

# How (Not) to Think About Surrogacy and Other Reproductive Innovations

By MICHAEL H. SHAPIRO\*

“Everything must be made as simple as possible but not one bit simpler.”

—Einstein<sup>1</sup>

AS FAR AS we know, the vast majority of surrogate motherhood transactions<sup>2</sup> “succeed” in the sense that the intended parents take custody of the child without litigation, hard bargaining during the contract’s performance, or anyone’s serious emotional injury.<sup>3</sup> These may not be the only criteria for success, and no one doubts that there are costs in uncertainty and some degree of mental distress for all of the parties, even in the smoothest of transactions. But in matters of reproduction by infertile<sup>4</sup> persons, actu-

---

\* Dorothy W. Nelson Professor of Law, University of Southern California. Thanks to Professor Roy G. Spece, Jr. and my research assistants Dennis Plaisted and Shervin Mirhashemi for their comments and suggestions. Some of the discussion in this Commentary derives from several of my prior writings. They are cited at appropriate points below.

1. Albert Einstein, in EDWARD F. MURPHY, 2,715 ONE-LINE QUOTATIONS FOR SPEAKERS, WRITERS & RACONTEURS 66 (1981).

2. By this time, most readers know that a surrogate transaction involves an agreement between a “hiring” parent or couple, and a woman who agrees either to be artificially inseminated by the intended custodial father (or another donor) or to carry an embryo derived from the intended custodial mother (or another genetic source). At birth, the child is to be transferred to the intended parents. In this Commentary, I will assume the intended custodial parents are married heterosexual couples. For definitions, see UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1, 9B U.L.A. 138 (Supp. 1993).

3. Persons involved in arranging surrogacy transactions indicate that the incidence of serious breaches of the agreement is very low. Peter H. Schuck, *Some Reflections on the Baby M Case*, 76 GEO. L.J. 1793, 1801 n.30 (1988). Professor Schuck reports an interview with Noel Keane, a lawyer dealing in surrogacy transactions. It was claimed that there were nine problem cases out of about 600, and four (including Baby M) ended up in court. See also ADVISORY PANEL REPORT TO THE MEMBERS OF THE JOINT COMMITTEE ON SURROGATE PARENTING, MINORITY REPORT at M12 (July 1990) (on file with author) [hereinafter MINORITY REPORT]; MICHAEL H. SHAPIRO & ROY G. SPECE, JR., 1991 SUPPLEMENT TO CASES, MATERIALS AND PROBLEMS ON BIOETHICS AND LAW 160 (1991) [hereinafter SHAPIRO & SPECE, 1991 SUPPLEMENT].

4. The driving force in surrogacy and other current technological and social mechanisms for reproduction is simply *to have a child*, not to “engineer” its traits. Infertility, then, is a key concept. It covers widely different impediments to reproduction, including, for example, an absence of effective germ cells, impaired mechanisms for fertilization and gestation, and perhaps serious medical risks for the woman, fetus or child posed by pregnancy or genetic factors. See generally OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES 35-37 (1988) (not referring directly to pregnancy or fetal risks). In *In re Baby M*,

ally receiving a desired child counts for nearly everything from the intended parents' point of view.

For many enterprises, a modest failure rate inspires little more than annoyance. Of course, small error rates can count heavily in certain circumstances. It is one thing when a toaster fails, and quite another when an aircraft's communications cease or a building collapses. In surrogacy, the small failure rate also gets writ large, but for reasons sharply different from those involving equipment losses. The failure of a surrogacy transaction is vivid and disturbing because, among other things, it involves a battering of the familiar categories we use to describe and evaluate the world; our basic tools of thinking are compromised.<sup>5</sup> The relationships in surrogacy, the reasons for transfer of custody and the revealed purposes of reproduction all embody anomalies that are difficult to manage within our customary forms of thought. The image of a mother who is not too ill, too young, too single, too disabled or too poor to raise a child, but who nevertheless voluntarily gives it up to another, is deeply unsettling: it does not "fit"; it is a "monster." If you are not safe from your mother, from whom are you safe?

The problem is not confined to "rejection" by the genetic mother. The intended custodial parents—including the intended custodial father—may also reject the child. This has in fact occurred, although in the best-known case, where a child had been born with serious disorders, tests established that the intended custodial father was in fact not the genetic father, as originally thought.<sup>6</sup> The very possibility that an intended parent would reject a

---

537 A.2d 1227, 1235 (N.J. 1988), the intended custodial mother wished to avoid pregnancy because she feared she had multiple sclerosis and thought it posed excessive risks to her health.

5. This is discussed at much greater length in Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331, 338-48 (1990) [hereinafter Shapiro, *Fragmenting*]. See also Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 27-33 (1991) [hereinafter Shapiro, *Technology*].

Note the idea that things become more noticeable when they fail. See generally MARTIN HEIDEGGER, *BEING AND TIME* 102-03 (John Macquarrie & Edward Robinson trans., 1962). Heidegger states:

When we concern ourselves with something, the entities which are most closely ready-to-hand may be met as something unusable, not properly adapted for the use we have decided upon. The tool turns out to be damaged, or the material unsuitable. In each of these cases *equipment* is here, ready-to-hand. We discover its unusability, however, not by looking at it and establishing its properties, but rather by the circumspection of the dealings in which we use. When its unusability is thus discovered, equipment becomes conspicuous. This *conspicuousness* presents the ready-to-hand equipment as in a certain un-readiness to hand.

*Id.*

6. *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992) (refusal by supposed father to accept baby with severe impairments; later determination that husband of surrogate was the genetic father; cause of action stated by surrogate mother against lawyer and others for negligence in arranging

child for his or her negative traits carries the hint of erosion of the absolute, noncontingent bonds we are expected to have with our children, whatever they are like.<sup>7</sup>

Challenges to reigning conceptual systems or their major components are, then, among the many things that make us deeply nervous. The elements of these systems are instruments for deciding how to think and what to do—in determining who has presumptive custody of a child, for example.<sup>8</sup> In surrogacy, we do not simply have a contest between man and wife over custody in a failed marriage (which is bad enough), we have something quite different. A genetic mother and genetic father, never married to each other, not single lovers, and indeed having no other non-market, non-commercial relationship to each other whatsoever, are contesting which of them is to have custody of “their” child.<sup>9</sup> There is also an odd relationship between the genetic mother and the genetic father’s wife—the intended custodial mother. The most conceptually explosive situation exists when the birth mother is not the genetic mother of the child, and we have a dispute

---

and implementing the transaction). The court stated that Mr. Malahoff appeared to have changed his mind and abandoned the child “even before it was discovered that Malahoff was not Christopher’s father.” *Id.* at 269.

7. Yet context strongly affects this: We accept the sort of “inspection of the goods” that some adoption processes take. We do so because there is no acceptable alternative, and because we believe that there is no *given* relationship between prospective adoptive parents and the children being assessed.

For extended treatment of the idea of noncontingent bonds, see Shapiro, *Fragmenting*, *supra* note 5, at 348-57; Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. (forthcoming Summer 1994) [hereinafter Shapiro, *Regulation*].

8. Much of the field called “bioethics” addresses assaults on basic modes of thought that we rely on virtually without question in ordering our lives. This is the argument made in Shapiro, *Fragmenting*, *supra* note 5. See also DAVID HEYD, *GENETHICS: MORAL ISSUES IN THE CREATION OF PEOPLE* 23-24 (1992). Heyd states:

[B]oth our everyday moral intuitions and our traditional ethical principles seem either to lead us into paradox or to break down altogether when applied to genesis problems [i.e., problems concerning creation of persons]. . . . The history of science is replete with examples of cases in which the encounter with completely new experiences or natural phenomena leads to changes not only in beliefs about the world but also to more radical revisions in general scientific theory.

*Id.*

9. See generally Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759, 1778-79 (1988) (“the contractual couple”). See also *id.* at 1774-82 (“Whose privacy?”; need for careful consideration of privacy-right attribution). Cf. *Stiver v. Parker*, 975 F.2d 261, 270 (6th Cir. 1992) (describing the relationship between the surrogacy broker and his medical and legal assistants on the one hand, and the surrogate mother and contracting father on the other).

between the genetic and gestating mothers over who is the "real"—the "natural"—mother.<sup>10</sup>

A few deceptively simple questions about how to characterize these transactions suggest the difficulties in knowing how to think about surrogacy. Are surrogacy transactions like divorces? Only a little. Divorces are upsetting, but their existence does not attack the way we think in the same numbing way that gestational surrogacy does. Are they like adoptions? Somewhat, but not exactly. If they are, don't they violate the adoption laws?<sup>11</sup> Is the baby being sold? If so, so what? Sales are not all alike. Is the mother's womb being rented? Are these transactions more like commerce, or more like intrafamilial shifts of custody or more like transfers of real or personal property? And if they are—in *certain respects*—like rentals, custody shifts, or transfers of property, in what ways are they *unlike* them? This latter question is often omitted in the testier complaints about surrogacy.

Some observers talk as if the proper response to events or innovations that do not fit our patterns of thought is to forbid the transaction or construct a taboo: not all change is progress, after all. "[F]lying squirrels are not unambiguously birds nor animals, and they are avoided by discriminating adults."<sup>12</sup>

Before we shut down the surrogacy industry, however, we should be sure that the failure of our category system requires this fatal result, and that adjustments or repairs consistent with our basic values are out of the question. We could say, for example, that in gestational surrogacy the child indeed has two mothers and assign custody jointly to each, along with their spouses.<sup>13</sup> (I don't recommend this, however.)

---

10. See *Johnson v. Calvert*, 851 P.2d 776 (Cal.), *cert. denied*, 114 S. Ct. 206 (1993) (upholding gestational surrogacy contract and assigning custody on a contractual basis rather than on the prime criterion of the child's best interests).

11. Unif. Parentage Act, CAL. FAM. CODE §§ 7600-7954 (West 1994).

12. MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* 166-67 (Pelican ed. 1966). More fully:

One way or another the animals which they [the Lele of Africa] reject as unsuitable for human or female consumption turn out to be ambiguous according to their scheme of classification. Their animal taxonomy separates night from day animals; animals of the above (birds, squirrels and monkeys) from animals of the below; water animals from land animals. Those whose behaviour is ambiguous are treated as anomalies of one kind or another and are struck off someone's diet sheet. For instance, flying squirrels are not unambiguously birds nor animals, and they are avoided by discriminating adults.

*Id.*

13. This seems to be the view of one of the proposed draft statutes presented in this collection, the Unenforceable Surrogacy Agreements Act (Proposal 1). See also R. Alta Charo, *United States: Surrogacy*, in *LAW REFORM AND HUMAN REPRODUCTION* 223, 263 (Sheila A.M. McLean ed., 1992). Charo states:

More generally, we need to evaluate the idea that personal choice in reproductive matters is not properly compromised except for good reason. Here, moral reasoning parallels to some extent constitutional argument structures: burdens on procreative autonomy—at least in its standard forms—must be justified by those who wish to interfere with it. Of course, how far the presumption should extend beyond the customary forms is part of what is contested in assessing alternative modes of reproduction.<sup>14</sup>

The draft statutes presented in this symposium reflect several of the basic responses to our discomfort with surrogacy transactions: (1) Ban them altogether, with criminal penalties for all or some of the participants. The contracts will then be full or partial nullities—“void,” perhaps without even the possibility of restitution.<sup>15</sup> (2) Banish them through civil death—no criminal penalties, but the contracting parties take their chances that there will be no enforcement of the contract and perhaps no restitution. (3) Allow them by validating the contracts, but heavily regulate them in various ways—psychological screening, health and genetic screening, avoidance of coercion and undue influence, no specific performance of agreements concerning abortion or intrusive medical tests, limits on commercial “excesses” and certain “brokering” activities, and so on.<sup>16</sup>

---

Some children have three biological parents, not two. . . . Acknowledging that *two* women are biologically related to the same child, that *both* women are “natural” mothers, does not necessarily determine which will have superior claims to raise the child. . . . Perhaps it is time to take an even greater leap in family law. All biological relationships—genetic and gestational—are irrevocable. . . . Why not give these children a break? . . . While courts and legislatures may see the need to determine who has a primary role in raising the child, there is no need to cut these other people out entirely. Indeed, from the child’s point of view, it is simply wrong to do so. It has been said that you can never be too rich or too fit. Shall we add, perhaps, that you can never have too many parents to love you?

*Id.*

In *Johnson v. Calvert*, the court criticized the American Civil Liberties Union’s position that there were two mothers. 851 P.2d 776, 781 n.8 (Cal.), *cert. denied*, 114 S. Ct. 206 (1993).

14. These are complex points that can only be touched on here. There seems to be a tradition, reflecting common moral views, that reproduction is a matter for individuals and couples to decide. There also seems to be strong support for the idea of reproductive autonomy (a complex idea) as a liberty interest meriting protection by some form of heightened scrutiny. *See generally* *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (reproduction is a “basic liberty” requiring strict scrutiny under the Court’s equal protection analysis); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 961-62 (1986).

15. There is ordinarily no restitution in a void contract, but there may be exceptions, as when the parties are not equally in the wrong. *See* BERNARD E. WITKIN, 1 SUMMARY OF CALIFORNIA LAW: CONTRACTS §§ 445-47 (9th ed. 1987). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 197-99 (1981) (specifying other exceptions to unavailability of restitution).

16. *See generally* R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 88, 96-104 (Larry Gostin ed., 1990) (discussing various models of state policy—“static,” private ordering, inducement, regulatory and punitive;

I will not investigate these draft statutory schemes in detail. I simply suggest how *not* to go about deciding which of the above approaches to take. In particular, I describe what I view as a series of common mishaps in thinking about surrogacy.

Before that, however, I will try to draw a conceptual map that identifies the forms of harm and benefit that may arise from the practice of surrogacy. This enterprise concerns *instrumental* risks and benefits; I do not entertain the idea that surrogacy is "intrinsically" or "definitionally" immoral. Statements such as "surrogacy is by definition abuse or slavery"<sup>17</sup> are simply tendentious and question-begging. (Still they serve the purpose of spurring us to investigate why some critics are bent on collapsing questions of fact and value into definitional stops.)

In effect, then, I construct in outline form, two catalogues: one of supposed harms and benefits, describing subjects of harm and kinds of harm; and one of common errors in thinking about them.

## I. A Taxonomy of Consequences<sup>18</sup>

### A. Subjects of Harm

What follows is a typology of possible subjects of harms and benefits arising from particular surrogacy transactions and from the institution of surrogacy. They include: (1) the surrogate mothers; (2) women generally (by spillover effects of surrogacy); (3) the children born of the transaction; (4) the siblings who see or later hear of the transfer of the child; (5) the hiring parents; (6) children available for adoption who might be adopted but

---

there are, of course, many alternative ways of categorizing these often overlapping approaches). For a discussion of ways of regulating surrogacy contracts, see generally CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989) (women should be able to form binding contracts concerning reproduction).

17. See 2 ROYAL COMM'N ON NEW REPRODUCTIVE TECHNOLOGIES, *PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES* 683-84 (1993). The Commission states:

The premise of commercial preconception contracts is that a child is a product that can be bought and sold on the market. . . . The commodification of children *entailed* by preconception arrangements ignores these essential values [that children are not commodities or instruments]. . . . Commercial preconception contracts *by their nature*—the exchange of money for a child—contradict one of the fundamental tenets of the Commission's ethical framework.

*Id.* (emphasis added). Cf. Comments of Barbara Katz Rothman, in Isabel Marcus et al., *Looking Toward the Future: Feminism and Reproductive Technologies*, 37 *BUFF. L. REV.* 203, 214 (1988-89) ("Surrogacy *entails* the notion that one can rent a womb and can affix an arbitrary price tag on pregnancy, often \$10,000.") (emphasis added). Perhaps I am taking these remarks too literally.

18. See also Michael H. Shapiro, *Pregnancy, Genetic Motherhood Distinguished*, *L.A. DAILY J.*, Nov. 1, 1990, at 7; Michael H. Shapiro, *Parental Surrogacy Gives Birth to Legal Risks*, *L.A. DAILY J.*, Nov. 2, 1990, at 7 [hereinafter Shapiro, *Parental Surrogacy*].

for surrogacy transactions;<sup>19</sup> (7) other parties involved or keenly interested in the transaction, such as grandparents and other relatives, brokers, lawyers and counselors; and (8) the community's normative system, thus the community itself, and thus we and our successors.<sup>20</sup>

## B. Kinds of Harm

What kinds of harm or benefit can befall these subjects? (1) Having a life and becoming bonded to one's family (a benefit or burden to the child); (2) gaining a child and becoming bonded to her; (3) losing a child by transferring him to others; (4) regretting entry into an arrangement one should have avoided; (5) being objectified or commodified—going from personhood to thinghood (either the surrogate or the child); (6) falling victim to the risks of pregnancy, from discomfort to death; (7) being affected by change—on the part of others and/or on one's own part—in attitudes, beliefs and values basic to our normative system (a risk or benefit to individuals and communities); (8) being subject to whatever inappropriate behaviors are generated by this shift in values, including behaviors accompanying shifts in social relationships and in our views of each other; (9) being demoralized by seeing one's sibling transferred, whether for value or not; (10) living in an institution or a series of foster homes or on the streets after remaining unadopted; and (11) being prevented from existing because surrogacy is banned or discouraged (though very few people will benefit from this).

To explain these taxonomies fully is not the mission of this Commentary. I stress two points before moving on. First, concluding that someone is harmed by a reproductive practice often rests on at least one of the mishaps described in the catalogue that follows. Second, I do not claim that we must be *certain* that anyone or anything is likely to be harmed before we control or demolish surrogacy. Those prepared to tolerate surrogacy are not calling for "definitive" data: we do not have to wait for final proof before

---

19. I do not deal with this matter. I suggest only that the problems of dealing with unadopted children should not rest too heavily on the infertile, particularly when they see themselves as having a chance to reproduce with technological/social assistance. See also Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 24 (1989) (making a similar point).

20. See Shapiro, *Parental Surrogacy*, *supra* note 18 (brief typology of who may be harmed and types of harm).

The idea of "harm" to a community's normative system may seem odd, but briefly, it involves shifts in attitudes, beliefs and values that characterize the basic features of the system. These shifts in turn may lead to behavior that is inconsistent with the formerly dominant system. Whether such shifts are themselves morally to be preferred or dispreferred is generally an open question. In that light, a particular harm to a given normative system may not be a moral harm.

we avert harm. But we need enough information to permit a rational belief that there *could* be data establishing a significant risk of harm.<sup>21</sup>

## II. Mischaracterizations

### A. In General

By "mischaracterizations" I mean to include not just outright inaccuracies, but subtler problems: characterizations that narrowly exclude concurrent characterizations that may also be true or instructive (e.g., I can be traveling rapidly by foot and simultaneously promoting my health); metaphors that are taken to be literal truths (e.g., "surrogates are slaves"); descriptions in which a part is taken for the whole (e.g., mentioning the child's departure from the surrogate and failing to mention the child's entry into his father's family); and accounts that beg empirical or value questions and build them into definitions (e.g., "surrogacy *necessarily* treats women and children as things"). When trading in questionable premises, one's argument is vulnerable. And if it is vulnerable, it is an uncertain basis for guiding thought and action.

To chart why such mischaracterizations occur would require a massive effort in cognitive psychology, and the results would probably be incomplete in any event. For now, it is enough to acknowledge that abstract thought necessarily involves incomplete characterization, and that when we are deeply puzzled it is more likely that our efforts to describe and evaluate will be severely burdened.<sup>22</sup>

---

21. See Michael H. Shapiro, *Surrogacy, New Parenthood, and the Coming Millennium*, L.A. DAILY J., June 16, 1993, at 7 [hereinafter Shapiro, *New Parenthood*].

22. See, e.g., HOWARD MARGOLIS, PARADIGMS AND BARRIERS: HOW HABITS OF MIND GOVERN SCIENTIFIC BELIEFS 29 (1993). Margolis states:

The most natural view of why a few new ideas provoke marked symptoms of incommensurability [roughly, conflicting intuitions], but many others do not, lies in some notion of a logical or conceptual distance between the new idea and what preceded it. We can then think of a revolutionary paradigm shift as a shift across an intrinsically large space between new and old theories or practices or concepts. Call that the gap view of paradigm shifts.

*Id.* Margolis then offers an alternative description, referring to situations "where there happens to be an important conflict between new ideas and ordinarily unnoticed habits of mind that have developed in the practice of the older ideas." *Id.* He also suggests that "a new idea will always involve some conflict with some existing habits of mind, since it is just the violation of expectations that fit existing habits of mind that gives us the sense that something is new." *Id.* at 30. See also *id.* at 30-32 (delayed recognition and incomprehension concerning new ideas); Hansmann, *infra* note 74; Shapiro, *Fragmenting*, *supra* note 5, at 338-48 (classification problems; failure of category systems; multiple aspects and concurrent characterizations).



## B. Mischaracterizations About Overall Purposes or Motivations

I start with two quotations:

Requiring a woman to suffer a pregnancy and forcing her to unwillingly abandon her child is an unlawful assertion of control over that woman. ([citing] California Penal Code § 181 prohibiting involuntary servitude.)<sup>23</sup>

[A child in a surrogacy transaction is] conceived in order to be given away.<sup>24</sup>

There are several errors and questionable assumptions in these descriptions. The first quotation is from Proposal 1 of the present collection. Consider the following:

(a) "Requiring a woman to suffer a pregnancy"

In what sense is a woman "required" to "suffer" a pregnancy? Is it assumed she is conscripted into service? Or that any woman who would agree to this is *necessarily* demented and, being incompetent, is thus being required to do something her better self would not? True, she is supposed to comply with the contract she voluntarily enters into—in this sense, *anyone entering into a contract is "required" to comply*. No one has demonstrated that these contracts are all involuntarily entered into, and it seems offensive to women as a group to suggest that they cannot in reality rationally assent to such arrangements.<sup>25</sup> One cannot blandly invoke notions such as "false consciousness" to dismiss the competence or the values of surrogate mothers. To do so contributes to the image of women as universal victims.

(b) "forcing her to unwillingly abandon her child"

Is this a correct description of the purposes and motivations behind the arrangement? If so, whose purposes and motivations are they? They are certainly not the original purposes of the surrogate herself. One would also think that the purposes of the hiring parents are to acquire and bond to a child genetically connected to one or both of them. The use of "force" is not one of their *purposes*. The hiring parents' intention that the surrogate—

23. Proposal 1: Unenforceable Surrogacy Agreements Act, § 2(a). This Commentary addresses Proposal 1 directly while alluding to issues presented in Proposals 2 and 3.

24. Herbert T. Krimmel, *Surrogate Mother Arrangements from the Perspective of the Child*, 9 LOGOS 97, 98 (1988) ("The child is conceived, not because he is wanted by his biological mother, but because he can be useful to her and others. He is conceived in order to be given away."). Of course, *someone* wants the child as part of creating a new nuclear family—a child who, by all evidence so far, will be regarded by everyone as intrinsically valuable. And as for being "useful" to the intended parents—any of their standardly-produced children would be equally "useful."

25. Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167, 171-76 (Larry Gostin ed., 1990) (women's decision-making in surrogacy).

and they themselves—be *bound* does not justify the description offered in the draft. All contracting parties acting in good faith intend to be bound and intend that the other parties be bound. It is no good to say “it’s different” when applied to reproduction. We are talking about the use of the idea of “force” as a purpose of an agreement, whatever its subject.

Further, few persons who advocate or are prepared to tolerate surrogacy believe that the surrogate can constitutionally be “forced” into aborting, or prevented from aborting, or be “required” to undergo any intrusive physical tests. I will not discuss here the question of damages for contractual breach in light of cases such as *Planned Parenthood v. Casey*<sup>26</sup> and *Roe v. Wade*.<sup>27</sup>

(c) “Section 181 of the California Penal Code Prohibiting Involuntary Servitude”

The reference to “involuntarily servitude” is also of limited value, although not entirely bereft of sense. Placing someone in such servitude *cannot* be an animating purpose on anyone’s part (unless one plays the game of saying that binding someone to be pregnant and to transfer a child is “by definition” slavery). The hiring parents do not generally assume an unwilling surrogate—no rational party would enter into a transaction believing this. But some have spoken of the possibility of applying thirteenth amendment strictures to specific performance in surrogacy.<sup>28</sup> At that level of specificity, the point is at least arguable.

(d) “conceived in order to be given away”<sup>29</sup>

---

26. 112 S. Ct. 2791 (1992).

27. 410 U.S. 113 (1973).

28. Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986) (considering whether the Thirteenth Amendment forecloses specific enforcement of surrogacy agreements, and discussing the impact of the constitutional right of privacy on such enforcement).

29. The discussion following in the text is derived from MINORITY REPORT, *supra* note 3, at M12. As I stated in Shapiro, *Parental Surrogacy*, *supra* note 18, I was a member of this Advisory Panel and participated in the drafting of the Minority Report. The Advisory Panel’s majority proposed that the parties to paid surrogacy—the intended parents and the surrogate—be guilty of misdemeanors. Lawyers, counselors and other third parties would also be misdemeanants, unless their services related to a preexisting valid surrogacy agreement. *Id.* at M22. The majority also proposed that a gestational mother irrefutably be presumed the true mother of the child, though she could voluntarily transfer the child to the genetic mother pursuant to a surrogacy agreement. *Id.* at M26. In passing, I note that I dissented because (among other reasons) I think criminal penalties are uncalled for when people are pursuing the common wish, rational or not, to have a genetically connected child. Indeed, “genetically connected child” is arguably the dominant meaning of “one’s own child” in light of current common knowledge, though I do not take this meaning to decide the legal issues. A less intrusive path would be simply to render paid surrogacy agreements void and unenforceable as contrary to public policy—perhaps even disallowing restitution.

This is an incomplete and therefore misleading description. Whose point of view is referred to here? Obviously, the purpose of the hiring parents, at least one of whom participates in conception by supplying germ cells, can accurately be described by saying: "They want to construct a nuclear family in which the child bears a genetic relation to one or both of the intended parents, and contemplate a mechanism in which the child is transferred to them from the woman who gives birth."

If we move to the viewpoint of the surrogate, her intention can be described as "conceiving a child for the purpose of aiding another family in constructing a nuclear family to which the child bears some genetic connection, and to whom she will transfer the child at birth."

So what is wrong with the shorter description—"conceived in order to be given away"? If that were all there were to it, *the child would be handed out to the first person who came along*. The child is *not* being conceived because the *transfer* of the child is *itself* the intrinsically valuable goal of the arrangement. The child is conceived as part of the formation of a nuclear family—with all the bonds, relationships and duties for which one hopes. That is the purpose of the overall transaction.<sup>30</sup> The new family is, of course, not that of the birth mother, so transfer is a necessary mechanism. *The transfer is not the purpose or goal, but the means.*

As I said, one can describe the same action, event or process in many ways.<sup>31</sup> These concurrent characterizations may all capture one portion of the truth but simultaneously suppress another. My descriptions of surrogacy above, whatever their infirmities, are more complete and therefore more accurate than those contained in the quotations of which I complain. Abstractions and generalizations highlight and suppress all at once. The remarks I criticize, however, suppress with a vengeance. They abstract from a complex transaction some of its particular features, and transform

---

30. See Marilyn Strathern, *Preface* to JEANETTE EDWARDS ET AL., *TECHNOLOGIES OF PROCREATION: KINSHIP IN AN AGE OF ASSISTED CONCEPTION* viii (1993) ("For many of [the contributors to this book], procreation is not just about how human beings come into being—it is also about how relationships come into being, and relationships that have an influence not just on early life but throughout a lifetime.") (emphasis added). Cf. Sarah Franklin, *Making Representations: The Parliamentary Debate on the Human Fertilisation and Embryology Act*, in *TECHNOLOGIES OF PROCREATION: KINSHIP IN AN AGE OF ASSISTED CONCEPTION* 128-29 (new reproductive technologies produce "new conceptions of kinship and relations," which brings new methods of "understanding relatedness, new implications of relatedness, new joys of relatedness, and new fears about the dangers of relatedness, or of bringing new relations into being. . . . [F]or this reason . . . a sense of loss, threat and anxiety is so often palpable in the parliamentary debate [in Britain], as in public discourse more widely . . .").

31. The problem of multiple characterizations and perspectives is reflected in the philosophical analysis of act description. See generally ALVIN I. GOLDMAN, *A THEORY OF HUMAN ACTION* (1970).

them into the whole. We do not say that we go to the drinking fountain in order to press a button. Pressing it is not the object of the enterprise; it is the means to get a drink.

We therefore need to look at the whole transaction, from more than one point of view. We need to avoid conflating the parties' intentions, goals and actions at Time 1 (when the transaction is entered into), with those at Time 2 (when the transaction may have failed). When rational parties enter into a contract at Time 1, their purpose is not to sue the other party and force the other party to comply or pay damages. That is their purpose, if at all, only at Time 2, if at *that* time there has been a major failure.

### C. Mischaracterizations About Moral and Legal Standing Deriving from an Excessively Narrow Focus

As suggested by my remarks about mischaracterization,<sup>32</sup> one of the central mistakes in surrogacy analysis (and in many other analytical enterprises) is having too narrow a focus of attention or range of observation. We cannot stand everywhere at once, and we cannot literally experience perspectives other than our own. But trying to get some grasp of others' perspectives seems a morally sound and perhaps obligatory enterprise, and is certainly instinct with legal analysis.<sup>33</sup>

We regularly read in the surrogacy debates that babies are sold, that children are wrenched from their mothers and that women are treated purely as commodities or "fetal containers."<sup>34</sup> All of these remarks are, in their colorful ways, instructive: exaggeration moves us to think of things we

---

32. "Mischaracterization" may be a term carrying too great a burden here, but it designates a sufficient variety of errors to work well enough. I do not think I am mischaracterizing "mischaracterization."

33. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

34. George Annas, *Pregnant Women as Fetal Containers*, HASTINGS CENTER REP., Dec. 1986, at 13. See also Alexander M. Capron & Margaret J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 59, 62-64 (Larry Gostin ed., 1990) (criticizing markets for children; discussing ideas of property and ownership; analyzing commodification and the nature of objects). See generally Judith Andre, *Blocked Exchanges: A Taxonomy*, 103 ETHICS 29 (1992); MICHAEL WALZER, SPHERES OF JUSTICE 100-03 (1983). See also the review (without endorsement) of surrogacy characterizations in Andrews, *supra* note 25 ("paid breeders," "prostitutes," intended fathers as "pimps," children as "chattel" and so on). See also Allen, *supra* note 9, at 1759 (raising characterization questions). Note that in *Stiver v. Parker*, the court asserted that surrogacy arrangements "may lead to the monetization of a surrogate mother's attributes like race, intelligence, beauty and social standing, or the child may be of the wrong gender." 975 F.2d 261, 269-70 (6th Cir. 1992).

For a complaint about how *defenders* of surrogacy characterize matters, see Thomas W. Mayo, *Medical Decision Making During a Surrogate Pregnancy*, 25 Hous. L. REV. 599, 641 (1988) ("mere provision of gestational services").

may not have considered. But the risk of being misled at least matches the chance of enlightenment. Are we describing something with reasonable accuracy? Are we taking metaphors to be literally accurate, failing to see that metaphors hide even as they reveal, precisely because they are, as metaphors, generalizations?<sup>35</sup> Are we describing matters with reasonable accuracy and completeness?

Thus, the image of the mother severing her connection with her child is often stressed, while the image of the father *not* receiving *his* child is rarely mentioned. But the image of the child parted from its mother (made worse when the mother has agreed to it) should be compared to that of the child being received into the father's family. When viewed from this perspective, these children are assuredly "commodities" or "chattel" only in an empty, abstract sense: if they were interchangeable objects in a market, no one would insist on custody of *that child* as a unique, intrinsically valuable person.<sup>36</sup> The only reason for such insistence would be the costs of starting over—and this does not at all seem to be the prime motivation in these bitter custody battles, which entail even greater expense than trying again! No one is looking for the generic baby.

Why is the image of the father—and his wife—not receiving the child so often ignored? Because of assumptions about the differing roles of male and female in child care? Because of the belief that the mother is the real, true parent, and the father an epiphenomenon? Because one can more clearly see a *removal* as opposed to a *failure* to deliver, as with many act/omission pairs?<sup>37</sup> (These questions are interconnected.)

---

35. See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980) for an instructive account of the nature and role of metaphor in abstract thought. Lakoff and Johnson note: "The very systematicity that allows us to comprehend one aspect of a concept in terms of another . . . will necessarily hide other aspects of the concept that are inconsistent with that metaphor." *Id.* See also MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* 22 (1985). Ball states:

Inasmuch as social and physical reality is understood in metaphorical terms, metaphor is instrumental in shaping reality . . . . However, in helping to determine reality, metaphor also restricts or eliminates or conceals. For this reason an adequate conceptual system requires alternate, even conflicting, metaphors for a single subject, and our daily living requires shifts of metaphors for fullness of thought and action.

*Id.*

36. *But cf.* Capron & Radin, *supra* note 34, at 63 (contrasting having people "regarded as intrinsically valuable" rather than being viewed as "monetized units in a marketplace"). This may be a false contrast. Pricing of certain sorts is compatible with personhood and its intrinsic value. *Cf.* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1881, 1885, 1917-21, 1933-36 (1987) (discussing "incomplete commodification"; referring to a continuum reflecting degrees of commodification, *id.* at 1918; mentioning the idea of fungibility).

37. Andrews, *supra* note 25, at 170. Andrews states:

Feminists opposing surrogacy have also relied heavily on a visual element in the debate over Baby M. They have been understandably upset at the vision of a baby being

One of the more notable examples of limited focus is the opinion in *In re Baby M*.<sup>38</sup> In discussing constitutional issues relating to procreational autonomy and rights to the companionship of one's child, the court stated: "There is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed to the claim of the mother to the same child."<sup>39</sup> Amazingly, the court failed even to mention, never mind assess, the symmetrical proposition that the mother had no right to the custody of the child as part of *her* right to procreate when opposed by the claim of the *father* to the same child. It is simply assumed that she had a fundamental interest in her child's companionship—and impliedly that the father did not. The court stated: "Mrs. Whitehead, on the other hand, asserts a claim that falls within the scope of a recognized fundamental interest protected by the Constitution. As a mother, she claims the right to the companionship of her child."<sup>40</sup> Is this because "in our culture or society," gender roles are divided? Does the genetic mother's interest outweigh the genetic father's because of the burdens of gestation (assuming she indeed gestated the child)? There is no explanation.

Just what is going on? In assigning rights to the "natural mother,"<sup>41</sup> the court, of course, did not rely on the fact that she is easier to identify than the natural father. The court's statement is a flat ruling that the father's rights are trumped by the mother's rights, and it failed even to reflect that this asymmetry must be defended. The focus was exclusively on one aspect of the transaction, to the almost total exclusion of the other.

Standing alone, this criticism does not suggest that the court's resolution of the conflicting rights was necessarily wrong. It is, however, a criticism of a *failure to count something that needed to be counted, because of a failure of perception, understanding or attention*.<sup>42</sup> If selective focus, par-

---

wrenched from its nursing mother or being slipped out a back window in a flight from governmental authorities. But relying on the visceral and visual, a long-standing tactic of the right-to-life groups, is not the way to make policy. Conceding the value of symbolic arguments for the procreative choice of surrogacy makes it hard to reject them for other procreative choices.

Andrews, *supra* note 25, at 170. Still, the "visceral and visual" may provide clues for further moral analysis.

38. 537 A.2d 1227 (N.J. 1988).

39. *Id.* at 1254.

40. *Id.*

41. This is the phrase in the Uniform Parentage Act, as enacted in CAL. FAM. CODE §§ 7600-7954 (West 1994).

42. The court also insisted that Mr. Stern, the intended custodial father, had exhausted his right to procreate by using his sperm to create a child, a process which entailed no right to companionship of the child. *In re Baby M*, 537 A.2d at 1253-54. While the U.S. Supreme Court has spoken separately of "rights to procreate" and "rights to companionship," it is hard to believe that

tial interpretation, and loose comparisons yielded the right decision in *Baby M*, it was by accident only, and does not inspire confidence in the tribunal.

#### D. Mischaracterizations About the Very Effects of Characterization: Baby Selling

Seeing similarities without attending to differences, and the reverse, are both the result and cause of being burdened by limited perspectives.<sup>43</sup> The conclusion that the child in a surrogacy transaction is being “sold” is an obvious example. If one *fails* even to consider that “sale of a child” accurately describes surrogacy, one is obviously missing a major aspect of the transaction. If money or value goes one way and the baby goes the other, one thinks of sales. In fact, one even thinks of sales in adoption, where value labelled “expenses” travels to the mother and the baby travels elsewhere.

---

the right to procreate (even as held by men) is so thin. It would simply be a right to provide sperm and no interests beyond that. On rights to the companionship of one's child, see generally *Lehr v. Robertson*, 463 U.S. 248 (1983) (protection for “certain formal family relationships,” *id.* at 257; “relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection,” *id.* at 258; but “mere existence of a biological link does not merit equivalent constitutional protection,” *id.* at 261; in this case, biological father could not block adoption of child born out of wedlock); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” The state must satisfy clear and convincing evidence standard before irrevocably terminating parental rights.); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (unwed father entitled to a hearing on fitness before losing his children). The court in *Stanley* stated:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children “come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”

*Id.* (citation omitted). In surrogacy, of course, the intended father wants to create the genetic and companionship link, and would argue that the commerce involved is not of the sort remitted to lesser scrutiny. See also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (presumption that child born to wife is a legitimate child of the marriage could not be overcome by putative genetic father's paternity claim).

43. For an example of a more complete analysis, see Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 141-42 (1990) (suggesting aspects of surrogacy that make the surrogate and her child a “kind of slave,” but concluding that surrogacy “is not slavery, and equating the two does not prove surrogacy immoral. By treating the two practices as moral equivalents, one ignores the enormous scope of control the slave owner exerts over the slave, a feature quite lacking in surrogacy arrangements.”).

Of course, a major aspect of all reasoning, including—with a vengeance—legal reasoning, is the pursuit of comparison and analogy as part of the process of abstract thought. But there is no reason to pursue here a separate venture into legal philosophy. See generally Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 4-5 (1985).

Let us say, then, that, there is a kind of sale. But there are sales and there are *sales*. Compare the transfer of the child in a *surrogacy* case—not the black market case of, say, selling an existing child to a stranger who offers money for her. If indeed sold, the child is not sold in the same sense that a bowling ball is sold. Look at the differences. The child is not dealt with as a bowling ball; despite the commercial context, the child is viewed as an intrinsically valuable person who is to be integrated into a nuclear family. No bowling ball has made it quite that far, even as a fetish.

Nevertheless, if anyone wants to say that *on balance* the child is “sold,” so be it.<sup>44</sup> But not all sales are the same, and we cannot necessarily draw the same inferences from one “sale” that we draw from another one with sharply different characteristics. To suggest, for example, that a child’s value is “monetized” through surrogacy cannot, standing alone, yield a conclusion that the child is in fact regarded as an object. “Monetize” is a term that refers, in part, to our *overall* view of a transaction and its parts; it is not merely an objective, definitional component of a transaction.<sup>45</sup> The idea of monetizing is too complex to support a sharp tension between it and the intrinsic value of personhood. Certain aspects of pricing are not incompatible with such intrinsic value. Without greater precision then, “monetization vs. personhood-as-intrinsic-value” may be a false contrast.

We therefore cannot casually, and without evidence of certain sorts, invoke the buzzword “commodification” except by definitional stipulation, which no one need accept. What evidence is needed? Think of the ways in which children born in the usual course of events are mistreated and thrown away by their families. Is there a higher incidence of this among the children of surrogacy?

Comparisons between surrogacy and other commercial transactions, then, are often grossly incomplete. We should not talk in all-or-nothing terms when our characterizations are only *partly* accurate. “Baby selling,” standing alone, leaves out too much. If one said of a surrogate mother, “She sold her baby,” one would have a partial truth at most, a description that deals with the surrogate mother unfairly. The fact that money changes hands does not by itself transform children into objects, nor women into reproductive machines. Rational decisionmakers are obliged to focus carefully on *many* warring frames of reference before an informed decision can

---

44. Schuck, *supra* note 3, at 1795 (“Surrogacy is a special kind of baby selling, and examination of its special character shows that the ‘baby selling’ epithet should stimulate—not end—the moral and policy debate.”).

45. Cf. Capron & Radin, *supra* note 34, at 63 (contrasting people as “intrinsically valuable” rather than as “monetized units in a marketplace”).



be reached. The alternative is simply too simple, and is an inappropriate basis for reaching conclusions.

## E. Some Other Mischaracterizations

### 1. "Genetic Engineering"

Some critics of surrogacy charge that surrogacy is like genetic engineering,<sup>46</sup> or at least is reminiscent of it. They draw a picture of hiring parents inspecting lineups of women (as in a bordello).<sup>47</sup> And they speak of correlating prices paid in surrogacy transactions to the characteristics of the children born.<sup>48</sup>

The short answer: The typical intended parents<sup>49</sup> say to themselves, "Let's have a child." They do not say "Let's engineer a child." The aim is *having children*, not fabricating them. After beginning the search for a surrogate mother, the prospective father and mother will look for women who seem likely to keep their promises and who are "like them" in appearance and intellect. *This is indeed a form of genetic control—one which most of us practice, though loosely and perhaps unconsciously, in looking for a mate.* And it is far removed from what is often called to mind when we think of genetic engineering.

---

46. This phrase is often left undefined in such discussions. For present purposes, it contemplates control of the attributes of future generations by rigorous selection of mates based on their traits, many of which may have genetic components. On genetic control generally, see MICHAEL H. SHAPIRO & ROY G. SPECE, JR., *BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS* ch. 10 (1981) [hereinafter SHAPIRO & SPECE, *BIOETHICS*], and SHAPIRO & SPECE, 1991 SUPPLEMENT, *supra* note 3, at 63-68.

47. See Allen, *supra* note 9, at 1780-81 (discussing and rejecting the analogy between surrogacy and prostitution).

48. See, e.g., ADVISORY PANEL REPORT TO THE MEMBERS OF THE JOINT COMMITTEE ON SURROGATE PARENTING, MAJORITY REPORT 16 (July 1990) (on file with *The University of San Francisco Law Review*) [hereinafter MAJORITY REPORT].

To the extent that the amounts paid in surrogacy contracts come to be correlated with certain expected (or actual) characteristics of the children produced (for example, in terms of athletic ability, intelligence, or physical appearance), then a "market price" has been set for those characteristics which has implications for all persons (or, at least, all newborns) whether or not they are produced within the context of a surrogacy contract.

*Id.* This argument has little parallel in reality, for the reasons asserted in the text. The decision, once again, is to have children, not to have children of a very specific sort with engineered traits. No genetic control is entailed beyond what is normally contemplated in choosing a reproductive mate. Perhaps the authors are overly influenced by the image of a group of women being lined up for inspection. But this too does not match the reality of selecting surrogates.

49. The court in *Johnson v. Calvert*, 851 P.2d 776 (Cal.), *cert. denied*, 114 S. Ct. 206 (1993), relied heavily on the notion of intended parenthood discussed in Marjorie Maguire Shultz, *Reproductive Technology and the Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; and John L. Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991).

As for the problems of pricing, it is not clear that traits will come to be correlated with prices in surrogacy any more than they are in adoption. Indeed, since only living children are adopted, not unconceived entities or fetuses, the risk seems to be quite the other way. If it is deemed necessary to reduce the risks of price-trait correlation, prices could be fixed, or restricted to a certain range (though this would not sit well with rigorous free-marketeters). This would create only a modest compromise with reproductive autonomy.

## 2. Misconceptions About Using People as "Means" and the "Selfishness" Argument<sup>50</sup>

It is sometimes urged that the surrogate mother and the child born of the transaction are being used as mere means.<sup>51</sup> The idea seems to be that

---

50. See DEP'T OF HEALTH & SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY 46 (1984) (discussing surrogacy and concluding: "That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection.").

Cf. Robertson, *supra* note 14, at 1014 (discussing the idea that "[s]urrogate gestation appears to treat the body as a reproductive machine and the child as an instrument to selfish ends"). Robertson, however, believes that procreative liberty should protect "collaborative reproductive transactions with donors and surrogates." Robertson, *supra* note 14, at 1040.

Cf. also *In re Baby M*, 537 A.2d 1227, 1236 (N.J. 1988) ("Both parties [Mrs. Whitehead, the surrogate mother, and the Sterns—the intended parents], undoubtedly because of their own self-interest, were less sensitive to the implications of the transaction than they might otherwise have been.").

51. For a statement and discussion of the Kantian formula that requires treating humanity as an end in itself, see generally THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 38-57 (1992) "'Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an end.'" *Id.* at 38-39 (citation omitted). The Kantian formula is difficult to interpret, but some matters are relatively clear. For example,

It would be obviously absurd to say that one cannot use a person's services unless that person, quite literally, shared all of one's ends in doing so—for example, to say that carpenters employed to build an opera house must have among their goals the increased enjoyment of opera. The point is that, insofar as they are used as means, they must *be able* to adopt the agent's end, under some appropriate description, without irrational conflict of will. If the carpenters are in need of work and are decently paid, they can without irrationality adopt the immediate end of building an opera house, whether they care for opera or not.

*Id.* at 45. Hill also suggests "certain attitudes and symbolic gestures, and avoidance of others, may be required. If humanity is of incomparable value, it should be honored and respected or at least not mocked, dishonored, or degraded. This is especially suggested by the term dignity . . . , which is Kant's label for this special value." *Id.* at 50-51. As I argue in the text, of course, the usual surrogacy agreement does not obviously violate the principle that "humanity in persons has an unconditional and incomparable worth." *Id.* at 51.

See also Christine M. Korsgaard, *Kant's Formula of Humanity*, 77 KANT-STUDIEN 183, 194, 197-200, 236 (1986); BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 227-30 (1993) (task of Formula of Autonomy is to show why rational agents must not be "used" through decep-

the child is “useful” to her genetic mother and to others—presumably including her intended parents.<sup>52</sup> As far as the child is concerned, the charge is hard to defend as a total assessment of her existence. Consider the viewpoint of the intended parents. Why isn’t *any* child born to *any* parents—not just the intended parents in a surrogacy transaction—“merely” a means to their satisfaction? Apparently, when one strays from the “normality baseline” of standard reproduction<sup>53</sup> and thereby creates incremental risks to the child, one is being selfish in not avoiding reproduction. So violation of the Kantian injunction against using persons merely as means seems linked to a showing of selfishness,<sup>54</sup> which in turn is linked to a showing of serious incremental risk.<sup>55</sup> The “means” and “selfishness” arguments seem to presuppose the very finding of risk that is sharply in question.

As for the surrogate’s viewpoint, one cannot focus solely on the transfer of the child or on the receipt of money. The motivation of surrogates has not been shown, on the whole, to be purely mercenary; the fact that receipt of value is a necessary condition for most surrogacy agreements does not make it a sufficient one, and many surrogates report that the desire to assist others in forming families such as their own is an important incen-

---

tion; discussion of the person as an end-in-herself; “The Formula of Humanity interprets the requirement that our maxims have the form of universal lawgiving as setting rational nature as a final end”; discussion of determining when “our treatment of others is not compatible with their status as rational agents”). See also ONORA O’NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT’S PRACTICAL PHILOSOPHY 105-44, 126 (1989) (“Between Consenting Adults,” (comments on using others and treating them as persons); “Universal Laws and Ends-in-Themselves”).

52. Cf. Krimmel, *supra* note 24, at 98 (child is conceived “because he can be useful” to his genetic mother and others).

53. Recall Margolis’ remarks on habits of mind. MARGOLIS, *supra* note 22. See also Shapiro, *Fragmenting*, *supra* note 5, at 338-46.

54. I do not further investigate the idea of selfishness. For our purposes, I suggest keeping in mind the idea of a “baseline”—a familiar device in various areas, e.g., the analysis of coercion. See generally ALAN WERTHEIMER, COERCION (1987). Assuming that “normal” parents living in “normal” ways under “normal” circumstances are not selfish, critics of alternative modes of reproduction presumably are arguing that the usual motivations for procreation, including self-benefit from parenthood, become unjustified in light of risks to the child. No one, however, has shown that the risks of surrogacy and certain other modes of reproduction are in fact so great that we are entitled to restrain such procreation. For a brief philosophical inquiry into selfishness, see Andrew Oldenquist, *The Possibility of Selfishness*, 17 AM. PHIL. Q. 25, 32-33 (1980) (selfishness as aiming at the good of oneself; egoism).

55. Few apply this line of argument to, say, in vitro fertilization techniques, because the risks seem marginal. See generally Norma J. Wikler, *Society’s Response to the New Reproductive Technologies: The Feminist Perspective*, 59 S. CAL. L. REV. 1043 (1986); Robertson, *supra* note 14, at 1025 (“IVF does not appear to hold any greater risk of commodification than other currently accepted modes of conception and acquisition of children.”). But cf. Paul Lauritzen, *What Price Parenthood*, HASTINGS CENTER REP., Mar./Apr. 1990, at 38-39 (critical evaluation of reproducing with the aid of technology; “The Tyranny of Technology”; “The Dismemberment of Motherhood”; “The Commodification of Reproduction”).

tive to becoming a surrogate.<sup>56</sup> In any event, even the crassest motive does not alter the fact that the child becomes the child of a family that intends to receive him as a person, not a thing.

As for the surrogate's status as a mere means: perhaps some are misled by taking the viewpoint of the hiring parents, who are indeed using the surrogate as a means—just as a physician uses a patient as a source of income, or a scientist uses a research subject.<sup>57</sup> But the hiring parents' perspective does not reflect mere use of persons as means. Just as a physician does not ordinarily force competent people to see her, intended parents do not force a woman, in any plausible sense of the word "force," to act as a surrogate.

Moreover, even if the injunction were violated by a particular party or parties, it is not clear why we are restricted to investigating the motives of those parties only. No one is subject to a single moral agent; we are all affected by networks of such agents. A person's overall status as a mere means arguably requires attending to more than a single aspect of, or motivation for, a given course of conduct.<sup>58</sup> For example, assuming for the sake of argument that a scientific investigator views her subjects "simply" as "means," and is individually culpable in a Kantian sense, this cannot hide the fact that a complex array of statutes, regulations, common law principles, committees and public norms prevent impressing subjects into service, detaining them in clinical trials over their objection, or otherwise abusing them.<sup>59</sup> Here too, as in any system, there are failures, but it seems hopelessly simplistic to inflate a particular aspect of a complex process into an assessment of the entire enterprise.

---

56. See MINORITY REPORT, *supra* note 3, at M16-17 (referring to study concluding that "while the women have some feelings of sadness at relinquishing the child, these feelings are outweighed by the sense of satisfaction derived from assisting another couple in having a child. . . . [Another study] notes that in a ratio of 5 to 2, surrogate respondents in the study felt surrogacy to have been a positive influence in their lives, including resulting in increased marital communication.") (footnotes omitted). See also MINORITY REPORT, *supra* note 3, at M57-61 (cataloging research papers on surrogate studies).

57. Recall that at least one couple has had a child as part of a project to provide bone marrow to an older child. See Michael H. Shapiro, *Can Children Be Used as a Means to an End?*, L.A. DAILY J., Mar. 22, 1990, at 7.

58. Cf. Michael H. Shapiro, *Randomized Clinical Trials*, 325 N. ENG. J. MED. 1515 (1991) (letter criticizing objections to randomized clinical trials based on violation of means principle).

59. If surrogacy is regulated at all, it is likely that all parties concerned will receive information and counseling. See, e.g., MINORITY REPORT, *supra* note 3, at M38-39. See also UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1, 9B U.L.A. 138 (Supp. 1993).

Even without detailed government regulation, and despite inevitable lapses (there was no adequate screening procedure in *Johnson v. Calvert*<sup>60</sup>) the private sector has developed a set of procedures offering some protection for the parties in a surrogacy transaction. Imperfect as this set of procedures is, it does not resemble an institution that deals with any of the protagonists as objects *simpliciter*.

### 3. Loose Ideas About Coercion and Otherwise Impaired Consent

The impairment of consent is a familiar theme in surrogacy.<sup>61</sup> Part of the argument rests on the possibility of regret, part on the very status of women, part on the inability to forecast changes in one's own preferences. Perhaps part rests on inchoate notions that no one is really "free" anyway, but I do not pursue this broader inquiry into free will and determinism.<sup>62</sup>

In any given case, one must indeed consider the possibility of various distortions of choice—haste, a narrow range of opportunities, a tradition of oppression, and so on. Yet, as many have already observed, if one focuses solely on such impairments, the risks to autonomy are very serious. The occurrence of regret does not alone entail that one was coerced or unduly influenced;<sup>63</sup> nor does inability to predict one's views nullify an agreement.<sup>64</sup> And the oppressed status of women cannot be cited without more to prove that women are incapable of making choices.<sup>65</sup> Theories of autonomy and its impairments are too complex to allow us to say simply that the

---

60. In the *Baby M* case, the Sterns did not ask to read and were not told the results of the critical psychological evaluation of Mrs. Whitehead. *In re Baby M*, 537 A.2d 1227, 1247-48 (N.J. 1988).

61. See, e.g., Andrews, *supra* note 25, at 173 (discussing the views of others).

62. For a discussion in another context, see Michael H. Shapiro, *Law, Culpability and the Neural Sciences*, in *THE NEUROTRANSMITTER REVOLUTION: SEROTONIN, SOCIAL BEHAVIOR, AND THE LAW* 179 (Roger D. Masters & Michael T. McGuire eds., 1994).

63. Posner, *supra* note 19, at 25 (noting that there is no persuasive evidence, given the history of surrogacy, to think that surrogates generally underestimate the regret or distress they will feel after transferring the child).

64. See Posner, *supra* note 19, at 29-30 (rejecting the argument in *Baby M* that the surrogate's decision is uninformed when made before birth, by noting that "[c]ontracts are made before, not after, they are performed").

65. This is not to say that straitened economic circumstances and other hardships do not bear on autonomy. See, e.g., WERTHEIMER, *supra* note 54, at 233 ("Hard choices are importantly different from other choices. They have a particularly severe constraining effect. There is, as Joseph Raz suggests, a sense in which people do not act autonomously when they are struggling to maintain the 'minimum conditions of a worthwhile life.'" (citing Joseph Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, in 7 *MIDWEST STUDIES IN PHILOSOPHY* 89, 112 (Peter A. French et al. eds., 1982))). But it does not appear that surrogates—at least surrogates who are genetic mothers also—are so severely burdened by economic conditions that their autonomy is impaired on that ground. See also *MINORITY REPORT*, *supra* note 3, at M16 (noting that the typical surrogate is in the middle-income range).

effects of regret, lack of foreknowledge and false consciousness entail a fatal compromise of autonomy.

The complaints about *necessarily* impaired consent—as opposed to autonomy-compromising conditions in particular cases—require additional layers of analysis if arguments from impaired autonomy are to be made. These layers deal with notions of nonwaivability, inalienability, exploitation and unconscionability, among others.<sup>66</sup> These are not simple matters of lack of information, reservations, or subsequent regret, and their very connection with autonomy is unclear.<sup>67</sup>

In some cases, the “informed consent” inquiry seems to be a cover for another set of arguments that seem opposed to autonomy, because they attack procreative agreements. “Objectification” arguments are obvious examples. This may explain to some extent the strained arguments about voluntariness and coercion. In those cases, perhaps we ought to deemphasize the “informed consent” inquiry in favor of focusing on these other arguments. We cannot drop the consent arguments altogether, however, because they may indeed bear on autonomy to some extent.<sup>68</sup>

### III. Back to Harm

#### A. Harms to the Child Born of the Surrogacy Transaction

Persons attacking surrogacy and certain other forms of assisted reproduction regularly discuss the “best interests of the child.” This concept is sometimes used to decide assignment of custody in a failed transaction,<sup>69</sup> but for our purposes, its more important use is to suggest that children should not be born as a result of certain transactions that create special risks of harm.

Several major problems are implicated in this line of argument. First, consider once again the problem of viewpoint. If we speak of the *child's* best interests, it makes sense to consider the matter from the *child's* point of view. Let us assume that there are some risks of emotional distress and its consequences when one's coming into existence does not match some ide-

---

66. See generally Radin, *supra* note 36, at 1849. On ideas of exploitation, unconscionability and “unacceptability” and their connection with coercion—and hence autonomy—see WERTHEIMER, *supra* note 54, at chs. 12-13 (coercive proposals).

67. See generally WERTHEIMER, *supra* note 54, at 287-306 (coercion and voluntariness), 179-310 (Part Two: Philosophy).

68. See WERTHEIMER, *supra* note 54.

69. See *In re Baby M*, 537 A.2d 1227 (N.J. 1988). See also *Johnson v. Calvert*, 851 P.2d 776 (Cal.), *cert. denied*, 114 S. Ct. 206 (1993) (upholding the gestational surrogacy contract and assigning custody on that basis).

alized way of proceeding.<sup>70</sup> From the child's viewpoint, however, it is hard to believe that the harms arising from her knowing the nonstandard circumstances of her birth are in general so grave that she is likely to disprefer her very existence.<sup>71</sup>

Of course, there are widely different alternative reproductive modes that may involve the sorts of risks in question—for example: knowing your mother transferred you or gave you up for adoption; knowing that you were an unwanted child (one or both of your parents were supposedly sterilized or were using birth control devices when the “accident” occurred); knowing that your genetic father, the anonymous donor, never wanted anything to do with you (is this worse than maternal “abandonment”?); and so on.

But it is difficult indeed to see these as examples of lives not worth living—lives of the sort one thinks of in “wrongful life” cases.<sup>72</sup> There is, in any event, little or no evidence concerning developmental risks in any of these situations, surrogacy included.<sup>73</sup> Moreover, to some extent the risks

---

70. See Margaret R. Brown, *My Turn: Whose Eyes Are These, Whose Nose?*, NEWSWEEK, Mar. 7, 1994, at 12. The author, a young college student born after her mother was artificially inseminated through an anonymous donor, describes her distress at not knowing who her genetic father is.

71. Parallel issues arise in “wrongful life” cases. See, e.g., *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) (awarding special damages for hereditary deafness). See generally Joel Feinberg, Comment, *Wrongful Conception and the Right Not to Be Harmed*, 8 HARV. J.L. & PUB. POL’Y 57, 69 (1985) (“When one party says that another would have been better off had he never been born, he is claiming that the preference for the one state of affairs over the other is a rational preference. Whether true or not, this is an intelligible claim without contradiction or paradox. . . . In the most extreme cases . . . , I think it is rational to prefer not to have come into existence at all . . .”).

See also Peter Pallot, *Babies for Older Women: BMA Chief Calls for Ethical Guidelines*, DAILY TELEGRAPH, Dec. 28, 1993, at 3. Dr. Raanan Gillon, editor of the *Journal of Medical Ethics*, said: “You have to ask, would life for these children be worse than no life at all?” *Id.* Dr. Gillon was referring to children born to women who have undergone menopause. See also Posner, *supra* note 19, at 29 (“no contract, no child”). Referring to children whose mothers died during the children’s infancy and whose fathers remarried, Posner states: “If there is any evidence that such babies, when they become adults, decide they’d rather not have been born, I am not aware of it.” Posner, *supra* note 19, at 23. He also notes the analogy between such situations and being artificially inseminated by a donor. Posner, *supra* note 19, at 23. *But cf.* Brown, *supra* note 70 (comments by a person born through artificial insemination by donor).

For a review of the difficulties in analyzing problems concerning the creation of lives, see HEYD, *supra* note 8, at 21-38.

72. See generally *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1992) (no general damages for child with hereditary form of deafness that should have been predicted, but allowing special damages).

73. Evidence is of course hard to find. One source of partial—and very tentative—insight is comparisons to adoption. See Andrews, *supra* note 25, at 176-78 (noting that evidence suggests little difference between adopted and non-adopted children in adjustment and achievement). Some studies suggest some problems in adjustments; others suggest that adoptees do better in some ways than non-adopted children. See MINORITY REPORT, *supra* note 3, at M27-31 (characterizing the studies, but criticizing the analogy to adoption). Although there are some parallels between surrogacy and standard adoption, there are also some major differences—notably the presence of the genetic father in the new nuclear family. It is not clear what the varying impacts

are akin to self-fulfilling prophecies. For example, damage may be caused by intense media attention when the transaction undergoes a significant failure, itself partly a function of legal uncertainty.<sup>74</sup> These circumstances simply do not make nonexistence the rational preference for the child<sup>75</sup>—at least as a *general* matter.<sup>76</sup>

These remarks do not establish that surrogacy is a wonderful or even neutral practice that should be left to flourish without regulation. They sim-

---

of these differences might be, and the adoption data are thus of uncertain significance. In *Johnson v. Calvert*, the court concluded that “[t]he limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.” 851 P.2d 776, 785 (Cal.), *cert. denied*, 114 S. Ct. 206 (1993) (citing Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 673-78 (1991)).

74. To pursue the point a bit further: It seems inapt to complain that the child will be harmed by publicity in a failed relationship, such as that involved in the exceedingly well-known *Baby M* case. For one thing, most transactions do not fail, as already noted. Secondly, the intense scrutiny is partly a function of the disapproval and fear engendered by surrogacy. While wishing this away is akin to ordering the tides to cease, it is not unrealistic to urge that over time our revulsion at this innovation will change through public debate, and harm from media or other forms of attention will wither away. See generally Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL’Y & LAW 57, 76-77 (1989). Hansmann states:

This inflexibility in our normative categories may help explain the reflexively negative moral response that commonly greets proposals for marketing human organs. . . .

But initial resistance to shifting normative categories should not in itself be a sufficient reason for avoiding change. Transactions can be and have been recategorized when technological changes have made market mechanisms advantageous. . . . [A]fter several decades’ experience our society has accepted a thriving market in human sperm brokered by proprietary firms. . . . [E]vidently, there was substantial ethical resistance to this market when it was first introduced. . . . Yet over time we have chosen not to so characterize such transactions, but rather to draw the symbolic lines between our normative categories elsewhere so that market transactions in human sperm are not perceived as undermining non-market norms in those areas where such norms continue to play a strong functional role.

On the other hand, it is costly to make people upset their received normative categories, and there is no point in doing so unless substantial benefits will result.

*Id.* See also Posner, *supra* note 19, at 29, arguing that the “‘tug-of-war’ [in a failed surrogacy transaction] is an artifact of legal uncertainty.” As stated in the text, however, the conflict and the risk of damage may involve more than uncertainty; it may derive from the fears about surrogacy, in turn partly deriving from their lack of fit within our normative frameworks and expectations.

But see THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY* 120 (1988) [hereinafter *SURROGATE PARENTING*] (children caught in situations of conflict and litigation may be harmed); Robert E. Gould, *And What About Baby M’s Ruined Life?*, N.Y. TIMES, Mar. 26, 1987, at A27.

In any case, one would expect that whatever the child is told, it need not necessarily be couched in the most denunciatory terms (i.e., “Your mother sold you like a sack of potatoes.”). That would tend to induce precisely the sorts of harms complained about.

75. There are problems, to say the least, in talking of the relative merits of existence and nonexistence. See generally HEYD, *supra* note 8 (discussing paradoxes of wrongful life).

76. A particular child may of course be unusually vulnerable and suffer greatly.



ply attack a certain kind of argument against surrogacy. But they have drawn two responses that require attention.

### **B. Points of View Other Than the Child's**

The resulting child's point of view is not the only relevant one in addressing the question of whether an unconceived entity should be born. To take a hypothetical case (the sort philosophers come up with to test concepts, but which are hard to replicate in reality): suppose we knew that some unconceived entity, from its point of view, would have a great life, but from the viewpoint of others such a life would be catastrophic. Think of Hitler. Think of serial killers. Somewhat less horrendous are cases of persons fated to become public charges or troublemakers of serious proportions. Finally, think of the children of parents who simply did not want to have children, but whose contraceptive efforts failed. Some of these children may be significantly harmed if their parents' attitudes do not change.

Of course, we are not on morally clear ground in saying that such existences are plainly to be dispreferred *from a social standpoint*. But an *overall* moral assessment should at least consider more viewpoints than those of the persons whose existence is in question. Surely we are not all obliged to reproduce endlessly just because most children will have lives that are worth living.

The point then is this: as a community, we may fear that children born under extremely adverse circumstances would pose serious risks *to us*. These circumstances might include extremes of crowding, poverty, abuse and disability. We are right to lament that children are born with Tay-Sachs disease, both from their points of view and everyone else's. Even more generally, we all know persons and couples who we think should avoid reproduction because they would (on the evidence) make poor parents. As a community, we may rationally wish that fewer such persons have children, even if such children may have, from their own points of view, lives worth living.

On the other hand, it is easy to descend into racism, classism, perfectionism or other questionable thinking habits in hoping that certain groups of children do not get born. In any event, I do not propose any intrusions on procreational autonomy. I am simply discussing the possible rationality of dispreferring certain states of affairs. With surrogacy, however, there is little or no evidence that any serious social concern should exist over the welfare of children born of surrogate transactions. The common talk of risks to the child is simply not borne out by the evidence.

### C. A Failed Reductio Ad Absurdum

Here is another response to the assertion that the surrogacy-child's only alternative to life is nonexistence:

Advocates of surrogate parenting suggest that any risks to children are outweighed by the opportunity for life itself—they point out that the children always benefit since they would not have been born without the practice. But this argument assumes the very factor under deliberation—the child's conception and birth. The assessment for public policy occurs prior to conception when the surrogate arrangements are made. This issue then is not whether a particular child should be denied life, but whether children should be conceived in circumstances that would place them at risk. *The notion that children have an interest in being born prior to their conception and birth* is not embraced in other public policies and should not be assumed in the debate on surrogate parenting.<sup>77</sup>

Put another way, the response to the claim that the child's life *to itself* is worth living is that this proves too much. It proves the extreme pronatalist position that all potential unconceived entities should be born, unless their existence would be worse for them than their nonexistence.

But it proves no such thing. Invoking the nonexistence-is-not-preferred argument does not in any way commit us to the view that "children have an interest in being born prior to their conception." Further, even if we concluded that most unconceived entities did have an interest in being born, it would not prove they had a *right* to be born, because others may have countervailing interests, as already outlined.

But if the New York State Task Force did not characterize the matter properly, what is a more accurate or appropriate account? We start with the assumption that someone *wants* a child, *not* that he or she is *obliged* to have one. At this point, in United States culture at any rate, persons wanting children generally are not burdened with showing exactly why this is a good idea—for them, the child, or anyone else, whatever private reservations anyone may have. It is up to us to explain to persons wishing to enter into a surrogacy transaction, or to be artificially inseminated by an unknown donor, or to have a child post-menopause, or to resort to in vitro fertilization, and so on, just why reproduction under the particular circumstances is undesirable.

What reasons constitute sound considerations in persuading a rational moral agent not to reproduce via a surrogacy arrangement? What reasons would count as unsound? Among the *unsound* reasons are claims that the child—from his or her viewpoint—should not be born because of the risks

---

77. SURROGATE PARENTING, *supra* note 74, at 120 (emphasis added).

of surrogacy *to the child*. Given the desire or the decision to reproduce,<sup>78</sup> one cannot morally trump that desire by invoking risks to the child—even from a failed transaction. It is a non sequitur to conclude that we are committed to an extreme pronatalism when we observe that for most children of surrogacy transactions, their lives are worth living. The allusion to nonexistence simply suggests that surrogacy's risks to a child are not sufficient to show that a potential child should *not* be born, given someone's preference to have a child at all.

One further critique of The New York Task Force Report: The Report asserts that “[t]he issue . . . is whether children should be conceived in circumstances that places them at risk.” Framed in this simplistic way, this cannot be “the issue.” Serious risks are precisely what have *not* been demonstrated. Moreover, all children are at risk. We must be talking about *special* risks, compared to some baseline of “normality” or “tradition.”

#### D. Special Risks

What *are* these special risks? Compare the life of the average baby born of a surrogate transaction to that of a baby born to a teenage woman who takes drugs, or whose father is absent. If the risks posed to the child, from the child's viewpoint, are *not* sufficient to make its life dispreferred to nonbirth, and are unlikely to result in harms greater than those arising from many other reproductive circumstances, then from the child's viewpoint *there is no argument*.

Yet one must concede that there are *some* incremental risks in using alternative reproductive mechanisms. Given our legal and cultural system, we of course cannot license reproduction, at least in its standard or near-standard forms. We cannot stop the drug-using young woman from having a child or a man from fathering the child.<sup>79</sup> We cannot forbid the homeless to reproduce before they find lodging. But we *can* prevent the incremental risks involved in surrogacy because we can convince most courts and legislatures that commercial and noncommercial surrogacy, in different ways,

---

78. This assumption seems to account for the Task Force's view that the nonexistence-isn't-dispreferred idea “assumes the very factor under deliberation—the child's conception and birth.” SURROGATE PARENTING, *supra* note 74, at 120. But the text is simply discussing an “if—then” argument. The argument being made in defense of surrogacy is this: *if* you want a child and are considering arguments for and against having one, *then* the risk that the child's life will not be worth living from the child's viewpoint is too low to be a good reason not to reproduce. The risks of innovative reproductive methods do not ordinarily satisfy this standard—i.e., that the child's nonexistence would be preferred by that child. If the argument is that parents shouldn't even want to have a child in novel circumstances—that is the very question at issue, and it is not answered by referring to risks to the child that fall short of this threshold.

79. This does not establish that penalties cannot be imposed in some of those cases, but that is immaterial here.

violate the adoption laws of most jurisdictions, and commercial surrogacy violates laws against sales of children. If we cannot prevent all ill-advised reproductive ventures because most are protected by constitutional and cultural immunities, we can at least ban *certain* forms of reproduction, including surrogacy transactions.

Who bears the burden here?<sup>80</sup> As we saw, we do not ordinarily question the motivations of persons wanting to reproduce. We do not impose upon them a burden of rationality. As a constitutional matter, of course, one cannot simply assert with complete confidence that a liberty interest in reproductive autonomy and the companionship of one's child will be applied full strength to alternative modes of reproduction.<sup>81</sup> One is immediately confronted with the problem of "level of generality" in insisting that our cultural tradition of reproductive autonomy extends to these innovative modes.<sup>82</sup> Perhaps the argument is that we have a "second order" tradition of (reluctantly?) accepting new reproductive techniques, such as artificial insemination by donor and certain other fertility programs.<sup>83</sup> In any event, in matters of constitutional analysis pressing against technological innovations, we have to construct our traditions.

Finally, I restate the point that most surrogacy transactions do not fail in any significant sense. They cannot be *defined* as *intrinsic* failures. Why the children of *those* transactions are at extreme risk I do not know.<sup>84</sup> And

---

80. Cf. Allen, *supra* note 9, at 1785-86 (raising the issue of burden of persuasion).

81. See Lisa C. Ikemoto, *Providing Protection for Collaborative, Noncoital Reproduction: Surrogate Motherhood and Other New Procreative Technologies, and the Right of Intimate Association*, 40 RUTGERS L. REV. 1273, 1307 (1988) ("It remains unsettled . . . which constitutional doctrine protects procreative liberty and whether the Supreme Court would include noncoital, collaborative reproduction within the protected means of procreation.").

82. See generally Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Timothy L. Raschke Shattuck, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992).

83. Michael H. Shapiro, *What Rights Might Be Held by the "Fertile Decedents"?*, L.A. DAILY J., Mar. 9, 1993, at 7.

84. Again, it is tempting to resort to the analogy of adoption. There is little evidence of serious impairments of adopted children, when compared with similarly situated nonadopted children. See generally MINORITY REPORT, *supra* note 3, at M27-29. However, the analogy cannot be pressed too far. Given the preferred and common forms of child raising in most parts of the world, adoption in some form seems desirable and is a necessity because, whatever its risks, the children must be dealt with and it is thought better that they not be in institutions or shuttled from one foster home to another or left on the streets. Surrogate parenthood, in this light, is not a necessary mechanism for dealing with children *already in existence*. Defenders of surrogacy need to avoid errors also.

Cf. *Hecht v. Superior Court (Kane)*, 20 Cal. Rptr. 2d 275, 291 (Ct. App. 1993), in which the court of appeal issued a peremptory writ vacating a superior court order that directed the destruction of decedent's sperm. Petitioner Hecht, the decedent's "girlfriend" claimed that she had the power to decide whether to use his sperm to impregnate herself after his death. *Id.* at 279. Those opposed to the distribution had argued that producing "orphaned children by artificial means with

for those that do fail—generating lawsuits, media attention, and so on—nothing shows that the existence of children in those circumstances is comparable with that of children suffering from Tay-Sachs disease. If indeed a “successful” surrogacy transaction poses no special risks, why should the potential children of such transactions be kept from existence because of the risks to *another* set of children—those of the “failed” transactions?

### E. A Note on Perfection

The fact that a transaction or process falls short of some ideal of perfection is not alone a reason for rejecting it. Although striving for “perfection” has its admirable qualities and is reflected in everyday striving for improvement, it also poses serious risks—as when we try to enhance our performance through technological assistance.<sup>85</sup>

For some, surrogacy seems to be an example of this: it suggests a form of “genetic engineering” that may fray our bonds to our children. This is a serious mischaracterization, as I argued earlier, but there is a concurrent aspect of the complaints about surrogacy that may cut the other way. In emphasizing the supposed risks to the children born of surrogacy arrangements, surrogacy’s opponents seem to suggest, relying on little evidence, that imperfect reproductive arrangements are to be rejected: *Life is to be foregone unless no blemishes appear to mar the child’s future*. To illustrate their point, opponents often ask, “What do we tell the child? That it was”—another contested characterization—“‘sold’?”<sup>86</sup>

Here are more questions: What do you tell the child when she hears that many people complain of the transaction that gave her life? Will she characterize it as a complaint that she was born? Will people denounce her as an object? Will she see herself as “tainted” by an “evil” process? (Mischaracterizations? They happen, don’t they?)

## IV. A Note on Gestational Surrogacy

Problems of incomplete perception are again in place in the debate about gestational surrogacy. There is a strong conflict between the genetics-oriented and the gestation-oriented in the search for the one, true

---

state authorization” would be “tragic.” *Id.* at 288. In concluding that there was no public policy against post-mortem artificial insemination, the court said: “[R]eal parties do not cite any authority establishing the propriety of this court, or any court, to make the value judgment as to whether it is better for such a potential child not to be born, assuming that both gamete providers wish to conceive the child. In other words, assuming that both Hecht and decedent desired to conceive a child using decedent’s sperm, real parties fail to establish a state interest sufficient to justify interference with that decision.” *Id.* at 288-89.

85. See generally Shapiro, *Technology*, *supra* note 5, at 15-19.

86. See Gould, *supra* note 74.

mother. Observers seem overwhelmed by the obvious *enduring physicalness* of gestation and the real burdens, emotional and otherwise, that it entails. Bear in mind also that the child's prenatal development—and its ultimate traits—may vary depending on who the gestational mother is.<sup>87</sup> Some critics conclude, then, that because of the intense bonding during gestation and perhaps because of the gestator's "investment" of physical and mental labor, she should prevail in contested cases, prior contrary intentions notwithstanding. Otherwise, gestation is "devalued."<sup>88</sup>

But it is precisely how to value these contributions to reproduction that is in question. The "sunk cost" of physical gestation and delivery was precisely what the gestational surrogate was prepared to discount at the time she agreed to the transaction. Moreover, the nature of the respective bondings of the surrogate and the genetic mother (and father) have to be taken *in context*. That is, they must be evaluated not in general, but in the particular case in which the gestating mother *has entered into an agreement that con-*

---

87. *But cf.* R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387, 424 (1993) (recommending decision on the basis of the child's best interests):

A child born to a gestational mother who has not contributed genetic material to the zygote has two mothers, a gestational mother and a genetic mother. . . . The gestational mother's endocrine connection and role in the formation, development, and physiological functioning of the fetus are unique in every instance and create a biological mother-child relationship.

There is no organ system of the resulting fetus that is not anatomically, physiologically, and genetically affected by the maternal endocrine system to the extent that the resulting fetus is a unique product of the gestational mother that gives rise to a lifelong maternal-child relationship. This relationship must be taken into consideration in any legal proceeding where physical and legal custody of a surrogate-produced child is at issue. The surrogate mother is a creator of the child sharing an equal role with the genetic mother, and the surrogate's right to a relationship with the child she has created must receive legal recognition.

Because the gestational mother's contribution to the genetically unrelated child is so significant, the appropriate disposition of custody disputes requires the best interests of the child to be assessed . . . .

But, as asked in the text, how *in context* should these contributions be valued? What is the nature of the bonding in question and what is its moral significance? What effects do the original intentions of the parties have on the very process of bonding? The author urges that "the emotional bonds between the child and its gestational mother *and its genetic parents*, and all of the other circumstances surrounding the lives of the parties, should be considered by a court in determining a custody award for the child." *Id.* at 390 (emphasis added). Once again, the full context, including the impact of intentions, must be addressed.

88. See Sherrie Russell-Baker, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard*, 23 COLUM. HUM. RTS. L. REV. 525, 542-45 (1992).

Note that the genetic mother is subject to some physical intrusions.

*templates transferring the child, and the genetic mother expects to receive the child.*<sup>89</sup>

I add a comment about Justice Kennard's dissent in the recent gestational surrogacy case, *Johnson v. Calvert*.<sup>90</sup> The California Supreme Court awarded custody of the child to the genetic parents, upholding the validity of the surrogacy agreement and ruling that under the Uniform Parentage Act ("UPA"), the identity of the "natural mother" could be fixed by reference to the parties' intentions.<sup>91</sup> The court believed that the UPA's indeterminacy concerning the meaning of "natural mother" in this fragmented transaction left it free to decide the issue by identifying a sound theory of parenthood and using it as an interpretive tool to fill in the statutory "gaps." The court stated that such a theory focuses on all parties' intentions at the time of agreement,<sup>92</sup> though its argument supporting this is not entirely clear. Presumably, the court believed that one of the driving forces behind the UPA was to help implement reproductive autonomy—the choice to reproduce and to enjoy the companionship of one's child. To move straightaway to the child's best interests as a criterion for identifying the legal mother, as Justice Kennard did,<sup>93</sup> would be to shift the focus away from reproductive autonomy before it was appropriate to do so. In any event, the court did not decide that, by deduction from the very idea of "mother," genetics necessarily defeats gestation; the idea of motherhood is too indefinite. Genetics won by intention, not definition.

The idea of parenthood-by-intention is useful in explaining why recognition of surrogacy arrangements promotes reproductive autonomy. It is, of course, not without limits, as its explicators know. "Intent" is neither a necessary nor sufficient condition for parenthood in any form. Intending otherwise will not keep a genetic father from being a genetic father, though he may not be a "natural" parent if courts adhere to section 7613 of the California Family Code<sup>94</sup> (regulating artificial insemination). A woman who becomes pregnant unintentionally still has a liberty interest in the resulting child's companionship, whether she wants the child or not. And difficulties arise when the parties' choices are to be "aggregated" or when any or all of them change their minds. Whose intentions should trump

---

89. Cf. MINORITY REPORT, *supra* note 3, at M17 (referring to a study concluding that "surrogate mothers are significantly less attached to the fetus," and to another study concluding that "surrogates are able to emotionally distance themselves from the fetus" (footnotes omitted)).

90. 851 P.2d 776 (Cal.), *cert. denied*, 114 S. Ct. 206 (1993). The remarks following in the text are based on Shapiro, *New Parenthood*, *supra* note 21.

91. *Johnson*, 851 P.2d at 783.

92. *Id.*

93. *Id.* at 799 (Kennard, J., dissenting).

94. CAL. FAM. CODE § 7613 (West 1994).

those of others? At what times? Intention may be decisive in “resolving” parentage and custody disputes in many cases, but not all.

Justice Kennard sharply contested the majority’s analysis, and argued that reliance on intent was unwarranted by the UPA and “entirely devalues” gestation.<sup>95</sup> Specific performance of paid or unpaid gestational surrogacy agreements should therefore be impermissible and the child’s “best interests” should govern.<sup>96</sup> But Justice Kennard referred approvingly to the Uniform Status of Children of Assisted Conception Act (“USCACA”).<sup>97</sup> It offers two surrogacy alternatives—one rejecting the agreement, the other accepting it (in a way) and regulating it.

Was Justice Kennard’s approach internally inconsistent because she endorsed the USCACA alternative regulating surrogacy while complaining of devaluation? The answer depends on whether the USCACA looks primarily to the parties’ intentions rather than to a “best interests of the child” standard. If intention is primary, then how does statutorily required judicial ratification of parenthood-by-intention blunt rather than compound gestational devaluation?

The USCACA, however, imposes adoption-like standards, and its commentary suggests that a best interests analysis is required before the contract can be authorized. Does this reject parenthood-by-intention and avoid gestational devaluation? Arguably, the USCACA does not just leave assignment of parenthood open, assigning equal weight to the gestational and genetic claims. The USCACA alternative exists precisely to allow intended parents to become parents in fact. Indeed, as Justice Kennard noted, “If the arrangement for gestational surrogacy has court approval, ‘the intended parents are the parents of the child’ [under section 8(a)(1) of the USCACA].”<sup>98</sup> If they satisfy the fitness standards, it is unlikely that they would lose their custody claim under the Act simply because the gestator proves more fit. Note also that section 7(b) of the USCACA<sup>99</sup> gives only a surrogate “who has provided an egg”—not all gestators—cancellation rights during pregnancy.

There may thus be some conflict between Justice Kennard’s USCACA endorsement and her fear of devaluation of gestation.

---

95. *Johnson*, 851 P.2d at 797 (Kennard, J., dissenting) (“The majority’s approach entirely devalues the substantial claims of motherhood by a gestational mother such as Anna.”).

96. *Id.* at 776.

97. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 135-57 (1988 Act) (West Supp. 1993).

98. *Johnson*, 851 P.2d at 794 (citing USCACA, § 8(a)(1)).

99. USCACA § 7(b).



## V. A Concluding Argument to Consider in Appraising Surrogacy and Biological Technologies Generally

I offer some observations that I think capture the worst aspects of surrogacy and form part of a coherent argument against it. I do not think the argument carries the day, but for what it's worth, it relies on the idea of the learning effects of observing both public and private institutions and regulatory systems. Like it or not, people often see things in fragments and pieces. This reflects both our aptitudes and our deficiencies.<sup>100</sup> Part of what many see in surrogacy is either a mother voluntarily giving up "her own" child, or a "wrenching" of a child from her.<sup>101</sup> Either way—and particularly via the former—the mother's conduct and the conduct of others seems inconsistent with the moral ideal of noncontingent bonds of duty and affection between parent and child.<sup>102</sup> This "ideal" is not always reflected in our conduct. Children are abandoned, abused and killed. But it remains an ideal, and it appears to be breached by surrogacy in a very elementary way.

So what? The fear is that we will become inured to such attenuations of the absolute bonds that are supposed to exist between parent and child. The image of mother parting with child seems to assault this ideal more than the non-image of the father failing to receive the child he wants. The very existence of unconstrained choice in creating and parting from children is suggestive of how we deal with artifacts.<sup>103</sup> Will long-term observation of the practice of surrogacy, or the mere knowledge that it exists, erode such bonds?<sup>104</sup>

---

100. Lorraine Daston & Gerd Gigerenzer, *The Problem of Irrationality*, 244 *SCIENCE* 1094 (1989) (reviewing HOWARD MARGOLIS, *PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT* (1987)) ("[T]he same processes that are responsible for our cognitive successes—'our facility in handling patterns in faces, languages, places, and even entirely artificial things like chess and concert music'—are also to blame for our cognitive failures.") (citation omitted).

101. The "wrenching" image is discussed in Shapiro, *Fragmenting*, *supra* note 5. See also Andrews, *supra* note 25, at 170.

102. I explain the idea of noncontingent bonds—which addresses both empirical psychological attachments and a sense of duty—in Shapiro, *Regulation*, *supra* note 7.

103. See Shapiro, *Fragmenting*, *supra* note 5, at 348-55; Shapiro, *Regulation*, *supra* note 7. See generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *MICH. L. REV.* 779, 820-21 (1994) ("If the law wrongly treats something—say, reproductive capacities—as a commodity, the social kind of valuation may be adversely effected . . . . It is appropriate to evaluate the law on this ground.").

104. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 83 (1985) ("deciding whether we want to get accustomed, whether we wish to become callous") (emphasis deleted). Such considerations may be part of a slippery slope argument, but I do not carry out the analysis here.

Attitudes, beliefs and values do change, despite the inherent conservatism of our cognitive systems in resisting change.<sup>105</sup> A substantial alteration in current ideals of intrafamilial bonds would mark a society quite different from our own. It is generally an open question whether one system is morally superior to another system; and it may be a question difficult to answer, partly because of radical differences in perceptual and normative frameworks contained within competing world views. In this sense, we may be comparing incommensurables.<sup>106</sup> I do not consider whether any given social system has a right to preserve its normative framework, or least some portions of it.<sup>107</sup>

Nevertheless, I think the idea of risks to our normative system—and hence to ourselves—is overblown in the case of surrogacy.<sup>108</sup> From the perspective of our existing system, the breakdown of noncontingent bonds would indeed be a disaster. But this is unlikely to happen. This is partly because of the small scale of the practice, though the vividness of failure may enhance its influence; and partly because, over time, people are likely to see that surrogacy does not “entail” abandonment, slavery or objectification. Surrogacy does not leave a child to the elements, nor is it a commercial transaction of the sort we associate with trade in widgets. The commercial “taint”—or the “abandonment” taint, in cases where there is no true fee—simply does not carry over when one reflects on what one sees.

There are other sorts of “learning” risks here that I leave aside, not because they are unimportant, but because this commentary is not addressed to them. For example, surrogacy—and gestational surrogacy in particular—raises the possibility of creating an oppressed group, disproportionately populated by persons of low income or persons of color, or both. I think that terms such as “exploitation” and “oppression” suggest relevant lines of inquiry, but are subject to the same complaints made here: they are often used loosely as part of an incomplete analysis.

---

105. In HOWARD MARGOLIS, *PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT* 122 (1987), the author observes that entrenched thought and behavior patterns cannot be easily shut off. He also points out that they do change. *See id.* at 170-71, 172-76 (commenting on acquiring new habits of mind, contagion of radically new idea, and discovery).

106. *See generally* Sunstein, *supra* note 103, at 779; ALLEN BUCHANAN, *ETHICS, EFFICIENCY, AND THE MARKET* 36-46 (1985) (problem of comparing whole systems).

107. *See* WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* (1990). Kymlicka argues that communitarian states “should encourage people to adopt conceptions of the good that conform to the community’s way of life, while discouraging conceptions of the good that conflict with it.” *Id.* at 206-07. Kymlicka also discusses duties to protect the cultural structure.” *Id.* at 217-19.

108. The risks may be greater in other areas—e.g., germ line genetic engineering and performance enhancement generally.