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CONSTITUTIONAL ANALYSIS OF THE *BABY M* DECISION

BARBARA STARK*

INTRODUCTION

Despite the exhaustive coverage of the *Baby M* case,¹ there has been relatively little discussion of the difficult constitutional questions posed by that case.² Judge Harvey Sorkow, the trial court judge, held that the surrogacy contract was constitutionally protected as an exercise of the parties' "procreation" rights.³ His

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¹ *In re Baby M*, 217 N.J. Super. 313 (Ch. Div.), 525 A.2d 1128 (1987), *rev'd*, No. A-39 (N.J. Feb. 3, 1988) (available Feb. 15, 1988 on LEXIS, States library, NJ file, as "1988 N.J. Lexis 1") (The court specifically enforced a surrogacy contract entered into by William Stern and Mary Beth Whitehead. Mrs. Whitehead agreed to be artificially inseminated with Mr. Stern's sperm, carry the child to term, terminate her parental rights, and surrender the child. The court found provisions of the contract preventing Mrs. Whitehead from having an abortion unconstitutional, while holding that Mrs. Whitehead breached the contract by not surrendering the child and giving up her parental rights. The court further determined that it was in the best interests of the child to enforce the agreement.).

² See generally Kaufman, *Judges or Scholars: To Whom Shall We Look for Our Constitutional Law?* 37 J. LEGAL EDUC. 184, 187-97 (1987). Kaufman argues that "the open-ended provisions of the fourteenth amendment, . . . present the problem of constitutional interpretation in its most difficult form. . . . For better or worse the course of history has brought us to the 1980s with the judiciary in possession of the obligation to interpret the fourteenth amendment." *Id.* at 197. But cf. Comment, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385, 386 (1982) [hereinafter *Parenthood by Proxy*] (questioning whether a constitutional analysis can provide adequate guidance as to the pragmatic concerns inherent in the surrogacy relationship such as support, visitation, and custody, which are better addressed by family law).

³ 217 N.J. Super. at 385, 525 A.2d at 1164. As this article was going to press, the New Jersey Supreme Court reached its decision to reverse the lower court decision in the *Baby M* case. *In re Baby M*, No. A-39 (N.J. Feb. 3, 1988) (available Feb. 15, 1988, on LEXIS, States library, NJ file, as "1988 N.J. Lexis 1"). The New Jersey Supreme Court did not decide the case on constitutional grounds. In dicta, the court did find that the constitutionally protected right to procreate asserted by Mr. Stern did not encompass the

constitutional analysis of the *Baby M* case failed, however, because Sorkow mistakenly assumed that surrogacy is a single event, rather than a relationship which changes over time.

The procreation right which the trial court identified is not broad enough to encompass all aspects of the multi-faceted surrogacy relationship. Moreover, the trial court never reached the critical question of the alienability of the several different rights actually involved here.⁴ This article suggests an alternative approach to the crucial constitutional questions raised in *Baby M*, an approach which addresses the issue of alienability in the surrogacy context.⁵

Although the surrogacy agreement in *Baby M* raises novel legal issues, no dearth of constitutional interpretation exists with respect to the components of the surrogacy agreement, such as its

right to raise the child or to destroy Mrs. Whitehead's parental rights; and because the case was decided on other grounds it was not necessary for the court to decide if Mr. Stern's rights to the "custody, care, companionship, and nurturing that follow birth" were constitutionally protected fundamental rights, "when opposed by the claim of the mother to the same child." Likewise, although the court noted that the natural mother's claim to "the right to the companionship of her child" was recognized as a fundamental right, the issue was moot since the case was decided in her favor. Since the New Jersey Supreme Court's constitutional discussion is not fully developed, the critique of Judge Sorkow's constitutional analysis is given as a counterbalance to the alternative constitutional formulation the author proposes.

⁴ Alienation is a present promise to waive a right in the future. Alienation of rights is distinguishable from waiver in that waiver occurs only at the time one may invoke a vested right. See generally Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 936 (1985) (defining alienable rights as those which can be sold or transferred and inalienable rights as those which cannot be transferred or given away, using voting as an example of an inalienable right; neither kind of right need be exercised in order to be retained).

⁵ As used in this paper, "surrogacy" refers only to agreements between biological parents. It does not include other types of agreements—the implantation of a fertilized egg in the surrogate, for example—which may well raise issues not considered here. In addition, this article will not discuss the myriad rights and obligations arising under the common law or the various statutes applicable in this case. A discussion of Judge Sorkow's determination with respect to payment for Whitehead's services, for example, is beyond the scope of this article since this was decided on common law contract principles. See generally Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 77 (1982); Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1933 (1987); *Parenthood by Proxy*, *supra* note 2, at 389 n.32.

A full discussion of the societal implications of the new reproductive technology is also beyond the scope of this article. See generally Widler, *Society's Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1044 (1986); L. Andrews, "Feminist Perspectives on Reproductive Technologies," a paper presented at a Forum on Reproductive Laws for the 1990s, in New York City (May 4, 1987) (on file at the Harvard Women's Law Journal).

provisions regarding abortion⁶ and termination of parental rights.⁷ The basic underlying issues here have similarly been addressed by the courts in cases involving contracts,⁸ procreation,⁹ and adoption.¹⁰ While the surrogacy relationship in its entirety may be qualitatively different from the sum of its parts, a full understanding of the precedents addressing artificial insemination, pregnancy and abortion, and determination of parental rights is essential in developing a constitutional analysis.¹¹

The article will be in two parts. The first section will discuss the problems raised, and the questions left open, by Judge Sorkow's inchoate formulation of the parties' "procreation" rights.¹² The second section suggests an alternative formulation

⁶ See *Roe v. Wade*, 410 U.S. 113, 166 (1973) (striking Texas criminal abortion statutes prohibiting abortion at any stage of pregnancy except to save the life of the mother as violative of constitutional right of privacy). See also *Doe v. Bolton*, 410 U.S. 179, 210 (1973) (requirements of Georgia statute that hospital committee approve proposed abortion lacks constitutional pertinence and requirement that two licensed physicians confirm recommendation of pregnant woman's consultant has no rational connection with patient's needs).

⁷ See *Lehr v. Robertson*, 463 U.S. 248 (1983) (failure to give the putative father notice of pending adoption did not deny him due process where he never established any relationship with the child); *Caban v. Mohammed*, 441 U.S. 380 (1979) (where father establishes substantial relationship with child, statute permitting adoption of child without consent of unwed father violates Equal Protection Clause); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (equal protection principles did not require that an unwed father, who never legitimated child, be given the same authority to veto adoption as a divorced father); *Stanley v. Illinois*, 405 U.S. 645 (1972) (due process required that an unwed father be granted a hearing as to his fitness as a parent before his children could be taken from him after the death of their natural mother).

⁸ See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 438 (1934) (holding that "[t]he question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end").

⁹ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (law authorizing sterilization of person convicted more than twice of felonies involving "moral turpitude" held violative of equal protection); *Buck v. Bell*, 274 U.S. 200 (1927) (upholding sterilization law applicable to mentally defective inmates in state institution).

¹⁰ See *supra* note 7.

¹¹ Cf. Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291, 306 n.65 (1982); Note, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 468, 481 (1982) [hereinafter *Surrogate Mother Agreements*] (discussing inadequacies of analyzing the various components of the surrogacy process rather than the process as a whole, and raising the provocative point that surrogacy may define the outer limits of the flexibility of the privacy concept developed in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and its progeny).

¹² In fairness, Judge Sorkow did not have much guidance. See Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1163 (1974) [hereinafter *Right of Privacy*] ("One of the major failings of the Court has been its treatment of privacy as

in which the particular privacy rights involved in the surrogacy process are identified as the decisional right with respect to one's own reproductive capacity and the right to bodily integrity.¹³ Moreover, it is argued that the development of the parents' liberty interest in their child must be taken into account. Using the revised formulation, the second section presents an analysis of the parties' rights at each discrete stage of the complex surrogacy relationship: (1) the agreement, (2) insemination and conception, (3) pregnancy and abortion, and (4) determination of parental rights.¹⁴

This article will develop the proposition that because of the nature of the rights involved in the surrogacy relationship, the parties—particularly the surrogate mother—cannot constitutionally alienate and deprive their future selves of these rights.¹⁵ The

a self-explanatory, unitary concept, when in fact one or more of a number of distinct meanings may lie behind a claim to privacy protection."'). See also Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 199-200 (1965) ("Few concepts, however, are more vague or less amenable to definition and structured treatment than privacy. . . . The term [right of privacy] nowhere appears in the Constitution, but is quite obviously a background interest underlying the specific guarantees of the third, fourth and fifth amendments."); Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 287-88 (1965) (noting that the privacy right has been found by the Court in the Fourteenth Amendment's "latent" due process guarantees and that at some point a subjective value judgment must be made that the Court is probably the best ultimate arbiter). Cf. *Right of Privacy*, *supra* at 1174 ("[T]oo broad a definition might actually be counterproductive to the effective protection of privacy interests. A broad but vague concept might prove less vigorous than a narrow but more clearly defined one."').

¹³ These two rights have been identified by the Supreme Court as well as described by commentators. See *infra* notes 81-92 and accompanying text. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1306-07, 1329-61 (2d ed. 1988).

¹⁴ For a general discussion of the issues arising at each of these stages, see generally *Part I: The Law of Abortion*, 77 MICH. L. REV. 1568 (1979); Regan, *Rewriting Roe v. Wade*, at 1569; King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, at 1647; Appleton, *The Abortion Funding Cases and Population Control: An Imaginary Lawsuit (and Some Reflections on the Uncertain Limits of Reproductive Privacy)*, at 1688; Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, at 1724; *Part II: The Politics of Abortion*, at 1749. See also Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865 (1985); Isaacs & Holt, *Redefining Procreation: Facing the Issues* (Sept. 1987) (Vol. 42, No. 3, Population Bulletin) (on file at the Harvard Women's Law Journal); Johnson, *The Baby M Decision: Specific Performance of a Contract for Specially Manufactured Goods*, 11 S. ILL. U.L.J. 1339 (1987); Lister, *The Right to Control the Use of One's Body*, in *THE RIGHTS OF AMERICANS* 348 (N. Dorsen ed. 1971); *Privacy Symposium*, 31 LAW & CONTEMP. PROB. 251-435 (1966); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁵ It should be noted that this article focuses on the substance of the right; that is, the content of the agreement rather than any presumption that the promisor's reasoning ability is in some way defective. See Kronman, *Paternalism and the Law of Contracts*,

article concludes that the alienation of rights under the terms of the *Baby M* surrogacy agreement was unconstitutional.¹⁶ It is further argued that the line of Supreme Court cases which have addressed the issues raised here, including the cases cited by Judge Sorkow, require (1) that either party be permitted to withdraw from the surrogacy relationship before conception, (2) that the court recognize the woman's exclusive right to control her body during the pregnancy and (3) that there be a post-birth voluntary surrender by the surrogate mother. In the absence of such surrender, parental rights cannot be terminated without due process.¹⁷ Therefore, courts cannot enforce a demand for specific performance of essential provisions of the surrogacy contract without violating the parties' constitutional rights.

I. SURROGACY AND PROCREATION RIGHTS: THE TRIAL COURT'S ANALYSIS

State legislatures would ordinarily have the power to ban surrogacy agreements as long as such a ban would not violate the constitutional rights of the surrogate mother and/or the biological

92 YALE L.J. 763, 786 (1983) (distinguishing prohibitions against self-enslavement, which bar certain agreements regardless of their particular terms or the circumstances under which they were entered, and restrictions concerned with the promisor's reasoning ability, such as the rule against enforcing a child's contract against him). There is no implicit assumption that women, or pregnant women, are incapable or less than fully competent to make these decisions for themselves at the time they act upon those decisions.

The formulation of a comprehensive theory of rights to explain what it is about the substance of these rights that renders them inalienable is beyond the scope of this paper. It will be assumed for my purposes that these rights are as crucial to "personhood," see Radin, *supra* note 5, at 1879-87, or "integrity or self-respect," see Kronman *supra*, at 778-79, as any fixed in the *Griswold v. Connecticut* penumbra, see *Griswold*, 381 U.S. 479 (1965). See also *infra* note 56.

¹⁶ Cf. Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1941 (1986) [hereinafter *Inalienable Rights*] (asserting that constitutional doctrines developed in connection with the Thirteenth Amendment and the *Roe v. Wade* privacy right "offer no determinate answers to questions of alienability").

¹⁷ See *infra* notes 152-153, 157. Under New Jersey law, the power to terminate parental rights is reserved to the state and expressly limited by statute. N.J. STAT. ANN. §§ 9:2-18-9:2-20 (West 1987). If the surrogate's parental rights are not terminated, there must be a judicial determination of custody.

father.¹⁸ However, if it can be shown that surrogacy involves fundamental constitutional rights, the state would have to establish a compelling interest to justify any restriction.¹⁹ Although there was no legislation at issue in the *Baby M* case, Judge Sorkow properly noted that "[t]his court's inquiry constitutes state action."²⁰ By finding that fundamental rights were at stake, Judge Sorkow triggered the more stringent standard.²¹

Judge Sorkow's constitutional analysis focused on the line of cases including *Meyer v. Nebraska*,²² *Skinner v. Oklahoma*,²³ *Stanley v. Illinois*,²⁴ *Reed v. Reed*,²⁵ *Griswold v. Connecticut*,²⁶ and *Eisenstadt v. Baird*.²⁷ Tracing a fundamental right to "marry, establish a home, and bring up children,"²⁸ to *Meyer v. Nebraska*, the Judge proceeded to cite *Skinner v. Oklahoma* for the proposition that the right to procreate is among the "basic civil rights of man,"²⁹ and *Stanley v. Illinois* and *Cleveland Board of Education v. LaFleur*³⁰ to establish that these rights are "far more

¹⁸ Legislation regulating social and economic matters, including regulation of contracts, is subject to a rationality test. In order to be upheld as constitutional, socioeconomic regulation must merely be rationally related to a legitimate government objective. See *Blaisdell*, 290 U.S. 398. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 13, at 581-84.

As of July 1987, no state legislature had yet banned surrogacy. Surrogate Parenthood: Legislative Update, 13 Fam. L. Rep. (BNA) 1442 (July 14, 1987). But see *States Assess Surrogate Motherhood*, N.Y. Times, Dec. 13, 1987, at 42, col. 1 (noting that since the trial court's decision in *Baby M*, 70 bills seeking to ban, regulate, or study surrogacy have been introduced and Louisiana has approved legislation declaring surrogacy contracts unenforceable).

¹⁹ Legislation restricting fundamental rights is subject to a two-tiered strict scrutiny test. As set forth in *Carey v. Population Serv. Int'l*, 431 U.S. 678, 686 (1977), the test requires: (1) a compelling state interest in regulating the activity and (2) a restriction which is narrowly tailored to meet the compelling state interest. See also Note, *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597, 653 & n.275 (1986) [hereinafter *Conception, Pregnancy and Birth*] (noting that since privacy and procreation rights are fundamental rights, restrictive regulations must meet the *Carey* test in order to be constitutional); *Right of Privacy*, *supra* note 12, at 1167 ("Historically, the state has rarely lost under the rational relation test and has rarely prevailed under the compelling state interest test.").

²⁰ 217 N.J. Super. at 387, 525 A.2d at 1165.

²¹ 217 N.J. Super. at 384-88, 525 A.2d at 1164-66.

²² 262 U.S. 390 (1923).

²³ 316 U.S. 535 (1942).

²⁴ 405 U.S. 645 (1972).

²⁵ 404 U.S. 71 (1971).

²⁶ 381 U.S. 479 (1965).

²⁷ 405 U.S. 438 (1972).

²⁸ *Baby M*, 217 N.J. Super. at 385, 525 A.2d at 1164 (citing *Meyer*, 262 U.S. at 399).

²⁹ 217 N.J. Super. at 385, 525 A.2d at 1164 (citing *Skinner*, 316 U.S. at 541).

³⁰ *Cleveland*, 414 U.S. 632 (1973).

precious . . . than property rights”³¹ and that “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”³²

Without providing a full analysis of these cases, the trial court suggested that surrogacy involves a fundamental “right to procreate”:³³ “If one has a right to procreate coitally, then one has the right to reproduce non-coitally. If it is the reproduction that is protected, then the means of reproduction are also to be protected.”³⁴ Although most commentators who have found a right to engage in surrogacy relationships have similarly grounded it in these cases,³⁵ the privacy rights which they establish are far from clear.

The constitutional basis, if any, for the privacy rights dealing with sex, marriage, and the family remains the subject of raging debate.³⁶ Each new case seeking to extend these rights has inspired a renewed onslaught.³⁷ A more probing doctrinal analysis

³¹ *Baby M*, 217 N.J. Super. at 385, 525 A.2d at 1164 (quoting *Stanley*, 405 U.S. at 651 (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953))).

³² 217 N.J. Super. at 385, 525 A.2d at 1164 (citing *Cleveland*, 414 U.S. at 639–40).

³³ 217 N.J. Super. at 385, 525 A.2d at 1164.

³⁴ 217 N.J. Super. at 386, 525 A.2d at 1164 (quoting *Cleveland*, 414 U.S. at 639–40).

³⁵ See, e.g., Coleman, *supra* note 5, at 75–76, 118 (questioning the extension of the privacy right to the surrogacy context and suggesting that such extension is logical); Note, *Baby-Sitting Consideration: Surrogate Mother's Right to 'Rent Her Womb' For a Fee*, 18 GONZ. L. REV. 539, 553 (1982) [hereinafter *Baby-Sitting Consideration*] (discussing development of expansive approach to fundamental right of privacy by the Supreme Court and the revival of substantive due process as applied to surrogacy). See also Graham, *supra* note 11, at 308–15 (arguing that the protective structures espoused in *Skinner* and *Griswold* were related to the preservation of a system of patriarchal family structure and authority; “[n]either [case] emphasized the particular impact upon women and children of the unavailability of choice,” *id.* at 308); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669 (1985) [hereinafter *Procreation Rights of the Unmarried*] (arguing that the due process clauses of the Fifth and Fourteenth Amendments encompass a right to procreate).

³⁶ See, e.g., Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259 (1965); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 365–67 & n.81 (1981).

³⁷ As the majority noted in *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986) (White, J.):

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 151, 152, 82 L.Ed. 288 (1937), it was said that this category includes those funda-

than that set forth by Judge Sorkow is necessary to ascertain the extent to which the privacy rights recognized in the cases to date offer an approach to surrogacy.

While noting that the cited cases address "family" rights,³⁸ the trial court skimmed over the limitations of their holdings. *Skinner*, for example, involved a challenge to a law authorizing the sterilization of persons convicted more than twice of "felonies involving moral turpitude."³⁹ The *Skinner* Court stressed the irrevocable impact, for society as well as the individual, of the statute in dispute. "The power to sterilize, if exercised, may have subtle, far reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches."⁴⁰

The "basic civil right"⁴¹ established in *Skinner* was the "right to have offspring."⁴² The plaintiff was protected only from an affirmative act of the state which would irredeemably deprive him of that right—an act, moreover, that involved an invasive physical procedure. A ban on surrogacy would not prevent either party in the *Baby M* case from physically engendering children. It would simply preclude the agreed upon arrangements regarding legal parentage, an issue which did not concern the *Skinner* Court.

Skinner, in the surrogacy context, may more aptly be relied on for the proposition that individuals should be free from state interference with respect to control over their own bodies for

mental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 1937, 52 L.Ed.2d 531 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 503, 97 S. Ct. at 1938 (Powell, J.). See also *Griswold v. Connecticut*, 381 U.S. at 506, 85 S. Ct. at 1693.

³⁸ *Baby M*, 217 N.J. Super. at 385, 525 A.2d at 1164. Cf. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 270 n.133 (discussing limitations of the concept of "familial" privacy).

³⁹ *Skinner*, 316 U.S. at 537.

⁴⁰ *Id.* at 541. See generally Note, *Validity of Oklahoma Statute Involving Sterilization of Criminals*, 22 B.U.L. REV. 590 (1942); Note, *Constitutionality of Sterilization Statutes*, 27 MARQ. L. REV. 99 (1943); Note, *Compulsory Sterilization Statute*, 41 MICH. L. REV. 318 (1942); Note, *Constitutionality of State Laws Providing Sterilization for Habitual Criminals*, 51 YALE L.J. 1380 (1942).

⁴¹ *Skinner*, 316 U.S. at 541.

⁴² *Id.* at 536.

reproductive purposes.⁴³ The trial court, however, did not make this point.

The trial court's analysis of *Stanley v. Illinois* was similarly inadequate. The *Stanley* Court protected an intact, functioning family unit in which the father, albeit unwed, had lived with and supported his minor children for several years. Upon the death of their natural mother, the children became wards of the state under Illinois law.⁴⁴ Under these circumstances, the Court held that "Stanley's interest in retaining custody of his children is cognizable and substantial"⁴⁵ and that the children could not be removed from his custody without a hearing.

The *Stanley* decision created no affirmative right to begin a family outside of marriage, which was precisely the point of the surrogacy arrangement. Rather, the parental rights recognized in *Stanley* arose from substantial parental responsibilities assumed years before the protection of family status was sought. As the Court noted: "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."⁴⁶

Judge Sorkow's reliance on *Reed v. Reed* is also troublesome.⁴⁷ The trial court held that surrogate mothers, like "surrogate father" sperm donors, should be recognized by the law.⁴⁸ Judge Sorkow explained that "[i]f a man may offer the means for procreation then a woman must equally be allowed to do so. To rule otherwise denies equal protection of the law to the childless couple, the surrogate, whether male or female, and the unborn child."⁴⁹

Reed only required that similarly situated persons be treated alike. A classification based on gender, according to the *Reed*

⁴³ As other commentators have noted, *Skinner* recognized "the fundamental character of the reproductive decision." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 13, at 1339.

⁴⁴ *Stanley*, 405 U.S. at 646.

⁴⁵ *Id.* at 652.

⁴⁶ *Id.* at 651.

⁴⁷ 404 U.S. 71, 76 (Court determined that state law giving men preference over women in appointment as executors of estates was discriminatory and violative of the Equal Protection Clause).

⁴⁸ *Baby M*, 217 N.J. Super. at 388, 525 A.2d at 1165. *Cf. Radin*, *supra* note 5, at 1932 n.285 (noting that the situations of sperm donors and surrogate mothers are "asymmetrical because the carrying of the child in the woman's body (whether or not it is hers genetically) is a stronger factor in interrelationships with a child than an abstract genetic relationship").

⁴⁹ *Baby M*, 217 N.J. Super. at 388, 525 A.2d at 1165.

Court, "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."⁵⁰ A persuasive argument may be made that a surrogate mother and a sperm donor are not similarly situated. There is no male analogue to gestation, labor and birth. A sperm donor is at most comparable to an ovum donor.⁵¹ In fact, given the present state of technology, which requires a far more intrusive procedure to obtain an egg than to obtain sperm, there may be no comparison at all.

Moreover, classifications based on gender are merely quasi-suspect, and therefore, not subject to strict scrutiny. These classifications do not violate equal protection as long as they are substantially related to an important governmental objective.⁵² Under this standard the avoidance of the undeniably greater health risk assumed by the surrogate mother could well be considered such an important governmental objective.

There are more persuasive arguments for the right of the parties in the surrogacy relationship to utilize artificial insemination,⁵³ including the arguments advanced by Judge Sorkow regarding the right to engender a child.⁵⁴ The parties exercise their rights to make decisions regarding their reproductive capacity when they utilize artificial insemination, for biological engendering is all that is involved in the insemination process. The right to engage in artificial insemination may also be seen as an aspect of the fundamental right of each party to control his or her own body.⁵⁵

⁵⁰ *Reed*, 404 U.S. at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective. . . ." *Reed*, 404 U.S. at 76.

⁵¹ See *Donating Parenthood: Clinic Opens First Egg Depository for Infertile Couples*, *Star-Ledger* (Newark, N.J.), July 15, 1987, at 9, col. 1 (discussing procedure for ovum donation which includes surgical removal of the egg from the donor).

⁵² See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁵³ See Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 29-40 (1981) (arguing that none of the state interests which could be advanced to forbid artificial insemination, including an economic interest in limiting number of welfare recipients, protection of the child, and promotion of traditional family units are sufficiently compelling to justify restrictive legislation).

⁵⁴ See *supra* text accompanying notes 28-34.

⁵⁵ See generally Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 963 (1986).

Judge Sorkow relied on *Griswold*⁵⁶ for the proposition that “individuals ha[ve] a right of privacy entitled to constitutional protection,”⁵⁷ but there is no effort to define the privacy right protected in *Griswold* or to show how the right might apply in the surrogacy context.⁵⁸ The *Griswold* Court found that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,”⁵⁹ and that a marital right of privacy was created by the penumbras of “several fundamental constitutional guarantees.”⁶⁰

The Supreme Court’s “privacy” formulations in *Griswold* are ambiguous and a clear standard has yet to be articulated. The trial court did not grapple with the complexities of that decision. Nor did the court acknowledge the considerable controversy generated by the *Griswold* decision, and the lack of consensus regarding its significance. The difficulties of identifying the rights at issue in *Griswold* must be recognized, if not resolved, before those rights may be considered dispositive in the surrogacy context.

Judge Sorkow’s citation of *Eisenstadt* is similarly problematic: “If the right of privacy means anything it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁶¹ The

⁵⁶ 381 U.S. 479 (*Griswold*, the executive director of the Planned Parenthood League of Connecticut, was arrested for giving medical advice regarding contraception to married persons in violation of a state statute forbidding the use of contraceptive devices. The Court held that the Connecticut law was an unconstitutional invasion of the parties’ privacy rights.).

⁵⁷ *Baby M*, 217 N.J. Super. at 385, 525 A.2d at 1164.

⁵⁸ Cf. Sutherland, *supra* note 12, at 285–88 (discussing the difficulties in identifying a traditional “right of privacy” to justify the *Griswold* holding).

⁵⁹ *Griswold*, 381 U.S. at 484.

⁶⁰ *Id.* at 485. In a concurring opinion, Justice Goldberg explicitly grounded the privacy right in the Ninth Amendment:

I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that . . . it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution [footnote omitted] is supported both by numerous decisions . . . and by the language and history of the Ninth Amendment.

Id. at 486–87.

⁶¹ *Baby M*, 217 N.J. Super. at 385, 525 A.2d at 1164 (quoting *Eisenstadt*, 405 U.S. at 453).

privacy right in *Eisenstadt*, relied upon by the Court, may be of dubious relevance in the surrogacy situation because of the absence of "privacy," as it is commonly understood, in the latter.⁶² The surrogacy relationship in *Baby M* was a commercial transaction. The conception took place in a doctor's office.⁶³ The relationship was solicited through a newspaper advertisement. The parents had no sexual relations. These factors arguably destroy the "private" nature of the decision, undermining the Court's reliance on *Eisenstadt*.⁶⁴

In its consideration of *Roe v. Wade*,⁶⁵ and in *In re Quinlan*,⁶⁶ the trial court came closest to articulating a constitutional basis for surrogacy: "If the law of our land sanctions a means to end life, then that same law may be used to create and celebrate life."⁶⁷ On its face, this somewhat grandiose statement is far from compelling. First, the *Roe* Court expressly declined to authorize the "end[ing of] life," explaining that it was beyond the purview of the Court to determine when life began.⁶⁸ The Court further sought to avoid bestowing such authority by restricting the right to an abortion to the period before the fetus attains viability. Major concerns of the court in establishing the "right to die" in the *Quinlan* case, including concern about imposing criminal li-

⁶² Cf. Graham, *supra* note 11, at 316 (noting that the holding in *Eisenstadt* is arguably inapplicable in the surrogacy context since surrogacy does not have the purpose of "eradicating the effects of a system that uses women's childbearing ability to unfairly subordinate them," unlike the use of contraceptives to avoid the "detriment of pregnancy" in *Eisenstadt*).

⁶³ But cf. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973) (protection of privacy rights with regard to matters of family "is not just concerned with a particular place, but with a protected intimate relationship" which extends to the doctor's office); *Doe*, 410 U.S. at 219 (Douglas, J., concurring) ("The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relation.").

⁶⁴ See Note, *Legal Recognition of Surrogate Gestation*, 7 WOMEN'S RTS. L. REP. 107, 112 (1982) (principle of right to privacy only applies if surrogacy process is private rather than public).

⁶⁵ 410 U.S. 113.

⁶⁶ 70 N.J. 10, 355 A.2d 647 (1976).

⁶⁷ *Baby M*, 217 N.J. Super. at 386, 525 A.2d at 1164.

⁶⁸

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe, 410 U.S. at 159.

ability for homicide or suicide,⁶⁹ are similarly inapposite in the surrogacy context.⁷⁰

The common thread in these cases—the thread upon which a constitutional defense of surrogacy must hang—is the notion of a decisional right, which may be exercised negatively (“to end life”) or positively (“to create life”).⁷¹ These rights, at least in certain areas of personal choice, outweigh any countervailing state interests.⁷² As the *Quinlan* court explained: “Presumably this [privacy] right is broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain conditions.”⁷³ That an individual has an affirmative right to make these decisions in connection with her reproductive capacity, however, is not the same as saying, as the trial court did, that state interference is prohibited in private matters by virtue of a vague privacy right.

The Supreme Court has held quite clearly that the state is not so prohibited in *Bowers v. Hardwick*,⁷⁴ the most recent Supreme Court privacy case, conspicuous by its omission from the *Baby M* decision. Respondent Hardwick challenged the constitutionality of a Georgia statute criminalizing consensual sodomy. The Supreme Court forcefully rejected the argument that the line of cases cited by Judge Sorkow conferred a broad right of privacy. The Court took the opportunity to stress its reluctance to expand the concept of fundamental rights:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in

⁶⁹ *Quinlan*, 70 N.J. at 51–52, 355 A.2d at 669–70.

⁷⁰ See *In re Farrell*, 212 N.J. Super. 294, 303–02, 514 A.2d 1342, 1344–46 (Ch. Div. 1986) (identifying four state interests adverse to the “right-to-die”: preserving life, preventing suicide, safeguarding the integrity of the medical profession and protecting innocent third parties).

⁷¹ *Baby M*, 217 N.J. Super. at 386, 525 A.2d at 1164.

⁷² See *In re Conroy*, 98 N.J. 321, 353–55, 486 A.2d 1209, 1225–26 (1985). See generally Cantor, Conroy, *Best Interests, and the Handling of Dying Patients*, 37 RUTGERS L. REV. 543 (1985); Gerety, *supra* note 38, at 236 (defining privacy as “an autonomy or control over the intimacies of personal identity”).

⁷³ *Quinlan*, 70 N.J. at 40, 355 A.2d at 663. Karen Quinlan’s “putative decision” to end her life is later characterized by the court as “a valuable incident of her right of privacy.” *Id.* at 41, 355 A.2d at 664.

⁷⁴ 106 S. Ct. 2841 (1986).

the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.⁷⁵

It is difficult to argue that the procreational rights relied upon by Judge Sorkow, without further clarification, do not require precisely such an "expansive view" in order to accommodate the surrogacy relationship.

First, none of the cases relied upon by Judge Sorkow extends an affirmative procreation right beyond the traditional family unit.⁷⁶ There are no precedents suggesting that a procreation right exists where there is an express intention, like that made by Mrs. Whitehead, *not* to parent the child. Nor is there support for the trial court's allusions to the "couple's" right to procreate.⁷⁷ Elizabeth Stern, though undoubtedly an interested party, was not a party to the contract. The court ascribed a recondite "procreation" right to Dr. Stern which the case law does not support.

Second, surrogacy is distinguishable from the foregoing cases because it does not involve sexual intercourse. There is no invasion of "the sacred precincts of marital bedrooms" decried by the *Griswold* Court.⁷⁸ Judge Sorkow extracted principles from the above cases that do not necessarily support surrogacy. They are too general and unfocused. Indeed, under Judge Sorkow's analysis, it may be argued that almost any activity resulting in "procreation" would be constitutionally protected.

Finally, even if the procreation rights outlined by Judge Sorkow were sufficient to assure both parties the right to engender a child, those rights have little if any bearing on the custody of such child. The court erroneously confused the procreation right to beget a child with the natural parents' liberty interest in their

⁷⁵ *Id.* at 2846.

⁷⁶ See Graham, *supra* note 11, at 310 (noting that *Griswold* and *Skinner* protect only family rights).

⁷⁷ *Baby M*, 217 N.J. Super. at 387, 525 A.2d at 1165. See Brief of Concerned United Birthparents, Inc. as Amicus Curiae at 25, *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *rev'd*, No. A-39 (N.J. Feb. 3, 1988) [hereinafter *Birthparents' Amicus Brief*] (The brief argues that, "Elizabeth Stern is not procreating at all. Rather, she is attempting to acquire a biologically unrelated child through adoption.").

⁷⁸ *Griswold*, 381 U.S. at 485.

child.⁷⁹ Because he neglected to identify the latter, the Judge never grappled with the issue of its alienability.⁸⁰ The rights outlined by Judge Sorkow are simply insufficient to sustain the surrogacy agreement, which requires not only the engendering of a child, but the subsequent surrender of that child, as well. The degree to which the right to enter into a surrogacy relationship may be considered a "procreation" right raises serious problems which the *Baby M* decision does not resolve.

II. AN ALTERNATIVE APPROACH—THE DECISIONAL RIGHT, THE RIGHT OF BODILY INTEGRITY, AND THE LIBERTY INTEREST

A. A Revised Formulation

The constitutionality of the surrogacy process may be defended more persuasively by focusing on the parties' decisional rights, their rights to bodily integrity, and the development of their liberty interests in their child.⁸¹ The notion of a fundamental "decisional" privacy right was first made explicit in the abortion cases.⁸² In *Roe v. Wade*, the Supreme Court stated that the right

⁷⁹ For fuller discussion of liberty interest, see *infra* note 93 and accompanying text, and text accompanying notes 135–148. Cf. Robertson, *supra* note 55, at 986 (noting that the Supreme Court has "not distinguished carefully between conceiving and rearing a child").

⁸⁰ See Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 484 n.36 (1984) ("[C]ourts have properly held that assertion of one right does not constitute waiver of another, even though actions inconsistent with the exercise of the first right may be necessary in order to exercise the second. . . . Assertion of the first right may constitute a decision, but because of the substantive policy that separate rights may be separately asserted, it is not deemed a decision taken with respect to the second right.").

⁸¹ The term "decisional rights" as used in this paper refers only to a person's right to make decisions regarding her own reproductive capacity; that is, decisions with respect to conception, gestation, abortion or birth, and the surrender of her child. The right to bodily integrity includes the right to control one's own body as well as the right to be free from bodily invasions imposed by others. Both facets of the right to bodily integrity are implicated in the surrogacy situation.

⁸² See Note, *Roe v. Wade and In re Quinlan: Individual Decision and the Scope of Privacy's Constitutional Guarantee*, 12 U.S.F. L. REV. 111, 121 n.71 (1977) (noting that although *Roe* "was certainly not the first 'privacy' case to refer to individual decision . . . [and] the concern for 'freedom of choice' has been implicit in all the other 'privacy cases', *Roe* is the first case, explicitly decided on the basis of the right of privacy, that ties the right of privacy to freedom of individual decision").

As Justice Blackmun noted in his dissent in *Bowers*, 106 S. Ct. at 2850: "In construing

of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁸³ As the Court noted later in *Carey v. Population Services International*:

This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." [sic] While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified governmental interference are personal decisions "relating to marriage, procreation, contraception, family relationships, and child rearing and education." (citations omitted)⁸⁴

The surrogacy relationship involves precisely those decisions regarding procreation, family relations, and child rearing discussed in *Carey*. Commentators have suggested that the decisional right is a privacy right which focuses "on broader aspects of autonomy and is concerned with a more generalized ability of individuals to determine for themselves whether to perform certain acts or to undergo certain experiences."⁸⁵ Others suggest that the notion of a decisional right is supported by the precedents established in cases such as *Skinner* and *Griswold*. "Taken together with *Griswold* which recognized as equally protected the individual's decision *not* to bear a child, the meaning of *Skinner* is that *whether one person's body shall be the source of another life must be left to that person and that person alone to decide*."⁸⁶ It is suggested here that the cases discussed above, support the proposition that both potential biological parents have a fundamental right to be free from state interference in the exercise of their decisional privacy rights to engender a child through surrogacy.⁸⁷

the right to privacy, the Court . . . has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make."

The doctrinal underpinnings of the "right to die" cases may aptly be characterized as "decisional," also. See *Quinlan*, 70 N.J. at 40-42, 355 A.2d at 663-64.

⁸³ *Roe*, 410 U.S. at 153.

⁸⁴ *Carey*, 431 U.S. at 684-85.

⁸⁵ *Right of Privacy*, *supra* note 12, at 1163.

⁸⁶ L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 13, at 1340 (emphasis added).

⁸⁷ See generally *Carey*, 431 U.S. at 684-85 (The right of privacy extends to individual decisions by nonmarried individuals to use contraceptives, for "[t]he decision whether or

Both parties in the surrogacy context also have a fundamental right to bodily integrity, at least for purposes of reproduction, without state interference. Freedom from intrusion of the body merits the same degree of constitutional protection, at minimum, as freedom from intrusion of the home or the bedroom, which has been well established.⁸⁸ *Roe* stressed that the woman is free to control her own body, at least until fetal viability.⁸⁹

The Supreme Court has also held that the individual has the right to be free from intrusive bodily invasions.⁹⁰ According to Tribe, "the body constitutes the major locus of separation between the individual and the world and is in that sense the first object of each person's freedom."⁹¹ As another commentator points out, "[a]ll of this comes in the end to a control over the most basic vehicle of selfhood: the body. For control over the body is the first form of autonomy and the necessary condition, for those who are not saints or stoics, of all later forms."⁹²

Finally, the nature of the parents' interest in the child conceived, carried and born pursuant to the terms of the surrogacy

not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."); *Eisenstadt*, 405 U.S. at 453 (dictum, Brennan, J.) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Skinner*, 316 U.S. at 541-42. See also Graham, *supra* note 11, at 317 (discussing decisional rights).

⁸⁸ See *Poe v. Ullman*, 367 U.S. 497, 515-22, 539-55 (1961) (Douglas, J. and Harlan, J., dissenting); *Griswold*, 381 U.S. 479; *Stanley*, 394 U.S. 557.

⁸⁹ 410 U.S. 113. See also *infra* note 122; *Conroy*, 98 N.J. at 346, 486 A.2d at 1221 (The court held that bodily control has been "long recognized" by the law. "[G]enerally, a competent informed patient's interest in freedom from nonconsensual invasion of her bodily integrity would outweigh any state interest."); Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights?*, 10 HARV. WOMEN'S L.J. 9, 18-21 (1987).

⁹⁰ See *Rochin v. California*, 342 U.S. 165, 172 (1952) (pumping of defendant's stomach to obtain evidence of morphine use "shocked the conscience" and therefore, was prohibited by the due process clause). See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 13, at 1329-37. Cf. *Schmerber v. California*, 384 U.S. 757 (1966) (taking of a blood sample from a drunk driving suspect did not violate the Fourth Amendment); Comment, *Analyzing the Reasonableness of Bodily Intrusions*, 68 MARQ. L. REV. 130 (1984) (discussing the circumstances under which an invasive procedure may be permitted under the Fourth Amendment in procuring evidence for use in a criminal proceeding). The Fourth Amendment cases allowing intrusion are distinguishable in that the state interest in regulating surrogacy, if any, is presumably less compelling than the state's interest in prosecuting criminal suspects.

⁹¹ L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 13, at 1330. Professor Tribe notes, however, that not all forms of intrusion or unwanted touching can be considered "violations of the self," e.g., police officer who gently pushes people back in order to allow an ambulance to pass. *Id.* at 1330.

⁹² Gerety, *supra* note 38, at 266 & n.119. See generally Radin, *supra* note 5, at 1880 (discussing the nature of bodily integrity, using a personhood analysis).

agreement will be considered. The Supreme Court has discussed this liberty interest in several cases,⁹³ making it clear that a parents' interest in their child vests not merely as a result of a biological tie but through the parents' voluntary cultivation of a relationship with that child. It is argued here that the surrogate mother cannot voluntarily "cultivate" such a relationship, within the court's meaning, if it has already been legally repudiated, as required by the surrogacy agreement.

B. The Revised Formulation Applied

This section will examine the decisional and bodily integrity rights as they arise during the first three stages of the surrogacy process: (1) the agreement; (2) insemination and (3) pregnancy. These fundamental rights as well as the liberty interest that arises will then be addressed in the context of the fourth stage of the process, the determination of parental rights.

The key issue is whether rights exercised at the agreement stage should control subsequent rights. Whether or not one party may constitutionally obtain specific performance if the other changes her mind (as in *Baby M*) hinges on the alienability of the rights and interests involved at each stage of the surrogacy arrangement.

The law generally "prohibits alienation and destruction of rights to freedom from physical invasions of our bodies."⁹⁴ A boxer, for example, may waive⁹⁵ his right to be free from bodily invasion on a fight by fight basis, i.e., he can contemporaneously consent

⁹³ See *Santosky v. Kramer*, 455 U.S. 745, 753 (1981) (noting "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment").

⁹⁴ *Inalienable Rights*, *supra* note 16, at 1941 n.30. The constitutional magnitude of this rule is demonstrated by the burden which must be met by the party seeking such invasion before it is permitted. See generally Comment, *Lee v. Winston: Court Ordered Surgery and the Fourth Amendment—A New Analysis of Reasonableness?*, 60 NOTRE DAME L. REV. 149 (1984).

⁹⁵ Waiver has been defined as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). See generally Simon, *Rescinding a Waiver of a Constitutional Rights*, 68 GEO. L.J. 919 (1980) (discussing rescission of waivers in the criminal context).

to battery.⁹⁶ The boxer, however, cannot transfer his right to be free from bodily invasion to another person who would then be empowered to make those decisions.⁹⁷

A crucial underlying notion here is that the boxer may legitimately change his mind about the value of his rights after he has been knocked out a few times. The right to decide whether to waive his right to be free from bodily invasion, must be equally available to the “new” self that may emerge as a result of the initial exercise of that right. It is argued in this article that the same principle is applicable in the surrogacy context where certain decisional privacy rights and bodily integrity rights are involved.

The proposition here is that it would violate the essence of the decisional and bodily integrity rights to enforce the provisions of a surrogacy contract against a decision-maker who changes her mind through the subsequent exercise of the very same rights. A bar on specific performance, therefore, preserves rather than diminishes these rights.

As explained below there is an equally compelling argument against the alienation of the surrogate’s liberty interest in her child because of the nature of that liberty interest. Since the interest does not attach unless—and until—the parent has cultivated a relationship with the child, it will be argued that the course of conduct necessary to vest the interest precludes its alienation. The surrogate cannot cultivate such a relationship if she has alienated her interest.

1. The Agreement

It is not at all clear, as the trial court asserted, that the parties have a constitutionally protected right to enter into the contract, or that the “surrogate . . . [had such a right] to perform services” pursuant to its terms.⁹⁸ There is no affirmative constitutional right to enter into a contract. The Contract Clause protects against the

⁹⁶ See *McAdams v. Windham*, 208 Ala. 492, 94 So. 742 (1922) (boxing match as an agreement or consent to suffer battery).

⁹⁷ *Inalienable Rights*, *supra* note 16, at 1941 n.30.

⁹⁸ *Baby M.*, 217 N.J. Super. at 387–88, 525 A.2d at 1165.

impairment of the obligations of contracts; it does not guarantee a right to enter into them.⁹⁹

The court's reliance on *Lochner v. New York*¹⁰⁰ was misplaced.¹⁰¹ In this case, the Supreme Court struck down restrictive wage and hour legislation, holding it an unconstitutional interference with the parties' right to contract. That case has long been repudiated as the prime example of the discredited economic substantive due process approach, used by the Court to substitute its own view for that of the legislature.¹⁰²

The constitutional protections to which the parties to a surrogacy agreement are entitled are not triggered because the parties entered into a contract; they are triggered because that contract involved fundamental rights. If the parties may constitutionally engage in the surrogacy process, the only constitutional impediment that arises stems from the difference between acting and agreeing to act. The difference is the period of time which may lapse between making the decision and acting on it. Where a very short period of time passes between the decision and the act, the decision may be considered contemporaneous with the action. It may be useful to think of the decision and the resultant act as merged under such circumstances.

As the period of time increases, the decisionmaker becomes increasingly detached from the act. A surrogate may agree to become artificially inseminated a month from the date of the agreement, for example. If she does not change her mind, she confirms that original agreement through the contemporaneous exercise of her decisional right at the time of the actual insemination.

⁹⁹ But cf. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 253 (1965) ("The point is made that since liberty of contract is not mentioned in the Constitution, it should not be a constitutionally protected right. Yet, since the body of the Constitution protects against the impairment of the obligations of contracts, it does not require a far-fetched application of the emanations-and-penumbra theory to suggest that implicit in the contracts clause (or at least radiating from it) is a constitutional right to enter into contracts.").

¹⁰⁰ 198 U.S. 45 (1905).

¹⁰¹ See H. CHASE & C. DUCAT, CONSTITUTIONAL INTERPRETATION 607 (1983) ("Though *Lochner's* reputation lived on as a classic period piece in the history of the Court's jurisprudence, its constitutional effect was fleeting. . . . The [Bunting v. Ore., 243 U.S. 426 (1917)] decision was significant principally because it accomplished the *de facto* overturning of *Lochner*.").

¹⁰² See *Lochner*, 198 U.S. at 75 (Holmes' famous dissent); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 343-50 (1986) (discussion of *Lochner* and substantive due process from 1900 through 1936).

nation. If she does change her mind, she has, by definition, done so through the exercise of a decisional right no less valid than her first exercise of that right and no less entitled to constitutional protection. Similarly, a surrogate cannot irrevocably waive her right to an abortion, although she may decline to exercise it. If a surrogate does not have an abortion by the time the pregnancy has progressed to the stage specified in *Roe*, the waiver may become conclusive.

The more opportunities given to the decisionmaker to exercise the right, the greater the experience and information available to her each time she does so. The notion of maximizing the decisional right in this fashion finds support in *Roe*.¹⁰³ The Court explicitly elaborates on the broad range of physical, social, and psychological considerations that the woman's decision will take into account, and makes clear its expectation that such decisions require the fullest possible understanding of the situation. Alienation of the decisional right denies the decisionmaker the benefit of all reflection and experience acquired after she enters into the agreement.¹⁰⁴

The *Carey* Court lends support to the notion of maximizing decisional rights. Noting that a "less rigorous" test is applied to restrictions on the rights of minors than the compelling state interest test applicable when the privacy rights of adults are in issue, the Court explains: "[T]he right of privacy implicated here is the 'interest in independence in making certain kinds of important decisions'¹⁰⁵ and the law has generally regarded minors as having a lesser capability for making important decisions."¹⁰⁶ The *Carey* Court recognized the *very* limited circumstances under which diminution of the decisional right may be appropriate; that is, where the decisionmaker is less capable.

The inability to alienate fundamental rights at the outset should not preclude the parties from entering into a surrogacy relation-

¹⁰³ 410 U.S. at 153.

¹⁰⁴ Cf. Rubin, *supra* note 80, at 537 (There needs to be "an irreducible minimum of legal protection in every waiver situation, a requirement that follows directly from the notion that the right inheres in the relationship between the parties. Because the right is an essential part of the relationship, it can only be altered in form, but not totally eliminated. In other words, the rights being waived are structuring devices; they can be relinquished only if acceptable alternative means of structuring the relationship are employed.").

¹⁰⁵ *Carey*, 431 U.S. at 693 n.15 (quoting *Whalen v. Roe*, 429 U.S. 529, 599-600 (1977)).

¹⁰⁶ *Carey*, 431 U.S. at 693 n.15.

ship in which they express a present intent to proceed with the insemination, pregnancy, and surrender of the child as set forth in their agreement. This prohibition on alienation, however, bars specific performance as a remedy. Although this results in an agreement of diminished enforceability, it does not rule out agreement.¹⁰⁷ In effect, this limits the exercise of the decisional right at the agreement stage only insofar as it would otherwise preclude the exercise of that right at a subsequent stage. This maximizes the individual's opportunity to exercise the right and enhances the quality of decisionmaking at every stage.

2. Insemination and Conception

It is suggested in this section, that neither party to a surrogacy contract may alienate his or her right to decide whether to utilize artificial insemination. Judge Sorkow did not address the issue in these terms, but held that until conception, breach by Mrs. Whitehead could not have been specifically enforced: "[T]he surrogate may nonetheless renounce and terminate the contract until the time of conception. She may be subject then for such monetary damages as may be proven."¹⁰⁸ Although Judge Sorkow rejected specific performance at the pre-conception stage, there is no explanation for his intuitive refusal to do so. The court did not even speculate as to whether it could order specific performance in the event of a similar breach, or change of mind, by Mr. Stern.

There are at least three justifications for the proposition that a subsequent revocation of one's consent to be artificially inseminated is constitutionally protected. First, the frequently made suggestion that the Thirteenth Amendment prohibition against enslavement bars specific enforcement of a surrogacy contract is

¹⁰⁷ In the event of breach, the remedy could be limited to damages, as it generally is in personal services contracts. *But see Kronman, supra* note 15, at 780 (suggesting that an interest in the preservation of the promisor's integrity or self-respect underlies the prohibition against permitting a promisor from contracting away the right to "depersonalize" his relationship with the other party by substituting damages for promised performance).

In the alternative, specific performance could be permitted only if the breach were not attributable to the subsequent exercise of a decisional right, such as the loss of decisional capacity of one of the parties (by reason of a coma, for example) or an attempt by the father, while consistently indicating a willingness to rear the child, to extort support from the surrogate.

¹⁰⁸ *Baby M*, 217 N.J. Super. at 375, 525 A.2d at 1159. *See also supra* note 107.

applicable at this stage as well as at the other stages of the surrogacy process.¹⁰⁹

Second, the court's refusal to specifically enforce the agreement at this point is consistent with, and perhaps implicitly recognizes, the inalienability of the bodily integrity rights of both parties.¹¹⁰ Artificial insemination involves a far more invasive (albeit less painful) bodily intrusion for the woman than the blows exchanged between boxers. The surrogate, like the boxer, may not irrevocably transfer her right to bodily integrity.

Similarly, under the analysis proposed above, to compel specific performance on the part of the man would constitute an impermissible bodily intrusion.¹¹¹ Waiver of the right to be free of such intrusion cannot be valid if it is revoked prior to the commission of the act waived. To do so would require an act of physical force repugnant to our constitutional scheme.¹¹²

Third, both parties have important decisional rights in this context. A waiver may be understood as a negative exercise of a decisional right. The question then becomes under what circumstances such a negative exercise becomes irrevocable. As Judge Sorkow held, waiver of one's right to participate in artificial insemination can never be irrevocable, nor may it be enforced.¹¹³ The decisional right of each party with respect to his or her reproductive capacity is such an important and personal matter that, where it has addressed the issue, the Supreme Court has forbidden its delegation¹¹⁴ and protected it from encroachment by the state.¹¹⁵ In doing so, the Court has effectively proscribed the

¹⁰⁹ See *Surrogate Mother Agreements*, *supra* note 11, at 470. Cf. Kronman, *supra* note 15, at 778-79 (The author explains that every contract creates an enforceable obligation to perform or pay damages, and argues that it is not the nature of the services to be performed that makes an employment contract self-enslaving. Rather, the distinguishing mark of such a contract is that it attempts to deprive the promisor of the option of substituting money damages for specific performance.). See *infra* note 131.

¹¹⁰ Cf. *Inalienable Rights*, *supra* note 16, at 1941-49 (rejecting the traditional justifications for the inalienability of rights in this context as paternalistic and inappropriate, and suggesting a theory of "personhood" as an alternative).

¹¹¹ See *supra* notes 88-92 and accompanying text.

¹¹² See *supra* notes 90-92 and accompanying text.

¹¹³ *Baby M*, 217 N.J. Super. at 375, 525 A.2d at 1159.

¹¹⁴ *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) ("Clearly since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.").

¹¹⁵ See *Roe*, 410 U.S. at 154 (noting that the woman's decisional right is protected; however, this right to make decisions regarding reproduction is not "unqualified").

removal of a decisional right from its holder's contemporaneous control. As the parties make various decisions regarding reproduction and use of their bodies during the surrogacy process, they acquire new information and perspectives. Through such continued decisionmaking the parties not only express themselves, they define themselves. It may be argued that a self denied this capacity is severely, and intolerably, diminished.¹¹⁶

3. Pregnancy and Abortion

Just as Judge Sorkow rejected specific performance in the pre-conception breach situation, he also struck the provision in the contract prohibiting abortion even though, like pre-conception breach, it was not at issue in the *Baby M* case:

After conception, only the surrogate shall have the right, to the exclusion of the sperm donor, to decide whether to abort the fetus. Her decision to abort must comply with the guidelines set forth in *Roe v. Wade* [citation omitted]. . . . [O]nly woman has the constitutionally protected right to determine the manner in which her body and person shall be used.¹¹⁷

This statement could not be a clearer recognition of the nondelegability of the woman's decisional privacy interest in the surrogacy context.

The *Roe* Court did not, however, address the alienability of that decisional right, for the Court did not analyze the question of whether a surrogate can be bound by *her own* prior agreement

¹¹⁶ See *infra* note 133.

¹¹⁷ 217 N.J. Super. at 375, 525 A.2d at 1159. Although the argument may be persuasive, the court's reliance on *Roe* is misplaced in view of note 67 of that decision: "Neither in this opinion nor in *Doe v. Bolton* [citations omitted], do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases. . . ." *Roe*, 410 U.S. at 165 n.67. See *infra* note 118 (distinguishing nondelegability of the abortion right from inalienability). See generally Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974) (discussing then-current status of issues left open by *Roe* and *Doe*, including constitutionality of statutes requiring spousal or parental consent). But cf. Graham, *supra* note 11, at 310-15 (suggesting that it is "an aspect of motherhood" that underlies women's right to choose whether to bear the child or terminate the pregnancy). Under Professor Graham's analysis, it is questionable whether the surrogate, who has presumptively renounced "motherhood" with respect to post-birth parenting, retains her right to choose.

to abjure abortion.¹¹⁸ It may be argued, nevertheless, that *Roe* precluded such a result since the decision not to have an abortion before pregnancy could only be theoretical. *Roe* recognized the rights of a *pregnant* woman, not a woman contemplating pregnancy.¹¹⁹ By its emphasis on the woman's actual circumstances, the Court firmly anchored the decisional right in a concrete, practical context, rather than a speculative or abstract one.¹²⁰ As the *Danforth* Court observed: "The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences."¹²¹ It would be inconsistent with the principle of maximizing decisional rights to give that right exclusively to the surrogate's earlier self. That earlier self's waiver would be less knowing and intelligent than that of her later, more experienced self.

While *Roe* did not establish that a woman has complete control over her own body for purposes of pregnancy, it suggested such a right limited only by the conflicting rights of a viable fetus.¹²²

¹¹⁸ See Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333, 336-38 (1985) (developing the concept of "relational" as opposed to "individual" privacy rights and arguing that "relational rights," including abortion and the right to be free from involuntary servitude, are "necessarily inalienable" because the purpose of the right is to protect the individual in her relations with others). Tribe argues that an individual's earlier choices do not lessen the scope of her right: "Government must facilitate the right's exercise by means within its constitutional power—so as to make its actual exercise *possible* notwithstanding any prior choices made by the right's holder—in order to ensure the continuing vitality of fundamental relational norms." *Id.* at 335.

But see *Inalienable Rights*, *supra* note 16, at 1940 (The author distinguishes defeasance, i.e., revocation of a right by the government, delegability, i.e., transfer of a right by the government, and alienability, voluntary transfer of a right by the holder of that right, in the abortion context. It is then argued that although "*Roe* created an inalienable right to an abortion during the first trimester" and *Danforth*, 428 U.S. 52, made the right nondelegable, neither precludes alienability of that right since that "assume[s] that private control of the [abortion] right invites evils similar to those of government control and that inalienability will not create evils of its own.").

¹¹⁹ *Roe*, 410 U.S. at 124 *passim*.

¹²⁰ *Id.* at 153.

¹²¹ *Danforth*, 428 U.S. at 67.

¹²² *Roe*, 410 U.S. at 163. But as Justice Blackmun notes, the right to privacy and the "unlimited right to do with one's body as one pleases" are not the same. *Id.* at 154. See Thomson, *A Defense of Abortion*, in *THE PHILOSOPHY OF LAW* 115 (R. Dworkin ed. 1977); Graham, *supra* note 11, at 313 (noting that in allowing women to abort during the first trimester, the Court was, in part, recognizing women's "special interest" in pregnancy due to its "physical impact upon her"). Cf. *Right of Privacy*, *supra* note 12, at 1172 n.59 ("The Court's emphasis on viability as the critical element in this decision seems to make the law of abortion dependent on the state of medical technology."). See generally Note,

Even if the biological father's decisional rights at this stage were equal to those of the biological mother, the surrogate mother's combined decisional and bodily integrity rights would nonetheless outweigh the rights of the father.¹²³ The conflicting rights of a potential father are simply not of the same magnitude, mainly for the simple reason that he is not pregnant and his physical health is not at stake.¹²⁴ In the absence of such conflicting rights, the woman's pregnancy is not generally subject to state control.¹²⁵ Thus, she could not be ordered to continue the pregnancy prior to fetal viability. Nor could she be ordered to abort a "defective" fetus or undergo any other type of medical treatment related to her pregnancy or to the birth of the child.¹²⁶

In addition, a waiver cannot be used to achieve a result which could not be ordered by a court.¹²⁷ Because a court could not prevent a woman from obtaining an abortion within the limits of *Roe*, pre-conception alienation may not be used to prevent a surrogate from having an abortion.

4. Determination of Parental Rights

Judge Sorkow predicated his enforcement of the provision in the surrogacy agreement requiring termination of parental rights on his conclusion that the contract was "constitutionally protected."¹²⁸ The threshold question to be addressed is the meaning of such "protected" status in the surrogacy context. Even if the

Medical Responsibility for Fetal Survival Under Roe and Doe, 10 HARV. C.R.-C.L. L. REV. 444 (1975) [hereinafter *Medical Responsibility for Fetal Survival*].

¹²³ *Danforth*, 428 U.S. at 67-72. Since the marriage contract bestows no greater rights on the father, it would be difficult to argue that the surrogacy contract can do so. One might question whether this could be challenged if the latter contract is structured so as to impose significantly greater obligations on the father.

¹²⁴ See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 13, at 1340.

¹²⁵ There may be a trend toward subjecting pregnant women to some degree of state control even prior to the point at which the fetus becomes viable, and even where abortion is not sought. *ABA Reveals Mounting Rights Transgressions Against Pregnant Women*, *Star-Ledger* (Newark, N.J.), Aug. 8, 1987, at 7, col. 1.

¹²⁶ See *Andrews*, *supra* note 5, at 2 (arguing that women should have control over their bodies including the ability of the surrogate mother to "engage in whatever activities she wishes, to refuse any medical consultations or treatments and to abort or not abort based on her own decisions"). See also *Medical Responsibility for Fetal Survival*, *supra* note 122, at 447 (discussing woman's interest in her own health, distinct from, although "[c]losely allied to the privacy interest").

¹²⁷ See *Rubin*, *supra* note 80, at 539.

¹²⁸ *Baby M*, 217 N.J. Super. at 388, 525 A.2d at 1166.

parties have a constitutional right to enter into performance contracts in general, such a right will not be found where it conflicts with other constitutional rights—voting rights, for example.¹²⁹ There are similar problems with according protected status to the provision of the *Baby M* contract regarding termination of parental rights,¹³⁰ insofar as it requires the unconstitutional alienation of fundamental rights and the surrogate's liberty interest in her child.

First, specific performance of the provision requiring the surrogate to terminate her parental rights again raises Thirteenth Amendment issues. It has been argued that it would violate the Thirteenth Amendment's prohibition against forced servitude to order the surrogate to surrender the child and to jail her for contempt if she refuses.¹³¹

Second, the surrogate exercises both her right to control her own body and her decisional right to carry and bear a child when she chooses to become and remain pregnant. Focusing on her right of bodily integrity, she should not be put in a position where abortion is her only legal alternative to surrendering the child.¹³²

Moreover, if pregnancy is viewed as the ongoing exercise of a decisional right, it may well lead to the development of a new self with new values. The self who has undergone pregnancy and birth may legitimately place a different value on her parental rights than the self who has not. For the latter the alienation of her parental rights at the agreement stage is an abstraction—at least with respect to this particular pregnancy, birth, and child.¹³³

¹²⁹ See Rose-Ackerman, *supra* note 4, at 936.

¹³⁰ The trial court held that "in the absence of a public policy regarding surrogacy in New Jersey . . . the laws of adoption, custody and parental termination were never intended to apply and do not apply to surrogacy . . ." 217 N.J. Super. at 390, 525 A.2d at 1167. While the distinction made by the court may be appropriate for purposes of interpreting state statutes, such a distinction cannot justify the denial of well-established constitutional rights otherwise available to the parties in the adoption, custody, and parental termination contexts.

¹³¹ See *Surrogate Mother Agreements*, *supra* note 11, at 470. But see *Inalienable Rights*, *supra* note 16, at 1938 (noting that the Thirteenth Amendment does not prohibit ". . . several family arrangements that bear a striking similarity to slavery").

¹³² The *Baby M* case presented an equally desperate (or manipulative, depending on one's point of view) mother. Mrs. Whitehead threatened, during a tape recorded conversation, to kill herself and the baby. *Court Hears Suicide Tape of Surrogate Mother*, *Star-Ledger* (Newark, N.J.), Feb. 5, 1987, at 1, col. 1.

¹³³ See Radin, *supra* note 5, at 1904 ("The identity aspect of personhood focuses on the integrity and continuity of the self required for individuation. In order to have a unique individual identity, we must have selves that are integrated and continuous over time.").

The pre-birth decision to surrender the child is too attenuated from the actual surrender of the child to constitute a valid waiver.¹³⁴ Consequently, the court cannot specifically enforce a contractual provision in which the surrogate mother alienates her decisional right with respect to her child.

In its adoption statutes, the state has determined the point at which surrender becomes irrevocable, presumably taking into account the interests of the child and the adoptive parents. If the surrogate does not change her mind, she confirms her initial decision to surrender the child through the contemporaneous exercise of her decisional right at that point. The surrender is valid under the adoption statutes, as well as under a decisional analysis.

Third, the unique nature of the right, that is the natural mother's liberty interest in her child, precludes its alienation. The Supreme Court has examined this liberty interest in four cases: *Stanley v. Illinois*,¹³⁵ *Quilloin v. Walcott*,¹³⁶ *Caban v. Mohammed*,¹³⁷ and *Lehr v. Robertson*.¹³⁸ These cases have made it quite clear that an unwed biological father must take affirmative steps to secure his liberty interest in his child.¹³⁹ Such affirmative steps are similarly required of the biological mother.

In *Lehr*, the denial of a putative father's petition to vacate or set aside an order of adoption was affirmed by the Supreme Court. The Court found that the father had never established a substantial relationship with his biological child, and therefore,

See also *Bowers*, 106 S. Ct. at 2851 ("We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition. . . ."); *Surrogate Mothers Vent Feelings of Doubt and Joy*, N.Y. Times, Mar. 2, 1987, at B4, col. 5.

¹³⁴ Cf. Rubin, *supra* note 80, at 484 (arguing that waiver can only result from a decision directly related to the right in question).

¹³⁵ 405 U.S. 645.

¹³⁶ 434 U.S. 246.

¹³⁷ 441 U.S. 380.

¹³⁸ 463 U.S. 248, 258-63. The *Lehr* Court succinctly analyzed *Stanley*, *Quilloin*, and *Caban*. The Court cites these cases for their discussion of the development of the liberty interest. For the Court's approach to termination of a liberty interest, see *Santosky*, 455 U.S. 745. See generally Raab, *Lehr v. Robertson: Unwed Fathers and Adoption—How Much Process Is Due?*, 7 HARV. WOMEN'S L.J. 265, 285 (1984) (suggesting that the *Lehr* Court's holding that due process was not required to terminate the unwed father's parental rights demonstrates "an unfounded preference for the nuclear family").

¹³⁹ A married biological father assumes responsibility for the child as a matter of law. The law does not extend this right to non-biological adoptive parents who are anticipating and planning for the birth of the prospective child. The adoptive parents, as a matter of law, cannot develop a liberty interest in the child until the adoption takes place.

had no liberty interest in that child entitled to constitutional protection.¹⁴⁰ As Justice Stewart noted in his dissent in *Caban*,¹⁴¹ cited with approval by the majority in *Lehr*: "Parental rights do not spring forth full blown from the biological connection between parent and child. They require relationships more enduring."¹⁴²

The very next sentence of Justice Stewart's dissent, irrelevant in *Lehr* but crucial here, discusses the interests of the biological mother in her child: "The mother carries and bears the child, and in this sense her parental relationship is clear."¹⁴³ It is implicit in Stewart's dissent that the biological mother's assumption of responsibility for the child must be as voluntary and deliberate as that of the father. The decision in *Caban* supports the proposition that the same standard should be applied in determining parental liberty interests of men and women.¹⁴⁴ The surrogate assumes responsibilities which give her a liberty interest in the newborn child by choosing to carry the fetus to term and giving birth, just as the biological father must choose to cultivate a relationship with the child in order to acquire such an interest.¹⁴⁵ As the *Lehr* Court noted, "[T]he rights of the parents are a counterpart of the responsibilities they have assumed."¹⁴⁶

The surrogate's voluntary assumption of such responsibility begins with her exercise of her decisional right to conceive the child and the continuance of the pregnancy represents an ongoing affirmation of that decision. Carrying and bearing the child are tantamount to the "accept[ance] of some measure of responsibility for the child's future,"¹⁴⁷ which an unwed biological father must show in order to establish a liberty interest.

The fact that the liberty interest cannot vest until its subject—a child rather than a fetus—exists does not in itself preclude

¹⁴⁰ *Lehr*, 463 U.S. at 262.

¹⁴¹ *Caban*, 441 U.S. at 397.

¹⁴² *Lehr*, 463 U.S. at 260.

¹⁴³ *Caban*, 441 U.S. at 397.

¹⁴⁴ See *Caban*, 441 U.S. at 388–89.

¹⁴⁵ See *Lehr*, 463 U.S. at 260.

¹⁴⁶ *Id.* at 257.

¹⁴⁷ *Id.* at 262. Indeed, some authors argue that pregnancy itself should be considered a "significant" parent-child relationship. See Chavkin, *Third Party Reproduction: Dissenting Voices & Questions*, a paper presented at a Forum on Reproductive Laws for the 1990s, in New York City (May 4, 1987), at 2–3 (on file at the Harvard Women's Law Journal).

alienation of that interest. Future property rights may be freely assigned, for example. The difference is that in this context the course of conduct which must be followed in order for the liberty interest to vest, that is, the cultivation of a parent/child relationship, cannot be reconciled with the alienation of that liberty interest.

If the surrogate decides to abide by the terms of the agreement, and confirms her intention to relinquish the child after its birth, there is no problem. The liberty interest vests and she is free to relinquish it. But if she changes her mind during the pregnancy, birth, or at any time prior to the valid surrender of that liberty interest and is compelled against her will, to proceed with the terms of the agreement, her assumption of responsibility cannot be considered voluntary. The volitional element essential to the creation of the liberty interest is destroyed and the interest does not vest.¹⁴⁸ Thus, the alienation of the surrogate's liberty interest is inconsistent with the nature of that interest.

The foregoing analysis is consistent with state adoption statutes which uniformly prohibit irrevocable pre-birth consent to adoption by the biological mother.¹⁴⁹ Although the mother may decide to surrender her child before birth, and may discuss arrangements for doing so with an agency or prospective adoptive parents, as a matter of law she cannot be held to any agreement to surrender the child entered into prior to that child's birth. This is usually justified by referring to the great stress to which the biological

¹⁴⁸ This is consistent with the doctrinal uncertainty regarding the biological mother's rights, if any, with respect to an aborted but viable fetus. At the very least, under this liberty interest analysis, pregnancy could be construed as conduct inconsistent with the alienation of that interest.

Under substantive due process analysis, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 102, at 416-19, legislation restricting the decisional and bodily integrity rights of the parties is subject to the two-tiered *Carey* test. See also *supra* note 19. However, it is not absolutely clear whether the decision to surrender custody of one's child would trigger the same standard. The question is whether the decision to relinquish one's child could be considered a decision regarding child rearing, and thus a fundamental right under *Carey*, or the surrender of a lesser right, a "liberty interest" under the analysis of *Lehr*, and therefore subject to a less stringent standard.

¹⁴⁹ See e.g., ILL. ANN. STAT. ch. 40, § 1511 (Smith-Hurd 1987) ("Any consent or surrender . . . which is not revoked *within 72 hours after the birth of the child* is irrevocable. . . ." *Id.* at § 1511, paragraph D (emphasis added)); N.Y. DOM. REL. LAW § 111 (McKinney 1988) (which describes required consents for the adoption of a *child*, interpreted by the courts as invalidating pre-birth consents to adoption, see *Anonymous v. Anonymous*, 108 Misc. 2d 1098, 439 N.Y.S.2d 255 (1981) (holding that § 111 does not apply to consents given before birth, and such consents are void *ab initio*)).

mother is subject during the pregnancy, which precludes a valid surrender. The superficial paternalistic appeal of this argument cannot account for the universality of the rule it purports to explain.¹⁵⁰ The proposition here is that the fundamental contradiction described above, between the voluntary assumption of responsibility by the biological mother which leads to the vesting of a liberty interest and the coerced assumption of responsibility, which could result from the alienation of that interest, better explains the aspect of the adoption statutes.

If Mrs. Whitehead's liberty interest and decisional rights could not be alienated,¹⁵¹ the absence of a voluntary surrender of that right at the time of *Baby M*'s birth precluded the termination of her parental rights without due process.¹⁵² The process due Mrs. Whitehead in this situation should not have been any less than that afforded parents who have had a change of heart after agreeing to surrender the child, or who have abused or neglected their children.¹⁵³ Nor should it have been any greater. It would have been appropriate for the court to have considered Mrs. White-

¹⁵⁰ Cf. Coleman, *supra* note 5, at 97 (arguing that pre-birth consent by the surrogate should be irrevocable since the policy considerations against enforcing such consents in the adoption context, such as the concern that the consent is a result of emotional distress or societal pressure, are not present in the surrogacy situation). Coleman seems to address the voluntariness of the consent and assumes that duress is so inherent in the adoption situation that a consent is presumptively invalid. Yet, one might argue that such duress is not necessarily alleviated after the birth. All that has really changed is (1) the woman subject to the duress has experienced the pregnancy and birth and (2) her body is no longer necessary to sustain the child's life.

¹⁵¹ Cf. Rose-Ackerman, *supra* note 4, at 935, 942-49 (suggesting that this right is "modified inalienable"; babies cannot be sold but they may be given away). The law recognizes the need for this option, but retains a strong interest in controlling the terms of its exercise. Again, it may be conceptually useful to think of surrender as a negative exercise of the decisional right.

¹⁵² See *Santosky*, 455 U.S. at 753 ("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. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs."). See generally, Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1, 4 (1978) (comparing the "extraordinary judicial remedy" of termination of parental rights characterized by a "permanent and irreversible nature" with the far less portentous custody order, which does not preclude the parent denied custody from subsequently regaining it).

¹⁵³ See *Santosky*, 455 U.S. 745 (holding that to terminate parental rights constitutionally, the state must prove its allegations by "clear and convincing evidence" rather than by a lesser "preponderance of the evidence" standard).

head's original agreement to surrender the child,¹⁵⁴ her conduct throughout her pregnancy,¹⁵⁵ and her initial voluntary release of the infant to the Sterns.¹⁵⁶

Absent a valid surrender, parental rights cannot be constitutionally terminated unless there are findings justifying such termination under the applicable statute.¹⁵⁷ The state's interest in the child should be limited to its traditional *parens patriae* concern for that child's welfare.¹⁵⁸ Accordingly, if there are no findings justifying termination, the court must determine the custody and visitation arrangements which would be in the child's best interest, consistent with the liberty interests of both biological parents in their child.¹⁵⁹

CONCLUSION

Surrogacy contracts are constitutional. Indeed, as Judge Sor-kow correctly noted, barring them may be unconstitutional. Sur-

¹⁵⁴ *Baby M*, 217 N.J. Super. at 344, 525 A.2d at 1142-43.

¹⁵⁵ *Id.* at 347, 525 A.2d at 1144.

¹⁵⁶ *Id.*

¹⁵⁷ Although the Court held that the due process requirements of *Stanley*, 405 U.S. 645, and *Santosky*, 455 U.S. 745, were satisfied by the "notice to the defendants, [and] their appearance and active participation in the trial itself," 217 N.J. Super. at 399, 525 A.2d at 1171, the standard imposed on Whitehead during that trial was without precedent in termination proceedings. While parental fitness is the standard typically imposed, Mrs. Whitehead's parental rights were effectively terminated by utilization of the "best interests of the child" criteria usually employed in custody determinations. In effect, the trial court treated Mrs. Whitehead's agreement to terminate her rights as the basis for a rebuttable presumption of unfitness and required her to show that it would be in the child's best interest for her to have custody. *Cf.* Comment, Washington County Dep't of Social Serv. v. Clark: *The Constitutionality of a Rebuttable Presumption in a Parental Rights Termination Case*, 43 MD. L. REV. 632, 633-34, 643-44, 646 (1984) (analyzing the decision of the Maryland Court of Appeals striking as unconstitutional a statutory rebuttable presumption that the best interests of a child in continuous foster care for more than two years would be served by the termination of parental rights).

¹⁵⁸ The oft-cited prohibitions against baby-selling are not disputed here. It is assumed for purposes of this article that Mrs. Whitehead was being paid for services rendered, and that notwithstanding contractual provisions to the contrary, she would have been entitled to *pro rata* payment for such services on a quantum meruit theory at whatever point, and for whatever reason—including abortion—the pregnancy terminated. Such an approach may deter the hiring of surrogates, but that is not the concern here.

¹⁵⁹ In New Jersey, for example, the biological mother and biological father have equal claims in a custody dispute, subject to the court's determination as to the arrangement which would be in the best interest of the child. N.J. STAT. ANN. § 9:2-4.

rogacy, however, is not a single event. It is a relationship which changes over time, composed of four distinct stages: agreement, insemination and conception, pregnancy and abortion, and determination of parental rights. Rejecting Judge Sorkow's formulation of a single "procreation right" broad enough to encompass all aspects of surrogacy, and perhaps any form of procreation, this article focuses on two other manifestations of the fundamental privacy right—the parties' bodily integrity and decisional rights—as well as on the parents' liberty interest in their child.

While both parties have the right to indicate a present intent to comply with the terms of the surrogacy agreement, and to affirm their decisions at each stage, neither party can constitutionally attain specific performance where the other's fundamental bodily integrity or decisional rights are involved. To do so would destroy the parties' ability to fully exercise these fundamental rights.

Accordingly, neither party to the surrogacy contract may be compelled to participate in any of the stages of surrogacy involuntarily. This includes the right to refuse to participate in artificial insemination after signing a contract but before conception or, for the woman, the decision whether or not to abort or otherwise control the medical procedures to which she may be subjected during pregnancy and birth.

Nor may decisional privacy rights be alienated, at least in the surrogacy context. Decisions regarding reproductive choice are too personal and important to be removed from the individual's contemporaneous control. The parties acquire new information and possibly new values during the course of the surrogacy process. The rights to make decisions about reproductive choice available to the original self should be equally available to the "new" self that may emerge as the result of the continued exercise of those decisional rights. It would violate the surrogate's decisional and bodily integrity rights to forcibly remove the child from her absent a valid, voluntary surrender. Moreover, the notion that the parties should have the fullest possible benefit of their own experience and reflection in exercising their decisional rights requires that they have the opportunity to exercise those rights at each stage of the surrogacy process.

Finally, the surrogate's liberty interest in her biological child cannot be alienated. An analysis of the parental liberty interest

suggests that it vests as a result of the parent's assumption of responsibility for the child, a course of behavior inconsistent with the alienation of the surrogate's rights at this stage. If the surrogate does not freely confirm her original intention to relinquish the child after the birth, her parental rights may not be terminated without due process of law.