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A CONTRACTUAL ANALYSIS OF SURROGATE MOTHERHOOD AND A PROPOSED SOLUTION

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I. INTRODUCTION

The phrase "surrogate motherhood"[1] may spark notions of advanced scientific procedures similar to those described in Aldous Huxley's *Brave New World*.[2] Surrogate motherhood, however, is an ancient concept. For example, the Bible notes two occasions where surrogate mothers provided infertile women with children.[3] Surrogate motherhood

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1. A "surrogate" is a person who takes the place of another. WEBSTER'S NEW COLLEGIATE DICTIONARY 1165 (2d ed. 1979). A "surrogate mother" is one who bears a child for another. Robertson, *Surrogate Mothers: Not So Novel After All*, HASTINGS CENTER REP., Oct. 1983, at 28, 28. More specifically, a surrogate mother has been defined as:

> a female person at least eighteen years of age, whether married or unmarried, who agrees to be inseminated with the semen of a natural father and who, if she should conceive a child through such insemination, voluntarily agrees to bear the child and to terminate in favor of the natural father and his wife her parental rights and responsibilities to the child.

Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1300-01 (1985) (footnotes omitted).

In this Article, the author will refer to the man who supplies the sperm as the "biological father" or "natural father" and to the woman who bears the child as the "biological mother," "surrogate mother," "surrogate" or "natural mother." The woman who intends to raise the child will be called the "rearing mother" or the "adopting mother." The biological father and the rearing mother will be called collectively the "infertile couple" or the "adopting parents."

The surrogate mother may be either single or married. Regardless of marital status, most surrogate mothers have previously given birth and have children of their own. Robertson, *supra*, at 29. At least one commentator urges that a married woman, with children of her own, is the best prospect for surrogate motherhood because she is familiar with the psychological and emotional factors associated with giving birth and, thus, will be more likely to relinquish the child at birth. Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 2 n.4 (1986).

2. A. HUXLEY, BRAVE NEW WORLD (1932).

3. The Bible states that "Abraham's wife Sarah had borne him no children. Now she had an Egyptian slave-girl whose name was Hagar, and she said to Abraham, 'You see that the Lord has not allowed me to bear a child. Take my slave-girl; perhaps I shall found a family through her.' " *Genesis* 16:2 (New English). Later the Bible relates the dilemma of Rachel who had borne no children with her husband, Jacob. *Id.* 30:1. Rachel finally said to Jacob, " 'Here is my slave-girl Bilhah. Lie with her, so that she may bear sons to be laid upon my

has continued through the centuries,[4] and it is likely to remain a viable alternative for infertile couples. An increasing number of infertile couples use surrogacy because of the shortage of adoptable babies,[5] and the couples' desire to have a genetically related child.[6] Unfortunately, surrogacy often negatively impacts the woman acting as the surrogate.[7]

This Article examines the contracts entered into by surrogate mothers and adopting parents and suggests that these agreements *should not* be enforced.[8] First, this Article discusses the typical contractual clauses in surrogate parenthood agreements and explains the motivations of both the adopting parents and surrogate mothers who enter into these contracts. Next, the Article suggests that modern contract theories, as exemplified by Richard Posner's theory of Law and Economics, Charles Fried's theory of Moral Obligation, and Anthony Kronman's theory of Distributive Justice, cannot account for the unique characteristics of surrogate parenthood agreements. This is primarily because of the surrogate mother's physical and emotional ties to the child that develop during pregnancy. The author concludes that surrogacy contracts are different than other types of contracts and should not be enforced. Finally, the author suggests that if these contracts are enforced, state legislatures should provide a post-birth "cooling-off" period during which the surrogate mother could reconsider whether she wants to relinquish her parental rights.

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knees, and through her I too may build up a family.' " *Id.* 30:3. In both of these situations, the infertile women were provided with children by a surrogate mother. *Id.* 16:4, 30:5.

4. Katz, *supra* note 1, at 2. Although the procedure for surrogate motherhood "is less personal than in Biblical times . . . [the basic] objective, impregnation of a surrogate to bear a child for the natural father and his wife rather than for herself, has not changed." *Id.*

5. *See infra* notes 26-30 and accompanying text.

6. M. FIELD, SURROGATE MOTHERHOOD 6 (1988).

7. *See infra* notes 155-58 and accompanying text.

8. In some states surrogate parenthood agreements are not enforceable. Arizona, Kentucky, Louisiana, Nebraska and Utah have enacted statutes declaring surrogate parenthood agreements void. ARIZ. REV. STAT. ANN. § 25-218(A) (1989) ("no person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract"); KY. REV. STAT. ANN. § 199.590(3) (Michie/Bobbs-Merrill 1988) (surrogacy "[c]ontracts or agreements . . . shall be void"); LA. REV. STAT. ANN. § 9:2713(A) (West Supp. 1990) ("A contract for surrogate motherhood . . . shall be absolutely null and shall be void and unenforceable as contrary to public policy."); NEB. REV. STAT. § 25-21,200(1) (1988) ("surrogate parenthood contract entered into shall be void and unenforceable"); UTAH CODE ANN. § 76-7-204(1)(a) (1990) ("No person, agency, institution, or intermediary may be a party to a contract for profit or gain in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result.").

Further consideration of whether surrogate parenthood agreements are enforceable under existing law is beyond the scope of this Article. This Article focuses solely on whether surrogate parenthood agreements *should be* enforceable.

II. TYPICAL SURROGATE PARENTHOOD AGREEMENTS

A. *Terms Frequently Included in the Agreement*

Surrogate parenthood agreements usually define the rights and duties of the adoptive parents and the surrogate mother.[9] These contracts typically provide that the surrogate mother will be artificially inseminated,[10] carry the resulting fetus to term, and then relinquish her parental rights to the adopting parents.[11] Many such contracts also require the surrogate to undergo physical and psychological testing before the artificial insemination takes place.[12] Furthermore, contracts may require the surrogate to refrain from the use of alcohol, drugs or tobacco during pregnancy.[13] In addition, some contracts may require an amniocentesis test;[14] if this reveals some defect in the pregnancy, the natural father and adopting mother may have the contractual right to demand an abortion.[15] Many contracts forbid the surrogate mother from aborting the fetus unless necessary for the surrogate's physical well-being.[16] Finally, some surrogate contracts may require paternity testing after the child is born.[17]

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9. The contracts may be long and detailed, or short and simple. *See, e.g.*, Doe v. Kelley, 106 Mich. App. 169, 172, 307 N.W.2d 438, 440 (1981) (simple surrogacy contract); *In re* Baby M, 109 N.J. 396, 470-78, 537 A.2d 1227, 1265-73 (1988) (detailed surrogacy contract).

10. Artificial insemination is the insertion of semen into the vagina or uterus by mechanical or instrumental means other than by sexual intercourse. MOSBY'S MEDICAL & NURSING DICTIONARY 92 (2d ed. 1986). Recently, surrogacy contracts have also arisen where the surrogate mother is instead implanted with the fertilized egg of the adoptive parents. *See* Mydans, *Surrogate Denied Custody of Child*, N.Y. Times, Oct. 22 1990, at A14, col. 1. In these circumstances, the surrogate mother is not the "biological mother" in a genetic sense. The case, therefore, for disallowing surrogacy contracts is less compelling, and is beyond the scope of this Article.

11. M. FIELD, *supra* note 6, at 6; Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291, 291-92 (1982); Note, *Surrogate Parenthood—An Analysis of the Problems and a Solution: Representation for the Child*, 12 WM. MITCHELL L. REV. 143, 164 (1985).

12. Kimbrell, *The Case Against the Commercialization of Childbearing*, 24 WILLAMETTE L. REV. 1035, 1040 (1988). *But see* Note, *supra* note 11, at 164.

13. Kimbrell, *supra* note 12, at 1040-41; Note, *supra* note 1, at 1306; Note, *supra* note 11, at 165.

14. Amniocentesis is the "transabdominal puncture of the amniotic sac, using a needle and syringe, in order to remove amniotic fluid. The material obtained may be studied chemically or cytologically to detect genetic and biochemical disorders or maternal-fetal blood incompatibility." TABER'S CYCLOPEDIC MEDICAL DICTIONARY A-71 (15th ed. 1985).

15. Kimbrell, *supra* note 12, at 1040-41; Comment, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee*, 18 GONZ. L. REV. 539, 544 (1983).

16. Comment, *supra* note 15, at 544; Note, *supra* note 11, at 164. *But see* Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986) (courts should hold specific performance not to abort unconstitutional).

17. Comment, *supra* note 15, at 544.

In exchange for these services, the adoptive parents agree to pay all medical and health-related expenses associated with the surrogate's pregnancy.[18] Contracts may also provide that the adoptive parents pay for the living expenses of the surrogate during the period of pregnancy.[19] Furthermore, the adoptive parents may often pay traveling expenses and insurance premiums connected with the pregnancy.[20] Contracts usually indicate the amount and payment terms of the fee paid to the surrogate in consideration for her services.[21]

B. The Need for Surrogate Mothers

1. Motivations of the adoptive parents

Recently, the use of surrogate motherhood has increased.[22] In most instances, adoptive parents pursue surrogate motherhood because the adopting mother is infertile.[23] One commentator has estimated that one out of six American couples faces infertility problems.[24] This problem is largely attributable to the availability of more effective birth control, which allows couples to postpone the decision to have children until the couples' less fertile years.[25]

Moreover, today's infertile couples face what has been coined "the adoption famine."[26] In the past, infertile parents could adopt a child

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18. Katz, *supra* note 1, at 2.

19. *Id.*

20. Comment, *supra* note 15, at 544.

21. Katz, *supra* note 1, at 3 n.7 ("Fees paid to a surrogate can range from $5,000 up to $25,000."); Note, *supra* note 11, at 164. One commentator notes that "[i]n return for their servitude, mothers who sign surrogacy agreements generally are paid $10,000. Usually, this payment is made only after the product, a healthy baby, is delivered to the customer." Kimbrell, *supra* note 12, at 1036; *accord* Katz, *supra* note 1, at 21 ("[T]he common mode of payment to a surrogate mother is by escrow account."). Some contracts, however, specify that no compensation is to be paid. M. FIELD, *supra* note 6, at 19.

22. M. FIELD, *supra* note 6, at 5 (100 children born of surrogate contracts between 1976 and 1981, and 500 between 1981 and 1986); Smith, *Third-Party Motherhood*, L.A. Times, Sept. 25, 1990, at E1, col. 5 (San Diego County ed.).

23. M. FIELD, *supra* note 6, at 5. Other reasons why couples pursue surrogate motherhood include: (1) the adoptive mother may have a genetic defect that runs in her family that she does not want to pass on to her child, *see* Katz, *supra* note 1, at 3; (2) pregnancy may pose medical problems, *id.*; (3) the adopting parents merely wish to avoid the inconvenience of pregnancy, *id.*; or (4) the adopting parents' desire to have a genetically related child. M. FIELD, *supra* note 6, at 6.

24. Comment, *supra* note 15, at 540; Note, *supra* note 11, at 145.

25. Harding, *The Debate on Surrogate Motherhood: The Current Situation, Some Arguments and Issues; Questions Facing Law and Policy*, 1987 J. SOC. WELFARE L. 37, 41; Kopytoff, *Surrogate Motherhood: Questions of Law and Value*, 22 U.S.F. L. REV. 205, 211-12 (1988).

26. Harding, *supra* note 25, at 42.

with relative ease.[27] Today, however, there is a scarcity of children "suitable" for adoption.[28] In 1984, two million couples contended for the 58,000 children placed for adoption—this was a thirty-five to one ratio.[29] Even if an infertile couple is able to adopt a child, they must wait an average of seven years.[30] In contrast, infertile couples who contract with surrogate mothers need only wait the gestation period.[31]

2. Motivations of the surrogate mother

Scientists have completed very little research concerning a woman's motivation for becoming a surrogate mother. One study, however, uncovers three motivating factors.[32] One factor is the enjoyment of pregnancy.[33] A majority of the prospective surrogate mothers questioned indicated that they were more content, felt more attractive or feminine and enjoyed the extra attention given to them while they were pregnant.[34] Some members of this study commented that pregnancy was " 'the best time of my life'—so much so that they wanted to be pregnant the rest of their lives."[35]

This study also found that surrogates believed that the advantages of relinquishing the child born in a surrogacy context outweighed any disadvantages.[36] The researchers found that the "advantages" included: (1) the surrogates' strong desire to give a child to a couple who could not have children themselves;[37] and (2) the feeling "that surrogate mother-

27. *Id.* at 41-43.

28. *Id.* at 42-43. As one commentator remarked, "The excess of adoptive applicants for desirable infants is well-known. . . . While there is an abundance of older, handicapped, or minority children waiting for adoption, healthy white infants are in scarce supply." Katz, *supra* note 1, at 4 n.12. This scarcity of adoptable children is usually attributed to three factors: (1) the decisions of a larger number of unmarried mothers to keep their children; (2) the greater availability of abortion; and (3) the wide-spread use of birth control. Harding, *supra* note 25, at 42-43.

29. *In re* Baby M, 217 N.J. Super. 313, 332, 525 A.2d 1128, 1137 (1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.3d 1227 (1988).

30. Note, *supra* note 11, at 146.

31. Katz, *supra* note 1, at 4.

32. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140:1 AM. J. PSYCHIATRY 117 (1983).

33. *Id.* at 118.

34. *Id.* Other subjects of the study felt more complete, adequate, special, and often felt an inner glow when they were pregnant. *Id.*

35. *Id.*

36. *Id.*

37. Franks, *Psychiatric Evaluation of Women in a Surrogate Mother Program*, 138:10 AM. J. PSYCHIATRY 1378, 1379 (1981); Parker, *supra* note 32, at 118. Dr. Franks comments that "[a]ll [prospective surrogate mothers] gave similar reasons for entering this program . . . . [Among these reasons were the] love for their own children, [and] the desire to share this love and pleasure with others who had not been able to conceive their own child." Franks, *supra*,

hood would help them master unresolved feelings they had regarding a previous voluntary loss of fetus or baby through abortion or relinquishment."[38] In fact, more than one-third of the surrogate mothers interviewed previously had undergone a voluntary abortion or had given a child up for adoption.[39]

Finally, researchers have found that many surrogate mothers are also motivated by economics. The vast majority of prospective surrogate mothers surveyed indicated that they would not participate in a surrogate parenthood arrangement unless they were paid a fee.[40] Payment of a fee, however, was not the only reason for a woman to want to be a surrogate mother.[41]

III. THREE CONTRACT THEORIES AND SURROGATE MOTHERHOOD

This section attempts to place surrogate motherhood contracts within three modern contract law theories.[42] Although a surrogate

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at 1379. For example, Mary Beth Whitehead testified that "she wanted to give another couple the 'gift of life.' " *In re* Baby M, 109 N.J. 396, 413, 537 A.2d 1227, 1236 (1988). Another surrogate similarly stated that: " 'I'm not going to cure cancer or become Mother Theresa, but a baby is one thing I can sort of give back, something I can give to someone who couldn't have it any other way.' " Kantrowitz, *Who Keeps Baby M*, NEWSWEEK, Jan. 19, 1987, at 44, 47 (quoting Lisa Walters, a thirty-two year old housewife and mother of two).

38. Parker, *supra* note 32, at 118; Goleman, *Motivations of Surrogate Mothers*, N.Y. Times, Jan. 20, 1987, at C1, col. 4 ("Surrogate mothers may have guilt over a past abortion.").

39. Of this latter group, the number of women who had had an abortion outnumbered those who had relinquished a child for adoption by more then two to one. Parker, *supra* note 32, at 118.

40. Franks, *supra* note 37, at 1379; Parker, *supra* note 32, at 117 ("Of 122 women, 108 (89%) said that they required a fee for their participation: most required at least $5,000.").

41. Franks, *supra* note 37, at 1379; Parker, *supra* note 32, at 118. Dr. Franks claims that the motivation of surrogates "seem[s] to be an interesting mixture of financial and altruistic factors." Franks, *supra* note 37, at 1379. Although the surrogate mother in *In re* Baby M was motivated to become a surrogate because of "her sympathy with family members and others who could have no children . . . she also wanted the $10,000 [surrogate fee] to help her [own] family." *Baby M*, 109 N.J. at 413, 537 A.2d at 1236.

42. Unfortunately, the three contract law theories selected may not represent an adequate conception of the current analysis of contract doctrine. One could very interestingly place surrogate motherhood contracts in Critical Legal Studies philosophy. *See* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 994 (1985); Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983). Surrogacy agreements could also be analyzed under the "relational" rubric. *See* Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978); Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589 (1974); Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545. Consideration of these contract law theories in the context of surrogate motherhood contracts, however, is beyond the scope of this Article.

At least two commentators have argued that extant contract doctrine cannot accomodate

mother's relationship with the adoptive parents is contractual,[43] an analysis of that relationship within the three contract theories reveals that surrogate motherhood contracts are unique. This is because surrogate mothers develop a special bond with their child during pregnancy—a bond which surrogate mothers are unable to consider adequately when signing the surrogacy contract.[44] As a result, this section concludes that surrogacy contracts should not be enforced against the surrogate mother. Rather, the surrogate mother should be permitted to reconsider her decision in light of the "bonding" element after the birth of the child. Then, at that time, the surrogate mother should be permitted to either reaffirm or revoke the surrogacy contract.

A. Contract Law in Terms of Economic Theory

1. Posner's theory of law and economics

According to Richard Posner,[45] economics is the science of rational choice in a world of limited resources.[46] As such, it can be a powerful tool for analyzing a vast range of legal questions from common law prop-

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surrogate motherhood contracts. One commentator believes that "[s]urrogacy contracts call for new doctrine; current doctrine cannot accomodate a mother who changes her mind." Barnes, *Delusion by Analysis: The Surrogate Mother Problem*, 34 S.D.L. REV. 1, 15 (1989).

Another commentator examines surrogate motherhood contracts in light of the historical distinction between commercial contracts and domestic agreements. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581 (1988). Carbone argues that contract doctrine is more appropriate for governing agreements that are concerned primarily with the interests of the contracting parties and in which the parties to the agreements have equal bargaining power. *Id.* at 583, 586. Carbone believes that these requirements are satisfied in surrogate motherhood contracts, and consequently, contract doctrine should be applied to these contracts. *Id.* at 597-603. However, Carbone recognizes that:

> The fact that many people may be able to enter into a surrogate agreement on the basis of an informed and rational decision does not mean that all volunteers are thus capable. Some women may be psychologically unable to make a realistic commitment to surrender a child in advance. Those who have not experienced childbirth may underestimate the changes that occur during pregnancy, such that their decision is, in fact, less than wholly informed.

Id. at 598 n.56.

Carbone mistakenly believes that this particular problem may be avoided by requiring surrogate mothers to undergo psychological screening and counseling and to have experienced previous pregnancies. *See id.* This is not always the case. For example, the surrogate mother in *In re Baby M* met the above conditions, yet was psychologically unable to make a realistic commitment to surrender a child in advance. 109 N.J. 396, 437, 537 A.2d 1227, 1248 (1988).

43. M. FIELD, *supra* note 6, at 5.

44. *See infra* notes 103-09 and accompanying text.

45. Richard Posner is a judge of the United States Court of Appeals for the Seventh Circuit and Senior Lecturer at the University of Chicago Law School.

46. R. POSNER, ECONOMIC ANALYSIS OF LAW 3 (1986).

erty rights to free speech.[47] So important is economic analysis in legal reasoning, Posner argues, that many judicial opinions of the great common law areas "bear the stamp of economic reasoning."[48]

Posner's theory begins with the assumption that people are "rational maximizers" of their self-interest.[49] If this is true, people will alter their behavior in ways that will increase their own satisfaction.[50] Posner believes three fundamental principles of economics derive from this proposition.[51]

The first is the Law of Demand which recognizes the inverse relation between the price charged and the quantity demanded for a good or service.[52] When prices increase, a person will investigate the possibility of substituting less expensive, and perhaps less desirable, goods for the more expensive ones.[53] An increase in prices has two effects: (1) substitutes become more attractive; and (2) consumer wealth is reduced—the same income buys fewer goods.[54] Therefore, as the price of a good or service rises, demand for it falls.

The second principle is that consumers will maximize their utility,[55] and sellers will maximize their profits.[56] A central concept to this principle is the idea of "opportunity cost"—by using a resource in one way, a person is denying the use of that resource to someone else.[57] This alternate value is not necessarily pecuniary.[58]

The third principle is that resources tend to gravitate to the most valuable uses in a system of voluntary exchange.[59] For example, if the owner of a good [O], prices the good's total pecuniary and non-pecuniary value at x dollars and if someone else offers [O] x plus one dollar for the same good, [O] will sell it to that person. In other words, resources will be employed efficiently by employing their highest value uses.

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47. *Id.*

48. *Id.* at 21. Posner specifically mentions property, tort, crimes and contracts, but insists this list is not exhaustive. *Id.*

49. *Id.* at 3.

50. *Id.* at 4.

51. *Id.* at 4-11.

52. *Id.* at 4-5.

53. *Id.*

54. *Id.*

55. According to Posner, utility has two meanings: (1) the value of an expected cost or benefit; or (2) the value in the sense of happiness. *Id.* at 11.

56. *Id.* at 5.

57. *Id.*

58. *Id.* Posner points out that economics is not about money. Housework is considered an economic activity, even if the homemaker is not paid. *Id.* at 6-7.

59. *Id.* at 9-10.

These three principles assume that transactions are voluntary.[60] A problem with this assumption, however, is that a truly voluntary transaction is one which has no potential losers. Very few transactions satisfy this requirement.[61] The alternative approach is to "guess" what would have occurred had a truly voluntary transaction been possible.[62] From this it may be determined, to some extent, whether or not the transaction was efficient.[63]

Efficiency is an important concept in contract analysis for several reasons. Most importantly, efficiency maximizes wealth, and wealth makes possible the major ingredients of people's happiness.[64] Another reason is that efficiency is a secondary meaning of justice.[65] In a world of scarce resources, waste should be regarded as immoral.[66] However, Posner himself admits that efficiency is not the only value that may be considered in legal analysis and that there is more to justice than just economics.[67]

2. Criticisms of Posner's theory as applied to surrogate motherhood agreements

Posner has applied his economic theories to surrogate mother contracts and has concluded that such contracts should be enforceable.[68] Posner cites three key factors in the popularity of surrogate contracts: (1) infertile couples are not prone to resign themselves to infertility because of scientific advances in the field of reproduction; (2) the decline in conventional attitudes toward sex and family; and (3) the shortage of healthy, white babies for adoption.[69]

According to Posner's economic theory, parties would not enter into a contract unless they believed it to be mutually beneficial.[70] This princi-

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60. *Id.* at 13.

61. *Id.* It is often impossible to foresee all potential losers from a transaction. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 14-15. Posner also notes that it is not only monetary wealth of which he is speaking. He notes that leisure, medicine and even philosophy are made possible by wealth. *Id.*

65. *Id.* at 25.

66. *Id.*

67. *Id.* at 26.

68. Posner, *The Ethics and Economics of Enforcing Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22 (1989).

69. *Id.* Posner argues that even if a shortage of healthy, white babies did not exist, a demand for surrogate contracts would continue because couples desire a genetic link to the child. *Id.*

70. R. POSNER, *supra* note 46, at 5.

ple holds true in surrogate parenthood contracts.[71] Mutual benefits cannot be realized, however, unless the contracts are enforced.[72] If surrogate motherhood contracts are not enforced, the arrangement becomes less attractive to the adopting parents because of the possibility of their disappointment.[73]

Additionally, if surrogacy contracts are not enforced, Posner believes surrogacy becomes less valuable to the surrogate mother because she loses part of her bargaining power.[74] If surrogacy contracts are enforced, the surrogate could command a much higher fee from the adoptive parents because the result is certain.[75]

Posner's analysis, however, is flawed.[76] Although Posner attempts to rebut criticisms of his application of economic theory to surrogate motherhood contracts, three of these rebuttals are unpersuasive. First, Posner concludes that no evidence exists to support the common belief that surrogate mothers underestimate the distress of giving up a child.[77] Posner reasons that just because surrogate mothers in a few highly publicized cases may have underestimated this distress, there is no reason to make a generalization for all surrogate mothers.[78] Contrary to Posner's assertion, however, the relatively little amount of litigation concerning the custody of babies born of surrogacy arrangements does not necessarily indicate that most "surrogate mothers do *not* balk when it comes time to surrender [the] baby."[79] Evidence concerning how a birth mother feels in giving up her child indicates that many natural mothers who

71. Posner, *supra* note 68, at 22. A father and his wife expect to derive a benefit from the baby which is greater than the contract price. *Id.* Additionally, the surrogate expects to derive a benefit from the contract price which is greater than the pecuniary and nonpecuniary costs of being pregnant, giving birth and surrendering the baby. *Id.*

72. *Id.*

73. *Id.* Additionally, Posner notes that the adoptive parents also spend considerable time searching for the appropriate surrogate mother arrangement. *Id.*

74. *Id.* If surrogate contracts are enforceable, the surrogate mother could still bargain for an option to rescind, but such an option would lower the value of her surrogacy services. *Id.* By declaring all surrogacy contracts unenforceable, the surrogate mother loses the option to rescind, and she, therefore, has no freedom of choice. *Id.*

75. *Id.*

76. A basic attack on Posner's analysis is that legal economics does not adequately account for the noneconomic consequences resulting from enforcement of a contract against a surrogate mother who has bonded with her fetus. Hillman, *The Crisis in Modern Contract Law*, 67 TEX. L. REV. 103, 122 (1988). For example, it may be impossible to quantify a surrogate mother's loss of self-respect and personal integrity when she relinquishes her child. *See infra* notes 155-58 and accompanying text.

77. Posner, *supra* note 68, at 22.

78. *Id.* at 25.

79. *Id.*

relinquish their babies at birth are affected negatively.[80] Therefore, it is mistaken to conclude that the average surrogate mother would not underestimate the way she may feel at giving up her child. A surrogate mother's desire to enter a surrogacy contract for emotional reasons may cloud her ability to estimate the way she may feel in giving up the baby at birth.[81]

Posner's second flaw is in his rationalization that most surrogate mothers are mature women with children, and therefore, are able to make an informed decision.[82] The "maturity" of a woman, however, is not likely to make a surrogate's decision fully informed. Regardless of the awareness raised by the publicity surrounding surrogacy cases, such as the *Baby M* case,[83] the trauma resulting from the birth mother bonding with the baby and then relinquishing the child can only be appreciated by a woman who has experienced this situation. Surely, an individual blind from birth cannot truly appreciate what it is like to see. Likewise, a birth mother cannot appreciate what it is like to give up "her child" until she has been in that situation. Thus, publicity of this potential harm does not make future surrogate mothers fully informed.

The third flaw in Posner's reasoning is his overstated assertion that if surrogate mothers were allowed to rescind their contracts, the entire world of contracting would be undermined.[84] What Posner fails to consider is that surrogacy contracts are different from other contracts. Allowing natural mothers to rescind the surrogacy contracts will not undermine the entire world of contracting. Surrogate mothers represent a unique class of individuals deserving special protection because surrogate mothers may not comprehend the full ramifications of their promise.[85] Therefore, surrogacy agreements should be rescindable

B. Contract as a Promise

A second theory of modern contract law which fails to furnish an adequate analytical model for analyzing the unique nature of surrogate

80. *See infra* notes 155-58 and accompanying text.

81. *See supra* notes 32-38 and accompanying text.

82. Posner, *supra* note 68, at 25.

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

84. Posner, *supra* note 68, at 30. Posner reasons that if the law considers a surrogate's assent to a surrogacy contract uninformed, "the whole enterprise of contracting is placed under a cloud." *Id.*

85. *See infra* notes 155-58 and accompanying text.

parent agreements is that advanced by Charles Fried.[86]

1. Fried's theory of "moral obligation"

Fried's "Moral Obligation" theory of contract law rests upon the "promise principle" which itself is supported by three pillars: trust, commitment and individual autonomy. Fried contends that these pillars suffuse each promise with moral obligation thereby rendering all promises irrevocable.

a. the promise principle

In essence, through the "promise principle," individuals "impose on themselves obligations where none existed before."[87] Fried contends that the promise principle serves as the moral basis of contract law.[88] The promise principle reflects a societal recognition that individuals have basic rights with respect to their persons and their labor, and that individuals can freely "dispos[e] of these rights on terms that seem best to [them]."[89]

There are three basic elements which comprise Fried's promise principle—trust, commitment and individual autonomy. According to Fried, a promise confers upon the promisee a moral power to consummate a transaction with the expectation of promised help from the promisor.[90] The promises of the contracting parties are based on trust, which "becomes a powerful tool for our working our mutual wills in the world."[91] Therefore, Fried concludes that, "By promising, we transform a choice that was morally neutral into one that is morally compelled."[92]

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86. Charles Fried is a Professor at Harvard Law School. Professor Fried served as Solicitor General under President Reagan from 1985 to 1989.

87. C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 1 (1981).

88. *Id.*

89. *Id.* at 2.

> [C]itizens in the liberal democracies have become increasingly free to dispose of their talents, labor, and property as seems best to them. The freedom to bind oneself contractually to a future disposition is an important and striking example of this freedom . . . because in a promise one is taking responsibility not only for one's present self but for one's future self.

Id. at 21.

90. *Id.* at 8. When people can freely serve each other's purposes through promises, it is trust which allows them to have confidence that the other "will do what is right." *Id.*

91. *Id.*

92. *Id.* Fried compares reporting present intentions to making a promise. "Promising is more than just truthfully reporting . . . present intentions, for [as to present intentions] I may be free to change my mind, [but] *I am not free to break my promise.*" *Id.* at 9 (emphasis added). Fried distinguishes a broken promise from a lie, even though both abuse trust. *Id.* When a person lies, the wrong is committed at the time of utterance. *Id.* On the other hand, a

The second element of Fried's promise principle is commitment. According to Fried, "[a] promise invokes trust in . . . future actions, not merely in . . . present sincerity."[93] In order to animate this trust, *commitment* is required: the promisor must be committed to more than the truth of some statement.[94] Fried suggests that commitment prevents a change of heart by the promisor because a commitment "make[s] non-optional a course of conduct that would otherwise be optional . . . ."[95] The irrevocable, non-optional nature of the commitment reflects the *reciprocity of gain* between the promisor and the promisee as to the terms of the promise.[96]

The third element of Fried's promise principle is individual autonomy.[97] "[M]utual respect allows men and women to accomplish what in a jungle of unrestrained self-interest could not be accomplished."[98] Fried concludes that recognition of the opportunity to accomplish things by promise is not grounded merely in a societal convention of upholding promises, but rather, is grounded in the individual's moral obligation to keep the promise.[99] For Fried, promising is "a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise."[100]

Fried suggests that promises cannot be broken because the elements of trust, commitment and individual autonomy which comprise the promise, act symbiotically to create a *moral obligation* from which indi-

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promise puts a moral charge on a future or potential act, and therefore, the wrong is committed later. *Id.*

93. *Id.* at 11.

94. *Id.* For Fried, the simple communication of an intent to do some future act is not enough to bind the parties morally. *Id.* at 10. The promisor could have an honest change of heart. *Id.* Additionally, a stated intent (or promise) cannot be enforced simply because the promisee relied on it. *Id.* A promisee could then "pick and choose" from the promisor's statements or conduct on which to rely. *Id.* at 10-11. The promisor's commitment morally binds the promisor to the statement. *Id.* at 12-13.

95. *Id.* at 13.

96. *Id.* Fried suggests people do not make commitments for purely altruistic motives, but because of a need for cooperation. *Id.*

97. *Id.* at 16.

98. *Id.* at 17.

99. *Id.*

100. *Id.* As a subcomponent to Fried's concept of "individual autonomy," Fried explains that, unless a promisor cannot change his or her mind, the promisor cannot be taken seriously. *Id.* "[H]olding people to their obligations is a way of taking them seriously and thus giving the concept of sincerity itself serious content." *Id.* at 20. However, Fried also argues that "respect for others as free and rational requires taking seriously their capacity to determine their own values." *Id.* A surrogate mother's refusal to terminate her parental rights is a value decision that deserves respect. Consequently, a surrogate mother cannot be taken seriously unless she is allowed to change her mind. The contradiction should be resolved in favor of the surrogate mother.

vidual promisor cannot retreat.[101]

2. Criticisms of Fried's theory as applied to surrogate motherhood agreements

The essence of Fried's theory is that a promisor cannot renege on a promise because of an underlying moral obligation to keep the promise and to not change one's mind as the time for performance draws near. Applying this theory to the surrogate mother context, the surrogate mother would be irrevocably bound by her promise to deliver the child to the adopting parents after bearing it.[102] The consequences of this irrevocable promise create serious problems for surrogate mothers who freely enter into a surrogacy agreement before insemination and later change their minds.

Fried's theory of contract forecloses the possibility that the surrogate mother can change her mind. This unalterable premise fails to consider the possibility that a surrogate mother having given birth may be a wholly different promisor than she was when she entered the agreement. Therefore, perhaps she ought to be able to change her mind and be released from the obligation to deliver the child to the biological father and his wife.

At least one study reveals that most mothers form a strong emotional attachment to the fetus during pregnancy.[103] This "emotional bond with the fetus develops surprisingly soon after conception and for most women deepens considerably during pregnancy, so that as delivery approaches, feelings of identity with the fetus and a new readiness and eagerness to relate to the actual baby have been established."[104] By the

101. *Id.* at 14-15.

102. Fried maintains that a promise represents the ability to freely dispose of rights with respect to property and labor. *Id.* at 2. The surrogate mother situation fits this definition. With respect to a "free" disposition of rights there are three reasons why the surrogate parenting agreement is entered into freely by the surrogate mother. First, when the agreement is made, the intended surrogate is not suffering from financial pressure to "give up a child" because the proposed surrogate has not even been inseminated yet. Katz, *supra* note 1, at 21. Second, because the surrogate is not yet inseminated the stresses associated with an unwanted pregnancy are not present. *Id.* at 21; Comment, *supra* note 15, at 549; Comment, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467, 478 (1982). Third, a surrogate is often represented by her own independent counsel, who will strive to promote her best interests. Katz, *supra* note 1, at 21.

103. *See* M. LIEFER, PSYCHOLOGICAL EFFECTS OF MOTHERHOOD: A STUDY OF FIRST PREGNANCY 71 (1980). A maternal bond is an "attachment . . . [in which] an enduring affectional bond and commitment to a child develops." Mercer, Feretich, May, DeJoseph & Sollid, *Further Exploration of Maternal and Paternal Fetal Attachment*, 11 RES. NURSING & HEALTH 83, 84 (1988) [hereinafter *Further Exploration*].

104. M. LIEFER, *supra* note 103, at 76.

end of the last trimester, the mother's relationship with the fetus has solidified.[105]

Maternal bonding is not limited to women who become pregnant with the intention of keeping their child.[106] One researcher who studied twenty women who had agreed in writing to relinquish the child at birth for adoption discovered that:

> [Nineteen] of them developed a covert maternal identification with the fetus; this identification became more manifest in the second trimester with quickening. During this time the subjects established an intense private monologue with the fetus, including a rescue fantasy in which they and the newborn infant would somehow be "saved" from the relinquishment.[107]

Another study has indicated that women who have relinquished a child for adoption have continued to feel a "bond of such enduring intensity that time and physical separation often do not seem to weaken the affinity of the mother for the child."[108]

Just as in the adoption scenario, fetal bonding occurs with surrogate mothers.[109] Thus, Fried's "Moral Obligation" theory of contract fails to appreciate the significance of the surrogate mother's changed position.[110] Fried's basic premise is that the "individual" is morally obligated to ir-

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105. *Id.* at 79.

106. Rynearson, *Relinquishment and Its Maternal Complications: A Preliminary Study*, 139:3 AM. J. PSYCHIATRY 338 (1982).

107. *Id.* at 339.

108. Miller & Roll, *Solomon's Mothers: A Special Case of Pathological Bereavement*, 55(3) AM. J. ORTHOPSYCHIATRY 411, 412 (1985).

109. Katz, *supra* note 1, at 21; Suh, *Surrogate Motherhood: An Argument for Denial of Specific Performance*, 22 COLUM. J.L. & SOC. PROBS. 357, 373 (1989). "Bonding evidence . . . shows that the birthmother's bond to her baby at birth is stronger than that of the biological father." *Id.* A recent study disclosed that "women demonstrated higher fetal attachment . . . then [sic] men." *Further Exploration*, *supra* note 103, at 93.

110. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 780 n.59 (1983). Kronman believes that when a person enters into a contract, he or she has certain goals that he or she believes will be promoted, and has certain assumptions about the world. *Id.* Although a mistaken assumption will often disappoint the promisor, Kronman argues that it does not in itself undermine a person's confidence in the rationality of his or her own choices, and consequently has little moral significance. *Id.* A mistake of this type should not excuse performance. *Id.*

On the other hand, when a promisor's goals undergo a significant change, he or she may believe that their decision was irrational. *Id.* Moreover, Kronman argues that the promisor may feel self-betrayed, because he or she was responsible for making the promise. *Id.* This feeling, according to Kronman, will weaken a person's confidence in his or her ability to make lasting commitments and will undermine his or her self-respect. For these reasons, when a promisor's goals undergo a significant change, he or she should be allowed to rescind his or her contract. *Id.*

revocably uphold a promise.[111] In the context of surrogate mother contracts however, Fried's theory is unsupportable because the uninseminated surrogate promisor undergoes physiological and psychological experiences that, in the end, render the post partum mother a different "individual."[112]

Therefore, a theory of contract that provides an escape mechanism for the promisor in a scenario where the promisor has undergone a fundamental change in circumstances, views and goals is necessary.

C. *Contract Law as Distributive Justice*

1. Kronman's theory of distributive justice and paretianism

Anthony Kronman[113] identifies the basic theme of the libertarian theory of exchange—only voluntary agreements that do not infringe on rights of third parties are enforceable.[114] He notes that in assessing the voluntariness of an agreement the fact that the agreement was motivated by a "deliberate decision of some sort" is not dispositive.[115] He suggests that a true assessment of voluntariness would demand giving adequate consideration to the circumstances under which the agreement was entered.[116] Consequently, Kronman asserts, a contract theory should specify the circumstances under which an agreement is made voluntarily.[117]

Kronman provides three examples of circumstances which make a promisor's agreement involuntary and thus unenforceable: (1) incapacity of the promisor;[118] (2) performance of an impermissible act by the other party;[119] and (3) the other party's monopoly of some scarce resource.[120] The problem, Kronman argues, is how to identify the circumstances

111. C. FRIED, *supra* note 87, at 16.

112. See *supra* notes 106-10 and accompanying text for a discussion of maternal bonding.

113. Anthony T. Kronman is a Professor at Yale Law School.

114. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 475 (1980).

115. *Id.* at 478. For example, suppose a gunman stops X and says, "Your money or your life," and X decides to relinquish his wallet. It is possible to characterize X's agreement as voluntary for, after a rational consideration of alternatives, X decided to do precisely what the gunman asked. *Id.* at 477. Kronman argues that this is not the type of voluntary action that would or ought to give rise to binding contractual assent because "defining voluntariness in this way conflicts with deeply entrenched notions of moral responsibility." *Id.* at 478.

116. *Id.*

117. *Id.*

118. *Id.* at 478-79. For example, a contract entered into by a minor is voidable. 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 222 (1938).

119. Kronman, *supra* note 114, at 475-79.

120. *Id.* at 479. Assume that Y owned a lemonade stand in the middle of the Sahara desert. Y refused to give X, a lost and thirsty traveler, a glass of lemonade unless X signed over his entire estate. Kronman argues that, if X were to sign over his entire estate, the agreement would be involuntary and thus not legally binding. *See id.* at 479.

under which an agreement should be deemed involuntary.[121] He posits that the problem is "determining which of the many forms of advantage-taking in exchange relationships are [involuntary and, thus,] impermissible."[122] Kronman uses the term "advantage-taking" in a liberal sense[123] and concludes that any positive attribute one party has that the other party lacks constitutes an advantage.[124] Advantage-taking may involve the use of inherent traits, such as intelligence or strength, and resources, such as information, in the contract exchange process.[125] Kronman asserts that advantage-taking occurs in every contractual exchange by both parties to the transaction,[126] but, not every exploited advantage is objectionable.[127] According to Kronman, an agreement is voluntary, and therefore legally enforceable, if no objectionable advantage-taking takes place.[128]

Kronman argues that a principled basis is needed to distinguish permissible forms of advantage-taking from impermissible ones.[129] He offers the principle of "paretianism" as the proper basis to make this distinction; one that, he argues, libertarians would adopt.[130] Paretianism states that "a particular form of advantage-taking should be allowed [only] if it

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121. *Id.* at 479-80.

122. *Id.* at 480. Kronman reasons that:

> In each of the hypothetical cases [in which the agreement was held to be involuntary] . . . the promisee enjoys an advantage of some sort which he has attempted to exploit for his own benefit . . . . In each of these cases, the fundamental question is whether the promisee should be permitted to exploit his advantage to the detriment of the other party, or whether permitting him to do so will deprive the other party of the freedom that is necessary, from a libertarian point of view, to make his promise truly voluntary and therefore binding.

Id.

123. *Id.*

124. *Id.*

125. *Id.* ("The advantage may consist in his superior information, intellect, or judgment, in the monopoly he enjoys with regard to a particular resource, or in his possession of a powerful instrument of violence or a gift for deception."). Impermissible advantage-taking may consist of, for example, a physically stronger party using his or her strength to coerce the physically weaker party to enter into an agreement. *Id.* at 481. Agreements induced by impermissible advantage-taking are involuntary and for this reason are not legally binding. *Id.*

126. *Id.* at 480.

127. *Id.*

128. *Id.*

129. *Id.* at 481-83. Such a principle is needed to determine which agreements are voluntary and consequently, which agreements are legally binding.

130. *Id.* at 484-85. Initially, Kronman considers the "liberty principle" as a possible criterion. The liberty principle holds that "advantage-taking by one party to an agreement should be allowed unless it infringes the rights or liberty of the other party." *Id.* at 483. Kronman notes that the liberty principle, despite its apparent simplicity and appeal, fails to "provide a satisfactory test for discriminating between acceptable and unacceptable forms of advantage-taking in the exchange process." *Id.* He reasons that the liberty principle is not useful because

works to the long[-]run benefit of those disadvantaged by it."[131] Kronman considers the possibility of two distinct interpretations of this principle—one individualistic and the other class-based.[132] Noting the near unworkability of the individualistic interpretation,[133] Kronman opts for a class-based interpretation "requiring only that the welfare of *most people* who are taken advantage of in a particular way be increased by the kind of advantage-taking in question."[134]

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it does not provide information on the rights of individuals, but rather "assumes that we possess such knowledge independently of the principle itself." *Id.*

Kronman also considers the "doctrine of natural superiority" as a possible candidate. *Id.* at 484. This principle holds that some people have inherent advantages over others as a result of greater intelligence, beauty or nobility. *Id.* According to this principle, if a person benefits in her agreements from her natural attributes then these transactions categorically involve unobjectionable advantage-taking even though it leads to non-egalitarian results. *Id.* However, Kronman believes that this principle rests upon the idea of differential worthiness. *Id.* Therefore, it is contrary to the libertarian conception of individual equality. *Id.* at 485.

Finally, Kronman considers classical utilitarianism. This principle would allow advantage-taking if it would maximize the greatest amount of some desired good, such as happiness, for the greatest number of people. *Id.* at 484. Kronman notes that libertarianism, in addition to being egalitarian, "is also an individualistic theory in the sense that it assigns a unique value to the autonomy of the individual person." *Id.* at 485-86. However, he rejects utilitarianism as inconsistent with the idea of individual autonomy for its evident inability to take into account the individual's independence. *Id.* at 486. He concludes that paretianism, the only principle that is neither anti-individualistic nor anti-egalitarian, is the only logical choice that libertarians would embrace. *Id.*

131. *Id.*

132. *Id.* at 486-87. The individualistic interpretation, on the assumption that paretianism is an individualistic principle, would require us to look at the long-run effect of advantage-taking on each individual being taken advantage of in the transaction. *Id.* at 486; *see* Alexander & Wang, *Natural Advantages and Contractual Justice*, 3 LAW & PHIL. 281, 283 (1984).

133. Kronman, *supra* note 114, at 486-87 (such individualistic approach would deprive legal rules of their predictability; legislature is better equipped to evaluate effects of rules on classes of persons).

134. *Id.* at 487. Kronman asserts that this interpretation of the principle is easier to apply. *Id.* Arguably, one could criticize his theory for not taking into account the decrease in the welfare of the advantaged party or class which would result by not allowing the advantage-taking in question to be exercised.

It must be noted that Kronman is attempting to construct a principle of distributive justice that would comport with libertarian philosophy. According to the libertarian philosophy, "individuals have a moral right to make whatever voluntary agreements they wish for the exchange of their own property, so long as the rights of third parties are not violated as a result." *Id.* at 475. Thus, the libertarian theory of contract law, and not Kronman, limits paretianism's concern to the welfare of the disadvantaged party or class.

In addition, if the principle of paretianism were to take into account the well-being of the advantaged party, then the principle's application would be indistinguishable from the utilitarian calculus. For a discussion of why Kronman believes that a libertarian would object to utilitarianism as the appropriate principle for distinguishing permissible from impermissible advantage-taking, see *id.* at 486-87.

2. Criticisms of Kronman's theory as applied to surrogate motherhood agreements

In applying Kronman's theory to surrogacy contracts, the surrogate mother is arguably "taken advantage of" by the adoptive parents because she is in an economic position that is inferior to that of the adoptive parents.[135] Therefore, surrogacy contracts should be enforceable only if the class of surrogate mothers, as a whole, is benefitted by surrogacy contracts.

There are at least two flaws with Kronman's theory when applied to surrogate parenthood contracts. First, Kronman's conclusion that libertarians would adopt the principle of paretianism as the appropriate principle for distinguishing permissible from impermissible advantage-taking is false. Kronman correctly comments that libertarian philosophy is very individualistic.[136] Specifically, Kronman states that "libertarianism is . . . an individualistic theory in . . . that it assigns a unique value to the autonomy of the individual person."[137] Kronman explains that "Respect for the autonomy of persons means that individuals cannot be restricted in their freedom solely for the purpose of increasing the overall amount of some desired good, including freedom itself."[138]

Using the class-based interpretation of the principle of paretianism, Kronman would conclude that surrogacy contracts work to the long-run welfare of surrogate mothers as a class.[139] This conclusion, however, disregards the welfare of certain individual surrogates who may want to rescind the surrogacy contracts. Therefore, Kronman's interpretation of paretianism fails to consider the welfare of individual surrogates and, as a result, seems directly opposed to libertarian philosophy of strict individualism.[140]

A second flaw in Kronman's theory is that the principle of paretianism leads to contradictory conclusions depending on how the class of "surrogate mothers" is defined. For example, suppose that surrogate

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135. In the surrogacy situation, the adoptive parents are the advantaged party and the surrogate mother is the disadvantaged party because the adoptive parents are usually wealthier than the surrogate mother. Kantrowitz, *supra* note 37, at 46.

136. Kronman, *supra* note 114, at 485.

137. *Id.* at 485-86.

138. *Id.* at 486 n.34.

139. Kronman would base this conclusion on several factors. First, the class of surrogate mothers will likely receive a larger surrogate fee. *See id.* at 476; *see also* Posner, *supra* note 68, at 22 (concluding enforcability of surrogate motherhood contracts will result in larger fees to surrogates). Second, the autonomy of the class would be increased by allowing them to enter into enforceable contracts. *See* Kronman, *supra* note 114, at 476.

140. Kronman, *supra* note 114, at 476 (class-based interpretation of paretianism principle would substitute "the overall welfare of a group for the welfare of a particular individual").

mothers from urban or rural areas compose forty percent of the class of "all surrogate mothers," and the surrogates from the suburbs constitute the remaining sixty percent of the class. Assume further that ninety-five percent of the surrogate mothers living in the suburban areas are financially successful and are not motivated to enter into the surrogacy contracts by the fee offered. Assume also that seventy-five percent of the surrogate mothers who live in rural or urban areas are less successful financially, and, therefore, are influenced to enter the surrogate parenthood agreement primarily because of the surrogacy fee. If the paretianism principle were applied to the subclass of surrogate mothers who live in urban or rural areas, the natural father's wealth-based advantage-taking would be impermissible because the majority of surrogates in this subclass (seventy-five percent) would be economically coerced into the surrogacy agreement. When the principle is applied to the class of "all surrogate mothers" however, a contrary result is reached.[141] This dichotomy seems somewhat arbitrary.

As a result of these two flaws, Kronman's theory is unhelpful in determining whether surrogacy contracts should be enforced. All surrogate mothers cannot be "lumped into" one class. Such a class definition not only contradicts libertarian philosophy, but it fails to consider adequately the individual motivations of each surrogate mother.

3. Proposed reformulations of paretianism

One possible solution is to formulate a principle of paretianism that solely concerns the long-term welfare of the exploited individual. While Kronman considers this possibility, he rejects it as impractical.[142] Alter-

141. Based on the hypothetical, the advantage-taking result for the class of all surrogate mothers is illustrated as follows:

demographic categories of surrogates	percentage of all surrogates in category	percentage of category economically influenced	percentage of all surrogates economically influenced
urban/rural areas	40%	75%	30%
suburban areas	60%	5%	3%
			33%

According to this illustration, only 33% of the class of all surrogate mothers is economically coerced. Therefore, as a whole, surrogate mothers are benefitted by surrogacy contracts.

142. Kronman, *supra* note 114, at 486-87. Kronman believes that:

> [I]t would probably be impossible for courts to make such highly individualized assessments, except in rare cases, and in any event, an approach of this sort would create uncertainty and deprive legal rules of their predictability. . . . Moreover, unlike a court, a legislature must evaluate the effects of proposed rules on classes of persons rather than on particular identifiable individuals.

Id.

natively, paretianism may be reformulated to incorporate a narrower definition for the group of people who are taken advantage of in a particular way. A narrower definition decreases the chance of violating the autonomy of a particular disadvantaged individual.[143] Such a formulation would hold:

> The advantage-taking by [A] is permissible if, and only if, the welfare of the class of people [B] who occupy state of affairs [Cn] is increased in the long run by [A] exercising his or her advantage.

In the context of surrogacy agreements [A], the advantaged party, would represent the wealthy adopting parent, and [B], the disadvantaged party, would represent surrogate mothers.[144]

This new version of paretianism is more useful because the parameters of the disadvantaged class are defined by the state of affairs [Cn]. The state of affairs [Cn] should be defined in terms of a set of relevant circumstances and should not turn on a specific individual's mental state. For example, impoverished surrogates may occupy state of affairs [C1], while financially stable surrogates would occupy another, [C2]. In addition, surrogate mothers who lack a high-school education may occupy state of affairs [C3], and those surrogates who have earned a bachelor's degree would occupy [C4]. This formulation accounts for the fundamentally different positions surrogate mothers occupy in relation to each other.

The proposed formulation of paretianism is incomplete without a secondary principle to construct the different state of affairs. Given that the state of affairs [Cn] does not include subjective mental states, the secondary principle need focus only on relevant objective facts.[145] The secondary principle holds that an objective, non-mental characteristic possessed by the disadvantaged party (members of class [B]), that is exploitable by the advantaged party (members of class [A]), is a relevant act for determining state of affairs [Cn].

As noted above, a surrogate's lack of education or desperate finan-

143. Although it would not respect individual autonomies in every conceivable case, it is less likely to be injurious to the autonomy of individuals involved. It also avoids the impracticality associated with the individualistic interpretation of paretianism because it still operates within the class-based framework, albeit smaller classes.

144. *See supra* note 135.

145. For example, the fact that one surrogate mother has red hair and another black hair is not a relevant fact that would dictate that the two women should occupy different states of affairs [Cn] for purposes of application of the new principle.

cial need are examples of relevant characteristics.[146] Both facts are objective and non-mental.[147] Under the reformulation of paretianism, when these are exploited by adopting parents who are wealthier and better educated, the resulting contract is unenforceable.

IV. TOWARD A NEW LAW OF CONTRACT FOR SURROGACY

Each of the contract theories discussed requires that the promisor's commitment be rational.[148] In the case of surrogacy contracts, a surrogate mother's decision to terminate before conception her parental rights is arguably not a rational commitment.[149]

Kronman, for example, argues that "[j]udgment is . . . best thought of as the faculty of moral imagination, the capacity to form an imaginative conception of the moral consequences of a proposed course of action and to anticipate its effects on one's character."[150] When deliberating, a person should form a mental image of the conceivable consequences of the proposed act.[151] A deliberating person, however, can only anticipate the possible consequences of the action if he or she possesses adequate information concerning the proposed action,[152] and is able to detach himself or herself from the immediacy of his or her desires.[153]

Many surrogate mothers do not possess the information or experience necessary to form an adequate mental image of their commitment, nor do they have the ability to suspend their desires during deliberation.[154] Although many surrogate mothers may already have children, few can anticipate the emotional trauma associated with relinquishing a

146. Since individual bargaining power could be affected by these characteristics, there attaches to them a possibility of coercion.

147. These characteristics reflect the experience of identifiable classes of individuals.

148. *See* R. POSNER, *supra* note 46, at 80 ("If someone cannot judge what is in his self-interest, there is no presumption that the contracts made increase value."); C. FRIED, *supra* note 87, at 38 (a promise "must . . . have been made rationally, deliberately."); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 794 (1983) ("[T]he circumstances . . . making the promisor's agreement involuntary is an incapacity of the promisor himself—his insanity, youth, ignorance or impecuniousness.").

149. *See In re* Baby M, 109 N.J. 396, 437, 537 A.2d 1227, 1248 (1988) (natural mother never makes a totally voluntary and informed decision).

150. Kronman, *supra* note 148, at 790.

151. *Id.*

152. Feinburg, *Legal Paternalism*, 1 CAN. J. PHIL. 105, 110 (1971). ("One assumes a risk in a fully voluntary way when one shoulders it while fully informed of all the relevant facts and contingencies, with one's eyes wide open, so to speak.").

153. Kronman, *supra* note 148, at 792-93. Kronman argues that if a person is able to neutralize his or her desires, then "[t]he range of alternative interpretations . . . [the person] is able to place on his [or her] future conduct . . . is increased. *Id.* at 793.

154. *See, e.g., Baby M*, 109 N.J. at 437, 537 A.2d at 1248.

child.[155]

In addition, many relinquishing mothers feel empty and experience a loss of self.[156] For example, relinquishing mothers have stated that they "felt like pieces of a person" and they think there is always "a haunting shadow of sadness" around them.[157] The anguish and pain associated with the voluntary relinquishment of a child can last for extended periods of time.[158]

Many surrogate mothers will not anticipate these emotions, and consequently, are not able to form an adequate mental image of the commitment or its consequences. In addition, research indicates that women base their decision about surrogacy on emotional grounds: the enjoyment of being pregnant,[159] the satisfaction of altruistic feelings,[160] and the need to resolve feelings associated with a previous loss.[161] The vivacity of the desires may overcome a woman's ability to anticipate the conse-

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155. *Id.* In *Baby M*, the court stated that:

> 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, uniformed, and any decision after that, 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.

Id.

Many women who have been mothers before are suprised by their reaction to surrogacy. M. FIELD, *supra* note 6, at 71. *But see* Kantrowitz, *supra* note 37, at 48 (One surrogate reported: "It wasn't my baby. There was no attachment at all. I knew from the beginning that this was their baby, not mine."). Of surrogate mothers who have experienced a voluntary loss in the past, most of these women had aborted a fetus as opposed to relinquishment of the baby through adoption. *See supra* note 39 and accompanying text. Moreover, many women who voluntarily lost a child through adoption became a surrogate mother to resolve feelings concerning the previous adoption. *See supra* note 38 and accompanying text. Although these women may be aware of the experience associated with relinquishment, they may not appreciate the possible harm connected with giving up another child.

The adoption process is fundamentally similar to the surrogacy agreement. P. CHESLER, SACRED BOND: THE LEGACY OF BABY M 116 (1988); M. FIELD, *supra* note 6, at 85. A recent study of 334 birth mothers who had relinquished a child for adoption found that several years later over 60 percent had experienced some form of significant gynecological, medical and psychiatric problems. P. CHESLER, *supra*, at 117. Another study found that relinquishing mothers viewed relinquishment as an "externally enforced decision." Rynearson, *supra* note 106, at 339. These external factors include the demands of the adopting parents and the desire to act in the best interests of the child. *Id.*

156. Miller & Roll, *supra* note 108, at 416.

157. *Id.* The authors concluded that "[t]he grieving person's experience of emptiness and loss of self are exacerbated in these women by the reality of a child having indeed been part of them physically as well as emotionally." *Id.*

158. *Id.* at 412.

159. *See supra* notes 33-35 and accompanying text.

160. *See supra* note 37 and accompanying text.

161. *See supra* note 38 and accompanying text.

quences of entering a surrogacy agreement and may, therefore, cloud her judgment.[162] As a result, a woman's decision to enter a surrogacy contract may be characterized as irrational.

One possible resolution to this failure of contract law in the context of surrogacy may be a legally required "cooling-off" period[163] after the birth of the child. At the end of this time period, the restriction is removed, and the agreement may be enforced.[164] During the cooling-off period, however, the surrogate should be able to renounce performance under the contract without incurring any legal sanction for the breach.[165]

This limitation on contracting ability is by no means foreign to contract law. The law applies many types of paternalistic limitations to promisors when it presumes that their reasoning ability is impaired.[166] Furthermore, a cooling-off provision would be analogous to adoption statutes in some states whereby the natural's mother consent can be valid only when given *after* the birth of the child.[167] Judicial interpretation of these statutes further provide that within a certain period of time after birth of the child, consent to adoption is voidable.[168] One court found that the underlying legislative intent behind its state statute was the desire to preserve the natural mother's right to make an informed choice because she is unable to make an informed choice before the cooling-off period expires.[169]

Ideally, this cooling-off period allows for reflection which would "encourage sound judgment and reduce the influences of passion and whim on the contractual commitments a person makes."[170] Given that voluntary agreements require sound judgment and deliberation,[171] surro-

162. Kronman, *supra* note 148, at 793. ("[T]he pressing immediacy of our desires can paralyze our ability to anticipate, in imagination, the moral consequences of our actions.").

163. A cooling-off period is a type of limitation that prohibits enforcement of certain contracts for a period of time. BLACK'S LAW DICTIONARY 302 (5th ed. 1979).

164. Kronman, *supra* note 148, at 786.

165. *Id.* At least one other commentator has taken this position. *See* M. FIELD, *supra* note 6, at 84-89.

166. *Id.* The paradigm example of this type of restriction is the legal premise that a contract entered into by a minor or an incompetent is not necessarily valid and legally binding. 2 S. WILLISTON, *supra* note 118, § 222.

167. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-107(B) (1989) (allows 72 hour cooling-off period); KY. REV. STAT. ANN. § 199.500(c)(5) (Michie/Bobbs-Merrill 1989 & Supp. 1990) (allows 5-day cooling-off period).

168. Surrogate Parenting Assocs. v. Commonwealth, 704 S.W.2d 209, 213 (Ky. 1986) (statute deems consent invalid if given prior to fifth day after birth); Steffen v. Bunker (*In re* Krueger), 104 Ariz. 26, 30, 448 P.2d 82, 86 (1968) (consent before 72 hours after birth is invalid).

169. *Surrogate Parenting Assocs.*, 704 S.W.2d at 213.

170. Kronman, *supra* note 148, at 788-89.

171. *See supra* notes 148-53 and accompanying text. As one scholar reasoned, voluntary or "[c]hosen actions are those that are decided upon by *deliberation*, and this is a process that

gate mothers who are unable to exercise sound judgment should be provided a legal right to rescind the contract during the cooling-off period. The law should presume that surrogate mothers are not adequately rational when they enter into the surrogacy contracts.[172] Surrogate mothers deserve this special treatment because, like mothers giving up their child for adoption, they are unable to critically evaluate what their own desires and interests will be after the child is born.[173] A cooling-off period imposed after the birth of the child would remedy some of these problems. Additionally, a cooling-off period is desirable to ensure the surrogate mother's sound judgment " promotes the welfare of the parties without significantly diminishing their freedom."[174]

V. CONCLUSION

This Article has viewed surrogate mother contracts in the context of three contract theories of modern law. None of these theories, however, supports the enforceability of surrogacy contracts.

A surrogate mother's decision to terminate her parental rights can rarely be made rationally before pregnancy and birth. Few surrogates can appreciate the negative implications of the post-adoption experience. Therefore, enforceability of surrogacy contracts imposes an undue hardship on the surrogate mother.

To solve the many problems of enforcing surrogacy contracts, a cooling-off period, such as those imposed by many state legislatures for mothers giving up their babies for adoption, is necessary. Such a period would allow the surrogate mother an opportunity to understand fully the consequences of her decision to relinquish her parental rights. Furthermore, such a period would ensure that no impermissible advantage-taking would harm the surrogate mother.

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requires time, information, a clear head, and highly developed rational faculties." Feinberg, *supra* note 152, at 161 (emphasies added).

172. *See* Kronman, *supra* note 148, at 788. ("But there can be little doubt that the rule barring enforcement of a [child's or incompetent's] contract . . . works to protect . . . [them] from their own shortsightedness and lack of judgment.").

173. *See supra* note 155.

174. Kronman, *supra* note 148, at 794.