Surrogate Motherhood as Prenatal Adoption

Bonnie Steinbock

The recent case of "Baby M" has brought surrogate motherhood to the forefront of American attention. Ultimately, whether we permit or prohibit surrogacy depends on what we take to be good reasons for preventing people from acting as they wish. A growing number of people want to be, or hire, surrogates; are there legitimate reasons to prevent them? Apart from its intrinsic interest, the issue of surrogate motherhood provides us with an opportunity to examine different justifications for limiting individual freedom.

In the first section of this article, I examine the Baby M case and the lessons it offers. In the second section, I examine claims that surrogacy is ethically unacceptable because it is exploitive, inconsistent with human dignity, or harmful to the children born of such arrangements. I conclude that these reasons justify restrictions on surrogate contracts, rather than an outright ban.

Baby M

Mary Beth Whitehead, a married mother of two, agreed to be inseminated with the sperm of William Stern and to give up the child to him for a fee of $10,000. The baby (whom Ms. Whitehead named Sara, and the Sterns named Melissa) was born on March 27, 1986. Three days later, Ms. Whitehead took her home from the hospital and turned her over to the Sterns.

Then Ms. Whitehead changed her mind. She went to the Sterns' home, distraught, and pleaded to have the baby temporarily. Afraid that she would kill herself, the Sterns agreed. The next week, Ms. Whitehead informed the Sterns that she had decided to keep the child, and threatened to leave the country if court action was taken.

At that point, the situation deteriorated into a cross between the Keystone Kops and Nazi stormtroopers. Accompanied by five policemen, the Sterns went to the Whitehead residence armed with a court order giving them temporary custody of the child. Ms. Whitehead managed to slip the baby out of a window to her husband, and the following morning the Whiteheads fled with the child to Florida, where Ms. Whitehead's parents lived. During the next three months, the Whiteheads lived in roughly twenty different hotels, motels, and homes to avoid apprehension. From time to time, Ms. Whitehead telephoned Mr. Stern to discuss the matter: he taped these conversations on advice of counsel. Ms. Whitehead threatened to kill herself, to kill the child, and to falsely accuse Mr. Stern of sexually molesting her older daughter.

At the end of July 1986, while Ms. Whitehead was hospitalized with a kidney infection, Florida police raided her mother's home, knocking her down, and seized the child. Baby M was placed in the custody of Mr. Stern, and the Whiteheads returned to New Jersey, where they attempted to regain custody. After a long and emotional court battle, Judge Harvey R. Sorkow ruled on March 31, 1987, that the surrogacy contract was valid, and that specific performance was justified in the best interests of the child. Immediately after reading his decision, he called the Sterns into his chambers so that Mr. Stern's wife, Dr. Elizabeth Stern, could legally adopt the child.

This outcome was unexpected and unprecedented. Most commentators had thought that a court would be unlikely to order a reluctant surrogate to give up an infant merely on the basis of a contract.[1] Indeed, if Ms. Whitehead had never surrendered the child to the Sterns, but had simply taken her home and kept her there, the outcome undoubtedly would have been different. It is also likely that Ms. Whitehead's failure to obey the initial custody order angered Judge Sorkow, and affected his decision.

The decision was appealed to the New Jersey Su-

preme Court, which issued its decision on February 3, 1988. Writing for a unanimous court, Chief Justice Wilentz reversed the lower court's ruling that the surrogacy contract was valid. The court held that a surrogacy contract that provides money for the surrogate mother, and that includes her irrevocable agreement to surrender her child at birth, is invalid and unenforceable. Since the contract was invalid, Ms. Whitehead did not relinquish, nor were there any other grounds for terminating, her parental rights. Therefore, the adoption of Baby M by Dr. Stern was improperly granted, and Ms. Whitehead remains the child's legal mother.

The court further held that the issue of custody is determined solely by the child's best interests, and it agreed with the lower court that it was in Melissa's best interests to remain with the Sterns. However, Ms. Whitehead, as Baby M's legal as well as natural mother, is entitled to have her own interest in visitation considered. The determination of what kind of visitation rights should be granted to her, and under what conditions, was remanded to the trial court.

The distressing details of this case have led many people to reject surrogacy altogether. Do we really want police officers wrenching infants from their mothers' arms, and prolonged custody battles when surrogates find they are unable to surrender their children, as agreed? Advocates of surrogacy say that to reject the practice wholesale, because of one unfortunate instance, is an example of a "hard case" making bad policy. Opponents reply that it is entirely reasonable to focus on the worst potential outcomes when deciding public policy. Everyone can agree on at least one thing: this particular case seems to have been mismanaged from start to finish, and could serve as a manual of how not to arrange a surrogate birth.

First, it is now clear that Mary Beth Whitehead was not a suitable candidate for surrogate motherhood. Her ambivalence about giving up the child was recognized early on, although this information was not passed on to the Sterns.[2] Second, she had contact with the baby after birth, which is usually avoided in "successful" cases. Typically, the adoptive mother is actively involved in the pregnancy, often serving as the pregnant woman's coach in labor. At birth, the baby is given to the adoptive, not the biological mother. The joy of the adoptive parents in holding their child serves both to promote their bonding and to lessen the pain of separation of the biological mother.

At Ms. Whitehead's request, no one at the hospital was aware of the surrogacy arrangement. She and her husband appeared as the proud parents of "Sara Elizabeth Whitehead," the name on her birth certificate. Ms. Whitehead held her baby, nursed her, and took her home from the hospital—just as she would have done in a normal pregnancy and birth. Not surprisingly, she thought of Sara as her child, and she fought with every weapon at her disposal, honorable and dishonorable, to prevent her being taken away. She can hardly be blamed for doing so.[3]

Why did Dr. Stern, who supposedly had a very good relation with Ms. Whitehead before the birth, not act as her labor coach? One possibility is that Ms. Whitehead, ambivalent about giving up her baby, did not want Dr. Stern involved. At her request, the Sterns' visits to the hospital to see the newborn baby were unobtrusive. It is also possible that Dr. Stern was ambivalent about having a child. The original idea of hiring a surrogate was not hers, but her husband's. It was Mr. Stern who felt a "compelling" need to have a child related to him by blood, having lost all his relatives to the Nazis.

Furthermore, Dr. Stern was not infertile, as was stated in the surrogacy agreement. Rather, in 1979 she was diagnosed by two eye specialists as suffering from optic neuritis, which meant that she "probably" had multiple sclerosis. (This was confirmed by all four experts who testified.) Normal conception was ruled out by the Sterns in late 1982, when a medical colleague told Dr. Stern that his wife, a victim of multiple sclerosis, had suffered a temporary paralysis during pregnancy. "We decided the risk wasn't worth it," Mr. Stern said.[4]

Ms. Whitehead's lawyer, Harold J. Cassidy, dismissed the suggestion that Dr. Stern's "mildest case" of multiple sclerosis determined the Sterns' decision to seek a surrogate. He noted that she was not even treated for multiple sclerosis until after the Baby M dispute had started. "It's almost as though it's an afterthought," he said.[5]

Judge Sorkow deemed the decision to avoid conception "medically reasonable and understandable." The Supreme Court did not go so far, noting that Dr. Stern's "anxiety appears to have exceeded the actual risk, which current medical authorities assess as minimal."[6] Nonetheless, the court acknowledged that her anxiety, including fears that pregnancy might precipitate blindness and paraplegia, was "quite real." Certainly, even a woman who wants a child very much may reasonably wish to avoid becoming blind and paralyzed as a result of pregnancy. Yet is it believable that a woman who really wanted a child would decide against pregnancy *solely* on the basis of *someone else's* medical experience? Would she not consult at least one specialist on her *own* medical condition before deciding it wasn't worth the risk? The conclusion that she was at best ambivalent about bearing a child seems irresistible.

This possibility conjures up many people's worst fears about surrogacy: that prosperous women, who do not want to interrupt their careers, will use poor and educationally disadvantaged women to bear their children. I will return shortly to the question of whether this is exploitive. The issue here is psychological: what kind

of mother is Dr. Stern likely to be? If she is unwilling to undergo pregnancy, with its discomforts, inconveniences, and risks, will she be willing to make the considerable sacrifices that good parenting requires? Ms. Whitehead's ability to be a good mother was repeatedly questioned during the trial. She was portrayed as immature, untruthful, hysterical, overly identified with her children, and prone to smothering their independence. Even if all this is true—and I think that Ms. Whitehead's inadequacies were exaggerated—Dr. Stern may not be such a prize either. The choice for Baby M may have been between a highly strung, emotional, overinvolved mother, and a remote, detached, even cold one.[7]

The assessment of Ms. Whitehead's ability to be a good mother was biased by the middle-class prejudices of the judge and of the mental health officials who testified. Ms. Whitehead left school at fifteen, and is not conversant with the latest theories on child rearing: she made the egregious error of giving Sara teddy bears to play with, instead of the more "age-appropriate," expert-approved pans and spoons. She proved to be a total failure at patty-cake. If this is evidence of parental inadequacy, we're all in danger of losing our children.

The Supreme Court felt that Ms. Whitehead was "rather harshly judged" and acknowledged the possibility that the trial court was wrong in its initial award of custody. Nevertheless, it affirmed Judge Sorkow's decision to allow the Sterns to retain custody, as being in Melissa's best interests. George Annas disagrees with the "best interests" approach. He points out that Judge Sorkow awarded temporary custody of Baby M to the Sterns in May 1986, without giving the Whiteheads notice or an opportunity to obtain legal representation. That was a serious wrong and injustice to the Whiteheads. To allow the Sterns to keep the child compounds the original unfairness: "justice requires that reasonable consideration be given to returning Baby M to the permanent custody of the Whiteheads."[8]

But a child is not a possession, to be returned to the rightful owner. It is not fairness to all parties that should determine a child's fate, but what is best for her. As Chief Justice Wilentz rightly stated, "The child's interests come first: we will not punish it for judicial errors, assuming any were made."[9]

Subsequent events have substantiated the claim that giving custody to the Sterns was in Melissa's best interests. After losing custody, Ms. Whitehead, whose husband had undergone a vasectomy, became pregnant by another man. She divorced her husband and married Dean R. Gould last November. These developments indicate that the Whiteheads were not able to offer a stable home, although the argument can be made that their marriage might have survived if not for the strains introduced by the court battle and the loss of Baby M. But even if Judge Sorkow had no reason to prefer the Sterns to the Whiteheads back in May 1986, he was still right to give the Sterns custody in March 1987. To take her away then, at nearly eighteen months of age, from the only parents she had ever known would have been disruptive, cruel, and unfair to her.

Annas' preference for a just solution is premised partly on his belief that there *is* no "best interest" solution to this "tragic custody case." I take it that he means that however custody is resolved, Baby M is the loser. Either way, she will be deprived of one parent. However, a best-interests solution is not a perfect solution. It is simply the solution that is on balance best for the child, given the realities of the situation. Applying this standard, Judge Sorkow was right to give the Sterns custody, and the Supreme Court was right to uphold the decision.

The best-interests argument is based on the assumption that Mr. Stern has at least a *prima facie* claim to Baby M. We certainly would not consider allowing a stranger who kidnapped a baby and managed to elude the police for a year to retain custody on the grounds that he was providing a good home to a child who had known no other parent. However, the Baby M case is not analogous. First, Mr. Stern is Baby M's biological father and, as such, has at least some claim to raise her, which no non-parental kidnapper has. Second, Mary Beth Whitehead *agreed* to give him their baby. Unlike the miller's daughter in *Rumpelstiltskin,* the fairy tale to which the Baby M case is sometimes compared, she was not forced into the agreement. Because both Mary Beth Whitehead and Mr. Stern have *prima facie* claims to Baby M, the decision as to who should raise her should be based on her present best interests. Therefore we must, regretfully, tolerate the injustice to Ms. Whitehead, and try to avoid such problems in the future.

It is unfortunate that the court did not decide the issue of visitation on the same basis as custody. By declaring Ms. Whitehead-Gould the legal mother, and maintaining that she is entitled to visitation, the court has prolonged the fight over Baby M. It is hard to see how this can be in her best interests. This is no ordinary divorce case, where the child has a relation with both parents that it is desirable to maintain. As Mr. Stern said at the start of the court hearing to determine visitation, "Melissa has a right to grow and be happy and not be torn between two parents."[10]

The court's decision was well-meaning but internally inconsistent. Out of concern for the best interests of the child, it granted the Sterns custody. At the same time, by holding Ms. Whitehead-Gould to be the legal mother, with visitation rights, it precluded precisely what is most in Melissa's interest, a resolution of the situation. Further, the decision leaves open the distressing possibility

that a Baby M situation could happen again. Legislative efforts should be directed toward ensuring that this worst-case scenario never occurs.

Should Surrogacy Be Prohibited?

On June 27, 1988, Michigan became the first state to outlaw commercial contracts for women to bear children for others.[11] Yet making a practice illegal does not necessarily make it go away: witness black-market adoption. The legitimate concerns that support a ban on surrogacy might be better served by careful regulation. However, some practices, such as slavery, are ethically unacceptable, regardless of how carefully regulated they are. Let us consider the arguments that surrogacy is intrinsically unacceptable.

Paternalistic Arguments

These arguments against surrogacy take the form of protecting a potential surrogate from a choice she may later regret. As an argument for banning surrogacy, as opposed to providing safeguards to ensure that contracts are freely and knowledgeably undertaken, this is a form of paternalism.

At one time, the characterization of a prohibition as paternalistic was a sufficient reason to reject it. The pendulum has swung back, and many people are willing to accept at least some paternalistic restrictions on freedom. Gerald Dworkin points out that even Mill made one exception to his otherwise absolute rejection of paternalism: he thought that no one should be allowed to sell himself into slavery, because to do so would be to destroy his future autonomy.

This provides a narrow principle to justify some paternalistic interventions. To preserve freedom in the long run, we give up the freedom to make certain choices, those that have results that are "far-reaching, potentially dangerous and irreversible."[12] An example would be a ban on the sale of crack. Virtually everyone who uses crack becomes addicted and, once addicted, a slave to its use. We reasonably and willingly give up our freedom to buy the drug, to protect our ability to make free decisions in the future.

Can a Dworkinian argument be made to rule out surrogacy agreements? Admittedly, the decision to give up a child is permanent, and may have disastrous effects on the surrogate mother. However, many decisions may have long-term, disastrous effects (e.g., postponing childbirth for a career, having an abortion, giving a child up for adoption). Clearly we do not want the state to make decisions for us in all these matters. Dworkin's argument is rightly restricted to paternalistic interferences that protect the individual's autonomy or ability to make decisions in the future. Surrogacy does not involve giving up one's autonomy, which distinguishes it from both the crack and selling-oneself-into-slavery examples. Respect for individual freedom requires us to permit people to make choices they may later regret.

Moral Objections

Four main moral objections to surrogacy were outlined in the Warnock Report.[13]

1) It is inconsistent with human dignity that a woman should use her uterus for financial profit.
2) To deliberately become pregnant with the intention of giving up the child distorts the relationship between mother and child.
3) Surrogacy is degrading because it amounts to child-selling.
4) Since there are some risks attached to pregnancy, no woman ought to be asked to undertake pregnancy for another in order to earn money.[14]

We must all agree that a practice that exploits people or violates human dignity is immoral. However, it is not clear that surrogacy is guilty on either count.

EXPLOITATION

The mere fact that pregnancy is *risky* does not make surrogate agreements exploitive, and therefore morally wrong. People often do risky things for money; why should the line be drawn at undergoing pregnancy? The usual response is to compare surrogacy and kidney-selling. The selling of organs is prohibited because of the potential for coercion and exploitation. But why should kidney-selling be viewed as intrinsically coercive? A possible explanation is that no one would do it, unless driven by poverty. The choice is both forced and dangerous, and hence coercive.[15]

The situation is quite different in the case of the race-car driver or stuntman. We do not think that they are *forced* to perform risky activities for money: they freely choose to do so. Unlike selling one's kidneys, these are activities that we can understand (intellectually, anyway) someone choosing to do. Movie stuntmen, for example, often enjoy their work, and derive satisfaction from doing it well. Of course they "do it for the money," in the sense that they would not do it without compensation; few people are willing to work "for free." The element of coercion is missing, however, because they enjoy the job, despite the risks, and could do something else if they chose.

The same is apparently true of most surrogates.

"They choose the surrogate role primarily because the fee provides a better economic opportunity than alternative occupations, but also because they enjoy being pregnant and the respect and attention that it draws."[16] Some may derive a feeling of self-worth from an act they regard as highly altruistic: providing a couple with a child they could not otherwise have. If these motives are present, it is far from clear that the surrogate is being exploited. Indeed, it seems objectionally paternalistic to insist that she is.

HUMAN DIGNITY

It may be argued that even if womb-leasing is not necessarily exploitive, it should still be rejected as inconsistent with human dignity. But why? As John Harris points out, hair, blood, and other tissue is often donated or sold; what is so special about the uterus?[17]

Human dignity is more plausibly invoked in the strongest argument against surrogacy, namely, that it is the sale of a child. Children are not property, nor can they be bought or sold.[18] It could be argued that surrogacy is wrong because it is analogous to slavery, and so is inconsistent with human dignity.

However, there are important differences between slavery and a surrogate agreement.[19] The child born of a surrogate is not treated cruelly or deprived of freedom or resold; none of the things that make slavery so awful are part of surrogacy. Still, it may be thought that simply putting a market value on a child is wrong. Human life has intrinsic value; it is literally priceless. Arrangements that ignore this violate our deepest notions of the value of human life. It is profoundly disturbing to hear in a television documentary on surrogacy the boyfriend of a surrogate say, quite candidly, "We're in it for the money."

Judge Sorkow accepted the premise that producing a child for money denigrates human dignity, but he denied that this happens in a surrogate agreement. Ms. Whitehead was not paid for the surrender of the child to the father: she was paid for her willingness to be impregnated and carry Mr. Stern's child to term. The child, once born, is his biological child. "He cannot purchase what is already his."[20]

This is misleading, and not merely because Baby M is as much Ms. Whitehead's child as Mr. Stern's. It is misleading because it glosses over the fact that the surrender of the child was part—indeed, the whole point—of the agreement. If the surrogate were paid merely for being willing to be impregnated and carrying the child to term, then she would fulfill the contract upon giving birth. She could take the money *and* the child. Mr. Stern did not agree to pay Ms. Whitehead merely to *have* his child, but to provide him with a child. The New Jersey Supreme Court held that this violated New Jersey's laws prohibiting the payment or acceptance of money in connection with adoption.

One way to remove the taint of baby-selling would be to limit payment to medical expenses associated with the birth or incurred by the surrogate during pregnancy (as is allowed in many jurisdictions, including New Jersey, in ordinary adoptions).[21] Surrogacy could be seen, not as baby-selling, but as a form of adoption. Nowhere did the Supreme Court find any legal prohibition against surrogacy when there is no payment, and when the surrogate has the right to change her mind and keep the child. However, this solution effectively prohibits surrogacy, since few women would become surrogates solely for self-fulfillment or reasons of altruism.

The question, then, is whether we can reconcile paying the surrogate, beyond her medical expenses, with the idea of surrogacy as prenatal adoption. We can do this by separating the terms of the agreement, which include surrendering the infant at birth to the biological father, from the justification for payment. The payment should be seen as compensation for the risks, sacrifice, and discomfort the surrogate undergoes during pregnancy. This means that if, through no fault on the part of the surrogate, the baby is stillborn, she should still be paid in full, since she has kept her part of the bargain. (By contrast, in the Stern–Whitehead agreement, Ms. Whitehead was to receive only $1,000 for a stillbirth).[22] If, on the other hand, the surrogate changes her mind and decides to keep the child, she would break the agreement, and would not be entitled to any fee or to compensation for expenses incurred during pregnancy.

The Right of Privacy

Most commentators who invoke the right of privacy do so in support of surrogacy.[23] However, George Annas makes the novel argument that the right to rear a child you have borne is also a privacy right, which cannot be prospectively waived. He says:

> [Judge Sorkow] grudgingly concedes that [Ms. Whitehead] could not prospectively give up her right to have an abortion during pregnancy. . . . This would be an intolerable restriction on her liberty and under *Roe v. Wade,* the state has no constitutional authority to enforce a contract that prohibits her from terminating her pregnancy.

But why isn't the same logic applicable to the right to rear a child you have given birth to? Her constitutional rights to rear the child she has given birth to are even stronger since they involve even more intimately, and over a lifetime, her privacy rights to reproduce and rear a child in a family setting.[24]

Absent a compelling state interest (such as protecting

a child from unfit parents), it certainly would be an intolerable invasion of privacy for the state to take children from their parents. But Baby M has two parents, both of whom now want her. It is not clear why only people who can give birth (i.e., women) should enjoy the right to rear their children.

Moreover, we do allow women to give their children up for adoption after birth. The state enforces those agreements even if the natural mother, after the prescribed waiting period, changes her mind. Why should the right to rear a child be unwaivable before, but not after, birth? Why should the state have the constitutional authority to uphold postnatal, but not prenatal, adoption agreements? It is not clear why birth should affect the waivability of this right or have the constitutional significance that Annas attributes to it.

Nevertheless, there are sound moral and policy, if not constitutional, reasons to provide a postnatal waiting period in surrogate agreements. As the Baby M case makes painfully clear, the surrogate may underestimate the bond created by gestation and the emotional trauma caused by relinquishing the baby. Compassion requires that we acknowledge these findings, and not deprive a woman of the baby she has carried because, before conception, she underestimated the strength of her feelings for it. Providing a waiting period, as in ordinary postnatal adoptions, will help protect women from making irrevocable mistakes, without banning the practice.

Some may object that this gives too little protection to the prospective adoptive parents. They cannot be sure that the baby is theirs until the waiting period is over. While this is hard on them, a similar burden is placed on other adoptive parents. If the absence of a guarantee serves to discourage people from entering surrogacy agreements, that is not necessarily a bad thing, given all the risks inherent in such contracts. In addition, this requirement would make stricter screening and counseling of surrogates essential, a desirable side-effect.

Harm to Others

Paternalistic and moral objections to surrogacy do not seem to justify an outright ban. What about the effect on the offspring of such contracts? We do not yet have solid data on the effects of being a "surrogate child." Any claim that surrogacy creates psychological problems in the children is purely speculative. But what if we did discover that such children have deep feelings of worthlessness from learning that their natural mothers deliberately created them with the intention of giving them away? Might we ban surrogacy as posing an unacceptable risk of psychological harm to the resulting children?

Feelings of worthlessness are harmful. They can prevent people from living happy, fulfilling lives. However, a surrogate child, even one whose life is miserable because of these feelings, cannot claim to have been harmed by the surrogate agreement. Without the agreement, the child would never have existed. Unless she is willing to say that her life is not worth living because of these feelings, that she would be better off never having been born, she cannot claim to have been harmed by being born of a surrogate mother.[25]

Elsewhere I have argued that children can be *wronged* by being brought into existence, even if they are not, strictly speaking, *harmed*.[26] They are wronged if they are deprived of the minimally decent existence to which all citizens are entitled. We owe it to our children to see that they are not born with such serious impairments that their most basic interests will be doomed in advance. If being born to a surrogate is a handicap of this magnitude, comparable to being born blind or deaf or severely mentally retarded, then surrogacy can be seen as wronging the offspring. This would be a strong reason against permitting such contracts. However, it does not seem likely. Probably the problems arising from surrogacy will be like those faced by adopted children and children whose parents divorce. Such problems are not trivial, but neither are they so serious that the child's very existence can be seen as wrongful.

If surrogate children are neither harmed nor wronged by surrogacy, it may seem that the argument for banning surrogacy on grounds of its harmfulness to the offspring evaporates. After all, if the children themselves have no cause for complaint, how can anyone else claim to reject it on their behalf? Yet it seems extremely counter-intuitive to suggest that the risk of emotional damage to the children born of such arrangements is not even relevant to our deliberations. It seems quite reasonable and proper—even morally obligatory—for policy-makers to think about the possible detrimental effects of new reproductive technologies, and to reject those likely to create physically or emotionally damaged people. The explanation for this must involve the idea that it is wrong to bring people into the world in a harmful condition, even if they are not, strictly speaking, harmed by having been brought into existence.[27] Should evidence emerge that surrogacy produces children with serious psychological problems, that would be a strong reason for banning the practice.

There is some evidence on the effect of surrogacy on the other children of the surrogate mother. One woman reported that her daughter, now seventeen, who was eleven at the time of the surrogate birth, "is still having problems with what I did, and as a result she is still angry with me." She explains: "Nobody told me that a child could bond with a baby while you're still pregnant. I didn't realize then that all the times she listened to his heartbeat and felt his legs kick that she was becoming attached to him."[28]

A less sentimental explanation is possible. It seems likely that her daughter, seeing one child given away, was fearful that the same might be done to her. We can expect anxiety and resentment on the part of children whose mothers give away a brother or sister. The psychological harm to these children is clearly relevant to a determination of whether surrogacy is contrary to public policy. At the same time, it should be remembered that many things, including divorce, remarriage, and even moving to a new neighborhood, create anxiety and resentment in children. We should not use the effect on children as an excuse for banning a practice we find bizarre or offensive.

Conclusion

There are many reasons to be extremely cautious of surrogacy. I cannot imagine becoming a surrogate, nor would I advise anyone else to enter into a contract so fraught with peril. But the fact that a practice is risky, foolish, or even morally distasteful is not sufficient reason to outlaw it. It would be better for the state to regulate the practice, and minimize the potential for harm, without infringing on the liberty of citizens.

References

1. See, for example, "Surrogate Motherhood Agreements: Contemporary Legal Aspects of a Biblical Notion," *University of Richmond Law Review*, 16 (1982): 470; "Surrogate Mothers: The Legal Issues," *American Journal of Law & Medicine*, 7 (1981): 338, and Angela Holder, *Legal Issues in Pediatrics and Adolescent Medicine* (New Haven: Yale University Press, 1985), 8: "Where a surrogate mother decides that she does not want to give the baby up for adoption, as has already happened, *it is clear that no court will enforce a contract entered into before the child was born* in which she agreed to surrender her baby for adoption." Emphasis added.

2. Had the Sterns been informed of the psychologist's concerns as to Ms. Whitehead's suitability to be a surrogate, they might have ended the arrangement, costing the Infertility Center its fee. As Chief Justice Wilentz said, "It is apparent that the profit motive got the better of the Infertility Center." In the matter of Baby M, Supreme Court of New Jersey, A-39, at 45.

3. "[W]e think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. . . . We . . . cannot conceive of any other case where a perfectly fit mother was expected to surrender her newly born infant, perhaps forever, and was then told she was a bad mother because she did not." Id.: 79.

4. "Father Recalls Surrogate Was 'Perfect,' " *New York Times*, Jan. 6, 1987, B2.

5. Id.

6. In the matter of Baby M, supra note 2, at 8.

7. This possibility was suggested to me by Susan Vermazen.

8. George Annas, "Baby M: Babies (and Justice) for Sale," *Hastings Center Report*, 17, no. 3 (1987): 15.

9. In the matter of Baby M, supra note 2, at 75.

10. "Anger and Anguish at Baby M Visitation Hearing," *New York Times*, March 29, 1988, 17.

11. *New York Times*, June 28, 1988, A20.

12. Gerald Dworkin, "Paternalism," in R.A. Wasserstrom, ed., *Morality and the Law* (Belmont, Cal.: Wadsworth, 1971); reprinted in J. Feinberg and H. Gross, eds., *Philosophy of Law*, 3d ed. (Belmont, Cal.: Wadsworth, 1986), 265.

13. M. Warnock, chair, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: Her Majesty's Stationery Office, 1984).

14. As summarized in J. Harris, *The Value of Life* (London: Routledge & Kegan Paul, 1985), 142.

15. For an argument that kidney-selling need not be coercive, see B.A. Brody and H.T. Engelhardt, Jr., *Bioethics: Readings and Cases* (Englewood Cliffs, N.J.: Prentice-Hall, 1987), 331.

16. John Robertson, "Surrogate Mothers: Not So Novel after All," *Hastings Center Report*, 13, no. 5 (1983): 29; citing P. Parker, "Surrogate Mother's Motivations: Initial Findings," *American Journal of Psychiatry*, 140 (1983): 1.

17. Harris, supra note 14, at 144.

18. Several authors note that it is both illegal and contrary to public policy to buy or sell children, and therefore contracts that contemplate this are unenforceable. See B. Cohen, "Surrogate Mothers: Whose Baby Is It?," *American Journal of Law & Medicine*, 10 (1984): 253; "Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion," *University of Richmond Law Review*, 16 (1982): 469.

19. Robertson makes a similar point, supra note 16, at 33.

20. In re Baby "M," 217 N.J. Super. 372, 525 A.2d 1157 (1987).

21. Cohen, supra note 18. See also Angela Holder, "Surrogate Motherhood: Babies for Fun and Profit," *Law, Medicine & Health Care*, 12 (1984): 115.

22. Annas, supra note 8, at 14.

23. See, for example, Robertson, supra note 16, at 32; and S.R. Gersz, "The Contract in Surrogate Motherhood: A Review of the Issues," *Law, Medicine & Health Care*, 12 (1984): 107.

24. Annas, supra note 8.

25. For discussion of these issues, see D. Parfit, "On Doing the Best for Our Children," in M.D. Bayles, ed., *Ethics and Population* (Cambridge, Mass.: Schenkman, 1976); M.D. Bayles, "Harm to the Unconceived," *Philosophy & Public Affairs*, 5 (1976): 292; J. Glover, *Causing Death and Saving Lives* (Harmondsworth, Eng.: Penguin, 1977), 67; John Robertson, "In Vitro Conception and Harm to the Unborn," *Hastings Center Report*, 8 (1978): 13; J. Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), 95.

26. Bonnie Steinbock, "The Logical Case for 'Wrongful Life'," *Hastings Center Report*, 16, no. 2 (1986): 15.

27. For the distinction between being harmed and being in a harmful state, see Feinberg, supra note 25, at 99.

28. "Baby M Case Stirs Feelings of Surrogate Mothers," *New York Times*, March 2, 1987, B1.