contracts therefore cannot be viewed as a purchase of such an entitlement; rather they must be seen as payment for services. 16 LAW, MED. & HEALTH CARE 7, 11-12 (1988).

55. No. X 63-31-90 (Cal. Super. Ct. Nov. 21, 1990).

56. There is some suggestion in the *Baby M* opinion that the court might reach a different result in a case involving gestational surrogacy than it reached respecting the surrogate mother arrangement at issue. The court expressly limited its holding to "the surrogacy contract used in this case," and concluded with an invitation to the state legislature to "begin to focus on the overall implications of the new reproductive technology" including embryo implantation. *In re* Baby M, 537 A.2d 1227, 1264 (N.J. 1988).

II
MATERNAL RIGHTS IN THE CONTEXT OF GESTATIONAL SURROGACY

By splitting "natural motherhood" between two women, gestational surrogacy raises a novel question: How should maternal rights and responsibilities be allocated when one woman supplies the egg and another woman gestates and gives birth to the child? Answering that question requires an examination of the background rules of state parentage law. Finding these rules indeterminate, I will argue for a rule that recognizes a fundamental right on the part of genetic-intended mothers to a parent and child relationship with their offspring.

A. Background Rules: State Parentage Law

It is not surprising that state parentage statutes do not provide a clear answer to the question posed above. Prior to the advent of in vitro fertilization in 1978,[57] every woman who gave birth to a child was also its genetic mother. Legal rules governing parentage reflected this simple certainty of unitary motherhood.

The Uniform Parentage Act (U.P.A.),[58] promulgated by the National Conference of Commissioners on Uniform State Laws in 1973 and subsequently adopted (substantially or in its entirety) by eighteen states, provides a model for analysis. The sections governing maternity reveal an assumption of unitary motherhood. Section 3 states: "The parent and child relationship between a child and . . . the natural mother may be established [ascertained] by proof of her having given birth to the child, or under this Act."[59] Section 21, Action to Declare Mother and Child Relationship, provides that: "Any interested party may bring an action to determine the existence or non-existence of a mother and child relationship. Insofar as practicable, the provisions of this

57. George Annas & Sherman Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199, 202 (1983).

58. UNIFORM PARENTAGE ACT, 9B U.L.A. 287 (1987 & Supp. 1992) [hereinafter U.P.A.]. The National Conference of Commissioners on Uniform State Laws is a publicly-funded organization of lawyers, judges, legislators, and law school professors appointed by and representing the fifty states, the District of Columbia, and Puerto Rico. *Id.* at III. The Commission seeks to "promote uniformity in state law, on all subjects where that is desirable and practicable," by drafting model legislation recommended for voluntary adoption by state legislatures. *Id.* The Uniform Parentage Act is interesting, not only because it is presently the law in more than one third of the states, but also because it represents the considered best judgment, albeit two decades ago, of an eminent group of legal experts concerning appropriate state response to related developments in federal constitutional law, other areas of state and federal law, and the technology of paternity testing.

59. *Id.* § 3. The Act defines the "parent and child relationship" as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." *Id.* § 1. "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." *Id.* § 2.

Act applicable to the father and child relationship apply."[60] The comment to Section 21 explains the brevity of the section as follows:

> Since it is not believed that cases of this nature will arise frequently, Sections 4 to 20 [setting forth the rules and procedures to be followed in ascertaining paternity when questions arise] are written principally in terms of the ascertainment of *paternity*. While it is obvious that certain provisions in these sections would not apply in an action to establish the mother and child relationship, the Committee decided not to burden these already complex provisions with references to the ascertainment of *maternity*. In any given case, a judge facing a claim for the determination of the mother and child relationship should have little difficulty deciding which portions of Sections 4 to 20 should be applied.[61]

One could infer that had the commissioners drafted provisions for establishing disputed maternity, they would have been consistent in principle with those governing paternity determinations.

With respect to paternity, the U.P.A. provides a rule of biological fatherhood modified to protect the marital relation and the child's interest in legitimacy. The Act presumes that the natural mother's husband is the father of a child born to a married woman;[62] but where paternity is contested in an appropriate action, the court will determine the question based on evidence from which biological fatherhood may be inferred.[63] The U.P.A. provides that where the evidence of paternity is ambiguous, policy and logic should control.[64] However, tests that can prove (or disprove) paternity to a near certainty have been developed recently, so judgments based on factors other than a genetic relationship should be far less likely to occur now than in the past.[65]

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60. *Id.* § 21.

61. *Id.* § 21 (emphasis in original).

62. *Id.* § 4. The paternity presumptions reflect not only the prevailing social norms disfavoring reproduction outside of marriage and the corresponding bias in favor of legitimacy, but also the historic difficulties in proving paternity prior to the development of accurate blood tests. Historically, the limitation on standing made it virtually impossible for one outside the family to attack the presumption. However, according to one scholar, "the strength of the longstanding presumption of paternity and its insulation from legal challenges [has been] eroding" and standing rules have been relaxed in some jurisdictions. Wadlington, *supra* note 3, at 9. In the case of artificial insemination with donor sperm (AID), the U.P.A. and most state paternity statutes provide that the mother's husband will be treated in law as if he were the natural father, and the donor will be treated in law as if he were not the natural father. This rule effectuates the intent of the donor and the parents prior to insemination.

63. The U.P.A. makes blood tests admissible as evidence of paternity and provides for compulsory submission to such tests upon court order. U.P.A. § 11.

64. *Id.* § 4(b).

65. "Procedures such as human leucocyte antigens (HLA) testing now are widely accepted for use even in affirmatively establishing paternity rather than simply excluding it as a possibility. Even more refined capacity is considered to be just around the corner." Wadlington, *supra* note 3, at 7.

The U.P.A. and state paternity statutes modeled after it appear to provide two methods for ascertaining the existence of a legal mother and child relationship between a child and the "natural mother": proof of having given birth to the child or proof of genetic maternity. Given the reliability of modern tests for genetic relation, both methods provide the clarity and certainty deemed desirable in this area. The problem is that the U.P.A. rules point us in two directions in the context of gestational surrogacy. The gestator has given birth and the intended mother is the genetic mother. Neither is the "natural mother" so easily identified at the time the U.P.A. was adopted. Accordingly, states that have adopted the U.P.A. or similar parentage rules should modify their statutes in order to clarify the legal relationships of women and children involved in disputed gestational surrogacy arrangements. Yet, what principles should guide the allocation of maternal rights as between a surrogate gestator (the "birth mother") and the genetic-intended mother? Before turning directly to that question, several problems with the solution recently proposed by the National Conference of Commissioners on Uniform State Laws must be pointed out.

In 1988 the Conference promulgated the Uniform Status of Children of Assisted Conception Act,[66] which was intended to bring clarity and order to the legal status of children born through assisted conception,[67] "primarily to effect the security and well being of those children."[68] According to the prefatory note, the "Act is not a surrogacy regulatory act," but it provides two alternative sections addressing the status of children born under, and the rights of parties to, such arrangements.[69] Alternative A, providing for "limited, supervised, judicially-guided surrogacy," designates the intended parents as the legal parents.[70] If an agreement is not judicially approved in conformance with the Act, however, the surrogate is deemed the mother of a resulting

66. UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 122 (Supp. 1992) [hereinafter ASSISTED CONCEPTION ACT]. The Act was approved by the National Conference in 1988 and by the American Bar Association House of Delegates in February 1989. *Id.* at 122. So far only two states, North Dakota and Virginia, have adopted the Act. *Id.*

67. The Act defines "assisted conception" as "a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband." *Id.* § 1.

68. *Id.* at 123.

69. *Id.* The Act treats gestational surrogacy and surrogate motherhood identically with one exception: under Alternative A, a surrogate mother who has provided an egg for assisted conception is permitted to "recant" at any time up to 180 days after the last insemination without incurring liability under the surrogacy agreement. The comment to this provision explains that the "recantation period" coincides approximately with the period of time during which the surrogate would have a constitutional right to abort the pregnancy. *Id.* Alternative A, § 7(b).

70. *Id.* Alternative A, §§ 5-9. Key provisions of Alternative A include: restriction of access to surrogacy to married couples, one of whom must have provided a gamete, *id.* § 1; certification of intended parents by a child-welfare agency as meeting the standards of fitness applicable to adoptive parents, *id.* § 6; compensation of the surrogate is permitted, *id.* § 9; allowance for a surrogate mother (but not a gestator) to "recant" any time up to 180 days after the last insemination, *id.* § 7.

child.[71] Under Alternative B, which provides that any surrogacy agreement is void, the woman who gives birth is the legal mother of the child, and her husband, if she is married, is presumed to be the legal father.[72]

The Act raises several problems. First, the commissioners purportedly designed it to complement existing state laws and the U.P.A.[73] Contrary to this assertion, Alternative B is inconsistent in principle with U.P.A. rules governing AID that facilitate the intent of the reproductive collaborators prior to insemination. The Act provides no rationale for permitting waiver (or enforceable transfer) of parental rights in advance in the AID setting, but not in the case of surrogacy. In addition, the Act makes the recognition of parental rights turn on a policy judgment concerning the permissibility of surrogacy, thereby endorsing the notion that states are free to determine parentage in radically conflicting ways. It is surprising that a commission charged with responsibility for encouraging uniformity in state law would endorse a policy that likely will lead to serious conflict of law problems in the important area of parent-child relationships.[74] Furthermore, it is not at all clear that states do have unrestricted freedom to determine the allocation of parental rights. One

71. *Id.* Alternative A, § 5(b). The surrogate's husband, if she has one, is deemed the father if he was a party to the agreement. If he was not a party, or if the surrogate is unmarried, then paternity is governed by the state's paternity statute. *Id.* Under the U.P.A., the genetic-intended father would be able to establish paternity through a court determination of biological fatherhood. *See supra* notes 62-65 and accompanying text.

72. *Id.* Alternative B, § 5. This presumption is rebuttable only by the man presumed to be the father. In order to rebut the presumption, he must commence an action within two years of learning of the child's birth and prove that he did not consent to the assisted conception. *Id.* § 3. If the surrogate is unmarried, or if married and her husband was not a party to the agreement, then paternity is again governed by the state's paternity statute, *id.* § 5, which may permit the genetic-intended father to establish legal parent status.

73. *See* Wadlington, *supra* note 3, at 17 n.76. Wadlington was an official reporter of the Conference during the initial year of the project.

74. It is interesting to note that the Uniform Parentage Act provides no alternative provisions among which a state might choose in order to promote particular policy choices. Indeed, section 26 states the contrary intent: "This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it."

Professor Laurence Tribe has pointed out the inappropriateness of treating matters of fundamental rights as mere policy choices amenable to decision by political majorities. In countering the argument that the Supreme Court should have deferred to the political process rather than striking a balance in Roe v. Wade between women's interests in autonomous decision making about whether to terminate a pregnancy and the State's interest in protecting fetal life, Professor Tribe stated:

> "[O]ne certainly cannot justify relegating the controversy to legislative tie-breakers in fifty statehouses by the utterly jejune observation that the issue is destined to be difficult and divisive. This sort of democratic default is wholly inappropriate in this context because '[a]bortion is not merely a policy choice [*sic*, word "issue" is used in original]; it lies at the intersection of powerful conflicting rights. Fundamental rights, unlike liquor regulations or traffic laws, should not vary from state to state.' "

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1358 (2d ed. 1988) (citing Brian Koukoutchos, *A No-Win Proposal on Abortion Rights*, N.Y. TIMES, July 25, 1985, at A23). The interest in a parental relationship with one's child is no less fundamental than the interests at stake in the abortion debate and thus also should not be "relegated to legislative tie-breakers."

may fairly assume that the commissioners saw no constitutional obstacle to the parentage rules incorporated in the surrogacy provisions of the Act. Nevertheless, serious questions remain as to whether a parentage rule that grants maternal rights exclusively to a surrogate gestator is consistent with constitutional principles.[75]

B. Constitutional Constraints on Parental Rights Determinations

Although the Supreme Court has not ruled on parental rights issues in the context of surrogacy, decisions in related contexts suggest that the federal constitution limits the extent to which states may use their parentage laws to promote policies with respect to particular reproductive practices. Such related decisions include those adjudicating the parental rights of unwed fathers and those involving conflicting claims of biological and foster parents to a parent-child relationship. I will argue that the principles underlying these decisions call for the recognition of a fundamental liberty interest on the part of genetic-intended parents and their offspring to a family relationship. This recognition puts a heavy burden on states to justify parentage rules that extinguish the interest of a genetic-intended parent. I will argue that the surrogate gestator's interest is a lesser one, analogous to that of a foster parent, which may be constitutionally subordinated to the claims of the genetic-intended parents. Finally, I will show how equal protection principles preclude state parentage rules that discriminate between genetic-intended fathers and genetic-intended mothers.

1. Due Process Constraints

Several Supreme Court decisions adjudicating the parental rights of biological fathers of children born out of wedlock established the principle that such a father has a fundamental liberty interest in having a parent and child relationship with his offspring. The father's interest may ripen into a constitutionally protected right if he undertakes parental responsibility (for example, by providing financial support) and seeks to establish a substantial relationship with his child. In *Lehr v. Robertson*, the Court stated that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship."[76]

75. States that have included provisions in their anti-surrogacy statutes that explicitly recognize the surrogate (the "birth mother") as the legal mother are Arizona, New Hampshire, and North Dakota. Florida permits the surrogate to decide the issue by granting her an unwaivable right to rescind, within seven days of the child's birth, her agreement to relinquish parental rights. *See infra* Appendix.

76. 463 U.S. 248, 262 (1983). Absent an adulterous conception, when a father has formed a substantial relationship with his child, the Court has protected his rights. *See* Stanley v. Illinois, 405 U.S. 645 (1972) (holding that an irrebuttable presumption that unwed fathers are unfit parents violated the Equal Protection Clause and that an unwed father's interest in retain-

It could be argued that a subsequent case, *Michael H. v. Gerald D.*,[77] narrowed this standard. The plaintiff in *Michael H.* was the biological father of a child conceived in the course of an adulterous relationship. He relied on the *Lehr* standard to support his claim that he had been unconstitutionally deprived of an opportunity to establish his paternity in relation to the child, with whom he had established a substantial relationship. The Court held that his constitutional rights were not violated by the application of a statute that precluded him from rebutting a presumption of paternity in the mother's husband. In an opinion joined by three other justices, Justice Scalia stated that rather than "establishing that a liberty interest is created by biological fatherhood plus an established parental relationship," the unwed father cases "rest . . . upon the historic respect . . . accorded to the relationships that develop within the unitary family."[78]

Several factors suggest that *Michael H.* did not significantly change the general standard of constitutional protection of biological parent-child relationships. First, a majority of the *Michael H.* Court reaffirmed the *Lehr* standard; the four dissenting justices explicitly reaffirmed it;[79] and a fifth justice, concurring only in the judgment, did so implicitly.[80] Second, the plurality

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ing custody of his children after their mother's death warranted protection absent a powerful countervailing interest); Caban v. Mohammed, 441 U.S. 380, 389 (1979) (holding that a New York law denying unwed fathers the right to block the adoption of their children while granting such a right to unwed mothers violated Equal Protection; an unwed father who had lived with his two children and their mother for several years and participated in the care and support of the children had a relationship with his children fully comparable to that of the mother).

In two cases, the Supreme Court upheld lower court decisions extinguishing the unwed father's parental rights. Quilloin v. Walcott, 434 U.S. 246, 262 (1978) (holding that an unwed biological father's substantive rights were not violated by application of a Georgia adoption law denying him the authority to prevent his child's adoption by the mother's husband, where the father had never legitimated the child and had not sought actual or legal custody, and where the effect of the adoption was to give full recognition to an existing family unit); Lehr v. Robertson, 463 U.S. 248 (1983) (holding that an adoption order entered without notice to the unwed father did not violate the father's constitutional rights, since the father had not established a relationship with the child and had failed to enter his name in the putative father registry, a step that would have secured his right to notice). In both of these cases, the father's claim was pitted against the claim of a "natural mother" who had been the child's primary caretaker for a substantial period of time before the case arose and who desired to have the child adopted by her husband. In neither case had the father shared caretaking responsibilities nor had he pursued available state mechanisms for establishing legal parent status.

77. 491 U.S. 110 (1989).

78. *Id.* at 123.

79. *Id.* at 142-43 (Brennan, J., dissenting, joined by Marshall, J. and Blackmun, J.) (stating that the unifying theme of the unwed father cases is that "although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so"); *id.* at 157-158 (White, J., dissenting, joined by Brennan, J.) ("The basic principle enunciated in the Court's unwed father cases is that an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child.").

80. Justice Stevens assumed for the purpose of the decision that Michael H.'s relationship with his daughter was strong enough to generate a constitutional right to try to convince a trial

viewed the case as extraordinary[81] and expressly limited its holding to the relevant facts.[82] Justice Scalia framed the relevant inquiry as whether the states had historically protected the interest of an adulterous natural father in a relationship with his child "conceived within and born into an extant marital union that wishes to embrace the child?"[83] If *Michael H.* is limited to its facts, the strongest principle that emerges is that an adulterous relationship undercuts an unwed father's claim for constitutional protection.[84] Accordingly, the relevance of *Michael H.* appears minimal with respect to cases in which no adulterous relationship threatens an extant marital union. The surrogate's husband, if she has one, will have consented to the pregnancy which will have been achieved without sexual intimacy. Finally, even if one accepts the very narrow view of the plurality that only "unitary family" relationships are deserving of constitutional protection, the typical surrogacy case presents a choice between two "unitary families," both of which wish to embrace the child. The *Michael H.* decision does not suggest a principle other than biological parenthood for rationalizing a choice between them.

If Justice Scalia's approach to substantive due process were adopted by the Court, only those interests (defined at the most specific level possible) which have enjoyed a long history of protection[85] would remain within the Constitution's shield. Under this approach the interests of genetic-intended parents are arguably excluded.[86] On the same analysis it would seem that the interests of the surrogate gestator and her husband would also be unprotected. This would leave the Due Process Clause silent with respect to the substantive rights of parties to gestational surrogacy arrangements. However, if the interests at stake are characterized a bit more abstractly, the Court's decisions in the unwed father cases again become relevant. The question then becomes whether the interests of participants in gestational surrogacy arrangements are

judge that the child's best interests would be served by granting him visitation rights, and concluded that such an opportunity had in fact been provided to him. *Id.* at 133.

81. *Id.* at 113.

82. *Id.* at 129.

83. *Id.* at 126-27. Finding no such traditional protection, Justice Scalia concluded that the plaintiff's relationship with his daughter was "not the stuff of which fundamental rights qualifying as liberty interests are made." *Id.* at 127.

84. Three dissenting justices believed that the plurality paid lip service to a broader concept of unitary family than "marital family" in order to rationalize the earlier unwed father cases, but the crucial factor in the denial of constitutional protection was the fact that the child was the product of an adulterous relationship. *Id.* at 143.

85. *Id.* at 127 n.6.

86. Justice Scalia's narrow historical approach to substantive due process analysis in the plurality opinion of *Michael H.* was endorsed only by Chief Justice Rehnquist. A concurring opinion by Justice O'Connor, joined by Justice Kennedy, expressly rejected the view that only those interests that, defined as specifically as possible, have received explicit historical protection may be deemed fundamental. *Id.* at 132. Justice Stevens, concurring only in the judgment (and that based on a finding that the plaintiff had had an adequate opportunity to claim visitation rights), implicitly rejected Scalia's approach, *id.* at 132-36; the dissenting opinions forcefully rejected it. *Id.* at 136-63.

the sort that qualify for substantive due process protection under the standard established in those cases.

The interest of intended parents who conceive a child using their own gametes in having a parental relationship with that child is at least as deserving of protection as that of an unwed father at the time of the child's birth.[87] The genetic parent(s) conceived the child with the intent of assuming full parental responsibility; they stand ready and eager to provide for the child's emotional and physical well being. During the pregnancy they will have provided for the surrogate's medical care and other pregnancy-related expenses and, assuming a commercial arrangement, for her general financial support as well. They also may have provided substantial emotional support for the surrogate. By the time the child is born, the intended parent(s) will undoubtedly have prepared for the child's arrival in many ways. In short, they will probably have done all that they could do to shoulder responsibility and lay a foundation for a substantial relationship with their child. Surely these acts indicate a commitment to parenthood that will ripen kinship-based fundamental interests into constitutionally protected rights.

In contrast, a substantive right to legal parent status on the part of the surrogate gestator may not be derived by analogy to the cases protecting rights of unwed fathers. The basis for unwed fathers' rights is the *combination* of genetic kinship and assumption of parental responsibility;[88] none of the Court's parental rights decisions suggest that legal parent status arises from the assumption of parental responsibilities alone. Although it might be argued that the gestator undertakes parental responsibility by becoming pregnant and giving birth,[89] she does not have the genetic relationship which is also necessary to derive a constitutionally protected right by analogy to unwed father cases.

An analogy may also be drawn between the gestator's interest and the law's treatment of the interests of temporary caretakers in a continuing relationship with the child. Perhaps the closest analogy to the surrogate gestator's relationship is that of a "wet nurse." Before the advent of infant formula, it was common practice to hire a "wet nurse" to suckle an infant whose mother died in childbirth or for some other reason was unable, or unwilling (as was the case with some wealthy women), to nurse the baby.[90] A wet nurse's rela-

87. This holds true for the intended mother as well as the intended father, since the distinguishing facts of pregnancy and childbirth which have often provided justification for differential treatment of men and women are not present here.

88. *See supra* notes 76, 79-81 and accompanying text.

89. Arguably these acts would not constitute such an undertaking, since the pregnancy was initiated on the understanding that the surrogate would *not* assume parental responsibility for the child. If pregnancy and childbirth are viewed as a job performed for economic gain, or as a gift, it does not necessarily follow that the acts constitute the sort of intentional undertaking that the Supreme Court has required in order to perfect paternal rights.

90. *See, e.g.*, Barbara Andolsen, *Why a Surrogate Mother Should Have the Right to Change Her Mind, in* ON THE PROBLEM OF SURROGATE PARENTHOOD: ANALYZING THE BABY M CASE 45 (Herbert Richardson ed., 1987).

tionship with the child could continue for well over a year and involve physical closeness, dependency, nurturing, and psychological bonding. Like a surrogate gestator, the wet nurse gave of her own body, providing nutrients and antibodies through her milk; however, the nurse did not thereby acquire legal parent status.[91]

The gestator's interest is also somewhat analogous to that of a foster parent who cares for an infant over an extended period of time. In *Smith v. Organization of Foster Families for Equality & Reform (O.F.F.E.R.)*, the Supreme Court observed that substantial bonds may develop between a child and its foster parents giving rise to a liberty interest in a continued relationship.[92] But the Court went on to distinguish the interests of the foster parents from the overriding interests of the natural (biological) parents. The Court noted that the foster family's claim was limited by its origin in a "knowingly assumed contractual relation"[93] and by the fact that protection of the interest would be in derogation of the natural parents' "constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right."[94] A surrogate gestator's interest in a continuing parental relationship also derives from a knowingly assumed contractual relation, and constitutional protection of that interest would operate in derogation of the interests of genetic-intended parents whose relationship with the child is a "blood relationship" within the traditional meaning of that term.

The *O.F.F.E.R.* Court was divided over, and did not decide, the issue of whether the foster family relationship was ultimately entitled to any constitutional protection. Three concurring justices would have squarely held that the interests asserted by the foster parents were "not of a kind that the Due Pro-

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91. The trial court noted this in Johnson v. Calvert, No. X 63-31-90, slip op. at 17 (Cal. Super. Ct. Nov. 21, 1990).

92. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals.

431 U.S. 816, 844 (1977) (citations omitted). It should be noted that the relationships at issue in *O.F.F.E.R.* extended over longer periods of time than pregnancy and, since the children were not *in utero*, involved psychological attachment between consciously identified children and adults.

93. *Id.* at 845.

94. *Id.* at 846.

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right — an interest the foster parent has recognized by contract from the outset.

Id. (citations omitted).

cess Clause of the Fourteenth Amendment protects."[95] The majority (six justices) were willing to entertain the possibility of constitutional protection but found it unnecessary to decide the issue, holding that even assuming a protected liberty interest, the procedures at issue (those for removing children from a foster placement) were not constitutionally defective.[96]

In *Johnson v. Calvert*,[97] the American Civil Liberties Union of Southern California filed an amicus brief in support of the surrogate gestator's claim. The brief attempted to take advantage of the *O.F.F.E.R.* Court's willingness to consider providing constitutional protection for the relationships established between foster parents and foster children by arguing that a psychological bond forms during pregnancy and birth which should be protected from severance by recognizing the fundamental right of the gestator to a parent and child relationship.[98] They relied in part, as did the foster parents in *O.F.F.E.R.*,[99] on a "psychological parent" theory which holds that a child's healthy development depends on stable relationships with adult caretakers.[100]

There are several problems with arguing for the recognition of parental rights in the surrogate gestator on the basis of a psychological parent theory. First, it is questionable whether the fetus bonds with the gestator before birth. Psychological attachment to a particular individual would appear to require both the cognitive capability and experiential basis necessary to distinguish one mother from another.[101] Although most children in foster care have these prerequisites and many of them, especially those who remain with a foster family for a long time, do form substantial attachments to their foster parents;[102] however, the claim that the unborn, even in the latest stages of prenatal development, form a psychological attachment to the birth mother seems tenuous at best.[103] Second, even if we assume that a bond is formed, it is not

95. *Id.* at 858.

96. *Id.* at 847.

97. No. X 63-31-90 (Cal. Super. Ct. Nov. 21, 1990). The facts are set out *supra* text accompanying notes 31-38.

98. Brief of Amicus Curiae, American Civil Liberties Union of Southern California, Johnson v. Calvert, No. X 63-31-90, slip op. at 9 [hereinafter ACLU Brief].

99. The majority opinion stated that the parties' briefs

> dispute at some length the validity of the 'psychological parent' theory propounded in J. Goldstein, A. Freud, and A. Solnit, Beyond the Best Interests of the Child (1973). . . . But this case turns, not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those in existing biological families.

O.F.F.E.R., 431 U.S. at 844-45 n.52.

100. ACLU Brief, *supra* note 98, at 9. For explanation of the theory, see *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963) [hereinafter *Alternatives*]; JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

101. "Mutuality," a criterion of psychological parenthood, denotes that the child perceives the adult's role as that of parent. GOLDSTEIN, FREUD & SOLNIT, *supra* note 100, at 19.

102. *See supra* note 92 and accompanying text.

103. *See Alternatives*, *supra* note 100, at 160 (explaining that the fundamental "affection-relationship" of psychological parenthood ordinarily develops during the child's first year of

obvious that severing the bond *at birth* would be detrimental to the child.[104] Furthermore, the detriment to the child, if there is any, would not differ in kind or degree from that suffered by adopted children. Yet the possibility of psychological harm due to separation from the birth mother has not been deemed sufficiently serious to preclude adoption.[105] Finally, a claim based on detriment to the child considers the child's right to continuity in parenting, and does not establish a constitutionally-protected fundamental right on the part of the gestator.[106]

Thus, although the *O.F.F.E.R.* Court was somewhat open to the claims of foster parents seeking continued relationships with children who had been in their care for substantial periods of time, the reasons for such openness do not carry over to the surrogacy context where the issue is custody of the child at birth. Accordingly, the case provides little, if any, support for the constitutional protection of a gestator's interest in parental rights. Instead, it suggests (although admittedly in dicta) that the kinship-based claims of genetic-intended parents are of overriding importance. If a majority of the Court found that rights based on kinship outweigh those based on current de facto parent-child relationships in the foster care context, surely the Court would reach the same result more easily in the context of surrogacy when the determination is made at the time of the child's birth.

The ACLU buttressed its argument with the claim that the concept of "biological parenthood" employed by the Supreme Court in determining the existence of fundamental liberty interests is broad enough to include the gestator; that the gestator's having supplied blood and nutrients during pregnancy established a biological or "blood" relation between the gestator and the child.[107] This argument has several weaknesses. First, the ordinary meaning of the term "blood relationship" refers to descent from a common ancestor.[108] Second, provision of blood or organs does not give rise to legal rights in the donor. Furthermore, the biological connection during gestation is tempo-

life); *see also* John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 394-403 (1991) (providing an extensive review of literature on mother-child bonding and reaching the conclusion that "the only real claim that can be marshalled on behalf of the birth mother [based on bonding] is . . . that compelled relinquishment of the child may have severe consequences for [her] . . . psychological health").

104. *Alternatives*, *supra* note 100, at 161 n.43; *see also* MARY WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILISATION AND EMBRYOLOGY 46 (1985) ("[I]t is argued [by proponents of surrogacy] that as very little is actually known about the extent to which bonding occurs when the child is *in utero*, no great claims should be made in this respect.").

105. WARNOCK, *supra* note 104, at 46 ("[T]he breaking of such bonds, even if less than ideal, is not held to be an overriding argument against placing a child for adoption, where the mother wants this.").

106. *Cf.* Smith v. Organization of Foster Families for Equality & Reform (*O.F.F.E.R.*), 431 U.S. 816, 861 (1977) (Stewart, J., concurring in the judgment) ("Third-party custodians acquire 'rights' . . . only derivatively by virtue of the child's best interests being considered.").

107. *See* ACLU Brief, *supra* note 98, at 8-9.

108. *See* BLACK'S LAW DICTIONARY 172 (6th ed. 1990) (defining "blood relations" as:

rary and relatively insignificant when compared to the controlling influence of a person's genetic code. Unlike the gestational connection, the genetic relationship endures and shapes the individual's development and experience from conception to death.[109]

The *O.F.F.E.R.* Court also found that "[w]hatever liberty interest might otherwise exist in the foster family . . . must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."[110] The gestator's interest is similarly attenuated when separation from the surrogate gestator serves the purpose of placing the child with its genetic parents.

In summary, there is very little, if any, support in Supreme Court parental rights cases for an argument that the Constitution requires recognition of parental rights on the part of surrogate gestators. To the contrary, the Court's reasoning in *O.F.F.E.R.* suggests that the Constitution does not protect a gestational surrogate's interest in legal parent status for several reasons: her interest is limited by its contractual origin; the protection would operate in derogation of the genetic parents' constitutionally protected rights; the interest does not derive from genetic kinship (an important, possibly essential, component of the "blood relationship" recognized by the *O.F.F.E.R.* Court as the source of "natural" parents' parental rights) or an established psychological parent-child relationship; and the removal of the child from the surrogate for the purpose of placing it with its genetic parents further attenuates the surrogate's claimed interest. For all of these reasons, state laws recognizing sole or superior rights in the genetic-intended parent(s) should not be held to violate the Fourteenth Amendment.[111] However, states may violate the Due Process Clause if they adopt maternity rules that abrogate the interests of the genetic-intended mother. The principles of the unwed father cases and *O.F.F.E.R.*, when combined, support the conclusion that the genetic-intended parents' interest in a family relationship is the sort of fundamental liberty interest that the Fourteenth Amendment protects from arbitrary deprivation. Even if the present Court would not grant Due Process protection to these interests, there are important ways in which the Equal Protection Clause may constrain state action in this area.

"Kindred; consanguinity; family relationship; relation by descent from a common blood ancestor.").

109. The ACLU is not alone in suggesting that a gestator's claim is at least equal to that of the genetic mother. Annas and Elias assert that "the womb mother has contributed more of herself than the genetic mother to the child and therefore has a greater interest in it." Annas & Elias, *supra* note 57, at 222. Similarly, Margaret Radin concludes that "the carrying of the child in the woman's body (whether or not it is hers genetically) is a stronger factor in interrelationships with a child than an abstract genetic relationship." Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1932 n.285 (1987). All of these analyses are short-sighted in that they fail to consider the impact of the pre-birth contributions *over the course of the child's life*.

110. *O.F.F.E.R.*, 431 U.S. at 846-47.

111. *Cf.* FIELD, *supra* note 22, at 46-74 (contending that constitutional analysis involves a balancing of interests, which, in the case of surrogacy, is indeterminate).

2. Equal Protection Constraints

Several states have enacted statutes invalidating surrogacy agreements, while nevertheless either recognizing the biological father as the child's legal father at the outset, or permitting him to establish paternity by rebutting a presumption of paternity in the surrogate's husband, if she is married.[112] In states where legislation has not addressed surrogacy, state parentage law may permit recognition of the biological father as the legal father. By way of example, it is interesting to note that the New Jersey Supreme Court did not discuss the question of who was the legal father in its *Baby M* opinion, despite the fact that the state's statute governing paternity presumes paternity in a consenting husband of a woman impregnated by means of artificial insemination.[113] States that have granted parental rights to the biological fathers of surrogacy children will be constrained by the Equal Protection Clause to grant genetic-intended mothers equal rights.

Supreme Court decisions in gender discrimination cases have established the principle that equal protection means that states must treat men and women equally to the extent that they are similarly situated.[114] In a gestational surrogacy arrangement wherein the intended parents conceived the child by the union of their sperm and egg, the man and woman stand in virtually identical positions with respect to the facts relevant to legal parenthood.

States wishing to treat genetic-intended fathers and mothers differently face a heavy burden of justification. If the genetic-intended parents' interest in parental rights is recognized as fundamental within the meaning of the Due Process Clause of the Fourteenth Amendment, strict scrutiny should be triggered for claims arising under the Equal Protection Clause. Strict scrutiny will require the state to justify unequal treatment of genetic-intended mothers and genetic-intended fathers by showing that the discriminatory rule is necessary and narrowly tailored to achieve a compelling state purpose.[115] Even if

112. Examples include Arizona, Florida, Nebraska, New Hampshire, and Virginia. Arkansas permits surrogate mother arrangements and grants the genetic-intended father legal parent status.

113. N.J. STAT. ANN. § 9:17-44 (Supp. 1992).

114. *See* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

115. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (subjecting a statute requiring sterilization of persons convicted of certain crimes to strict scrutiny under the Equal Protection Clause despite the absence of a suspect class where the statute abrogated the right to procreate, a basic civil right); Stanley v. Illinois, 405 U.S. 645, 651, 657-658 (1972) (subjecting statute creating an irrebuttable presumption that unwed fathers were unfit parents to strict scrutiny and invalidating it on Due Process grounds; finding that an unwed father's interest in retaining custody of children after the mother's death warranted protection absent a "powerful countervailing interest"); Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972) (stating that strict scrutiny is appropriate where statute impinges upon fundamental freedoms, but unnecessary in the present case because the statute restricting distribution of contraception to married people failed even to meet a rationality test); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (subjecting a statute which conditioned the right to marry upon satisfaction of prior child support obligations to strict scrutiny under the Equal Protection Clause; stating that although a state may impose reasonable regulations that do not significantly interfere with the exercise of fundamental rights,

the Court did not recognize the interest in parental rights as fundamental, precedent in the area of gender discrimination would demand heightened scrutiny, a requirement that the State demonstrate a substantial relation between a discriminatory rule and an important state objective.[116] Unless states meet this "intermediate scrutiny" burden of justification, they cannot constitutionally accord genetic-intended fathers legal parent status without according genetic-intended mothers the same rights.[117] Given the absence of pregnancy as a distinguishing fact and the Court's rejection of sex role stereotyping,[118] this burden will be difficult, if not impossible, to meet.

C. A Role for the Surrogate Gestator

The conclusion that the United States Constitution does not protect a surrogate gestator's interest in a parent and child relationship does not answer the question whether, for other reasons, states should grant the gestator an enforceable right to some form of continuing relationship after the child's birth. In order to answer this question, we must consider the interests that would be served or harmed by granting such a right. The interests at stake are those of the surrogate, the child (whose interests subsume those of the State in its *parens patriae* role), and the genetic parents.[119]

"[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests").

116. *Craig*, 429 U.S. at 197 (adopting, for the first time, intermediate scrutiny as the standard for review of gender-based discrimination claims).

117. Some surrogacy statutes appear to require amendment. The "birth mother" maternity rule endorsed in the Assisted Conception Act and embraced by the Nebraska, New Hampshire, and North Dakota surrogacy statutes completely extinguishes the genetic-intended mother's claim. In contrast, the Assisted Conception Act allows genetic-intended fathers to establish paternity under three circumstances: (1) if an agreement is voided under the Act, (2) if the surrogate is unmarried or, (3) if the surrogate is married, but her husband was not a party to the agreement. The Nebraska statute provides that the biological father will be the legal father. The New Hampshire statute identifies the woman who gives birth as the legal mother and establishes a presumption of paternity in the surrogate's husband; however, the biological father may assert his paternity by rebutting the presumption in a civil action. North Dakota's statute follows the Assisted Conception Act. Each of these acts treats genetic-intended fathers and mothers unequally and thus appears vulnerable to an equal protection challenge.

118. The Supreme Court explicitly eschewed the path of sex-role stereotyping in cases adjudicating claims of gender-based discrimination. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (striking down as irrational a Utah statute establishing different ages of majority for males and females, the Court stated "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas"); Orr v. Orr, 440 U.S. 268, 279 (1979) (invalidating Alabama laws authorizing gender-based discrimination in alimony awards, the Court found that a state may not prefer "an allocation of family responsibilities under which the wife plays a dependent role"). For a thorough exposition on the Court's gradual rejection of sex-role stereotyping, *see* LAURENCE TRIBE, *supra* note 74, at 1561-65.

119. With respect to parental rights, the interests of society as a whole should be served by a fair balancing of the equitable claims of these parties. *See infra* Part III for discussion of societal interests in a social policy determination.

It should be noted at the outset that in most cases, the surrogate will perceive carrying through with the contract to be in her own interest; it is only the exceptional arrangement that would give rise to a dispute over parental rights.[120] Accordingly, a rule giving surrogates parental rights would not serve the goals of most surrogates. Such a rule would only directly serve the goals of the small number of surrogates who change their minds and wish to establish a parental relationship with the child.[121] The question is whether the interest of the surrogate who changes her mind is sufficiently important to override the interests of the rearing (genetic-intended) parents, and possibly, the child, when these interests are in conflict.

Forced separation from a child to whom one has become emotionally attached can undoubtedly be a very painful experience. Some opponents of surrogacy claim that forced separation from the child presents a serious threat to a surrogate's mental health.[122] There is evidence that some women who give their children up for adoption experience guilt and emotional distress.[123] Some surrogate mothers have reported this as well.[124] However, there is no persuasive evidence of a general pattern, and the absence of a genetic bond may reduce the risk of harm to surrogate gestators as compared to surrogate mothers.

A surrogate gestator's attachment to the child arises from a temporary, though intimate, physical relationship. For the "natural mother," pregnancy is one manifestation of a more fundamental physical bond that will continue to manifest itself in many ways throughout the child's life. Thus natural mothers who give up their children for adoption, in a very real sense, separate from a part of themselves. There is some evidence that gestational surrogates are less likely to feel that they are giving up a part of themselves in relinquishing the child.[125] If this is so, the problems some natural mothers encounter as a con-

120. *See, e.g.*, FIELD, *supra* note 22, at 98 ("[W]hat experience there is shows that the overwhelming majority of surrogates do perform the contract without any resistance.").

121. The self-interest of a surrogate might also be served by a rule that makes her right contingent upon showing that its exercise protects the child's well being. Such a rule would serve the interests of the surrogate who believes that the child's interest is her own.

122. TASK FORCE, *supra* note 2, at 24 (stating that a "surrogate may face psychological harm related to relinquishing the infant at birth").

123. *Id.* ("Studies have found that women who relinquish their children for adoption are exposed to problems such as guilt, depression, marital problems and sexual dysfunction. Surrender of the child may remain an issue of conflict and intra personal difficulty for years after the adoption. Indeed, one study suggests that women who intend to relinquish their child fall into a high risk group for depressive or psychosomatic illness." (citing Edward Rynearson, *Relinquishment and its Maternal Complications: A Preliminary Study*, 139 AM. J. PSYCHIATRY 338 (1982); Eva Deykin, Lee Campbell & Patricia Patti, *The Post-Adoption Experience of Surrendering Parents*, 54 AM. J. ORTHOPSYCHIATRY 271-72 (1984))). *But see* H.E. Baber, *For the Legitimacy of Surrogate Contracts*, *in* ON THE PROBLEM OF SURROGATE PARENTHOOD: ANALYZING THE BABY M CASE, *supra* note 90, at 31, 38 ("There is however no evidence to suggest that all or most mothers do in fact 'bond' to their babies or that those who give up their babies shortly after birth suffer extreme or long-lasting distress.").

124. *See* TASK FORCE, *supra* note 2, at 25, and sources cited therein.

125. According to Ralph Fagan, Executive Director of the Center for Surrogate Parenting

sequence of giving up their children for adoption may be less relevant than commentators often assume to the assessment of the mental health risks posed by gestational surrogacy. The experiences of foster parents and other temporary caretakers may be more instructive. As already noted, although they may be significant, the emotional costs to these individuals have not given rise to enforceable rights to maintain the caretaking relationship.[126]

From the perspective of the child's well being, there is no compelling need to perpetuate the gestator's relationship if the intended parents are also the genetic parents and not unfit.[127] There is every reason to think that the intended parents will do everything they can to make a good home for the child. Whether the continued involvement of the gestator would be a good idea depends on what she could add to the child's rearing and whether her involvement could be maintained without creating conflict or confusion harmful to the child.

On the one hand, a continuing loving relationship between the child and the surrogate could be a very supportive experience for the child and help her to develop a positive view of her unusual birth circumstances. Although the notion may conflict with many people's concept of the ideal family, establishing a role for the surrogate should be seriously considered. As Michael Hill points out, "the concept of parenthood in this society is frequently conflated with the ideological ideal of the independent conjugal nuclear family, [but] we generally act quite differently, routinely splitting parenthood roles and assigning their performance to a surprisingly wide variety of individuals."[128] He goes on to note that the increasing prevalence of divorce and remarriage as well as "the growing number of single parent families calls for a redefinition of 'family' and parenting roles."[129]

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in Beverly Hills, California, it is "easier to recruit women to be gestational surrogates than to be traditional surrogates [surrogate mothers]. 'They feel they are not giving up their own genetic material, their own baby.' " Carol Lawson, *Couples' Own Embryos Used in Birth Surrogacy*, N.Y. TIMES, Aug. 12, 1990, at A1. *See also* Andolsen, *supra* note 90, at 45 ("Pregnancy, childbirth, and lactation .... may give rise to a physiologically-based form of maternal attachment. However, the expression of that bond (if such a bond exists) is highly influenced by the material and cultural circumstances in which mothers and children find themselves.").

126. *See supra* notes 92-96 and accompanying text.

127. Rearing by the biological parents has traditionally been presumed to be in the best interests of the child absent proof of parental unfitness. *See Alternatives*, *supra* note 100, at 155. *See also* Katz, *supra* note 23, at 11 n.44 (explaining that the child welfare system presumes that children should remain with biological parents if possible); *In re* Baby M, 537 A.2d 1227, 1246-47 (N.J. 1988) (finding that by guaranteeing the permanent separation of the child from one of its natural parents, the surrogate mother arrangement violated the state's longstanding policy that, "to the extent possible, children should remain with and be brought up by both of their biological parents").

128. Michael Hill, *A Cross Cultural Analysis of Several Forms of Parenting*, *in* ON THE PROBLEM OF SURROGATE PARENTHOOD: ANALYZING THE BABY M CASE, *supra* note 90, at 69, 77.

129. *Id.* Hill also urges legislators not to ban surrogacy blindly because it entails a distribution of parenting roles, but instead to consider the benefits it offers for all involved. *Id.* at 78-85.

On the other hand, if the rearing parents objected to continuing involvement with the surrogate, or if the surrogate objected to the manner in which the child was being raised, conflict and stress could result. If the surrogate attempted to compete with the genetic mother for the child's primary allegiance, the child could experience conflict and identity problems.[130] There is no reason to presume that these problems are inevitable, but making continued surrogate involvement contingent upon a determination of the child's best interests[131] in the particular case would avoid the risk that a legally enforceable right will be exercised to the child's detriment. If a case-by-case determination is necessary, the question then arises whether the court, the genetic parents, or some other party should make the determination.

American law has traditionally presumed that biological parents act in their children's best interests.[132] While many contrary examples can be given, as a general rule this assumption may be valid. Leaving the decision to the rearing parents would also serve their interest in controlling the child's upbringing and their intimate family relations. Furthermore, the child's best interest cannot be determined in isolation from the self interests of the rearing parents. Their feelings about the surrogate's involvement with the child, and in the life of the family generally, will inevitably be conveyed to the child either verbally or nonverbally. The child's relationship to the surrogate cannot be wholly positive unless the rearing parents see it in that light. Because these matters require intimate knowledge of the ever changing individuals and relationships which comprise the family, it may make sense to rest decision making authority with the rearing parents rather than the courts. By minimizing court involvement, this approach maximizes family privacy and conserves judicial resources.

The obvious disadvantage of this approach is that it fails to acknowledge the important contribution of the surrogate and affords no incentive for developing a social role for her in the child's life when such a role could benefit all involved. It may not be realistic to assume that rearing parents would involve a surrogate whenever that could be accomplished consistently with the child's well being. Accordingly, the best approach might be to guarantee the surro-

130. The child development experts in *Johnson v. Calvert* testified to this effect, persuading the trial judge that shared parental rights was not in the best interests of the child. Johnson v. Calvert, No. X 63-31-90, slip op. at 3, 9-10 (Cal. Super. Ct. Nov. 21, 1990).

131. Several points should be noted concerning the words "the child's best interests." First, this phrase and slight variations of it (e.g., "in the best interests of the child") may be used to refer to the legal standard commonly applied in resolving custody disputes, in which case state statutes and common law provide the substantive content of the relevant inquiry. This is the sense in which I use the phrase here and in the following paragraph. I have avoided the phrase where I do not wish to invoke a legal standard, but in some instances use similar phrases such as "in the child's interest" or "in the interest of the child's well being" where I describe an action or decision intended to further the child's healthy development without reference to a legal standard. None of these phrases alludes to a standard applicable to the inquiry as to whether the individual has an interest protected by the Due Process Clause of the Fourteenth Amendment.

132. *See supra* note 127.

gate some minimal contact with the child, perhaps an annual visit, leaving the decision of greater involvement to the rearing parents.

D. States Should Adopt a Genetic Maternity Rule

In determining how maternal rights should be allocated in the context of gestational surrogacy, it is important to distinguish two separate issues: (1) the basis for maternal rights, and (2) appropriate state policy toward surrogacy. Commentators sometimes conflate these two issues and end up arguing for a birth mother parentage rule as a means of avoiding harms believed to flow from surrogacy arrangements. As a matter of social policy, surrogacy may be proscribed and sanctions imposed if there is a consensus that the practice should be prevented, but to contort parentage law for the sole purpose of achieving this result indirectly is both unnecessary and illegitimate.[133] A maternity rule must take into account the substantive rights of all the parties involved, as well as the interests of society generally.[134] Because the rule determines custody of children at birth, special emphasis must be given to the interests of children.

Given these principles, states should recognize the genetic mother as the legal mother of a child born as a result of a surrogacy arrangement. This rule accords parental rights to surrogate mothers, but not to surrogate gestators. A genetic maternity rule, like a birth mother rule, provides clarity and certainty in the determination of maternal rights. States should adopt the genetic rule because it is consistent with constitutional principles and best serves the interests of children and society.

The consistency of a genetic maternity rule with constitutional principles has already been shown and need not be repeated here in full.[135] Several points, however, do require elaboration. Not only does a genetic maternity rule promote gender equality by treating genetic-intended fathers and mothers equally, it also promotes this goal symbolically by giving equal weight to the procreative acts of men and women. By contrast, a birth mother rule reinforces archaic sex roles and stereotypes by giving greater recognition and responsibility to the childbearer. In a world where most women work outside

133. *Cf. In re* Baby M, 537 A.2d 1227, 1257 (N.J. 1988) (rejecting the surrogate mother's argument that she should be given custody in order to deter future surrogacy contracts, the court stated "we need not sacrifice the child's interests in order to make that point sharper"); Michael H. v. Gerald D., 491 U.S. 110, 146-47 (1989) (Brennan, J., dissenting) ("It is a bad day for due process when the State's interest in terminating a parent-child relationship is reason to conclude that that relationship is not part of the "liberty" protected by the Fourteenth Amendment."). *But see id.* at 129 (Scalia, J., plurality opinion) (stating that whether a state will allow rebuttal of the presumption of legitimacy is a question of legislative policy, not constitutional law).

134. Even a fundamental right to a parent-child relationship may be abrogated where such action is necessary to achieve a compelling state purpose. Santosky v. Kramer, 455 U.S. 745 (1982).

135. *See supra* Part II-B.

the home,[136] family responsibilities must be more equally shared by men and women. A genetic maternity rule promotes this goal symbolically by allocating childrearing responsibility in a gender-neutral fashion. It begins to dismantle the stereotypes of women as nurturers only and men as providers only and recognizes that the genetic contributions of men and women are of equal importance, that women as well as men are "progenitors," and that inheritance flows through both mothers and fathers.

A genetic maternity rule links conception with parental responsibility, and therefore, serves the interests of children and society by promoting responsible procreative behavior. It is not in the best interests of children or society for biological parents to view responsibility for their offspring as a matter of choice rather than status and moral obligation. Therefore, initial responsibility for childrearing should be placed unequivocally with the persons who conceive the child.[137]

The recognition and protection afforded biologically-based family relationships by Supreme Court decisions adjudicating the rights of natural parents and illegitimate children should be extended to genetic-intended parents and their offspring in gestational surrogacy arrangements. Basing family rights on genetic kinship makes sense for several reasons. First, it brings strength and continuity to family relationships. The knowledge of kinship ties can help parents and children, brothers and sisters, to weather the rough times in their relationships.[138] Kinship endures, even when social relations end, and helps individuals to feel grounded. In an age when divorce and remarriage are the norm, social parents come and go in children's lives. Family law should reinforce biologically based parent and child relations to promote continuity and security for the children over time.[139] The compelling importance of kinship relationships to an individual's sense of identity and wholeness is demonstrated by the attempts of adopted children to discover their biological parents and by separated siblings to reconnect. To the extent that knowing her biological family is important to a child's psychosocial development, constitutional protection of genetic kinship ties serves the child's interests.

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136. Martha Fineman, *Illusive Equality: on Weitzman's Divorce Revolution, in* AMERICAN BAR FOUNDATION, REVIEW SYMPOSIUM ON WEITZMAN'S DIVORCE REVOLUTION 781, 789 (1987).

137. Of course, a legal process for the transfer of parental rights may still be afforded. *But see* Radin, *supra* note 109, at 1927 (raising the question "whether parents who are financially and psychologically capable of raising a child . . . [should be able to] give up the child for adoption, for what we would consider less than compelling reasons"). The moral condemnation of surrogate motherhood arises in large measure from the view that it is wrong to conceive a child intending to abandon it. *See* WARNOCK, *supra* note 104, at 45 (contending that for a woman deliberately to allow herself to become pregnant with the intention of giving up the child is a distortion of the mother and child relationship).

138. TASK FORCE, *supra* note 2, at 120.

139. For an insightful discussion of the importance to children of continuity in parenting and knowledge of biological and cultural heritage, and a persuasive argument for nonexclusivity in parental rights upon family reconfiguration, see Bartlett, *supra* note 1.

Finally, a genetic parentage rule protects the important values of individual choice in reproductive decisions and individual control over genetic material. Commissioning couples have chosen to beget and rear a child; the gestator has chosen to bear it. A genetic parentage rule protects these choices. Given truly informed consent,[140] once the child has been conceived these decisions ought to be binding.[141] While a genetic parentage rule need not preclude gamete donation, it does protect individual choice in the matter. Infertile people may not have an affirmative right to the assistance of a gestator, but they do have a right to protection from forced gamete donation.[142]

III
STATE POLICY TOWARD GESTATIONAL SURROGACY GIVEN A GENETIC MATERNITY RULE

Given a genetic maternity rule, states will be compelled to choose between prohibition and enforcement of gestational surrogacy arrangements. An approach of tolerating surrogacy (making the contracts void or voidable) simply does not work when the commissioning parents will have legal parent status from the outset. Presumably a state would make the contracts void or voidable in order to discourage their formation. Yet this approach would be an ineffective means of deterring gestational surrogacy. Since the intended parents would be the legal parents of any child born as the result of a gestational surrogacy arrangement, refusal by the surrogate to surrender the child could constitute kidnapping. The state would then be compelled to lend its

140. *See* New Hampshire and Virginia surrogacy statutes for regulatory schemes that attempt to secure truly informed consent through extensive counseling and judicially pre-approved agreements. N.H. REV. STAT. ANN. §§ 168-B:1-32; VA. CODE ANN. §§ 20-156 to -165.

141. For arguments supporting the claim that preconception intent alone should determine the parental rights of parties to surrogacy arrangements, see Hill, *supra* note 103. Hill weighs competing parental claims to a hypothetical child conceived of donated gametes and gestated by a surrogate (whom he calls a "gestational host"). He concludes that the claims of those who first intend to procreate and who then "engineer" the birth — the intended parents — should be given priority over claims based on genetic or gestational relationships. Hill's strongest affirmative arguments for basing parental status on the preconception intent of the parties are the normative claim that promise-keeping is a moral good in itself and the legal argument that detrimental reliance by the intended parents should render a surrogacy contract enforceable. *Id.* at 415-16.

Hill considers a number of the issues addressed in this Note, coming to conclusions substantially consistent with mine in several areas including the significance of the prenatal mother-child bonding argument, *id.* at 394-403; the cultural importance of biological relationships, *id.* at 389-90, 419; the confused nature of the exploitation arguments advanced by some opponents of surrogacy, *id.* at 410-413; and the compelling nature of the genetic-intended parents' claim to parental status, *id.* at 393. The fundamental differences in our views can best be seen in relation to surrogate mother arrangements. Hill expresses no objection to the practice and his conclusions would compel the surrogate to relinquish her child. I find such arrangements morally objectionable when undertaken on a commercial basis and would allow the surrogate to renege on her promise. A full comparison of our views is beyond the scope of this Note.

142. *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1951 (1986) ("We have a right not to have our genes appropriated . . . [not] to create children we do not want or to whom we have no access.").

aid to effect the surrender. As a result, genetic-intended parent(s) could achieve their objectives even if the surrogate changed her mind about relinquishing the child.[143] This being the case, infertile couples might be more, rather than less, likely to seek out surrogates than they are now.

Yet making the contracts void or voidable in the context of a genetic parentage rule could have very unfortunate effects for the gestator. Absent parental rights, the surrogate would have no leverage to use against the intended parents if they failed to make good their promises. The genetic parents could wind up with the child without paying the surrogate her fee.

If most commissioning couples fulfilled their promises, so that the risk of nonpayment was perceived as minimal by surrogates, surrogacy would probably still grow in frequency under a toleration approach and a genetic parentage rule. Accordingly, states that seek to discourage surrogacy will need to implement prohibitory measures. Since gestational surrogacy can be accomplished only with the help of medical professionals, a ban could probably be implemented effectively through regulations prohibiting the implantation of embryos in anyone other than the woman who supplies the ovum and/or intends to raise the child. A simple prohibition of commercial gestational surrogacy would probably withstand constitutional challenge on the ground that the market aspect and involvement of third parties take commercial surrogacy out of the realm of reproductive activities protected by the right to privacy.[144] However, severe penalties would be difficult to justify in jurisdictions that adopt a genetic parentage rule, at least when the intended parents are also the genetic parents. If genetic-intended parents are given full parental rights, conflicts with state laws governing adoption and termination of parental rights disappear — no adoption will be required and no parental rights terminated or transferred — and, as I will show, most of the policy arguments against surrogacy lose their force.

The realistic choices for state policy thus appear to be a prohibitory statute without much coercive force or a regulatory scheme providing for enforceable contracts. The question then becomes: What considerations should drive the choice? Unfortunately, the public policy debate regarding surrogacy has

143. An interesting question, but one beyond the scope of this Note, is whether the gestator would be free, under a parentage rule that accorded her no maternal rights, to abort the fetus against the will of the genetic-intended parent(s). In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Supreme Court held that a woman's husband does not have a right to veto her decision to abort; however, the case involved a woman who was the genetic mother. The legal issues that arise include: What effect does absence of a genetic relationship with the fetus have on a woman's abortion right? To what extent, if any, is the right to abort undermined where the woman would not be faced otherwise with the prospect of unwanted parental responsibility (since the intended parents will raise the child)? Would requiring a gestator to continue a pregnancy which she wanted to terminate constitute involuntary servitude? (Possible reasons why a gestator might decide she doesn't want to go through with the pregnancy and birth include a positive change in financial circumstances, recognition that she cannot after all relinquish a child she carries to term, or developments in her personal or family relationships that make continuance of the pregnancy undesirable.).

144. *See supra* note 22 and accompanying text.

focused almost exclusively on the surrogate mother model.[145] Had legislators and commentators worked through their arguments in the context of gestational surrogacy, they would have had to confront the difficulties posed by a "birth mother" parentage rule when not only the intended father, but also the intended mother, is a genetic parent of the child. They also would have discovered that nearly all of the arguments against surrogacy are substantially weakened, if not entirely eliminated, when the arrangement is commissioned by the genetic parent(s) whom the law recognizes as having full rights to a parent and child relationship.

The most pervasive charge against surrogacy is that it constitutes "baby selling." While the epithet carries some punch in the context of surrogate motherhood, it has little, if any, application to gestational surrogacy. As discussed in Part I, the objection to surrogacy on the ground that it involves baby selling must pertain to the sale and purchase of parental rights — the only rights in a child that a parent could conceivably sell.[146] Surrogate mother arrangements do give rise to charges of baby selling in this sense because they require the surrogate to relinquish the parental rights she has as the natural mother. The surrogate's fee can be viewed, at least in part, as consideration for this relinquishment. Gestational surrogacy, though, need not entail the relinquishment of any rights held by the surrogate. If states accord genetic-intended mothers full parental rights (as I have argued the Constitution requires), then it is not necessary for the gestational surrogate to relinquish any rights she may have in order for the intended mother to enjoy a legal mother-child relationship. In states whose parentage rules accord no parental rights to the gestator, no rights could be relinquished. Under these circumstances there can be no "baby selling."

This analysis responds to the baby selling charge only in its most limited sense. The argument usually conflates related concerns that reach beyond baby selling per se to the impact, on individuals and societal norms, of permitting women to gain economic advantage by marketing their reproductive capacities. One strand of this argument focuses on a perceived tendency of market exchanges to undermine societal values respecting the dignity and worth of individuals. Proponents sometimes express the belief that commer-

145. Although many authors have noted the differences between surrogate mother and gestational surrogacy arrangements, and some have made passing reference to the unique issues raised by bifurcated motherhood, few have explored the full ramifications of their arguments within the context of gestational surrogacy. Some who have considered the issue have reached conclusions not inconsistent with mine. *See, e.g.*, SINGER & WELLS, *supra* note 4, at 93-114; Patricia Werhone, *Against the Legitimacy of Surrogate Contracts*, *in* ON THE PROBLEM OF SURROGATE PARENTHOOD: ANALYZING THE BABY M CASE, *supra* note 90, at 25 (1987) (" '[R]enting a womb' might be justified on the grounds that . . . mere gestational motherhood does not constitute full parenthood."); Katz, *supra* note 23, at 3 n.11 (describing the difference between "surrogate carrier" (gestator) and surrogate mother arrangements and noting the possibility that "an even stronger argument can be made for the propriety of surrogate carrier arrangements because of the wife's biological connection to the child").

146. *See supra* text accompanying notes 39-56.

cial surrogacy demeans women and children generally and will lead to exploitation of poor women by the relatively wealthy. A second strand views surrogacy as a violation of the social order, in particular, of responsible motherhood, and posits psycho-social harms to those involved. An examination of each of these concerns will show that they do not justify a blanket prohibition of gestational surrogacy.

Margaret Jane Radin's analysis of surrogate motherhood exemplifies the first strand of the anti-market exchange arguments.[147] Radin argues that payment to surrogate mothers, whether viewed as payment for services or "goods" (the baby), "commodifies" the women and children involved and, through a "domino effect," may lead to conceiving of all children and women in terms of market rhetoric.[148] The world at the bottom of this slippery slope is one in which individuals will be valued solely in monetary terms based upon personal attributes such as eye color, race, intelligence, and athletic ability.[149] Radin acknowledges that the father's genetic link to the child may check this slide toward the commodification of children as long as the father has an "unmonetized attachment" to his biological offspring.[150] Nevertheless, she concludes that paid surrogacy should be disallowed (child bearing should be made "market inalienable"), because the danger of commodification of women is too great and, in part, because "people's commitment to men's genetic lineage is an artifact of gender ideology" that also harms personhood.[151]

Radin's article does not analyze gestational surrogacy, but it seems clear that her arguments play out differently in this context. First, since the gestational surrogate does not contribute an ovum, the risk of a market transaction commodifying her personal attributes is much diminished. The commissioning parent(s) would not be concerned with her appearance or intelligence except as a general indicator of health and responsibility. Second, the danger of commodification of children is further checked when both intended parents are genetic parents since both would have an "unmonetized attachment" to their genes. It seems plausible that the child in this case is no more likely to be viewed as a "commodity" than any child born to a couple who have undertaken considerable expense and effort to reproduce as, for example, the couple who finally conceives after multiple IVF procedures.[152]

147. Radin, *supra* note 109, at 1928-36. For other "first strand" arguments, see, e.g., TASK FORCE, *supra* note 2, at 82-87 and sources cited therein; Nadine Taub, *Amicus Brief:* in the Matter of Baby M, 10 WOMEN'S RTS. L. REP. 7 (1987); FIELD, *supra* note 22, ch. 2.

148. Radin, *supra* note 109, at 1930, 1932-33. Similarly, Annas & Elias argue that commercial surrogacy "could encourage the view that children are commodities, and since this would probably be harmful to children, payment should continue to be forbidden." Annas & Elias, *supra* note 57, at 221.

149. Radin, *supra* note 109, at 1925-26, 1932.

150. *Id.* at 1933.

151. *Id.* at 1936.

152. Baber argues that payment to surrogates need not lead to commodification (even in the surrogate mother context), noting that, "There is no evidence to suggest that adoptive parents who have made a financial investment in their children are more likely to regard them as mere possessions or to mistreat them than are biological parents." Baber, *supra* note 123, at 34.

Arguments against surrogacy based on concerns about potential exploitation of poor women are typified by the following passage from Barbara Katz Rothman's, "Motherhood: Beyond Patriarchy":

> What will happen as the new technology allows brokers to hire women who are not related genetically to the babies that are to be sold? Like the poor and non-white women who are hired to do other kinds of nurturing and caretaking tasks, these mothers can be paid very little, with few benefits, and no long-term commitment. The same women who are pushing white babies in strollers, white old folks in wheelchairs, can be carrying white babies in their bellies. Poor, uneducated, third world women and women of color from the United States and elsewhere, with fewer economic alternatives, can be hired more cheaply . . . [and] controlled more tightly. With a legally supported surrogate motherhood contract, and with new technology, the marketing possibilities are enormous — and terrifying. Just as Perdue and Holly Farms advertise their chickens based on superior breeding and feeding, the baby brokers could begin to advertise their babies: brand-name, state-of-the-art babies, produced from the "finest" of genetic materials and an all-natural, vitamin-enriched diet.[153]

It is interesting to note that if we eliminate from the passage above those portions which go to baby-selling per se or to commodification, what appears to remain is a concern that women hired as surrogates will not receive fair compensation and job benefits. This is certainly a legitimate concern, but the remedy for economic exploitation would seem to be minimum wage and benefits regulation, not elimination of the employment opportunity altogether.

For prohibition of a particular sort of labor to be warranted, some unavoidable evil must be linked to it. The work must be inherently degrading or dehumanizing or so dangerous or harmful that it remains socially unacceptable regardless of the amount of compensation paid. The passage above and her conclusion suggest that Rothman believes that it is inherently degrading to act as a "mother" toward other people's children, whether pushing them in strollers or carrying them in your belly. She concludes that "[w]omen are not, and must not be thought of as, incubators, bearing the children of others — not the children of men, and not the children of other women."[154] This view that the very role of gestation is degrading if you do not intend to raise the child is really a part of what I have identified as the second strand of the anti-market exchange argument — the one that views surrogacy as a violation of the social order and posits psycho-social harms to those touched by surrogacy.

This view is also reflected in the following quotation from the "Instruction on Respect for Human Life in Its Origins and On the Dignity of Procrea-

153. Barbara Katz Rothman, *Motherhood: Beyond Patriarchy*, 13 NOVA L. REV. 481, 485-86 (1989).

154. *Id.* at 486.

tion: Replies to Certain Questions of the Day" issued by the Roman Catholic Congregation for the Doctrine of the Faith in March 1987:

> Surrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood; it offends the dignity and right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families.[155]

One element of this argument reduces to a belief that the biological events of human life should be permitted to unfold without human intervention. This view, though sincerely held and consistently applied by some groups (notably the Christian Scientists and Seventh Day Adventists), is essentially religious and is, as such, untenable as the basis for social policy in the United States today. We have adopted too many practices that substantially interfere with the "natural" biological course of human life for this argument to be effective, without more, as a justification for a substantial restriction of individual liberty.

A second element of this argument propounds the value of integrating the "physical, psychological and moral elements" of family relationships, suggesting that children and families are harmed when these elements are separated in the course of collaborative reproduction. Courts, commentators, and governmental study commissions have voiced concerns regarding the potential for surrogacy to harm the children born of these arrangements and their siblings. Specifically, it is argued that knowledge of the fact that the surrogate relinquished the child in exchange for money will be damaging to the child so relinquished and cause a surrogate's other children, if she has any, to fear abandonment.[156]

It should first be noted that there is, at this time, no empirical evidence that either proves or refutes these charges.[157] This being so, it could be argued that the opportunity to procreate should not be denied on the basis of wholly

155. Roman Catholic Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origins and On the Dignity of Procreation: Replies to Certain Questions of the Day, in* CRUX, Mar. 30, 1987, II:3, 5, *quoted in* TASK FORCE, *supra* note 2, at 101.

156. *See, e.g.*, Warnock, *supra* note 104, at 45 ("[S]urrogacy . . . is degrading to the child . . . since, for all practical purposes, the child will have been bought for money."); Linda Whiteford, *Commercial Surrogacy: Social Issues Behind the Controversy, in* NEW APPROACHES TO HUMAN REPRODUCTION 145, 154 (Linda Whiteford & Marilyn Poland eds., 1989) ("[C]hildren born through surrogacy might find it disturbing to learn that they were given up and might, as some adopted children do, feel that their mothers rejected them because of some personal flaw."); FIELD, *supra* note 22, at 33 (arguing that a surrogate's other children are inevitably harmed).

157. *See, e.g., In re* Baby M, 537 A.2d 1227, 1250 (N.J. 1988) ("The long-term effects of surrogacy contracts are not known, but feared."); Baber, *supra* note 123, at 34 (setting forth the argument that there is no empirical support for the claim that it is in the best interests of children to be raised by their natural parents).

speculative potential harms. However, if the concerns turn out to be well founded, the consequences are serious enough to substantially justify a prohibition of surrogacy. Accordingly, they should not be dismissed out of hand, even though they can be met only with equally speculative counter arguments.

In order to analyze the validity of these concerns and determine whether they arise in the context of gestational surrogacy, one must posit the source of harm to the children. It would seem that knowledge of the lengths to which the rearing parents went to bring her into being could make a surrogacy child feel especially valued. At the same time, this knowledge could impose a pressure to perform, to be extraordinary, in order to justify the parents' "investment." Whether a child felt this burden would appear to be within the power of the rearing parents to control, by communicating their expectations and love in such a way as to relieve the child of any anxiety she might experience in this regard.

It could be somewhat more difficult (although not outside the realm of possibility) for rearing parents to successfully mediate the child's understanding of her separation from the surrogate. Here the differences between surrogate mother and gestational surrogacy arrangements become critical. In the first case the child is separated from the woman who is in all respects her "natural mother"; in the second, the child has been separated from the woman who carried her for nine months and gave birth to her but who is not her "natural mother." When her rearing mother is her genetic mother, the surrogacy could be viewed as a temporary separation, now past, from her "real" mother who is raising her. The child born of a gestational surrogacy is not denied the opportunity of knowing and being loved and nurtured by the woman whose offspring she is. Although the child may be curious about the woman who carried and gave birth to her, she can think of her much in the same way as a child raised in infancy by a hired nanny might think of the nanny. The fact that the surrogate was paid for her services need not be a source of hurt to the child.

Separation from a surrogate mother, on the other hand, would seem to pose far greater difficulties for the child. The search for roots, for the "real" mother, leads to the surrogate. The rearing parents may be seen as having caused the separation from the mother, and this perception could undermine the child's bond to the rearing parents. Of course, many adoptive parents successfully mediate their adopted child's incorporation of the knowledge of her origins.[158] However, the task may be more difficult if the mother initiated the pregnancy with the intention of giving up her parenthood in exchange for money. In this case, the explanation that she relinquished the child reluc-

158. Nevertheless, it is not unusual for adopted children to interpret having been put up for adoption as rejection and to experience maternal loss retrospectively. Katz, *supra* note 23, at 11. Katz suggests that this feeling may be mitigated in the surrogate mother context by the acceptance of the natural father. *Id.* at 19.

tantly, in order to give the child a better life (an explanation available in many, if not most, ordinary adoptions) is not available.

The potential for harm to the surrogate's other children would also appear to be greater in the case of surrogate mother arrangements than in the case of gestational surrogacy. The surrogate mother's other children are the half siblings of the surrogacy child. Their relationship is also severed by fulfillment of the agreement.[159] This fact in itself could cause the surrogate's children grief and anger. In addition, the children could worry that if their mother would "give away" their half sibling she might also be willing to give them away. The gestational surrogate's children are not related to the child who disappears from their lives. It would appear easier for them, especially as they get older, to understand and accept the arrangement as a form of temporary caretaking, a service performed by their mother that does not threaten their security nor deprive them of a family member. In sum, the possibility that children born of gestational surrogacy arrangements and their siblings will experience harm appears remote, speculative, and largely dependent on the extent to which the practice becomes commonplace and socially acceptable and the sensitivity with which the parents mediate their children's understanding of the surrogacy arrangement.[160]

The potential for commercial gestational surrogacy to harm women is a difficult issue. I have argued that differences between surrogate motherhood and gestational surrogacy make concern about psychic and dignitary harm less warranted in the latter context. For some people, however, attaching a market value to pregnancy and childbirth is so antithetical to their ideal conceptions of those experiences, so contrary to the values they associate with motherhood, that the practice appears to them inherently degrading and immoral. I can only say in response that not all women share this view[161] and I

159. So, of course, are the relationships with grandparents and other kin. As the *Baby M* case demonstrated, this fact can create additional complications and suffering.

160. Professor Davis states that "[t]he emotional and social consequences for the [surrogacy] child depend largely upon whether we create a social climate of acceptance or stigmatization with respect to three- and four-party reproductive arrangements, and whether we accept in this context the responsibility for prompt, reasoned resolution of custody disputes that we bear in every other family context." Peggy Davis, *Alternative Modes of Reproduction: Determinants of Choice, in* REPRODUCTIVE LAWS FOR THE 1990S 421, 426 (Sherrill Cohen & Nadine Taub eds., 1989).

161. As Professor Davis points out, subjective judgments about the acceptability of surrogacy arrangements depend in large measure on one's own experience with atypical family situations such as "adoption, step parenting, extended families, and fictive kinship relationships." *Id.*

For an interesting socialist perspective, see Jane Ollenberger & John Hamlin, *"All Birthing Should be Paid Labor" — A Marxist Analysis of the Commodification of Motherhood, in* ON THE PROBLEM OF SURROGATE PARENTHOOD: ANALYZING THE BABY M CASE, *supra* note 90, at 57 (arguing for valid surrogacy contracts to protect working class women from exploitation and provide payment for labor that is being performed but until now has gone unpaid).

For other arguments by women countering concerns about degradation and exploitation, see, e.g., CARMEL SHALEV, BIRTH POWER (1989) (depriving women of the opportunity to make binding and financially profitable contacts concerning reproductive capacity belittles and

would be inclined to err on the side of liberty by resting responsibility for determining this issue in the hands of individual women.[162] If there is a public consensus that the State *should* take protective action, a regulatory scheme that ensures informed consent and fair compensation and that restricts access to those who are infertile should prevent abuse.[163]

CONCLUSION

States must amend parentage laws that are ambiguous in regard to bifurcated motherhood or that accord maternal rights exclusively to the woman who gives birth. This conclusion rests on two findings: that the Uniform Parentage Act, and statutes modeled on it, potentially identify both the gestator and the genetic mother as legal mothers; and that a woman who commissions a surrogacy arrangement and provides the ovum for conception has a fundamental right, based on principles of constitutional and state law, to a parental relationship with her offspring, while a surrogate gestator has a subordinate interest analogous to that of a temporary caretaker.

In order to justify a "birth mother" parentage rule, which would abrogate the genetic-intended mother's interest, states should be required to show that it is both necessary and narrowly tailored to achieve a compelling state purpose. Since a genetic parentage rule would protect the rights of natural mothers (including surrogate mothers) and achieve the state's compelling interest in providing clarity and certainty regarding the legal status of children born under such arrangements, these purposes may not be used to justify a "birth mother" parentage rule. Nor can the rule be justified as a means of discouraging gestational surrogacy arrangements since prohibitory policies may be implemented effectively through medical practice regulation. A maternity rule that recognizes the genetic mother as the legal mother is consistent with constitutional principles and state law treatment of genetic-intended fathers. In addition, such a rule promotes gender equality in the rights and

disempowers women); Shultz, *supra* note 20, at 336 (noting that "the inability of women to gain monetary recognition for the things they uniquely or preeminently do is one of the core causal factors in the exploitation of women," and arguing for determination of parental status on the basis of intentions expressed in contracts).

162. This position also accommodates an insight articulated by Margaret Radin, that to the extent restrictive surrogacy policy is justified as a prophylactic against exploitation, and poverty is equated with coercion, a prophylactic prohibition requires a corollary in welfare rights and is politically hypocritical without a large-scale redistribution of wealth and power that seems highly improbable. Radin, *supra* note 109, at 1911.

163. For a sensible regulatory scheme, see Randall P. Bezanson, *Model Human Reproductive Technologies and Surrogacy Act*, 72 IOWA L. REV. 943 (1987) (setting forth a model act that was the product of students in a law school course). The New Hampshire surrogacy statute provides for a similar scheme but disallows compensation (only medical costs actually incurred may be reimbursed). N.H. REV. STAT. ANN. §§ 168-B:1-32 (1991). Similarly, Virginia's statute provides for judicially supervised noncommercial surrogacy. VA. CODE ANN. §§ 20-156 to -165 (Michie 1991). In my view, if surrogacy is permitted, a floor should be set for compensation but not a ceiling: women willing to provide this service should receive full market value for their labor.

responsibilities associated with child rearing, serves the best interests of children, and ensures individual control over genetic material. For all of these reasons, states should adopt genetic maternity rules.

Recognition of parental rights in the genetic mother will prevent state courts from resolving contested gestational surrogacy agreements by treating them as custody disputes between the surrogates and the biological fathers (both presumed to have full parental rights) — the approach taken by the New Jersey Supreme Court in the *Baby M* case. The legislative approach taken by a number of states, that of making the contracts void, is also unworkable in the context of gestational surrogacy.

Although state laws prohibiting commercial gestational surrogacy arrangements would likely withstand constitutional challenge, and a prohibition could be implemented effectively through regulation of in vitro fertilization and embryo transfer procedures, it is not clear that legal and policy considerations justify that approach. If genetic-intended mothers are entitled to full parental rights, then the primary legal objections to surrogacy do not arise. Furthermore, when the surrogate is not the genetic mother, the potential for dignitary harms to women and children is much diminished and enforcement of the surrogate's agreement to surrender the child does not disserve the child. For these reasons, gestational surrogacy agreements should not be deemed against public policy, but instead should be regulated and enforced.

APPENDIX

State Surrogacy Statutes

Alabama: ALA. CODE §§ 26-10A-33 to -34 (Supp. 1991) excludes "surrogate motherhood" from the operation of sections of the state adoption code criminalizing unauthorized placements of children for adoption and making it a crime to offer or make payment of anything of value for placement for adoption or consent or cooperation in adoption.

Arizona: ARIZ. REV. STAT. ANN. §§ 25-218 (1991) proscribes entering into, inducing, arranging, procuring, or otherwise assisting in the formation of a "surrogate parentage contract" defined as a "contract, agreement or arrangement in which a woman agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial insemination and to voluntarily relinquish her parental rights to the child." The statute refers to crimes but provides no penalties. It also makes the surrogate the legal mother, entitles her to custody, and establishes a rebuttable presumption of paternity in the surrogate's husband, if she is married.

Arkansas: ARK. CODE ANN. § 9-10-201 (Michie 1991) creates an exception in the case of surrogate motherhood to presumptions of parentage usually operative when a child is born as a result of AID. The statute makes the child the legal child of the biological father and the woman intended to be the mother if the biological father is married, or of only the biological father if he is unmarried, or of the woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was used for insemination.

Florida: FLA. STAT. ch. 63.212 (1991) makes illegal contracts for the purchase, sale, or transfer of custody of parental rights involving a fee to the biological mother above and beyond actual medical, living, and legal expenses; proscribes fees to any person or entity except approved agencies for assisting in arranging a preplanned adoption. Violation of the statute is a third degree felony carrying a maximum penalty of a $5,000 fine and five years imprisonment; court-approved arrangements not involving prohibited compensation are permitted, but a "volunteer mother's" (surrogate's) agreement to relinquish parental rights is subject to a right of recission within seven days of the child's birth and any party may terminate the agreement at any time before the final transfer of custody. The statute reaches all forms of conception including embryo adoption.

Indiana: IND. CODE §§ 31-8-2-1 to -3 (Supp. 1991) declares any surrogate agreement containing any of the following terms void and unenforceable as against public policy: requiring the surrogate to provide a gamete; become pregnant; consent to or undergo an abortion; undergo medical or psychological treatment or examination; use a substance or engage in activity only in accordance with the demands of another person; waive parental rights or duties; terminate care, custody, or control of a child; or consent to a stepparent adoption. The statute provides that a court may not base a custody determination solely on evidence of a surrogacy agreement absent fraud, duress, or

misrepresentation; reaches both gestational surrogacy and surrogate motherhood; and custody is to be determined on the basis of the child's best interest standard.

Kentucky: KY. REV. STAT. ANN. §§ 199.590, 199.990 (Michie/Bobbs-Merrill 1990) proscribes entering into and receiving compensation for facilitating agreements which would compensate a woman for her artificial insemination and subsequent termination of parental rights.

Louisiana: LA. REV. STAT. ANN. § 9:2713 (West 1991) declares " 'contracts for surrogate motherhood' . . . void and unenforceable as contrary to public policy." Such contract is defined as "any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child." No penalties are attached.

Michigan: MICH. COMP. LAWS §§ 722.851-.863 (Supp. 1991) makes surrogate parentage contracts void and unenforceable, and proscribes entering into and assisting in the formation of surrogate parenting contracts which would compensate the surrogate in excess of actual expenses incurred or involve a surrogate who is an unemancipated minor, mentally ill, or developmentally disabled. "Surrogate parentage contract" is defined as "a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child." It prescribes custody determination based on the child's best interests. Facilitators of proscribed contracts are guilty of a felony and punishable by a fine up to $50,000 and/or imprisonment up to five years. Participants are guilty of a misdemeanor and punishable by a fine up to $10,000 and/or imprisonment up to one year unless the surrogate is an unemancipated minor, mentally ill, or developmentally disabled, in which case penalties are the same as for facilitators.

Nebraska: NEB. REV. STAT. § 25-21,200 (1989) provides that a surrogate parenthood contract, defined as "a contract by which a woman is to be compensated for bearing a child of a man who is not her husband," is void and unenforceable and the "biological father of child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child."

Nevada: NEV. REV. STAT. § 127.287 (1991) excludes "any lawful contract to act as a surrogate" from the operation of the state baby selling statute.

New Hampshire: N.H. REV. STAT. ANN. §§ 168-B:1-32 (1991) provides a comprehensive regulatory scheme for judicially preapproved surrogacy arrangements. Intended parents must be married, at least one genetically related to the child, and the woman must be medically infertile. The only fees permitted are those to cover surrogate's medical expenses related to the pregnancy, actual lost wages, health, disability and life insurance during the term of the pregnancy, and six weeks thereafter, counselling fees, costs associated

with required non-medical evaluation, and reasonable attorney's fees and court costs. No specific performance of term requiring surrogate to become pregnant. The surrogate has 72 hours after the birth to rescind agreement to relinquish the child and parentage rules included provide that (1) the woman who gives birth is the mother and her husband, if she is married, is presumed the father, and (2) the paternity presumption is rebuttable. The statute also states that a violation of the proscription on solicitation is a misdemeanor; and arrangements not conforming to the Act are unlawful.

New York: 1992 N.Y. Laws 308 (McKinney 1992) declares all surrogate parenting contracts void and unenforceable and prohibits compensation of parties and facilitators, except for the birth mother's reasonable and actual medical expenses and costs permitted in adoption proceedings by the social services law. Imposes a civil penalty (not to exceed $500) for a violation by a genetic or gestational parent or such person's spouse. First offense by a facilitator is subject to civil penalty (up to $10,000 plus forfeiture of fee). Second and subsequent facilitation violations are punishable as felonies. No provision for parentage determinations in the event of disputes except that courts may *not* consider a surrogate's participation in the contract as a factor "adverse to her parental rights, status, or obligations," and courts may require either party to pay the other's legal costs incurred in connection with settling the dispute.

North Dakota: N.D. CENT. CODE § 14-18-01 to -07 (1991) states that any contract in which a woman agrees "to relinquish her rights and duties as a parent of a child conceived through assisted conception is void." The surrogate is the legal mother and the surrogate's husband, if a party to the agreement, is the legal father. If the surrogate is unmarried or her husband is not a party to the agreement, paternity is governed by the state's paternity statute which provides for rebuttal of presumption of paternity in the husband. N.D. CENT. CODE § 12.1-31-05 (Supp. 1991) excludes parties to surrogacy agreements from application of the state's child selling statute.

Utah: UTAH CODE ANN. § 76-7-204 (1992) provides that both commercial and noncommercial surrogacy agreements ("in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result") are "null and void and unenforceable as contrary to public policy." Parties and facilitators are subject to a class B misdemeanor, and the surrogate and her husband, if any, are the legal parents. A child's best interest standard is prescribed for resolution of custody disputes.

Virginia: VA. CODE ANN. § 20-156 to -165 (Michie 1991) (effective July 1, 1993) determines parentage of children born through "assisted conception" and provides for enforcement of judicially pre-approved surrogacy contracts. A surrogate who is also the genetic parent is granted the right to terminate the agreement within 180 days following the last assisted conception. Reformation (in conformance with pre-approval requirements) and enforcement of contracts not pre-approved by the court are allowed, as long as at least one of

the intended parents is the genetic parent of child. It prohibits and provides criminal and civil penalties for accepting compensation for brokering and otherwise arranging surrogacy contracts in Virginia. Any contractual provision for "compensation" (valuable consideration in excess of reasonable medical and ancillary costs) is void and unenforceable.

Conditions for judicial approval include: intended mother is infertile or unable to bear child without unreasonable risk to herself or the child; at least one intended parent will be the genetic parent; all parties meet standards of fitness applicable to adoptive parents as determined by the court based on home study and physical and psychological examinations; surrogate is married and has had at least one live birth and bearing another child does not pose unreasonable risk to her or the child; surrogate's husband is a party to the contract; all parties receive counselling and a court finds that they have entered into the agreement voluntarily and understand its terms including that any agreement for compensation is void and unenforceable.

Parentage: Intended parents are parents of a child born of a judicially pre-approved contract except when the surrogate who is also the genetic parent exercises the right to terminate the agreement. In that case she and the husband are parents. If the contract is not judicially pre-approved then the surrogate is the mother of the child unless the intended mother is the genetic parent, in which case the genetic-intended mother is the mother. The intended father is the father if he or the intended mother is the genetic parent. If neither intended parent is a genetic parent, the surrogate is the mother, the surrogate's husband (if party to contract) is the father, and intended parents may only obtain parental rights through adoption.

Washington: WASH. REV. CODE ANN. §§ 26.26.210-.260 (West 1992) declare "surrogate parentage contract's agreements" in which a female, not married to the contributor of the sperm, agrees to conceive a child through natural or artificial insemination or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental rights to the child," entered into for compensation void, as contrary to public policy and unenforceable. These statutes proscribe entering into and assisting in the formation of such contracts and proscribe *all* surrogate parentage contracts where the surrogate would be an unemancipated minor or a woman diagnosed as mentally ill or retarded, or developmentally disabled. Violation is a gross misdemeanor and custody disputes are to be resolved on the basis of the child's best interests standard.

West Virginia: W. VA. CODE § 48-4-16 (1992) exempts "fees and expenses included in any agreement in which a woman agrees to become a surrogate mother" from prohibition of, and criminal penalties for, payment or receipt of valuable consideration in connection with transfer of legal or physical custody of a child.