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Rocking the Cradle, Rocking the Boat:
Surrogate Motherhood Legislation in California

By

Anna Wildy Kaminski
A.B. (Vassar College) 1982

THESIS

Submitted in partial satisfaction of the requirements for the degree of
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Introduction

Surrogate motherhood has a distant heritage, although it now presents new moral, economic and psychological dilemmas. Two biblical stories serve as reminders of this long history. The biblical story of Hagar, Abraham and Sarah is a surrogate mother arrangement. Sarah was said to be barren so she arranged with Abraham that her handmaiden, Hagar, would bear a child for them. Abraham and Hagar thus had a son, Ishmael. Sarah's prayers for a child continued and were answered in her old age. She bore a son of her own, Isaac.¹ Rather than a peaceable family, Hagar and Ishmael were cast out as Abraham and Sarah began a family with their son Isaac, populating the nation of Israel.² In Baby M we see a resurrected version. A fertile man, William Stern, whose wife was unable to bear a child for medical reasons, solicited and contracted with a woman, Mary Beth Whitehead, to bear a child for the couple with the use of artificial insemination in 1986. Whitehead agreed prior to pregnancy to relinquish her parental rights³ and to give the child for adoption to the biological father and Elizabeth Stern. After the child's birth, Whitehead found that she could not fulfill this agreement in good faith and wished to keep the child known as Baby M with her family, a husband and two children.

This *cause celebre*, one of the few unsuccessful cases of a probable 600 surrogacy agreements in the United States⁴, catapulted the growing fertility

¹ Genesis 16:19 Standard Version.

² Ishmael does not take this lightly. Some have referred to his expulsion as the inciting incident in Arab-Israeli conflicts.

³ Parental rights are defined as "[t]he sum total of rights of the parent or parents in and to the child as well as the rights of the child in and to the parents." Black's Law Dictionary 1004 (5th ed. 1979).

⁴ Estimates vary greatly. Six hundred possible surrogacy births and adoptions seem to be a number selected by most sources but others estimate as many as 1000.

treatment industry into the public forum. The first baby born as a result of a surrogate contract in the sense that we now know it was delivered in 1976.⁵ The terminology and use of surrogacy arrangements substantiate a new phenomenon in the past ten years. Previously human reproduction has not involved planning, contracts, intermediate brokers and money exchanges. In these ten years, the issue has moved from a private and unknown practice to a media event demanding front page news with the most prominent papers in the nation. As a public phenomenon, surrogacy has attracted comment from individuals in legislature, judiciary, ethics, medicine, religion, politics, media, social services and private sectors.

The issue of surrogacy strikes at a visceral level. The passion felt for and against surrogate motherhood is often not resolvable between differing opinions. Infertile people, physicians, lawyers, children's advocates, reproductive specialists, religious advisors and surrogate mothers themselves all focus on some particular issues. The commonalities are fewer than the differences. Adoptees are concerned with secrecy and harm to the children. A physician may have concern for the ability for a contract to limit his or her patient's choice and behavior during pregnancy. The lawyers may be concerned with contracting for termination of parental rights, or protection of the surrogate. Since few can agree how to prioritize these issues, the public discourse presently remains mired in a collection of legitimate but ultimately unresolved concerns.

What direction are we to take in helping to resolve these issues? It is with respect for the broad spectrum of interests that I tackle only some of the issues in surrogacy, examine some of the suppositions and values that surrogacy

⁵ Noel Keane: *The Surrogate Mother*. New York: Everest House. (1981) p. 11. Hereinafter referred to as Keane: *The Surrogate Mother*

exposes about what we value and how we value it. We should be concerned for "whose interests are invested in and saved by those values and their preservation?"⁶ I will limit my discussion by primarily addressing the issues of relevance to the surrogate mother.

The case of Baby M raised a public discussion about the nature of motherhood. Surrogacy involves the services of a woman who is willing to become pregnant and relinquish her rights to that child after birth to another family. Surrogacy is a service that only women can perform. Sociological and feminist study of women's roles often reveal gender differences in those things that women alone can do as well as those things that women and men can perform. Surrogate mothers perform part of the role of mother. Unlike the usual role of mother, they are often paid for that role. In fact, it would be hard to call surrogate mother a role; instead it is more of a service by a woman for another individual or couple willing and able to pay for this service. Specifically, I looked at what values and suppositions supported the present distinction between two forms of surrogacy: volunteer surrogacy, where the woman is not paid for her services, or paid surrogacy where she is said to be remunerated for her time, risk and gestational service by some and coerced into selling a child by others.

The fact that surrogate motherhood involves the offering of personal services by women is not trivial; it is the essence of the distinction between the acceptability of surrogacy and the condemnation of it. The concern with values of women's work and motherhood conceals a hidden agenda in retaining a certain role for women. I argue that the central issue in allowing

⁶ Derek Morgan: "Making Motherhood Male: Surrogacy and the Moral Economy of Women." *J Law and Soc* 12(2): 219-238. (1985), p. 220. Hereinafter referred to as Morgan: Making Motherhood Male.

women to perform as surrogates regards whether women can establish themselves in the market place, offer their services, sexual, gestational or otherwise, and get paid for their labor.⁷ In a broader sense, the discussion about surrogacy reflected values about the role of women as mothers and as paid workers. As an outgrowth of concern for these values, state legislatures responded by proposing and debating bills that outlawed, regulated, facilitated or voided these arrangements. Legislation reflected the public discussion of this role or service.

B. Methodology

My argument is based on the examination of California legislative bills over the past five years and on personal statements and written resolutions of organizations involved in the surrogacy debate. The personal statements were solicited by interviews with five individuals active in the state of California in forming policy on the legislative level. All interviews and attempts to recruit interviewees were conducted between November 1987 and March 1988. Initially, I contacted individuals active in two California Legislature Hearings⁸ on surrogate parenting. Availability of subjects was

⁷ This does not mean that there are not other important and vital issues. In fact, I will first offer that my argument must necessarily rely on ignoring the issue of whether or not a child is being sold or degraded. The effects of alternative reproduction methods on children, a broad subject in itself, is beyond the scope of this thesis. Even if my argument regarding the surrogate mother is convincing, the discourse on the applicability to issues relevant to the children involved will still need to occur. For some, ignoring aspects of child abandonment and selling will be sufficient grounds for dismissal of my argument. But even without the issue of children's interests, the exploration of the public and legislative views regarding surrogacy reveal much about women's role.

⁸ California Legislature. Assembly. Committee on Judiciary. *Surrogate Parenting Contracts. Hearing of November 19, 1982.* 1981-82 Regular Session, Pub. No. 962. (1982) Hereinafter California Assembly Hearing of Nov. 19, 1982.

California Legislature. Senate. Committee on Health and Human Services. *Surrogate Parenting. Testimony for hearing of December 11, 1987.* 1987-88 Regular Session. (1987)

limited by their time and ability to participate. The intent of the interviews was to determine what groups and individuals were active, which groups should be active and why, and the salient issues regarding surrogacy. In the course of interviews and primary research, the initial question was re-focused to examine the two specific types of legislation being proposed in California.

I approached special interest groups who were known to have supported or opposed legislation in California. I evaluated positions with regard to paid and volunteer surrogacy from their spokespersons when available and written summaries or resolutions of their positions. In addition, thirty organizations whose activity and constituency could be construed to have some bearing on the surrogacy argument were contacted to determine positional statements, resolutions, lobbying activity and spokespersons if any. Of these, any whose information was publicly available were solicited to send me copies of prepared statements representing their position. Finally, five California bills introduced between 1982 and 1987 were collected and analysed regarding participation of surrogate mothers in surrogate contracts.

C. Outline of the argument

In Part I, I will look at the relevance of comparing surrogacy to artificial insemination by donor (AID), a form of alternative reproduction or, to others, new reproductive technology. Briefly, the history of AID reveals some basic assumptions about the acceptability of men's participation in the private and

Hereinafter California Senate Testimony of Dec. 11, 1982. The latter is submitted written testimony. Hearing transcripts are unavailable as of April 1988. Personal interviews will be referred to as- Interview, position of person if applicable.

public sphere. This comparison between surrogacy and AID may be useful in examining the differences in public attitude towards women and men but it is insufficient. The comparisons between the two are too weak.

Part II presents a brief history of the legislative efforts in California, some other American states and Great Britain in order to set the stage for a discussion of the issues relevant to surrogate mothers. These statements and resolutions examine the problems in a public forum. Legislation has taken three directions with regard to surrogacy: prohibition, regulation with intent to limit, and regulation with intent to allow and possibly encourage surrogacy. Surrogacy regulated in the last two legal directions mirrors the public separation of the woman's role into that of volunteer services (non-commodified gestation) and paid services (commodified gestation). As the discourse in the legislative forum has unfolded, it has revealed a stigmatized view of the right for women to participate in the public market preferring the more conventional relegation of women's labor to non-commodified services.

Part III examines the various aspects of women's roles in the private sphere, in sexual behavior and in motherhood. Women's sexual behavior has been subjected to classification, criticism and evaluation to a far greater extent than that of men. Motherhood has great social value and meaning in Western developed culture. In motherhood sex, pregnancy and rearing are inseparable and inalienable tasks. By valuing women's role as mother very highly society subordinates women's sexuality to reproductive purposes.

Those inalienable tasks have social and moral value. We do not value these acts in market terms. Part of mothering, a role we associate with the fulfillment of womanhood, is the act of giving, of selflessness. *Alienation*, the ability to separate a thing or a service from one's self, and

commodification, the ability to place a value and sell those things in the market economy, are traditionally not applied to certain personal attributes. Maintaining a particular paradigm of motherhood allows the separation of women in the private home based economy from the public market economy.

In the last section of part III, I will argue that surrogate motherhood is akin to prostitution in some respects. Prevention of commodification, despite some genuine ethical objections, can be problematic and discriminatory. Commodification of pregnancy relies on the alienability of personal labor. This labor has many similarities to sex labor in the sex work industry. I will review some particularly illustrative and controversial arguments for the alienability of women's sex labor. Based on these supporting arguments commodification can be warranted under certain circumstances.

Lastly, Part IV by advocates that surrogate motherhood should be regulated in the market place. Women should get paid for labor that they provide. This would value the actual work involved in surrogacy. It would also diminish the privatization of women's work outside of a market economy. Such a framework, in addition to respecting the rights, needs and vulnerabilities of all parties, enables protection to the worker and offers options for her. To specifically exclude one sex from participation in third party reproduction, mirrors the attempt to relegate women to the private/home sphere even as AID laws presently condone and enhance procedures for men's paid participation. Present attempts at legislation demonstrate these issues in the context of regulating women's use of their bodies. Although the risks of emotional and ethical harm to the surrogate can be high, it is favorable to offer the advantages of surrogacy under restricted conditions that could minimize these harms.

offer the advantages of surrogacy under restricted conditions that could minimize these harms.

To restate the purpose, this paper examines the suppositions and values that in part constitute our social view of the role of women as revealed in the legislative efforts regarding the allowability of surrogate motherhood. Specifically the examination of the differentiation in the legislature between paid surrogacy and volunteer surrogacy serves as illustration to the argument that women's participation in the public/market sphere is regulated by social factors. The task of evaluating all the salient issues in surrogacy, their merits and prioritization is truly formidable. This paper will contribute to the development of this amalgam by investigating this one issue of surrogate mothers. Only with further analysis of the effects and concerns of children and families can a really complete picture emerge. Such discussion portends future conceptions of women's rights and public morality. An examination of the public interest in this role can be used ultimately to help form policy and to reveal to ourselves the specter, good or bad, of the not too distant future.

Part I

A. Infertility: some causes and some solutions

And sterile behavior carried the taint of abnormality; if it insisted on making itself too visible, it would be designated accordingly and would have to pay the penalty.

- Michel Foucault, *The History of Sexuality* ¹

The inability to be a parent has usually carried a social stigma. In a society which can define maleness in part as the ability to impregnate and femaleness as an ability to mother, infertility strikes at the essence of who one is in society. Those who choose to remain childless are subject to suspicion, stigmatization, criticism and isolation²; those who suffer infertility garner sympathy or pity.

In the Baby M decision, Judge Sorkow wrote, "Being unable to bear and rear a child excludes women and men from a range of human activity associated with childbearing and rearing."³ This statement crystallizes the predominant social view of isolation and exclusion in infertility. Both poignant and sensational stories wend their way into the media and thereby into a public forum. Noel Keane, who has been the most prolific surrogate contract lawyer and counsel to the parties of the Baby M contract, writes:

¹ Foucault, Michel: *History of Sexuality*. Vol I: An Introduction. New York: Vintage Books. (1980), p. 4.

² Sharon Houseknecht: "Voluntary childlessness- a social/psychological model." *Alternative Lifestyles* 1 (3): 379-401. (1978)

³ In Re Baby M, 217 N.J. Super. 313 (1987), 537 A. 2d 1227 (1988) p. 2004. Hereinafter In Re Baby M.

The fertility rate from 1955-1959, the late baby boom years, was 3.7 children per woman. This has dropped to 1.8 per woman from 1975-1980.⁶ Now one out of six to one out of ten couples are expected to have fertility problems. In the United States the rise in infertility has been 177% from 1965-1987.⁷ Reasons for this drop bring in multiple issues relevant to this "baby boom" generation of potential parents. Increasing numbers of women in the work force, have postponed pregnancy. Fertility decreases with age. A "late bloomer" baby boom compensation may occur in the next few years with rates rising rapidly to "catch up" with delayed first pregnancies. But poorly tested assumption relies heavily on the fact that women who are in the job market still plan on parenting. This career delay has become true for only a small but powerful and visible minority in the middle to upper middle classes, the same minority most active in surrogacy.⁸

A second reason for this drop in fertility has been that both birth control and abortion allow control over number of pregnancies. This rationale assumes one of two things. First, that family planning in the past was unsatisfactory, leading to unplanned children. Second, a change in the preferred size of families creates a desire for fewer children and has been concomitant with the demand for birth control and abortion.

The third reason for a decreasing fertility rate is increasing physiologic infertility. Increasing age of first pregnancy, increased use of effective but iatrogenic birth control and abortion, and increased prevalence of sexually transmitted disease are all factors in a complex equation that might create

⁶ United States. Bureau of the Census: *Household and Family Characteristics March 1980*. Current Population Reports, Series P-20. No. 336. Washington D.C. U.S. Government Printing Office. (1981)

⁷ Peter Singer and Deane Wells: *Making Babies: The New Science and Ethics of Conception*. New York: Scribner's. (1985), p. 26-27.

⁸ Interview, assistant director of a surrogate parenting clinic.

increased inability to fertilize an ovum and carry a fetus to term. Some of these factors are social, some medical.

Some solutions to infertility

Defining infertility has great bearing on the perception of the use of new reproductive technologies. When infertility is discussed as a medical problem, it can be subsumed under a metaphor of illness.⁹ Its *cure* depends on the medical evaluation and reversal of the condition. The use of third parties is not a cure. One is still infertile after adoption, AID or surrogacy. It alleviates a social problem- childlessness.¹⁰ Because medicine is a formidable power in society, an ability to use available techniques to cure what is a social problem is now considered standard treatment. There has been demand for medical therapy of infertility. It has become a standard of care that will probably not disappear, even if society decides by legislation or policy that it cannot support third party reproduction.

Couples have turned to medicine for evaluation and for a cure. Desire to have a child genetically related to at least one partner and failure of other methods have increased use of third party reproduction. Until a decade ago, the only third party reproduction used was AID. A relatively simple procedure performable at home, AID is now a standard of therapy for male infertility. This method is also used by women who might not otherwise

⁹ Morgan: *Making Motherhood Male*, p. 225.

¹⁰ R Snowden, GD Mitchell, EM Snowden: *Artificial Reproduction: a Social Investigation*. London: George Allen & Unwin. (1983), p. 16. Hereinafter Snowden: *Artificial Reproduction*. George Annas: "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor." *Fam L Q* 1-14. (1980), p. 13-15. Hereinafter Annas: *Father's Anonymous*.

have a male partner.¹¹ Although some surrogates may be accomplishing pregnancy the old-fashioned way, this procedure also relies on AID.

Surrogacy is a term used very loosely. It describes arrangements such as the one the Sterns had with Mary Beth Whitehead. But the actual term is a misnomer. Surrogates are those who stand in for another: a parent is the surrogate decision-maker for a minor. There are a variety of terms introduced to describe the role of a woman who bears a child with the intention of relinquishing her parental rights in order to allow sole rights to the biological father and his wife. Some terms imply distaste, some are neutral and others imply commercialism: breeding mother, gestating mother, surrogate wife, womb renters, womb vendors, surrogate birth mother and others.

As new alternative reproduction methods, both AID and surrogacy represent some fundamental changes in the way women and men are attempting to construct families. By "construct" I mean a planned strategy with distinct paths and goals. This has been the hallmark of families created as a result of alternative reproduction. These families do not happen by accident or as a matter of life course. Surrogate motherhood, in particular, involves a discussion among the participants, usually moderated by a third party, to facilitate this planning.

What is the purpose of comparing AID and surrogacy? Although both are commonly considered forms of third party reproduction, surrogacy is more aptly represented by "the donation of an ovum with a nine month womb

¹¹ M. Curie-Cohen, L. Lutrell, and S. Shapiro: "Current Practice of AID in the U.S." *N Engl J Med* 300 (Mar 14): 585-590. (1979) p. 587. Hereinafter referred to as Curie-Cohen: Current Practice of AID. Single women and lesbian couples have shown increasing use of AID. Where it was once very difficult to achieve, many clinics no longer discriminate among recipients. The procedure is also easy to accomplish at home with sperm supplied by a practitioner or performed by a practitioner with sperm brought by the client.

rental thrown in..."¹² Surrogacy requires a long and intimate attachment between the woman and the child. Surrogacy requires and carries much greater risk, time and effort as well as a laborious and painful procedure at the end of the gestation. There is, in short, a very significant gift of the body. More acerbically put by Gena Corea, a vocal opponent of surrogacy:

There is no analogy between the sperm of a man and the womb of a woman. There is none. They are not analogous in any way . To underscore it: not physiologically, not ethically, not reproductively, not morally and by no means are they analogous in terms of their meaning to the integrity of the person.¹³

But the public discourse has often compared the two. Joseph Fletcher, a "conception revolution" advocate, calls them both tasks of tenderness.¹⁴ One infertile woman asked "If artificial insemination for couples where the man is infertile is all right, why is this not?"¹⁵ Others argue that despite similarities, the differences are appropriately adjusted by payment with respect to a greater burden on the surrogate mother.

To ignore most of the similarities we need only to dismiss the interests of the child produced. Since the ultimate goal of both is to enable a couple or a single person to overcome either a social or medical obstacle and construct a family, the common denominator is that both produce a child. However, I have stated that the issues relevant to the child will not be addressed

¹² George Annas: "Contracts to Bear a Child: Compassion or Commercialism?" *Hastings Center Report* April: 23-24. (1981), p. 23. Hereinafter referred to as Annas: Contracts to Bear a Child. The complete quote asks "...or are they really agreements to sell a baby?"

¹³ Gena Corea: *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*. New York: Harper and Row. (1985) ?

¹⁴ Joseph Fletcher: *Humanhood*. Buffalo, NY: Prometheus Books. (1979)

¹⁵ Nadine Brozan: "Surrogate Mothers: Problems and Goals." *New York Times*, Feb. 27, 1984, Sec C, p 12. (1984)

specifically in this paper. Instead, this paper focuses on the public response to salable physical attributes and services of women is based on the possibility of alienability of those attributes. Although I summarize that there are too few similarities between the job required of a sperm vendor and that of an ovum vendor/womb renter to advocate surrogacy based on the present acceptance of AID, examination of AID elucidates some fundamental ways we prescribe the role of men and that of women. It contributes to a framework in which we might evaluate surrogate motherhood.

B. Artificial Insemination by Donor

AID was developed for widespread use in animal husbandry in the nineteenth century though it has been used for much longer, perhaps thousands of years. The first medical use in humans was performed and reported by Dr. J. Marion Sims in 1866, who later renounced his work as immoral and deeply regretted his actions.¹ A small group of practitioners in Great Britain reported to the British Medical Association (BMA) in 1945 the advent of the practice of insemination with the husband's semen and subsequent application to infertility problems.² In 1948, artificial insemination with husband or donor sperm was made a criminal offense in Great Britain. In 1957 the Morton Commission in Great Britain released its report on the place and danger of "sexual license and permissiveness."³ The Commission advocated reproductive behavior only within the bonds of matrimony and called for the criminalization of AID as the attempt to "foster another man's child on an unwitting husband"⁴ although it is unlikely that the husband was always unwitting. More than two decades later, others have similarly construed the relationship between donor and recipient as adulterous because AID introduces "into the family of the husband a false strain of blood."⁵

Nevertheless, growing need and interest spurred deregulation of AID. AID laws were accepted slowly but with a similarity to surrogacy: if

¹ Allen Holloway: "Artificial Insemination: An Examination of the Legal Aspects. *ABA J* 43: 1089-1092. (1957) Hereinafter Holloway: Artificial Insemination.

² Snowden: Artificial Reproduction, p. 10.

³ Morton Commission as cited in Carol Smart: *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations*. London: The Women's Press. (1984), p. 37.

⁴ *Ibid.*, p. 39.

⁵ Holloway, Artificial Insemination, p.1092.

criminalized many thought it would simply go underground.⁶ Ignoring an unregulated practice still would permit relatively small and discrete numbers of couples to utilise this technology without appearing to condone or facilitate AID. Perhaps those individuals involved in setting policy also relied on the fact that couples involved in AID would prefer anonymity. Anonymity would help to retain the obscurity of the practice. But in 1970, growing use prompted a British Medical Association panel not only to advocate laws but advocate coverage for AID under the National Health System.⁷ The BMA estimated 1400 procedures a year were being performed in 1970, yielding a significant number of children if all attempts were successful. Because secrecy on the part of the family is a large part of the process, estimates are probably conservative. Physicians appear to be sensitive to the concern their clients might have about secrecy, similar to that in adoption. Very rough estimates from clinical sources put the annual number of births in the United States at 6000-10,000.⁸

In AID a man, usually anonymously, produces a sperm specimen for insemination into a woman without a fertile male partner. Although the man is called a "donor", he is actually paid and perhaps better described by the term "vendor".⁹ Language itself expresses the fine distinctions between the role of a donor and that of a vendor. Vendor is offensive to some, cold and impersonal, which has significance for the way we might wish to see this

⁶ Snowden: *Artificial Reproduction*, p. 10.

⁷ *Ibid.*, p. 11.

⁸ Curie-Cohen: *Current Practice of AID*, p. 588.

⁹ Lori Andrews: *New Conceptions: A Consumer's Guide to the Newest Infertility Treatments*. New York: St. Martin's Press. (1985). Ms. Andrews in most of her work makes great distinction between the use of the words donor and vendor. She states that the act of monetary exchange creates a vendor/buyer rubric although the value of donation is not necessarily removed from the exchange. See also Annas: *Contracts to Bear a Child and Fathers Anonymous* in which he discusses and uses vendor in a more pejorative sense.

exchange. Donor may construe a type of giving relationship that is not actually present. Sperm acquisition for AID has rarely been one of donation.

In California, the law regarding AID is subsumed in the Uniform Parentage Act. The law provides that the:

...donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.¹⁰

The section further stipulates that insemination of a woman whose husband consents to the procedure in writing to the attendant physician is to be considered the natural father. This gives the intended parents, if a couple, the right to declare the non-biological father as the father on the birth certificate. This section as it now stands results from the case of *Jhordan C. v. Mary K.*¹¹ Mary K. had asked an acquaintance, Jhordan C. for a sperm donation with the understanding that he would not seek any further involvement with her or her child. Jhordan C. agreed, supplied the sperm that Mary K. used to successfully inseminate herself at home. Because they were acquaintances and they were employed at the same establishment, their interactions were not limited prior to birth. Jhordan C. then asked to see the child and, over a one year period maintained contact and gave him presents. Jhordan C.'s desire to maintain a father relationship with the child led to his filing a claim to parental rights and legal custody for the child. In order to establish paternity, as occurred in *Jhordan C. v. Mary K.*, either a parent-child relationship had to be demonstrated as existent, the woman's husband was

¹⁰ West's Ann. California Civil Code, Sec 7005 (b).

¹¹ *Jhordan C. v. Mary K.* 179 Cal. App. 3d 386. (1986).

[presumed father, or the actual insemination was not performed by a physician thereby allowing for suit by the donor.

Jhordan C.'s claim was accepted because the insemination was not performed by a physician. It is highly likely that the claim would have also been regarded quite differently if Mary K, had been married or had another man who might have been the presumptive father. Because the father had established a relationship during the child's first year of life, the court found that the interest's of the child were best served by joint custody. It is interesting to note that this case allowed joint custody to a "third party" father where Whitehead, a "third party" mother, was denied contact with the child by the lower court ruling.

This case clarified and rewrote the law in California. It established that the donor/vendor could claim paternity if there was no presumptive father or if the insemination was not performed under physician's supervision. The case established that when physicians or persons under the direction of physicians performed the insemination, the biological father would not be the legally recognized father. Physician inseminations protected the donor from suit by the woman or, later, by his genetically related child. This particular case was the exception that clarified the rule since most prior AID had been performed anonymously and by physicians. It placed AID under the purview of medical therapy. The case ensured sole parental rights for the woman and her husband if any. It showed how to secure anonymity for all parties and how anonymity would be lost even to the point of overriding individual's provisions to the contrary. The case condoned the past practice within the purview of the medical field. Statutes which had been constructed initially to *protect* the anonymous donor from suit by the

mother developed a new twist now that there was the reverse- a donor wanting fatherhood.

Historically, records of inseminations were rarely kept and not required to be kept by the practitioner. This created difficulty in seeking information by the recipient, the child and the donor.¹² Again, this protection was to afford the donor safety. Without such protection, some feared that the donor might have felt unprotected legally from a paternity suit and that this would compromise the sperm supply. The statute ensured that this procreative gift would be separated from fatherhood by clarifying the legal right of the donor to be absent from parental duties. No term was ever used to describe this as surrogate father, biological father or any parental relationship at all. Concealment made this "technology" palatable for many families who wished to conceal their infertility. In a study by a British clinic active in AID from the late 1950s of couples who had children by AID over a twenty year period, many had expressed a desire to have their own baby and to minimize the "dirty laundry" of a husband's infertility problems. "AID is creation. Adoption is accomodation...to pass [as a] normal family"¹³ by being able to hide certain aspects of the creation of that family. These same concerns are voiced today by the understandable desire for many couples to maintain reproductive issues as private. One interviewee said:

And when men became sperm donors or sperm donors became public, there was a law made very quickly to protect men who were [donors]. I can guarantee you we will not have laws to protect egg donors for quite some time... eggs are much more controversial.

¹² Annas: Fathers Anonymous, p. 12-13.

¹³ Snowden: Artificial Reproduction, p.89.

The key point is that AID was treated quite dissimilarly to surrogacy. If AID were introduced today as a new concept it might also relieve some hesitation and public discussion given the new insight we now have after Baby M regarding parental relationships and agreements of matters dear to the heart. Adoption services and birthmother/adoptee organizations have organized to question our methods of concealment in adoption and AID. Still, AID enjoys some protection different from that of other third party reproduction. Four major points serve to underscore and illustrate these differences:

First, there has never been any discussion of the ancillary parties and services that have facilitated AID. Sperm banks have entered into existence with little or no regulation in most states. While it is commonly accepted that the vendor/donor and recipient's husband, if there is one, be matched for physical characteristics, very little has been said of eugenics or interference by these third parties.¹⁴ AID has been a mainstay of therapy in the practice of many infertility specialists. The public dialogue has not entered any debates on the relative efficacy or palatability of such health care businesses.

Second, there was an assumption of disinterest in paternity by the vendor. The statute made possible the anonymity of the vendor. The sperm vendor's biological relationship with the child was not taken to infer any commitment, interest or desire on his part to enter into a parent-child relationship. He was protected from his child's interest as well. Unlike some surrogate mothers, the vendor/donor was not stigmatized for his lack of interest in assuming a father relationship. Conversely he was not publically acknowledged as the

¹⁴ Most concern has come from religious opposition. However, several others have voiced concern regarding a slippery slope to eugenic breeding- See George Annas in general. Herbert Krimmel: "The Case Against Surrogate Parenting." *Hasting Center Report* October: 35-39. (1983)

giver of a priceless gift to a couple or woman as surrogate mothers might be. His role would seem to have been trivialized with respect to the importance of the child to such an individual. As one critic of surrogacy remarks "men seldom bond to their ejaculate."¹⁵ But the issue is more symbolic than the sperm since this would presume that fathers are unable to bond with their own children. Is it that men cannot bond with children? Of course, this is not the case. Rather it is a sexist assumption of the level of desire which men, in general, have been thought to have for the business of fatherhood.

Third, the best interest of the child was secondary to anonymity for the vendor/donor. Best interest of the child and reproductive rights are the most prominent aspects in the discussion of surrogacy. The discussion of children's rights, which is only beginning to be included in AID and adoption circles, was limited in AID. As the first generation of AID children become adults, some have a sense of loss and betrayal by having an unknown past, a genetic confusion.¹⁶ Adoption, birth mother and children's welfare advocates are pointing to the deleterious aspects of anonymous records. Alexander Capron, Professor of Law and Ethics at USC, has criticized the present policies on AID for limited interest in the clarification of legal rights of the woman or child.¹⁷ George Annas, in "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor", lashes out at the AID laws. He charges them with exaggerated concern with the legal pitfalls of the vendor to the detriment of the best interests of the child.¹⁸ Among his criticisms are: the biological father

¹⁵ William Pierce: "Government Should Ban Surrogate Parenting". *National Committee for Adoption, Inc.* Position statement, April 16, 1987, p. 7. William Pierce is Executive Director of National Committee on Adoption, Inc.

¹⁶ See Snowden and Annas: Fathers Anonymous. Also Alexander Capron: "Alternative Birth Technologies." *UC Davis L Rev* 20: 679-704. (1987) Hereinafter Capron.

¹⁷ Alexander Capron, "Alternative Birth Technologies." *UC Davis L Rev* 20: 679-704. (1987) p.693. Hereinafter Capron: Alternative Birth Technologies.

¹⁸ Annas: Fathers Anonymous, p.1.

gives up future rights to any relationship with his child; the physician or facility fails to keep records, or mixes the sperm of two or three vendors/donors to confuse paternity.¹⁹ Whose interest is being served? Most often the answer is the adopting parent and the vendor/donor in deflecting legal responsibility for a child.²⁰ Is this new concern for separation of the child and from his or her biological parent true for both AID and surrogacy? Or is there some distinction between the mother-child and father-child bonds?

Fourth, there has never been a public discussion about payment of donors. Money would seem to be an accepted method of compensation in AID. The absence of discourse might be attributed to several factors. We might assume that there is a relative disinterest in the meaning of commodifying sperm unlike the public interest in commodifying the rental or donation of nine months in the womb. I posit that the lack of discussion was not forgetfulness or malice but a primary assumption that the item in question, sperm, was marketable and commodifiable. Payment would seem obvious and expected if the thing to be paid for was both valued by the recipient and vendor/donor and considered commodifiable by both parties. The pay has been \$25-\$100 for a product that is completely replenishable, and a service that is low risk and takes little time.²¹ The exchange of sperm for money, unlike surrogacy, is rarely likened to sex work, although one author recounts the story of several medical students who compared their fees for services to prostitution.²² It might be that until recently donors and vendors were often solicited from

¹⁹ Annas: *Fathers Anonymous*, p. 12.

²⁰ Capron: *Alternative Birth Technologies*, p. 691.

²¹ The fee ranges from \$20-\$100 and has been within this range for at fifteen years. Most donors are paid less than \$35 per sample (87.9%). See Curie-Cohen: *Current Practice of AID*, p. 587.

²² W. Finegold *Artificial Insemination*, cited in Cynthia Rushevsky: "Legal Recognition of Surrogate Gestation." *Women's Rights Law Reporter* 7(2): 107- 142. (1982). p. 112 (footnote). One donor declined to cash his check when notified of the recipient's pregnancy; he said it would make him feel like a prostitute.

professional schools. Would such a pool of individuals be less likely to be suspect on grounds of prostitution? Are men less suspect? Or is it simply that the impersonal nature of the transaction does not conjure up the same connotations of sexuality? After all, he does not receive another's egg *into* his body.

These four important distinctions point to a common theme that I offer in order to put surrogacy into a new perspective. These parameters to AID are responses that recapitulate the acceptance of traditional men's roles in parenting and in the public domain. Men have been afforded the ability to trade in their bodies and body products and labor to a greater extent than women. Whether it is physical labor, youth and vitality- as in competitive sports- or body products, men have been allowed a greater range of mobility and access to monetary trade. There has been no cry of the callousness of abandonment of the fruits of his sperm. On the other hand, there has been no exclamations of generosity or altruism.²³ There is no doubt that the risk and discomfort involved in selling semen is significantly lower than that of ova or even blood donation. Even blood donation versus payment for blood, which I discuss below, has enjoyed scholarly analysis²⁴; paid AID has been ignored. Briefly, the role of the father as more aloof and more able to leave the family role than the mother allows for a very different set of rules with regard to alternative reproduction. While hopefully few father-child relationships are represented by this framework, there is a relative lack of social stigma applied to the disattachment when compared to a mother's abandonment or disinterest.

²³ Annas in particular and others have begun to advocate a gift arrangement and open records.

²⁴ Richard Titmuss: *The Gift Relationship: From Human Blood to Social Policy*. New York: Pantheon Books. (1971) Hereinafter Titmuss: *The Gift Relationship*.

The history of AID acceptance is a story still unfolding. Despite the wide acceptance in the medical community, indicated by the number of births per year attributable to AID, not all state legislatures have enacted laws to govern the performance of AID. In 1986, Ohio and New Mexico brought the number of states with AID laws to thirty.²⁵ Do the remaining twenty-two have no need of laws, no interest in facilitating or have no awareness of an impending need for legislation either for or against AID? One physician called AID, unlike surrogacy, a "justifiably...well established procedure with limited emotional involvement from the 'donor'"²⁶ intimating that AID needed no such regulation as compared to surrogacy. This legislative history is decidedly not the case in surrogacy. If the Baby M case has left its imprint in an unequivocal way, it certainly has done so at the state legislatures. More than thirty states now face legislation regarding surrogacy; a number of these have additional guidelines for AID as well indicating a reconstruction of alternative reproduction law and value.²⁷

Then what is discernibly new in surrogacy? There is almost always an exchange of money, a promise or structure to limit future interaction with the child, a gift, a service and a needy person or persons. Both satisfy the desire and need of a childless couple or person. The similarities are apparent but inconclusive. The American Fertility Society, in evaluating surrogacy, used AID as a comparison with the conclusion that there were not adequate differences between the two to prohibit surrogacy but allow AID at this time, requesting scholarly study to warrant a future decision.²⁸ We have separated

²⁵ Lori Andrews: "The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood." *Hastings Center Report* October: 31-40. (1987), p. 31.

²⁶ California Assembly Hearing of Nov 19, 1982. Letter to Judiciary Committee, 6/28/82.

²⁷ *Ibid.*, p. 39.

²⁸ American Fertility Society: Ethical and Professional Guidelines to Infertility Treatments. *Fertility and Sterility Supplement 1* 46 (3): p. 67S. (1986)

AID from the same context as surrogacy because the time, effort and risk to the vendor/donor of sperm are minimal. In surrogacy there is a larger burden in time, risk and physical expense that some find reflected in "consideration"²⁹, some find too risky³⁰, some simply abhorrent for a variety of reasons. If a man has the right to vend his sperm, a woman may also be able to vend her ova. But surrogate mothers are also leasing their womb for nine months- an ovum donation with a "gratis" nine month rental thrown in.³¹ What is the source of contention in surrogacy that causes people to voice strong opinions for and against the practice? Although reproductive rights may or may not extend into the procurement of children in any way that we wish, the distinction between those methods that employ men and those that employ women should be subject to scrutiny.

²⁹ Martha Field: "Surrogate Motherhood- The Legal Issues." (in press) (1988), p. 17.

³⁰ See Capron, Annas, Krimmel. Mostly these authors are concerned with respect to effects on children. Capron and Annas are concerned with exploitation of poor and minority women as surrogates.

³¹ George Annas: "Baby M: Babies (and Justice) for Sale." *Hastings Center Report* June: 13-15. (1987), p. 14. Hereinafter, Annas: Baby M.

Part II

A. History of California Legislature

Any change in custom or practice in this emotionally charged area has always elicited a response from established custom and law of horrified negation at first; then negation without horror; then slow and very gradual curiosity, study, evaluation, and finally a very slow but steady acceptance.

- Sophia Klegman and Sherwin Kaufman, *Infertility in Women* ¹

The history of AID is instructive in new reproductive technologies. The emergence of new reproductive technologies has forced society to reconsider its old values regarding the creation of family. Reproductive issues are concerned with values that are not gender blind and this paper deals with the import of new and old values that are specific to women. The greater the value placed on women's roles in reproduction, the greater the trespasses will appear if she acts outside the limits of that role. In addition, any change in such a valued role may warrant a relatively greater amount of concern for maintaining that traditional role. If the above authors' statement is correct, any change in that role and the dissemination of that change from communities will take a relatively long time for the assessment and resolution of conflicts.

Society highly values motherhood and the creation of family. The state has discovered a compelling interest from many fronts in the matters of the

¹ Sophia Klegman and Sherwin A. Kaufman quoted in Lori Andrews: "The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood." *Hastings Center Report* October: 31-40. (1987), p. 31. Hereinafter Andrews, *Aftermath of Baby M*.

family and reproduction.² *Roe v. Wade* can be used to emphasize that the corollary of the right not to procreate is the right to choose to do so.³ Several other cases, such as *Eisenstadt v. Baird*, *Griswold v. Connecticut* and *Skinner v. Oklahoma*, have also been cited as construing a right to privacy and to procreate is protected.⁴ Yet, legislation has curbed, controlled or limited sexual behavior. If "surrogate mothering, like pornography, is situated in that volatile zone where law and ethics, commerce and the body, intersect and widely divergent moralities collide"⁵ then we begin to understand the broad spectrum of issues that the law and the public must consider and the weight that social value must play in the public discussion.

The matter of surrogacy could be examined in either courts of law or in the legislatures. The courts are subject to public opinion and discussion to a lesser extent than the legislature. It is in the legislature that the public is expected to discourse, educate, engage, mediate, compromise and create law that will sufficiently meet the needs of individuals involved and satisfy the courts. Although five cases of surrogate contracts have reached the stage of court litigation, only *Baby M* made headlines. But the court records do not necessarily reflect the social and public issues raised in the course of such litigation. Courts may be left to adjudicate in a piecemeal fashion as dilemmas occur. The New Jersey Supreme Court's decision on *Baby M* is an example of how both the courts and the individuals involved in surrogacy have suggested that the legislature act in order to clarify the situation. With

² *Doe v Attorney General Kelly*, 106 Mich App. 169, 307 N.W.2d 438 (1981). *Eisenstadt v. Baird*, 405 U.S. 438, 453. (1971)

³ *Roe v. Wade*, 410 U.S. 113 (1973)

⁴ See "Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers." *Harvard L Rev* 99 (2): 1936- 1955. (1986) referring to right to abortion and right to procreate as constructed in case law. *Eisenstadt v. Baird*, 405 U.S. 438. See also Lorio: "Alternative Means of Reproduction: Virgin Territory for State Legislation." *Louisiana L Rev* 44: 1641-1673. (1984)

⁵ Levine, p.48. where's this from?

notable exceptions, there has generally been an effort by the legislatures to accumulate information in order to meet this need and to regulate surrogacy in some form. A New York Senator, John Dunne, author of legislation providing regulation of surrogate contracts, said:

We recognized after considerable research that the right to choose whether to bear or beget a child is a constitutional right and therefore, we came to the legal conclusion- desirable or undesirable- that we could not outlaw it.⁶

The primary exceptions to the call for regulation have been individuals and groups, most notably religious groups, who propose that surrogacy in any form should be proscribed. However the more general consensus has been to modify present arrangements for the alarmingly simple reason that most people, in the legislature or otherwise, seem to believe that surrogate motherhood is here to stay.

There is general acceptance that criminalization would "drive the practice underground"⁷ furthering the possible exploitation of all parties, increasing their risk and the level of detriment to the child. Some aspects of this assumption are erroneous; for example, if baby-selling occurred before it was criminalized why did baby broker laws successfully, but not completely, limit this trade? Nevertheless, prevailing opinion⁸ about surrogacy nevertheless appears to favor some kind of regulation, not a ban, if only by slight margins.

Regulation has the advantage for some of being a method with which to protect all parties and thereby facilitate surrogacy in some way. For others

⁶ Senator Dunne quoted in Jane Andrade: "The Law and Surrogate Motherhood." *State Legislatures* July: 24-26. (1987), p. 25.

⁷ Alan Rassaby: "Surrogate Motherhood- The Position and Problem of Substitutes." In (eds.), p. 97-109. Melbourne: Oxford University Press. (1982) p. 102.

⁸ Interviewed activists, most testimony to California Assembly Hearing Nov. 19, 1982 and California Senate Testimony of Dec. 11, 1987 and such indicators as "Surrogate Mothers: A Newsweek Poll." *Newsweek Magazine* Jan. 19, 1987. p. 48.

who may object to or feel more ambivalent about surrogacy, regulation will make the job of surrogacy less palatable by increasing the burden of risk to participants or penalizing particular forms of surrogacy. In an interview for *State Legislatures* Alexander Capron finds it "[un]feasible to literally outlaw the procedure.' ...[and] maintains a government can allow the practice totake place" while strongly discouraging it.⁹

The goals of bills that address the issue of surrogacy are multiple but may be summarised as encompassing four main issues: 1) the enforceability of the contract for the surrogate should she renege; 2) the determination of the legal parents by contribution of genetic material, gestation, intent to adopt or any combination of the three; 3) the participation of individuals covering such issues as age, marital status; and 4) the ability to pay surrogates entering into an agreement to gestate a child with the intention of relinquishing parental rights. Of these four, I have chosen to discuss the last, the issue of payment versus volunteer surrogacy.

Because of the speed of introduction, hearing and, usually, defeat, the list of bills in any state legislature may not be up to date. Nevertheless, a sketch of bills presently making their way through the legislative process is useful in understanding the direction legislation is taking. The majority of bills proposed in the United States over the past two years have allowed surrogacy in some form.¹⁰ Only five proposed bills (Alabama, Illinois, Iowa, Maryland, and Wisconsin) would ban surrogacy altogether.¹¹ Of those that have specific provisions regarding payment, eleven proposed to allow regulated paid

⁹ Jane Andrade: "The Law and Surrogate Motherhood." *State Legislatures* July: 24-26. (1987), p. 25.

¹⁰ Andrews, *Aftermath of Baby M*, p. 34.

¹¹ *Ibid.*, p. 32.

surrogacy¹², four proposed to void paid surrogacy contracts but presumably allow unpaid¹³. Seven proposed specifically to ban paid surrogacy. Of these seven, there were a variety of responses to unpaid surrogacy ranging from ignoring it to allowing it.¹⁴ Presently, only three states have enacted laws regarding surrogacy issues. The only law pertaining to payment is that of Nevada; it exempts surrogacy from laws prohibiting payments in connection with adoptions.¹⁵ This appears to be consistent with Nevada's regulation and decriminalization of prostitution.

The history of surrogate motherhood legislation in the state of California can be summarised in five bills presented in three sessions of the legislature. The history of these bills begins with William Handel, a young lawyer, who had been retained as counsel for a couple entering into a surrogate parenting arrangement. His concern for the lack of law regarding surrogacy arrangements in ascertaining the limits and legality of such a contract led him to consult John FitzRandolph, Professor of Law at Whittier College School of Law and later Director of the Surrogate Parenting Foundation, Inc. Mr. FitzRandolph's solution was to present the material as an exercise to his law school class in legislation. The class addressed the issue by writing a bill which was the backbone of the bill later introduced by Assembly Member Mike Roos as Assembly Bill 3771 and 365.¹⁶ The bill's premise was to exempt surrogate arrangements from the Penal Code statute prohibiting the selling of

¹² IL, NJ, MA, NY, PA, MD, MI, MN, MO, OR, SC as cited in Andrews, *Aftermath of Baby M*, p. 40.

¹³ AL, MN, NB, NY, as cited in Andrews, *Aftermath of Baby M*, p. 40.

¹⁴ FL, KY, MI, NJ, NY, OK, PA as cited in Andrews, *Aftermath of Baby M*, p. 40.

¹⁵ Andrews, *Aftermath of Baby M*.

¹⁶ California Legislature. Assembly: *An act to add Part 9 to Division 4 of the Civil Code, relating to surrogate parenthood, and declaring the urgency thereof, to take effect immediately. (Surrogate Parent Act of 1982). A.B. 3771 and 365. 1981-82 Regular Session. (1982)* Hereinafter AB 3771 and 365, 1982.

persons and the Civil Code prohibition against selling of babies in the Uniform Parentage Act.¹⁷

The rationale for legislation was stated by several parties at the California Assembly Hearings before the Committee on Judiciary as decriminalizing an action that "was going to happen anyway".¹⁸ The bill required a home study and evaluation of the adoptive couples ability to "function as parents"¹⁹; it required "reasonable monetary compensation"²⁰ for the surrogate; and allowed the court oversight in the placement of compensations in escrow and it's disbursement.²¹ The bill's inclusion of court approval for a "reasonable" fee was apparently not of great concern since it occupied no time in the discussion in the hearings. Payment was discussed in reference to the aspects of payment that would coerce a potential surrogate to undertake the contract and with respect to whether the contract was in fact baby-selling. Opponents of payment grounded their argument in baby-selling laws but were also the same individuals and groups that opposed surrogacy in general. No participant who criticized payment spoke in favor of a volunteer surrogacy agreement.

With the defeat of AB 3771 and 365 in the Committee on Judiciary, surrogacy did not enter the legislative picture for three more years. In this time, Surrogate Parenting Associates, Inc. continued its actions to bring together infertile couples and surrogates for a fee. AB 1707 was written by the California State Bar Association Family Law Section and introduced by

¹⁷ West's Ann. Calif. Penal Code Sec. 181 and 273. Sec. 274, prohibiting advertising for the purpose of placement or adoption of a child is also addressed by this bill. Civil Code Div. 4 Sec. 7017 regarding termination of parenting rights.

¹⁸ California Assembly Hearing of Nov. 19, 1982.

¹⁹ AB 3771, 1982, p. 4, 7505 (c).

²⁰ AB 3771, 1982, p. 4, 7506 (e).

²¹ AB 3771, 1982, p. 4, 7506 (f).

Assembly Member Jean Duffy in March of 1985. Duffy was approached, as she says, for two reasons: 1) she was on the Committee on Judiciary; and 2) she was a nurse, a woman and therefore seen as a "friend" of such a bill.²²

AB 1707 was written like AB3771 to be highly regulatory but this time without the oversight of the courts. The Senate bill digest stated the purpose of the bill was to:

...establish the Alternative Reproduction Act of 1985, which would authorize a procedure, determine what would constitute a valid and enforceable contract, and declare the legislative intent that surrogate contracts are not against sound social policy.

The purpose of this bill is to authorize child bearing by surrogates, for a fee.²³

The bill sought to set up certain uniform measures regarding surrogate contracts. One these measures stipulated the requirements of the agreement and the obligations of each party-surrogate, her husband if any and the "intended" and/or biological parent or parents.²⁴ The intended parents, referring to the adopting couple, were responsible for securing the fees of all required medical, psychological and legal fees in addition to a "reasonable monetary compensation" to be paid the surrogate.²⁵ The surrogate's wages, child care for her other children, transportation and "other expenses" of daily living were not to be provided unless expressly stated.²⁶ This left the "reasonable fee" to be payment for services of gestation. Proponents of

²² Interview, Jean Duffy, author of AB 1707, 1985.

²³ California Legislature. Assembly: *Alternative Reproduction Act of 1985*. AB 1707, 1985-86 Regular Session. (1985) Legislative digest. Hereinafter AB 1707, 1985.

²⁴ AB 1707, 1985 made provision for the adoptive person to be married or unmarried. AB 1707, 1985, p. 2, 7502 (f)-(h).

²⁵ AB 1707, 1985, Sec. 7522 (e).

²⁶ AB 1707, 1985, Sec. 7519 (i).

payment expressed that the money was like lost wages during her pregnancy and payed for her inconveniences and risk. All known and estimated fees, such as for medical expenses, were placed in an escrow account on execution of the surrogate contract. The timing of disbursement of the compensation, whether before or after relinquishment, was not covered in the bill.

Support for this bill came from the Bar Associations of Beverly Hills, Riverside, and San Francisco and from the California Medical Association. Opposition was a longer and more formidable list with the ACLU, two adoption agency associations, two Catholic organizations, Committee on Moral Concerns and the Women Lawyers' Association of Los Angeles and Sacramento. The bill was unusually prescriptive regarding the components of the contract, the method of entering the contract and the regulation of the contract. This drew criticism from several groups concerned about the imbalance of legal power between the couple and the surrogate. A legislative digest was published of the the main arguments of these groups for and against the bill, but it had no specific references to testimony about fees paid to the surrogate. Neither side addressed the treatment of women as commodities with regards to gestational services.

In an interview Ms. Duffy, who is now practising law and engaging in lobby efforts, stated that the intent of the bill was to give better protection to all parties and increase options for all parties. The contingent of lawyer's both for and against the bill "argued for the basic ingredients of the contract. They wanted to set up a negotiable contract... regardless of the issues to set up some guidelines since it [surrogacy] was going on."²⁷ As some members of the Bar Association pulled back for various reasons, opposition from the Women

²⁷ Interview, Jean Duffy, author of AB 1707, 1985.

Lawyers' Associations grew out of the perception that the surrogates' interests were being placed secondary to those of the child and the adoptive parents. Those interests of concern were the ability for the surrogate to revoke her obligation to relinquish the child and to have control over her pregnancy. The concerns that the association raised later became important feminist arguments with regard to surrogacy as I will discuss in Part III.

The latest efforts in the California Legislature have been three bills proscribing particular types of payment to surrogate mothers. Assembly Member Longshore introduced AB 2403 and 2404 in March 1987. AB 2403, "Pursuant to specified procedures for adoption"²⁸, prohibits voluntary relinquishment of a child by his or her biological parent. By specifying conformance to sections prohibiting the exchange of consideration for a child, the bill limits the ability of a surrogate to be paid by a couple if the payment is intended to compensate the mother for "cooperation in the completion of an adoption of a child."²⁹ The companion bill AB 2404 forbids payment for agreement to undergo abortion or prenatal diagnostic tests if "the purpose of the test is not the protection of the woman's or the child's life or health."³⁰ The latter bill, coming from a legislator active in pro-life laws, ironically protects the right of the woman to control her pregnancy and retain decision-making in her pregnancy without monetary coercion. Both bills received little support and are expected to die in committee.³¹

²⁸ California Legislature. Assembly. *An act to add Section 1669.5 to the Civil Code, relating to contracts*. A.B. 2404, 1987-88 Regular Session. (1987) Legislative digest. Hereinafter AB 2404, 1987.

²⁹ California Legislature. Assembly: *An act to add Section 198 to the Civil Code, relating to parent and child*. A.B. 2403, 1987-88 Regular Session. (1987) Legislative digest. Hereinafter AB 2403, 1987.

³⁰ AB 2404, 1987, p. 1 Sec 1669.5 (a).

³¹ Interview, aide to author of AB 2403 and 2404, 1987.

On February 11, 1988, Assembly Member Sunny Mojonnier introduced AB 3200 which would void contracts to bear a child and would make a felony the act of being a broker for parents willing to pay a surrogate mother.³² The bill's introduction on the floor was announced in press conference by Mojonnier, surrogate mother Laurie Yates and her husband Richard. The Yates' are in litigation to keep the twins she bore as a result of a surrogate contract.³³ Also present was Sharon DeAngelo, attorney for and founding member of National Coalition Against Surrogacy. Like AB 2404 and 2403, this bill to the point and prohibits any fees that might be considered payment for facilitating a surrogate contract. Under AB 3200, anyone arranging, brokering or negotiating, or offering to arrange, broker or negotiate, or compiling information for the purpose of arranging, brokering or negotiating or soliciting for a contract to bear a child would be guilty of a felony punishable by state imprisonment of not less than two years. Any third person or party who commercially performs or attempts to perform advertising or solicitations towards a contract to bear a child would be guilty of a misdemeanor. The bill would establish the birth mother as the natural mother until such time as she decided to relinquish her child through the usual adoption proceedings pursuant to legally accepted routes.

The three bills, AB 2403, 2404 and 3200, proscribe payment of money which is seen as coercion to obligate a woman to perform in a way contrary to her wishes. The bills would ensure that fees could not legally bind a woman to have an unwanted abortion, for example, or exchange monies with the

³² California Legislature. Assembly: *An act to amend Section 7003 of, and to add Section 1668.4 to, the Civil Code, relating to contracts, and declaring the urgency thereof, to take effect immediately.* A.B. 3200, 1987-88 Regular Session. (1988) Hereinafter AB 3200, 1988.

³³ Ken Hoover: "Lawmaker Wants Surrogate Motherhood Outlawed." *United Press International*, Feb. 11, 1988.

purpose of relinquishing parental rights against her wishes. AB 3200 voids as *a priori* a contract by the surrogate mother to terminate her parental rights. All the bills, by implication, appear to allow the possibility of volunteer surrogacy except that in AB 3200 any surrogate contract entered into before a woman is pregnant is void. This eliminates surrogacy and leaves only adoption as the method of relinquishing parental rights.

The bills focus on the primary concerns of money and exchange of a child. They address and define the most pertinent issue as one of selling of children and coercion of surrogates. In one sense the bills are protective of the rights of the mother-she cannot be bought into an abortion or into an adoption arrangement against her wishes. Could the risk of coercion be avoided without proscribing money? The intent of the bills may not be purely to remove all threat of coercion but something deeper. It rests on a discomfort with the threat of commodification.

The five bills that have been introduced into the Assembly and Senate of California are in two distinct groups. The first two that permit surrogacy are highly regulated and permissive bills that were written before Baby M. The last three were written after the complex Baby M case. The public discourse about surrogacy has taken time to develop and to explore all the relevant aspects of the arrangement. Before Baby M, there was a notion that if we just controlled for everything the contract would work. The three bills after Baby M, and like many bills around the country, now take into account the deeply felt issues and emotional cost of the risks in surrogacy. There is more than just a temporal difference between the two sets. I will discuss them with relevance to the primary issues that I raise in this paper.

The permissability of surrogacy requires a dissection of the concerns for the parents, the birth mothers and the children born of surrogate arrangements.

This paper addresses the concerns of the surrogate. Can a woman carry a baby with the primary intent of relinquishing that baby to another individual? AB 3771 sought to locate surrogacy within the context of adoption proceedings and to utilise the courts as if there were no difference between surrogacy and adoption. AB 1707 did similarly except it did not use the courts to oversee the fruition of the contract. Both these bills ignored any potential differences between paid and unpaid surrogacy except in the Hearings of AB 3771 where the issues of coercion and baby-selling were brought out. However, as I will expand on later, the opponents to surrogacy were the vocal opposition to payment.

After Baby M, AB 3200 and 2403/4 bills present strong opposition to surrogacy if not in their content, then in interviews or press statements. One reason may be that these bills are intended to ride the crest of ambivalence about surrogacy following such a complicated and newsworthy case as Baby M. John Miller, consultant to the Senate Health and Human Services Committee, doubted any legislation even moderately favoring surrogacy would get introduced until the furor attenuated. Particularly in AB 3200, the bill's introduction with Sunny Mojonier, Sharon DeAngelo, founder and Attorney for the National Coalition Against Surrogacy, and the Yates family demonstrated the intention to void as many aspects of the contract as possible.³⁴ Then if this is the bill's intent, why does well over half of the bill dwell on the monetary aspects? AB 2303 and 2404 both attempt to limit surrogacy by placing limits on payment rather than on other aspects common to volunteer and paid surrogacy. In fact, the focus on monetary content, with the exception of some provisions in AB 3200, seems permissive of voluntary.

³⁴ Ibid.

It would then indicate disapproval of women undergoing this process for compensation rather than as volunteers. The preclusion might be demonstrative of a greater concern with payment than with some other items in surrogate contracts such as the obligations of parties to the children born of surrogate contracts. If the concern is with baby-selling, why do these last bills not address this apparently salient concern with the child? The preclusion of payment might also indicate that this was the easiest route by which to limit surrogacy. In fact, the tone of the argument, and of the press presentation, reveals intention to deter, and to punish, willing participants from mercenary intentions.

The case developed by both sides sought to address the promissory nature of the contract. It would then seem natural that the legislature might clarify this issue as well, but none of the *post* Baby M bills do this. This leads to the conclusion that the bills are either broadly disapproving of surrogacy or particularly disapproving of payment. In the former, payment is a vulnerable part of the contract that can be used to limit the contracts in general. In the latter, the problems concomitant with coercion, compulsion and commodification of the surrogate should be dissuaded by criminalization or proscription.

In the history of these five bills from the California legislature, there is a history and sociology of the role of women as mothers, as paid workers and a moral philosophy of the value and actions appropriate to that role. The bills proposed prior to Baby M encourage surrogate contracts. The later bills distinguishing paid from unpaid labor reflect a subtle but definite discomfort with the participation of women as surrogates. A desire to maintain clearer definitions of family, "work", gifts and women's role underlies this discomfort. These issues have significance for the direction that future

legislation can and should go. A better understanding of the values underlying the social role of women as child bearers, as members of a family, as mothers and as workers is necessary to give direction to my argument that volunteer surrogacy and paid surrogacy reflect certain social values about the roles women are expected to accept and are valued in fulfilling. This academic exercise is necessary to evaluate how future bills should address the issues of: 1) can a woman get pregnant with the later intention of relinquishing her right to rear that child and 2) can she get paid for the labor of bearing a child she will not raise.

I will divide the issues relevant to women's participation in surrogacy into three stages. In the first stage I will examine the suppositions about women's sexuality and her role in the family that are the basis for some of the criticism about surrogacy. Surrogacy impinges on the sanctity of the family by being willing to separate sexuality, pregnancy and motherhood and bring a public face to a private world. Second, current legislative moves to allow volunteer surrogacy reflect a concept of women's traditional role. Surrogacy devalues the social value of women in general by relegating child-bearing to something less noble, less spiritual than what is expected of women.² It may be through the device of volunteerism that surrogate motherhood recoups this value. Last, I will look at the consequences of payment and its effect on the value and ethics of surrogates. The surrogate mother is criticized for her willingness to be paid for this work. She puts a market value on herself and the child whom she delivers to the adopting couple.

² It is particularly in the religious tradition that surrogacy is seen to interfere directly with the marital bond as is AID.

Part III

A. Surrogate motherhood: a set of issues relevant to women's role

Surrogacy is not creating a dilemma only because it is a new therapy for sterility. It represents the outcome of a revision in moral perceptions regarding families, women and children. Critics and proponents have one belief in common: surrogacy demonstrates a questioning of social and cultural values upon which the sale or exchange of previously inalienable things- babies, physical services or organs- are predicated.¹ This questioning illustrates a transition, lauded by some and condemned by others, in traditional social norms. Whether a transition in those norms fully occurs will depend on how we identify salient values, understand their compromise and contradiction, and commit to their coherent change or preservation.

Examination of the role of the surrogate mother is a more consuming task than examination of the role of the sperm donor. Perhaps it is proportional to the more consuming task of gestation. A great deal of criticism opposes the performance of such a task by women. In general, this criticism has explored whether the act of agreeing to be a surrogate is degrading to a particular woman, to women in general, and to society as a whole. I must examine the social norms and the values that underlie those norms to construct the argument that gender equity is operative in surrogacy. I propose to discuss the aspects of women's participation that have helped to shape the public and legislative debate on surrogacy.

¹ Robert Pritchard: "A Market for Babies." *Toronto L J* 24: 341-358. (1984) He makes use of this argument to support a transition of values that might support an open, controlled baby market.

B. Women's sexuality

Suppositions about women's sexuality are the basis for some of the criticism about surrogacy. Surrogacy impinges on the sanctity of the family by being willing and able to separate sexuality, pregnancy and motherhood.

To discuss a woman's morals is often equivalent to discussing her sexuality.¹ She is subject to scrutiny in the absence of what is considered appropriately demure denial of her sexuality. She may then be subject to overt derision about her moral nature. Sexuality brings into conflict traditional notions of femininity that are premised on the suppression of sexual desire in exchange for mother love of others.² Her sexuality is supposed to be passive, not active: she should not seek it out except for the express purpose of procreation, which then fulfills a duty.³

Control of sexuality has been justified by advocating the procreational model. Sex is to be found only within the bonds of matrimony and for the express purpose of reproduction. Starting in the beginning of this century, a time of great reformation of women's roles with both the suffragist movements and birth control, women were placed on a higher moral plane than men.⁴ One overwhelming right to this stature was the greater control women were supposed to have over their sexual needs.⁵ Sexual powers were viewed as a thing held in trust that was not to be used for "debauchery,

¹ Sue Cartledge: "Duty and Desire: Creating a Feminist Morality." In *Sex and Love: New Thoughts on Old Contradictions*. London: The Women's Press. (1983) p. 170.

² Carol Gilligan: *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, MA: Harvard University Press. (1982) p. 70. Hereinafter Gilligan: *In a Different Voice*.

³ *Ibid.*, p. 68

⁴ Elizabeth Cady Stanton, Josephine Butler, the Pankhurst sisters, among many others.

⁵ Josephine Butler was a vocal proponent of women's superiority because of their greater ability to control their sexual appetite.

but...reverently, and in a union based on love, for the purpose of carrying on the race."⁶ A woman who lost control of her passion and exercised indiscretion in sexual matters was degrading herself. "Promiscuous unchastity"⁷ was suspect in a female, relegating her to diminished value as a woman. She had lost the ability to claim for herself a special moral stature. Social and legal prohibition of certain behaviors, whether extramarital affairs, prostitution or others, concealed a program by which women's proper role and moral limits could be maintained.⁸ Given changed social norms, this no longer appears to be a compelling argument for the enforcement of public morality, although it is by no means forgotten. This is demonstrated by Paul Ramsey, an American Protestant theologian and activist vehemently opposed to genetic and reproductive technology,:

To put radically asunder what God joined together in parenthood when He made love procreative, to procreate beyond the sphere of love (AID, for example, or making human life in a test tube), or to put acts of sexual love beyond the sphere of responsible creation (by definition, marriage) means a refusal of the image of God's creation in our own.⁹

⁶ Christabel Pankhurst as quoted in Lucy Bland: "Purity, Motherhood, Pleasure or Threat?" In *Sex and Love: New Thoughts on Old Contradictions*. London: The Women's Press. p. 8-29 (1983) p. 13. The Pankhursts, in Great Britain, and the American Suffragists, Elizabeth Cady Stanton, etc. held similar views on the moral superiority of women allowing them greater virtue in shaping political matters in the vote.

⁷ David Richards: "Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution." *Univ Penn Law Rev* 127 (5): 1195- 1287. (1979) p. 1204. Hereinafter Richards: Commercial Sex and the Rights of the Person.

⁸ Derek Morgan: *Making Motherhood Male*, p. 228. See also Foucault, whose concern is less with gender, who saw law and social rules as suspect in control of sexuality and prescriptive and proscriptive of social control.

⁹ Paul Ramsey: *The Fabricated Man: The Ethics of Genetic Control* quoted in John Morgan: "The Created Individual: Are Basic Notions of Humanity Threatened?" In *Test Tube Babies: A Guide to Moral Questions, Present Technique and Future Possibilities*. William Walters and Peter Singer (eds.) Melbourne: Oxford University Press. p. 88-96. (1982), p. 91.

One of the concerns raised by the American Fertility Society's evaluation of surrogate arrangements is that the involvement of the surrogate in child-bearing will weaken the marital bond and undermine the integrity and institution of the family.¹⁰ This view condemns surrogacy as a threat to the family cohesiveness.¹¹ William Pierce, President of The National Committee for Adoption, finds surrogacy the basis for marital discord akin to adultery:

Surrogacy is anti-wife. Just play out the scenario that can take place. "If you weren't barren, I could have a child. If you love me, you'll let me have a child through surrogacy. If you don't, it will make me question your love...I need a child that has my bloodlines, my genetics. If I can't get a child through a surrogate, maybe I'll have to get one with a different wife." ¹²

The threat described here is apparently this: allowing surrogacy allows such a conversation to take place. However, this conversation could occur even in the absence of surrogacy. What may be true is that surrogacy, as a coerced choice for the hapless wife, might still allow her the dubious pleasure of keeping this marriage together. It is an erroneous assumption that Henry the VIII would not happen again with or without surrogacy.¹³

The threat of the surrogate, not unlike that of the prostitute, is found in her interference with (private) family affairs. The moral fabric of the family is

¹⁰ American Fertility Society: Guidelines, p. 64S. Another view is that of Joseph Fletcher (*Humanhood*). He argues that technology characterizes man's [sic] creation. A baby that is the result of deliberate and careful contrivance would have more value and be more spiritual representative of human creation than one resulting "from sexual roulette". p. 94.

¹¹ George Smith: "The Razor's Edge of Human Bonding: Artificial Father's and Surrogate Mothers." *W New Eng L Rev* 5: 639- ??? (1983)

¹² William Pierce: "Government Should Ban Surrogate Parenting". *National Committee for Adoption, Inc.* Position statement, April 16, 1987. p. 12. Dr. Pierce is president of the Committee.

¹³ It is quite clear that infertility problems and stress are a major test of the marital bonds with or without third party and technological intervention. Interview.

held together by exclusivity. The value of the exclusivity has as its basis some ethically sound reasoning but I caution against the assumption that it is gender blind. The family is also a social construct which, in its present form, has certain roles for each member.¹⁴ In the case of the surrogate the relationship to the family is not sexual although it is very personal. She will be the person that helps them to create their family. An outsider involved in personal, private family affairs is aberrant. In part, the American notion of ignoring what occurs behind closed doors seems predicated on the fact that at least the participants behind those doors conform to a particular model. When there is a challenge to the model, either in gender, number or roles that are present, prescribed obligations and duties become less clear to the observers. Traditional notions of the family are challenged. Sexuality introduced from the outside, even in the case of surrogacy, has to do with reconstructions of previously exclusive relationships and with changes in the perception of women's sexuality. One person interviewed who is active with sex workers protection said:

I think part of the disapproval of surrogate contracts has to do with that women deliberately decide to do a sexual act, that is to be inseminated, in order to give the baby to someone else... Even though its not sex, its seen as kinky... [Surrogacy] points out the way we look at... women and sexuality, whether women are supposed to have sex or not, there's a big stigma on women's sexuality.

¹⁴ Stephanie Coontz and Peta Henderson: "Explanations of Male Dominance." In *Women's Work, Men's Property: the Origins of Gender and Class*, Stephanie Coontz and Peta Henderson(eds.) London: Verso. p.1-42. (1986) The authors review some of the various schools of thought on the purpose of exclusivity. From sociobiology, increasing the males' chances of dispersing his genes, to the "ownership" of children as tradable or working assets, exclusivity in the family is not simply a matter of moral strength and spiritual devotion.

Again, it is the overtones of sexuality that demonstrate a linking of women's sexual function with pregnancy, the family and the home.

Families are seen in our Western culture as a structure basic to the function of society.¹⁵ The construct that we presently call the "traditional" or nuclear family cannot be attributed exclusively or primarily to biological differences as many are wont to do.¹⁶ Appeals to the natural order usually presume a post-industrial arrangement where the woman is at home, in the domestic sphere and the man earns wages in the public, industrialized economy. Reproduction is subsumed within the private, domestic sphere of the home. Men, in the public sphere as wage earners, garner economic and political power. Women, at home, are involved in non-monetary forms of exchange. Because the private sphere has been accepted as women's sphere, location of her sexual behavior within this structure does not seem surprising.

When women enter the public sphere, rather than remain in the private, they are often accused of disturbing the natural order. And this can certainly be so. The labor provided primarily by women in the home is crucial to our economy. Feminists active in the movement to recognize homemakers wages attempt to locate all of women's work, private and public, within the paid world. Their demands are for valuation of women's work- as child caretakers, housekeepers, cooks, cleaners, teachers and health care providers- both in social terms and economic terms. It has become quite apparent that

¹⁵ Sonja Ruehl: "Sexual Theory and Practice: Another Double Standard." In *Sex and Love: New Thoughts on Old Contradictions*. Sue Cartledge and Joanna Ryan (eds.) London: The Women's Press, p. 210-223. (1983) p. 212. Aside from the effect a surrogate might have on a family, alternative family structures might also result such as single men, gay couples.

¹⁶ Sociobiology, with E.O. Wilson at the head, represents one pole of "biology is destiny". Sufficient research particularly into "primitive" societies reveals a much more complex exchange of labor, value and roles which cannot be elaborated here. See discussions in Coontz and Henderson.

paying for all these services, if this were affordable, would necessitate a drastic change in the economy.

Surrogacy demands pay for one aspect, a very valued aspect, of creating a family and home. It extends the private world of the family into the public, creates a new public role for women. Limitations of women's entry into surrogate arrangements is done in one sense to maintain a separation of the private and public spheres.¹⁷

We might attempt to retain, like the Victorian era did, women's more "superior capacities for spiritual and moral inwardness that were properly insulated in the home from coarsely sensual, masculine, competitive concerns derived from the business and political worlds."¹⁸ Perhaps this is not necessarily as heinous on second inspection: it could be indicative of genuine concern for the loss of and dependency on the social world created around and by women if it were completely subsumed in the public sphere.

This arrangement of the family, with women at home, is a last hold-out of communitarian ideals that have evaded complete commercialization and utilitarian description in market rhetoric. Even so, gender should not be the determinant of whether or not the home and private sphere are the basis of a communitarian ideal. A non-commercial sphere of daily living should not be predicated on women volunteering services. It should arise from gender equity and consensus on the value of those things thought to represent such an ideal. The role of the surrogate mother is aberrant in the sense that the family, privacy and sexuality are made less private. However, this role is more acceptable when surrogacy is framed as a gift and as giving. The next section examines how women's volunteerism and gift-giving are valued.

¹⁷ Interviews.

¹⁸ Richards: *Commercial Sex and the Rights of the Person*, p. 1252.

C. Women as volunteers, surrogacy as a gift

Current legislative moves to allow volunteer surrogacy reflect a concept of women's traditional role. Surrogacy devalues the social value of women in general by relegating child-bearing to something less noble, less spiritual than that expected of women. It may be through volunteerism that surrogate motherhood recoups this value.

That's not what they're really concerned about, not Baby M herself, but what that M stands for- Motherhood, pure and simple or pure and complicated... with our own notions of being a mother, a parent- what it means, how important it is, how to do it, who should do it, who should not, and whether it's O.K. to have a baby for someone else or whether doing that violates something fundamental. Underneath it always, for women, are the questions: Could I do that, could I have a baby and give it away? Or, vice-versa, could I pay someone to have a baby for me and then raise him or her as my own?

- Anne Fleming, *Our Fascination with Baby M* ¹

The legislative efforts regarding surrogacy that I presented earlier demonstrated a propensity, particularly in the later bills, to discourage any form of monetary exchange. For the most part, the reason was to dissuade the public from a notion that there was any intimation of baby-selling. As I also pointed out, this issue was mired in generalized ethical distaste for surrogacy. Allowing women to participate as surrogate mothers in a volunteer framework is not a new notion. One respondent in interviews said:

¹ Anne Fleming: Fleming, Anne Taylor: "Our Fascination with Baby M." *New York Times Magazine*, March 29, 1987, p. 33-36. (1987) p. 36.

Why is it O.K. to do something for free and its not O.K. to get money for it. What is this? And how come its only things women can do? Anything men can do for free they can do for money... There's a whole thing for women and money.²

In order to examine the concerns this interviewee brings up and to better explore the prohibition against money, we must situate women's roles as individuals whose lives have different constructs, different meaning because of their gender. Continuing with a look at motherhood, its role and value, there is a prodigious calling for women in volunteerism, gift-giving and nurturing that does not enter a market sphere.

Motherhood has great social value and meaning in Western culture. Motherhood is defined as a broad set of tasks inalienable from each other. Having a child is inseparable from the family. To have a child is to create family, relationships and obligations. Sex, pregnancy and rearing in this paradigm are inseparable. The separation of the "parts" of motherhood into gestational and rearing have allowed us to conceive of surrogate motherhood as specifically satisfying a need or problem in one part of motherhood while not impinging on the other. The intent of surrogacy is to create a child that the biological and gestational mother will not raise as her own.

Pregnancy is a symbolic bridge between sexuality, the experience of conception, and motherhood, the experience of raising a child. Does this mean we cannot separate the three? Pregnancy has been inherently linked to motherhood. Women are tied to roles of birthing and rearing by ideological glorification of this function.³ In traditional values, as espoused by pro-life women in Kristin Luker's study of abortion politics, "when pregnancy

² Interview, feminist activist.

³ Morgan: Making Motherhood Male, p. 229.

becomes discretionary- when people are allowed to put anything else in front of it- then motherhood has been demoted from a sacred calling to a job".⁴ Feminists might argue that this calling- a manifestation of biology is destiny- becomes less compulsory when motherhood becomes more of a choice, lending value to the other work that women perform.⁵

The greater propensity for women to parent, to caretake, is often treated as synonymous with a biological difference. The nurturant quality of women is naturally oriented towards her genetic child. Second, she may nurture a child who is not her own genetic offspring. A woman's refusal to nurture is poorly understood. A woman not mothering her own child is unacceptable except when she is unable to care for him or her.

But surrogate mothers freely enter into an agreement so that they may do just that. Nurture to give away... I am sure only about my own inability to comprehend a woman who bears a child to give it up...⁶

Surely, this is a desirable state for many but as a prescription for motherhood it may negate the complexity of the experience. We choose an experience for women that fills a very real social and biological need of the infant. She, or another, but preferably the mother, must be available, responsive and dependable to an infant's needs. But cannot another fulfill this duty as well? Another mother or father? In the courts, the care of the natural mother has

⁴ Kristin Luker: *Abortion and the Politics of Motherhood*. Berkeley: University of California Press. (1985) p. 205.

⁵ Adrienne Rich: *Of Woman Born: Motherhood as Experience and Institution*. New York: W.W.Norton & Co. (1976) p. 76.

⁶ Mary Gordon: "Baby M: New Questions about Biology and Destiny." *Ms. Magazine* June: 25-28. (1987) p. 25.

always been preferred, if all other things are equal.⁷ One surrogate mother said:

We thought feminism was about breaking *down* the barriers between the sexes, not about creating another presumption that only the woman who produces a child can have its presumed interest at heart. Fathers and adoptive mothers have rights, too.⁸

It is natural to want to raise a child but unnatural to not want to do so.

I do not understand a woman who would give up her child at birth... Get pregnant *for the purpose* of giving the child up...⁹ (emphasis in original)

Motherhood is acceptable in the absence of pregnancy. It is assumed that women should want to mother. The question of how a mother can give up her child appears frequently, revealing that many think it unnatural not to want the child. Adoption is allowable not because we perceive the woman, or girl, as willing to keep the child but unable to do so. She may be out of wedlock, too young or too poor. Adoption also allows the community to respond in some way to a perceived difficult situation. It relieves the burden of guilt or shame. Certainly adoptive parents will argue that they love their children no less because of the non-genetic link. Motherhood divorced from pregnancy does not lose much of its intrinsic value.

In Nancy Chodorow and Susan Contratto's article *The Fantasy of the Perfect Mother*, the authors point out the two poles of motherhood described in the feminist literature. The first is the all-powerful mother whose every act

⁷ Carol Smart: *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations*. London: The Women's Press. (1984) p. 123.

⁸ Jan Sutton in California Senate Testimony of December 11, 1987.

⁹ Mary Gordon: "Baby M: New Questions about Biology and Destiny." *Ms. Magazine* June: 25-28. (1987) p. 25.

is responsible for the children she has brought forth. On the otherside, the mother is not blamed but completely idealized as the self-sacrificing and giving woman. In the latter she is so imbued with the strength to heal that:

We need to imagine a world in which every woman is the residing genius of her own body...[she] will truly create life, bringing forth children (if and as we choose), but the visions and the thinking necessary to sustain, console and alter human existence-a new relationship to the universe.¹⁰

The natural nurturant, woman is seen as the holder of the future in some specially imbued relationship to her body and her life giving capacities. She has the power to give and withhold warmth and nourishment.

In surrogacy, pregnancy is discretionary, divorced from its perceived teleological purpose- motherhood. Pregnancy divorced from motherhood has less meaning. The American Fertility Society regarded the surrogate as facing "the potential physical risks of pregnancy and childbirth without receiving what appears to be a commensurate benefit."¹¹ From a medical perspective, there are certain risks in pregnancy. The desire to accept these risks is commensurate with the desire to have the child, to create a family. We cannot understand the intrinsic value in pregnancy but rather see it as a calling to motherhood, to the value of children.

We do not understand enough about the nature of the mother-child relationship to limit or prescribe its performance.¹² While one school of feminist thought would liberate women from the constructed terms of motherhood, the other guards the specialness of motherhood. A growing

¹⁰ Adrienne Rich: *Of Woman Born: Motherhood as Experience and Institution*. New York: W.W.Norton & Co. (1976) p. 292.

¹¹ American Fertility Society (AFS), p. 59S.

¹² Certainly, legal sanctions exist to guard against abandonment for good reason.

concern for the problems faced in the Baby M case have evoked solidarity with the surrogate should she wish to keep her child. The prescription to nurture, and to do so willingly, may imbue pregnancy with meaning for some surrogates. Conversely, the proscription to sever that relationship by dissolving parental ties agreed upon in the contract is regarded as heinous.

The separation of pregnancy from motherhood, whether it is the outcome of a "natural" sexual act or a substitute for it, disrupts a continuum. In surrogacy, the "bond between mother and child is demystified, made clear, intelligible, scientific- and also provisional, revocable and of no more than contractual force."¹³ Such words intimate that, usually, every mother has such a mystified bond. As one interviewer expressed:

There are women who bond differently with different children at different times. It's a male notion that every woman feels absolutely attached to every fetus and every child she carries. If that was the case we wouldn't have adoption or abortion.¹⁴

The bond of mother and child also reiterates that most mothers are dependably present in the role of mother, not subject to a contract or provisional trust. We imply that bonding of mother to child is the norm when we settle blame for the failure to bond on the woman's lack of natural nurturance. In Carol Gilligan's work on the psychological development of women, the reliance on women's responsibility for both women and men creates a different ethical framework. Alteration of this framework invokes "... the fear that freedom for women will lead to abandonment of responsibilities in relationships,"¹⁵ particularly in relationships to children

¹³ Editorial in *The Times* (London), quoted in Morgan: *Making Motherhood Male*, p. 224.

¹⁴ Interview, psychologist of surrogate parenting agency.

¹⁵ Gilligan: *In a Different Voice*, p. 129-30.

and to the family. But "selfish" motives, such as the desire to be pregnant or to receive remuneration, do not make it necessarily immoral to be pregnant if there is the guaranteed anticipation of adoption by a couple¹⁶. For many these extrinsic motives alter the meaning of continuity and obligation in a mother-child relationship. Jan Sutton, spokesperson for National Association of Surrogate Mothers replies "...the child born of this process is not 'bought', 'rejected', 'abandoned', 'sold', but is 'planned', 'desired', 'loved', 'given', and 'nurtured' by the adults involved."¹⁷

One of the gravest concerns raised in the discussion of "natural ties" is whether we understand enough about the parental relationship or the mother/fetus/infant relationship to advocate a contract whereby one party must fulfill an obligation because of promises made before she has, in effect, the full set of facts before her. The Committee on Moral Concerns, a group with whom Paul Ramsey is active, in testimony on AB 1707 found that, "A mother should not be required by law or contract to surrender her child regardless of insemination techniques'...It ignores the natural ties between a mother and her child, and would attempt to place man-made laws above natural parental love."¹⁸ Although I am arguing that the language herein sees the mother-child bond as natural and irrevocable, it is also apparent that the contractual revocation of the feelings a mother might have for a child is problematic. The language enshrines a "natural" calling to motherhood based on real feelings, real people, real situations in every day life. Even if we can describe the social role of women as being limited by some social forces, we do

¹⁶ John Robertson: "Surrogate Motherhood: Not So Novel After All." *Hastings Center Report* 13 (5): 28-34. (1983) p. 32.

¹⁷ California Senate Testimony of Nov. 19, 1987.

¹⁸ AB 1707, Senate Committee on Judiciary Legislative Digest, p. 9.

not lessen the evocation or powerful emotional content of actions such as motherhood by understanding their possible basis.

It is this same sacredness of motherhood that may be "calling" some surrogates to perform the job of gestating. What Carol Gilligan calls the ethic of responsibility may form the basis of the desire of many surrogates to become pregnant with the intent of giving up the child. According to Gilligan, women prefer to utilise an ethic of responsibility to shape their lives and private, family-centered world, rather than use an ethic of rights that is more common to men and the public world. In the ethic of responsibility, an ethical dilemma is often answered by attempting to meet the needs of all parties rather than subjugate one side to another. Their attempts to meet others needs may be done at their own expense. A woman's sense of responsibility to the community and the world then acquires a selfless quality.¹⁹

One side of surrogacy has, in part, this selfless quality. Anne Fleming, for the New York Times Magazine, wrote:

When I first heard of surrogate mothering in the late 1970's, I thought it was just fine, noble even, an act of sisterhood, probably the ultimate act. By that time, a lot of women in my generation were having trouble having babies, also having trouble finding babies they wished to adopt. Prodded by loneliness and husbands who wished to father, they were susceptible to the idea of borrowing another woman to do what they could not. Surrogacy didn't seem weird or ugly or mean or any of that; in fact, it had an aura of sweetness, of sharing.²⁰

A surrogate mother interviewed for a major newspaper said:

¹⁹ It is highly likely that without women's charitable volunteer services, churches, clubs and non-profit organizations, many life-enhancing and sustaining activities would be diminished.

²⁰ Anne Fleming: "Our Fascination with Baby M." *New York Times Magazine*, March 29, 1987, p. 33-36. (1987) 1987, p. 36

I'm not going to cure cancer or become Mother Teresa, but a baby is one thing I can sort of give back, something I can give to someone who couldn't have it any other way.²¹

And another potential surrogate mother who concurred wished to give the joy of children to other parents:

I firmly believe in creating a child for an infertile couple because they desperately want one and I can provide it for them.²²

Altruistic motives point to the unselfishness of bearing a child for another. Surrogate Parenting Associates, Inc. assesses their surrogates as "evolving from a genuine altruism and empathy by a select group of individuals who understand the problem..."²³ Few surrogates call pregnancy a job. In its own way, owning pregnancy as a calling of special importance to women can give some meaning to surrogates, to elevate it and approximate the "calling" of motherhood.

Surrogacy has been a practice primarily within for-profit agencies set up for the most part to create surrogate arrangements. In the business of and with a vested interest in maintaining as positive a view as possible of surrogates, they are often in the forefront in attempts to downplay and minimize the effects that money might have. Surrogate Parenting Associates, Inc. in Kentucky describe the surrogate mother as "the girl next door" type who

²¹ Lisa Walters, 32 year old mother of two and surrogate mother quoted in Leo Kantrowitz: "Who keeps Baby M?". *Newsweek Magazine* Jan. 19, 1987, p. 44- 48. (1987) p. 48.

²² California Assembly Hearing of Nov. 19, 1982. p. 35.

²³ Surrogate Parenting Association, Inc. (SPA) pamphlet quoted in Mary Mellow: "An incomplete picture: the debate about surrogate motherhood." *Harvard Women's L J* 8: 231- 245. (1985) p. 235.

enjoys the experience of pregnancy.²⁴ Some agencies have been forthright in declaring that they "avoid the money hungry types."²⁵ Individuals who were thought to be unduly influenced by excessive desire for and susceptibility to financial gain were excluded because of their lesser ability to make a free choice or give informed consent.²⁶ Not only would it be reasonable to limit financial coercion from the standpoint of the agency looking for the most stable applicant possible, but the public relations aspect must certainly have influenced the agencies to minimize the importance of any monetary transactions.

Certainly others, such as Noel Keane, promote the service as a complex gift the value of which can not be summarized in simple monetary terms. He associates surrogacy with a "prenatal wet nurse" advocates payment in relation to all the other positive attributes that the surrogates perceived to arise from their participation. Keane also allowed research to be done at his agency under the direction of Dr. Philip Parker to characterise the women coming to him to volunteer. This was subsequently published. The Center for Surrogate Parenting in Beverly Hills is undertaking long term studies and allowing graduate research although there have been no publications of that data.

A much quoted study by Dr. Philip Parker addresses the motivations of surrogates themselves. First published in 1983, he studied 125 potential surrogate mothers coming to the office of Noel Keane up to prior to 1982.²⁷

²⁴ Ibid., quoting SPA pamphlet and telephone interview of SPA personnel, p. 233 .

²⁵ Mary Kay Blakely: "Surrogate Mothers: For Whom are They Working?" *Ms. Magazine* March: 18. (1983) p. 19 quoting Keane. Women who list money as the only motivation are not selected for further interviewing.

²⁶ Philip Parker: "Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling and Public Policy." *Bull Am Acad Psychiatric Law* 12 (1): 21-39. (1984) p. 26. Hereinafter Parker: Informed Consent

²⁷ Parker: Motivations of Surrogate Mothers, p. 117-118.

Parker found that monetary compensation was never a primary and only consideration but that 89% of the applicants reported that a fee²⁸ was a necessary condition for their participation. An unknown number among the 35% who had a past abortion or adoption relinquishment desired to deal with unresolved feelings: one woman wished to master her forced relinquishment of a child at age 14, another woman wanted to give a baby to make up for the one she "killed" in a therapeutic abortion. Some of the 125 (an unspecified number) desired and enjoyed pregnancy. Ninety one percent of the 125 women had children of their own and wished to share that joy with another. Most (an unspecified number) admitted they would experience sadness at relinquishing the baby. Unfortunately, Dr. Parker's study, the only and often quoted view of surrogates, is flawed by failing to provide some better statistics and verbatim quotes. His work was part of an on-going study but there have been no additional publications.²⁹ Despite such flaws, this piece remains the scientific evidence that surrogates have multiple reasons for participation.

In two other papers regarding psychiatric participation in surrogate contracts, Dr. Parker presumably used data from his experiences at Keane's offices. In interviews Dr. Parker found that surrogates did not believe that the \$10,000 was to buy exclusive parental rights for the adoptive couple.³⁰ They viewed it as fee for a service citing that the importance of the fee decreased as the pregnancy progressed. Dr. Parker interpreted some of their reactions to an increasing and idealized empathic relationship with the contracting couple. The birth mothers stipulated that the money was not important in forcing their cooperation in relinquishment following delivery. Parker cites that

²⁸ Ibid., p. 117. "Most [of the 108 who required some payment] required \$5000."

²⁹ Parker stated he had not reorganized or published this data for presentation. Personal communication, Nov. 19, 1987.

³⁰ Philip Parker: Informed Consent, p. 34.

cooperation with the terms well after the exchange of fees indicated that the relationship was built on factors other than monetary exchange.

The background information on surrogate parenting and written testimony to the Senate Committee on Health and Human Services Hearing, Nov. 19, 1987 on surrogate parenting presents summarized data from three sources. One source is The Center for Surrogate Parenting in Beverly Hills.³¹ The Center is an active practice facilitating 40-50 surrogate contracts per year. The founder, director and legal counsel, William Handel, has been active in California legislature since the 1982 bills which he was instrumental in introducing. There appears to be agreement between The Center's and Parker's studies at Keane's practice. At The Center, 80-90% of potential surrogates required the fee for participation, reported enjoying pregnancy, and felt deep empathy for the infertile adoptive women.³²

Many surrogates also see their service as a gift:

It seemed to me that, since, I felt complete with my own family and did not want any more children and was able to do this easily, it would be my way of giving a gift.³³

In the Hagar Institute in San Francisco's testimony to the California Senate hearing on Dec. 11, 1987, the founder, Beth Bacon, describes the surrogates as having "created and relinquished out of love and giving" in written testimony to the California Senate Hearing of December 11.³⁴ Another person active in surrogacy arrangements and presenting testimony describes the

³¹ Dr. Hilary Hanafin, a clinical psychologist, has been conducting research for three years on the outcome of surrogacy for surrogates and couples. Personal communication.

³² California Senate Testimony of Dec. 11, 1987.

³³ California Assembly Hearing of Nov. 19, 1982.

³⁴ California Senate Testimony of Dec. 11, 1987.

surrogates as "active, empathetic, involved, enthusiastic and positive... accepting and wanting to be givers."³⁵

Have women who wanted to be surrogates been maligned in being called selfish or greedy? The New Jersey Supreme Court, in partial reversal of the Baby M decision condemned "self-seeking on the part of the natural mother."³⁶ Judge Wilentz concomitantly condemned any self-interest other than the selfless motivation of another towards the child. Is avarice a part of the contract? There is a propensity for those opposed to surrogacy to disbelieve that a woman could have such objectives while supporters of surrogacy, mostly in the agencies facilitating the arrangement, minimize the importance of payment. It is easy to dismiss the data presented as fraudulent because of a biased derivation. However, who else are we to ask why women should want to be surrogates than the women themselves? One proponent of surrogacy said in interview:

Maybe [its'] a sexist thing or condescending or part of the belief that surrogate moms are all poor and ignorant and don't have anything to contribute...[to shaping legislation].

Where else to find these women than at surrogate parenting agencies?

Studies of surrogates do need to continue, if surrogacy continues, if we are to make an informed decision about the success of these arrangements.

In this section, I have explored the underlying concern that surrogacy infringes on the definition of the roles of women in terms of their participation in the family, in pregnancy and in mothering. Pregnancy devoid of the role of motherhood may be valuable enough in its own right if

³⁵ Interview, staff person at surrogate agency.

³⁶ Kentucky v. Surrogate Parenting Association at 2247.

a surrogate acts as a volunteer. If women participate in surrogacy for the pleasure of pregnancy, helping others and gift-giving, there is a more comfortable fit with the ideological role of women as nurturers. The ethic of responsibility creates intrinsic value to the pregnancy. The illusion of abandonment disappears in light of maintaining a sacredness in gift-giving. When the gift is "from the goodness of her heart" it removes or sufficiently dulls the specter of avarice. Legislation directed at maintaining surrogacy as a volunteer position solves no problems that aren't also confronted in paid surrogacy save two- the aspect of child selling and the selling of women's personal services. Volunteerism would possibly offer a more giving, nurturant vision of surrogacy.

However volunteerism has as its corollary a certain punitive quality readily apparent in public discussions. Rather than promote surrogacy, laws that envision volunteer surrogacy do so only because they begrudgingly acknowledge that surrogacy exists. As one person in the Assembly hearings said "If surrogates are really sincere, they should do this for free."³⁷ Another bill proposed in Wisconsin prohibits payment exceeding medical expenses and prevents the surrogate from changing her mind. Representative Sue Magnuson said, "It will make them think twice."³⁸ The state's interest appears to be not controlling or safeguarding the parties involved. Instead the intent is to make surrogacy distasteful enough or unsafe enough to deter potential participants. In particular, it seeks to make it distasteful enough to the potential surrogate mothers.

³⁷ California Assembly Hearings of Nov. 19, 1987.

³⁸ Iver Peterson: "States Assess Surrogate Motherhood." *The New York Times* Dec 13, 1987. Sec1, Part 2, p. 42.

D. Paid surrogacy as sex work

*The consequences of payment and its effect on the surrogate are evaluated
The surrogate is condemned for her willingness to be paid for this work
which puts a market value on herself and the child whom she delivers to the
adopting couple.*

Does a woman have the capacity to employ herself in such a way as to suggest that she is selling either her body parts or use of her body to another? Safeguarding by legal constraints of the public's use of body parts and products is warranted by the potential risk to the giver or seller of blood, organs and personal services as well as an ethical concern regarding the non-monetizable value of certain exchanges and things. Selling of one's body may be allowed under certain circumstances, such as the physical labor of an athlete, but not under others, such as into servitude. The distinction between what may be bought and sold and what may not be bought and sold is sometimes clear, as in the slavery issue, and sometimes not clear as in prostitution.¹ How we regulate these exchanges and what specifically is used to effectuate the exchange- is it money? returned favors?- depends on the value we give to the participants and the object or service being traded. In particular, what is allowable with respect to those things that are of intrinsic value to the person- body, body products, body parts- and unique to each individual.

As I pointed out earlier, the various aspects of reproduction- sex, pregnancy and rearing- are not so easily teased apart. These aspects and their

¹ Although prostitution is generally not legal, there are covert ways of allowing sex work. In San Francisco, for example, massage parlors and escort services are able to offer a way for client and sex worker to meet. Massage parlors are governed by a section of law that regulates the work conditions while ignoring the actual work taking place.

connections to each other represent various ways of viewing the role of women. Whether the actual labor and services provided in surrogacy and prostitution are comparable is not as relevant as other similarities. The payment for a service that is uniquely performed by women and one that may carry social stigma is more relevant. The community and legislative persons active in the field have clearly equated surrogacy and prostitution, particularly when trying to lobby against payment.

Sexual services performed by women² for a fee is one area where there has been much discussion regarding morality and legality. A discussion about prostitution, also called the sex industry or sex work, is not specious in reference to surrogate motherhood. Often legislative maneuvers aimed at surrogacy are done with subtle or blatant reference to sex work. Susan Nash, Women Lawyer's Association of Los Angeles, said:

We can't deny that women have historically used their bodies to make money, but we can certainly say that the Legislature has never taken the step of actually endorsing this ancient profession.³

Jenny Cassem, a 28 year old surrogate, was called a "high class hooker" by women in her congregation as she was carrying the child she ultimately relinquished.⁴ (Her answer? "Mary was a surrogate for God."⁵) One person active in feminist politics interviewed said:

There are stigmas put on surrogate mothers. I instinctively knew as soon as it was brought up... [pause] I knew it was related to the prostitution issue. Now there

² Approximately 90-95% of sex workers are women. Personal communication with Priscilla Alexander, director of COYOTE, a prostitutes advocacy group in San Francisco.

³ Susan Nash, Women Lawyers Association of Los Angeles, giving testimony in California Assembly Hearing of Nov. 19, 1982.

⁴ Kantrowitz: Who Keeps Baby M, p. 46

⁵ Op. cit.

are a lot of people who will get upset that I make that connection.⁶

In the consideration of Michigan Senate Bill 63, Senator Connie Binsfeld condemned the selfish 'industrial strength' sexual services of a surrogate as "the buying and selling of babies for the financial gain of attorneys, physicians and women who regard their bodies as manufacturing plants."⁷ Criticism of the financial yearnings of the surrogate reflect stigmatization of her willingness, not necessarily her requirement, to be paid. Testimony offered by a physician in response to AB 3771 asked:

Considering the recent concerns regarding the emotional and legal needs of adopted children, what effect might there be if a child knew their mother had 'prostituted herself' for their birth.⁸

Speaking for the The National Committee for Adoption, William Pierce remarks:

This society has not yet endorsed legalization of contracts for coital prostitution; I think it therefore highly improper for society to legalize and for the courts to enforce contracts for reproductive prostitution.⁹

During hearings on the British Surrogacy Arrangements Act, surrogacy was condemned by some members of Parliament as "sick, as is any sort of womb leasing", "reproduction as marketable for women as sexuality has always been

⁶ Interview, feminist activist.

⁷ Jay Mathews: "Surrogate Motherhood Becoming an American Growth Industry". *Washington Post Jan. 24, 1983. Health sec Z11.*

⁸ California Assembly Hearing of Nov. 19, 1982, p. 213. In the same letter he accepted AID as justifiable because of the vendors limited involvement yet did not later include AID problems in his concerns for adopted children.

⁹ Information on surrogacy from the National Committee on Adoption, 1987.

historically."¹⁰ The decision in *Doe v. Kelly*, a case brought by clients of Noel Keane to certify the legality of monetary exchange before the participants entered into a contract, criticized the determination of a "...Saks Fifth Avenue price tag for one woman as opposed to a K-Mart price tag for another."¹¹ One author remarked pejoratively that "the glowing descriptions of surrogates sound remarkably like a happy hooker with a heart of gold."¹²

Both prostitution and surrogacy have been accused of disturbing the natural order of society and families. Even if the word prostitution is not mentioned, the language used is similar. In Parliament, the Surrogacy Act was warmly welcomed in order to "preserve family life, stabilise society and do away with this unnatural and unfortunate practice which has sickened so many decent and family-loving people"¹³ very similar to moral reasoning given to prohibit sex work.¹⁴ Like sex workers, the surrogate has been accused of undermining the family and of being the type of woman who would attempt to entice men away from the stability of marital relationship.

Rather than liken the surrogate to a wanton woman, others have felt more pity akin to the notion that only the desperate and desolate choose such a living. Suzanne Rubin, of Concerned United Birthmothers (CUB), has said:

¹⁰ Parliamentarians quoted in Morgan: Making Motherhood Male, p. 226.

¹¹ *Doe v Attorney General Kelly*, 106 Mich App. 169, 307 N.W.2d 438 (1981)

¹² R. Ince: "Inside the Surrogate Industry". In *Test Tube Women: What Future for Motherhood*. R. Arditti, R. Duelli-Klein, and S. Minden (eds.), p. 114- ??? London: Pandora Press. (1984) p. 112.

¹³ Peter Briunfels, Parliamentarian quoted in Morgan: Making Motherhood Male, p. 226.

¹⁴ Priscilla Alexander: "Prostitution: a Difficult Issue for Feminists." In *Sex Work: Writings by Women in the Sex Industry*. Frederique Delacoste and Priscilla Alexander (eds.). Pittsburgh, Pa.: Cleis Press. p. 184-219. (1987) p. 186.

I am a feminist, and I believe very strongly in most of the issues. The concern that we have are concerns also that were echoed by other people, having to do with a woman being put in a position where it's economic for her to have a child and to sell that child to an adopting parent. We think it's sad that some women feel that that's the one thing they have to offer is their ability to bear a child. We think it's a sad statement about women.¹⁵

This statement reveals concern that a woman would have to be in the position of needing to sell her services. It assumes that she would only sell her gestational services if she were under economic duress. This premise is not significantly different from a paternalistic concept that women should be spared the exigency of their situation and, barring that, should not be allowed to use certain means to alter her situation.

Paternalistic protection from self-denigration infers that women are particularly susceptible to commercial coercion. This view implies that women are more volatile and fragile not that they have stronger moral constitution as claimed by earlier feminists noted above. The California Catholic Conference, in addition to other moral concerns regarding alternative reproduction, alluded to the enticement and "impact on young surrogate mothers...which would prove tempting for young women in difficult economic situations."¹⁶ As I discussed above, feminism has a paradoxical interest in revering motherhood, or pregnancy as leading to motherhood, while at the same time recognizing the total spectrum of women's personhood, so as not to perceive of her total fulfillment in the singular role of mother. In Congressional hearings on the policies of new

¹⁵ Suzanne Rubin, branch coordinator for CUB, Inc. giving testimony to California Assembly Hearing of Nov. 19, 1982.

¹⁶ Monsignor William J. Levada, California Catholic Conference, giving testimony in California Assembly Hearing of Nov. 19, 1982. p. 62.

reproductive technologies, Wendy Chavkin, infertility specialist said, "Women are in danger of being viewed as disembodied uteruses, for rent or considered essentially breeders."¹⁷ Selling of services is construed to reduce women to depersonalized objects. Salient aspects of conscientious paternalism can be illumined by exploring sex work.

The criminalization of prostitution has been based on the following arguments: 1) sex work begets other criminal actions aside from sexual services for a fee such as drug trafficking and slavery by pimps; 2) sexually transmitted disease is controlled better by minimizing individuals active in the sex trade; 3) sex trade is intrinsically degrading and immoral, and must be limited; and 4) the debilitation and destruction of the sex worker by work that is physically demanding, dangerous and objectifying should be limited.¹⁸

The state has criminalized prostitution in order to extend certain controls and protection to both the family and the woman who finds herself in need or desire of earning a living in sex work. The social proscription has been directed at sex workers rather than clients. Understanding the argument for and against prostitution requires a discussion on the rights and wrongs of commodification of the body. Surrogacy and prostitution can be compared in terms of the morality and legality of women's ability to offer a service only they can perform (i.e. it is gender specific for the service performed) and ask for money in exchange.¹⁹ Sexuality and some personal services have been

¹⁷ Wendy Chavkin quoted in Celia Hooper: "Committee Considers New Reproductive Techniques." *United Press International* May 21, 1987.

¹⁸ This scheme is in part that used by David Richards: "Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution." *Univ Penn Law Rev* 127 (5): 1195- 1287. (1979) p. 1215. Hereinafter Richards: Commercial Sex.

¹⁹ Cynthia Rushevsky: "Legal Recognition of Surrogate Gestation." *Women's Rights Law Reporter* 7(2): 107- 142. (1982) Rushevsky argues that they are not the same because there is no question of immorality in surrogacy. As I have stated above, I believe that the public and motherhood aspects of surrogacy do in fact disturb a vocal group of opponents.

prohibited from a public, market exchange. In order to best understand the ethics of selling sexual or gestational services- that is, commodifying a personal attribute, skill or service- we must discuss the concept of inalienable and alienable rights of persons. This discussion of rights has been put forth by Margaret Radin in her paper *Market-Inalienability* . I will summarize her discussion and comment on it with reference to other authors' work.

Radin argues that non-commodification is premised on a long standing tradition of the inalienability of personal attributes. Inalienability is

...ascribed to an entitlement, right or attribute that cannot be lost or extinguished...
...[it] cannot be voluntarily transferred from one holder to another.²⁰

The body, body parts, body products, and the freedoms and services intrinsically valuable to the body, may be considered as inalienable under certain circumstances. A thing must be "alienable" to be given, sold or bartered. For a thing to be alienable the separation of the thing from the person should not greatly devalue or harm his or her personhood by its separation. Preclusion of a sale often coexists with a gift, as in organ-selling and blood donation.²¹ A thing that is alienable is salable or tradable thus constituting its value in the market realm where money or a money equivalent is used in exchanges. This same thing can also be constituted in the social realm where value is expressed without money. An alienable thing may have value in both the market and social realm. Payment in one does not preclude a social value in the other. For example, we may recognize a

²⁰ Margaret Radin: "Market-Inalienability." *Harvard L Rev* 100 (8): 1849-1937. (1987) p. 1853. Hereinafter Radin: *Market Inalienability*.

²¹ Blood is made available by both sale and donation.

social value in the work done by people at day care centers. This social value and recognition does not keep us from also feeling that day care workers should be paid. Whether as social exchange or a job, we cannot actually buy the feelings of tenderness or concern that we might wish to have bestowed on our children, but we do not necessarily remove all hopes of it occurring by allowing some exchange to occur in the market realm. Money does not necessarily remove a social value from a product or service..

Are there some things that we simply do not want to measure in terms of money? A powerful example of social exchange is the blood donation system. Richard Titmuss, in The Gift Relationship, eloquently argues for the maintenance of a donation system. In encouraging giving acts, donation encourages an interconnectedness that fosters a valued concept of moral behavior.²² In the best of all worlds, this concept would encourage an ideal set of values to foster a sense of community, connectedness and shared human need. This social mechanism can be a force with which to justify market inalienability. Instead of market terms, we allow trade to symbolize our interconnection. Protecting the blood donation system from market rhetoric, from commodification, might be an important way to foster a sense of community and social responsibility. However, in the United States there is also a concurrent system of paid donations. Individuals that sell their blood or blood products (plasma) do so for economic reasons and do so frequently. Does allowing two systems to operate side by side diminish the social value of the donation system?

The value of a voluntary transfer of labor or products to a known or unknown person depends on the perceived value of the gift and on the need

²² Richard Titmuss elaborates this ideal throughout *The Gift Relationship*.

of the donor. For example, is a kidney "worth" more than blood? If so why? Is it that there is a more limited "supply" of kidneys or that the need of a kidney tends to have great meaning to the recipient in terms of life and freedom from constraints of dialysis?

There exists, potential or real, a two way exchange. The motivation might not be self-less. The giver might feel she has donated to some common resource which she may now partake of when needed. While this does not necessarily detract from the intent or nature of the gift, or its value, it is important not to assume such an act is motivated by altruism but rather a complex set of drives and desires. Blood donors do not *need* to have altruistic motives in order to have their blood valued. Nor does the person that sells his or her blood have blood that is less valuable. Even in the presence of a system that monetizes blood at one time but not at all times, donation can be valued. It extends a conception of the social good, gift-giving and the dependence of the community on each other.

The argument for a non-monetizable system of giving of certain services and things maximizes a conception of the giver as part of a larger community that must share certain limited resources. This argument can be extended to surrogacy. If the giver was expected to donate her services because such volunteerism fostered a sense of good, then could we allow intermediaries to be paid? Paying the intermediaries just expenses- the time for a lawyer to review the contract for example- would still amount to payment for his or her services and not the surrogate's services. This would not truly foster a sense of gift-giving. It simply condones volunteerism on the part of the woman.

Surrogates do not to have "pure" motives in the sense that they desire the gift only for the value of giving, as evidenced by Parker's studies, although

most claim to have some altruistic inspiration to varying degrees.²³ In the last section I presented some arguments that one of the issues with surrogacy is that the place of women has been one of *unpaid* givers of labor- the "labors of love". However, there is a very significant difference between the gift of blood and a child. What if the exchange is for a service as in pregnancy, or in *making* the blood. More importantly, can it be argued that even in the presence of a monetary exchange that there is still a social value to the exchange?

Radin argues that we do not need to forbid the sale of blood, for example, to foster the altruism of giving. If blood is sold, there could be the diminution of the intrinsic value of the gift. It would be made known that a pint of blood was worth so much on the open market.²⁴ "In precluding sales but not gifts, market inalienability places some things outside the marketplace but not outside the realm of social intercourse."²⁵ In a contractual transfer there are prescribed limits and methods to effect that trade.²⁶ Salable goods adjudicate between the needs of the donor and the needs of the recipient are being adjudicated in some fair and commonly agreed upon manner. Can a gift also be less than altruistic or, conversely, can a commodified thing be necessarily devoid of intrinsic value? There are some grey areas in which the exchange of personal attributes and services remain less than symbolic and more than a commodity. This area might be exemplified by what Radin calls incompletely commodified things. These things retain some meaning- symbolic, social or

²³ See earlier discussion of Parker and others regarding reasons surrogate mothers.

²⁴ Radin: *Market Inalienability*, p. 1913.

²⁵ Radin: *Market Inalienability*, p. 1853.

²⁶ Thomas Murray: "Gifts of the Body and the Needs of Strangers." *Hastings Center Report* April: 30-38. (1987) p. 31

moral- of gift-giving but also become valued in the market or exchange realm.

Under what conditions might commodification of the bodies be allowed? The state or community in its endeavors to foster giving could limit the prostitution of community members whether it was with regard to unsatisfying labor, dangerous labor or degrading labor. Certainly prostitution is not the only form of labor that might have one of these three aspects relevant to it. There are two arguments that I wish to put forward with respect to this issue of whether or not sex workers should be allowed to work. Both arguments have been derived from the feminist community over a long and sometimes bitter debate on the acceptability of prostitution.

Radin has argued that if the ideal world existed and individuals were not compelled to harm our sense of personal value, then the basic wants and needs would be met:²⁷

But we are situated in a nonideal world of ignorance, greed, and violence; of poverty, racism, and sexism. In spite of our ideals, justice under nonideal circumstances... consists in choosing the best alternative now available to us. How are we to decide, now, what is the best transition toward our ideals...to reconstitute those ideals?²⁸

In our nonideal world women are regarded as second class citizens in many respects. In fact, they are depended on as unpaid labor which brings both some social recognition but limited power within a predominantly market economy. In the first argument against prostitution and pornography this powerlessness is the result of and is perpetuated by the representation of

²⁷ Radin predicates this argument on the assumption that prostitution is something one would never wish to undertake. This is not true for many sex workers who find it, despite the stigma and possible dangers, to be a highly paid living in which the sex worker can control when, how and with whom she works.

²⁸ Radin: *Market Inalienability*, p. 1915.

women as sex objects, as unpaid workers in the home and as limited entrants into the labor market. Prostitution and pornography are the ultimate symbol of woman as a sex object. Women are dehumanized and economically exploited in being commodified into impersonal objects with a market value. They become useful, used, detracting from their full sense of self and from their personhood. They are subject to the exigencies and flagrancy of the market. Prohibition of prostitution would prevent the degradation of objectification. The premise of this argument against prostitution is that regarding women as commodities is preventable if we remove the source of objectification.

There are some problems with this argument. First, it may be that we view prostitution as selling of women but the sex worker herself would certainly see it as selling a service²⁹- "...no more a sale of sexual organs than is the sale of a mover's muscles, a model's beauty or a lawyer's legal talent."³⁰ Second, although it is generally held true, there is no absolute predictor that the presence of sex work has fostered a view of women as commodities any more than the apparent selfless labor in the home. Further, the removal of pornography and prostitution may be predicted to alleviate this degrading view of women but that cannot actually be proven unless it is attempted.

Two other concerns remain in the development of this argument. First, the slippery slope argument contends that with the continuation of sex work and pornography, we will all view persons, particularly women, as commodities. The argument against sex work is predicated on an assumption that we otherwise would have equality and equanimity. This fails to note that

²⁹ Priscilla Alexander, personal communication. I am indebted to Priscilla Alexander's work and conversation in developing this argument.

³⁰ Richards: *Commercial Sex*, p. 1257.

the world, without prostitution, does not seem to be devoid of inequitable relationships for women or men. It is doubtful that this inequity is *based* solely on the role of prostitution. Rather, prostitution might be one representation of such inequities. Second, this assumes that if we prevent sex work there are other options available that are as desirable to the worker. It is this last issue on which the proponents of prostitution as a work choice diverge from the opponents.

A second feminist argument advocates allowing prostitution. It arises from a dual recognition of women's more limited earning power, and the relegation of women to predominantly unpaid labor. Proscription of sex work would represent the continuing efforts to relegate women to an unpaid and therefore powerless economic condition. It reiterates the exclusion of women, and the presence of roadblocks, to full participation in a market economy. The argument against proscription extends the valuation of women, which has been covert and in the private sphere, into a public sphere. Proponents would argue that women were being paid for something that they were in reality being expected to donate all along.

Condemning commercial sex indicates certain paradigms of acceptable behavior for women. Sex workers criticize a failure of the status quo to provide subsistence. Laws that would "save her from moral bankruptcy" focus not on those who would create the market for her services- pimps and johns- but on the sex workers themselves. The burden of criminality rests on the prostitute not the john indicating that the latter is afforded more tolerance. Abridgement of sexual services is discriminatorily aimed at women and an imposition on her free choice to earn her living. Does she have the free choice to perform sexual services? One author, discussing surrogacy, argues that:

The right to be a prostitute is as important as the right not to be one. It is essentially the right to set the terms of one's own sexuality, plus the right to earn a good living.³¹

Radin further argues that if the sale is banned, then "we [must] consider changing the circumstances that created the dilemma."³² If we deny the sex worker the opportunity to work, we deny her the right to shelter, food and financial autonomy she might not otherwise have. If we cannot provide her with those needs, given that they are within reasonable limits, then we cannot diminish her quality of life further by banning sales. The value the sex worker may place on her autonomy may be of greater import than a desire to uphold a moral paradigm that is not applicable to her state of affairs. Market inalienability would be justified in light of an ideal concept of human flourishing but unjustifiable if applied unequivocally or in a non-ideal world.³³ An interviewee said:

The issue of women getting exploited this way [in prostitution and surrogacy]... If you don't want women to get exploited then you raise their salaries. You make it so that money is not an issue. If money is an issue and you have poor people they're going to do whatever they need to [do] to get money... If women were paid to do things like men the economic motives would be less. I don't think ten thousand's very much money but if you're poor it may seem like a lot.

Both proponents and opponents of surrogacy frame their arguments in terms of the freedom and limits a woman has over her body. A woman certainly has the right not to be a surrogate, however she should be free of

³¹ Griffin: *Wives, Hookers and the Law*. Student Lawyer 10: 7-42. (1982) p. 13.

³² Radin: *Market Inalienability*, p. 1917.

³³ Radin: *Market Inalienability* p. 1903.

constraints such as the need for money that would minimize her ability to make an uncoerced decision. If she should choose to engage in a surrogate contract she would require protection from social and economic exploitation. There is fear that if the role of pregnancy were subsumed within a market framework then women would be considered as mere breeders. The value of motherhood and of the sacredness of the mother-child relationship, as discussed above, would be subjected to baser values. Secondly, the paid surrogate will be susceptible to coercion and exploitation due to poverty or a poor self-value. But what does volunteer surrogacy do? It relegates women to a social framework without pay, just as much of women's work has been treated. Proponents of payment such as Lori Andrews, argue that surrogate mothers might be paid generously to minimize the possibility of exploiting them by cogently valuing their work.³⁴ One surrogate mother remarked:

Being a surrogate is not a quick or efficient way to make money. Generally, over 200 hours are spent in appointments, meetings, travel and time with the medical world....nine months of time and energy spent being pregnant and six weeks of time and energy recuperating. ...[W]e are not typically reimbursed for time missed from work. In any event this money could not even begin to reimburse us much less be payment for a human life.³⁵

Another advocate said of the exchange of money:

³⁴ Martha Field: "Surrogate Motherhood- The Legal Issues." (in press) (1988) p. 12

³⁵ Jan Sutton, Senate Committee Hearing, Nov. 9, 1987.

We feel that somewhere along in the process, she may feel resentful of she does not feel the couples are doing their fair share. If the infertile wife were able to be pregnant, the family finances would take care of her pregnancy bills and living expenses; we feel it's only fair for the couple to do the same for the surrogate. However, there is probably some price at which anyone would be a surrogate; we therefore favor a legal limit...³⁶

This last quote contains a great deal of material for analysis. Of course the reader may want to know whether or not the surrogate herself will feel resentful or how the surrogate or institution arrive at some figure for the living expenses for the wife and therefore surrogate. Nevertheless, the above quotes intimate that there is some distinction between paid and volunteer surrogacy.

Advocates of payment propose similarities to the payment of aspects of child care (i.e. wet nurse, day care). Commodification, which is charged with maintaining oppression of certain less powerful groups, by limiting the monetary means to engage in exchange, can also be used to afford greater power to the less powerful and effect change to those who most need it. As I have argued above, one of the motivations to limitations on the trafficking of commercial sex has been an underlying predisposition to limit the sexual behavior of women based on an idealized view of motherhood, chastity and family. This limitation would retain women's role in the private sphere.

Even if we can criticize the paradigm of non-commodification as it is used to limit women's role in the public sphere, there are certain things, babies as one example, upon which society does not want to put a price tag. When an ethic is espoused and considered valuable for facilitating a good in the society it should be globally useful and universally applicable. When an ethic or

³⁶ Beth Bacon, Hagar Institute. California Senate Testimony for Hearing of Dec. 11, 1987.

value is constructed for unilateral application to women it is suspect. It is the biased application of social values to women that has, in part, enabled a construction of surrogacy as outside the ambit of women's role.

Part IV

A. Regulation of surrogate contracts

Should surrogacy just be allowed to flourish with no regulation or parameters mandated? Should it be outlawed all together or should it be regulated somewhere on the continuum between these two extremes. Prohibiting surrogacy arrangements has been criticized as being patronizing "to the persons that enter them...when the arrangements are satisfactory to the persons who enter them."¹ It would be dangerous for "society to consider it its role to protect them from doing what they want to do."² However the risk is of harm to all parties is potentially high and the failure of such arrangements sufficiently detrimental to all parties, especially the child, some regulation is warranted.

Surrogacy raises vital concerns because of the potential for harm to all parties. These potential harms warrant state intervention to protect the parties from undue risk. This right to intervene can be based on several aspects of surrogacy. In this conclusion, I will clarify the need for some state intervention and propose some parameters to surrogacy that can be addressed in regulatory legislation.

Based on the five California bills, I have divided regulatory models into two different formats. The first is regulatory legislation allowing exchange of market goods (usually money) for a surrogate mother's ability and willingness to gestate a child and relinquish that child to an awaiting adopting couple or person. The second seems to allow volunteer participation by the surrogate by elimination of paid exchange with some variations on the

¹ Martha Field: "Surrogate Motherhood- The Legal Issues." (in press) (1988) p. 14

² Op. cit.

reimbursement for out-of-pocket expenses such as prenatal and hospital medical care. It is also possible to divide the two forms of regulation into those in which there is great state protection by overseeing aspects of the contract and those in which the contract is more laissez-faire but sets up specific minimal requirements for both parties. The highly regulated form as demonstrated in AB 3771 and AB 1707 allows for paid surrogacy. The state's facilitation of surrogacy can be accomplished by a highly regulatory model in which the rights, duties, obligations and expectations of all parties are defined. AB 2403, 2404 and 3200 are considerably less concerned with the parameters of surrogacy and more with the exigency of prohibiting payment for *particular* acts.

I propose that the problematic aspects of payment are alleviated in part when the state has more ability to control and protect the interests of all parties. Bills proscribing payment but ignoring volunteer surrogacy do not actually foster the arrangement or encourage a particular model of ethical, social and economic exchanges. Instead they curtail use of the arrangement at all.

Legal enforcement of a familial ideal has been used to maintain the family within prescribed formulas. The state regulates who can marry whom. Many states dictate how two consenting adults may or may not have a sexual relationship and in the not too distant past how they could or could not prevent pregnancy. The state also sets limits on how individuals in a family may treat each other such as their duties and obligations to their offspring. There are excellent and defensible intentions in every category such as protection from abuse, neglect or abandonment. There are also some unwarranted restrictions that limit individual autonomy. Surrogate

motherhood regulation lies balanced between untoward restriction of autonomy and complete paternalistic protection

The state's "refusal to certify and effect surrogate contracts is an infringement of the right to procreate" if, as John Robertson cites from case law, the individual has a fundamental procreative right.³ Because the state has a "monopoly" and duty to oversee paternity, adoption and contracts it is withholding protection and regulation if it does not allow surrogacy in some form. However, the state should have some method to regulate the activities of the participants because there is possible commodification of certain services that have previously been a concern to the state. Furthermore, those participants involved may be vulnerable to certain preventable risks and some unpreventable risks. The state's minimization of those risks is appropriately within its jurisdiction.

State intrusion into such private matters can be warranted because the state can function as the arbiter *in absentia* by setting up specific parameters for the contracts. Although, there is always concern that the state cannot or will not create fair law, in this case the need for intervention outweighs this concern. In choosing between the problems of regulation by the state and a repeat Baby M, I am inclined to accept the potential problems of the former. However, I advocate a regulatory model as enabling the facilitation of a method of creating families and prevent the arbitration of difficulties in the courts. The intention should be to attempt to prevent suits and custody battles. The courts are hopefully the last resort of surrogate contracts.

³ John Robertson: "Surrogate Motherhood: Not So Novel After All." *Hastings Center Report* 13 (5): 28-34. (1983) p. 33. See also Robertson's "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth." *Va Law Rev* 69: 405. (1983) Also see below in discussion of Part I Section B.

State intrusion into the private matters of the family is also warranted because of a compelling interest in the protection of children. As Radin and Capron wrote in testimony to the California Senate Hearing of Dec. 11, 1987:

Certain core values are, however, recognized as matters of legitimate concern for the state. Among these are the protection of children's welfare and interests (especially through encouragement for responsible behavior by parents), the maintenance of accurate records and vital statistics and family status, and the promotion of human well being and prevention of human exploitation... [T]he state has acted in light of its concern for these values by adopting certain legal rules about parentage...⁴

This warrants constructing contracts under the aegis of agencies equipped with personnel and credentials to work with families undertaking surrogacy. Adoption agencies or registration of present surrogate parenting agencies that conform to regulatory guidelines would be adequate.

The court in *Eisenstadt v. Baird* said:

If the right of the individual to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁵

But matters of the child and of coercion of the surrogate do warrant intrusion. The right to procreate might even extend to those cases where there are consenting parties but the state considers the risk to one or both too high. Such an example might be unlimited fees since informed consent could become less than voluntary. For this reason, I recommend limitation of fees.

⁴ Margaret Radin and Alexander Capron in California Senate Testimony of Dec. 11, 1987.

⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 453. (1971)

Hopefully this would diffuse concern about the distinction between K-Mart and Saks Fifth Avenue surrogate mothers. We want to monitor the possible deleterious harm of commodification. However, the postential surrogate should not be penalized for having payment as one of a set of variables. This set allows her to evaluate her decision to be or not to be a surrogate mother and this may include financial need. While we might not want to limit the types of persons who participate-for example disallowing poor women because they would have less valid informed consent- we could justify fee setting in order to minimize the market haggling that would contribute to a distinction between a K- Mart donor or Saks Fifth Avenue donor.

Aside from the specter of baby-selling, another argument against the use of payment in surrogacy regards payment as a coercion. There is legitimate concern for the coercive nature of money. The decision in *Doe v. Kelly*, wherein a couple sought to legitimate their exchange *ex ante* to their signing of a contract, the judge remarked:

...in all but the rarest of situations, the money plaintiffs seek to pay the 'surrogate' mother is intended as an inducement for her to conceive a child she would not have normally wanted to conceive, carry for nine months a baby that she would not normally want to carry, give birth to a child she would not normally want to give birth to and then, because of this monetary reward, relinquish her parental rights to a child that she bore.⁶

The exchange of money seems to create a more binding commitment to exchange. Payment may carry a greater compulsion to fulfill particular aspects

⁶ *Doe v. Kelly*, *Doe v Attorney General Kelly*, 106 Mich App. 169, 307 N.W.2d 438 (1981). Prosecuting attorney.

of a contract that the surrogate mother finds herself unwilling to do. Would these concerns diminish if there were no monetary exchanges? In a volunteer situation can a surrogate mother be "coerced" by social values, as in fulfillment of a promise? Even if payment is removed from the relationship, the surrogate who changes her mind is presentally as legally bound as one who is paid since neither are protected contracts under California law. There is no predictor that payment would alter the frequency of revocation of contracts. It could be that volunteer surrogates were even more committed to fulfilling the desire of a childless couple and therefore less likely to renege on her agreement to relinquish the child.

The logical extension of payment for gestation would result in recommending payment whether or not the surrogate relinquished the child. If this were the case, the state would be placing a high degree of risk on the adopting couple. Another argument could be extended that if payment was for gestation and the *chance* to adopt a child, rather than a contract to adopt, then the couple was still carrying a very high risk for having paid but not received the thing that they had desired. After all, their desire is not to have a woman pregnant with their child but to ultimately be parents to a child born from that woman. The burden on the couple would be enough to deter, not facilitate, surrogacy.

Arguments that the child is being bought are specious. The question is, "Do we want the baby-selling laws to apply to this situation?" If the laws do apply, then there needs to be a consensus as to whether or not those laws are generally acceptable. If they do not apply, and surrogacy is considered outside the purview of this doctrine, then the complaint about baby-selling is inapplicable. The discussion will have to center on what values and goods are promoted or preserved by the baby-selling laws.

The burden of restructuring a framework whereby a community good is fostered should not be rested on those least capable of putting aside their needs to foster this good. If we are committed to make a change for a better future, as Radin describes, we should not ask those most in peril- the women who are seen as subject to exploitation in the marketplace- to create it for us. In fact, we should not ask women, as opposed to men, to create it for the society. Should we expect them to refuse payment as a gesture that they recognize the social value and sacredness of the act of pregnancy? Refusal to receive payment would indicate a higher moral stature not unlike that expected at the turn of the century. Should we expect them to set a high moral standard so that others will follow? Or conversely, should we set this standard for them? This would impose a standard on one set of individuals with the least resources to enact them and least flexibility to accommodate them.

Regulation can also foster a context that embodies and embraces a positive image of surrogacy.⁷ This might be accomplished by incorporating it into adoption proceedings where there is greater respect for and social value of the relinquishing of infants. Furthermore, agencies could be required to be non-profit to minimize the presently notorious view of the money-making venture.

⁷ Radin likewise argues that commodification be regulated to ensure the realization of personal ideals, the safety and freedom of the workplace. P. 1920.

B. Conclusion

The history of third party reproduction has been represented, until the advent of surrogacy, in AID. AID was introduced in Part I as an example of the permissiveness of alternative reproduction legislation that has occurred in the past. The reasons for the state's facilitation and the encouragement of the practice could be construed as particular to the participants and specifically the male donors. In Part II, the history of legislative efforts demonstrated a change from early attempts to regulate but facilitate surrogacy to more recent attempts to discourage surrogacy by restricting certain aspects most of which are aimed at the performance by the surrogate. Part III argued that criticism of surrogacy has to a great extent arisen from concerns about the impact and meaning of women's changing role in the public sphere. In each of the three arguments regarding paid surrogacy I have presented- limitation of women's sexual behavior, volunteerism as discriminatory and commodification of sexual services - the state can protect the violated interests and redress wrongs. The state can regulate the transaction in order to maintain as best it can a social value such as it uses to promote the health and well-being of families. I have demonstrated that surrogacy should not be an inalienable service nor refused partial commodification. Money as a coercive item could be regulated by the state to minimize the danger of women being lured into a possibly deleterious job without voluntary, informed consent.

This paper has addressed the issues that have arisen regarding the acceptability of women's performance as surrogate mothers. In forming legislation about surrogate parenting contracts the issues of the adoptive couples and the child will need to be addressed. Arguments against surrogacy embody a large range of values about the creation of family and women as mothers. When I first began research on surrogacy, the legislative distinction

between paid and volunteer surrogacy was apparent. Most legislative arguments addressed the issue of whether this constituted baby-selling. However, there were also voices, both for and against surrogacy, that were concerned with the payment of women as surrogates in addition to concerns of baby-selling. The differentiation between those things that women can and cannot do for money was not clearly discussed. This particular distinction not only represented the ambivalence that the general public felt about surrogacy, but my own as well. There were few black and white issues; most were within the grey zone. Rocking the cradle of the child born of surrogate mothers is also rocking the boat.

This paper evaluates the values that underlie the discussion of surrogacy. It examines the coherence in values that are used to argue for and against a commodified market in gestational services. Parties who wished to facilitate the surrogate parent arrangement in general favored a regulatory model to define the parameters of performance and obligation for all participants. Opponents to surrogate parenting, in general, limited the scope of the surrogate mother to receive payment and for other agents to facilitate in any way the arrangement for financial transaction. Commodification of personal attributes and services presented a very real threat to how we viewed women. Women's changing role in motherhood and in public labor was exemplified by some of the surrogate mothers strong belief in their right to be involved in this act of creation.

A final model for surrogate parenting will need to take into account the above concerns and whether or not there is a state interest to facilitate and regulate such arrangements. We might argue, when all the information is accumulated, that surrogacy should be prevented in order to enhance a concept of inalienable goods and values and thereby avoid the controversy of

buying and selling life and degrading personal attributes. On the other side, we might find that there is a way to address the issues of concern and still foster a sense of value of the participants and the child, examples of which I have given in this last section. The proscription of surrogacy based solely on the discomfort we might have with the public role of women- as paid persons, as arbiters of their fate, as controllers of their bodies- is not sufficient reason to allow volunteer surrogacy but not paid surrogacy. The gender inequity recapitulated by distinguishing between paid and unpaid surrogacy needs to be revealed. The values that we intend to foster, for families and children, should reveal an agenda that is appropriate for men and women. Open discussion and critical analysis of those values may not provide the answer to surrogacy itself. Hopefully it will provide the compass to get our bearings and get the rocking boat ashore.

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