The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract

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The process of pregnancy and childbirth often follows a "typical" course, based on natural biological functions. But in our technological age, such functions no longer need to be relied on. Women who do not wish to physically give birth or are unable to do so can have an embryo implanted in another woman (a "surrogate") who can gestate and give birth to the child. This process is called "surrogacy." There are two types of surrogacy. When the woman carrying the fetus is the genetic mother, the process is called "traditional surrogacy." When the woman is not the genetic mother of the fetus—often because it is the genetic product of the couple that initiated the implantation process (the "intended parents")—the process is called "gestational surrogacy."

While surrogacy allows numerous individuals and couples to parent children in situations that might not otherwise be possible, these developments have caused scholars and courts substantial concern.[1] Surrogacy law is an area unresolved in many places. Some

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1. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1932 (1987) (addressing concerns of commodification of women and children in surrogacy arrangements); Mary Lynne Birck, *Modern Reproductive Technology and Motherhood: The Search for Common Ground and the Recognition of Difference*, 62 U. CIN. L. REV. 1623, 1648 (1994) (arguing that the experience of pregnancy makes gestation unique and different from artificial insemination cases); *In re* Baby M., 109 N.J. 396, 421-22 (1988) (holding that surrogacy arrangements are void as against public policy); Kass v. Kass, 91 N.Y.2d 554, 561-62 (1998) (holding that when a couple divorces, they are bound to the terms of a contract in determining the disposition of pre-zygotes frozen for in vitro fertilization).

states have banned it;[2] other states have strictly regulated it.[3]

This Note will examine the gestational surrogacy process and its relationship to the contracting parties' rights. Specifically, this Note proposes that reproductive technologies require recognizing the Constitutional rights of a gestator as distinct from those of a "mother." The concept of motherhood is often reworked when dealing with reproductive technologies, in order to recognize the distinction between the woman who gestates a fetus and the woman who intends to raise the child. Likewise, the rights associated with pregnancy and parenting should also be divided this way. Failure to do this shifts the boundaries of appropriate behavior, causing intended parents to have flawed beliefs about their rights to exercise control over the gestational surrogates with whom they contract.

Although many issues that arise in gestational surrogacy also apply to traditional surrogacy arrangements, gestational surrogacy is unique because the fetus is genetically unrelated to the surrogate, and thus it may be easier to separate "motherhood" from gestation. On the other hand, it may be more difficult in the traditional surrogacy arrangement, when the gestator is the genetic mother. The most prominent example of this is the famous *Baby M.* case, where a New Jersey court invalidated a traditional surrogacy arrangement as a baby-selling contract.[4]

Where courts or legislatures have allowed gestational surrogacy contracts, however, surrogates have often been seen as providers of a "service," rather than baby-sellers. As such, the individual rights closely associated with pregnancy—and implicitly in our society, "mothers"—such as the right to an abortion or the right to make medical decisions about one's own body, are not usually acknowledged as the explicit rights of a *gestator* specifically. So while we do not usually question a mother's right to make decisions about her medical care, the rule is blurred when the mother is a contracting

2. *See, e.g.,* ARIZ. REV. STAT. § 25-218 (2000); LA. REV. STAT. ANN. 9:2713 (West 2000) (prohibiting surrogacy contracts for consideration) MICH. STAT. ANN. § 25.248 (159) (Michie 2000); N.D. CENT. CODE §14-18-05 (2000); N.Y. DOM. REL. § 122 (Consol. 2000).

3. *See, e.g.,* NEV. REV. STAT. ANN. 126.045 (Michie 2000) (Parentage of the child must be stated in the contract and compensation is prohibited for other than "medical and necessary living expenses related to the birth of the child."); WASH. REV. CODE §§ 25.25.210-26.26.260 (2001) (disallowing surrogacy arrangements for compensation or in situations where the surrogate is mentally retarded, has a mental illness or developmental disability, or is a minor).

4. *See In re* Baby M., 109 N.J. 396 (1988).

party who only observes the process of gestation, rather than being an active participant in it.

This recognition of the role of the gestator, as separate from that of the intended mother, is necessary in our society and should be explicitly acknowledged in the gestational surrogacy arrangement. To understand this concept, I suggest that gestational surrogacy arrangements should be conceptualized as a process with three phases: the creation of procreative intent that occurs when intended parents contract for a surrogate's services, the decision-making phase of gestation, and parenthood. These phases give rise to different concerns: the first phase necessitates consideration of contract formation and rights, the second phase requires reflection on bodily integrity and property rights, and the final phase merits consideration of parental rights. I propose that this three-part framework helps delineate the relevant legal principles that apply at each phase, rather than taking a more aggregated view that allows courts to reach their desired results without giving full weight to the rights of the gestational surrogate—for example, by justifying the intended parents' right to control a gestational surrogate's medical decisions about the fetus because they are the parents of the resulting child.

Thus, this Note will focus on the crucial second phase of the gestational surrogacy arrangement, which is often undervalued or ignored in discussions about how to treat surrogacy contracts and violation of those contracts. Part I will give a brief summary of the current state of surrogacy law in the nation, paying particular attention to California, which is considered a "favorable legal forum" for surrogacy contracts.[5] It will then examine the Florida statute on surrogacy and the Uniform Status of Children of Assisted Conception Act, both of which provide statutory models for states seeking to regulate surrogacy.[6] Part II will address the surrogate's rights, including rights to medical care and procreation. Part III will address contract and property rights that become relevant when the contract is breached. Finally, Part IV will address post-birth rights, focusing on parental rights, which sometimes affect the perceived degree of control intended parents are entitled to during gestation.

This Note then proposes that gestational surrogacy arrangements must be carefully and thoroughly addressed by state legislatures in order to ensure the rights of all parties are fully understood and

5. Thomas M. Pinkerton, Esq., *Surrogacy and Egg Donation Law in California,* at http://www.surrogacy.com/legals/article/calaw.html.

6. FLA. STAT. ANN. § 742.15 (West 2000); 9B U.L.A. 152 (Supp. 1994).

respected. Failure to legislate not only risks compromising constitutional protections, usually for surrogates rather than intended parents, but also creates unnecessary instability for children born from gestational surrogacy arrangements. Therefore, legislators should help parties have realistic expectations that will help prevent or expedite litigation.

I. Surrogacy Law in the United States

Many states have dealt with surrogacy directly.[7] However, many other states remain devoid of statutory guidelines. Even if statutes were to declare surrogacy contracts void, as is the case in many states, at least clearly defined principles would allow individuals to know what to expect in surrogacy contracts, informing their decisions about the possible risks and benefits of entering such arrangements. As Lori Andrews has recognized:

> Currently, the biggest risk to children in the surrogacy context comes not from the actions of either set of parents but from the uncertain status of the law, which . . . can lead to the child being subjected to years of litigation to determine who will be considered to be his or her legal parents.[8]

Thus legislation is needed not only for the benefit of the contracting parties, but also for the child that is born as a result of the contract.

A. Legislative Silence: The Failure of Unregulated Surrogacy Arrangements in California

California is one state without legislation in the arena of surrogacy law. California's silence has been particularly poignant because of a 1993 case that allowed enforcement of a surrogacy contract under a liberal "intent-based" analysis that favors couples contracting for the services of a surrogate.[9] The intent-based analysis determines that the parties with intent to parent at the formation of the contract—the "intended parents"—are the parents under California law.[10] While the intent test created a resolution in the *Johnson* case, subsequent cases suggest that further guidance is needed to interpret other possible variations on surrogacy

7. *See supra* notes 2-3.

8. Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2358 (1995).

9. Johnson v. Calvert, 5 Cal. 4th 84, 93 (1993).

10. *Id.*

arrangements, because it is evident that questions about surrogacy remain, despite the guidance offered in *Johnson*.[11]

In January 1990, Mark and Crispina Calvert sought a gestational surrogate to carry a fetus of their genetic makeup.[12] Hearing about their situation from a co-worker, Anna Johnson volunteered to act as a gestational surrogate for the couple in exchange for an insurance policy and several monetary payments.[13] In return, Johnson agreed to relinquish her parental rights.[14]

Within a month of implantation, Johnson was pregnant.[15] However, relations between the Calverts and Johnson deteriorated when Mr. Calvert discovered Johnson had previously suffered several stillbirths and miscarriages.[16] Johnson felt the Calverts had not done enough to obtain the insurance policy, and felt abandoned during an onset of premature labor in June.[17] Distressed at what she perceived as their lack of concern together with her inability to work, she worried that she and her daughter were going to be evicted, and sent the Calverts a distraught letter.[18] In it, she threatened that she would not give them the child unless they "helped her out."[19]

In response, the Calverts filed a lawsuit, seeking a declaration that they were the parents of the child.[20] Neither party disputed that

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11. *In re* Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998); *In re* Marriage of Moschetta, 25 Cal. App. 4th 1218 (1994).

12. *Johnson*, 5 Cal. 4th. at 87. Crispina Calvert was unable to carry a child because of a previous medical problem that had resulted in a hysterectomy. However, she was still able to produce eggs. *Id.*

13. *Id.* Ms. Johnson was to receive $10,000 in a series of installments and a $200,000 insurance policy on her own life. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 87-88.

18. Anna J. v. Mark C., 12 Cal. App. 4th 977, 984 (1991) (opinion below).

19. *Id.* In her letter, Johnson explained, "[D]ue to the complications of this pregnancy, I am unable to return to work until the delivery of this baby so my income is limited .... I don't think you'd want your child jeopardized by living out on the street. I have looked out for this child's well being thus far, is it asking too much to look after ours? ... "[Y]ou have not been very supportive mentally the entire pregnancy & you've showed a lack of interest unless it came to an ultrasound. I am asking you for help .... But see, this situation can go two ways. One, you can pay me the entire sum early so I won't have to live in the streets, or two you can forget about helping me but, calling it a breach of contract & not get the baby! I don't want it to get this nasty, not coming this far, but you'd want some help too, if you had no where to go & have to worry about not only yourself but your own child & the child of someone else!!!" *Id.*

20. *Johnson*, 5 Cal. 4th at 88.

Mark Calvert was the child's genetic father.[21] Ensuing litigation determined that both Crispina Calvert, because she was the genetic mother, and Anna Johnson, as the woman who gave birth to the child, met the California statutory definition of "natural mother."[22]

In "breaking the tie" of motherhood, the court applied the Uniform Parentage Act, which was not designed to deal with surrogacy arrangements, but was created to eliminate the legal distinction between legitimate and illegitimate children.[23] In situations where the gestator (Anna Johnson) and the genetic contributor (Crispina Calvert) both met the statutory definition of "mother," the California Supreme Court reasoned, "[S]he who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[24] As a result, the court held Crispina Calvert as the mother of the child.[25] The contract previously characterized as one to terminate Anna Johnson's parental rights was re-characterized by the court as a contract for "services."[26]

In its decision, the court emphasized the Calverts' procreative right to have a child and their parental right to the companionship of that child.[27] Because Anna Johnson was not the "natural mother" of

21. *Id.*

22. *Id.* at 112. The court further reasoned that the legislation contemplated that a child would only have one "natural mother." *Id.*

23. *Id.* at 88.

24. *Id.* at 93.

25. *Id.* at 99.

26. *Id.* at 96. While the facts of the case indicate that Anna Johnson was giving up her parental rights in the contract, in its decision the court noted, "The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child." *Id.* at 96.

27. *Id.* at 100. The lower court was even more explicit in establishing the Calverts' parental rights. *See id.* at 95 ("To hold that Anna has a liberty interest in the relationship with the child is to diminish the liberty interest of Mark and Crispina in their relationship with the child. Given that Mark and Crispina are the "natural parents," due process can hardly be used to deprive them of the traditional parental relationship which they might otherwise be able to enjoy."). The right to raise one's child is grounded in the Fourteenth Amendment's Due Process clause and has been expounded upon by the Supreme Court. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding Fourteenth Amendment guarantees the right to "establish a home and bring up children."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (holding that a law which requires children to attend public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that the parental right to children one has "sired and raised . . . undeniably warrants deference and, absent a powerful countervailing interest, protection.").

the child, her constitutional rights were not implicated.[28] Thus, Anna Johnson had no procreative or parental rights. The matter seemed logically settled.

However, the problematic nature of the *Johnson* court's holding can be seen if other possibilities are contemplated. Consider the two alternatives below:

Anna Johnson faces the same situation: her relationship with the Calverts has deteriorated, and she is resentful that she must care not only for her own child, but another couple's.[29] Unable to work and concerned about her own child, Johnson informs the Calverts that she is going to have an abortion.[30]

Anna Johnson undergoes testing that reveals that the fetus is physically or mentally impaired.[31] Hearing this, the Calverts order Anna to have an abortion or take responsibility for the child that will be born—they no longer wish to "parent."

The *Johnson* Court addressed the immediate situation before them, and suggested that further legislative guidance was needed.[32] As the *Johnson* court seemed to recognize, parties continue to remain "in the dark" about their general rights and duties, and questions like those addressed above remain unanswered. The Court's decision in *Johnson* did not answer these questions about the general structure and validity of surrogacy contracts during performance, and the California legislature's subsequent failure to address the issue means courts that apply *Johnson* in gestational surrogacy arrangements face

28. *See Johnson*, 5 Cal. 4th at 99.

29. Anna J. v. Mark C., 12 Cal. App. 4th 977, 984 (1991) (opinion below).

30. The appellate court that reviewed the *Johnson* case asked a similar question, but they chose not to answer it as being an issue better left to the legislature. *See id.* at 997-98. However, the subsequent California Supreme Court case noted that abortion was specifically written into the contract. *Johnson*, 5 Cal. 4th at 96. The contract also recognized, however, that "[a]ll parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable." *Id.* at 96-97. Thus the court did not elect to address this issue. *Id.* at 97.

31. Such a scenario was addressed in a tort action where an intended father's sperm arguably infected the surrogate mother with a disease that caused the child to be born with hearing loss, mental retardation, and severe neuro-muscular disorders. Stiver v. Parker, 975 F.2d 261, 263 (6th Cir. 1992). The intended father disclaimed responsibility, but the court never ruled on the issue of parentage because it turned out that the child was genetically related to the surrogate's husband. *Id.* at 269. The contract in that case likewise sought to give the intended father control of the surrogate's abortion right, allowing him to determine if the pregnancy should be terminated in the event of genetic or congenital malformation. *Id.* at 265.

32. *See Johnson*, 5 Cal. 4th at 97.

unanticipated and unanswered problems.

Some states have adopted the logic of the *Johnson* court's test.[33] The California legislature has not done so, despite numerous pleas for legislation from the lower courts.[34] Without such legislation, *Johnson*'s limitations are evident. The intent-based test proposed in *Johnson*[35] does not factor in other rights that might be implicated if one is willing to look carefully at the gestation period that is the reality of all successful pregnancies. Because the intent test only focuses on the pre-gestation period when initial intent is formed and the post-gestation period *after* the child is born, it does not deal with the decisional autonomy frequently addressed by the Supreme Court in issues of privacy, procreation, and childrearing.[36] Indeed, the dispute in the *Johnson* case occurred within this very important gestational period,[37] when the respective rights of the parties were muted, overlapping, and in direct conflict.

B. Legislative Action: Florida's Regulation of Surrogacy Contracts

Other states have gone further than California to either explicitly reject surrogacy agreements as void against public policy,[38] or to allow surrogacy contracts with limitations.[39] For example, the Florida legislature has taken an approach far different from the *Johnson*

33. N.H. REV. STAT. ANN. §168-B:1 (2000) ("'Intended parents' . . . means persons who are married to each other, and who, complying with the requirements of this chapter, enter into a surrogacy contract with a surrogate by which they are to become the parents of the resulting child."). The Virginia statute is defined equally broadly to include traditional surrogacy contracts: "'Intended parents' means a man and a woman, married to each other, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parents, the surrogate, and the child." VA. CODE ANN. § 20-156 (Michie 2000).

34. *See infra* note 52; *Anna J.*, 12 Cal. App. 4th at 998 ("We join our colleagues on the trial bench who, in delivering this decision, underscored the urgent need for (*legislative*) action. In particular, we hope the Legislature will tackle the difficult questions attendant to surrogacy agreements so that both parents and children can face the future with certainty over their legal status."). Note that the California Legislature has attempted to legislate in the arena on several occassions, even prior to the *Johnson* case. S.B. 937, Reg. Sess. (Cal. 1991-92) (vetoed by the Governor); S.B. 1160, Reg. Sess. (Cal. 1993-94) (failed in the Senate); Assemb. B. 799 Reg. Sess. (Cal. 2001-02) (committee hearing cancelled at request of author).

35. *Johnson*, 5 Cal. 4th at 93.

36. Roe v. Wade, 410 U.S. 113 (1973); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

37. *Johnson*, 5 Cal. 4th at 88.

38. *See supra* note 2.

39. *See supra* note 3.

court.[40] It specifically requires that in order to enter into a gestational surrogacy contract, the "commissioning mother"[41] must be unable to carry a child to term, face physical risk, or her pregnancy may cause physical risk to the fetus.[42] This reduces, at the outset, issues of commodification that are often raised in connection with surrogacy arrangements, because the number of situations in which gestation is appropriate is pre-defined to eliminate surrogacy when more traditional gestation is possible. Payments to a surrogate are limited,[43] assumedly to prevent this commodification.

The statute attempts to define other elements of the surrogacy contract as well. It specifically notes that the surrogate is "the sole source of consent with respect to clinical intervention and management of the pregnancy,"[44] which eliminates concerns about attempted coercion or contracting her abortion rights. Further, "the commissioning couple agrees to accept custody of and to assume full parental rights and responsibilities for the child immediately upon the child's birth, regardless of any impairment of the child."[45] Such language, sadly, has proven necessary by caselaw. In the 1992 case *Stiver v. Parker*, a traditional surrogate gave birth to a child with physical and mental defects due to contamination by the intended father's sperm.[46] The intended parents did not want to assume custody of the child.[47] Although it turned out that the child was actually the genetic son of the surrogate's husband,[48] the situation suggests it is not always the surrogate who changes her mind.

The Florida statute would solve the problem addressed in *Stiver*, because the commissioning couple would have to parent the child under any circumstances. Of course, this may raise concerns about the "best interest of the child."[49] For the majority of cases, however,

40. *See* FLA. STAT. ANN. § 742.15 (West 2000).

41. *Id.* at § 742.15(2).

42. *Id.* at § 742.15(2)(a)-(c).

43. *Id.* at § 742.15(4)("As part of the contract, the commissioning couple may agree to pay only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods.").

44. *Id.* at § 742.15(3)(a).

45. *Id.* at § 742.15(3)(d).

46. 975 F.2d 261, 263-64 (6th Cir. 1992).

47. *Id.* at 269.

48. *Id.* at 263.

49. *See, e.g., id.* at 269. In *Stiver*, the court expressed concern about child abuse when an intended parent refuses to take custody of a child due to "changed circumstances;" in

the statute would clearly define the rights of the parties prior to the impregnation of the surrogate, allowing intended parents to make informed decisions before contracting for a surrogate's services.[50]

The Florida statute is a useful model, though it is not without potential problems. Unlike the *Johnson* court, the Florida statute assumes the surrogate is the mother in the surrogacy contract, stating, "[T]he gestational surrogate agrees to relinquish any parental rights upon the child's birth."[51] The possibility then arises that a court could invalidate the agreement as a "baby selling contract" and a *Baby M.* scenario could exist.[52] Even if a court did not determine that an agreement terminating parental rights was void, it could raise visitation and custody issues if the surrogate were to refuse to surrender parental rights.[53] By refusing to define the surrogate as the "mother," the *Johnson* court avoided another path that is potentially equally problematic.

Nonetheless, the Florida statute is far preferable to none at all. At very least, it can provide intending parents and potential surrogates with general guidelines about how to pattern their behavior and what outcome to anticipate. In so doing, it can avoid many of the procreative, parental, contract, and property pitfalls that

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this case due to the mental and physical disabilities of the child. *Id.* Conversely, concern should also arise when an intended parent is forced to take custody of a child he or she does not want.

50. Such an agreement might be attacked on the grounds that it will discourage surrogacy. But that begs the question—why should surrogacy arrangements be encouraged? Even assuming surrogacy arrangements do not exploit women or commodify children, as is often suggested, does this make them inherently *good*? *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 28 (1990).

51. FLA. STAT. ANN. § 742.15(3)(c) (West 2000). This situation could be complicated when a gestational surrogate is implanted by an embryo not related to either member of the "commissioning couple." "When at least one member of the commissioning couple is the genetic parent of the child, the commissioning couple shall be presumed to be the natural parents of the child." § 742.16(7). Nonetheless, the statute requires the surrogate to terminate her parental rights. § 742.15(3)(c). Speculatively, a "natural parent" could still lose under *Michael H.* analysis. Michael H. v. Gerald D., 491 U.S. 110, 129-130 (1989) (holding that a natural father was not entitled to constitutional protection to his relationship with his child, who was born as a result of an adulterous affair).

52. In this highly publicized case, a traditional surrogate changed her mind upon birth of the child. *In re* Baby M., 109 N.J. 396, 414-15 (1988). The court held that the exchange of money for a surrogacy arrangement constituted baby selling and thus was void. *See id.* at 421-422.

53. *See* Troxel v. Granville, 530 U.S. 57, 72-73 (2000) (holding that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions" by forcing a mother to allow her children to have visitation with their grandparents). Potentially, a surrogate mother could attempt to limit an intended mother's visitation this way.

loom behind the *Johnson* decision. The California Legislature would be wise to take another look at *Johnson* and to consider the issues it both addresses and fails to address. In so doing, it can strive to fashion a statutory model that will respect the constitutional rights of the parties and provide stability for the children that result from modern reproductive technologies.

C. A Statutory Model: The Uniform Status of Children of Assisted Conception Act

One comprehensive statutory model for surrogacy arrangements is the Uniform Status of Children of Assisted Conception Act.[54] The act provides for two alternatives: under Alternative A, surrogacy arrangements are allowed, but well-regulated. Under Alternative B, surrogacy arrangements are void and the surrogate is the resulting child's mother.[55]

Alternative A, which does not distinguish between traditional and gestational surrogates, requires several prerequisites to protect the surrogate, both by ensuring her mental and physical ability to participate in the surrogacy process and by ensuring that the intended parents are fully informed about the process. These prerequisites include the following: the intended mother must be unable to bear a child or to do so would cause unreasonable risk, a home study must be performed on both the intended parents and the surrogate, the surrogate must have had at least one prior pregnancy and delivery, and all parties must have received counseling.[56] In addition to these prerequisites, the surrogate can terminate the agreement within 180 days after the last insemination by filing a written notice with the court.[57] Finally, the statute specifically provides that a surrogacy agreement "may not limit the right of the surrogate to make decisions regarding her health care or that of the embryo or fetus."[58]

Thus, the Uniform Status of Children of Assisted Conception Act is probably the most comprehensive form of protection for a gestational surrogate. It specifically protects her rights to control medical care, and it implicitly allows her the opportunity to

54. 9B U.L.A. 152 (Supp. 1994). Note that the Act has since been replaced by the Uniform Parentage Act, which is significantly less protective. *See* Unif. Parentage Act, 9B U.L.A. 287 (Supp. 2000).

55. 9B U.L.A. 152 (Supp. 1994).

56. *Id.*

57. *Id.*

58. *Id.*

reconsider her decision even after pregnancy.[59] At the same time, intended parents are protected: the requirement that the surrogate has given birth previously not only suggests her physical ability to bear a child, it also implies that she can anticipate the experience of gestation and, at contract formation at least, that she believes she will be capable of performing that function without assuming motherhood. Although not perfect, the Act deals most realistically with surrogacy contracts. Certainly it can and should be a model for states attempting to formulate appropriate legislation.

II. The Surrogate's Individual Rights

When fashioning legislation, it is important that the bodily integrity rights of the surrogate are appropriately acknowledged. This will prevent attempts at coercive behavior in surrogacy arrangements, as in a recent situation in California, where the intended parents attempted to force a surrogate to have an abortion.[60] Surrogacy contracts necessarily involve the surrogate's right to bodily integrity. The concept is well founded in law: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[61]

Gestational surrogacy contracts raise issues of fundamental constitutional rights to privacy[62] because the woman who intends to parent the resulting child does not gestate the fetus. There are, therefore, questions about what rights vest in the intended mother and what rights vest in the gestator.[63] Issues of controlling the medical care of the surrogate, the health of the fetus, and the termination rights of the surrogate are different than they would be if the intended mother was also the gestator. While an intended mother does have valid concerns about contract enforcement and her parental rights, these concerns must not control the gestational

59. Notably, however, this decision must occur within the first six months of any pregnancy; otherwise, the intended parents are considered the "parents." *See id.*

60. Eliza O'Driscoll, *Parents: What's Yours is Mine: In California They are Commonplace, but Here in Britain Surrogate Mothers Make Us Queasy. So is it Time for a Change in Attitude?*, THE GUARDIAN (LONDON), Oct. 3, 2001, at 8.

61. Union Pacific v. Botsford, 141 U.S. 250, 251 (1891).

62. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (the right to procreate is "one of the basic civil rights of man [sic]"), Griswold v. Connecticut, 381 U.S. 479 (1965), Roe v. Wade, 410 U.S. 113 (1973).

63. *See* Johnson v. Calvert, 5 Cal. 4th 84, 87 (1993).

process.

A. The Right to Control of Medical Care

The right to control one's medical care is not a concept unique to pregnancy. The issues may be somewhat different when pregnancy becomes part of the discussion, however, because the potential life engenders some degree of social concern. For example, we may feel comfortable when we discuss a pregnant woman's right to make decisions about life-threatening medical procedures; we may feel less comfortable when we discuss her ingestion of substances that could harm a fetus, such as heroin or cocaine. But in both cases, the rights of the surrogate must be reaffirmed so as to prevent intended parents from believing that by virtue of carrying a fetus for them, a surrogate is surrendering her constitutional rights to make decisions about her own body.[64]

Perhaps the seminal case in the area of bodily integrity is *Cruzan v. Missouri*, a 1990 Supreme Court case that dealt with the right to voluntarily cease life-sustaining medical care measures.[65] Certainly, the case only addressed the issue indirectly: Nancy Cruzan was incapable of making her own medical decisions, and the case dealt with family members making the decision for her.[66] Nonetheless, Chief Justice Rehnquist dealt with the issue in terms of the individual's right to withdraw life-sustaining treatment.[67] He began his analysis by looking to the common law, recognizing the well-established principle that the right to be free of interference is well established in law.[68] The Court went on to state "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."[69] In strong language, Justice O'Connor concurred, stating:

> Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to

64. As one scholar suggests, even attempts at "balancing" the interests of the fetus with those of the gestator can be inappropriate, because "[a]ny attempt at balancing impairs a competent individual's right to decline treatment and, in an effort to protect an unborn fetus, invades the autonomous decision-making of a living woman." Susan Goldberg, *Medical Choices During Pregnancy: Whose Decision Is It Anyway?*, 41 RUTG. L. REV. 591, 595 (1989).

65. 497 U.S. 261 (1990).

66. *Id.* at 265.

67. *Id.* at 269.

68. *Id.* (quoting Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

69. *Id.* at 278.

> determine the course of her own *treatment.* Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment . . . .[70]

Thus, though not explicitly, the Court made it evident that the right to control one's medical treatment is highly personal. This rationale has been applied to pregnant women as well, even when juxtaposed with the rights of the fetus and the state's interests in protecting the fetus.[71] For example, in *In re Baby Boy Doe*, a pregnant woman was informed that if she did not have an immediate cesarean section, her child could be born dead or severely retarded.[72] Because of religious beliefs, the woman preferred to deliver naturally and did not consent to the procedure.[73] The court reiterated her right to make such a decision, stating, "Applied in the context of compelled medical treatment of pregnant women . . . a woman's right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy."[74] The court further stated, "A woman is under no duty to guarantee the mental and physical health of her child at birth, and thus cannot be compelled to do or not do anything merely for the benefit of her unborn child."[75]

This concept may be an uncomfortable one, but it is necessary. A moral responsibility on the part of any woman—a mother *or* a surrogate—does not create a legal obligation. If one is shocked by the idea, it would be prudent to consider that parents are not required to submit to surgery to assist their children in life-threatening situations.[76] As Susan Goldberg notes, "To carve out an exception for pregnant women, an exception having nothing to do with decisional

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70. *Id.* at 289.

71. *See, e.g., In re* Fetus Brown, 294 Ill. App. 3d 159, 171 (1997) ("[u]nder the law of this State . . . we cannot impose a legal obligation upon a pregnant woman to consent to an invasive medical procedure for the benefit of her viable fetus"); *In re* Baby Boy Doe, 260 Ill. App. 3d 392, 392-93 (1994); Norwood Hospital v. Munoz, 409 Mass. 116, 130-31 (1991) ("[t]he State's interests in preserving the patient's life, in maintaining the ethical integrity of the profession, and in protecting the well-being of the patient's child, did not override the patient's right to refuse life-saving medical treatment"). This interpretation is not unanimous, however. *See, e.g.*, Jefferson v. Spalding, 247 Ga. 86 (1981).

72. *Baby Boy Doe*, 260 Ill. App. 3d at 393.

73. *Id.*

74. *Id.* at 401.

75. *Id.*

76. *See Goldberg, supra* note 64, at 618.

competency, would relegate these women to a second-class status."[77] There is no reason to distinguish between mothers who give birth naturally and surrogates who carry fetuses unrelated to them—both implicate personal rights related to autonomous decision-making.

Thus, surrogates should not be compelled to undergo treatment for the benefit of their fetuses, any more than mothers who give birth naturally. Some cases have disallowed forced medical treatment of criminal suspects and involuntarily committed mental patients.[78] Since those within the state's custody are still entitled to make their own medical decisions, suggesting that a competent pregnant woman should be subject to outside control is incompatible "with our heritage of civil liberties"—even if those decisions could affect another woman's resulting child.[79]

The recognition of a gestator's right to make decisions about her medical care raises the question of whether fetuses should be allowed to recover damages at law when born with defects resulting from a gestator's behavior or decisions about her medical care. Courts have been somewhat inconsistent in treating a fetus as a person under the law. In medical care decisions, as noted above, courts have often treated fetuses as "part" of the women who are making decisions about their bodily integrity.[80] On the other hand, when dealing with third party tort claims, courts have often allowed fetal recovery.[81]

There is an important distinction between a suit against a third party and a suit against the gestator, however. In *Stallman v. Youngquist*, the Court discussed the distinction between third party tort claims and claims against the pregnant woman carrying the fetus.[82] The Court there stated:

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77. *Id.* at 620.

78. *See* Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Right to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 615-17 (1986).

79. *Id.* at 617. This is not to say that courts have not tried to exercise such extensive control over pregnant women. One district court even went so far as to order the court to take "custody" of an unborn child when the county discovered that the mother was using illegal drugs. *See* Wisconsin v. Angela M.W., 209 Wis. 2d 112, 118 (1997). The Supreme Court of Wisconsin reversed the decision but did not address the constitutional issues. *See id.* at 121. Instead, it determined that the legislature had not intended fetuses to be included in child abuse statutes. *See id.* at 137.

80. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992).

81. *See, e.g.*, Womack v. Buchhorn, 384 Mich. 718 (1971); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Scott v. McPheeters, 33 Cal. App. 2d 629 (1939); Williams v. Marion Transit, 152 Ohio St. 114 (1949).

82. 125 Ill. 2d 267, 276 (1988). Note that some courts have allowed fetuses to sue

> A legal right of a fetus to begin life with sound mind and body assertable against a mother would make a pregnant woman the guarantor of the mind and body of her child at birth. A legal duty to guarantee the mental and physical health of another has never before been recognized at law.... Mother and child would be legal adversaries from the moment of conception until birth.[83]

The Court went on to state that allowing torts by fetuses against their mothers would require a judicially defined standard for a woman's acts and omissions during pregnancy.[84] On the other hand, holding third parties responsible for torts against fetuses does not affect a defendant's ability to control his or her own life, and is thus distinguishable.[85]

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their mothers. *See, e.g.*, Grodin v. Grodin, 102 Mich. App. 396 (1980) (allowing child to sue mother for discolored teeth that resulted from mother's ingestion of tetracycline).

83. *Stallman*, 125 Ill. 2d at 267.

84. *Id.* at 277-78.

85. *See id.* at 278. One scholar has summarized the appropriate approach this way:

> "The law should continue to recognize the existence of the fetus insofar as is necessary to protect the interests of the subsequently born child and is consistent with the pregnant woman's interests, as, for example, in suits by children against third parties for prenatal injuries. In their attempt to protect pregnant women from violent criminal or tortious acts, however, lawmakers should structure the laws so that they retain their focus on the primary subject of protection—the pregnant woman. Attempts to deter the destruction of fetuses by third parties against the will of pregnant women should recognize that the actual physical injury is inflicted on and suffered by the pregnant woman and that the fetus is affected only through her."

Johnsen, *supra* note 78, at 611. Many courts have also been unwilling to treat fetuses as people for purposes of child abuse statutes or other criminal laws attempting to penalize mothers for harm to their fetuses. *See, e.g.*, Johnson v. Florida, 602 So. 2d 1288 (1992) (overturning a conviction of a mother for "delivering" heroin to two children, ostensibly via their umbilical cords in the short time span after they were born but prior to the cords being cut); Collins v. Texas, 890 S.W.2d 893 (1994) (court overturning conviction of reckless injury to a child of a pregnant woman who ingested crack cocaine, stating that the legislature would have addressed fetuses directly if intended them to be within the law's applicability); State v. Luster, 204 Ga. App. 156 (1992); State v. Gethers, 585 So. 2d 1140, 1142 (Fla. 4th Dist. App. 1991) ("I conclude that the Legislature never intended for the general drug delivery statute to authorize prosecutions of those mothers who take illegal drugs close enough in time to childbirth that a doctor could testify that a tiny amount passed from mother to child in the few seconds before the umbilical cord was cut"); Ohio v. Gray, 62 Ohio St. 3d 514 (1992); Reyes v. San Bernadino County, 75 Cal. App. 3d 214 (1977); Reinesto v. Arizona, 182 Ariz. 190, 193 (1995) (finding that the Legislature would have included fetuses in child abuse statutes if it had intended fetuses to be protected, and finding that prosecuting unsuspecting parents under the child abuse statute would "offend due process notions of fundamental fairness" because "[d]ue process requires 'that criminal offenses be defined in terms sufficient to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'"); *In re* Pima County, 183 Ariz. 546, 548 (1995) ("we do not believe that the... statute should be broadly construed to include an unborn child"); Florida v. Ashley, 701 So. 2d 338 (1997) (holding

Should the framework be any different with respect to a surrogate? Is a surrogate comparable to a "mother" under this framework, or to a third party? Although it does not appear that the *Stallman* court wrote with surrogacy contracts in mind, the rationale should extend to surrogates. Ideally, as with any gestator, one hopes that the surrogate has the best interests of the child in mind—but as with any gestator, moral responsibilities do not create a legal obligation to act a certain way during pregnancy. And as would be true for any gestator, defined standards of appropriate conduct are unrealistic and infringe on the surrogate's right to control her own life.[86]

B. The Right to Procreate

With recent developments in reproductive technology, "[i]ntention about parenthood can now be expressed by means other than preventing the birth of a child . . . ."[87]or physically having one. Surrogacy arrangements are an alternate method of expressing one's intent to create. In *Johnson v. Calvert*, the Court specifically stated, "A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service . . . without any expectation that she will raise the resulting child as her own."[88] In this and similar statements, the *Johnson* Court did not distinguish between the gestational process and parenthood. The Court focused heavily on the importance of intent in defining rights. But the Court failed to distinguish between procreative and parental intent—a distinction that is vital to recognizing the rights of the surrogate. The Calverts intended to utilize their procreative intent to enter into a surrogacy contract, and to parent a child resulting from a surrogacy

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teenage girl could not be charged with murder when she shot herself, thereby killing her fetus). *But see* Whitner v. South Carolina, 328 S.C. 1, 4 (1997) ("[w]e do not see any rational basis for finding a viable fetus is not a 'person' in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse"); *In re* Ruiz, 27 Ohio. Misc. 2d 31, 34-35 (1986) ("The essence of *Roe*, the state's interest in the potential human life at the time of viability, in conjunction with Ohio's developing case law, compels a holding that a viable unborn fetus is to be considered a child . . . . [A]t the time of viability, the state has an interest in the 'child's' care, protection, and physical and mental development").

86. *Stallman*, 125 Ill. 2d at 278 (1988).

87. Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 309 (1990).

88. Johnson v. Calvert, 5 Cal. 4th 84, 100 (1993).

contract. But it was Ms. Johnson who intended to be pregnant—and thus during the period of pregnancy, it was Ms. Johnson whose procreative rights were at issue.

On the other hand, a plausible argument can be made that intended parents have a constitutional right to express their procreative rights via a surrogacy contract, without limitation by the surrogate.[89] John Robertson suggests, "Restrictions on paying surrogate fees and on enforcing surrogate contracts would infringe on the procreative liberty of the couple providing the embryo . . . . Such an interference with procreative liberty requires a justification beyond . . . elevation of a particular morality of reproduction."[90] Such a suggestion stems from the rationale that parties without the physical ability to have children should have the same constitutional protections as their counterparts who give birth naturally.[91]

But it is inappropriate to separate the procreative ability of a gestational surrogate from her procreative intent. Surrogates, too, are expressing an intent to procreate. And because our jurisprudence regarding procreative rights has historically been closely linked to the individual bearing the child, it is impossible to address procreative rights without considering that the gestator and "mother" are not the same person. The *Johnson* court failed to acknowledge that procreative rights can be sub-divided into two categories: pro-creative intent to parent that *creates* a surrogacy contract, and intent to use one's body as a procreative tool. In failing to recognize that Anna Johnson was using her body as a procreative tool, the court also failed to grant her any constitutional protections normally associated with procreation.

One example of procreative intent being separated from a "normal" pregnancy is the 1992 case *Davis v. Davis*.[92] In *Davis*, the Tennessee Supreme Court considered procreative rights in an in-vitro fertilization case.[93] Mary Sue and Junior Davis had stored embryos for future implantation, but did not sign an agreement about what to do with the embryos in the event that they divorced or the intent of one of the parties changed.[94] When they did divorce, dispute arose

89. *See, e.g.*, John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942 (1986).

90. *Id.* at 1013.

91. *Id.* at 1014.

92. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

93. *Id.* at 598.

94. *Id.* at 591-592.

about the disposition of the embryos.[95] Mary Sue Davis sought to donate them to a childless couple, while Junior Davis sought to have them destroyed.[96]

Surprisingly, the trial court did not directly address the issue of procreative rights. Instead, it determined that the embryos were "human beings" at fertilization and awarded "custody" to Mary Sue Davis.[97] In reviewing the trial court's decision, the Tennessee Supreme Court recognized "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[98] In so recognizing, the court determined that the disposition of the preembryos should be determined "by looking to the preferences of the progenitors."[99] If their wishes were unascertainable, their prior agreement should be carried out.[100] And if no such agreement existed, the interests of the parties in using the preembryos were to be weighed.[101]

Essentially, the disposition of the embryos was determined by the procreative intent of the parties. The approach, therefore, is not unlike the *Johnson* court's approach. However, the *Davis* court allowed the present intent of the parties to govern, whereas the *Johnson* court remained fixed on the status of the parties prior to implantation. This fixation fails to account for reality. As the *Davis* court recognized, "an 'adult' has a different legal status than does a 'child.' Likewise, 'child' means something other than 'fetus.'[102] A 'fetus' differs from an 'embryo.'"[103] In a gestational surrogacy arrangement, the fact that the third party, the surrogate, becomes involved changes the framework of procreative rights. The "embryo," with its almost property-like status,[104] has been

95. *Id.* at 589-590.

96. *Id.* at 590. Originally, Mary Sue Davis wanted the embryos for transportation to her own uterus, but after she remarried, her purpose changed. *See id.* at 589-590.

97. *Id.* at 589.

98. *Id.* at 597.

99. *Id.* at 604.

100. *Id.*

101. *Id.*

102. *Id.* at 592-93 (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 n. 8 (Stevens, J., concurring)).

103. *Id.*

104. Some cases have treated embryos as property, subject to claims for conversion and intentional infliction of emotional distress upon their destruction. *See* Del Zio v. Presbyterian Hospital, 1978 U.S. Dist LEXIS 14450, at *16 (S.D.N.Y. Nov. 9, 1978).

transformed into the "fetus"—and thus enters the privacy framework, where the privacy of the *surrogate*, not the intended parents, is at issue.

Thus, in changing the legal status of an embryo to that of a fetus, the intended parents have implicitly recognized the primacy of the surrogate's procreational rights over their own. Their procreative rights are not waived by the surrogacy contract, but are trumped by the reality of a surrogate's pregnancy. The *Johnson* Court's rationale in holding that the Calverts' procreative rights could not be infringed on does not recognize the primacy of the surrogate's procreative rights. The *Davis* court's rationale, on the other hand, suggests looking to the current situation—which would include the realities of a surrogacy arrangement and the presence of a new party.

As discussed above, the fallacy of the *Johnson* Court's denial of Anna Johnson's procreative right is evident if one considers Ms. Johnson's right to an abortion. The right to procreate also includes the converse right *not* to procreate.[105] If a right to procreate is vested in the intended parents, as suggested by both *Davis* and *Johnson*, would they have the right *not* to procreate? Arguably, should they choose to terminate the pregnancy, if the right is theirs, they could order the surrogate to do just that.

However, the Supreme Court has long recognized that the right to privacy is an individual right.[106] For example, in the context of abortion, it is unconstitutional to require a woman to have the consent of her spouse in order to have an abortion in the first trimester of her pregnancy.[107] Such a requirement would violate a woman's privacy right because "[t]he State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.'"[108] While the rigid trimester framework has been abolished when dealing with abortion cases, a woman's right to an abortion prior to viability

Interestingly, in its jury instructions, the court never questioned the fact that the embryos were property. *Id.* at *11.

105. *See* Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 461 (1999).

106. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

107. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 71 (1976).

108. *Id.* at 69 (quoting Planned Parenthood of Central Missouri v. Danforth, 329 F. Supp. 1362, 1375 (E.D. Mo. 1975)).

cannot involve an undue burden, and spousal notification, much less consent, creates such a burden.[109]

Courts have not yet been required to make the same findings in relation to gestational surrogacy arrangements.[110] However, if the Supreme Court is unwilling to allow a woman's husband to intervene in a pregnancy where it cannot, it seems equally plausible that the rationale would also be rejected when applied to unrelated third parties like intended parents.[111] The Calverts could not control Johnson's individual right, grounded in the Fourteenth Amendment, over which even the government could not exercise control.[112]

While the *Johnson* court found that recognizing Anna Johnson's liberty interest in the companionship of the child would threaten the procreative decisions of the Calverts,[113] it certainly cannot justify treating Anna Johnson as if she had no procreative right. After all, if gestation and motherhood need not be intertwined, as the *Johnson* court recognized, then why must procreative and parental rights? The *Johnson* court was willing to create a legal fiction to determine Crispina Calvert was the "mother" in that case, yet remained unwilling to address the fact that procreative rights did not belong to the same person.

By entering into a surrogacy arrangement, parties should be aware that the legal framework must be reworked to accommodate the realities of the unique situation. Intended parents should not expect to control procreative decisions. The question of "shifting" procreative rights is clear if one considers a situation in which a

109. *See* Planned Parenthood v. Casey, 505 U.S. 833, 893-94 (1992).

110. In *Johnson*, the contract both purported to give the Calverts decision-making authority and stated "All parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying." Johnson v. Calvert, 5 Cal. 4th 84, 96-97 (1993). The court decided it did not have to determine the validity of the provision that attempted to give the intended parents the right to control the surrogate's abortion right. *See id.*

111. Indeed, preventing a gestational surrogate from having an abortion is a form of involuntary servitude, prohibited by the 13th Amendment, the California Constitution, and the California Penal Code. *See* U.S. CONST. amend. XIII, §1 ("[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction"); CAL. CONST. art. I §6 ("[i]nvoluntary servitude is prohibited except to punish crime"); CAL. PEN. CODE § 181 (Deering 2000) (making the crime of involuntary servitude punishable by two to four years imprisonment). On a purely logical level, "[i]t would be most uncomfortable to allow the father in a surrogacy situation to obtain greater rights by contract and by the payment of money than a husband has . . . ." FIELD, *supra* note 50, at 65.

112. *See Danforth*, 428 U.S. at 69.

113. *Johnson*, 5 Cal. 4th at 100.

surrogate does not wish to terminate a pregnancy and the intended parents do—as in the case previously described, when the child is mentally or physically impaired. In such a situation, the intended parents should be aware that by asking another person to bear their child, they have surrendered the procreative rights that are so closely tied to the individual.

III. The Contract Formation Period: Contract and Property Considerations

A. Contract Rights

If the surrogate's procreative rights control gestation because the intended parents' procreative rights terminate upon implantation and their parental rights only begin at birth, then what rights do the intended parents have during the gestational period? The logical answer would be their contract rights. According to the *Johnson* Court, that meant a contract for the "services" of Anna Johnson.[114] Theoretically, the Calverts should therefore have been able to expect some sort of remedy if Anna Johnson had failed to render those services.[115]

Richard Epstein argues that surrogates should be free to contract prior to implantation.[116] Epstein suggests:

> To argue that these contractual terms are inconsistent with the autonomy of the surrogate mother is to miss the function of all contractual arrangements over labor. Full control over their own bodies and labor is what autonomous individuals have before they contract. The process of contracting always requires a surrender of some portion of autonomy, but only in exchange for things that are thought to be more valuable.[117]

Regardless of the possible issues of commodification, this fails to account for the reality that gestation is not like other forms of labor.[118]

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114. *Id.* at 96.

115. Theoretically, at least, Johnson could have fully performed her "services" and not surrendered the child to the Calverts. It would be difficult to argue, in that case, that the contract was solely for services. *See generally,* Christine L. Kenan, *Surrogacy: A Last Resort Alternative For Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 153 (1997).

116. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2335 (1990).

117. *Id.*

118. For, "to portray surrogacy contracts as representing meaningful choice and informed consent on the part of the contracting surrogate mother, rather than to see her as driven by circumstances, also reveals an idealized perspective and a failure to take account

Unlike an at-will employment situation, for example, requiring specific performance of a surrogacy agreement would violate the Constitution because it would result in involuntary servitude[119]—by forcing a woman to carry a child to term, the court would be forcing a performance of her "services." Though courts have generally rejected this argument, it is disingenuous for them to have it both ways—to characterize a surrogacy contract as a contract for "services," as the *Johnson* court did, and then to deny that forcing a woman to complete a pregnancy is coerced labor.

> Epstein does recognize the uniqueness of surrogacy, however:
>
> precisely because surrogacy contracts are not contracts for commodities, we need a legal regime where surrogacy contracts will be enforced come hell or high water. Once the legal regime is unmistakably clear, then any woman with doubts about her psychological willingness to part with her child will steer away from it.[120]

Certainly the call for clear legislation is in keeping with the proposal of this note. But locking a surrogate into a rigid framework only at the formation of the contract is to ignore the social and psychological realities of pregnancy in favor of convenient legal constructs. As Judith F. Daar notes, "A woman's liberty interest in reproductive decision making, although certainly imbued with concerns about bodily integrity, also pays homage to the emotional, psychological, familial, and spiritual ramifications surrounding the decision to bear a child."[121] Ideally, a woman could negotiate at arm's length about a fetus growing inside of her, [122] but caselaw suggests otherwise.[123]

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of realities." FIELD, *supra* note 50, at 27. As the *Davis* court noted, "the parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds." *Davis v. Davis,* 842 S.W.2d 588, 598 (Tenn. 1992).

119. *See generally* U.S. CONST. amend. XIII, §1; CAL. CONST. art. I §6; CAL. PEN. CODE § 181 (Deering 2000).

120. Epstein, *supra* note 116, at 2339.

121. *See* Daar, *supra* note 105, at 461.

122. Not all scholars recognize this form of labor as any different from any other form, however. For example, Eric Gordon suggests, "a pre-arranged surrogacy contract gives the surrogate the opportunity to rationally consider the arrangement .... To argue that her financial need does not give her a choice is to argue that any low income job is similarly oppressive and should also be illegal." Eric Gordon, *The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology*, 6 ST. THOMAS L. REV. 191, 209 (1993). Failing to take account of the surrogate's constitutional rights and the realities of pregnancy, such an analogy can be made. Realistically, it fails.

123. *See, e.g., In re* Baby M., 109 N.J. 396 (1987).

Majorie Schultz refines Epstein's argument.[124] She suggests:

> [w]ithin the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood. As with most arenas in which private ordering is encouraged, that rule ought not to be absolute. Rather, it should be a default rule, an enabling rule that allows intention to govern unless and until policy restrictions on particular types of private arrangements are articulated, justified, and adopted.[125]

From the perspective of determining parenthood, this analytical framework makes good sense. It looks to initial intent, but does not make it controlling. From the perspective of determining gestational control (violation of the contract *during* purported performance), policy restrictions are not needed because fundamental rights stand in the way of any attempt to control by private ordering.

Schultz's argument suggests that the contract would be voidable at the surrogate's option. If a contract is treated by a court as an expression of intent, all of its terms would be valid unless legally challenged. Parties could honor the contract if they so desired. But when a court evaluates a surrogacy contract, it can look to evidence of changed intent by the parties. Otherwise, parties can generally be expected to abide by the terms of the agreement unless willing to challenge them in court.

This is an approach that courts have taken when two parents contract for the custody and control of their children.[126] Such contracts are not binding on a court, even though not void or illegal.[127] Instead, courts use the best interests of the child to make child custody determinations, regardless of any agreement by the parties.[128] Even in the tenuous embryo situation prior to implantation, and before the Constitutional rights of bodily integrity become implicated, courts have been willing to consider contracts for the

124. *See* Schultz, *supra* note 87, at 323.

125. *Id.*

126. *See, e.g., In re* Arkle, 93 Cal. App. 404, 409 (1928); *In re* Guardianship of Joles, No. 99-L-087, 2000 Ohio App. LEXIS 2987, at *12 (11th App. Dist. June 30, 2000); *In re* Guardianship of Van Loan, 142 Cal. 423, 428 (1904).

127. *See, e.g.*, Stewart v. Stewart, 130 Cal. App. 2d 186, 193 (4th. Dist. 1955); Walker v. Williams, 214 Miss. 34, 42 (1952). This is also true when a parent contracts with a third party for custody. *See, e.g., In re* K.K.M., 647 S.W.2d 886, 890 (1983); *In re* Schwartzkopf, 149 Neb. 460, 467-68 (1948).

128. *Stewart*, 130 Cal. App. 2d at 193.

purpose of establishing intent only.[129] This consideration seems even more important in the gestational surrogacy arrangement, when bodily integrity rights are implicated and "the clock is ticking."[130]

The same rationale should apply to surrogacy arrangements. The *Johnson* case illustrates how poorly strict contractual arrangements conform to the surrogacy process. By enforcing the contract, the *Johnson* court refused to take into account evolving realities: primarily, Anna Johnson's changed intent.

Scholars have criticized surrogacy contracts for this very reason.[131] As Mary Beth Whitehead, a traditional surrogate who changed her mind about giving up the child, stated: "'I signed on an egg. I didn't sign on a baby girl . . . .'"[132] Our society assumes "that the interests at stake lend themselves to deliberation, choice, and commitment."[133] When a true physical transformation ensues and a child is born, one wonders if perspectives can change enough that original "deliberation, choice, and commitment" change. Cases like *Stiver v. Parker* suggest they change not just for the surrogate, but also for the intended parents.[134]

Understanding contracts as expressions of intent may be a difficult concept to fathom in law. After all, "[w]here contractual ordering is accepted, the state neither requires people to make binding commitments, nor bars them from doing so . . . . Persons who believe that feelings about parenthood are too hard to predict need not enter binding agreements."[135] But very little about surrogacy law suggests it operates to create normal bargaining relationships. Applying contractual provisions strictly can conflict with issues of bodily integrity by attempting to regulate future behavior based on what happens in a pregnancy—as in a recent situation, when the

129. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

130. An example might be the attempt of the Calverts to control the abortion rights of Anna Calvert, as mentioned previously. Johnson v. Calvert, 5 Cal. 4th 84, 96-97 (1993). Although the Calverts never found the need to utilize this purported control, it was inappropriate for them to even write it into their contract. Had it even been in dispute, Anna Johnson could have faced the risk of losing her abortion right by the mere passage of time.

131. FIELD, *supra* note 50, at 97.

132. *Id.* at 3.

133. Schultz, *supra* note 87, at 347.

134. *See, e.g., In re* Marriage of Buzzanca, 61 Cal. App. 4th 1410 (4th Dist. 1998) (intended father attempted to disclaim liability for a child implanted in a surrogate with his consent); Stiver v. Parker, 975 F.2d 261 (6th Cir. 1992) (assumed intended father attempted to disclaim responsibility for a child born with physical and mental defects).

135. Schultz, *supra* note 87, at 349.

intended parents attempted to force the surrogate to have an abortion because more than one fetus developed.[136] Additionally, the issue of damages if no specific performance occurs is certainly hard to conceptualize, particularly if one rejects the notion of "baby selling" and instead assumes surrogacy contracts are for "services." So while failure to perform might logically lead to damages as they would be in a contract action with a surrogate paying intended parents, "[w]hile superficially plausible, this analysis offends our belief in the uniqueness of each individual."[137]

Furthermore, treating contracts as expressions of intent will not remedy the problem that occurs when intent transforms so that all parties desire parental rights. In such a situation, litigation may be inevitable. But if intent during gestation means anything, and a court does not consider a contract as the final expression of the parties' intent, then at very least it would be *acknowledging* the changing attitudes of the parties.[138] In a situation such as *Stiver*, where neither party wanted the child,[139] the court could look to the contract as evidence of the intent of the intended parents. Arguably this puts a gestational surrogate at an advantage—if her intent changes and she desires parental rights, her changed intent can be evaluated and she might maintain a relationship with the child, whereas if the intended parents' intent changes, they may still be faced with parental responsibilities. But this once again goes to the uniqueness of the gestational surrogacy arrangement—because her procreative rights are at issue, the surrogate is entitled to protection, even at some cost to the intended parents. Furthermore, this perspective simply helps determine intent, and is not a hard and fast rule that makes the contract enforceable. The presumption of intent would be weighed in both cases.

Certainly recognizing expressions of intent could be accounted for by statute—but not by general contract law. A statute such as the

136. *See* O'Driscoll, *supra* 60.

137. Schultz, *supra* note 87, at 360.

138. This would be more consistent with contract principles as well. *See* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 511 (1996). Looking to intent only "is to determine legal motherhood according to a rigid contractual scheme that denies the parties the protections provided by contract law . . . [it] is thus inconsistent with contract principles which permit an inquiry into gross unfairness in determining whether promises must be kept." *Id.*

139. *Stiver*, 975 F.2d at 269.

Uniform Status of Children of Assisted Conception Act[140] could give adequate time for a gestational surrogate to re-express new intent. A contract created prior to implantation generally would not because of the difficulty in creating contractual terms to express intent that had not yet developed. Evaluating surrogacy contracts this way "focuses exclusively on intent without any analysis of procedural and substantive fairness that allegations of gross unfairness usually prompt."[141] The only way to account for a surrogate's procreative rights is by recognizing their primacy over the intended parents' contract rights.

B. The Rights of Ownership

By utilizing the contract framework, one ought to consider the possible consequences for breach of contract. Obviously, the *Johnson* court only needed to address breach at the termination of Johnson's services when she refused to surrender the child. But had Johnson failed to perform by having an abortion, or by failing to terminate the pregnancy when instructed to do so, the question of remedy might have had serious significance.[142] Legislative silence in this arena leads the ambiguity of surrogacy contracts into the dangerous area of property law. After all, isn't destruction of another person's "intended child" through exercise of one's own right to terminate a pregnancy a property violation?

Were the legislature to address such an issue directly, property law could be avoided.[143] But as it stands, the status of the human body in relation to property is largely unresolved. As Radhika Rao has observed:

> [s]ometimes the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights . . . the lack of coherence in our concept of the body promotes an inconsistent and haphazard approach that enables different

140. 9B U.L.A. 152 (Supp. 1994).

141. Coleman, *supra* note 138, at 510-11.

142. Another interesting scenario would occur if Johnson had terminated the pregnancy because she was instructed to do so, and then the Calverts had refused to pay her.

143. *See, e.g.*, FLA. STAT. ANN. § 742.15 (West 2000). The Florida statute provides that the surrogate has the sole source of consent with respect to management of her pregnancy. At very least, this might suggest that the fetus does not "belong" to the intended parents, and they would not be entitled to recover for any medical decisions with which they disagree.

treatment of the body under essentially similar circumstances.[144]

Certainly the law cannot afford an "inconsistent and haphazard" approach when considering the rights entangled in a surrogacy arrangement, for surrogacy should logically lead to birth, and when a new human being comes into the picture, courts must consider the best interests of the child.

Rao makes appropriate connections between privacy and property law; both carve out an area free from state interference, encompass the right to exclude others from a protected space, and preserve "a sphere of decentralized decision-making as a mechanism to check excessive governmental power."[145] But conversely, there are significant differences between the two.[146] For example, in terms of the human body, property theory sees body parts as severable from the person and distinguishable from individual identity.[147] On the other hand, privacy theory "forecloses such bodily fragmentation by identifying the person with his or her physical presence . . . ."[148] In order to take all this into account, Rao proposes a logical solution: "we should adopt the language of privacy rather than that of property when we seek to protect self-ownership without suggesting that rights in the human body can be conveyed to others . . . ."[149] So:

> [a]lthough embryos themselves are not full-fledged persons, they differ from other body parts because of their potential to develop into a person. Accordingly, if individuals seek to enter into or extricate themselves from personal relationships with their frozen embryos as potential children, the course of action implicates the right of privacy.[150]

Whose privacy rights are at stake in a surrogacy contract—the gestational surrogate's in relation to her body, or the intended parents in relation to their embryo? While Rao does not address this directly, she explains that "autonomy consists of the right to resist invasions of the body and open one's body to others in the context of intimate and consensual relationships."[151] Because privacy law is largely focused on the integrity of the human body, the interests at

144. Radhika Rao, *Property, Privacy, and The Human Body*, 80 B.U. L. REV. 359, 363-64 (2000).

145. *Id.* at 418.

146. *Id.* at 429.

147. *Id.*

148. *Id.*

149. *Id.* at 436.

150. *Id.* at 458.

151. *Id.* at 438.

stake must be those of the surrogate and her relation to the fetus.

Conversely, property rights would not be implicated. Certainly cases have treated genetic material with "the capacity for life" as property.[152] But appropriately, these cases have *not* involved genetic material that has been utilized procreatively by implantation, and thus have never approached the "second phase" of gestation. In *York v. Jones*, the court determined that pre-zygotes held for future in-vitro fertilization had been treated by the parties as property.[153] The court regarded them as such, and thus determined that a clinic's holding of such "property" created a bailment.[154]

Once again, the important distinction in that case was that it involved disposition of such property *prior to implantation.* As recognized by Judith Daar, "[i]n a sense, pregnancy was and remains the gatekeeper for reproductive rights."[155] And while reproductive technology is changing that and recognizing the procreative and parental rights of intended parents, this must be coupled with a strong reaffirmation of the right of a woman to make essential decisions about her pregnancy and the child she is carrying—regardless of whether the child is "hers" or not, and recognizing that parental rights in a child do not equate to property rights in a fetus.

IV. The Right to Parent

The right to control procreative decisions is separate from the right to parent a resulting child. The California Supreme Court's opinion in *Johnson* focused not just on the Calverts' procreative rights, but also their parental rights.[156] The court's final determination was that the Calverts were the "parents" of the "child."[157] At the time litigation was filed, there was no child, and therefore it is hard to understand how the court could determine that there were parents.[158] Logically, parental rights can only exist if a child exists. As a result, the Calverts did not have any "parental" right to the "child" during the gestation period in which the conflict arose.

Perhaps the point is moot. After all, a child certainly existed by

152. *See, e.g.*, York v. Jones, 717 F. Supp. 421, 427 (E.D. Va. 1989).

153. *Id.* at 425.

154. *Id.*

155. Daar, *supra* note 105, at 458-59.

156. *See* Johnson v. Calvert, 5 Cal. 4th 84, 98 (1993).

157. *Id.* at 99-100 (referring to Crispina Calvert as "the mother," the Calverts as "the parents," and the fetus not born at the commencement of litigation as "the child").

158. *See id.* at 88.

the time this litigation was before the California Supreme Court. But it fails to explain how the court could justify controlling Anna Johnson's liberty interest—which, during pregnancy would mean the autonomy to make decisions about her pregnancy—by the "parental" rights the Johnsons did not possess at the time.

By utilizing the framework of parentage in their decision, the Court implied that the Calverts controlled the entirety of the process—it was their genetic material, they intended to have the child, and they were the parents. The crucial step is the gestation period in the middle—where the parental rights of the Calverts had no significance. Considering the "second step" of gestation "affords new flexibility in the allocation of rights and obligations between procreating parties."[159] While not denying the rights of intended parents, examining gestation as a phase separate from parenting looks honestly at the Constitutional implications of such arrangements.

As evidenced by the cases that have followed *Johnson*, the problem has proved just as ineffective in practice as it has in theory. Several cases in California have proved that the lack of guidance in the arena of surrogacy law has resulted in continued dispute. The first case, *In re Marriage of Moschetta*, was decided shortly after *Johnson*.[160] The Moschettas contracted for a traditional surrogacy arrangement.[161] The surrogate had doubts about surrendering the child when the Moschettas announced their intent to divorce during her labor,[162] but relented when they said they would stay together.[163] Later, she changed her mind again.[164] Since this situation involved a traditional surrogacy arrangement, there was no "tie" to break, and the surrogate mother was determined to be the mother.[165]

In re Marriage of Buzzanca involved a gestational surrogacy arrangement.[166] The Buzzancas had a surrogate implanted with an

159. Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 188 (1986).

160. *See In re* Marriage of Moschetta, 25 Cal. App. 4th 1218 (4th Dist. 1994). *Johnson* was decided between the trial and appellate levels of the *Moschetta* case. *Id.* at 1224. While the parties originally agreed the surrogacy contract was unenforceable, thereafter the Moschettas attempted to apply *Johnson* to show Cynthia Moschetta was the "mother." *Id.*

161. *Id.* at 1221.

162. *Id.* at 1223.

163. *Id.*

164. *Id.*

165. *Id.* at 1224.

166. *See In re* Marriage of Buzzanca, 61 Cal App. 4th 1410, 1413 (4th Dist. 1998).

embryo that was not genetically related to either the Buzzancas or the surrogate.[167] When the couple divorced, Mr. Buzzanca attempted to disclaim any responsibility for the child.[168] Applying the *Johnson* test, the court broke the "tie" in favor of Luanne Buzzanca, who did not meet the statutory definition of "mother."[169] However, since her intent resulted in the birth of the child, she was considered the mother, and Mr. Buzzanca was the father and responsible for the child.[170]

Arguably, these cases were easily resolved under the intent-based analysis. Yet in each situation, had the California Legislature taken the opportunity to speak on the issue, perhaps the parties would not have had to subject more children to the arduous and confusing process not only of litigation, but also of determining their parentage. Notably, in each case, the court specifically asked for further legislative guidance in the arena.[171]

A more recent situation exhibits the continued need for legislative guidance in California. Helen Beasley entered into a surrogacy contract with California couple Charles Wheeler and Martha Berman.[172] For approximately twenty thousand dollars, Ms. Beasley agreed to act as their gestational surrogate.[173] The contract included the provision: "in the event of more than one child, the surrogate agrees that any decision regarding selective reduction shall be the decision of the intended parents."[174]

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167. *Id.* at 1412.

168. *Id.*

169. *Id.*

170. *See id.* at 1429. The court also made clear that her husband was the legal father. *Id.* at 1418. They analogized this situation to artificial insemination: "If a husband who consents to artificial insemination under Family Code section 7613 is 'treated in law' as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term. . . ." *Id.*

171. *In re* Marriage of Moschetta, 25 Cal. App. 4th 1218, 1235 (4th Dist. 1994) ("[o]nce again the need for legislative guidance regarding the difficult problems arising from surrogacy arrangements is apparent"); *Buzzanca*, 61 Cal. App. 4th at 1429 ("[t]he Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques").

172. Chris Taylor, with reporting by Helen Gibson, *One Baby Too Many*, TIME, Aug. 27, 2001 at 55.

173. *Nightline: World News Now* (ABC television broadcast, Aug. 29, 2001) (transcript on file with LEXIS).

174. *Id.* "Selective reduction" is more commonly referred to as abortion.

Helen Beasley became pregnant with twins.[175] Thirteen weeks into her pregnancy, Wheeler and Berman sent her a plane ticket and information about the "selective reduction" procedure that was already scheduled.[176] A battle ensued, with Wheeler and Berman unwilling to parent the two fetuses Beasley carried.[177]

Beasley's predicament made headlines in August 2001. The situation suggests that intended parents are still acting inappropriately by trying to control a surrogate's rights. Because Beasley failed to comply with a coercive contract that attempted to abrogate her constitutional rights, she faced the possibility of becoming a "mother." Under California law, however, she would not be recognized as one. Perhaps this ambiguity is the reason that a majority of surrogate births last year took place in California;[178] intended parents who are seeking such arrangements know that the law will favor them when they want to be parents, and yet may still leave a surrogate unprotected when they decide they do not want to.

These cases reveal several important problems. First of all, as previously recognized, the children born from contested surrogacy arrangements suffer not only from the process of litigation, but from the uncertainty of parenthood.[179] Thus, when these disputes arise, courts must deal with the reality of a child and the changed status of the parties. Parental rights *are* at issue—not in determining procreative rights, as *Johnson* suggests, but because the court has no choice *but* to address childhood.

Second, these cases also demonstrate that *Johnson* did not settle the issue of parental rights as clearly as it purported to. Although the *Moschetta* court easily dismissed the *Johnson* framework[180] and the *Buzzanca* court easily embraced it,[181] the parties might have had a better understanding of *Johnson's* meaning and their subsequent rights had statutory guidance been available. Again, such guidance might avoid some of the cost to the child, whose parentage was placed in legal limbo.

Finally, these cases show that the psychological and physical connection inherent in gestation make it hard to separate parental

175. *Id.*

176. *Id.*

177. *Id.*

178. O'Driscoll, *supra* note 60, at 8.

179. Andrews, *supra* note 8, at 2357.

180. *See In re* Marriage of Moschetta, 25 Cal. App. 4th 1218, 1224 (4th Dist. 1994).

181. *See In re* Marriage of Buzzanca, 61 Cal App. 1410, 1428-29 (4th Dist. 1998).

rights in a gestational surrogacy arrangement, no matter how "technically" inappropriate such connections may be. It is appealing and easy to treat the intended parents as the parents, and thus to assume that they control the entire course of events.[182] But by recognizing the uniqueness of the gestational surrogacy arrangement, one must acknowledge that this is *not* the case. Until a child is born, the parties should be governed by the realities of the procreative rights of the gestational surrogate, and not the potential parental rights of the intended parents.

V. Conclusion

Gestational surrogacy contracts raise a multiplicity of issues: commodification, equal protection, the best interests of the child—all these are deeply embedded in any discussion about the appropriateness of surrogacy arrangements, and are frequently addressed by scholars and courts. All present appropriate and important concerns, and sometimes, objections.

Such objections are valid. But since surrogacy arrangements do and will exist, it is important to regulate them appropriately. The most effective method of regulation would be legislative guidance that could give contracting parties a sense of what to expect in performance of surrogacy contracts. In forming statutes, legislatures must consider the constitutional rights of gestational surrogates, and the implication of those rights on the agreement between the surrogate and the intended parents. The *Johnson* court noted, "any constitutional interests Anna possesses in this situation are something less than those of a mother."[183] In a sense, the court was correct. Johnson did not have the constitutional interests of a mother—she had the *superior* constitutional rights of a gestator.

If one is willing to consider the status of the parties at the time of gestation, it is evident that individual autonomy, contract rights, and parental rights overlap in a way that does not help delineate the appropriate roles and behaviors of contracting parties. As a result, important issues remain unsettled—what are the remedies for breach

182. The court in a traditional surrogacy arrangement rejected a claim of procreational rights based on parental rights by an intended and genetic father on very similar grounds. *See In re* Baby M., 109 N.J. 396, 448 (1988). However, in that case, the court reasoned that the parental argument for the surrogate was just as strong, since she was the genetic mother and the surrogacy contract was considered void. *See id.* However, the argument is just as strong even if the surrogate has no parental rights, because in a gestational surrogacy arrangement, parenting does not control procreation.

183. Johnson v. Calvert, 5 Cal. 4th 84, 99 (1993).

of the contract? What will happen if a child is born addicted to drugs? Who will have responsibility for such a child if the interest of the intended parties in parenting has dissipated during gestation?

Myriad questions remain unanswered, and many legislatures remain silent. However, these problems will not go away. The gestational surrogate's rights must be addressed if surrogacy contracts are to account for the basic constitutional rights to which surrogates are entitled.