

1990

# Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate

Janet L. Dolgin

*Maurice A. Deane School of Law at Hofstra University*

Follow this and additional works at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/faculty_scholarship)

---

## Recommended Citation

Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 Buff. L. Rev. 515 (1990)  
Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/438](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/438)

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

# Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate

JANET L. DOLGIN\*

## TABLE OF CONTENTS

I.	Introduction .....	516
II.	From Status to Contract .....	517
	A. The Historical Shift .....	517
	B. Surrogacy as Status and as Contract .....	523
III.	Legal Background .....	525
	A. Commercial v. Non-Commercial Surrogacy Arrangements .....	525
	B. The Legal Stage for Surrogacy Law: Status and Contract .....	526
	1. "Nature" is to "Culture" .....	526
	2. The Right to Privacy Serves Status and Contract ..	527
	a. The Right to Procreate .....	527
	b. The Right to Raise One's Children.....	529
	c. In the Service of Status and Contract: The Fragility of the Right to Privacy .....	531
	3. The Right to Enter Contracts .....	534
	4. Surrogacy Eludes a Rights Analysis .....	534
IV.	Status and Contract Elucidate <i>Baby M</i> .....	535
	A. The Superior Court Opinion .....	536
	B. The New Jersey Supreme Court Opinion .....	539
	C. The Views of the Parties.....	542
V.	Legislative Options.....	545
	A. Resolution of the Ambivalence Surrounding Surrogacy .....	545

---

\* Associate Professor, Hofstra University School of Law. B.A., Barnard College; Ph.D. (anthropology), Princeton University; J.D., Yale Law School. I am grateful to Robert A. Baruch Bush, Carol Donovan, John DeWitt Gregory and Andrew Schepard for their critical readings of earlier drafts of this article. Their suggestions have been incorporated throughout. I would also like to thank my colleague Leon Friedman, who served as counsel to Mary Beth Whitehead in connection with her appeal to the New Jersey Supreme Court, for his generous assistance in providing me with invaluable research materials.

B. Concrete Solutions .....	546
1. Vesting of Parental Rights .....	546
2. For Love or Money .....	548
VI. Conclusion .....	550

## I. INTRODUCTION

FOR reasons rooted in its own evolution, society in the West is, at present, ambivalent about the increasingly impressive solutions offered by reproductive technology<sup>1</sup> to the growing prevalence of infertility.<sup>2</sup> And this ambivalence is precisely reflected in law, which seeks both to protect and to discourage such technology in general, and its embodiment in particular, in surrogate motherhood.

The article begins by providing the historical and social context indispensable to an understanding of current family law, including the law of surrogacy. It then defines the ideological and existential status of this law: essentially its ambivalence regarding the competing claims of two opposing ideologies and the tension produced by that ambivalence. To illustrate the historical process, the ambivalence and the resolution of the ambivalence, this article focuses on the responses of society and the law to the solution offered by surrogacy to the problems of infertility. After examining the legal background to surrogacy law, this article provides a textual analysis of the judicial decisions and briefs in the *Baby M* case.<sup>3</sup>

---

1. Reproductive technologies most commonly used at present include artificial insemination, whereby a woman is inseminated with sperm from her husband or from a known or anonymous donor, Cuire-Cohen, Luttrell & Shapiro, *Current Practice Artificial Insemination in the United States*, 300 N. ENG. J. MED. 585 (1979); *in vitro* fertilization, involving the removal of eggs from a woman's ovaries and fertilization with sperm of all or some of those eggs in a petrie dish, Bigger, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 N. ENG. J. MED. 336 (1981); and surrogate motherhood, the subject of this article.

2. Knoppers & Sloss, *Recent Developments: Legislative Reforms in Reproductive Technology*, 18 OTTAWA L. REV. 663 (1986). Approximately 15-20% of American couples of childbearing age are infertile. Cohen, *Surrogate Mothers: Whose Baby Is It?* 10 AM. J. L. & MED. 243, 244 (1985). Moreover, adoptable white babies are scarce and the waiting period for adoption is long. Most estimates place the waiting period to adopt a baby at three to seven years. *In re Adoption of Baby Girl L.J.*, 132 Misc.2d 972, 505 N.Y.S.2d 813, 815 (Sur. 1986).

3. *Matter of Baby*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

The *Baby M* case has been the subject of extensive commentary, both in the popular press and in professional journals. See, e.g., Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741 (1988) (surrogacy described as an arena in which the domestic sphere and the public sphere coalesce); Ishii, *Baby "M" and the Application of Adoption and Parentage Statutes*, 24 WILLIAMETTE L. REV. 1086 (1988) (urging either promulgation of new legislation or the appropriate reformulation of existing adoption and parentage statutes to protect welfare of child and interest of parties to surrogacy contracts); Mayo, *Medical Decision Making During a Surrogate Pregnancy*, 25 HOUS. L. REV. 599 (1988) (dis-

Contrasting visions of the family presented in the *Baby M* opinions reflect uncertainty about the comparative importance of status and contract. That uncertainty and its implications are analyzed. Finally, the article suggests a legislative model for regulating surrogacy that mediates the conflict between status and contract by acknowledging the significance of each.

## II. FROM STATUS TO CONTRACT

The ambivalence and confusions of contemporary society, and therefore of law, about the competing claims generated by surrogate motherhood derive from widespread uncertainty about the value of a basic cultural shift from status to contract, described over a century ago by Sir Henry Maine.

### A. *The Historical Shift*

"... [T]he society of our day," wrote Sir Henry Maine in 1884, "is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract."<sup>4</sup> In contrast to a universe so largely occupied by contract, Maine poses a more ancient world, largely defined through relations of status, relations which "fixed a man's social position irreversibly at his birth."<sup>5</sup>

In a universe based in status, rights and duties are set at birth; moreover, rights and duties are viewed as inexorable because they attend relationships understood as natural. Thus, the relationships between a master and a serf, or between a *pater familias* and his children, are established at birth, follow familiar forms, and determine the rights and duties between the two parties. In a world based on status, laws are not formulated abstractly for application to putatively equal individuals. Rather, they follow the perceived natural order of things, reflecting the inevitability of status and relationship.<sup>6</sup> In such a world, people are who they are be-

---

couraging specific performance of aspects of surrogacy contract that concern medical decisions during pregnancy); Miller, *Surrogate Parenting and Adoption Statutes: Can a Square Peg Fit into a Round Hole?*, 22 FAM. L. Q. 199 (1988) (recommending legislation providing for enforceability of surrogacy contracts); Schuck, *Some Reflections on the Baby M Case*, 76 GEO. L.J. 1793 (1988) (surrogacy has significant benefits and potential risks can be adequately regulated); Comment, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L.J. 721 (1988) (absent legislative action, surrogacy contracts should be viewed as extrajudicial agreements).

4. H. MAINE, *ANCIENT LAW*, 179 (1939).

5. *Id.*

6. *Id.* at 98-99.

cause they were born to be that way, and the pretext of abstract equality is absent.

In contrast, in a world based on contract, the basic unit of social reality is understood as the individual, equal to other individuals and free to define his or her own life apart from the accidents of birth, and defined legally by the ability to contract with other, equally situated individuals. Maine wrote:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved toward a phase of social order in which all these relations arise from the free agreement of individuals.<sup>7</sup>

In theory, in such a world individuals who are putatively equal and unconstrained by *a priori* characterizations reach their own bargains, act out their own dramas, and define their own lives.<sup>8</sup> In this social world, the individual is thought of as "the proprietor of his own person," free from dependence on the will of other people.<sup>9</sup>

In the language of contemporary sociology, the universe of status is one in which people's condition is largely ascribed; whereas, the universe of contract is one in which people's condition is largely achieved. As Maine wrote:

All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still colored by, the powers and privileges anciently residing in the Family. If then we employ Status . . . to

---

7. *Id.* at 99.

8. The notion of equality that attends an ideology of individualism always seems to mean, in fact, equality for some—for those who are defined at any moment as full human beings. For instance, Maine wrote in 1884 that the status of the Female, under Tutelage, "if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract." *Id.* at 99. For most women, of course, that period, during which they could form relations of contract, was quite short. For the most part women continued to be defined through relations of status. Similarly, in 1872, the United States Supreme Court affirmed the decision of the Illinois Supreme Court, refusing to grant Myra Bradwell the right to practice law because of her sex. *Bradwell v. State*, 83 U.S. 130 (1871). Over time, other groups including blacks and children have similarly been denied the right fully enter the world of contract as equal human beings.

9. C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 3 (1962).

signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from *Status* to *Contract*.<sup>10</sup>

The contemporary world is clearly one in which legal relations defined in terms of contract predominate over those defined in terms of status. Yet, relations based on status are found alongside those based on contract and often conflict with the general presumption in our society that legal rights and duties do not depend on "accidents of birth." In certain areas of social life, preeminently in family life, relations of status rather than contract are *supposed* to predominate. Children are supposed to love their parents, and parents their children. Parents are supposed to provide a home for their children and care for them because love, not money, is involved.<sup>11</sup>

The capacity of the shift delineated by Maine to alter many of the relationships basic to family life is, of course, manifest.<sup>12</sup> Such alterations have begun to occur, and not surprisingly, the social response to them has been mixed.

For example, the universe of contract has entered with significant effect into marriage considered as an institution.<sup>13</sup> It has entered also,

10. H. MAINE, *supra* note 4, at 100.

11. See Schneider, *Kinship, Nationality and Religion in American Culture: Toward a Definition of Kinship* in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* at 66 (J. Dolgin, D. Kemnitzer & D. Schneider, eds. 1977).

12. Maine's place in contemporary anthropology is uncertain. G. STOCKING, *VICTORIAN ANTHROPOLOGY* 296 (1987). In particular, the ethnography on which Maine relied should be and has been criticized. Maine argued that society moved from a situation in which rights and duties were set by kinship relations toward one of increasing individualism. J. HONIGMAN, *THE DEVELOPMENT OF ANTHROPOLOGICAL IDEAS* 141 (1976). The specific ethnographic development for which Maine argues, that modern society emerged from a universe in which all rights and duties stemmed from kinship relations, is far from certain. Generally, Maine's analysis of the move from status to contract has been more readily accepted by social scientists than by lawyers. G. FEAVER, *FROM STATUS TO CONTRACT: A BIOGRAPHY OF SIR HENRY MAINE 1822-1888* 55 (1969). In part, lawyers have resisted Maine's analysis because of his unusual legal terminology. *Id.* While some sociologists have tended to applaud Maine's broad analysis, see, e.g., *id.*; R. MACIVER & C. PAGE, *SOCIETY: AN INTRODUCTORY ANALYSIS* 231 (1961); T. PARSONS *et al.*, *THEORIES OF SOCIETY* 91 (1961), others have been less approving, see, e.g., Drucker, *The Employee Society*, 58 AM. J. SOC. 358 (1953) (arguing course of modern history has witnessed move from contract to status).

In using Maine's status-contract distinction to refer to the general character of the development of individualism, I do not necessarily accept Maine's depiction of the concrete historical process through which that development occurred.

I am appreciative to Professor Burton C. Agata for suggesting the importance of recognizing that various interpretations of Maine's work are possible and the importance of clearly differentiating the history that Maine wrote from the theoretical suggestions that emerged from his studies.

13. For example, a couple contemplating marriage may enter a prenuptial agreement in which

with far more startling and disconcerting effect and consequently accompanied by far greater and more intricate controversy, into an area traditionally governed, at least in conception, predominantly by status: the relationship between parents and children. Spouses and potential spouses, being adults, are now<sup>14</sup> considered capable of negotiating and entering into contractual relationships. Children are not. Correlatively, marriages *do* terminate, and marriage vows are, in fact if not in theory, not permanent. In contrast, the relationship between parents and children rarely ends.<sup>15</sup> Consequently, far more than the marriage relationship, the parent-child relationship is essentially conservative, a status-based relationship characterized by the loyalty and commitment of kinship.<sup>16</sup>

---

the parties provide for the possible dissolution of the marriage. Sometimes these agreements can contain provisions for the operation of the marriage itself. (I thank Professor Steven A. Barnett for this example.) Until recently, such agreements were strongly criticized and except in contemplation of the death of one of the parties were not considered valid contracts. However, such criticism has begun to diminish. For example, in the early 1970's the ban on prenuptial agreements in contemplation of divorce began to erode. See *Posner v. Posner*, 233 So.2d 381 (Fla. 1970); *Osborne v. Osborne*, 384 Mass. 591, 428 N.E. 2d 810 (Mass. 1981); *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (Ga. 1982). Early judicial decisions to enforce prenuptial agreements in contemplation of divorce frequently stressed changes in social mores affecting the institution of marriage. See, *Posner v. Posner*, 233 So.2d 381, 384 (Fla. 1970) (court took judicial notice of decrease in ratio of marriages to divorces). In American society, in the last several decades, marriage itself has begun to look like an institution defined through contract quite as much as through status. (Although marriages in the West have long been initiated through a "contract," the terms of the relationship have traditionally been set by state and/or church law and have not been freely negotiable between the parties). In the law, this shift is reflected in the increasing freedom to contract in prenuptial and separation agreements and in the increasing ease with which marriages can be terminated. Separation agreements deal with financial and other consequences of separation, but unlike prenuptial agreements, are entered into as a couple separate or divorce, not before they marry. Other evidence of a shift in the marriage institution toward one based in contract is the increasing variety of "nontraditional" relationships. A number of states now enforce cohabiting couples' contractual agreements regarding the termination of the relationships. See, e.g., *Marvin v. Marvin*, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (Cal. 1976); MINN. STAT. 513.075 (1988) (Frauds, Cohabitation; Agreements and Contracts).

14. As recently as 1872, a member of the United States Supreme Court declared in a concurring opinion that women are naturally unsuited to enter contracts. *Bradwell v. State*, 83 U.S. 130, 141 (Bradley, J., concurring) (precluding Bradwell from practicing law in Illinois because of her gender).

15. Certain cultures do provide for a formal end to the parent-child relationship, but even in such cases, the possibility rarely materializes. For instance, Jews may "*sit shiva*"—i.e. mourn, for a living child, but it is extremely unusual for a parent to take this step. In the United States, the parent-child relationship can be terminated by the state, but this is obviously different from voluntary termination of the relationship. Finally, biological parents do sometimes revoke all parental rights and allow an adoption of children. Typically, this last sort of termination does not occur because the parent is displeased with a child but because the parent does not feel that he or she can cope with raising a child.

16. The deep roots of status in defining the parent-child tie are dramatically illustrated by

To this conservatism reproductive technology has begun to oppose an unavoidable and profound challenge, a challenge nowhere more clearly defined than in surrogate motherhood. In essence, this arrangement (wherein a woman conceives a child through artificial insemination, bears it, and at birth surrenders it to the sperm donor, the child's biological father)<sup>17</sup> can invest the parent-child relationship with notions of choice and negotiation which have come, in this century, to characterize the marital relationship. This process, through which notions of intention and negotiation replace notions of biology and nature in defining and effecting the parent-child tie, is essentially the same process as the more general one described by Maine, in which relations of contract replace relations of status.

The process may be observed in detail by substituting for "status" and "contract" two correlative terms, respectively "gift" and "commodity," both understood to refer to children. Just as the family is supposed to be created from (and for) love, not money,<sup>18</sup> children are "gifts of nature." They are valuable but are not to be valued. Every state prohibits the sale of children.<sup>19</sup>

---

Pamela P. v. Frank S., 59 N.Y.2d 1, 462 N.Y.S.2d 819, 449 N.E.2d 713 (N.Y. 1983) (father held responsible for child-support even though he opposed child's birth).

17. Transformations of the standard case involve situations in which the biological father is unmarried, cases in which a single woman contracts with a surrogate who is inseminated with the sperm of a third-party donor, and cases in which the wife is unable to gestate a fetus but is able to supply ova which can be fertilized with her husband's sperm and then be implanted in the surrogate's uterus to gestate. In this article, I use the terms "contracting parents" to refer to a couple who initiate the birth of the baby by arranging its gestation with a surrogate. This article generally assumes the typical case in which the contracting father is the sperm donor and is married to an infertile woman who plans to adopt the resulting child. I use the term "biological" or "contracting father" to refer to the initiating father and "contracting mother" to refer to the initiating mother even though the initiating mother is not typically a party to the actual legal contract. I use the terms "surrogate," "gestational mother" or "biological mother" to refer to the woman who bears the baby. When used in this context, "biological mother" implies that the woman is the genetic as well as the gestational mother.

18. See Schneider, *supra* note 11, at 66. Schneider wrote:

what one does at home, it is said, one does for love, not for money, while what one does at work one does strictly for money, not for love. Money is material, it is power, it is impersonal and universalistic, unqualified by considerations of sentiment and morality. Relations of work and money are temporary, transient, and contingent. Love on the other hand is highly personal and particularistic, beset with considerations of sentiment and morality. Where love is spiritual, money is material. Where love is enduring and without qualification, money is transient and contingent. And finally, it is personal considerations which are paramount in love—who the person is, not how well he performs, while with work and money it does not matter who he is, but only how well he performs his task.

*Id.*

19. Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. (BNA)



Children are gifts, not commodities. "A gift," writes Lewis Hyde, "is a thing we do not get by our own efforts. We cannot buy it; we cannot acquire it through an act of will. It is bestowed upon us."<sup>20</sup> A gift creates a bond.<sup>21</sup> It cannot be compared with, or fairly exchanged for other things. In Hyde's words, a gift has "worth;"<sup>22</sup> it is prized, but we "can't put a price on it." In contrast, a commodity has a "value."<sup>23</sup> It can be compared with, and exchanged for, other things, including money.

Contracts are written in order to arrange for the exchange of commodities.<sup>24</sup> Contracts are entered into and commodities are exchanged between equal individuals who need not, and ideally do not, have other ties to each other.<sup>25</sup> By contrast, gifts are exchanged between people in relationships. Like relationships based in status, and unlike ties based in contract, gifts do not demand that the giver and the receiver be putatively equal. Hyde writes:

We might best picture the difference between gifts and commodities. . . by imagining two territories separated by a boundary. A gift, when it moves across the boundary, either stops being a gift or else abolishes the boundary. A commodity can cross the line without any change in its nature; moreover, its exchange will often establish a boundary where none previously existed (as for example in the sale of a necessity to a good friend).<sup>26</sup>

The home and the family represent a domain of life still largely based on status distinctions, on distinctions derived through birth such as sex and age. Members of a family exchange gifts. They do not typically enter into contracts with each other. If they do, they begin to treat familial relationships as if they were market relations.<sup>27</sup> The marketplace rep-

---

3001 (Jan. 29, 1985). In adoption proceedings, most states permit adopting parents to pay medical costs of the biological mother. Comment, *Surrogate Motherhood; Boon or Baby Selling, The Unresolved Question*, 71 MARQ. L. REV. 126, 127 n.81 (1987).

20. L. HYDE, *THE GIFT* xi (1979).

21. *Id.* at 56.

22. *Id.* at 60.

23. *Id.* As Hyde recognized, the distinction between worth and value correlates with Marx's distinction in *Das Capital* between use-value and exchange-value.

24. Legally, a contract to give a gift is unenforceable. There is no consideration.

25. The differences discussed here between gifts and commodities, and between contract and status, are being discussed at the level of ideology. Thus, an ideal, rather than a real, system is at issue. By ideology I mean, not propaganda, but a society's system of beliefs in terms of which reality is grounded for members of that society. See Dolgin & Magdoff, *The Invisible Event* in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* 363, n.7 (J. Dolgin, D. Kemnitzer & D. Schneider, eds. 1977).

26. L. HYDE, *supra* note 20, at 61.

27. Hyde tells the story of a girl who agreed to donate a kidney to her ill mother only if the mother promised a fur coat in return. This kidney donation, writes Hyde, "wasn't a gift. As soon as

resents a domain of life based on contractual understandings. In the market people exchange commodities. Commodity exchange does not reinforce relations. It is an economic exchange without emotional, spiritual or aesthetic correlations.<sup>28</sup> Commodity exchange is an exchange between free agents. Gift exchange has the capacity to cement and to commit people to each other.

### B. *Surrogacy as Status and as Contract*

Surrogacy arrangements can be ordered so that the baby is defined primarily as a commodity, or primarily as a gift. In either case, the results are problematic. The crucial variables affecting the definition of the baby in this regard are whether money is exchanged between the parties, and if so, how and when<sup>29</sup> and whether the parties bind themselves contractually. Surrogacy arrangements involving contracts and the exchange of money become legal business deals, opening the way for adversarial relationships.<sup>30</sup> Such relationships cannot be harmonized with the idea that life is a gift which can be bestowed but not sold,<sup>31</sup> or with the sense of family as an arena of loyalty and commitment, rather than of legal controversy and commercial interaction.

If, however, the child in a surrogacy arrangement is defined as a gift, the limits of what constitutes an appropriate present are superseded. Children are "gifts of nature" but are not considered appropriate objects to be exchanged between people as presents. Although gifts differ from commodities in establishing and reinforcing bonds, they are like commodities in being property.<sup>32</sup>

Commercial surrogacy is questionable because it defines a baby as a

---

the daughter shifted the category of the exchange and tried to barter all her authority drained away. When either the donor or the recipient begins to treat a gift in terms of obligation, it ceases to be a gift. . . ." L. HYDE, *supra* note 20 at 70.

28. *Id.* at 86.

29. For instance, if the surrogate is to receive a set fee regardless of whether the baby is born alive or well, then the fee can more easily be characterized as payment for a service than as payment for a product.

30. Obviously, controversy can develop in surrogacy arrangements that have no commercial aspects. But the "spirit of the gift" does not automatically produce creditors and debtors or define potential legal adversaries. L. HYDE, *supra* note 20, at 88. As Hyde writes, "courts of law would be rightly perplexed as to how to adjudicate a case of ingratitude." *Id.* at 95.

31. *Id.* at 95.

32. Organ transplantation provides a good example. When organ transplantation developed, there were no legally cognizable rights to body parts. Now the Uniform Anatomical Gift Act, enacted in every state, gives an adult the right to bequeath organs at death. In the case of minor children, the right to bequeath body parts falls to the parents. *Id.* at 94-95.

commodity,<sup>33</sup> up for sale at the prevailing market price. Surrogacy arrangements involving no exchange of money are less problematic. Although such arrangements also define a baby as property, the baby exchanged as a gift has a unique worth; whereas, the baby exchanged for money is fungible, substitutable for other, equally valuable things.

The difference is not only ideological. The relationships between the parties, including the baby, are likely to develop differently in the two cases. Where the baby is exchanged in the "spirit of a gift" (as between friends or siblings), the transfer is likely to reenforce existing bonds. Where the baby is exchanged for money, pursuant to a contract, the parties are likely to remain free of one another. Just as people are expected to enter contracts as equal, free agents, so they are expected to complete them and go on to other things. While gifts bind, contracts separate. While gifts transform relationships, contracts leave them untouched, and while gifts bespeak attachment, contracts bespeak freedom.<sup>34</sup>

With respect to surrogate motherhood in particular, and social institutions in general, the choice between status and contract, between gift and commodity, is the choice between essentially different conceptions of reality. Yet the choice does not, and should not, demand exclusive reliance on status or contract. A model must be erected that safeguards elements of each. Both status and contract have advantages—the first, the advantage of secure familial loyalties and commitments, the second, the advantages of new options and freedom. And status and contract each contains negative possibilities as well. The dangers of status stem from the perceived significance of biology and nature as determinants of human relationships. In a universe where commitments and loyalties are understood to be the consequences of biological inevitabilities, it is easy to justify the unequal treatment of certain groups (e.g., women) by reference to natural or biological differences. By contrast, the dangers of contract involve treating human beings as commodities; for instance, the possibility of purchasing or selling babies. Legal resolution of the ambivalence and conflicts evoked by surrogate motherhood arrangements must be effected through a model of family relationships that preserves the positive aspects of status *and* contract while controlling the negative tendencies of each. A solution entirely forfeiting either would not fully pro-

---

33. Correlatively, such deals may define the surrogate herself as a commodity. Mary Gordon writes, "Some feminists fear large-scale baby farms where poor women are turned into breeders for the rich who cannot or choose not to bear their own children." Gordon, *Baby M': New Questions about Biology and Destiny*, MS, June 1987, at 25.

34. L. HYDE, *supra* note 20, at 68.

tect the stability of familial relationships *and* the freedom to make life better through the use of new technological and human choices. We cannot, and need not, sacrifice either. So, perhaps fortunately, the choice between status and contract is being made only slowly, amid perplexity and discord.

### III. LEGAL BACKGROUND

American law concerns itself with surrogate motherhood explicitly only when contract, as defined by Maine, is integral to the arrangements made by the parties involved. When contract does not exist, the law is generally silent.<sup>35</sup> When it does exist, the law, like the society it reflects, has not yet decided conclusively whom to protect, how completely, and when. Its ambivalence, which pre-dates the *Baby M* case, has been highlighted by that case, which therefore merits attention in detail.

#### A. *Commercial v. Non-Commercial Surrogacy Arrangements*

Under present statutory conditions, there is no state in which the transfer of a child by its willing biological mother to its willing biological father would be *a priori* illegal. The basic surrogacy arrangement can be analogized to one in which a couple (married or unmarried) conceive a child, separate before its birth, and agree that the father will raise the child to the exclusion of the mother, who chooses to terminate her parental rights.<sup>36</sup> Legally, the arrangement does not become problematic merely because at the baby's birth the biological father is married to a third party who intends to adopt the child.

Thus, the transfer of parental rights, *per se*, does not make surrogacy legally problematic.<sup>37</sup> Since non-commercial, non-contractual surrogacy arrangements do not generally contravene constitutional or statutory principles,<sup>38</sup> in the absence of payments to the gestational mother or binding obligations entered into before the baby's conception or birth, surrogacy involves simply the surrender of parental rights by the gesta-

---

35. The law is obviously relevant to non-commercial surrogacy arrangements. However, relevant laws (e.g., adoption laws, laws regulating artificial insemination) simply provide the uncontroversial vehicle for effecting non-commercial surrogacy arrangements and do not comment on surrogacy, *per se*.

36. The analogy gets looser but can be sustained when the biological mother is married to a third party. Even when artificial insemination is the mode of conception, many state statutes provide that the mother's husband is the presumed father of the child.

37. See Schneider, *supra* note 11, at 65 (distinguishing the order of nature from the order of law as ideological constructs in American culture).

38. See *infra* text at notes 51-68.

tional mother, and a private-placement adoption by the biological father's wife. For the most part, the law prefers not to comment directly<sup>39</sup> upon such an arrangement.

With the introduction of significant commercial and contractual obligations, however, the luxury of silence ceases to exist. Pre-birth agreements which oblige the surrogate mother, in return for some financial consideration, to revoke her parental rights immediately upon the birth of the baby inescapably entail a wide range of profoundly unsettling questions and dilemmas. With these, people and society must deal. And so, in consequence, must the law.

Not surprisingly, the law is ambivalent. As we shall now see, both in rulings that establish the context of the *Baby M* case and in that case itself, as adjudicated both at trial and on appeal, two contradictory efforts have been made: to protect the family, as defined by status, from the incursions of surrogacy; and to empower surrogacy, as defined by contract, to effect such incursions.

#### B. *The Legal Stage for Surrogacy Law: Status and Contract*

The rulings that establish the context for surrogacy law, including rulings about the right to procreate, the right to raise children, and the right to enter into contracts, carry conflicting implications for the legality of surrogacy. These rulings reflect society's uncertainty about the comparative significance of status and contract, and of nature and culture.

1. "Nature" is to "Culture."<sup>40</sup> Mothers are distinguished from fathers on the strength of biological correlates.<sup>41</sup> Fathers represent culture, whereas mothers represent nature. Fathers stand for contract—for the right to negotiate reality, including relationships; mothers stand for status—for the inevitability of relationships and their structure. But, in the context of surrogacy arrangements, mothers can be opposed to *other kinds* of mothers rather than to fathers. In this opposition, certain mothers represent culture or contract; whereas others represent status or nature. This opposition is more complicated than that between fathers and mothers. Surrogate mothers represent contract and culture in that

---

39. Obviously, the termination of parental rights and adoption of a child involve legal processes. However, with regard to non-contractual, non-commercial surrogacy arrangements, the law comments no further than is necessary to effect the transfer of any child from its biological mother to its biological father and the adoption of the child by the biological father's wife.

40. See Schneider, *supra* note 11, at 65 (distinguishing the order of nature from the order of law as ideological constructs in American culture).

41. See *infra* text at notes 54-71.

they enter written agreements that provide for the creation of new forms of relationship and for the termination of maternal ties. But they represent nature in that they are "natural mothers;" their claim to the child is based in biology, not law. Contracting mothers also may represent contract and culture. They become mothers through agreement, rather than through pregnancy. But contracting mothers may be associated with status in that they typically hope to replicate traditional family forms, to create nuclear families indistinguishable (except in origin) from old-fashioned American families.

In the context of these confusions and complexities, the legal background for surrogacy cases has been woven. Viewed as a whole, the rights to procreate, to raise children and to enter contracts<sup>42</sup> offer no solution to the dilemmas of surrogacy. Each right can be fashioned to serve the interests of status or contract. In the end, the choice is a policy choice, and its resolution can stem only from the choice between status, and contract, or a mediation of the two.

2. *The Right to Privacy Serves Status and Contract.* Both the right to procreate and the right to raise children are encompassed by the more broadly defined constitutional right to privacy.<sup>43</sup> Yet these two privacy rights hold conflicting implications for surrogacy. Moreover, neither right is securely protected unless the right to privacy upon which it alone depends is broadly interpreted.

a. *The Right to Procreate.* If the right to procreate is a fundamental right,<sup>44</sup> then an equal protection argument suggests that it cannot be denied to men whose wives are infertile and for whom surrogacy offers one of the few viable alternatives to childlessness.<sup>45</sup>

However, several assurances beyond those provided in existing cases

---

42. Even the basic right to enter contracts can serve the interest of status in the context of surrogacy. As Elizabeth and William Stern argued in *Baby M*, a good old-fashioned American family can be erected on a contractual, as well as on a biological, foundation. Brief on Behalf of Respondent at 80, Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988) [hereinafter Stern Brief].

43. The right to privacy is not an enumerated, but an implied, constitutional right. M.G. ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION, 578 (4th ed. 1985).

44. A number of cases protect a right not to procreate; *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a law forbidding use of contraceptives intrudes upon the right of marital privacy). The right to procreate can be inferred from such cases. Only once has the United States Supreme Court expressly found a right to procreate. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (forced sterilization of habitual criminals violates constitutional right to procreate).

45. M.A. FIELD, SURROGATE MOTHERHOOD 47 (1988). The equal protection argument relies on the inequalities in the treatment between such men and between men with fertile wives and women with infertile husbands for whom the state permits the use of artificial insemination. A due

involving the right to procreate are necessary before the right will preclude governmental intrusions into surrogacy arrangements. First, the right to reproduce non-coitally must be inferred from the right to reproduce coitally. This step is most easily taken in cases involving contracting mothers unable to reproduce coitally. Obviously, the Constitution does not guarantee the biological ability to be a parent, but if the contracting mother is infertile, the contracting parents can argue that surrogacy provides the only reasonable available means of having children, and the contracting father can argue, more particularly, that surrogacy provides the only means short of adultery or divorce and remarriage of having biological children.<sup>46</sup>

Second, the presence of an essential third party (the gestational mother) in surrogacy arrangements may defeat the privacy claim.<sup>47</sup> The character of the relationship formed between contracting parents and surrogate mothers varies,<sup>48</sup> but typically these relationships are formed around specific, rather than diffuse goals; they are temporary, not enduring, and they are entered into for money,<sup>49</sup> not for love.<sup>50</sup> In most contractual surrogacy arrangements, the gestational mother is not expected to become a member of the family being formed. Neither is she supposed to be like a mother or other relative. To the contrary, the contracting mother is supposed to replace the surrogate as *the mother*,<sup>51</sup> and the resulting family is supposed to consist of the contracting parents and the baby. Any subsequent contact between the surrogate and the contracting parents or the baby is typically defined as minimal. Thus, at present the

---

process analysis reaches a similar conclusion. *Id.* at 49. In addition, the Ninth Amendment may protect the right to procreate. *Id.* at 172 n.8.

46. This argument was pressed by contracting parents, William and Elizabeth Stern, in the *Baby M* case. Stern Brief, *supra* note 42, at 88-90. Equal protection arguments can be used to cement the position insofar as artificial insemination by a male donor is permitted in cases involving male infertility. Artificial insemination, permitted by statute and premised on the interest of couples in "conceiving a biologically related child," can be analogized to surrogacy deals. *Id.* at 92.

47. Comment, *supra* note 19, at 122. See also *Bowers v. Hardwick*, 478 U.S. 186.

48. A.Z. OVERVOLD, SURROGATE PARENTING 88, 131 (1988).

49. A number of surrogates report acting out of altruistic concerns. A. Z. OVERVOLD, *supra* note 48 at 120. However, money is also a major motivation for most women who act as surrogates. *Id.*

50. David Schneider has analyzed the symbols of American kinship to refer to unity—to "diffuse, enduring solidarity," as he has phrased it. Kinship relationships are understood by Americans as diffuse, not specific, as lasting, not temporary, and as solidary, not limited to particular domains and concerns. Schneider, *supra* note 11, at 63, 67.

51. Counselors working with contracting mothers encourage them to participate in the biological processes of the surrogate's pregnancy to whatever extent possible. For instance, the Center for Surrogate Parenting in California encourages contracting mothers to "participate in the conception and insemination process." A.Z. OVERVOLD, *supra* note 48, at 88.

relationships between the contracting parents and the gestational mother are not viewed as familial and would not, therefore, be protected by the right to privacy.<sup>52</sup>

**b. The Right to Raise One's Children.** However, a parent does have some right to "the companionship, care, custody and management of his or her children," and this right, in contrast to the right to procreate, may significantly limit state enforcement of surrogacy contracts.<sup>53</sup> A parent's interest in raising children "undeniably warrants deference, and absent a powerful countervailing interest, protection."<sup>54</sup> The right suggests that in the case of surrogacy, the claims of each biological parent have merit. Yet this aspect of the privacy right, as interpreted by the United States Supreme Court, is linked to a conception of nature that favors biological mothers over biological fathers. Here, the right to privacy guards the perceived dictates of nature (status) rather than peoples' freedom to choose among alternative forms of relationship (contract).

In *Lehr v. Richardson*<sup>55</sup> the Supreme Court acknowledged the strength and importance of the parent-child tie:

The intangible fibers that connect parent and child have infinite variety. They are woven through the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.<sup>56</sup>

The Court went on to differentiate a mere biological link from a developed relationship. Constitutional protection was afforded to a developed father-child relationship, but not to a paternal claim based in biology alone.<sup>57</sup> *Lehr* was concerned with the paternal rights of a man who had

---

52. See *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981) (Michigan adoption statute held not to infringe privacy right of parties to surrogacy arrangement). A better argument can be made for the right to privacy in deals involving volunteer surrogates who sign no agreements. However, these arrangements do not need constitutional protection because they are legal in any case.

53. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

54. *Id.*

55. 463 U.S. 248 (1983).

56. *Id.* at 256.

57. *Lehr v. Robertson* rejected a biological father's claimed right to notice and an opportunity to be heard before his biological child could be adopted by the biological mother's new husband. 463 U.S. 248 (1983). See *Caban v. Mohammed*, 441 U.S. 380 (1979) (finding N.Y. DOM. REL. LAW 111 (a) unconstitutional for discriminating against unwed biological fathers in adoption proceedings); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (upholding Georgia statute authorizing adoption of child over objections of unwed biological father); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding unconstitutional Illinois statute presuming father not married to mother of child to be unfit). *Stanley v. Illinois* and *Caban v. Mohammed* can be distinguished from *Quilloin v. Walcott* and *Lehr v. Robertson* in that the first two involved actual parental relationships between the fathers and their children,



"never supported and rarely seen" his two-year old biological daughter.<sup>58</sup> The Court rejected Lehr's claim that the New York statute in question violated his right to equal protection by always allowing biological mothers the power to veto an adoption of their children but granting that power to only a certain group of biological fathers.<sup>59</sup> The Court went on to say that a statute preferring mothers would be unconstitutional in a case involving a similarly situated mother and father.<sup>60</sup> Thus, in *Caban v. Mohammed*,<sup>61</sup> decided four years before *Lehr*, the Court held it unconstitutional to grant the biological mother a right to veto her child's adoption, while failing to grant that right to a biological father who had "participate[d] in the rearing of his child."<sup>62</sup> However, the Court did not discuss the case in which the biological mother and the biological father are similarly situated in that neither has established the requisite relationship with the child. In effect, the statute in question *assumed* that biological mothers are almost always sufficiently related to their children to have the right to veto their adoption.<sup>63</sup>

---

while the second two involved fathers who had had little or no active involvement with their biological children.

58. 463 U.S. at 250.

59. The New York statute at issue in *Lehr v. Robertson*, N.Y. DOMESTIC RELATIONS LAW § 111 (a) provided: "2. Persons entitled to notice, pursuant to subdivision one of this section, shall include: (a) any person adjudicated by a court in this state to be the father of the child; (b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two of the social services law; (c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two of the social services law; (d) any person who is recorded on the child's birth certificate as the child's father; (e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out as the child's father; (f) any person who has been identified as the child's father by the mother in written, sworn statement; and (g) any person, who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law." (Quoted in *Lehr v. Robertson*, 436 U.S. at 251-52 n.5.).

60. 463 U.S. at 267.

61. 441 U.S. 380 (1979).

62. *Id.* at 392.

63. Justice Stevens, dissenting in *Caban v. Mohammed*, 441 U.S. 380, 401 (1979), made the assumption explicit. He argued that differences in the treatment of biological mothers and fathers in adoption statutes are legitimate, the equal protection clause notwithstanding, because of actual differences in the relation of men and women to their children. He wrote:

Both parents are equally responsible for the conception of the child out of wedlock. But from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny. Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. In

Thus, *Lehr* and *Mohammed*<sup>64</sup> assert that biology is not enough to guarantee paternal rights, but suggest that biology may be enough to guarantee maternal rights. In *Lehr*, the Court was explicit: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."<sup>65</sup> Implicit here is the assumption that biological motherhood carries the maternal *relationship* along with it,<sup>66</sup> or more strongly, that for mothers, but not for fathers, the biological link *is* the relationship.<sup>67</sup>

Thus, the Court has clearly recognized the right of almost all mothers and of many fathers<sup>68</sup> to the companionship of their children.<sup>69</sup> In the case of surrogacy, this right will attach to the surrogate mother and will usually attach to the biological father.<sup>70</sup> In the absence of legislation regulating surrogacy arrangements, the right to the companionship of one's children, "absent a powerful countervailing interest,"<sup>71</sup> argues against the termination of parental rights for either biological parent,<sup>72</sup> and thus against the enforcement of surrogacy contracts requiring the termination of maternal rights upon the birth of the child.

**c. In the Service of Status and Contract: The Fragility of the Right to Privacy.** Conflicting conclusions that stem from an analysis of the right to procreate and the right to raise one's children are magnified by the fragility of the privacy right itself. The Supreme Court has re-

---

many cases only the mother knows who sired the child. . . These differences continue at birth and immediately thereafter.

*Id.* at 404-405.

64. See also *Quilloin v. Walcott*, 434 U.S. 246 (1978).

65. 463 U.S. at 262.

66. The deeper assumption here may well be that the maternal relationship *is* biology (or at least the product of biology), while the paternal relationship is optional and develops over time.

67. The statutory scheme is more advantageous to mothers than to fathers but the assumptions behind the scheme—that the maternal relationship is based in biology (e.g., in instinct) and the paternal relationship is based in history (e.g., action in the world)—can be used in other situations to the disadvantage of women and the advantage of men.

68. Mothers and fathers can, of course, lose this right if the criteria outlined in termination statutes (e.g., abuse, neglect) can be demonstrated.

69. The constitutional right to the companionship of one's children is not absolute. The right may be weakened and even terminated in the face of a sufficiently pressing state interest. *In re Baby M*; 109 N.J. 396, 451 n.14, 537 A.2d 1227, 1255 n.14 (1988) *Santosky v. Kramer*, 455 U.S. 745 (1982).

70. Presumably, in most surrogacy cases, the biological father will take the requisite steps to claim paternity or to establish a paternal relationship with the child.

71. *Stanley v. Illinois*, 405 U.S. 645, 651 (1971).

72. Obviously, neither party can rely on the constitutional right to the companionship of his or her child if the companionship requested will eliminate such companionship for the other parent.

cently set limits to that underlying right and has suggested that the entire concept is shaky. In *Bowers v. Hardwick*,<sup>73</sup> the Court refused to extend the protection based on privacy concerns to sodomy between consenting adults. Of potentially more importance than the Court's holding, *per se*, is the Court's assertion in *Hardwick* that the privacy right is not supported by any textual reference in the Constitution.<sup>74</sup> Moreover, in *Webster v. Missouri Reproduction Services*,<sup>75</sup> the Supreme Court, while refusing to accept the position urged in the Bush administration briefs that the Constitution embodies no right to privacy,<sup>76</sup> sharply restricted a woman's right to abortion guaranteed by *Roe v. Wade*,<sup>77</sup> a right that *Roe* located within the right to privacy.<sup>78</sup>

Both those who favor the expansion of the privacy right and those who favor its restriction are responding to the choice between status and contract. Moreover, each group is ambivalent about the choice. Those favoring the restriction of the privacy right choose to protect the family as the preeminent preserve of status relations. Yet to do that they are willing to permit the intrusion of the state into personal, familial decisions, thereby invoking contract over status. In contrast, those favoring the expansion of the privacy right choose to safeguard a domain of status relations *in order to* protect relations based in contract (e.g., surrogacy).

Although the parameters and limits of the privacy right thus remain inadequately defined, the right to privacy does in existing legal fact protect the domain of family life and other, related domains. It protects freedom with regard to marriage,<sup>79</sup> conception,<sup>80</sup> abortion,<sup>81</sup> procreation,<sup>82</sup> family living patterns,<sup>83</sup> and childbearing.<sup>84</sup>

---

73. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

74. *Id.* at 191.

75. *Webster v. Missouri Reproduction Services*, 109 S.Ct. 3040 (1989).

76. Dworkin, *The Future of Abortion*, THE NEW YORK REVIEW OF BOOKS, 47, 50 n.13 (September 28, 1989).

77. 410 U.S. 113 (1973).

78. 410 U.S. at 154.

79. *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia miscegenation statute on due process and equal protection grounds).

80. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating Connecticut statute forbidding the use of contraceptives).

81. *Roe v. Wade*, 410 U.S. 113 (1972) (declaring woman's right to terminate a pregnancy during first trimester protected by privacy right).

82. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (forced sterilization of habitual criminal unconstitutionally infringes right to procreate).

83. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (invalidating East Cleveland ordinance prohibiting certain family members from dwelling together in one residence).

84. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (privacy right regarding childrearing decisions

However, it extends such protection most unreservedly to traditional family structures.<sup>85</sup> With regard to innovative family structures in general, it is decidedly ambivalent because the society it reflects is ambivalent. The ambivalence may be seen with particular clarity in the case of surrogacy.

In general, an unlimited constitutional right to privacy in family matters encourages the development of nontraditional relationships and arrangements. Thus, in deciding whether to limit the right to privacy, and if so, how, lawmakers are faced with two interrelated questions. First, should individuals be free to effect changes that may entail the transformation of the family from an institution defined largely through status to one defined largely through contract? Second, should individuals be free to choose new rights and duties, or new forms of interactions, *within* the universe of status? Since the acknowledgment that status relationships are mutable *is* the acknowledgment that such relationships are not inexorably based in nature, the two questions are inherently related. Thus, a decision to permit the unregulated alteration of familial relationships recognizes the family as a domain defined through contract, in Maine's sense, as a domain in which rights and duties, and forms of interaction, are not set forth at birth but may be negotiated and transformed.

But, as American society is at present unprepared to place the family unambiguously within the domain of contract—as indeed it remains uncertain quite where to place it—the privacy law hesitates to protect commercial and contractual arrangements involving families in general, and surrogacy in particular. The right to privacy is now conceived of as guarding family relationships and those resembling family relationships, but not contractual relationships. Thus, it becomes necessary to decide whether surrogacy arrangements resemble more closely family arrangements or business deals. At present, no clear decision on this matter has been reached. The inevitable legal consequence—the privacy right—when applied to surrogacy, protects both the right to procreate and the right to a relationship with the resulting child, but only to some extent, depending on the aspects of privacy law stressed and on the way surrogacy is defined.

---

combined with First Amendment right to free exercise of religion, protect Amish parents' decisions not to send children to high school despite state interest).

85. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

3. *The Right to Enter Contracts.* The broad right to enter contracts, and the expectation that the state will enforce them, also offer some protection to surrogacy arrangements. In the absence of relevant legislation<sup>86</sup> or countervailing public policy concerns,<sup>87</sup> a potential surrogate has the right to enter a contract in which she agrees to bear a child and forego the companionship, care and custody of that child. The Supreme Court has held that constitutional rights can be waived in a number of cases.<sup>88</sup> The waiver of a constitutional right requires a demonstration "that there was 'an intentional relinquishment or abandonment' " of the right.<sup>89</sup> If this can be shown, the surrogate mother has a right to enter a surrogacy agreement, and all else being equal,<sup>90</sup> that agreement should be enforceable against her.

Yet even the right to enter contracts does not ensure the legality of surrogacy contracts. Most of the requirements for a valid contract are found in surrogacy contracts.<sup>91</sup> But it can be argued that such contracts are inevitably baby-selling agreements and thus should be void as violative of public policy. Alternatively, it can be argued that such contracts should be neither void nor enforceable—that the state should not intervene between parties to a surrogacy contract but should also not enforce such contracts against unwilling biological mothers.<sup>92</sup>

4. *Surrogacy Eludes a Rights Analysis.* The conflicting results suggested by an analysis of the right to procreate, the right to raise children and an analysis of basic contract rights, like the law's more general ambivalence about surrogacy, reflect society's uncertainty about the comparative significance of status and contract. Identification of relevant legal rights does not resolve the surrogacy issue because legal analysis of those rights contains the same tension generated by the choice between status and contract that effects surrogacy. In short, the conflicts that sur-

---

86. Depending on how one views the relevance of adoption statutes to the surrogacy case, it may be illegal for a woman to enter into a contract in which she agrees, before conception, to give up a baby at birth. See Cohen, *supra* note 2, at 247-48.

87. See *id.* at 253.

88. See, e.g., *Brady v. U.S.*, 397 U.S. 742, 748 (1970) (waiver of constitutional right must be voluntary to be effective in criminal cases); *Pierce v. Somerset Railway*, 171 U.S. 641, 648 (1898) (act or omission to act can be grounds for waiving constitutional right).

89. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

90. "All else being equal," as used here, means that the contract is otherwise legal. See note 121 *infra*.

91. M.A. FIELD, *supra* note 45, at 76.

92. *Id.* at 77.

round and constitute the surrogacy debate are simply replicated at another level in the attempt to resolve the surrogacy question through rational selection of established legal principles.

#### IV. STATUS AND CONTRACT ELUCIDATE *BABY M*

All of the ambivalence thus far discussed—the inability or unwillingness of contemporary American society, and therefore of its legal system, to decide whether the family belongs to the universe of status, or to its apparent ideological antagonist, the universe of contract—and all of the tensions, confusions and perplexities inevitably engendered by that ambivalence, are reflected clearly in the case of *Baby M*<sup>93</sup> which, therefore, merits detailed analysis.

The case involved the most difficult and unpleasant consequence of a surrogacy arrangement: a custody battle between the contracting parents and the gestational mother. The case, the first involving a surrogate seeking to retain maternal rights to the baby and a biological father seeking to enforce a surrogacy contract in court, was brought by William Stern, the biological father. Stern asked the New Jersey courts to enforce the surrogacy contract among himself, the surrogate, Mary Beth Whitehead and her husband, Richard Whitehead.<sup>94</sup>

The opinion of Judge Sorkow, before whom the case was heard in the New Jersey Superior Court,<sup>95</sup> proceeded from the assumption that the preservation of the universe of status, as defined by Maine, was and ought to be, the overriding, though not the exclusive, concern of the law. Almost exactly the same assumption underlay both the opinion of the New Jersey Supreme Court<sup>96</sup> (which heard the case on appeal) and a brief presented to that court by the Sterns. An assumption more conservative than any other in the case underlay the brief presented by Mary Beth Whitehead. Thus, though the positions of the interested parties and of the courts differed radically, the consensus as regards ideology was almost total. The superior court held in almost all respects for the Sterns.<sup>97</sup> It upheld the surrogacy contract, framed the case as involving primarily the best interest of the baby—calling all the other issues “com-

---

93. *Matter of Baby M*, 217 N.J. Super. 313, 537 A.2d 1128 (1987), *aff'd in part and rev'd in part*, 109 N.J. 418, 537 A.2d 1227 (1988).

94. *Id.*

95. 217 N.J. Super 313, 525 A.2d 1128 (1987).

96. 109 N.J. 396, 537 A.2d 1227 (1988).

97. The superior court did declare void and unenforceable a clause in the contract which gave William Stern control over any abortion decision. 217 N.J. Super. at 375, 525 A.2d at 1159.

mentary,"<sup>98</sup>—decided that those interests required terminating the surrogate's parental rights, granted full custody to the contracting father, and ordered the adoption of the baby by Elizabeth Stern.

By contrast, the supreme court invalidated the surrogacy contract, outlawed the payment of money to the surrogate, and voided both the termination of Mary Beth Whitehead's parental rights and the adoption of the baby by Elizabeth Stern. Judicial positions more thoroughly at odds cannot be imagined. The differences between Whitehead and the Sterns were absolute. Yet—astonishingly perhaps to the casual observer—everyone involved argued from essentially the same ideological assumption: that whatever the legitimate demands of the marketplace, they should retire before the sacred prerogatives of institutions and impulses hallowed by fixed, eternal nature.

#### A. *The Superior Court Opinion*

In almost all respects, the New Jersey Superior Court held for Stern,<sup>99</sup> upholding the surrogacy contract and deciding that the best interests of the baby required terminating the surrogate's parental rights and granting full custody to the contracting father.

The centrality of status to the superior court opinion may not seem at once obvious, since Judge Sorkow focused intently, and at some length, upon the surrogacy contract itself. In fact, however, the contract was only an element of Judge Sorkow's "commentary," and, even as such was forced to serve the only concern he regarded as ultimately of importance: the best interests of the baby. With respect to that concern, Sorkow's commitment was almost unreservedly to status.

The judgments that lie at the heart of Judge Sorkow's opinion are very old-fashioned: that families should be traditionally middle-class, consisting of two parents and their children living in a conventional fashion, and that such families should be protected from unstable "outsiders." In defense of these judgments Judge Sorkow was prepared to rule very creatively indeed: by in effect asserting that Baby M had no mother and therefore no family,<sup>100</sup> and that in consequence the court was re-

---

98. *Id.* at 323, 525 A.2d at 1132. The opinion asserts that "[a]ll other concerns. . . constitute commentary." The description is confusing since the opinion contains an apparently serious analysis of the contract issues. It is not clear from Judge Sorkow's opinion whether a best interests determination would have been undertaken had the contract been found unenforceable. *See id.* at 390, 525 A.2d at 1166-67.

99. The superior court did declare void and unenforceable a clause in the contract which gave William Stern control over any abortion decision. 217 N.J. Super. at 375, 525 A.2d at 1159.

100. Obviously, one's view of whether or not a "family" existed for Baby M before the court's

quired to create both (to its liking) and by invoking, for the act of creation, the presumptions of contract.

That social polar opposites confronted him was self-evident to Judge Sorkow. He depicted William and Elizabeth Stern as a perfect middle-class, professional couple,<sup>101</sup> with a "strong and mutually supportive relationship," "cooperative parenting" skills and the ability to "initiate and encourage intellectual curiosity and learning for the child."<sup>102</sup> In contrast, Mary Beth and Richard Whitehead were portrayed as financially and emotionally unstable. Mary Beth was characterized as a manipulative wife and mother, unable or unwilling to "recognize and report the truth" and essentially unreliable.<sup>103</sup> As evidence of this last assertion the court referred to Mary Beth Whitehead's breach of the surrogacy contract.<sup>104</sup> Judge Sorkow decided that a woman who balked at fulfilling a contract to terminate maternal rights to her newborn baby, or who defied a court order by "running away with the infant,"<sup>105</sup> could not be an impressive mother in general, or in particular, a good mother to Baby M.

That being the case, Judge Sorkow proposed to find a good mother, part of a good family for Baby M. He did so by the remarkable expedient of asserting that in effect, at birth Baby M had lacked not only a family, but also a mother. "When Melissa was born on March 27, 1986," Judge Sorkow wrote:

there were no, attendant to the circumstance of her birth [sic] family gatherings, family celebrations or family worship services that usually accompany such a happy family event. . . . In reality, the fact of family was undefined if non-existent [sic]. The mother and father are known but they are not family. The interposition of their spouses will not serve to create family without further court intervention.<sup>106</sup>

The court's depiction is obviously biased. Whether or not a family existed before Judge Sorkow wrote his opinion depends on one's under-

---

decision depends on one's view of the American family. If the notion is limited to familiar variants (e.g., a nuclear family with two parents and their children) then, as Judge Sorkow believed, Baby M had no "real family" before the court rendered its decision.

101. "Upper-middle class," as used here, seems to refer to a pattern of life, a set of attitudes and a particular social and educational background, rather than to family income, *per se*.

102. 217 Super. 313, 397-98, 525 A.2d 1128, 1170.

103. *Id.* at 395-96, 525 A.2d at 1169.

104. *Id.* at 396, 525 A.2d at 1169.

105. *Id.* at 397, 525 A.2d at 1170.

106. *Id.* at 401, 525 A.2d at 1172. The context of the quote was the court's consideration of Whitehead's parents' application for visitation rights. The court rejected the application of Mr. and Mrs. Joseph Messer for grandparental visitation rights. *Id.* at 406-408, 525 A.2d at 1175.



standing of family.<sup>107</sup> In this regard, the court had a choice. It could have approached the case sociologically and asked: What *is* going on here? What definitions of family are suggested by this case? Or, it could have assumed a definition of family. It did the latter. It assumed that a family is composed of two parents and their children, and failed to consider the possibility that practices such as surrogate motherhood may represent or encourage new kinds of families. Judge Sorkow did not write that he was creating a proper family from an improper family. He wrote that the "fact of family was. . .non-existent" before the court reached its decision.<sup>108</sup>

In order to create a family from the characters involved in the case, Judge Sorkow slotted the parties into his model of an ideal American family. For that to be done, one of the biological parents had to be obliterated. Further, the spouse of the other biological parent had to be named *as a parent*. Thus, Baby M's family was defined so as to include her biological father and his wife Elizabeth Stern, who was able to adopt the baby immediately after the court's termination of Whitehead's parental rights.

The court symbolized its decision to grant full custody to William Stern and its creation of a family for Baby M by shifting from "Baby M" to "Melissa" in references to the child. (Melissa was the name given Baby M by the Sterns.)<sup>109</sup> No longer merely a key character in a complicated legal drama, the child was now *named*. In its view, the court had erased her a-familial past and allowed her to become a *real* baby, identified as part of a family with two parents. With this, the court attempted to obliterate history and its complications.<sup>110</sup>

That done to its own satisfaction, the court was able in good conscience to deprive Mary Beth Whitehead not only of custody but also of parental rights.<sup>111</sup> All of her rights could be terminated because, as she

---

107. See M.A. GLENDON, *STATE LAW AND FAMILY; FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* (1977), quoted in I.M. ELLMAN, P.M. KURTZ, A.M. STANTON, *FAMILY LAW: CASES, TEXTS, PROBLEMS* 810-11 (1986) (considering social and legal acceptance of cohabitation as a new family form).

108. 217 N.J. Super. at 401, 525 A.2d at 1172.

109. Mary Beth Whitehead had named the child Sara.

110. It is possible to see the court's view as consistent with the view reflected in the contract. The parties to the contract apparently intended to create a family composed of William Stern, Elizabeth Stern and the baby.

111. On the face of the opinion the termination of Whitehead's maternal rights was simply a result of the court's best interests determination and its reading of the contract. Mary Beth Whitehead, declared the court, "agreed to terminate [the contact]. This Court gives effect to her agreement." 217 N.J. Super. at 400, 525 A.2d at 1172. This article is arguing that the court's conclusions

had never really been the baby's mother, they had never existed.

Further, to demonstrate that this was so Judge Sorkow invoked the universe of contract, to serve his interests, however, rather than its own. Relying upon the contract in the case, he enforced an agreement which, in a larger context, represents significant alteration in familiar notions of the family. Implicitly, of course, Judge Sorkow recognized this contradiction by defining his contract analysis as "commentary," not law.<sup>112</sup> In addition, the contradiction between Judge Sorkow's view of family and his enforcement of the surrogacy contract was mediated by an association of the contract with Whitehead rather than with the Sterns. The Sterns were portrayed as an ideal couple, who exhibited all the virtues associated with a "good" family defined in traditional, status terms. Whitehead was characterized as being *outside* family. In relation to Richard Whitehead and her two children with him, Mary Beth was seen as a wife and mother, even a fit wife and mother.<sup>113</sup> But in relation to Baby M, Whitehead was depicted as someone who had signed a contract, an individual who had undertaken a personal service commitment pursuant to an agreement and then breached the agreement.<sup>114</sup> She was portrayed not as a mother to Baby M, but as the person who had promised to provide the Sterns with the means to create their family. Therefore she was ordered—legitimately, in the opinion of the court—to honor her part of a business agreement between autonomous, self-interested principals.

Whether or not Judge Sorkow understood the problems inherent in his appeal to contract is not certain. His overriding commitment, however, is beyond doubt. Custody law, as he demarcates it, bespeaks a universe defined unmistakably in terms of status.

### B. *The New Jersey Supreme Court Opinion*

The New Jersey Supreme Court did precisely the same thing, and although in a unanimous opinion it reversed almost all of the law made by Judge Sorkow, it did so in the name of moral standards more or less identical to his own.

As has been noted, the supreme court invalidated the surrogacy con-

---

were grounded in a view of the American family which the court hoped to actualize from the parties in the Baby M drama.

112. 217 N.J. Super. at 323, 525 A.2d at 1172.

113. *Id.* at 338-39, 525 A.2d at 1140.

114. *Id.* at 375, 525 A.2d at 1159.

tract on the grounds that it conflicted with state law and public policy.<sup>115</sup> Further, the court outlawed the payment of money to a surrogate.<sup>116</sup> It voided both the termination of Mary Beth Whitehead's parental rights and the adoption of the baby by Elizabeth Stern.

In particular, the supreme court declared that the promise of money from William Stern to Mary Beth Whitehead constituted payment for an adoption,<sup>117</sup> not for Whitehead's services, and therefore contravened New Jersey law prohibiting the transfer of money in connection with the placement of a child for adoption.<sup>118</sup> Secondly, the court declared the contract invalid because it provided for the termination of Whitehead's parental rights without satisfying relevant statutory criteria.<sup>119</sup> Finally, the court decided that the absence of a revocation right for Mary Beth Whitehead contravened New Jersey law.<sup>120</sup> In short, the court ruled, the central provisions of the contract<sup>121</sup> were "designed to circumvent [state] statutes, and thus the entire contract was unenforceable."<sup>122</sup>

For the supreme court, the child's parents were, and were to remain, her two biological parents. The opinion allowed no legal relationship between the child and either Elizabeth Stern or Richard Whitehead. Although her husband was given custody of the child, Elizabeth Stern was given no legal rights to Baby M, and should her husband die or

---

115. 109 N.J. at 411, 537 A.2d at 1234 (1988).

116. The state supreme court described the payment of money as affecting the adoption of the child by Elizabeth Stern. Thus, the court held the payment to have been illegal. *Id.* at 422, 537 A.2d at 1240.

117. The primary legal argument against the legality of surrogacy contracts for money is that they violate state law and public policy, which proscribe adoptions in exchange for money. The New Jersey Supreme Court, recognizing this in *Baby M*, called "the payment of money to a 'surrogate' mother 'illegal, perhaps criminal, and potentially degrading to women.'" 109 N.J. at 411, 537 A.2d at 1234.

118. *Id.* at 423-25, 537 A.2d at 1240. In regard to this question the trial court held that laws governing adoption were irrelevant to surrogacy cases. The court reasoned that the legislature could not have intended adoption statutes to govern surrogacy because surrogacy was unknown when the state's adoption laws were promulgated. 217 N.J. Super. at 372-75, 525 A.2d at 1157-58.

119. 109 N.J. at 425-29, 537 A.2d 1242-43. Termination of parental rights in New Jersey could be effected only pursuant to a voluntary surrender of a child to an agency approved by the state or to the Division of Youth and Family Services along with a document acknowledging termination or pursuant to a showing of parental abandonment or unfitness. *Id.* at 426, 537 A.2d at 1242.

120. *Id.* at 429-34, 537 A.2d at 1244-45.

121. The court further declared that the surrogacy contract between the Whiteheads and William Stern conflicted with New Jersey public policy. For instance, state public policy preferred that children be raised by their "natural" parents, *id.* at 435, 537 A.2d at 1247; that the rights of a "natural father" be equal to, and not greater than, those of a "natural mother," *id.*, 537 A.2d at 1246; and that a "natural mother" contemplating surrender of parental rights be evaluated and counseled. *Id.* at 436, 537 A.2d at 1247.

122. *Id.* at 435, 537 A.2d at 1246.

should she and William Stern divorce, it would be difficult for her to insist upon a continuing relationship with the child. The case was remanded to the trial court for consideration of Mary Beth Whitehead's right to visit Baby M.<sup>123</sup>

In sum, the court ruled that babies could not be bought or sold, and that contracts could not eliminate motherhood—obvious truths, but only in a universe in which absolute value, utterly unrelated either to commerce or to autonomous self-fulfillment, can be assigned both to babies, and to a clearly defined setting—the traditional family—presumed to give both babies and their parents the best chance to flourish. The supreme court ruled, in short, precisely as Judge Sorkow had ruled: almost unreservedly in favor of the universe of status.

In both opinions, only one concession—though a significant one, productive of significant tension—was granted to the universe of contract. It was granted perhaps unwittingly by Judge Sorkow, when, relying upon the expedient of the contract, he in effect empowered the substitution of law for nature in defining the relationship between parent and child. In this regard, the supreme court was far more self-aware and explicit, inviting the legislature to alter surrogacy law in any constitutional manner it chose:

We have found that our present laws do not permit the surrogacy contract used in this case. Nowhere, however, do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights. Moreover, the Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional constraints.<sup>124</sup>

By thus invoking the potential role of the legislature in regulating surrogacy, the court acknowledged, as Judge Sorkow had done far less overtly, that family forms and relationships are mutable. The court cautioned against the danger of such transformations<sup>125</sup> but did not recognize an essential discontinuity between family forms and natural processes. In

---

123. On remand, the trial court broadened Mary Beth Whitehead's visitation rights considerably, allowing her immediate visitation with the child one day each week between 10:30 a.m. and 4:30 p.m. Beginning in September 1988, Whitehead was to be given an additional day every other week with the child. By April 1989, the child was to stay with Whitehead for two days and overnight every other week. In addition, visitation during certain specified holidays was ordered. The court expressed the hope that the parties would not need to rely on the specific visitation rights outlined but would be able to work out a mutually agreeable visitation schedule that suited both sides. *In re Baby M*, 225 N.J. Super. 267, 542 A.2d 52 (1988).

124. 109 N.J. 396, 468-69, 537 A.2d 1227, 1264.

125. *Id.* at 469, 537 A.2d at 1264.

short, each opinion, though only grudgingly and only in part, opened the way for the transition of family relationships from relationships defined through status to relationships defined through contract.

### C. *The Views of the Parties*

Mary Beth Whitehead was far more conservative, arguing emphatically and without ambiguity of any kind that her claims should be judged *exclusively* against the imperatives of status.<sup>126</sup>

Whitehead grounded the mother-child relationship definitively in the inevitabilities of nature, describing her pregnancy not as a *quid pro quo* entitling her to a baby, but as an inexorable process endowed with natural, inalienable value.<sup>127</sup> Her brief to the New Jersey Supreme Court focused upon the biological basis of the mother-child tie, and declared that surrogacy represents a doomed effort to alter natural events and processes. More particularly, Whitehead characterized the mother-child relationship as quintessentially natural, contrasting it in this regard to the relationship between fathers and children.<sup>128</sup> Her brief founds the tie between mothers and their children on "hormonal balance" during and following pregnancy,<sup>129</sup> and asserts that "the learning responsible for the initial formation of the maternal bond appears to be heavily dependent upon the hormonal conditions normally present for a short time after birth."<sup>130</sup> Moreover, Whitehead invoked a cross-cultural similarity in maternal behavior as well as a similarity between human and animal parental behavior in support of her position.<sup>131</sup>

In short, Mary Beth Whitehead's position before the court provides an excellent illustration of the argument that surrogacy is evil *because* unnatural, and should be prohibited in light of its effects on the natural operation of familial relationships. In arguing that she was entitled to the child not because she had suffered hardships but because her claim was natural, she asserted that familial relationships are based in nature and cannot be altered or effected by the will of the parties to a contract. Her position represents in its purest form status as defined by Maine.

---

126. Brief on Behalf of Mary Beth and Richard Whitehead at 34-55, *Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) [hereinafter *Whitehead Brief*].

127. *Id.*

128. *Id.* at 37 ("Thus the emphasis on relationship found in women will tend to enhance bonding, while the emphasis on separation and independence in men will tend to minimize the importance of bonding.")

129. *Id.* at 38.

130. *Id.* at 38-39.

131. *Id.* at 39-40.

In apparent contrast, the Sterns' brief argues that traditional families can and should be effected by the will of parties to a contract.<sup>132</sup> But here, as in Judge Sorkow's opinion, appearance can deceive; like Judge Sorkow the Sterns invoked the universe of their ideological antagonist in their interest, rather than in its own. Upholding the contract, they argued, would serve to strengthen traditional values.

Like Whitehead, the Sterns were concerned with effecting status-based relationships, and neither denied the importance of natural process nor suggested that traditional families should be re-examined and re-fashioned in modern times. Rather, they asserted that good, old-fashioned American families can be created in a variety of ways and need not be grounded in natural processes:

Through surrogate parenthood, traditional family values are strengthened. In seeking to create a traditional family structure in the only way available to the commissioning couple, surrogate motherhood insures that the couple who has invested both considerable time and money in the surrogacy process will be dearly dedicated to the child. A surrogate motherhood arrangement actually increases the overall number of family units within society.<sup>133</sup>

"Surrogate parenting agreements," the Sterns' brief continued, "also facilitate the exercise of procreative liberty for women. A woman who is unable to have a child can now become a parent regardless of medical limitations."<sup>134</sup>

Despite the implications of the brief, Elizabeth Stern was, of course, neither biologically nor genetically related to Baby M. The brief did not really intend to declare that Elizabeth Stern was Baby M's "natural" mother; rather, it intended to suggest that Elizabeth was the baby's "real" mother and that, to be such, she need not demonstrate a genetic or biological link to the child. The Sterns' arguments imply that "blood" or genetic relationship is not essential to the creation and development of a simple, old-fashioned American family.<sup>135</sup> In this regard, the Sterns re-

---

132. Stern Brief, *supra* note 42, at 99-106.

133. *Id.* at 80.

134. *Id.* The Sterns' argument is opaque. Surrogate parenting agreements do *not* extend what the brief calls "procreative liberty" to women like Elizabeth Stern. *In vitro* fertilization may do that. Gamete transfer from one woman to another may do that. But surrogacy does not. Elizabeth Stern hoped to adopt Baby M. That option was available long before surrogacy.

135. See *Braschi v. Stahl Assoc. Co.*, 74 N.Y.2d 201, 211, 543 N.E.2d 49, 53, 544 N.Y.S.2d 784, 788 (1989) (similar response in context of homosexual couples; the court said that under N.Y.C. Rent Control Regulations protection from eviction "should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.") See also, Kolata, *Lesbian Partners Find the Means to be Parents*, N.Y. Times, Jan. 30, 1989, at A13, col.1.

lied on that aspect of American culture which stresses "code-for-conduct"<sup>136</sup> (culture) as opposed to "blood" (nature) as the crucial element in kinship relations.

In presenting the case that surrogacy harmonized with traditional family values, the Sterns expressly addressed the counter-argument that surrogacy for money is immoral.<sup>137</sup> They responded that the family was already affected by and defined through commercial interactions without ill effects. They referred to fees paid to sperm and ovum donors, to "commercialized social parenting in the form of day care facilities, babysitting, wet nurses and nannies" and to foster-parenting "subsidized by the state."<sup>138</sup> Again, the Sterns insisted that a proper family, even a traditional family, can be created through relations based on notions of blood and status *or* through relations based on law.

How such a family came into existence was relatively unimportant to the Sterns. That traditional families should be encouraged to exist and to thrive was crucial—to them, to Mary Beth Whitehead, to Judge Sorkow, and to the New Jersey Supreme Court, and to each of these participants in the legal drama for essentially the same ideological reason. In the unmistakable opinion of each, the family in general, and motherhood in particular, are absolutely valuable and must therefore be safe-guarded, even at the cost of tension resulting from the counter-claims of a legitimate and strengthening modernity. Thus the courts that issued the *Baby M* opinions and the parties themselves all stressed the overriding need to safeguard the family as an arena in which relationships are based on status. However, they disagreed about how that should be done.

The trial court and the Sterns argued that surrogacy (including surrogate contracts) can preserve relationships based on status because such relationships can stem from biology or from law. The Sterns even suggested that law can create biology when they argued that surrogacy offers "procreative liberty" to (otherwise) infertile women. The trial court was more confused about the significance of the surrogacy contract, viewing it, in the end, as an expedient for guarding status relationships *in this case*. Similarly concerned to protect the family from the incursions of contract in Maine's sense, the supreme court chose to preserve status *in*

---

136. See Schneider, note 11 *supra*, at 65-66.

137. Stern Brief, *supra* note 42, at 82.

138. *Id.* at 82. The analogy to "day care facilities, babysitting, wet nurses and nannies" is, of course, poor. These facilities and parties are not considered part of the child's or of the parents' family.

*general* by invalidating the contract in this case. In contrast to both courts and to the Sterns, Whitehead described the mother-child relationship as essentially unavailable except through a biological tie and vilified surrogacy contracts for defying natural processes. Each position represents an instance of society's ambivalence about the move from relationships based on status to relationships based on contract in the last important preserve of status relationships in modern society—the family.

## V. LEGISLATIVE OPTIONS

### A. *Resolution of the Ambivalence Surrounding Surrogacy*

The problems posed by surrogacy lie deep in the history of family relations and family law. Surrogacy demands legislative regulation. Judicial law, inevitably affected by the concrete particularities of one case, cannot resolve the essential conflicts generated by surrogate motherhood.

Resolution of the ambivalence generated by surrogacy, and of the concrete dilemmas that it poses, depends on recognizing that the choice between status and contract is not absolute and that advantageous aspects of each can be safeguarded. From that recognition, a legislative response follows.

Legislative control of surrogate motherhood<sup>139</sup> should allow for, but regulate, commercial surrogacy, despite the risks made evident in the *Baby M* case.<sup>140</sup> Neither surrogacy, nor reproductive technology more generally, initiated the conflict between status and contract that surrogate motherhood reflects. They simply carried the conflict a step further. The historical process through which the conflict developed is perturbing and complicated but (unless one believes with Mary Beth Whitehead that family relations are inexorably dictated by nature) not inherently evil.

Regulation of surrogacy should, first, permit the preservation of the family as a universe based on love, loyalty and commitment, but preclude the use of those ties as constraints against the freedom of certain traditionally oppressed status groups (*e.g.* women). Second, surrogacy should allow the development of contract, with the freedom and expanded options it provides, but should preclude the reduction of human beings to commodities, a process that threatens to obliterate the distinction be-

---

139. A number of commentators have prepared detailed statutory proposals for dealing with surrogacy or have reviewed proposals prepared for presentation to legislatures. *See, e.g.*, Model Act, *Model Human Reproductive Technologies and Surrogacy Act*, 72 IOWA L. REV. 943 (1987), Knoppers & Sloss, *supra* note 2, at 705-718.

140. 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part and rev'd in part*, 109 N.J. 418, 537 A.2d 1227 (1988).



tween love and money upon which the family as a realm of status, is based.

## B. *Concrete Solutions*

Of the questions facing those regulating surrogacy, two are of particular relevance to the meaning and operation of the family and offer useful arenas for illustrating how resolution of the ambivalence about status and contract can be effected. First, should the legal parents of a child produced by a surrogacy arrangement be identified before the baby's birth? Second, should the exchange of money be permitted? Each question forces recognition of the consequences of appearing to define a child (and possibly its gestational mother) either as a commodity or as a gift.

1. *Vesting of Parental Rights.* Contractual definitions of motherhood and fatherhood demarcating the manner and time in which contracting parents' rights vest may conflict with long-established understandings of these terms. In particular, surrogacy calls into question the meaning of mother.<sup>141</sup> Is the "real" mother the contractual mother, the woman who plans for the child, dreams of its birth, and signs a contract to obtain the desired child?<sup>142</sup> Is she the genetic mother,<sup>143</sup> the woman who provides the ovum which, once fertilized, becomes a fetus? Or is she the gestational mother, the woman who carries the fetus in her body, participating through the process of pregnancy in the development of the fetus toward its separate personhood? Legislation concerning the point in time at which claims to parenthood are determined should be based on the understanding that the meaning<sup>144</sup> of parenthood is at issue.

Legally, the issue becomes the comparative weight of different claims to parenthood.<sup>145</sup> Automatic vesting of parental rights in the con-

---

141. See Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 N. ENG. L. REV. 521, 547 (1988). The meaning of "father" is less problematic in the typical surrogacy arrangement. It is possible that a husband or lover of a surrogate mother could claim paternal rights. Paternity has been disputed in cases involving artificial insemination by a donor. See *Jhordan C. v. Mary K.* 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986) (sperm donor suing biological mother for joint legal custody received visitation rights and a declaration that biological mother's friend, Victoria C, was not a *de facto* parent).

142. At present, contracting mothers do not sign surrogacy contracts in order to avoid violating adoption statutes.

143. Surrogacy can involve the surrogate gestating a fertilized ovum, provided by the contracting mother or by a third woman.

144. "Meaning" here implies "use," as Ludwig Wittgenstein used those terms. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 2-6 (1953).

145. See Ashe, *supra* note 141, at 532.

tracting parents at the birth of the baby<sup>146</sup> would be consistent with an approach permitting specific enforcement of surrogacy contracts that provided no revocation period for the gestational mother. This approach regards surrogacy contracts as ordinary legal documents, subject to the general rules of contract law, and permitted Judge Sorkow in the New Jersey Superior Court to conclude in *Baby M* that the surrogate promised, and *therefore* was obliged to surrender the child;<sup>147</sup> it is an approach which ignores utterly the context of the contract. A surrogacy contract involving the creation of life and the organization of families is simply not an unremarkable document providing for the transfer of commodities. The rules which govern most contracts should not be applied automatically to surrogacy contracts.

The claims of contracting parents and gestational mothers to a newborn baby are strong. The claims of the first are based in a yearning to have children and a conscious decision to satisfy that yearning through a cultural process.<sup>148</sup> The claims of the second are based in a relationship formed with the baby during the months of pregnancy.<sup>149</sup> The formation and development of that relationship involve a process whose outcome is unknown, even for women who have previously borne children.<sup>150</sup> Such women should be allowed the same revocation period available to parents offering babies for adoption. A revocation period will provide the gestational mother a chance to evaluate, after the baby's birth, her relation to the new child, and to assert her strong claim to motherhood if she so chooses. After the revocation period has passed, full parental rights should vest in the contracting parents; the contract should become fully binding at this point and enforceable through specific performance. In consequence, the unique interests of the gestational mother will be adequately protected, and the baby's legal parents will be ascertained early, thereby precluding protracted legal uncertainties with regard to the identity of the child.

Not accidentally, the model proposed for delimiting the opposing rights to parenthood involved in surrogacy cases is similar to the model in use for regulating related questions in the context of adoption.

---

146. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L. J. 187 (1986).

147. 217 N.J. Super. at 400, 525 A.2d at 1172 (1987) ("She agreed to terminate. This court gives effect to her agreement.")

148. See Ashe, *supra* note 141, at 547-48.

149. See *id.* at 549 (describing experience of pregnancy for gestational mother to involve "a total bodily indwelling," "an alteration of the entire body").

150. See *id.* at 557.

Although revocation of an adoption consent by a biological mother before entry of a decree of adoption was once relatively easy, most states now strictly limit revocation.<sup>151</sup> However, some states prohibit adoption consents before a period of time (usually several days) has elapsed after the birth of the baby.<sup>152</sup> Several results ensue. The family as a domain of status, defined through constructs like loyalty and love, is preserved. Yet, new family forms (e.g., the family commenced through adoption<sup>153</sup> or surrogacy) are allowed to develop through the expansion of what Maine defines as contract into the familial world of status.

2. *For Love or Money.* Non-commercial, non-contractual surrogacy may involve social and moral dilemmas, but under present statutory schemes it raises few legal difficulties. Both artificial insemination and private adoption are legal in most states. Thus, a couple willing to forego the certainty of contractual promises and a surrogate willing to forego remuneration could enter into a surrogacy arrangement without encountering legal obstacles. The hard legal cases are those in which the surrogate desires payment, and the couple desires certainty.

Commercial surrogacy poses a concrete concern with deep moral roots:<sup>154</sup> that children and their gestational mothers may be defined as commodities. Although there is something odd about bestowing a child as a gift, the spirit of life may seem to be more in harmony with that of the gift than with that of the market. However, the family as a social institution is less likely to be jolted by commercial surrogacy arrangements than by surrogacy arrangements in which the baby is bestowed by its gestational mother as a gift upon its legal parents. Commercial surrogacy arrangements can be designed to replicate traditional families more easily than non-pecuniary arrangements. If the child is a gift, bonds be-

---

151. W. WADLINGTON, *DOMESTIC RELATIONS: CASES AND MATERIALS* 848 (1984).

152. See, e.g., ILL. ANN. STAT. ch. 40, para. 1511 (Smith-Hurd 1980) ("[a] consent or a surrender [for adoption] taken not less than 72 hours after the birth of the child is irrevocable. . ." unless obtained through fraud or duress). Other states, including Arizona, Kentucky and Massachusetts, prohibit relinquishments until a few days have elapsed after the baby's birth. ARIZ. REV. STAT. ANN. § 8-107(B) (1989) (72 hours); KY. REV. STAT. ANN. § 199.500 (Michie 1982 & Supp. 1988) (5 days); MASS GEN. LAWS ANN. ch. 210, § 2 (West 1987) (4 days).

153. The first modern adoption law was enacted in Massachusetts in 1851. Under Common Law, the absolute and permanent transfer of parental authority was prohibited. Zainaldin, *The Emergence of a Modern American Family: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038, 1042-43 (1979).

154. See Krimmel, *The Case Against Surrogate Parenting*, 13 HASTINGS CENTER REP. 35, 36-37 (1983) (viewing babies as commodities can lead to cloning people "as an inventory of spare parts for organ transplants," or using "comatose human beings as self-replenishing blood banks and manufacturing plants for human hormones").

tween the giver and the receiver are strengthened.<sup>155</sup> Such arrangements are more likely than commercial arrangements to involve the parties in relationships that continue beyond the child's birth and lead, potentially, to novel family structures involving as many as five "real" parents.<sup>156</sup>

Commercial surrogacy typically defines the payment from the contracting parents to the surrogate as payment for services and not for a product.<sup>157</sup> The intent has been to avoid violating baby-selling statutes.<sup>158</sup> If surrogacy is regulated by new, specific legislation, baby-selling statutes need not be applicable to the surrogacy situation. However, it makes sense to continue defining the payment involved in such cases as remuneration for services.<sup>159</sup> That construction avoids defining the baby as an item for sale and works toward protecting<sup>160</sup> the surrogate, who will be compensated for the services she performs and not for the commodity she produces.<sup>161</sup>

Permitting commercial arrangements will prevent surrogacy from moving underground and will allow state regulation of the more troubling aspects of the practice. These safeguards notwithstanding, brokers, lawyers and other mediators should not be permitted to profit from surrogacy arrangements. The likelihood of exploitation is increased significantly by the presence of commercial intermediaries.<sup>162</sup> Moreover, the

155. See L. HYDE, *supra* note 20, at 60-61.

156. A baby may have a contracting mother, a contracting father, a genetic mother, a genetic father and a gestational mother.

157. See, e.g., *Matter of Baby M*, 109 NJ 396, 470-478, 537 A.2d 1128, 1265-69 (1988) (Surrogate Parenting Agreement, Appendices A and B).

158. Babyselling or "black market" statutes were enacted to control the exchange of money for children in the adoption context. See Note, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 235 (1985).

159. The definition of the payment to the surrogate as a payment for services—rather than a product—should *not* be used to imply that contract law applies as if this were an ordinary contract for personal services. Were contract law to so apply, specific performance would be highly problematic. See Suh, *Surrogate Motherhood and Specific Performance*, 22 COL. J. OF L. AND SOC. PROBS. (1989). Rather, legislatures should provide particular rules that regulate the surrogacy case, rules that preclude specific performance for contract breaches that pre-date the baby's birth (e.g., breach of a promise not to abort or breach of a promise to seek particular sorts of medical attention) but that require specific performance after the revocation period granted to the biological mother. See, *supra* text at notes 148-153.

160. This difference in labeling is of potential importance since the name by which something is known affects the way people understand the thing. Dolgin, Kemnitzer & Schneider, "As People Express Their Lives, So They Are. . ." in *SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS* (J. Dolgin, D. Kemnitzer and D. Schneider, eds. 1977).

161. If the payment is defined as one for a service, the surrogate is more likely to receive compensation in cases in which the baby is miscarried or stillborn or not healthy at birth.

162. Knoppers & Sloss, *supra* note 2, at 715. Mediation between the surrogate and the con-

need for such intermediaries will decrease significantly once surrogacy is clearly legalized and regulated by statute.

If commercial surrogacy is permitted but regulated, people will be able to make choices reflecting changing mores and social patterns, and those choices can be channeled to avoid obvious abuse to any of the parties involved.

## VI. CONCLUSION

The ambivalence that surrogacy reflects and generates about relations of status and relations of contract can be resolved by *using* contract *in the service of* status, thereby safeguarding the freedom to develop new options for creating and living in families, and the continuation and replication of traditional, status-based aspects of family relationships (preeminently, love and loyalty) that make the home different from the office, and love different from money.<sup>163</sup>

Surrogacy suggests new definitions of mother, father, family and personhood and suggests that competing claims to parenthood may each carry some validity. It may result in moderately or even dramatically new modes of family organization but need not obliterate the commitment and love that traditionally demarcate the world of family from that of commerce and finance. Resolution of the ambivalence engendered by surrogacy requires that courts and legislatures recognize the conflict produced from the tensions between status and contract, and be prepared to mediate that conflict by containing the freedom that contract provides and employing it in the name of the best demands of status.

---

tracting parents need not be prohibited. Such roles should, however, be reserved for non-profit organizations. *Id.*

163. See Schneider, *supra* note 11, at 66.