

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

1-1-1988

Surrogacy and Adoption: A Case of Incompatibility

Barbara L. Atwell

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Family Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Barbara L. Atwell, Surrogacy and Adoption: A Case of Incompatibility, 20 Colum. Hum. Rts. L. Rev. 1 (1988), <http://digitalcommons.pace.edu/lawfaculty/3/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Surrogacy and Adoption: A Case of Incompatibility

by Barbara L. Atwell*

So the woman who has the baby is the surrogate mother. She is the substitute. But for what? For the real mother? No, she is the real mother. So, for what is she a surrogate? She is the surrogate, according to logic (if that is not too strong a word to use in relation to what lies behind this Bill or Act) for somebody who cannot have a baby. But that does not make her a surrogate mother, it makes her a mother. The woman who gets the baby is the substitute for that original mother who hands the baby over by a process of adoption.¹

INTRODUCTION

Since the highly publicized case of *Baby M*,² surrogate parenting agreements have become a popular issue for public comment. While the events leading to the *Baby M* case began in 1985, there has been a resurgence of surrogate parenting³ since the

* Assistant Professor of Law, Pace University. B.A., Smith College (1977); J.D., Columbia University (1983).

I would like to thank my husband Peter F. Hurst, Jr., Esq. and Professor Donald L. Doernberg for their editorial assistance and encouragement. I am also grateful to Professors Michael J. Kaufman and Harry G. Prince for their review of this article. I would also like to thank my colleagues at Pace for their moral support. Finally, I thank my research assistants Marianna Germana, Peter Navon, Hidalgaida Ortiz, Thomas Rubertone, and Katherine Speyer.

1. 173 PARL. DEB., H.L. (5th ser.) 174 (1986), *quoted in* Means, *Surrogacy v. The Thirteenth Amendment*, IV N.Y.L. SCH. HUM. RTS. ANN. 445, 445 n.1 (1987).

2. *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

3. The woman who agrees to bear a child in a surrogate parenting arrangement is normally referred to as the "surrogate mother." As indicated above, this term is misleading. In fact, the surrogate is not a surrogate mother at all, but is the natural or biological mother of the child. It is perhaps more appropriate to describe the surrogate as a "surrogate wife" since she substitutes for the wife by bearing a child for the biological father. *See* Means, *supra* note 1, at 445 n.1. *See also* THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 1 (1988) [hereinafter TASK FORCE REPORT] ("'[S]urrogate mother' is a misnomer because the woman is actually a 'surrogate wife' for the purposes of procreation.'").

mid-1970's.⁴ A "surrogate parenting agreement" is an agreement in which a surrogate agrees for a fee to be impregnated through artificial insemination, to carry the child to term, and, after birth, to deliver the newborn baby to the biological father and to surrender all the parental rights she would otherwise have.⁵ It is then contemplated that the wife of the biological father will adopt the child.⁶ Legal scholars⁷

4. The practice of surrogate parenting dates back to Biblical times. See *Genesis* 16:2 ("Sarai said unto [her husband] Abraham, Behold, now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her."); *Genesis* 30:3 (When Rachel was unable to bear children for Jacob she told Jacob to "go in unto . . . [Bilhah] and she shall bear upon my knees, that I may also have children by her."). See also Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1 (1986).

5. See Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1982). Typically, the parties to a surrogate parenting agreement are the surrogate, the biological father, and (where appropriate) the surrogate's husband. In an effort to circumvent baby-selling statutes, the wife of the biological father is generally not a party to the contract. *Surrogate Parenting Associates, Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 210 (Ky. 1986). The biological father and his wife will generally be referred to herein as the adopting couple.

Under this form of surrogate parenting agreement, the surrogate is both a "genetic" and "gestational" surrogate. She is a genetic surrogate because it is her egg that is fertilized and she therefore has a genetic link to the child. She is a gestational surrogate because she carries the child to term. There are other types of surrogate arrangements. For example, the surrogate could be a gestational surrogate only, that is a surrogate with no genetic relation to the child. This type of surrogacy occurs when another woman's already fertilized egg is implanted into the surrogate. This Article discusses women who are both genetic and gestational surrogates.

In addition to surrogate parenting, there are several other relatively recent advances in reproductive technology. For example, with artificial insemination by donor (AID) a woman may become impregnated without intercourse. In fact, it is through artificial insemination that a surrogate is impregnated. In the more typical non-surrogate AID situation, though, a woman who has been impregnated would keep the child upon birth. Another of the modern reproductive technologies is in vitro fertilization (IVF). This form of reproduction involves fertilizing a woman's egg in a laboratory and subsequently re-implanting the egg in her body. Surrogate arrangements differ from AID and IVF in that they require the rental of the woman's body over a prolonged period of time. See TASK FORCE REPORT, *supra* note 3, at 82.

6. Katz, *supra* note 4, at 2; see *infra* notes 69-70 and accompanying text.

7. See, e.g., Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate*, 22 TULSA L.J. 281 (1987); Note,

and other professionals⁸ have debated the advantages and disadvantages, the legality or illegality⁹ of this form of procreation.

Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, 99 HARV. L. REV. 1936 (1986); Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147; Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986); Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71 (1982); Note, *An Incomplete Picture: The Debate About Surrogate Motherhood*, 8 HARV. WOMEN'S L.J. 231 (1985) [hereinafter Note, *An Incomplete Picture*].

8. See, e.g., Parker, *Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy*, 12 BULL. AM. ACAD. PSYCHIATRY L. 21 (1984) [hereinafter Parker, *Surrogate Motherhood*] (psychiatrist); Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140:1 AM. J. OF PSYCHIATRY 117 (1983) [hereinafter Parker, *Motivation*] (same).

9. There are many legal issues surrounding the validity of surrogate parenting agreements. There are contract issues, for example, regarding both the enforceability of the agreements and the appropriate remedy, if any, for their breach. See, e.g., Field, *Surrogate Motherhood — The Legal Issues*, IV N.Y.L. SCH. HUM. RTS. ANN. 481 (1987); Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble With Specific Performance*, IV N.Y.L. SCH. HUM. RTS. ANN. 375 (1987). There is also the constitutional issue of one's privacy right of procreation. See *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See also Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983). Some commentators have suggested that surrogate parenting agreements must be enforced in order to avoid violating the parties' constitutional privacy right of procreation. Coleman, *supra* note 7; Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373 (1981). A better approach is to recognize that while there is a privacy right of procreation, the refusal to enforce a surrogate parenting agreement does not impair that right. See *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983). If surrogate parenting agreements are not enforced, only one method of procreation is prohibited — not procreation generally.

Another legal issue that arises in the context of surrogate parenting agreements is the presumption of paternity that the law imposes on the spouse of a woman who has been artificially inseminated with her spouse's consent. See, e.g., COLO. REV. STAT. § 19-4-106 (Supp. 1987) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."). Obviously, in a surrogate parenting arrangement, paternity is intended to rest with the biological father rather than with the spouse of the surrogate. In an effort to circumvent a similar provision in Michigan, the spouse of the surrogate signed a statement of "nonconsent" to the insemination of his wife. *Syrkowski v. Appleyard*, 122 Mich. App. 506, 506, 333 N.W.2d 90, 92 (1983), *rev'd on other grounds*, 420 Mich. 367,

This Article adds to the ongoing debate and suggests that, as currently practiced, surrogate parenting is an attempt to create a new form of independent adoption and that such agreements should not be enforced to the extent that they are incompatible with legitimate and well thought-out public policies expressed in state adoption statutes. Adoption is the method by which the state attempts to provide a suitable home for children whose biological parents are unable or unwilling to care for them.¹⁰ Because it results in a permanent severing of the legal ties between a child and his or her biological parents, adoption is strictly regulated by each state.¹¹

In an effort to ensure that the interests of all parties — the child, the biological parents, and the adoptive parents — are protected, several policies are reflected in state adoption statutes. One such policy is to ensure that the consent of the biological parents to surrender the child for adoption is voluntary and informed.¹² Another is to prevent children from being treated as chattel. Thus, states prohibit “baby-selling” or “baby-brokering” — a practice that tends to subordinate the suitability of the home to the financial interest of the baby-broker.¹³ Finally, states seek to protect the child by ensuring that the adoptive parents are fit before they are granted an adoption decree.¹⁴ Since surrogate parenting agreements are a form of adoption, they must conform to these policies.

This Article explores the public policy doctrine relating to contracts generally and examines specific public policies set forth in state adoption statutes. The Article concludes that surrogate parenting agreements are 1) incompatible with consent provisions of state adoption statutes, 2) inconsistent with state laws prohibiting baby-selling, and 3) inconsistent with state adoption provisions that provide for a thorough investigation of the adoptive parents in order to ensure that the adoption serves the child’s best interests. Accordingly, this Article suggests that as state legislatures debate the

362 N.W.2d 211 (1985). In *Baby M*, the surrogate’s husband also refused to consent to the insemination. See Surrogate Parenting Agreement between Mary Beth Whitehead, Richard Whitehead, and William Stern (Feb. 6, 1985), Exhibit G [hereinafter MBW Contract]. See *infra* note 145 and accompanying text.

10. See *infra* notes 48-67 and accompanying text.

11. See *infra* notes 69-73 and accompanying text.

12. See *infra* notes 73-108 and accompanying text.

13. See *infra* notes 109-119 and accompanying text.

14. See *infra* notes 120-128 and accompanying text.

best means of addressing the issue of surrogate parenting,¹⁵ they should recognize that surrogate parenting agreements must be restructured to avoid violation of adoption statutes. Surrogate parenting agreements that comply with adoption requirements in all respects except for failure to comply with adoption consent provisions should be voidable. Surrogate parenting agreements that violate baby-selling prohibitions or provisions requiring an investigation of the adoptive parents, however, should be void.

Part I of this Article examines the public policy doctrine as it applies to traditional contract law. Part II explores the adoption process and the public policies underlying it. Part III examines the incompatibilities between surrogate parenting agreements and the adoption statutes. Part IV describes the modifications required in the surrogate process in order to make surrogate parenting agreements enforceable and concludes by looking at surrogacy in the context of society at large.

I. THE PUBLIC POLICY DOCTRINE

Traditional contract law¹⁶ permits private parties to contract freely without undue government interference.¹⁷ In fact, private contractual agreements are encouraged and considered an important part of our free enterprise system.¹⁸ Individuals would be hesitant to rely on each others' promises without the assurance that those promises would generally be enforced. Without enforcement of promises, it would be almost impossible to conduct private business in an orderly fashion. Accordingly, society has an interest in protecting

15. Many states have recently proposed bills on the issue of surrogate parenting. Michigan is the first state that has actually enacted legislation. *See infra* notes 202-203 and accompanying text.

16. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

17. E. FARNSWORTH, CONTRACTS § 5.1 (1982) ("The principle of freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements.").

18. *See, e.g.,* Wallihan v. Hughes, 196 Va. 117, 117, 82 S.E.2d 553, 558 (1954) ("The law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes."); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 744 (1982) ("A modern free enterprise system depends heavily on exchanges over time and on private planning.").

the expectations of contracting parties by binding them to the contracts they make.¹⁹ In an effort to further this societal interest, courts normally enforce the promises of competent parties²⁰ that are supported by consideration.²¹

Not all promises, however, are enforceable.²² For example, a promise may be unenforceable due to the absence of consideration²³ or a failure to comply with the statute of frauds.²⁴ An agreement that appears valid on its face may be unenforceable if duress,²⁵ undue

19. Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629-30 (1943).

[The freedom to contract] became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way. Rational behavior within the context of our culture is only possible if agreements will be respected. It requires that reasonable expectations created by promises receive the protection of the law. . . . [F]reedom of contract does not commend itself for moral reasons only; it is also an eminently practical principle. It is the inevitable counterpart of a free enterprise system.

Id. (footnote omitted). See also Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 165 (1985).

20. If one of the parties lacks capacity due to infancy or mental illness, the contract will be voidable by the party who lacks capacity. See RESTATEMENT (SECOND) OF CONTRACTS §§ 12-16 (1979). See also *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894 (S.D. 1987); *Ortelere v. Teachers' Retirement Bd.*, 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362 (1969); *Keser v. Chagnon*, 159 Colo. 209, 410 P.2d 637 (1966).

21. E. FARNSWORTH, *supra* note 17, at § 5.1.

22. Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 591 (1969) ("No legal system devised by man has ever been reckless enough to make all promises enforceable."); Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1933) ("It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient."); *Inman v. Clyde Hall Drilling Co.*, 369 P.2d 498, 500 (Alaska 1962) ("We recognize that 'freedom of contract' is a qualified and not an absolute right.").

23. See, e.g., *State v. Bryant*, 237 Kan. 47, 697 P.2d 858 (1985); *Sanders v. Arkansas-Missouri Power Co.*, 267 Ark. 1009, 593 S.W.2d 56 (Ct. App. 1980); *Zamore v. Whitter*, 395 A.2d 435 (Me. 1978); *Kirksey v. Kirksey*, 8 Ala. 131 (1845). See also A. CORBIN, CORBIN ON CONTRACTS 167 (1963).

24. RESTATEMENT (SECOND) OF CONTRACTS §§ 110-50 (1979). See also *Farmer's State Bank v. Conrardy*, 215 Kan. 334, 524 P.2d 690 (1974); *Harry Rubin & Sons v. Consolidated Pipe Co.*, 396 Pa. 506, 153 A.2d 472 (1959).

25. RESTATEMENT (SECOND) OF CONTRACTS §§ 174-76 (1979). See also *Standard*

influence,²⁶ or mistake²⁷ induced one party to enter into it. A court may deem unenforceable a contract that is procedurally and substantively unconscionable.²⁸ A court may also excuse performance under a contract if there is a subsequent unforeseen event amounting to impracticability of performance or frustration of purpose.²⁹ Finally, and most importantly for purposes of this discussion, a court may refuse to assist in the enforcement of a contract if it concludes that the contract violates public policy.³⁰

The proposition that a contract may be void as against public policy is easily articulated. The definition of public policy, however, is much more elusive.³¹ In the past, contracts that violated public policy were referred to as "illegal" bargains.³² The current term, "public policy," is broader because contracts may violate public policy although they are not illegal.³³ "Public policy" encompasses those principles designed to protect the welfare of the people.³⁴ Thus, when a party challenges the validity of an agreement based on public policy, the underlying question faced by the court is whether the

Finance Co. v. Ellis, 3 Haw. App. 614, 657 P.2d 1056 (1983); Marriage of Hitchcock, 265 N.W.2d 599 (Iowa 1978); Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971).

26. RESTATEMENT (SECOND) OF CONTRACTS § 177 (1979). See also Dobbins v. Hupp, 562 S.W.2d 736 (Mo. Ct. App. 1978); Agner v. Bourn, 281 Minn. 385, 161 N.W.2d 813 (1968).

27. RESTATEMENT (SECOND) OF CONTRACTS §§ 151-58 (1979). See also Anderson Brothers Corp. v. O'Meara, 306 F.2d 672 (5th Cir. 1962); Lenawee County Bd. of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982); Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887).

28. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). See also U.C.C. § 2-302(1) (1964).

29. RESTATEMENT (SECOND) OF CONTRACTS §§ 261-72 (1979).

30. See Trist v. Child, 88 U.S. (21 Wall.) 441, 448 (1874) ("[A] contract may be illegal and void because it is . . . inconsistent with sound policy and good morals.').

31. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 403, 161 A.2d 69, 94 (1960) ("Public policy is a term not easily defined.'). See also J. CALAMARI & J. PERILLO, CONTRACTS § 22-1 (3d ed. 1987) (public policy is "an amorphous but ubiquitous concept").

32. See RESTATEMENT (FIRST) OF CONTRACTS § 512 (1932).

33. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8 introductory note (1979).

34. BLACK'S LAW DICTIONARY 1041 (5th ed. 1979) (public policy refers to "[t]hat principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good"). Public policy may "for the good of the community" restrict the freedom to contract. *Id.*

contract is consistent with the public interest.³⁵ The perception of what is or is not in the public interest, namely public policy, changes with time.³⁶

There are two basic reasons why a court will not enforce a contract or a portion thereof which offends public policy. First, by refusing to enforce the contract, the court hopes to deter others from making similar agreements. Second, the court does not want to assist the promisee by permitting him or her to use the judicial system to enforce a contract that violates public policy.³⁷ There is a greater reluctance to aid the promisee in these cases than there is a desire to help the promisor.³⁸

35. *Anaconda Fed. Credit Union v. West*, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971) ("[T]he courts can refuse to enforce any contract which they deem to be contrary to the best interests of citizens as a matter of public policy."). See also Prince, *supra* note 19, at 170, who explains:

The phrasing of the public policy doctrine as applied to contracts has been fairly consistent across time and jurisdictions. The Anglo-American courts have stated repeatedly that they will not enforce contracts that are contrary to public policy in that they injure the public welfare or interests, or are contrary to public decency, sound policy, and good morals.

36. *Wilson v. Carnley*, 1 K.B. 729, 738 (1908) ("The determination of what is contrary to the so-called 'policy of the law' . . . necessarily varies from time to time. . . . The rule remains, but its application varies with the principles which for the time being guide public opinion."); *Weeks v. New York Life Insurance Co.*, 128 S.C. 223, 228, 122 S.E. 586, 587 (1924) ("Public policy [is] a 'wide domain of shifting sands.' The term in itself imports something that is uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations of a people.") (quoting *MacKendree v. S. States Life Ins. Co.*, 112 S.C. 335, 335, 99 S.E. 806, 807 (1919)). See also A. CORBIN, *supra* note 23, § 1375, at 12 ("It must ever be borne in mind that times change, and that with them public policy must likewise change. A decision or a rule that is believed to be in accord with the general welfare today may not accord with it tomorrow.").

37. RESTATEMENT (SECOND) OF CONTRACTS ch. 8 introductory note (1979).

38. *Id.* In a breach of contract case, the plaintiff is generally the promisee — the party who alleges that the defendant/promisor failed to comply with the terms of the contract. Assume a typical breach of contract case involving a contract for the sale of cotton. If the buyer breaches the contract by failing to pay the contract price, the court, in an action by the seller/promisee, will protect the seller's expectation interest by requiring the buyer to compensate the seller for his loss. This is in keeping with the societal interest in protecting the expectations of contracting parties which in turn furthers our free enterprise system. In a contract

Public policy is reflected in constitutions and statutes,³⁹ judicial decisions,⁴⁰ and rulings of administrative agencies.⁴¹ There has been greater concern, however, over judicial pronouncements of public policy than over public policy set forth by legislatures. There is an apprehension that judicial pronouncements of public policy will simply reflect each judge's personal biases and opinions.⁴² Therefore it has been suggested that judicially created public policies would lead to too much unpredictability — like an “unruly horse.”⁴³ Moreover,

which violates public policy, though, the defendant/promisor's promise may not be enforced. This is not primarily to relieve the promisor of his contractual responsibility since he agreed to the improper transaction, but to deny the promisee the benefit of the bargain. E. FARNSWORTH, *supra* note 17, at § 5.1.

39. “Constitutions and statutes are declarations of public policy by bodies of men authorized to legislate.” A. CORBIN, *supra* note 21, § 1375, at 15. *See also* Pittsburgh, C., C. & St. L. Ry. v. Kinney, 95 Ohio St. 64, 67, 115 N.E. 505, 507 (1916) (“It has frequently been said that . . . public policy is a composite of constitutional provisions, statutes, and judicial decisions.”). *See also* Zamboni v. Stamler, 847 F.2d 73 (3d Cir. 1988).

An example of a public policy created by the federal Constitution is the Thirteenth Amendment which prohibits slavery. U.S. CONST. amend. XIII. *See infra* note 110 and accompanying text.

40. The public policy against the impairment of family relationships is a judicial creation. E. FARNSWORTH, *supra* note 17, at § 5.2. *See* Prince, *supra* note 19. For example, there is a public policy which favors the relationship of marriage. E. FARNSWORTH, *supra* note 17, at § 5.4. Thus, one court has condemned a cohabitation agreement as being inconsistent with the institution of marriage. Hewitt v. Hewitt, 77 Ill. 2d 49, 58-59, 394 N.E.2d 1204, 1208 (1979) (an agreement for which consideration consists in whole or in part of illicit sex is void). *But see* Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 113, 134 Cal. Rptr. 815, 831 (1976) (contract between nonmarital partners is unenforceable only to extent that consideration is explicitly illicit).

41. *Zamboni*, 847 F.2d at 82. *See also* Belenke v. SEC, 606 F.2d 193 (7th Cir. 1979).

42. *See* Anaconda Fed. Credit Union v. West, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971) (“[W]hether there is a prior expression or not the courts can refuse to enforce any contract which they deem to be contrary to . . . public policy.”). Prince, *supra* note 19, at 172, explains:

When the courts are without relevant legislative direction . . . they must focus on the specific policy standards accepted by society. Courts rely on their subjective perceptions to determine these societal standards. These perceptions will almost certainly vary depending on how judges view their social environment, where the environment is located and what the current societal morals are.

43. Richardson v. Mellish, 130 Eng. Rep. 294, 303 (1824) (Burrough, J.)

if the opinions of each judge reflect his or her own personal view of what the public interest is, that view may or may not accurately reflect the public interest.

When public policy is declared by a constitution or legislative enactment, the concern over unpredictability is reduced.⁴⁴ First, it is easier for the court to determine what the public policy is. The judge is not basing the decision on his or her personal views, but on the policy established by a duly elected legislative body. Second, because the public policy is more defined, it is easier for a court to determine whether a contract is compatible with the public policy.⁴⁵

("I, for one, protest as my Lord has done against arguing too strongly upon public policy; — it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.").

44. Prince, *supra* note 19, at 171 ("[The] identification of public goals and interest can be made with more certainty when legislative enactments exist. . . . The basis for the statutory public policy rule is that a duly constituted, public representative body has established law that reflects some public interest. The courts are then bound to act in accordance with this statutory public policy.").

45. Legislative declarations of public policy have increased over the years. Legislatures are often faster than courts in responding to matters of interest to their constituencies and have greater resources than a court with which to respond to a changing society. E. FARNSWORTH, *supra* note 17, at § 5.5. If legislation explicitly provides that contracts incompatible with it are unenforceable, a court's function is relatively simple, and it will conclude that the contract should not be enforced. But when the legislature enacts a statute, it often omits any reference to the intended treatment of contracts which are incompatible with it. Then a court must consider the violation of public policy on one hand, while on the other weigh the policy favoring the enforcement of promises. *Id.* In *Sirkin v. Fourteenth St. Store*, 124 A.D. 384, 108 N.Y.S. 830 (1908), for example, the buyer of goods challenged the enforceability of a contract on public policy grounds although the statute which set forth the public policy did not specify that contracts inconsistent with it were unenforceable. In that case the plaintiff, a seller of hosiery, sued for the purchase price of goods it delivered to buyer. The buyer defended on the ground that the contract had been procured through commercial bribery in violation of a New York statute and therefore was not enforceable. The seller had bribed the buyer's purchasing agent in order to obtain the contract. The court noted that while the statute did not specify how contracts procured through commercial bribery should be treated, the statute did, nonetheless, indicate "the public policy of the state." *Id.* at 389, 108 N.Y.S. at 833. Thus, the court held the contract unenforceable in an effort to further the public policy and deter commercial bribery. The dissent, however, argued that the express penalties imposed by the statute should not have been supplemented by the court. *Id.* at 395, 108 N.Y.S. at 838 (Scott, J., dissenting).

When a court concludes that a contract violates public policy, it need not declare the entire contract void; instead it may refuse to enforce only a portion of the contract. It may also allow one party to enforce the contract although the other party would not be permitted to enforce it.⁴⁶ The court thus retains some flexibility in determining the degree to which the contract should be enforced.⁴⁷ Keeping in mind the general contract rules of public policy, an examination must be made of specific public policies that affect both adoption and surrogate parenting agreements.

II. THE ADOPTION PROCESS AND ITS UNDERLYING PUBLIC POLICIES

A. The Adoption Process

Adoption did not exist at common law; it is entirely a creation of the state and is governed by state statutes.⁴⁸ In general, the state prefers to keep children with their biological parents.⁴⁹ Adoption is the state's response to the needs of children whose parents are unable or unwilling to care for them. It is the procedure by which the state attempts to find a permanent home for those children who are without one. In general, adoption permanently severs the legal ties between a child and his or her biological parents.⁵⁰ Since adoption is a state

46. As Professor Farnsworth explains:

[A] court will not necessarily condemn the entire agreement as unenforceable by both parties merely because it offends public policy. A court may hold instead that the agreement can be enforced by one of the parties though it cannot be enforced by the other. Or it may hold that part of the agreement is enforceable, though another part of it is not. It is therefore more accurate to say that the agreement or some part of it is unenforceable by one or both parties than to say that it is 'void'.

E. FARNSWORTH, *supra* note 17, at § 5.1.

47. In the surrogate parenting context, a court could declare that the agreement could be enforced by the biological mother but not by the biological father, for example, in a case involving a birth defect where the biological father attempted to renege on his promise.

48. *In re Taggart's Estate*, 190 Cal. 493, 213 P. 504 (1923).

49. B. JOE, PUBLIC POLICIES TOWARD ADOPTION 11-12 (1979).

50. In some instances, the adopter is the stepparent or some other relative of the biological parent(s) — so that the child is able to maintain contact with one or both of the biological parents.

creation that permanently removes children from their biological parents, several states strictly construe their adoption statutes.⁵¹

A couple that wants to adopt a child may generally follow one of two procedures. The first and often preferred⁵² procedure is for the couple to use an agency licensed by the state.⁵³ The license signifies that the state deems the agency to be an acceptable organization for child placement.⁵⁴ When a couple interested in adopting contacts an agency, the agency will normally investigate the couple's fitness as parents.⁵⁵ A child will be placed with the couple should the agency conclude that they are fit. The couple then petitions a court to approve the adoption.

The second option open to couples in most states is the independent adoption, which is also known as private placement or gray market adoption.⁵⁶ No state-licensed agency is involved in an independent adoption. Instead, the adoption is arranged by a private, unlicensed intermediary such as an attorney, doctor, or member of

51. See, e.g., *Scott v. Pulley* 705 S.W.2d 666, 670 (Tenn. Ct. App. 1985); *Anonymous v. Anonymous*, 108 Misc. 2d 1098, 1102, 439 N.Y.S.2d 255, 255 (Sup. Ct. 1981); *Matter of Doe's Adoption*, 89 N.M. 606, 555 P.2d 906 (Ct. App. 1976). But see *Wright v. Wysowatky*, 147 Colo. 317, 363 P.2d 1046 (1961) (adoption statutes should be liberally construed because of the humanitarian purpose they serve). See also N.J. STAT. ANN. § 9:3-37 (West Supp. 1988) ("This act shall be liberally construed to the end that the best interests of children be promoted.").

52. See *infra* notes 61-66 and accompanying text.

53. See, e.g., MINN. STAT. ANN. § 259.22 (West Supp. 1988) ("No petition for adoption shall be filed unless the child sought to be adopted has been placed by the commissioner of human services, the commissioner's agent, or a licensed child-placing agency.").

54. See, e.g., IDAHO CODE § 16-1602 (1979) ("'Authorized agency' means the department of health and welfare or a local agency, or a person, organization, corporation, benevolent society or association licensed or approved by the department or the court to receive children for control, care, maintenance or placement."). See also ARK. STAT. ANN. § 9-9-202 (1977); MINN. STAT. ANN. § 259.21 (West Supp. 1988).

55. See Note, *Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy Over Gray-Market Adoptions?*, 18 DUQ. L. REV. 629, 633 (1980).

56. See, e.g., KY. REV. STAT. ANN. § 199.473 (Baldwin 1984) (persons other than licensed child-placing agencies may seek permission to place a child for adoption); N.Y. DOMESTIC RELATIONS LAW § 115-b (McKinney 1986). See also Note, *Black-Market Adoptions*, 22 CATH. LAW. 48, 54 (1976) ("In contrast to the sinister sound of the term, gray-market adoptions, consisting of nonagency placement with nonrelatives, are legal in most states.").

the clergy.⁵⁷ These intermediaries are not necessarily in the business of child placement, but may be asked to arrange an adoption as an incident to their professions. Normally, the intermediary places the child in the prospective adoptive home. The state subsequently investigates the fitness of the couple, and a hearing is held in which the adoption is granted or denied.⁵⁸ In addition to the fact that in an independent adoption the intermediary is not licensed by the state, another major difference between an agency and an independent adoption is that in an independent adoption the investigation of the prospective adoptive parents often takes place subsequent to the placement of the child.⁵⁹ With an agency adoption, a determination of the prospective adoptive couple's fitness as parents is generally made prior to placing a child with them.⁶⁰

Several commentators have criticized independent adoptions because more abuses tend to occur through independent adoptions than through agency adoptions.⁶¹ For example, a child placed for adoption through an independent procedure is more likely to become a victim of the black market.⁶² Moreover, some studies conclude that there

57. See Note, *supra* note 55, at 629-30:

When a person or couple decides to adopt a child in the United States, there are several vehicles through which a child can be obtained. The most extensively used is the adoption agency, which can be either a public agency — an arm of the government — or a private agency — a nonprofit entity. Both types of agencies are heavily controlled through various state laws, rules, and regulations. In contrast to placement through controlled agencies is placement through unlicensed groups and individuals. This unlicensed placement activity [is] known alternately as the gray market, private placement, or independent adoption.

58. *Id.* at 633.

59. Note, *supra* note 56, at 52-53 (1976) ("In an independent adoption, there is seldom any requirement that adoptive parents be evaluated before placement.").

60. Note, *supra* note 55, at 633-34 ("When an agency places the child, the . . . significant change in the sequence of events is that the agency will investigate the prospective parents *before* they can receive a child." There is an "absence of this preplacement evaluation of the adoptive parents and their home" with an independent adoption.). Because of this difference in the sequence of events, the child's best interests are arguably not sufficiently considered in the independent adoption. *Id.*

61. See, e.g., Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547 (1975); L. McTAGGART, *THE BABY BROKERS: THE MARKETING OF WHITE BABIES IN AMERICA* (1980).

62. A black market adoption differs from a legal private placement or gray

is a greater risk that the biological parents will not receive proper counseling regarding the decision to place the child for adoption.⁶³ There also appears to be a greater risk that the placement will not be permanent due to some intervening problem.⁶⁴ Because of the potential problems associated with independent adoptions,⁶⁵ at least one state prohibits independent adoptions completely, and many others severely restrict them.⁶⁶ On the other hand, some commentators

market adoption only in that the intermediary receives a disallowable fee. Since it is so easy to cross the line between a permitted private placement and an illegal black market sale of a child, the threat of a black market adoption is greater with independent adoptions. *See Note, supra* note 56, at 54.

63. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK 47-48 (1985) [hereinafter ADOPTION FACTBOOK]. Of the risks associated with independent adoptions, the National Committee for Adoption concludes that perhaps "most important of all, [is the risk that] the biological parents [will] . . . receive little if any adequate counseling regarding the plan that is best for them and for the child." *Id.* at 48.

64. For example, the adopting couple may specify that they want a healthy child and may discover, after placement, that the child is not healthy. As a result, they may attempt to return the child to the biological parents. *See id.* at 12.

65. *See Amatruda & Baldwin, Current Adoption Practices*, 38 J. OF PEDIATRICS 208, 209-11 (1951); H. WITMER, E. HERZOG, E. WEINSTEIN & M. SULLIVAN, INDEPENDENT ADOPTIONS 337-62 (1963).

66. Massachusetts prohibits independent adoptions completely. MASS. GEN. LAWS ANN. ch. 210, § 11A (West Supp. 1986) (No person other than a "duly authorized agent or employee of the department of social services or a child care or [licensed] placement agency" shall "in any way offer . . . to place, locate or dispose of children for adoption.").

Some states prohibit independent placement unless the placement is by the biological parents. *See, e.g.,* CAL. CIV. CODE § 224p (West Supp. 1988) ("Any person other than a parent who, or any organization, association, or corporation that, without holding a valid and unrevoked license or permit to place children for adoption issued by the State Department of Social Services, places any child for adoption is guilty of a misdemeanor."). *See also* COLO. REV. STAT. § 19-5-206 (Supp. 1987); GA. CODE ANN. § 19-8-3 (1977); MONT. CODE ANN. § 40-8-108 (1981); NEB. REV. STAT. § 43-701 (1961); NEV. REV. STAT. § 127.240 (1979); R.I. GEN. LAWS § 15-7-1 (1970).

Another group of states generally prohibits independent adoptions, but provides for limited exceptions. *See, e.g.,* CONN. GEN. STAT. ANN. § 45-69d (West 1987); D.C. CODE ANN. § 32-1005 (1988); IND. CODE ANN. § 31-3-1-3 (Burns 1987); MD. FAM. LAW CODE ANN. § 5-507 (1984); MINN. STAT. ANN. § 259.22 (West Supp. 1988); N.J. REV. STAT. § 9:3-39 (Supp. 1988); N.M. STAT. ANN. § 40-7-34 (1985). For a discussion of state regulation of independent adoptions, see Note, *Independent Adoption: The Inadequacies of State Law*, 63 WASH. U.L.Q. 753, 755-56 (1985).

argue that despite the foregoing risks, independent adoptions pose no greater threat to a child's welfare than agency adoptions.⁶⁷ There are certain requirements, such as the investigation of the adoptive parents, that state laws impose before the adoption takes place irrespective of whether that adoption takes place through an agency or through private placement.

B. Surrogate Parenting as a Form of Adoption

A surrogate parenting agreement is not in itself an adoption agreement. It is an agreement pursuant to which the biological mother agrees for a fee to terminate her parental rights upon the birth of the child and to surrender the child to the biological father.⁶⁸ A threshold question may be why surrogate parenting agreements must conform to existing adoption statutes. The parties to the surrogate parenting agreement contemplate that the biological father's wife, the stepmother, will adopt the child.⁶⁹ Surrogate parenting agreements are, in effect, a form of independent adoption.⁷⁰ Their ultimate goal is to make the contracting couple the legal parents of the child through adoption.⁷¹ Since surrogate parenting agreements

67. See Note, *supra* note 55, at 629. See also W. MEEZAN, S. KATZ & E. RUSSO, *ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS* 232-33 (1978).

68. See *supra* note 5 and accompanying text.

69. "In the typical case, the surrogate . . . conceives, carries the child for nine months, gives birth, and . . . releases her parental rights, giving up the child to the [contracting] couple for adoption." Katz, *supra* note 4, at 2 (emphasis added).

70. The trial court in *Baby M*, for example, upon declaring the surrogate parenting agreement valid, immediately issued a decree of adoption to Elizabeth Stern, the wife of the biological father. See 109 N.J. 396, 417, 537 A.2d 1227, 1237 (1988). Although the Supreme Court of New Jersey reversed the trial court, holding that the surrogate parenting agreement was not enforceable, it acknowledged that the agreement was a form of adoption. "It strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money." *Id.* at 424-25, 537 A.2d at 1241. See also Field, *supra* note 9, at 510 ("Surrogacy arrangements are sufficiently similar to other adoption arrangements that the same rule[s] should apply."). For a description of independent adoptions, see *infra* notes 56-67 and accompanying text.

71. There are several reasons why the adopting couple may prefer to use a surrogate arrangement rather than proceeding through a traditional adoption.

are an attempt to create a new form of independent adoption, their compatibility with state adoption laws is critical.⁷²

C. Public Policy Interests Protected by the Adoption Process

The public policy interests protected by the adoption process are reflected in three aspects of state adoption laws, all of which apply irrespective of whether the adoption takes place through an agency or private placement: the requirement of consent, the prohibition of baby-selling, and the requirement of an investigation.

1. The Requirement of Voluntary, Informed Consent

Every state requires that the biological parents consent to the adoption of their child before the adoption will be approved.⁷³ There are several reasons for requiring the consent of the biological parents.

First, the surrogate arrangement maintains a genetic link, through the biological father, between the adopting couple and the child. Second, the combination of the increased use of contraception, the higher incidence of abortion, and the reduced stigma attached to being a single mother has reduced the number of adoptable white babies. Thus the waiting period for the adoption of a white baby may be as long as ten years. ADOPTION FACTBOOK, *supra* note 63, at 52. Surrogate parenting presumably involves a much shorter waiting period than a traditional adoption. Of course, there are children of many ethnic and racial minorities as well as foreign and handicapped children who are available for and are waiting to be adopted. For couples that are more flexible, a child can be adopted in a relatively short period of time. *See infra* notes 224-30 and accompanying text.

72. See TASK FORCE REPORT, *supra* note 3, at A-3, where the Task Force, in concluding that surrogate parenting agreements should be declared void as against public policy, included a legislative proposal "to reflect or incorporate existing laws relating to adoption."

73. See W. MEEZAN, S. KATZ & E. RUSSO, *supra* note 67, at 149-50 (there are certain limited circumstances in which consent is not required, e.g. when the child has been abandoned, neglected, or abused). The authors write:

Before a child may be adopted the consent of the biological parents is required in all instances unless they have voluntarily relinquished their child, or the courts have terminated the parents' rights in the child due to abuse or neglect, or have determined that waiver of the consent requirement would be in the best interests of the child.

Id. See also *Barwin v. Reidy*, 62 N.M. 183, 307 P.2d 175 (1957).

Consent of the biological parents may also be waived or supplemented with the consent of the child if the child has reached a certain age. MO. ANN. STAT. § 453.030 (Vernon 1986) (14 years old); PA. STAT. ANN. tit. 1, § 2 (Purdon 1963) (12 years old); R.I. GEN. LAWS § 15-7-5 (1981) (14 years old).

One reason is the state interest in preserving the relationship between the child and his or her biological parents. It is generally considered preferable that parents and their biological offspring remain together.⁷⁴ A second, related reason for requiring consent is that the involuntary termination of the biological parents' rights can only occur under limited circumstances.⁷⁵ The adoption process is designed primarily as a mechanism for the voluntary termination of parental rights.⁷⁶ A third reason for requiring the biological parents' consent to the adoption is to protect the adoptive parents from being subjected to the instability that would occur if the biological parents could freely change their minds and reclaim their child.⁷⁷ Finally, consent is required to prevent abuses which might otherwise occur if consent were not required.⁷⁸ Thus, without consent of the biological parents,

74. See B. JOE, *supra* note 49, at 11.

75. The involuntary termination of parental rights can normally occur when the parent has abandoned, neglected, or abused the child. See, e.g., IND. CODE Ann. § 31-3-1-6 (Burns 1987); OR. REV. STAT. § 109.324 (1984); R.I. GEN. LAWS § 15-7-7 (1981). When parental rights are involuntarily terminated, the child often becomes available for adoption.

76. While parents are permitted to voluntarily terminate their parental rights via the state adoption process, they may not contractually agree to terminate one parent's parental rights independent of the adoption process. In *Hawkins v. Frye*, 1988 WL 59841 (Fam. Ct. Del. May 25, 1988) (West), a divorcing couple contractually agreed to terminate the father's parental rights. In refusing to enforce this provision of the contract, the court in *Frye* relied on the reasoning in *Baby M*:

[I]t is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts. The Legislature would not have so carefully, so consistently, and so substantially restricted termination of parental rights if it had intended to allow termination to be achieved by one short sentence in a contract.

109 N.J. 429, 537 A.2d at 1234-44.

77. See W. MEEZAN, S. KATZ & E. RUSSO, *supra* note 67, at 150 ("[C]onsent affords protection to the prospective adoptive parents as a legal guarantee of the child's availability."). Some states, however, permit the biological parents to withdraw consent more easily than others. *Id.* Therefore, the giving of consent is not a total guarantee of protection for the prospective adoptive parents.

78. See *Barwin v. Reidy*, 63 N.M. 183, 191, 307 P.2d 175, 180 (1957). For example, kidnapping a child in order to place him or her for adoption would pose a greater threat if the adoption could legally occur without the consent of the biological parents. The consent requirement makes it more difficult for this kind of abuse to occur.

no state permits a child to be taken from them unless the child has been abandoned, neglected, or abused.⁷⁹

The consent that is required of the biological parent is generally referred to as intelligent, voluntary consent, or consent that is made on an informed basis.⁸⁰ The consent of the biological parents must therefore satisfy two criteria: it must be informed and it must be voluntary. To ensure that consent to an adoption is informed, it must generally be made in writing,⁸¹ but informed consent involves more than the mere signing of a form.⁸² It is a process that involves an exchange of information.⁸³ Informed consent requires that the biological parents understand the implications of their decision to surrender their child for adoption. They must be advised by counsel, the court, or some other appointed person that adoption results in a permanent severing of their legal relationship with the child.⁸⁴ If they are not so advised, and are not made to understand the

79. See *supra* note 75. The surrogate, by signing the surrogate parenting agreement and going forward with the pregnancy is arguably abandoning the child, but the signing of a form prior to the child's birth cannot realistically be equated to the abandonment of a living child. The better approach would be to recognize that, until the child is born, it is incapable of being abandoned.

80. See, e.g., FLA. STAT. ANN. § 63.092 (West 1985) (a study shall be made to determine "whether the consent of the natural parent or parents has been given on an informed and voluntary basis"). See also *Downs v. Wortman*, 228 Ga. 315, 315, 185 S.E.2d 387, 388 (1971) (consent must be given "freely and voluntarily"); *In re Adoption of Susko*, 363 Pa. 78, 69 A.2d 132 (1949) (consent must be intelligent, voluntary, and deliberate).

81. COLO. REV. STAT. § 19-5-203 (1986); GA. CODE ANN. § 19-8-3 (1977); HAW. REV. STAT. § 578-2 (1985); ME. REV. STAT. ANN. tit. 19, § 532 (1979); S.C. CODE ANN. § 20-7-1710 (Law. Co-op. 1976); VA. CODE ANN. § 63.1-225 (1987); W. VA. CODE § 48-4-3 (1986).

82. See *infra* notes 83-93 and accompanying text.

83. F. ROSOVSKY, *CONSENT TO TREATMENT: A PRACTICAL GUIDE* 3 (1984) ("Consent is a process, not a form.").

84. See W. MEEZAN, S. KATZ & E. RUSSO, *supra* note 67, at 150 (The purpose of the consent is to ensure the court that the biological parent "understands the implication of consenting to the adoption — that the parent-child relationship will be completely and permanently severed."). Thus, in *In re Cheryl E.*, 161 Cal. App. 3d 587, 207 Cal. Rptr. 728 (1984), where a social worker informed the biological mother that she could change her mind within one year of signing the consent form, the adoption decree was set aside. See also *Keheley v. Koonce*, 85 Ga. App. 893, 70 S.E.2d 522 (1952) (attorney advised biological mother that she could reclaim her child within one year).

consequences of their actions, the consent is invalid.⁸⁵ The biological parents should also be advised of the psychological consequences of their decision. They should be advised that the separation from the child can, and undoubtedly will, be emotionally trying.⁸⁶ Many states attempt to ensure that the biological parents are aware of the emotional and psychological feelings which may confront them by prohibiting them from consenting to the adoption prior to the child's birth.⁸⁷ These states recognize that until the child is born, the consent is necessarily uninformed. Until the child's birth, the parent is unable to understand how he or she will feel with respect to giving the child up for adoption.⁸⁸

In order to be valid, the consent of the biological parents must also be given voluntarily. Consent may be involuntary for a number

85. See, for example, *In re the Adoption of Robin*, 571 P.2d 850, 857-58 (Okla. 1977), where the court explained:

The court should thoroughly advise the relinquishing parent of the nature of his or her actions, and of the seriousness of the attendant consequences. As completely as possible, the court should attempt to ascertain whether the natural parent has an intelligent comprehension of their [sic] action. . . . Attorneys representing adoptive parents and adoption agencies, as well as attorneys representing relinquishing natural parents, should insist that these measures be taken to fully protect their clients and more importantly, to avoid subsequent emotionally traumatic custodial changes of the adopted child.

86. The doctrine of informed consent does not require that the patient be informed of obvious risks. *Crain v. Allison*, 443 A.2d 558 (D.C. 1982). It may be argued that it will obviously be difficult emotionally for a biological parent to separate from his or her child. Every parent who decides to give a child up for adoption undoubtedly is aware that it may be extremely painful. In fact, though, the emotional aspect is such an important matter for a parent to understand in the course of making his or her decision that it should not go unaddressed. The consideration of emotional repercussions is something which proper counselling can likely facilitate. Therefore, counselling ought to be given.

87. See *infra* notes 94-98 and accompanying text.

88. See *Keheley v. Koonce*, 85 Ga. App. 893, 900-01, 70 S.E.2d 522, 527 (1952), where the court, quoting the policy of the Fulton County Welfare Department, explained: "We do not accept releases before birth; we do not accept them until sometime after the child is born because mothers do change their minds and we want to give them time in which to be sure they want to release the child."

See also Gaffney, *Maternal-Fetal Attachment in Relation to Self-Concept and Anxiety*, 15 MATERNAL-CHILD NURSING J. 91 (1986) (author discusses the bonding between mother and child that occurs during pregnancy). See *infra* notes 137-142 and accompanying text.

of reasons. For example, consent given by the biological parents based on duress is not considered voluntary;⁸⁹ nor is it voluntary

89. Assuming that competent parties have entered into a contract, courts generally attempt to enforce their expectations. *See* discussion *supra* note 18. If, however, there is improper conduct on the part of one of the parties during the bargaining process amounting to duress, a court may allow the other party to avoid the transaction. E. FARNSWORTH, *supra* note 17, at §§ 4.9, 4.16. While every bargain generally involves some degree of coercion, duress refers to coercion to such a degree that the assent given has not been given freely. *Id.* at § 4.9. Duress is an improper threat which induces the other party's assent by leaving "no reasonable alternative." RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979).

Normally, the threat of withholding a financial incentive is not considered sufficient in itself to constitute duress. In fact, duress was once limited to threats of physical harm and was only later expanded to include threats involving economic duress. E. FARNSWORTH, *supra* note 17, at § 4.17. *See also* Dawson, *Economic Duress — An Essay in Perspective*, 45 MICH. L. REV. 253, 255 (1947). Recently, courts have begun to expand the doctrine of duress. Thus, it is impossible to create a bright line test for determining which threats constitute duress and which do not. Some commentators have suggested that the courts should focus on the unfairness of the bargain rather than on the impropriety of the threat. *Id.* at 286. Moreover, the surrounding circumstances should be considered, including the victim's "age and background, the relationship of the parties, and the availability of disinterested advice." E. FARNSWORTH, *supra* note 17, at § 4.18.

Duress, in the adoption context, is "defined . . . according to its generally understood meaning, to signify that condition which exists where one is induced by the unlawful act of another to make a contract or to perform or forego an act under circumstances which deprive him of the exercise of his free will." *Scott v. Pulley*, 705 S.W.2d 666, 669 (Tenn. Ct. App. 1985). It is extremely difficult to prove duress in adoption cases. There is a general recognition that parents will not place a child for adoption if they are not faced with some unfortunate circumstance. This "duress of circumstance" is not generally sufficient to vitiate the consent of the biological parents. As the court in *Barwin v. Reidy* explained:

If consents to adoption were ineffective every time this sort of duress entered the picture, it is difficult to see how any adoption where consent is required could be allowed to stand, for what natural parent would ever consent to the adoption of his or her child in the absence of duress of circumstance?

62 N.M. 183, 198, 307 P.2d 175, 185 (1957) (The court went on to find, however, that impermissible payments to the biological parents vitiated consent.). Other courts have also held that duress of circumstance is not sufficient to vitiate consent. *See Wooten v. Wallace*, 351 S.E.2d 72, 74 (W. Va. 1986) ("Duress of circumstance" has generally been held insufficient to void an otherwise valid consent to adopt.); *In re Adoption of E.W.C.*, 389 N.Y.S.2d 743, 749 (Surr. Ct. 1976) ("No statute has said that surrenders are valid only if executed free from emotion, tensions and pressures caused by [trying circumstances].").

Findings of duress have generally been limited to cases where the biological

when based on undue influence,⁹⁰ fraud,⁹¹ or mistake.⁹² Consent is also not considered voluntary when it is bought.⁹³ Thus, states prohibit biological parents from receiving a fee in exchange for their consent to place a child for adoption. The prohibition of such fees along with the prohibition on pre-birth consent must be explored further in order to understand how they facilitate the states' policy of ensuring that consent is voluntary and informed.

a. Consent Prior to Birth

Many adoption statutes expressly prohibit the biological parents from consenting to an adoption prior to the child's birth.⁹⁴ In other

parent consented while under the effects of medication or under extreme pressure from family members. *See* *Wuertz v. Craig*, 458 So. 2d 1311 (La. 1984) (mother was threatened with criminal abuse charges); *Adoption of Robin*, 571 P.2d 850 (Okla. 1977) (stepmother threatened to kill biological mother and her father); *In re Adoption of Susko*, 363 Pa. 78, 69 A.2d 132 (1949); *Huebert v. Marshall*, 132 Ill. App. 2d 793, 270 N.E.2d 464 (1971).

90. Undue influence is similar to the doctrine of duress but is a doctrine which grew up in equity "to give relief to victims of unfair transactions that were induced by improper persuasion." E. FARNSWORTH, *supra* note 17, at § 4.9. "In contrast to the common law notion of duress, the essence of which was simple fear induced by threat, the equitable concept of undue influence was aimed at the protection of those affected with a weakness, short of incapacity, against improper persuasion, short of misrepresentation or duress, by those in a special position to exercise such persuasion." *Id.* at § 4.20. Two elements are normally required to make a case of undue influence: "a special relation between the parties" and "improper persuasion of the weaker by the stronger." *Id.* at § 4.19. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 177 (1979).

In adoption cases, undue influence and duress are often not clearly distinguished from one another, and the definition of undue influence has been described, like duress, as force or coercion that deprives one of his or her free will. *See In re Adoption of a Minor Child*, 109 R.I. 443, 452, 287 A.2d 115, 119 (1972) ("A finding of undue influence is warranted only when the evidence shows that the influence has been exerted to such a degree as to amount to force or coercion so that the actor's free agency is destroyed.").

91. *In re the Adoption of Robin*, 571 P.2d 850, 857-58 (Okla. 1977) (The court must "determine whether the action is taken voluntarily, without being obtained by reason of fraud, duress, or promise by another."). *See also In re Steve B.D.*, 111 Idaho 285, 723 P.2d 829 (1986).

92. *See, e.g., In re Adoption of Anonymous*, 60 Misc. 2d 854, 859, 304 N.Y.S.2d 46, 52 (1969) (lack of adequate counselling); *In re D*, 408 S.W.2d 361 (Mo. Ct. App. 1966).

93. *See infra* notes 99-108 and accompanying text.

94. *See, e.g., ARIZ. REV. STAT. ANN. § 8-107* (1983) ("A consent given

states, where there is no express statutory prohibition against giving consent to an adoption prior to birth, statutes have nevertheless been construed to imply such a prohibition.⁹⁵ States with such a prohibition

before seventy-two hours after the birth of the child is invalid."); CONN. GEN. STAT. ANN. § 45-61c(d) (West Supp. 1987) ("No consent to termination by a mother shall be executed within forty-eight hours immediately after the birth of her child."); FLA. STAT. ANN. § 63.062 (West 1977) ("[A] petition to adopt a minor may be granted only if written consent has been executed *after* the birth of the minor" by the natural mother and/or father.) (emphasis supplied); FLA. STAT. ANN. § 63.082 (West 1978) ("The consent shall be executed only after the birth of the child."); GA. CODE ANN. § 19-8-4 (Supp. 1987) ("A surrender . . . shall be executed following the birth of the child."); ILL. REV. STAT. ch. 40, para. 1511 (1973) ("A consent or a surrender taken not less than 72 hours after the birth of the child is irrevocable. . . . No consent or surrender shall be taken within the 72 hour period immediately following the birth of the child."); IND. CODE ANN. § 31-3-1-6 (Supp. 1987) ("The consent to adoption may be executed at any time after the birth of the child."); IOWA CODE ANN. § 600A.4 (West 1977) (A release of custody must be signed "not less than seventy-two hours after the birth of the child."); KY. REV. STAT. ANN. § 199.500 (Michie/Bobbs-Merrill 1987) ("In no case shall . . . consent for adoption be held valid if such consent . . . is given prior to the fifth day after the birth of the child."); MD. FAM. LAW CODE ANN. § 5-324 ("The court may not enter a final adoption decree until at least 15 days after the birth of the individual to be adopted."); MISS. CODE ANN. § 93-17-5 ("[C]onsent shall be duly sworn to or acknowledged and executed . . . not before three (3) days after the birth of [the] child."); NEV. REV. STAT. § 127.070 (1987) ("All releases for and consents to adoption executed by the mother before the birth of a child are invalid."); N.H. REV. STAT. ANN. § 170-B:7 (1973) ("No consent or surrender shall be taken until a passage of a minimum of 72 hours after the birth of the child."); N.D. CENT. CODE § 14-15-07 (1981) ("The required consent . . . shall be executed at any time after the birth of the child."); OHIO REV. CODE ANN. § 3107.08 (Baldwin 1977) ("The required consent to adoption may be executed at any time after seventy-two hours after the birth of a minor."); TENN. CODE ANN. § 36-1-114 (1986) ("In no event shall a surrender [of a child] made prior to the birth of the child be effective."); W. VA. CODE § 48-4-5 (1985) (Consent may be revoked if executed prior to "seventy-two hours after birth of the child."). *But see* WASH. REV. CODE § 26.33.090 (Supp. 1988) (consent may be given prior to birth unless the child is an Indian).

95. *In re Baby M*, 109 N.J. 396, 422, 537 A.2d 1227, 1240 (1988) ("[T]he natural mother's irrevocable agreement, prior to birth, even prior to conception, to surrender the child to the adoptive couple . . . is totally unenforceable in private placement adoption. Even where the adoption is through an approved agency, the formal agreement to surrender occurs only *after* birth, and then, by regulation, only after the birth mother has been offered counseling.") (citations omitted) (emphasis in original); *J.D. ex rel. J.D. v. L.D.P.*, 713 P.2d 1191, 1193, *aff'd*, 719 P.2d 1370 (Wyo. 1986); *Anonymous v. Anonymous*, 108 Misc. 2d 1098, 1101-

recognize that it is impossible for consent to be given on an informed, intelligent basis prior to the child's birth. Accordingly, in these jurisdictions, the parents may revoke consent given prior to the birth of the child. Moreover, many states provide that even if the biological parents give consent after the child's birth, that consent may be revoked with relative ease within a short period of time.⁹⁶

One reason to prohibit pre-birth consent is to protect the biological parents from making a hasty, ill-considered, and uninformed decision about the adoption.⁹⁷ Prohibitions are also based on the recognition that pregnancy and childbirth can be a woman's most personal and emotional experience. Bonding between mother and child may take place during pregnancy and at birth. "Attachment begins with the . . . sensations created by fetal movement which

02, 439 N.Y.S.2d 255, 260 (Queens Cty. 1981) ("In the opinion of this court, any consent to adoption of an unborn child is not in conformance with statute. . . . The court holds that for the purposes of this statute and for reasons of public policy, an unborn child was never intended to be included in the definition of a person."); *In re Adoption of R.A.B.*, 426 So. 2d 1203, 1205 (Fla. Dist. Ct. App. 1983); *Korbin v. Ginsberg*, 232 So. 2d 417, 418 (Fla. 1970); *In re Adoption of Kreuger*, 104 Ariz. 26, 30, 448 P.2d 82, 86 (1969). See also ADOPTION FACTBOOK, *supra* note 63, at 76-85, where the only state listed as permitting pre-birth consent is the State of Washington.

96. See, e.g., TENN. CODE ANN. § 36-1-117 (Supp. 1988) ("Provided a petition to adopt has not been filed, any parent(s) who has surrendered a child for adoption shall have the absolute right to revoke the surrender within fifteen (15) days from the date of the execution of the surrender").

See also ALASKA STAT. § 25.23.070 (1983) ("A consent to adoption may be withdrawn before the entry of a decree of adoption, within 10 days."). Cf. DEL. CODE ANN. tit. 13, § 909 (Supp. 1988); MD. FAM. LAW CODE ANN. § 5-311 (1984).

97. See, e.g., MD. FAM. LAW CODE ANN. § 303 (1984) ("The purpose of this subtitle [is] to protect . . . the natural parents from a hurried or ill-considered decision to give a child up."); N.H. REV. STAT. ANN. § 170-B:1 (1973) ("The policies and procedures for adoption . . . [have] as their purpose . . . protection of . . . [t]he natural parent or parents, from hurried and coerced decisions to give up the child."). See also Note, *Surrogate Motherhood Legislation: A Sensible Starting Point*, 20 IND. L. REV. 879, 888 (1987) ("The purpose of the law is to prevent an expectant mother from making a hasty and later regretful decision to give up her child for adoption."). Thus the biological parents are permitted to choose, after the birth of the child, whether to go forward with the adoption. See *Surrogate Parenting Associates v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 213 (Ky. 1986) ("The policy of the . . . consent to adoption statute is to preserve to the mother her right of choice regardless of decisions made before the birth of the child.").

validate the mother's awareness of another — an awareness that continues throughout pregnancy."⁹⁸ Thus, a woman who bonds with the child during pregnancy or at birth is in a tragic situation if she is forced to give her child up for adoption based on consent given prior to the birth of the child. State permission to give consent prior to birth would leave the biological mother with no recourse but to complete the adoption. States that prohibit biological parents from granting consent to adopt prior to the child's birth explicitly and implicitly recognize that bonding between a biological mother and her child may occur, to varying extents, during the course of the pregnancy as well as at birth. Thus, pre-birth consent is strongly disfavored.

b. Financial Incentive

States also seek to ensure voluntary consent by prohibiting payment of fees to the biological parents in order to induce their consent.⁹⁹

98. See Gaffney, *supra* note 88, at 92. See also Hersh & Levin, *How Love Begins Between Parent and Child*, in SELECTED READINGS ON MOTHER-INFANT BONDING 29 (1979) ("[O]nce the child arrives the mother love that so strongly shapes the infant's future unfolds in a complex and wonderful pattern. This mysterious process begins before birth."); Kennell, Voos & Klaus, *Parent-Infant Bonding*, in *id.* at 62 ("After [fetal movement] a woman will usually begin . . . developing a sense of attachment and value toward [the infant].").

99. See, e.g., ALA. CODE § 26-10-8 (1940) ("It shall be unlawful for any [unlicensed] person . . . to . . . hold out inducements to parents to part with their offspring."); ARIZ. REV. STAT. ANN. § 8-114 (Supp. 1987) ("[A] person shall not be directly or indirectly compensated for giving . . . consent to place a child for adoption."); ARK. STAT. ANN. § 9-9-206 (1977) ("Under no circumstances may a parent or guardian of a minor receive a fee, compensation, or any other thing of value as a consideration for the relinquishment of a minor for adoption."); CAL. PENAL CODE § 273 (West 1967) ("It is a misdemeanor for any person . . . to pay money or anything of value, to a parent for . . . the consent to an adoption."); COLO. REV. STAT. § 19-4-115 (Supp. 1987) ("No person shall offer [or] give . . . any money or other consideration or thing of value in connection with the consent to adoption."); DEL. CODE ANN. tit. 13, § 928 (1953) ("No natural parent of any child whose adoption is proposed shall receive any contribution, fee or emolument of any sort from any person . . . having any connection . . . with the placement of the child for adoption or with the adoption."); FLA. STAT. ANN. § 63.212 (West Supp. 1987) ("It is unlawful for any person . . . [h]aving the rights and duties of a parent with respect to the care and custody of a minor to assign or transfer such parental rights for the purpose of, incidental to, or otherwise connected with, selling or offering to sell such rights and duties."); GA. CODE ANN. § 19-8-19

Most states, however, permit the adopting couple to reimburse the biological parents for medical expenses incurred in connection with the pregnancy and childbirth.¹⁰⁰ Some states also permit the adopting parents to pay the legal fees incurred by the biological parents, and some go so far as to allow the biological parents to be reimbursed for living expenses incurred during pregnancy.¹⁰¹ No state, however,

(Supp. 1984) ("It shall . . . be unlawful for any [unlicensed] person . . . to hold out inducements to parents to part with their children."); IND. CRIM. CODE § 35-46-1-9 (1980) ("[A] person who, with respect to an adoption, transfers . . . any property in connection with . . . the termination of parental rights, [or] the consent to adoption . . . commits . . . a class D felony."); IOWA CODE ANN. § 600.9 (West 1977) ("A natural parent shall not receive any thing of value as a result of the natural parent's child or former child being placed with and adopted by another person."); MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1987) ("[a] person shall not offer, give, or receive any money or other consideration or thing of value in connection with . . . [a] consent [for adoption]"); S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1987) ("Under no circumstances may a parent . . . receive a fee, compensation, or any other thing of value as consideration for consent or relinquishment for the purpose of adoption."); S.D. CODIFIED LAWS ANN. § 25-6-4.2 (1984) ("Any person who offers . . . any money or other consideration or thing of value . . . relating to the consent to adoption . . . is guilty of a . . . felony."); TENN. CODE ANN. § 36-1-135 (1978) ("it is unlawful for any [unlicensed] person . . . [h]aving the rights and duties of a parent with respect to the care and custody of a minor to assign or transfer such parental rights for the purpose of, incidental to, or otherwise connected with, selling or offering to sell such rights and duties"); UTAH CODE ANN. § 76-7-203 (1973) (No payment may be made to the biological mother "for the purpose of inducing the mother, parent, or legal guardian to . . . consent to the adoption, or co-operate in the completion of the adoption."); WIS. STAT. ANN. § 946.716 (1981) (Any person who, "[i]n order to receive a child for adoption, gives anything exceeding the actual cost of the hospital and medical expenses of the mother and the child incurred in connection with the child's birth, and of the legal and other services rendered in connection with the adoption" commits a Class E felony.).

100. See, e.g., MD. FAM. LAW CODE ANN. § 5-327 (1984) ("This subsection [barring baby-selling] does not prohibit the payment, by any interested person, of reasonable and customary charges or fees for hospital or medical or legal services."); ARK. STAT. ANN. § 9-9-206 (1977) ("[I]ncidental costs for prenatal, delivery, and postnatal care may be assessed, including reasonable housing costs, food, clothing, general maintenance, and medical expenses, if they are reimbursements for expenses incurred or fees or services rendered."). See also *Gray v. Maxwell*, 206 Neb. 385, 392, 293 N.W.2d 90, 95 (1980).

101. See *In re Baby Girl D*, 512 Pa. 449, 451, 517 A.2d 925, 927 (1986) ("Traditionally, allowable expenses to adoptor parents have been limited to reasonable unreimbursed lying-in expenses, reasonable legal fees incident to the adoption

permits a fee to be paid to the biological parents in exchange for their agreement to surrender the child. The prohibition of such fees is an acknowledgement that the financial incentive may induce a biological parent to consent to an adoption of a child whom he or she would otherwise keep. In *Downs v. Wortman*, for example, the court held that an offer to pay the airfare for the biological mother to go to Illinois where her parents lived vitiated her consent.¹⁰² In *Downs*, it was unclear whether the offer to pay the airfare was made directly by the adoptive parents or through an intermediary. The court recognized that regardless of the source, the mother's desire to visit her parents may have overcome her ability to make a voluntary decision about the adoption and concluded that the contract was void as against public policy.¹⁰³ The court distinguished between payments made for the benefit of the biological parent and payments made for the benefit of the child. It concluded that while the latter are permissible, the former violate public policy.¹⁰⁴ In *Barwin v. Reidy*,¹⁰⁵ the court explained the reason for permitting payments which benefit the child:

It is commonly the case that persons wishing to adopt a child will make provision with its mother, or mother and

proceedings and costs of the proceeding.''). See also *Barwin v. Reidy*, 62 N.M. 183, 193, 307 P.2d 175, 181-83 (1957); *Adoption of Baby Girl Fleming*, 471 Pa. 73, 80, 369 A.2d 1200, 1204 (1977); *In re Stone's Adoption*, 398 Pa. 190, 195, 156 A.2d 808, 811 (1959). It has been suggested that the payment by the adoptive parents of the biological parent's legal fees is not advisable since it may affect the attorney's ability to adequately represent the biological parents. See *Petition of Steve B.D.*, 111 Idaho 285, 289, 723 P.2d 829, 836 (1986).

102. *Downs v. Wortman*, 228 Ga. 315, 315, 185 S.E.2d 387, 388 (1971) (The court explained, based on these facts, that "the consent to the adoption, at least as to the natural mother, was not freely and voluntarily given.'). See also *Scott v. Pulley*, 705 S.W.2d 666, 669 (Tenn. Ct. App. 1985) ("Moral duress' consists in imposition, oppression, undue influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another, and relief is granted in such cases on the basis that *the party benefiting thereby has received money, property, or other advantages.*") (emphasis supplied).

103. *Downs*, 228 Ga. at 315, 185 S.E.2d at 388. See also *Gordon v. Cutler*, 324 Pa. Super. 35, 471 A.2d 449 (1983); *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980).

104. *Downs*, 228 Ga. at 315, 185 S.E.2d at 388. While the court in *Downs* did not speak in terms of undue influence, this was arguably the *de facto* conclusion of the court. See also *In re Baby Girl D*, 512 Pa. 449, 517 A.2d 925 (1986).

105. 62 N.M. 183, 307 P.2d 175 (1957).

father, before birth of the child, to pay hospital and medical expenses in connection with the care of the mother and child. There is nothing in this practice inimical to public policy. Indeed, it is productive of the welfare of the child that the child and the mother have adequate medical attention which perhaps would not otherwise be provided.¹⁰⁶

Payments made to the biological parents simply for their own benefit, however, constitute baby-selling.¹⁰⁷ Other courts have endorsed the distinction between payments for the benefit of the child and those for the benefit of the biological parents.¹⁰⁸

The extensive consent provisions in adoption statutes reflect a recognition by the states that an agreement to surrender a child for adoption is different in kind, not just in degree, from an ordinary commercial contract. Thus, special measures must be taken to ensure that the consent of the biological parents is valid. To ensure that the consent of the biological parents is informed, many states prohibit them from giving pre-birth consent; to ensure that it is voluntary, states prohibit them from being paid to consent to the surrender of their child.

2. Prohibition of Baby-Selling

Baby-selling or baby-brokering is prohibited irrespective of whether there is consent by the biological parents. Every state prohibits baby-selling,¹⁰⁹ either through adoption statutes, penal codes, or

106. *Id.* at 196, 307 P.2d at 184.

107. *Id.*

108. *Franklin v. Biggs*, 14 Or. App. 450, 513 P.2d 1216 (1973) (Court held that consent was vitiated, and set aside an adoption decree, in part because of a \$200 payment made by the adoptive parents to the biological mother for her to leave the state.); *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980) (Agreement to pay for medical expenses which had already been paid by the Department of Public Welfare vitiated the biological mother's consent.).

109. While the laws of each state vary, an example is MD. FAM. LAW CODE ANN. § 5-327 (1984), which provides in pertinent part:

(1) An agency, institution, or individual who renders any service in connection with the placement of an individual for adoption may not charge or receive from or on behalf of either the natural parent of the individual to be adopted, or from or on behalf of the individual who is adopting the individual, any compensation for the placement.

otherwise.¹¹⁰ Such prohibitions against baby-selling are a recognition

110. ALA. CODE § 26-10-8 (1986) ("It shall be unlawful for any [unlicensed] person . . . to advertise that they will adopt children or . . . hold out inducements to parents to part with their offspring"); ARIZ. REV. STAT. ANN. § 8-114 (1987) ("[A] person . . . shall not be directly or indirectly compensated for giving or obtaining consent to place a child for adoption."); CAL. PENAL CODE § 273 (West 1988) ("It is a misdemeanor for any person . . . to pay money or anything of value, to a parent for the placement for adoption . . . of his child."); COLO. REV. STAT. § 19-5-213 (Supp. 1987) ("No person shall . . . charge, or receive any money or other consideration or thing of value in connection with the relinquishment and adoption"); DEL. CODE ANN. tit. 13, § 928 (1975) ("No person or organization who is in any way connected with an adoption shall receive any remuneration in connection therewith"); FLA. STAT. ANN. § 63.212 (West Supp. 1987) ("It is unlawful for any person . . . [t]o sell or surrender, or to arrange for the sale or surrender of, a child to another person for money or anything of value or to receive such minor child for such payment or thing of value."); GA. CODE ANN. § 19-8-19 (1982) ("It shall . . . be unlawful for any . . . [unlicensed] person . . . directly or indirectly to hold out inducements to parents to part with their children."); IDAHO CODE § 18-1511 (1987) ("Any person . . . who shall sell or barter any child for adoption or for any other purpose, shall be guilty of a felony"); ILL. REV. STAT. ch. 40, para. 1526 (1980) ("No person . . . except a child welfare agency . . . shall receive or accept, or pay or give any compensation or thing of value . . . for placing out of a child"); IND. CODE ANN. § 35-46-1-9 (Burns 1985) ("[A] person who, with respect to adoption, . . . receives any property in connection with the . . . adoption . . . commits . . . a . . . felony."); IOWA CODE ANN. § 600.9 (West 1983) ("Any person assisting in any way with the placement or adoption of a minor person shall not charge a fee which is more than usual, necessary, and commensurate with the services rendered."); KY. REV. STAT. ANN. § 199.590 (Michie/Bobbs-Merrill Supp. 1988) ("No person . . . may sell or purchase or procure for sale or purchase any child for the purpose of adoption"); MD. FAM. LAW CODE ANN. § 5-327 (1984) ("An . . . individual who renders any service in connection with the placement of an individual for adoption may not . . . receive . . . any compensation for the placement."); MASS. ANN. LAWS ch. 210, § 11A (Law. Co-op. 1986) (No person shall "accept payment in the form of money or other consideration in return for placing a child for adoption."); MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1988) ("[A] person shall not offer, give, or receive any money or other consideration or thing of value in connection with . . . [t]he placing of a child for adoption."); NEV. REV. STAT. § 127.290 (1987) ("[N]o person who does not have . . . a license to operate a child-placing agency may request or accept . . . any compensation . . . for placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption"); N.J. STAT. ANN. § 9:3-54 (West Supp. 1988) ("No person . . . shall . . . [t]ake, receive, accept or agree to accept any money or any valuable consideration" in connection with an adoption.); N.Y. SOC. SERV. LAW § 374 (McKinney 1983) ("[N]o person may . . . receive any compensation . . . in

on the part of the states that the placement of a child with an adoptive family should be based on the best interests of the child, not on the profit motive of the individual arranging the placement.¹¹¹ Therefore, no state permits a person to profit from the independent placement of a child for adoption.¹¹² For example, if the attorney, physician, or other intermediary who arranges an independent adoption were permitted to profit from the transaction, the temptation would arise to place the child with adoptive parents who would pay the highest price for the child rather than with parents who would act in the child's best interest.¹¹³ In fact, one criticism of independent

connection with . . . adoption of a child'); N.C. GEN. STAT. § 48-37 (1984) (No unlicensed placement organization shall "offer or give, charge or accept any . . . compensation . . . for receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption.');

OHIO REV. CODE ANN. § 3107.10 (Baldwin 1988) (Petitioner in any proceeding for the adoption of a minor child permitted to pay only for prenatal care, including hospital care, attorneys' fees, agency expenses, and temporary costs of routine maintenance for the child.); OR. REV. STAT. § 109.311 (Supp. 1988) ("No person shall charge, accept or pay . . . a fee for locating a minor child for adoption');

S.D. CODIFIED LAWS ANN. § 25-6-4.2 (1984) ("Any person who . . . receives any money or other consideration or thing of value in connection with the placing of any child for adoption . . . is guilty of a . . . felony.');

TENN. CODE ANN. § 36-1-135 (1984) ("It is unlawful for any [unlicensed] person . . . [t]o [receive,] sell or surrender a child . . . for money or anything of value');

UTAH CODE ANN. § 76-7-203 (1978) ("Any person . . . who sells, or disposes of, . . . any child for and in consideration of the payment of money or other thing of value is guilty of a felony');

WISC. STAT. ANN. § 946.716 (1982) ("Whoever . . . [f]or anything of value, solicits, negotiates or arranges the placement of a child for adoption" is guilty of a felony.). See Katz, *supra* note 4, at 6-10. The United States Constitution, which prohibits slavery, and thus the sale of human beings, also prohibits baby-selling. U.S. CONST. amend. XIII.

111. See *In re Baby Girl D*, 512 Pa. 449, 454, 517 A.2d 925, 927 (1986) ("The reason for the limitations on fees are obvious. . . . [T]he limitations ensure that children will be placed in homes that promote their needs and welfare. . . . Although financial considerations are certainly a factor, placement of children in adoptive homes should not rest *solely* on the wealth of the adoptors.") (citation omitted).

112. See *supra* note 62 and accompanying text. Most states do, however, permit licensed agencies to collect fees to cover the expenses incurred in connection with the adoption. See, e.g., NEV. REV. STAT. § 127.290 (1987) ("A licensed child-placing agency may accept fees for operational expenses."). Cf. N.J. STAT. ANN. § 9:3-54 (West Supp. 1977); N.C. GEN. STAT. § 48-37 (1984); OHIO REV. CODE § 3107.10(4) (1988); TENN. CODE ANN. § 36-1-135(a) (1984).

113. Note, *supra* note 56, at 50 ("The priorities present in a normal adoption

adoptions is that at best only a superficial investigation is conducted concerning the fitness of the prospective adoptive parents.¹¹⁴

The baby-selling provisions are designed to prevent the treatment of children as chattel and to eliminate the black market.¹¹⁵ There is a recognition that a human life is unique; it is not to be treated as an ordinary commercial commodity.¹¹⁶ Instead, the state has an interest in protecting the welfare of the life involved — the child.

At least one state prevents the potential occurrence of baby-selling by an absolute prohibition against independent adoptions.¹¹⁷ In this state, even individuals such as priests, doctors, and lawyers are not permitted to arrange for the placement of a child. Instead, child placement must be conducted by a state-authorized agency.¹¹⁸ Other states permit independent adoptions, but in these states the

are completely reversed [in the black-market]; the welfare of the baby and the natural mother, as well as the fitness of the adoptive parents, are subordinated to the profit motive of the black marketeer.'').

114. ADOPTION FACTBOOK, *supra* note 63, at 47; Katz, *supra* note 4, at 11-12 ("In any private placement, especially in a black market transaction, the child benefits from few, if any, agency safeguards. The adoptive parents need not show the black marketeer that they are indeed fit for parenthood, only that they can afford his fee.") (footnote omitted).

115. TASK FORCE REPORT, *supra* note 3, at 39 (Baby-selling prohibition designed "to prevent trafficking in babies, the buying and selling, in effect, of human beings."), *quoting In re Grand Jury Subpoenas Duces Tecum*, 58 A.D. 1, 1, 395 N.Y.S.2d 645, 648 (1977); Katz, *supra* note 4, at 10 ("[W]hile the [baby-selling] laws may vary from state to state . . . all share the basic objective of curbing and eliminating the baby black market."). *Cf. Children's Aid Society v. Gard*, 362 Pa. 85, 92, 66 A.2d 300, 304 (1949) ("That a child cannot be made the subject of a contract with the same force and effect as if it were a mere chattel has long been established law."); *Surrogate Parenting Associates v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 211 (Ky. 1986) (Baby-selling prohibition "is intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements.").

See Posner, The Regulation of the Market in Adoptions, 67 B.U. L. REV. 59, 60, 71-72 (1987); Charney, *The Rebirth of Private Adoptions*, 71 A.B.A. J. 52, 54 (1985); Note, *supra* note 55, at 637-38.

116. *See In re Baby Girl D*, 512 Pa. 449, 454, 517 A.2d 925, 927 (1986) ("[T]he limitation upon expenses ensures that children are not bought and sold like commodities."); *Adoption of Anonymous*, 286 A.D. 161, 166, 143 N.Y.S.2d 90, 95 (1955) ("A child is not a chattel to be bought or sold."); *Goodman v. District of Columbia*, 50 A.2d 812, 813 (1947).

117. *See MASS. GEN. LAWS ANN.* ch. 210, § 11A (West Supp. 1988).

118. *Id.*

intermediaries must refrain from baby-selling. The collection of any prohibited fee by them violates state baby-selling provisions. Such a fee converts a permissible gray-market adoption into a black-market placement.¹¹⁹ Thus, no state adoption statute permits a fee to be paid an intermediary in exchange for placing a child.

3. The Requirement of an Investigation

In most adoptions, the biological parents do not know the identity of the adoptive parents¹²⁰ so they have no way to investigate their fitness. Even in an open adoption, when the biological parents know or even select the adoptive parents,¹²¹ the state requires an investigation into their fitness¹²² and thereby assumes ultimate responsibility for ensuring that the adoptive parents are fit and that the child's welfare is protected. Such an investigation entails a complete check of the potential adoptive parents' ability to care for a child, including their psychological, sociological, physical, and financial ability to provide a proper home.¹²³ By conducting a

119. See *supra* note 62 and accompanying text.

120. See, e.g., *Barwin v. Reidy*, 62 N.M. 183, 307 P.2d 175 (1957). Such adoptions are referred to as "closed" adoptions. When the biological parents are informed of the adoptive parents' identity, the adoption is an "open" adoption.

121. The biological parent may be permitted to select the adoptive home in which he or she wishes to place the child. See, e.g., COLO. REV. STAT. § 19-5-206 (Supp. 1987). The state, however, retains the right to investigate the adoptive parents so selected. *Id.* Thus, even where the biological parents choose the adoptive parents for their child, the state has the ultimate responsibility for ensuring the fitness of the adoptive parents, and if the couple selected by the biological parents is found to be unfit, the child will not be placed with them.

122. See, e.g., ALA. CODE § 26-10-2 (1986) ("[I]t shall be the duty of the . . . department . . . to make a thorough investigation . . ."); ALASKA STAT. § 25.23.100 (1983) ("A reasonable investigation shall be made by the department."); ARK. STAT. ANN. § 9-9-212 (1987) ("Upon the filing of a petition for adoption, the court shall order an investigation."); CONN. GEN. STAT. ANN. § 45-61f (Supp. 1988) ("The court may, and in any contested cases shall, request . . . an investigation . . ."). See also ADOPTION FACTBOOK, *supra* note 63, at 74-85; *infra* notes 125-128 and accompanying text.

123. See, for example, ARIZ. REV. STAT. ANN. § 8-105 (Supp. 1987), which provides in pertinent part:

This investigation . . . shall consider all relevant and material facts dealing with the prospective adoptive parents' fitness to adopt children, and shall include but is not limited to:

1. A complete social history.

comprehensive investigation of the prospective adoptive parents, the state limits those who are permitted to adopt to persons who the state believes will act in the child's best interest.

Some states do not require an investigation when the person adopting the child is a stepparent,¹²⁴ but most either require an investigation as they would in an adoption by an unrelated couple¹²⁵ or provide that the investigation may be waived when appropriate.¹²⁶

2. The financial condition of the applicant.
3. The moral fitness of the applicant.
4. The religious background of the applicant.
5. The physical and mental health condition of the applicants.

. . . .

9. All other facts bearing on the issue of the fitness of the prospective adoptive parents that the court, agency or division may deem relevant.

See also MONT. CODE ANN. § 40-8-122 (1987) (Investigation shall include medical and social histories of the adoptive parents along with all other relevant circumstances.); ALA. CODE § 26-10-2 (1986) (A "thorough" investigation must be made — including an investigation of the moral, physical and financial fitness of the proposed adoptive parents.).

124. *See, e.g.*, ALA. CODE § 26-10-2 (1986) ("The department . . . is no longer required to investigate petitions of stepfathers [or] stepmothers . . ."); ARIZ. REV. STAT. ANN. § 8-105 (Supp. 1987) (Provisions requiring investigation "shall not apply . . . where the prospective adoptive parent is the spouse of the natural parent of the child.").

125. *See, for example*, CAL. CIV. CODE § 227a (West Supp. 1985), which provides:

Notwithstanding any other provisions of this chapter, the probation officer or, at option of the board of supervisors, the county welfare department . . . shall make an investigation of each case of adoption by a stepparent where one natural parent retains custody and control of the child. No order of adoption shall be made by the court until after the probation officer has filed his or her or welfare department has filed its report and recommendation and it has been considered by the court.

126. *See, e.g.*, ARK. STAT. ANN. § 9-9-212 (1987) ("The court may . . . waive the requirement for an investigation report when a stepparent is the petitioner . . ."); CONN. STAT. ANN. § 45-63a (Supp. 1988) ("[I]n the case of a child sought to be adopted by a stepparent, the court . . . may waive all requirements . . . for investigation . . ."); IDAHO CODE § 16-1506 (Supp. 1988) ("At the hearing the court may deny the application, enter a final decree approving the adoption if it is satisfied that the adoption is for the best interests of the child, or order an investigation."); ILL. REV. STAT. ch. 40, para. 1508 (Supp. 1988) (An "investigation shall not be made when the petition seeks to adopt a related child . . . unless the court, in its discretion, shall so order."); MO. ANN. STAT. § 453.070

The rationale for making the investigation discretionary in these circumstances is presumably that a full investigation is not required in order to protect the child's best interest in every case of a stepparent adoption. For example, in a case involving the death of one of the child's natural parents, the state may wish to retain the flexibility of dispensing with a full investigation when the remaining spouse, who has sole custody of the child, remarries. The state could not and would not want to prevent the remaining parent from remarrying.¹²⁷ Therefore, since the stepparent would be present in the home, the only issue would be his or her legal relationship to the child. More often than not, it would be more beneficial for the child to be legally adopted than for the stepparent to forego the adoption. Thus, in a stepparent adoption, there may be factors other than the child's best interest — keeping the child with at least one biological parent and fostering the marriage relationship — at issue.¹²⁸ It is important to remember, though, that most states provide some mechanism for investigation, even of stepparents, which can be utilized when necessary.

The foregoing policies reflected in the adoption process are designed to protect all parties involved. By requiring that the biological parents give informed consent they are protected from improper termination of their parental rights. The adoptive parents are also protected by the consent provision because valid consent ensures the child's availability for adoption. The prohibition of baby-selling protects the child from being placed based on improper criteria which might totally ignore the child's best interests. Finally, the investigation of the adoptive parents is the state method of ensuring that they are fit to raise a child. With these policies established, a

(Vernon 1986) (Investigation may be waived where one of the petitioners is the natural parent of the child.); N.M. STAT. ANN. § 40-7-46 (1985); N.D. CENT. § 14-15-11 (1981); S.D. CODIFIED LAWS ANN. § 25-6-10 (1984) (investigation of stepparent discretionary); WIS. STAT. ANN. § 48.88 (West 1987) (limited investigation of stepparent). The fact that the investigation may be waived does not necessarily mean that the stepparent will be permitted to adopt the child. The court may still determine that the adoption is not in the child's best interest or order an investigation to make that determination.

127. For a discussion of the public policy favoring the marriage relationship, see *supra* note 40.

128. *But see In re R.H.N.*, 710 P.2d 482 (Colo. 1985) (best interests of child governs even in a stepparent adoption).

determination must be made of their compatibility with surrogate parenting agreements.

III. THE INCOMPATIBILITY OF SURROGATE PARENTING AGREEMENTS WITH THE PUBLIC POLICIES UNDERLYING THE ADOPTION LAWS

A. Absence of Voluntary, Informed Consent

Surrogate parenting agreements impair the ability of the surrogate to give voluntary informed consent in two respects. First, requiring the surrogate to consent to the surrender of the child before conception deprives her of informed consent. Second, the fee she receives in exchange for that consent renders the consent involuntary. Either factor is sufficient in itself to vitiate the surrogate's consent.

Requiring the surrogate to consent to the termination of her parental rights not only prior to the birth of the child, but also prior to conception is clearly incompatible with state adoption laws which require that consent be given only after birth. The laws prohibiting pre-birth consent are designed to ensure that the biological mother is not forced to make a hasty or ill-considered decision.¹²⁹ The surrogate agrees not only to act as a surrogate and to bear a child, but also to surrender that child. The final consent by the surrogate to surrender the child is hastened because it is given before conception and before the child is born. This practice ignores the psychological and emotional aspects of pregnancy and childbirth and puts the surrogate in an equally if not more difficult situation than a biological mother facing a traditional adoption decision.¹³⁰ Regardless of the

129. See *supra* notes 94-98 and accompanying text.

130. Of course, a woman's consent to become a surrogate and to surrender the child to the biological father at birth is arguably quite different from the consent of an expectant mother to surrender her child for adoption. The concern about a woman making a hasty decision is theoretically minimized in the surrogate context. In the adoption context, the woman is already pregnant and a decision must be made, within a relatively short period of time, as to who will raise the child. In a surrogate parenting situation, the biological mother is not pregnant at the time consent is given. The surrogate simply decides that she will bear a child for the adopting couple. There is no sense of urgency as might be experienced by one who is already pregnant. Moreover, the decision to become a surrogate may evolve over a prolonged period of time. As the one recent report explains, however:

[s]ome commentators suggest that surrogacy poses less risk to women than the surrender of a child for adoption in other circumstances because a surrogate becomes pregnant with the intention of giving the child

amount of time the surrogate has to consider her decision prior to signing the surrogate parenting agreement, she cannot accurately anticipate whether she will in fact be willing to give the child up for adoption once he or she is born.¹³¹ A bonding process occurs between mother and child during pregnancy which the current surrogate parenting process ignores.¹³² The surrogate is asked to consent to the surrender of the child before such bonding occurs and before she has an opportunity to know how the pregnancy will affect her emotionally.¹³³ By being forced to make this emotion-laden decision in an untimely fashion, the surrogate is deprived of her right to informed consent.

In *Surrogate Parenting Associates v. Commonwealth ex rel. Armstrong*,¹³⁴ the Supreme Court of Kentucky concluded that a surrogate who consented to surrender the child to the biological father prior to the child's birth had the right to change her mind. The court concluded that the surrogate parenting agreement was voidable because the timing of the surrogate's consent was inappropriate based upon the Kentucky adoption laws. As the court explained:

away. However, it is also possible that the risk is aggravated for surrogates, many of whom have been found to be emotionally or psychologically vulnerable before entering the surrogacy contract. For example, one study of potential surrogates revealed that one-third felt they were "atoning" for an abortion or for a previous child relinquished for adoption. Another study of 30 women who had babies as surrogates found that all the women experienced some degree of grief. Ten percent were so distraught after relinquishing the infant that they sought therapeutic counseling.

TASK FORCE REPORT, *supra* note 3, at 24-25.

131. See *supra* note 98 and accompanying text; *infra* note 137-139.

132. See Gaffney, *supra* note 88, at 91-95 (discussing maternal-fetal bonding process).

133. In some instances the organization arranging the surrogate agreement prefers to use surrogates who already have other children. TASK FORCE REPORT, *supra* note 3, at 25 ("Surrogates generally have from one to three living children (a requirement for acceptance at some parenting clinics). . ."). The fear may be that a woman who has never had a child cannot know how she will be affected by the birth of the baby and is more likely to decide to try to keep it. On the other hand, one surrogate organization, Surrogate Parenting Associates, has stated that the reason for using only surrogates who already have children is that their fertility has been established. Telephone interview with Loretta Bradshaw, Surrogate Parenting Associations (Mar. 2, 1989).

134. 704 S.W.2d 209 (Ky. 1986).

The surrogate mother's consent given before five days following birth of the baby is no more legally binding than the decision of an unwed mother during her pregnancy that she will put her baby up for adoption. The five days' consent feature . . . in the consent to adoption statute (KRS 199.500(5)) take[s] precedence over the parties' contractual commitments, meaning that the surrogate mother is free to change her mind.¹³⁵

The court in *Surrogate Parenting Associates*, and the Kentucky legislature which provided the five days' consent feature, were undoubtedly sensitive to the psychological aspects of pregnancy and childbirth. Mental health professionals who understand the bonding process that occurs during pregnancy recognize that a surrogate's decision to surrender a child may be extremely difficult to honor once the child is born.¹³⁶ Accordingly, at least one mental health expert has suggested that a woman be required to undergo a psychiatric evaluation before being permitted to become a surrogate and that such an evaluation must specifically include detailed discussions about the surrogate's "potential for changing her mind about relinquishing the baby after delivery and keeping the newborn."¹³⁷ The author, a psychiatrist, asks "[h]ow well can a surrogate mother applicant understand and comprehend, prior to the artificial insemination, how she will feel when she relinquishes the child?"¹³⁸ Good

135. *Id.* at 212-213. The court did not, however, hold that surrogate parenting agreements violate public policy, concluding instead that such a decision was for the legislature to make. The court explained:

[T]he threshold question is whether the legislation on the books declares the procedure impermissible. Short of such legislation it is not for the courts to cut off solutions offered by science. . . . We have consistently held that our Kentucky Constitution empowers the legislative branch, but not the judicial branch, of government to articulate public policy regarding health and welfare.

Id. at 213.

136. See *Parker, Surrogate Motherhood*, *supra* note 8, at 24.

137. *Id.* at 24-26.

138. *Id.* at 27. The author concludes that there is insufficient data to answer this question. He notes that "further research needs to be done on the adequacy of the various techniques to help assure the informed nature of the consent for the psychological issues." *Id.* See also Burt, *Judicial Enforcement Seen Inappropriate*, 119 N.J.L.J. 328 (1987) ("How can a court order a pregnant woman not to form an emotional bonding, a 'parent-child relationship' with the baby in her womb?").

psychiatric or psychological counseling is not a perfect determinant of which women will have difficulty surrendering the child.¹³⁹ The medical profession recognizes the psychological difficulty, if not impossibility, of giving voluntary, informed consent prior to birth. The adoption laws are evidence that the legal community also recognizes this difficulty; many states mandate that consent be given after birth.¹⁴⁰ Thus, the legal community, through traditional adoption laws, recognizes the emotional aspects of pregnancy and childbirth and incorporates measures designed to deal with this.¹⁴¹ The modern "surrogate adoption," however, fails to recognize that a woman, even one who has given birth in the past, may not be able to predict her emotional state when the child she has agreed to surrender is born pursuant to the surrogate parenting agreement. A surrogate's consent should be deemed invalid if she makes this decision prior to the birth of the child.¹⁴² Not only should the surrogate parenting agreement be voidable based on this factor alone, but the surrogate should be informed after the child's birth that she has the right to

139. But see Parker, *Surrogate Motherhood*, *supra* note 8, at 27. Parker implies that with adequate psychiatric counseling, few women who pass the psychological screening will change their mind. He concedes, however, that there is insufficient data with which to make a conclusive determination on this point.

140. See *supra* note 94 and accompanying text.

141. See, e.g., *Hendrix v. Hunter*, 99 Ga. App. 785, 796, 110 S.E.2d 35, 40 (1959) (Although court found consent was valid where mother of illegitimate child signed adoption consents both before and after the birth of the child, the court acknowledged that child "welfare agencies prefer that the mothers of illegitimate children see their offspring before consenting to adoption.").

142. "Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed" *In re Baby M*, 109 N.J. 396, 437, 537 A.2d 1227, 1248 (1988).

See TASK FORCE REPORT, *supra* note 3, at 124 ("Many of the [New York State] Task Force members support the nonenforceability of surrogate contracts, in part because they believe that it is not possible for women to give informed consent to the surrender of a child prior to the child's conception and birth. Some commentators have argued that this conclusion diminishes women's stature as autonomous adults. The Task Force members reject that assertion.").

See also Wolf, *supra* note 9, at 400 ("A parent can be unexpectedly smitten with profound connection to the newborn child at birth, and a parent who tries (for whatever reason) to give a child away, can find it impossible to go through with the parting.").

void the contract. Without this information being expressly provided to her, the surrogate is unlikely to believe that she has the freedom to renege on her agreement.¹⁴³ In turn, even her continued acquiescence after the baby's birth may not be considered informed.¹⁴⁴ Surrogate parenting agreements, by ignoring the fact that bonding occurs during pregnancy, are voidable for want of informed consent on the part of the surrogate.

The foregoing issues involving informed consent are analogous to the tort doctrine of informed consent which involves consent to

143. Approximately 60% of the women in Parker's study were working or had a working spouse. Although 26% had taken some college courses only one had a bachelor's degree. Parker, *Motivation*, *supra* note 8, at 117. In *Baby M*, Mary Beth Whitehead, the surrogate, left high school at age 15 while in the middle of the tenth grade. 217 N.J. Super. 313, 338, 525 A.2d 1128, 1140 (Super. Ct. App. Div. 1987). It therefore appears that the typical surrogate has no legal training. Moreover, she may not be financially able to gain easy access to legal counsel. While the organization may arrange for legal counsel to be provided to the surrogate, it is questionable whether the legal counsel she receives will be unbiased. At Surrogate Parenting Associates (SPA), for example, the following description has been given of the legal counsel that the surrogate receives:

The [surrogate] . . . sees an attorney at the clinic. SPA recommends the same attorneys regularly because of their familiarity with the agreements. This continuing relationship between the attorney and the company raises ethical questions about the representation of the surrogate mother during contract negotiations. Since the company has an interest in keeping the surrogate's fee as low as possible and thus increasing its volume of business, an attorney with ties to the company may have a conflict of interest. In one account, a woman requested to see a private attorney. The company recommended against this, and suggested a lawyer often used by other surrogate mothers. This attorney explained the contract to the prospective mother within earshot of a company official who recorded all the questions she asked.

Note, *An Incomplete Picture*, *supra* note 7, at 239-40.

The lack of adequate counselling has been deemed sufficient to vitiate consent in a traditional adoption case. See *In re Adoption of Anonymous*, 60 Misc. 2d 854, 304 N.Y.S.2d 46 (1969). In *Anonymous*, the 13 year-old biological mother received no legal advice and was informed that the private placement adoption was temporary. While *Anonymous* is a rather extreme case, it illustrates that lack of adequate counselling can, under appropriate circumstances, vitiate consent.

144. See, e.g., *Baby M*, 109 N.J. at 437, 537 A.2d at 1248 ("[A]ny decision after [the baby's birth] compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary.').

medical treatment.¹⁴⁵ Under the doctrine of informed consent, an individual who receives medical treatment has a right to be informed of all the material risks involved with the procedure.¹⁴⁶ As one court has described it, "a physician violates his duty to his patient and subjects himself to liability if he withholds *any* facts which are necessary to form the basis of an intelligent consent by the patient."¹⁴⁷ "Any" facts includes the fact that a given procedure involves certain psychological as well as physical risks. Thus, informed consent entails ensuring that the patient "understand[s] the risk of undesirable consequences"¹⁴⁸ — both physical and psychological.¹⁴⁹ Because

145. The surrogate parenting agreement requires the surrogate to undergo the medical procedure of artificial insemination, a procedure for which informed consent is required. F. Rosovsky, *supra* note 83, at 158 ("A.I.D. [artificial insemination by donor] is a medical intervention or intrusion into another person's body [that] cannot be overlooked: it triggers the need for fully informed consent.'). In addition to the issue of informed consent, artificial insemination creates potential legal problems in terms of the legitimacy of the child born pursuant thereto and who is perceived as the legal father of the child. *Id.* In Connecticut, for example, "[a]ny child or children born as a result of A.I.D. shall be deemed to acquire, in all respects, the status of a naturally conceived legitimate child of the husband and wife who consented to and requested the use of A.I.D.'" CONN. GEN. STAT. § 45-69.i (1980). In states with similar provisions, the child born pursuant to the surrogate agreement will be considered the legitimate child of the surrogate and her husband, rather than the legal child of the biological father. In order to circumvent provisions of this sort, the husband of the surrogate may expressly refuse to consent to the artificial insemination. See MBW Contract, *supra* note 9, at Exhibit G, in which Richard Whitehead, the surrogate's husband states: "I, RICHARD WHITEHEAD, husband of MARY BETH WHITEHEAD, . . . expressly withhold and refuse to consent to any artificial insemination in connection with the surrogate parenting procedures proposed by my wife. I recognize that by refusing to consent to the insemination, I cannot be declared or considered to be the legal father of said child conceived thereby."

146. See PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 189-91 (5th ed. 1984); Plant, *An Analysis of Informed Consent*, 36 FORDHAM L. REV. 639 (1968).

147. *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957). In the surrogate parenting context, an issue might arise as to who has the duty to ensure that the surrogate receives informed consent. The physician who performs the insemination may be unaware that it is for the purpose of conceiving a child pursuant to a surrogate parenting agreement. Arguably, then, there should be a shared responsibility between the physician who performs the insemination and the organization that brings the contracting parties together to ensure that the surrogate's right to informed consent is satisfied.

148. PROSSER AND KEETON, *supra* note 146, § 18, at 120.

149. See *supra* note 147. The consequences of the treatment of artificial insemination include pregnancy and the risks associated with it and childbearing.

informed consent requires that the patient be informed of and understand the material risks associated with a particular treatment, informed consent is a "process" rather than a simple "form" that the patient must sign.¹⁵⁰ This process involves an exchange of information between the doctor and patient. In the case of surrogate parenting, the requisite interchange should involve more than a simple question of whether the patient understands the risks and her affirmative or negative response. The surrogate should be required to explain to the satisfaction of the doctor that she in fact understands the risks. Even then, she should be permitted to give final consent to the termination of her parental rights only after the child is born.

Under the doctrine of informed consent, the issue generally is not whether the patient has consented to a particular treatment.¹⁵¹ Normally the patient has consented to the treatment, but later claims that he or she was not informed of the material risks associated with that treatment. A successful claim that informed consent was lacking requires the patient to show that she (1) was not informed of the material risks,¹⁵² (2) was injured, and (3) would not have consented

150. F. Rosovsky, *supra* note 83, at 2-3 ("Many people think of consent to treatment as a form. Consent is equated in their minds with the document through which patients agree to [medical] procedures Such a definition is incorrect and misleading. . . . Consent is a process, not a form. . . . [C]onsent is the dialogue between the patient and the provider of services in which both parties exchange information.").

151. If the patient has not consented to the treatment at all, the doctor may be liable for assault and battery. *See, e.g.,* *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905). In the typical case of informed consent, however, the patient consents to the treatment, but later claims that he or she was unaware of certain material risks associated with the treatment. In this situation, the patient's claim against the doctor would normally be based on negligence. *See, e.g.,* *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1973). There are, however, some jurisdictions which continue to base even the latter type of consent case on assault and battery. *See, e.g.,* *Spikes v. Heath*, 332 S.E.2d 889 (Ga. Ct. App. 1985); *Pugsley v. Privette*, 220 Va. 892, 263 S.E.2d 69 (1980).

152. With respect to the adequacy of the information conveyed to the patient, two different standards are used in this country. The first standard requires the physician to disclose risks that are customarily disclosed in the community. *See, e.g.,* *Rush v. Miller*, 648 F.2d 1075 (6th Cir. 1981); *Fuller v. Starnes*, 268 Ark. 476, 597 S.W.2d 88 (1980). The second standard requires the physician to disclose the material risks which a reasonable person in the patient's position would want to know. *See, e.g.,* *Price v. Hurt*, 711 S.W.2d 84 (Tex. Ct. App. 1986); *Logan v. Greenwich Hospital Ass'n*, 191 Conn. 282, 465 A.2d 294 (1983); *Wheeldon v.*

to the treatment had she been informed of the material risks.¹⁵³

Even assuming that a legitimate attempt is made to advise the surrogate of the risks involved in the procedure, the informed consent doctrine raises two issues in the surrogate context. The first issue is whether consent can justifiably be sought; the second is whether it is possible for a surrogate to understand, prior to conception, the psychological risks she is taking. In the area of human experimentation, it is acknowledged that, before consent is sought, a determination should be made that the procedure itself is justifiable and probably in the patient's interest. For example, one commentator has questioned the justification for seeking consent from patients for an artificial heart.¹⁵⁴ He suggests that if the procedure is not justifiable or the probability is that it is not in the patient's interest, the patient's consent to the treatment should not be sought.¹⁵⁵ There are undoubtedly significant differences between the life and death decision involved when a patient must decide whether or not to receive an

Madison, 374 N.W.2d 367, 374 (S.D. 1985). The trend is to use the second standard. F. Rosovsky, *supra* note 83, at 42.

153. F. Rosovsky, *supra* note 83, at 7. See also *Harnish v. Children's Hospital Medical Center*, 387 Mass. 152, 439 N.E.2d 240 (1982); *Woolley v. Henderson*, 418 A.2d 1123 (Me. 1980); *Wilkinson v. Vesey*, 110 R.I. 606, 295 A.2d 676 (1972).

154. See Annas, *Death and the Magic Machine: Informed Consent to the Artificial Heart*, 9 WEST. NEW ENG. L. REV. 89, 90 (1987) ("Prior to the conversation [involving possible risks] and offer of an experimental intervention, an *independent judgment* must be made that the proposed therapy . . . is a reasonable medical experiment from both a scientific and public policy perspective. This is necessary to protect the patient's *welfare*; to prevent patients from being demeaned and dehumanized by accepting offers they are in no position to refuse.") (emphasis in original).

155. The concern in the context of experimental medical procedures is that the physicians involved may want to do the procedure in order to enhance their own knowledge rather than to further the patient's interest. *Id.* at 92 ("[The physician] seemed unaware of . . . his own conflict of interest between wanting to perform the world's second human heart transplant for himself, and attempting to convince [the patient] that the operation was in [the patient's] best interests.'). In a surrogate arrangement, the threat of the patient's interests being subordinated to the interests of the other parties is much greater. The surrogate agreement does not purport to be an agreement designed to benefit the surrogate, except financially. The procedure is clearly designed to benefit the adopting couple and the organization that brings the parties together for a fee. Thus, even greater safeguards need to be implemented to ensure that the surrogate is given as much information about the procedure as possible.

artificial heart and a surrogate's decision to become impregnated by artificial insemination and to surrender the child born pursuant thereto to the adopting couple at birth. While artificial insemination may no longer be considered physical human experimentation, surrogate parenting may be considered psychological human experimentation.¹⁵⁶ Thus, it is essential that the surrogate be fully informed of the risks she is undertaking.

The surrogate may be less likely, however, to receive adequate counselling and information than the patient undergoing physical human experimentation such as the implantation of an artificial heart. The doctor who implants an artificial heart hopes that the patient's health will improve. The overall purpose is to advance medical techniques in order to prolong life. The participants in a surrogate agreement, however, are not primarily, or even secondarily, concerned with the surrogate's welfare. The adopting couple is primarily concerned with obtaining a baby. The organization which brings the parties together is a business enterprise which is interested primarily in making a profit.¹⁵⁷ Accordingly, an extra effort must be made to

156. "Experiment" has been defined as "[t]he process of testing," BLACK'S LAW DICTIONARY 519 (5th ed. 1979), or as "any action or process designed to find out whether something is effective, workable [or] valid," WEBSTER'S NEW WORLD DICTIONARY 493 (2d Coll. Ed. 1984). It has also been defined as "any action or process undertaken to discover something not yet known." *Id.* Surrogate transactions arguably involve a process designed to discover whether women are generally capable, emotionally and psychologically, of giving consent prior to conception to surrender their child to another couple and terminate their parental rights.

157. At Surrogate Parenting Associates (SPA), the Kentucky organization which facilitates surrogate transactions, "a couple receives the benefits of SPA's screening, matchmaking, and medical services . . . [f]or a fee that generally starts at \$25,000." Note, *An Incomplete Picture*, *supra* note 7, at 237. SPA does, however, provide for some psychological screening of the surrogate:

[T]he prospective mother . . . travels to [SPA] for a two-day visit. During her stay, she undergoes psychiatric interviews and a battery of intelligence and basic personality tests. This testing is designed to analyze the surrogate mother's ability to surrender her child after delivery, and to reveal the personality disorders or low intelligence.

Id. at 239.

While the counselling mechanism has been established, it is not clear that the counselling is adequate. "In one firsthand account, the interview with the psychologist [at SPA] involved only basic questions and inquiries about future plans. The intelligence test was omitted, since the woman was 'obviously bright.'" *Id.*

ensure that the surrogate is adequately advised of all the risks of artificial insemination, including, in the case of surrogacy, the psychological risks associated with pregnancy and childbirth. Even when the surrogate is so advised, her final consent must be given after the birth of the child because it is not possible to understand, prior to conception, the psychological risks she is taking.¹⁵⁸

The consent of the surrogate to surrender the child is also invalid because the surrogate parenting scheme contemplates that a fee over and above actual medical and/or legal expenses will be paid by the adopting couple to the surrogate. Surrogates have proffered a variety of reasons for their decisions to agree to surrogacy. Some assert that their main objective is to give the gift of life to another couple.¹⁵⁹ Others acknowledge that they acted as surrogates because of the financial incentive.¹⁶⁰ Whatever their professed reasons, it is generally agreed that if there were no fee paid to surrogates, the practice would all but disappear.¹⁶¹ Thus, although very few studies have been conducted on the motivations of women who agree to act as surrogates, the information that is available suggests that they are, to a significant degree, financially needy¹⁶² and that the financial incentive for entering into a surrogate parenting agreement is a strong one. This financial incentive may be sufficient to induce a woman to enter into the surrogacy agreement — an agreement she probably would not otherwise make, and one that she may later regret. The surrogate's fee particularly threatens the voluntariness of consent of a surrogate in dire financial straits.¹⁶³

158. See *supra* notes 130-138 and accompanying text.

159. Parker, *Motivation*, *supra* note 8, at 117-18.

160. *Id.* (study on the motivations of 125 women who applied to become surrogates found that 89% of 122 women would not participate unless they received a fee of at least \$5,000). See also TASK FORCE REPORT, *supra* note 3, at 25.

161. TASK FORCE REPORT, *supra* note 3, at 25.

162. In *Baby M*, for example, the Whiteheads filed for bankruptcy in or about 1983. 217 N.J. Super. 313, 339, 525 A.2d 1128, 1140 (Super. Ct. App. Div. 1987). In addition, they had been in default on both of the two mortgages on their home and were at one time faced with foreclosure proceedings. *Id.* at 340, 525 A.2d at 1140. See also TASK FORCE REPORT, *supra* note 3, at 25 ("Surrogates generally . . . are of modest or moderate financial means. One study found that over 60% worked outside the home or had husbands who worked while 40% were unemployed or received some sort of financial assistance or both. The annual incomes of surrogates ranged from \$6,000 to \$55,000.").

163. See, e.g., *Baby M*, 109 N.J. at 425, 537 A.2d at 1241 ("[T]he monetary

While the fee received by the surrogate — typically between \$10,000 and \$30,000 — is not enough to make the surrogate rich, it is sufficient to vitiate consent. Courts have held that much lower financial incentives vitiated the biological parents' consent to an adoption.¹⁶⁴ In *Barwin v. Reidy*, consent was vitiated when the adoptive parents paid the biological parents \$400 for two children in exchange for the biological parents' consent to the adoption.¹⁶⁵ The court in *Barwin* so held despite finding that both the biological parents and the adoptive parents were acting out of concern for the children's welfare.¹⁶⁶ If relatively small sums can vitiate the consent of the biological parents' consent to adoption, *a fortiori* \$10,000 should vitiate the surrogate's consent.¹⁶⁷

B. Violation of Baby Selling Prohibitions

Despite the states' well-defined public policy against baby selling, it has been argued that surrogate parenting agreements are legitimate.

incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary.''). In a study on the motivations of 125 women who applied to become surrogates, 40% of the first 50 applicants were unemployed or receiving some sort of financial assistance. Parker, *Motivation*, *supra* note 8, at 117.

164. In *Downs v. Wortman*, 185 S.E.2d 387, 228 Ga. 315 (1971), for example, the court held that an offer to pay airfare for the biological mother to travel between Georgia and Illinois vitiated consent.

165. 62 N.M. 183, 196, 307 P.2d 175, 184 (1957). The \$400 payment was not to reimburse the biological parents for medical or other legitimate expenses.

166. *Id.* at 195, 307 P.2d at 183. Cf. *Hendrix v. Hunter*, 110 S.E.2d 35, 41, 99 Ga. App. 785, 793 (1959) (Felton, C.J., dissenting) ("Monetary consideration to a mother, or its equivalent, which forms the basis of an adoption contract, vitiates the agreement.'). Cases which conclude that payment to the biological mother does not vitiate consent involve payments to cover medical and legal fees or other legitimate expenses. See, e.g., *Gorden v. Cutler*, 324 Pa. Super. 35, 471 A.2d 449 (1983); *Cohen v. Janic*, 57 Ill. App. 2d 309, 207 N.E.2d 89 (1965).

167. Arguably no parent would give his or her child up for adoption if they could afford to care for it, even in a traditional adoption. *Barwin*, 62 N.M. at 198, 307 P.2d at 185. Thus, even in a non-surrogate adoption, the adoptive parents are likely to be wealthier than the biological parents. Therefore, the restrictions on payments to the biological parents should be strictly enforced to ensure that a biological parent in dire financial straits is not induced to give his or her child up for adoption based on some financial incentive. Of course, parents may give children up for adoption for reasons independent of money. For example, teenage mothers who conclude that they would rather not be burdened with the responsibility of child rearing at a young age may place their children for adoption regardless of their financial status.

One argument advanced is that the adopting couple is not buying a baby, but is paying the surrogate for her services.¹⁶⁸ Another argument is that the evil that the baby-selling statutes were enacted to prevent does not exist in surrogate arrangements.¹⁶⁹ Neither argument is compelling.

The argument that the payment made to the surrogate is for her services rather than for the right to adopt the child places form over substance.¹⁷⁰ While the surrogate parenting agreement may state that the fee is for the surrogate's services, such a statement is not supported by the facts. An examination of the fee structure of a typical surrogate parenting agreement reveals that the fee paid to the surrogate is not just for the surrogate's services, but rather is a fee for the purchase of the baby itself. In the typical surrogate parenting agreement, the surrogate's fee ranges from \$10,000 to

168. Keane, *supra* note 7, at 152-59.

169. *Id.* at 154. See also Katz, *supra* note 4. A third consideration is whether the biological father, who is genetically related to the child, can be said to have purchased his own child. One commentator concludes that the Thirteenth Amendment to the United States Constitution, which prohibits slavery and thus the sale and purchase of human beings, also prohibits surrogacy. Means, *supra* note 1, at 478-79. "A modern father . . . has, by virtue of his paternity, his own parental rights to the child. What he does not have is the mother's parental rights. Sale of her parental rights is the equivalent of sale of the child." *Id.* at 449 n.18. Cf. *Hawkins v. Frye*, 1988 WL 59841 (Del. Fam. Ct. May 25, 1988) (West). There a divorcing couple contractually agreed to terminate the father's parental rights. The court, finding that this provision violated public policy, explained:

Although this case does not involve a parent receiving money for placing his child for adoption as did [*Baby M*], it does involve terminating one's parental rights, the effect of which would be to avoid paying child support. This smacks of the same forbidden motivation: giving up a child for monetary benefit.

Id. at 6.

If the surrogate were a gestational surrogate only, gestating a fetus created by the adopting couple, a question would arise regarding who would be considered the biological mother of the child, and thus, whether the biological father would still be purchasing the biological mother's parental rights. See *supra* note 5.

170. Compare *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) (surrogate parenting constitutes private placement adoption) with MBW Contract, *supra* note 9, at 2, which states that the fee is "compensation for services and expenses, and in no way is to be construed as a fee for termination of parental rights or a payment in exchange for consent to surrender a child for adoption." (This portion of the contract is reprinted in 109 N.J. at 471, 537 A.2d at 1266.) Of course, stating this as a proposition does not make it so.

\$30,000 plus medical and legal expenses.¹⁷¹ This fee is normally held in escrow until the surrogate releases the child to the adopting couple. If the surrogate fails to deliver the child, the fee is reduced. In *Baby M*, for example, the contract entered into by Mary Beth Whitehead provided that she was to receive a \$10,000 fee. If she failed to surrender the child, however, she was only entitled to receive \$1,000 at most. If she miscarried prior to the fifth month, she would receive no compensation aside from being reimbursed for her medical expenses.¹⁷² Thus, her fee, and surrogates' fees generally, are vastly larger if they deliver a child to the adopting couple than if they fail, for whatever reason, to deliver the child. In effect, the surrogate is paid a success fee. The success fee to a surrogate is analogous to the fee paid a real estate broker upon the closing of a home sale, an investment banker upon the closing of a financing or merger, or any other broker upon the closing of a transaction. Thus, more penetrating analyses recognize that the adopting couple is clearly paying the surrogate in order to purchase a child.¹⁷³

A suggestion has nevertheless been made that paying a fee to a surrogate is legal since most states permit the payment of money in connection with the adoption of a baby, including the payment of medical and legal fees, payment of an adoption agency fee, and the like.¹⁷⁴ But such fees are quite different from a separate fee for surrendering a child. Once again, an analogy may be made between

171. See, e.g., *Surrogate Parenting Associates, Inc., v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 211 (Ky. 1986) (In addition to the surrogate's fee, "the [biological] father assumes responsibility for medical, hospital, travel, laboratory and other necessary expenses of the pregnancy. . . . The biological father [also] pays the attorneys' fees.").

172. See MBW Contract, *supra* note 9, at para. 10, reprinted in 109 N.J. at 472, 537 A.2d at 1267; *Baby M*, 109 N.J. at 424, 537 A.2d at 1241 ("As for the contention that the Sterns are paying only for services and not for an adoption, we need note only that they would pay nothing in the event the child died before the fourth month of pregnancy, and only \$1,000 if the child were stillborn, even though the 'services' had been fully rendered.").

173. See, e.g., Wolf, *supra* note 9, at 388 ("We need to acknowledge and explore the extent to which surrogacy is the payment of money for children . . .") (emphasis in original); Katz, *supra* note 4, at 22 (distinguishing surrogate parenting agreements from baby-brokering in the black market regardless of whether the couple "is viewed as paying the surrogate . . . for her services or as paying for the rights to a child").

174. See *supra* notes 100-101 and accompanying text.

a surrogate transaction and the purchase of a home. A purchaser of a home normally pays legal fees, title insurance fees and many other collateral fees in connection with the purchase. It is undisputed, though, that the ultimate aim of the transaction is for the seller to sell and the buyer to buy the home. Irrespective of any other expenses involved in the transaction, the seller receives the purchase price of the home. In a traditional adoption, the permitted payments are not generally made to the biological mother in consideration for her child. Rather they are made to the lawyer, the hospital, and other persons or institutions legitimately entitled to be paid. A payment made directly to the biological parents must be for the purpose of reimbursing out-of-pocket expenses.¹⁷⁵ In the surrogacy context, the adopting couple might similarly be permitted to pay such legitimate collateral expenses of the surrogate as her medical expenses. These expenses are the same as the collateral expenses incurred in a traditional adoption, and are analogous to the collateral expenses incurred in connection with the sale of a home. The fee paid to the surrogate in excess of her legitimate expenses, however, constitutes the price of the child, just as the amount paid by a buyer of a house in excess of the collateral expenses is the price of the house. The surrogate situation cannot be distinguished from a traditional adoption with respect to state prohibitions against baby-selling. "It is a very short step, legally, from saying that it is acceptable for a woman to accept money for the transfer of a child who is purposefully conceived to saying that a woman may accept money for a child that is accidentally conceived."¹⁷⁶ Since a payment is being made in exchange for the right to adopt a child, surrogate parenting agreements violate the baby-selling statutes.

Surrogate parenting agreements violate not only the letter but also the spirit of baby-selling statutes because their potential effect is precisely that which the baby-selling statutes are designed to prevent. Baby-selling prohibitions are designed to prevent commercialization of the adoption process and to prohibit treating children as chattel.¹⁷⁷ These laws attempt to ensure that when an adoption

175. See *supra* notes 100-101 and accompanying text.

176. Pierce, *The "Surrogate Parenting" Issue and NCFA's Activities*, NAT'L ADOPTION REP., Vol. XIII, No. 1, Jan.-Feb. 1987, at 1, 5 (bi-monthly newsletter from National Committee for Adoption.).

177. See *supra* note 116 and accompanying text. See also H.R. 2101, 85th Gen.

takes place it is based on the child's best interest rather than on the profit motive of the black-marketeer.¹⁷⁸ Surrogate parenting agreements are the antithesis of that policy.¹⁷⁹

The evils that baby-selling statutes were designed to prevent are present in the surrogacy context in three respects. First, the fee that the surrogate receives may induce her to act not in the child's best interest but in her own best interest. Second, the biological father will not necessarily behave any differently from any other unrelated black marketeer. Third, the fee received by the organization arranging the surrogate transaction¹⁸⁰ is the organization's primary purpose for being. It does not exist to benefit the child.

While the few existing surrogate parenting cases are not in agreement on whether surrogate parenting is compatible with baby-selling provisions,¹⁸¹ the Supreme Court of New Jersey in *Baby M*

Assem., 1987 Ill. (In his proposed bill to prohibit surrogate parenting agreements, Representative Granberg recognizes that "any form of commercialization in relation to the placement or adoption of children is immoral and contrary to the State's goal of ensuring and protecting the welfare of children.").

178. *Id.* In *Baby M*, 109 N.J. at 425, 537 A.2d at 1241, the court expressed one of the evils of the baby black market as the selling of a child "without regard for whether the purchasers will be suitable parents."

179. *But see* Katz, *supra* note 4, at 52 (The author concludes that the baby-selling laws should not prohibit surrogate parenting agreements and explains that "these statutes were not enacted with surrogate motherhood in mind and should not be used to accomplish a purpose for which they were not designed.").

180. The organization charges a fee for finding the parties and for conducting other services such as the artificial insemination. *See* *Surrogate Parenting Associates, Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 211 (Ky. 1986) (*Surrogate Parenting Associates* was "paid a fee by the biological father for selection and artificial insemination of the surrogate . . . for obstetrical care and testing during pregnancy, and for actual delivery."); *Baby M*, 109 N.J. at 424, 537 A.2d at 1241 ("[T]he fee to the Infertility Center (\$7,500) was stated to be for legal representation, advice, administrative work, and other 'services.' Nevertheless, it seems clear that the money was paid and accepted in connection with an adoption. The Infertility Center's major role was first as a 'finder' of the surrogate mother whose child was to be adopted, and second as the arranger of all proceedings that led to the adoption."). Even Noel Keane, a strong advocate of surrogate parenting, recognizes that "[a]ny broker or intermediary who brings the interested parties together could . . . act from motives of pecuniary gain." Keane, *supra* note 168, at 156.

181. *Compare* *Surrogate Parenting Associates*, 704 S.W.2d at 209 (surrogate parenting does not violate baby-selling prohibitions), *with* *Baby M*, 109 N.J. at 396, 537 A.2d at 1227 (surrogate parenting does violate such prohibitions).

expressed the best view: "The negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother."¹⁸² The court reasoned that the natural mother's interests are neglected because she is unlikely to receive proper counselling.¹⁸³ The child's best interests are not protected because the child will be sold to the party with the financial means to pay, regardless of whether that party is a suitable parent.¹⁸⁴ Finally, the adoptive parents' interests may not be protected. In *Baby M*, the court felt that the adoptive parents might suffer, for example, from not being informed of the medical history of the child.¹⁸⁵

In a surrogate arrangement, both the biological mother and the organization that brings the parties together act as independent child-placers. In the traditional adoption context, neither would be permitted to profit from the placement of a child.¹⁸⁶ The biological mother does profit, though, by collecting a fee of anywhere from \$10,000 to \$30,000 over and above her medical expenses. It may be argued that, since the surrogate is the biological mother of the child, she is more likely to provide for the child's best interest and that the baby-selling statutes were not designed to encompass the surrogacy arrangement. In fact, however, the fee paid to the surrogate is an important if not the primary motivating force in a woman's decision to act as a surrogate.¹⁸⁷ Thus, even the biological mother in a surrogate arrangement treats the child as chattel at least to some extent. The surrogate is likely to work with the couple willing to pay her the most money, with the result that the child will likely be awarded to the highest bidder.

Since the adopting couple¹⁸⁸ is genetically related to the child through the father, an emotional bond, at least, is expected between the biological father and the child, which would tend to prevent the

182. *Baby M*, 109 N.J. at 425, 537 A.2d at 1245.

183. *Id.*, 537 A.2d at 1241.

184. *Id.*

185. *Id.*

186. See *supra* notes 110-119 and accompanying text.

187. See *supra* note 160.

188. In order to circumvent the baby selling statutes, the parties to a surrogate parenting agreement are often just the surrogate and the biological father. The biological father arguably cannot buy his own child.

creation of a black market in baby selling. The genetic tie, however, between the father and child does not ensure that the child's best interests will be served.¹⁸⁹ History demonstrates that such a bond does not preclude baby-selling. It is well documented that during the embarrassing time in this country when slavery was legal, white slave masters often raped slave women, creating mulatto babies. These slave owners, however, were not concerned with the health and welfare of these babies and often sold them as they sold other slaves.¹⁹⁰ Thus the mere existence of a genetic link did not ensure that an emotional bond existed or that the father would not be willing to sell the child to another individual at the right price. Of course, the racial considerations which were present at that time made such a practice almost acceptable. Such racial considerations are unlikely to be present in the surrogacy context. Other considerations, however, could arise which would create the same potential for the creation of a black-market. The child could, for example, be born with physical and/or mental handicaps. In such a case, the surrogate parenting agreement would normally provide that the adopting couple agrees to take legal responsibility for the child.¹⁹¹ The adopting couple, however, may not necessarily perform as previously agreed.¹⁹²

189. In cases of divorce or separation, many biological fathers fail to provide for their children's best interests by neglecting to make child support payments. See U.S. Bureau of the Census, *Current Population Reports* series P-23, No. 152, indicating that approximately 26% of women entitled to child support in 1985 failed to receive it.

190. D. BELL, *AND WE ARE NOT SAVED* 205 (1987) ("Forced to submit to the sexual desires of their masters or of slaves selected by their masters, [black] women then suffered the agony of watching helplessly as their children were sold off.").

191. See MBW Contract, *supra* note 9, at para. 14, which provides:
WILLIAM STERN . . . recognizes that some genetic and congenital abnormalities may not be detected by amniocentesis or other tests, and therefore, if proven to be the biological father of the child, assumes the legal responsibility for any child who may possess genetic or congenital abnormalities.

192. In a pending Michigan case, for example, a surrogate gave birth to a potentially handicapped child. The alleged biological father refused to take responsibility for the child and it was later determined that the actual biological father was the surrogate's husband. *Jane Doe v. Attorney General*, No. 88-819032-CZ (Cir. Ct. for Wayne County, Mich.). Michigan has subsequently passed legislation prohibiting surrogate parenting agreements. See Surrogate Parenting Act, 1988 Mich. Legis. Serv. 420-22 (West) (to be codified at MICH. COMP. LAWS ANN. § 722).

They may attempt to sell the child on the black market. Or, they may legally attempt to place the child for adoption with an unrelated couple. In such a case, the child is unlikely to be adopted, and is most likely to become a ward of the state.¹⁹³ Thus, a child who is born with physical or mental handicaps risks being neglected, abandoned, and/or abused.¹⁹⁴

C. Lack of an Investigation

The fee structure used in the surrogate context also fails to consider the adopting couple's fitness as parents since their ability to pay the surrogate's fee rather than their fitness as parents is the most important factor. No investigation whatsoever is required of the adopting couple's fitness as parents. This deficiency is also inconsistent with adoption laws.

Although several states provide that an investigation need not be conducted when a stepparent is adopting a child, most provide that an investigation will be made if the state, in its discretion, deems it necessary to protect the child's best interest.¹⁹⁵ Thus, the state mechanism of adoption is used to ensure that even in an adoption by a stepparent the child's best interests are served. Moreover, in at least one jurisdiction, the provision providing for a discretionary investigation in a stepparent adoption,¹⁹⁶ has not been applied in a surrogate situation. Instead, a full investigation of the adoptive stepparent was required.¹⁹⁷

With surrogate arrangements the fitness of the parents is not overseen at all. There is no mechanism for ensuring that the wife

193. There are many handicapped children who are waiting to be adopted. *See infra* notes 217-222 and accompanying text.

194. To some extent, a handicapped child faces such risks even when both of the parents are biological parents. The risks of abandonment, neglect, or abuse are arguably greater, however, in the surrogate context. The bonding between mother and child that occurs during pregnancy and childbirth will not be experienced by the adopting couple. *See supra* note 98 and accompanying text. Where both parents are biological parents, at least the biological mother will have experienced that bonding process. Thus, she may be less likely to reject a handicapped child.

195. *See supra* notes 124-126 and accompanying text.

196. D.C. CODE ANN. § 16-308 (Supp. 1988).

197. *In re R.K.S.*, 112 W.L.R. 1117 (Super. Ct.) *cited in In re R.M.G.*, 454 A.2d 776 (D.C. Ct. App. 1982).

of the biological father is fit. Her fitness as a parent is simply not a factor in the equation. There are no safeguards in a surrogate parenting arrangement to ensure that the child's best interests are served.

With surrogate parenting, the surrogate and the adopting couple select each other. By agreeing to work with a particular couple, it is the surrogate who determines who should adopt the child — not the state, as is the norm under adoption statutes.¹⁹⁸ Moreover, the surrogate's decision may not be based on the best interest of the child. It may be based purely on financial considerations.¹⁹⁹ This is not compatible with state adoption procedures whereby, even if the biological parents indicate their preference regarding who should adopt the child, the state has the freedom to disregard the preference if it is not in the child's best interest.²⁰⁰

Surrogate parenting agreements are incompatible with ordinary and well thought-out adoption procedures in at least three ways. They fail to regard the best interest of the child as the primary goal. This deficiency is reflected in the failure to provide for an investigation of the suitability of the adoptive parent. It is also reflected in the fee structure, which violates baby-selling prohibitions. Surrogate parenting agreements also fail to protect the interests of the biological mother because they fail to ensure that her consent to surrender the child is voluntary and informed. Because of the failure to comply with the adoption laws, the adopting couple is at risk because they have no assurance that the transaction is legal.²⁰¹

198. Although some states permit the biological parent to place the child, an investigation is made to ensure that the prospective adoptive parents are fit. *See supra* notes 121-122 and accompanying text.

199. *See supra* note 160 and accompanying text.

200. *Barwin v. Reidy*, 62 N.M. 183, 191-92, 307 P.2d 175, 181 (1957) (The court "may or may not decree adoption in favor of persons recommended by the natural parents." Even where "the natural parents have investigated the qualifications of the petitioners and given them their unqualified approval, the court may still refuse to decree adoption, the selection of [an adoptive] parent being a judicial act and the responsibility being that of the court.").

201. Although the public policies set forth in adoption statutes arguably should change to reflect advances in reproductive technology, there are certain adoption policies which must be retained if the interests of the biological parents, the adoptive parents, the child, and, in turn, society are to be protected. *See infra* notes 204-224 and accompanying text.

The fact that surrogate parenting agreements as currently structured are incompatible with adoption laws does not necessarily mean that no surrogacy contract can ever be enforced. They do, however, need to be modified in order to bring them into compliance with adoption laws. Moreover, surrogate agreements should be carefully regulated by the state.

IV. POTENTIAL COMPATIBILITY OF SURROGATE PARENTING AGREEMENTS WITH STATE ADOPTION LAWS

A. Minimum Requirements for Consistency With Adoption Statutes

Thirty-four states have proposed bills on the subject of surrogate parenting. Michigan has actually enacted legislation.²⁰² Many of the bills would, and the Michigan statute does, render surrogate parenting agreements unenforceable.²⁰³ While this is an acceptable and

202. Surrogate Parenting Act, *supra* note 192. The Michigan Act, which took effect on Sept. 1, 1988, renders surrogate parenting agreements "void and unenforceable as contrary to public policy." *Id.* at § 5. The Act encompasses both genetic and gestational surrogates (see *supra* note 5) and prohibits both types of arrangements. *Id.* at § 3(i). The Act makes violations a felony, "punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both." *Id.* at § 7(2). The Michigan Surrogate Parenting Act was already challenged by the Michigan Civil Liberties Union on constitutional grounds. A settlement was reached, however, when the state attorney general agreed to an interpretation of the statute which would permit surrogate parenting agreements to be enforced as long as the surrogate's final consent to surrender the child is made after birth. N.Y. TIMES, Sept. 20, 1988, at A15, col. 1.

203. See, e.g., H. 172, 1988 Ala.; A. 3200, 1988 Cal.; S. 358, 1987 Iowa; H. 2101, 1987 Ill.; S. 499, 1987 Ill.; S. 4, 1988 Ky.; S. 1660, 1987 Minn.; H. 1701, 1988 Minn.; S. 2157, 1988 Miss.; S. 305, 1987 N.C.; H. 751, 1988 N.H.; A. 6277/S. 4641, 1987 N.Y.; A. 8852/S. 6891, 1988 N.Y.; A. 9882, 1988 N.Y.; A. 11607, 1988 N.Y.; S. 4640, 1987 N.Y.; S. 386, 1987 R.I.; S. 2518, 1988 R.I.; H. 237, 1988 Va.; A. 554, 1987 Wis. Some bills go so far as to impose criminal penalties for violations of the provisions. See S. 281, 1988 N.H. (misdemeanor); A. 13, 1988 N.J. (crime of the third degree); Title 18, § 4305, 1987 Pa.; H. 2030, 1988 Wash. (gross misdemeanor). See also Surrogate Parenting Act, *supra* note 192, at § 9.

Other bills would allow surrogate parenting agreements with restrictions. See H. 2052, 1988 Iowa (surrogate parenting agreements permitted upon court approval); H. 2279, 1988 Iowa (permits surrogate parenting agreements but biological mother must sign release not less than 72 hours following the child's birth); S. 620, 1988 Kan. (voidable if no consideration); H. 1561, 1988 Mo.; H. 1108, 1988

even preferable approach, it is not the only possible approach; surrogate parenting agreements could be enforced in certain circumstances. First, in order to comply with consent provisions of adoption laws, they must not provide for the biological mother to receive a fee over and above the reimbursements she would be entitled to under state adoption laws.²⁰⁴ Although this proposal may reduce or virtually eliminate the pool of women who will agree to act as surrogates,²⁰⁵ it is necessary to protect the child's interests.²⁰⁶ Second,

N.H. (court approval required); A. 956, 1988 N.J.; S. 2468, 1988 N.J.; A. 2403, 1987 N.Y.; A. 4748/S. 1429, 1987 N.Y.; A. 5529, 1987 N.Y. (prohibits consideration); A. 9857, 1988 N.Y.; H. 776, 1987 Pa.; S. 742, 1987 Pa.; H. 8419, 1988 R.I.; S. 626, 1987 S.C.; H. 549, 1988 Vt.; H. 1529, 1988 Wash.; A. 827, 1988 Wis. Many states have had multiple bills proposed ranging from complete prohibition to regulated enforceability.

In addition to the proposed bills, a number of states have proposed and/or established special commissions to study the issue of surrogate parenting. *See* S. 548, 1987 Cal.; S.J. Res. 4, 1987 Del.; H.J. Res. 80, 1987 Ill.; H. 1148, 1988 Mass.; S. 239, 1987 Me.; S. 871, 1987 N.C.; H. 1098, 1988 N.H.; A.J. Res. 5, 1988 N.J.; H. Res. 93, 1987 Pa.; S. 2413, 1988 R.I.; H. 17, 1988 Utah; H.J. Res. 65, 1988 Va.; A.J. Res. 71, 1987 Wis.

On the national level, Democratic Representative Barbara Boxer and Republican Representative Henry Hyde are jointly sponsoring legislation against surrogate parenting. The bill would make surrogate parenting contracts unenforceable and would penalize intermediaries. H.R. 1188, 101st Cong., 1st Sess. (1989). *See* N.Y. Times, Feb. 3, 1989, at A11, col. 1.

204. For a discussion of permissible reimbursements, see *supra* notes 100-101 and accompanying text. The New York State Task Force, stated that the adopting couple "would be allowed to pay the same expenses that other adoptive parents could pay to or on behalf of a mother who consents to the adoption of her child" but no more. TASK FORCE REPORT, *supra* note 3, at A-2. "Allowable expenses would include the birth mother's medical fees and other necessary expenses arising from her pregnancy and the child's birth. They would also include reasonable expenses for legal services related to the adoption proceeding, but would not permit a 'finder's fee' or payment for the child." *Id.*

205. Most women would not agree to act as a surrogate without a substantial fee. *See supra* note 160 and accompanying text.

206. The foregoing analysis is of little use in a situation where a child has already been born pursuant to a surrogacy agreement or in those states that decide to permit surrogate parenting agreements. In these situations, the issue of custody remains. It has been suggested that a "best interest of the child" standard would be inappropriate to decide the custody issue because it would normally result in custody being awarded to the adopting couple who are likely to have more money and be better educated than the surrogate. *See* Wolf, *supra* note 9, at 398-99. But one of the major concerns about surrogacy is that it fails to adequately protect the welfare of the child. Once a child is born, custody decisions should be based

surrogate parenting agreements must be restructured to give the biological mother a period of time to change her mind after the birth of the child. This would be consistent with adoption statutes²⁰⁷ and is essential if the surrogate's interests are to be sufficiently protected. Moreover, she should be advised following the birth of the child of her right to void the contract. Without a personal counselling session, the surrogate may comply with the provisions of the surrogate parenting agreement simply because she is unaware of her right to do otherwise. In circumstances where the surrogate parenting agreement is incompatible with adoption statutes solely because it fails to comply with adoption consent requirements, the surrogate parenting agreement should be voidable. This situation is analogous to a situation in which one party to a contract lacks capacity.²⁰⁸ In such cases, the contract is generally voidable at the option of the party lacking capacity.²⁰⁹ The surrogate parenting agreement should also be voidable where the surrogate's consent is vitiated.²¹⁰

on his or her welfare. The best interest standard is designed to do this and should be used even if this would generally favor the natural father because this is the standard which is most likely to protect the child. As the court in *In re Adoption of Baby Girl L.J.*, 132 Misc. 2d 972, 974, 505 N.Y.S.2d 813, 815 (Surr. Ct. 1986) explained when confronted with the existence of a child born pursuant to a surrogate parenting agreement:

The reality is that the child is in being and of necessity must be reared by parents. The court . . . has found . . . that it would be in the best interests of the child to approve the adoption [by the biological father and his wife]. No other alternative, such as denying the adoption for the purpose of discouraging such procedures, is appropriate here. This child needs a home

See also *Baby M*, in which the trial court also applied the best interest standard in determining that the biological father and his wife should be given custody of Baby M. 217 N.J. Super. 313, 390-98, 525 A.2d 1128, 1166-71 (Super. Ct. App. Div. 1987). The custody determination was affirmed on appeal. 109 N.J. at 452-63, 537 A.2d at 1255-61.

In Michigan, the Surrogate Parenting Act provides that while surrogate parenting agreements are unenforceable, "[i]f a child is born . . . pursuant to a surrogate parentage contract . . . [t]he . . . court shall award legal custody of the child based on a determination of the best interests of the child." Surrogate Parenting Act, *supra* note 192, at § 11.

207. See *supra* note 94 and accompanying text.

208. See *supra* note 20.

209. See *supra* note 20.

210. In other words, all surrogate parenting agreements should be voidable —

If, however, a surrogate parenting agreement also violates baby-selling prohibitions, it should be considered void. An impermissible fee not only vitiates consent, but threatens to create a black market in baby-selling.²¹¹ Such an agreement should not be enforced at all.²¹²

Finally, the state must determine the fitness of the adopting couple just as it would investigate the fitness of any other adopting parents. The investigation should be made prior to the insemination of the surrogate. Once the investigation has been made and the adopting couple has been found fit, the surrogate parenting process can proceed within the limitations set forth above.

B. Surrogacy and Society at Large

Although surrogate parenting agreements may be enforceable if they meet the foregoing limitations, they are not desirable. While surrogate parenting is an attempt to create a new form of independent adoption, it has much less to recommend it than traditional adoptions, whether independent or agency. Under current adoption statutes the state's interest is to protect the welfare of a child whose parents are unable or unwilling to provide for him or her.²¹³ Thus, the state, by allowing the adoption, helps to meet the child's needs by providing a mechanism by which the child may be placed with an adoptive family. The key, though, is that adoption statutes came into being to address a need — the need to care for existing children without homes.²¹⁴ The state interest in meeting the needs of these children

either by express provision, allowing the biological mother to change her mind after the child's birth, or as a matter of law. Admittedly, this approach is paternalistic. Nonetheless, because an agreement to surrender a child is different in kind and not just in degree from other agreements, this added protection of the biological mother is justified.

211. On the other hand, it may be argued that the refusal to enforce surrogate parenting agreements will simply reduce further the number of healthy white babies — which, in turn, will strengthen the black market in baby-selling.

212. Cf. S. 620, 1988 Sess. § 1, 1988 Kan. (Proposed bill would render surrogate parenting agreements for consideration void, while rendering surrogate parenting agreements without consideration voidable.).

213. Note, *Matching For Adoption: A Study of Current Trends*, 22 CATH. LAW. 70 (1976) ("Theoretically, the primary purpose of adoption procedures is to serve the best interests of the child.").

214. *Barwin v. Reidy*, 62 N.W. 183, 190, 307 P.2d 175, 180 (1957) ("[T]he purpose of statutes for adoption is to make provision for the welfare of children . . .").

resulted in the adoption statutes currently in force in every state.²¹⁵

Surrogate parenting exists, however, not to meet the *needs* of children, but to meet the *desires* of the adopting couple. Therefore, at the outset there is lacking in the practice of surrogate parenting the state interest present in traditional adoptions of meeting the needs of existing children.²¹⁶ Moreover, there are thousands of existing children in this country who desperately need homes.²¹⁷ The need for homes for foster children is well documented.²¹⁸ There are also many children available for adoption.²¹⁹ Of course, many foster children are not infants and may have a variety of physical and/or mental health problems.²²⁰ Moreover, they are disproportionately

215. TASK FORCE REPORT, *supra* note 3, at 35 ("Adoption statutes were designed to benefit children in need of parents."); Derdeyn & Wadlington, *Adoption: The Rights of Parents Versus the Best Interests of Their Children*, 16 J. AM. ACAD. CHILD PSYCHIATRY 1 (1977); Huard, *The Law of Adoption, Ancient and Modern*, 9 VAND. L. REV. 743, 748-49 (1956).

216. *See Means, supra* note 1, at 466-67 ("Adoption is the societal method of providing for the necessity of the child. A surrogacy agreement is an agreement by adults, of adults, and for adults, which they designed to satisfy their own needs and (some would add) greeds. No necessity of any child prompts such an agreement.").

217. There are thousands of children in foster homes, many of whom are available for adoption. There are also minority, handicapped, and foreign children available for adoption. *See infra* note 227 and accompanying text. *See also* Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L.L. REV. 199, 201 (1988).

There may also be other children who are adversely affected by surrogate parenting agreements — other children of the surrogate. In *Baby M*, for example, Mary Beth Whitehead, the surrogate, already had two children when she agreed to become a surrogate. These children were undoubtedly affected by the surrogate arrangement. Mary Beth Whitehead actually fled to another state with Baby M after the birth in a desperate attempt to avoid being separated from her child. 109 N.J. at 415-16, 537 A.2d at 1237. Even in surrogate parenting situations which proceed without incident, the children of the surrogate will presumably be affected by the fact that their mother is pregnant for nine months, delivers a baby, but fails to bring the child home.

218. Mushlin, *supra* note 217; N.Y. Times, Sept. 30, 1988, at B1, col. 2 ("In New York City's glutted foster care system . . . there are not enough families to go around.").

219. There are "thousands of black and bi-racial children who wait for permanent homes." ADOPTION FACTBOOK, *supra* note 63, at 32.

220. There were 274,000 "special needs" children in foster care in 1982. Although many of them were free for adoption, only 9,591 adoptions by foster

racial or ethnic minorities.²²¹ Like any other group, the group of foster children is composed of individuals, each with his or her own personality. If more couples opened their homes to these children it would serve a number of purposes. First, the child who wants and needs a home would have one. Second, the couple that wants to care for a child would have one. Third, a child who is well cared for would be more likely to grow up happy and healthy and become a productive member of society than one who is homeless, neglected, or abused. In addition, for the couple willing to take in a child of a different race or religion, there is an opportunity for both the parents and child to become more sensitive to their cultural differences while appreciating their similarities.²²² Such adoptions might help to achieve Dr. Martin Luther King's dream that individuals "not be judged by the color of their skin but by the content of their character."²²³ If some of the couples who so desperately want children would consider opening their hearts and homes to children already born, society would benefit. While the existence of children available for adoption does not render surrogate parenting agreements unenforceable, it does illustrate that surrogate parenting may do more harm than good for society at large.

parents occurred during that year. *Id.* at 11. "Special needs" children include those "who may be difficult to place due to ethnic background, age, membership in a minority or sibling group, or the presence of physical, emotional or mental handicaps." *Id.* at 41.

221. A study conducted by the National Committee for Adoption, based on 1982 data, noted that "[b]lack children constitute 14 percent of the child population, 34 percent of foster care, and 41 percent of children free for adoption." *Id.* at 11. *See also id.* at 35 (citing 1984 DHHS report finding similar results). "Regrettably, there is a consistently poor record in finding adoptive homes for these black children." *Id.* at 32.

222. Transracial adoptions are controversial. In fact, the National Association of Black Social Workers has taken the position that they should not be permitted at all because it will amount to "cultural genocide." *Id.* at 32. The focus, however, should be on the best interest of the child. While it may be preferable to place a child with a family of the same racial or ethnic background, the child will undoubtedly be better off living with a loving family, regardless of racial or ethnic background, than living in an impersonal state-run institution. Of course, the state agencies which arrange adoptions must also ensure that their procedures are fair and do not make adoption more difficult for minorities than for whites. *See generally id.* at 32-34.

223. M. L. King, Jr., March on Washington Speech (Aug. 28, 1963), *reprinted in* L. DAVIS, I HAVE A DREAM . . . THE LIFE AND TIMES OF MARTIN LUTHER KING, JR. 263 (1969).

CONCLUSION

Surrogacy for pay is incompatible with baby-selling prohibitions and must be prohibited. Surrogate parenting agreements could be made, however, where no fee would be paid to the surrogate over and above the fees currently allowed under the adoption laws. In addition, some mechanism must be established for investigating the adopting couple's fitness as parents. Finally, surrogate parenting agreements would have to give the biological mother a period of time after the child is born to decide whether she wants to surrender the child. Otherwise, the surrogate parenting agreement would be voidable at her option. If she decides not to surrender the child, a custody decision must be made based on the best interest of the child without regard to the surrogate agreement. Despite the fact that surrogate parenting agreements can be made to conform to adoption statutes, society would be better served if infertile couples would provide a home for some of the thousands of children currently awaiting adoption.