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**PANEL V:
OWNERSHIP OF LIFE***

**SURROGATE MOTHERHOOD FROM THE
PERSPECTIVE OF FAMILY LAW**

CARL E. SCHNEIDER**

One of the things that I find most puzzling about the question of surrogate motherhood is how easily many people answer it. One of the things that I have most admired about today's comments is their tone of constraint and their sense of complexity.¹ I myself am sympathetic to the argument that the unhappiness of infertile couples is profound and that surrogacy contracts offer them the hope of an equally profound happiness. And I am prepared to believe that many surrogate mothers perform their part of the bargain without grief and even with gratification.

Yet these benefits of surrogacy are only two of the dauntingly numerous elements of any calculation about whether surrogacy contracts ought to be legally permitted or legally enforced. To these benefits we may want to add, for example, the happiness of children who would not otherwise have been born and who have good homes and good parents. On the other hand, some surrogate mothers will become sick or even die because of the pregnancy. Some surrogate mothers will feel the sharpest kind of sorrow when they are compelled to give up their children or the sharpest kind of regret after they have willingly done so. The husbands of surrogate mothers will share those sorrows and feel some of their own. Children born of these contracts may feel some bitterness toward both their parents and even some confusion about who their parents are. A few children will be rejected by both parents. The siblings of children given up by surrogate mothers may fear for their own status in the

* This panel was introduced by Patricia D. White, Professor of Law, University of Michigan.

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1. For other helpful work on surrogacy, see M. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* (1988); *Colloquy: In Re Baby M*, 76 *Geo. L.J.* 1717 (1988). For discussions of the related questions of a market for adoptive children, see Landes & Posner, *The Economics of the Baby Shortage*, 7 *J. LEGAL STUD.* 323 (1978); *Forum: Adoption and Market Theory*, 67 *B.U.L. REV.* 59 (1987).

family. Surrogacy might inhibit the adoption of hard-to-place children. The social consequences of treating children as objects to be sold and women as a means of production may be disquieting. And even if these were all the elements of the calculus, we might still wonder how to perform the calculation. How many contracting parents will be made happy? How many surrogate mothers will be made miserable? How many units of parental happiness are needed to outweigh the units of misery of one surrogate mother who changes her mind?

How, then, are we to make social policy in the face of this kind of uncertainty? In his article on the *Baby M* case, Professor Schuck is kind enough to say that "family law provides a rich source of norms, experience, and institutional guidance upon which the law can draw in attempting to predict behavior and regulate contracts dealing with surrogacy."² Because I make my living by studying family law, it occurred to me that this afternoon I might most usefully try to sketch some lessons from that "rich source." In particular, I want to examine in the light of my understanding of family law's experience two arguments commonly advanced for enforcing surrogacy contracts: first, the argument drawing on our ideas about the desirability of contract as a principle of social organization; second, the argument that these contracts are constitutionally protected. I should warn you, however, that the goal of this examination will not be to prove a case for or against surrogacy. The goal will be the more modest one of providing a cautionary look at two of the standard defenses of surrogacy.

I do not need to persuade this audience that the idea of contract has had a powerful position in American law, and I probably do not need to tell it that proponents of surrogacy have invoked that position to justify surrogacy. But I do want to say that contract has never had that kind of prepotence in family law. Even though family law has recently become less chary of contracts, many substantial limitations on them still apply: Contracts to marry are basically unenforceable. Contracts that restrain someone from marrying are subject to a judicial rule of reason. Couples may not alter the "essential incidents" of the marriage relationship. Courts will generally not enforce contracts regulating the non-economic aspects of marriage. Par-

2. Schuck, *Some Reflections on the Baby M Case*, 76 GEO. L.J. 1793, 1809 (1988).

ents are not unrestrainedly free to contract out their children's labor. Courts apply unusually strong tests of procedural and substantive conscionability in regulating even the economic aspects of marriage and of divorce. Courts may alter or ignore contracts allocating marital property, spousal support, child custody, and child support on divorce. Some jurisdictions will not enforce some kinds of contracts between unmarried cohabitants. No jurisdiction will enforce a contract for the sale of sexual services. Most jurisdictions allow a parent who has consented to the adoption of a child to revoke that consent more readily than contract law would ordinarily allow.

My point is not just that family law has been skeptical of, or even hostile to, contract. It is that some of the reasons for that skepticism speak to some of our concerns about surrogacy contracts. One reason, for example, is that the subject matter of family contracts—our relationship with the people closest to us—is both peculiarly important and peculiarly subject to emotions that are hard to comprehend, predict, or control. A central problem with surrogacy is precisely our fear that the surrogate mother will not correctly anticipate and will not be able to govern her feelings about someone closest to her—her child.

Another reason for family law's skepticism of contracts is the fear that contracting parties are specially vulnerable when they are contracting about their most intimate personal relationships and when they are contracting with people with whom they have intimate personal ties. People vulnerable in these ways may be particularly susceptible to manipulation by those they are contracting with and, even apart from this, may fail to assert their own interests adequately. Family law's concern here is thus not just that many family contracts may be unfair; it is also that many family contracts will be inefficient because the interests of both contracting parties will not have been accurately and vigorously represented.

It is not hard to see that these problems may present themselves in the negotiation of surrogacy contracts. If the advocates of surrogacy are correct, many surrogates enter into these contracts because they want to do good in a specially intimate way. Mary Beth Whitehead says that she was so much influenced by such a motive that she did not at first want to be paid. She suggests that the clinic that brokered her contract played

deliberately, effectively, and destructively on just those motives and emotions.³

A further reason for family law's skepticism of contract is that decent and effective remedies are often hard to contrive. Sometimes you cannot compel the breaching party to remedy the breach without simultaneously injuring the party breached against or other innocent members of the family. Sometimes you cannot compel the breaching party to remedy the breach without intolerable harshness. As the *Baby M* case and the cases in which a defective child has been born and rejected by the father demonstrate,⁴ surrogacy contracts potentially present each of these dilemmas. To put it briefly, money damages will often be inadequate and even inappropriate, yet specific performance will often be impractical and even cruel.

Another reason for family law's skepticism of contracts is the sense that contract is an inappropriate way of thinking about family relations, a way that encourages people to behave badly toward each other. The argument is that people who think in contract terms about their family relationships are thinking selfishly when they should be thinking altruistically, are, not to coin a phrase, treating each other as means and not as ends. And at the heart of much of the objection to surrogacy is precisely this sense that it reduces people to commodities and relations to commerce.

In this brief survey, I have found reasons in the experience of family law with contract for caution in deciding whether to enforce surrogacy contracts. I wish now to look at what family law may teach us about the argument that surrogacy contracts are constitutionally inviolable. I have no doubt that such an argument can be constructed. But I think that the experience of family law suggests that any such argument will be both constitutionally defective and socially inadequate.

In cases from *Meyer*⁵ and *Pierce*⁶ to *Griswold*⁷ and *Roe*,⁸ the Supreme Court has built what it calls the doctrine of privacy. That this doctrine is unfounded in any constitutional text or in

3. See M.B. WHITEHEAD, *A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M CASE* (1989).

4. See Areen, *Baby M Reconsidered*, 76 *Geo. L.J.* 1741, 1747 (1988).

5. *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

6. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

7. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. *Roe v. Wade*, 410 U.S. 113 (1973).

the contemplation of any Framers and that the “right to be let alone” is an inherently expansive right have together contributed to the fact that the privacy doctrine proves too much, that it potentially invalidates too much law that is too obviously necessary. If the privacy right is to be plausible and useful in interpreting the Constitution or in making social policy, it must be defined and thereby limited. The Court, however, has sedulously avoided that responsibility. Instead of defining the right, the Court has developed it in a frankly analogic and quite mystifying way. That is why I am confident that a constitutional right to enter into and even to enforce surrogacy contracts can be constructed—indeed, virtually every governmental regulation in family law has been condemned as violating the right of privacy by one commentator or another.

The experience of family law suggests, then, that the right to privacy is so loosely constructed, so vaguely limited, and so capaciously broad that it has become internally contradictory and analytically meaningless. For instance, the Court mechanically conceptualizes the right of privacy in the traditional terms of the Mill paradigm, in which a single right-holder confronts the power of the state. But family-law situations commonly involve two right-holders whose interests conflict. Our ordinary preference for the right-holder against the state then collapses because there are conflicting rights.⁹ Thus, where the question is whether a surrogacy contract can be enforced against an unwilling mother by an importunate father, the doctrine of privacy can tell us little more than that *both* the father and the mother have strong, similar, and irreconcilable interests.

One way of delimiting, and thus making more useful and plausible, the privacy right would be to allow the right to be circumscribed by state interests. However, the Court has established, in practice if not in preachment, that any such state interest must be almost impossibly strong and that the statute must be almost impossibly essential to the interest. (When the Court has wished to sustain a statute, it has, as in *Bowers v. Hardwick*,¹⁰ simply, if confusingly, manipulated the definition of the privacy right.) What this has meant is that state interests that are important but whose operations are complex and indi-

9. See Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CALIF. L. REV. 151 (1988).

10. 478 U.S. 186 (1986).

rect have been excluded from constitutional and social policymaking.¹¹

Much of family law tries to prevent harmful behavior by directly prohibiting the behavior, as when it criminalizes child abuse. But at the core of family law lies the enforcement problem: Much harmful behavior in families is impervious to direct prohibition. In response to this enforcement problem, family law has adopted two indirect techniques.

The first of these indirect techniques is the channelling function. Family law attempts to establish those social institutions that seem most likely to lead to human happiness. A classic example is monogamous marriage. The law's assumption is that while some people might well live happily in a polygamous marriage, many plural spouses and many of their children will find such marriages distinctly more difficult than they would find monogamous marriages. The law thus bans polygamy to channel people into monogamy. It seems to me that the number of things that can go wrong with surrogacy contracts is great enough that there is an argument to be made that, despite their potential advantages to some people, the law should channel people away from the institution of surrogacy.¹²

Family law's second technique for doing indirectly what it cannot do directly is its expressive function. The law, by its choice of rules, ideas, and language, seeks to encourage people to think about their relationships in ways that conduce to human happiness. Of course, many opponents of surrogacy refer to this function when they argue that surrogacy turns children into commodities. But the expressive function is relevant to surrogacy in another way. Family law is anxious to encourage in parents a strong—indeed, an automatic and even unreasoning—devotion to their children. Family law thus seeks to make it unthinkable, to make it taboo, for parents to abandon their children. (Adoption, on this view, is a necessary evil, and it is carefully hedged around with reminders that the mother is yielding her child for adoption only under the pres-

11. See Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 *LAW & CONTEMP. PROBS.* 79 (1988).

12. The channelling function can work in a variety of ways; channelling people away from surrogacy would not need to mean prohibiting surrogacy. For example, surrogacy contracts could be made unenforceable but not illegal, they could be made enforceable by the mother but not by the father, they could be burdened with particularly strong procedural requirements, and so forth.

sure of exigent circumstances, only in the child's interests, and only at painful cost to herself.) Part of what is troubling about surrogacy is that it is one of a number of developments that seem likely to weaken the sense of automatic and ineradicable commitment between family members. Indeed, surrogacy might seem to make detaching yourself from your child a virtue.

This quick survey of the channelling and the expressive functions of family law seems to me to suggest that both functions speak in important ways to the surrogacy problem. However, the analytic structure the Court now uses to evaluate privacy claims makes no room for such arguments because they do not fit neatly into the structure's "necessary to serve a compelling state interest" formula. In sum, the experience of family law with the privacy right is, once again, cautionary. It intimates that the Court has devised a doctrine so poorly defined that the doctrine's legitimacy is put into doubt, that the personal interests that it presumably protects cannot be intelligently understood, and that the state policies it confronts cannot be satisfactorily considered. It suggests, then, that the case for surrogacy is more persuasively defended in other terms.

I have not exhausted my subject. But I have exhausted my time, and I fear, your patience. So let me close by hoping that this view of family law's perspective on surrogacy convinces you that none of us has yet spoken the last word on the question.