An Examination and Critique
of the Contract Model of Legal Regulation of Preconception Arrangements
and an Alternative Proposal for Law Reform in Ontario

by

Juliet Ruth Guichon

A dissertation submitted in conformity with the requirements
for the degree of Doctor of Juridical Science
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ABSTRACT

This dissertation examines the practice of preconception arrangements ("surrogate motherhood") and the central arguments for its legal permissibility to determine how Ontario ought to respond. It claims that the major arguments for the practice from autonomy, equality, welfare maximization and suffering minimization are flawed because, inter alia, they fail to demonstrate the practice achieves these alleged beneficial consequences. Further, the contract model which they advocate is an inapplicable and inappropriate form of legal regulation because, when used in this context of human procreation, it would cause harm to participants and non-participants and to society generally, and it would violate five important ethical principles - autonomy, equality, welfare maximization, suffering minimization and responsible parenthood.

The dissertation's claims are advanced in nine ways: (1) The common description of the practice is made more complete and accurate by reference to demographic studies and personal accounts. (2) The arguments of six proponents (John Robertson, Lori Andrews, Richard Posner, Michael Trebilcock, the Ontario Law Reform Commission and the American Fertility Society) are demonstrated to be unconvincing, (3) to rely on an incomplete characterization of persons, and (4) to be based on ideologies of patriarchy, technology and commodification (5) all of which result in flaws of analysis. (6) The contract model advanced by proponents is revealed as inapplicable because the expectation interest it seeks to
create is either incapable or unworthy of legal protection, and as (7) inappropriate because of its harmful consequences. (8) Thus, when the contract model is used to regulate preconception arrangements, the practice entails the sale or waiver of reproductive rights; capitalizes on gender, class and race inequality; causes the break-up of families; transfers the pain of childlessness from one person to another; and aims to prevent the development of relationships between mother and child, and mother and father, presenting serious obstacles to the exercise of responsible parenthood. (9) The dissertation concludes that as a social practice of human procreation which, when regulated by contract law, has harmful results, preconception arrangements ought to be governed by family law, and more specifically, by the proposed legislation recommended herein.
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To

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INTRODUCTION

Purpose and Importance of Inquiry

In December 1995, a Canadian hospital announced that it would engage in "surrogate motherhood." The hospital’s infertility physicians would begin a practice whereby they would create a human embryo in a glass dish and then transfer it into the body of a woman who would gestate the fetus and, upon delivery, relinquish the child to the people whose gametes formed the embryo. According to medical reporter, Robert Walker, the woman who would give birth would be legally obligated to surrender the child because both she and the gamete providers would sign "legal contracts holding the parties to their promises."¹

Insofar as a contract is a promise or set of promises which the law will enforce, what the reporter presumes is that a promise to gestate and surrender a baby at birth is, in fact, the type of promise which the law will enforce. Is a surrogate motherhood agreement a contract? Ought it to be a contract?

These questions are the subject of this inquiry. This dissertation examines preconception arrangements (popularly but incorrectly known as "surrogate motherhood") to determine the appropriate legal response of Ontario to the practice. In particular, this dissertation challenges the view that a practice by which women and men come together to have children should be treated as a matter of contract law rather than family law.

A "preconception arrangement" is defined as one in which a man and a woman, who are not married to each other, agree that the woman will become pregnant by a procedure involving the man’s sperm and that she will relinquish the child to the man at birth. The child might be genetically related to the woman if she is inseminated through sexual intercourse or by a manual procedure. This is the practice in its simple form. In the more complicated type of arrangement, the child might be genetically related to a second woman (usually the man’s wife or partner). This genetic relation to a woman who does not become pregnant is achieved through in vitro fertilization (IVF) of the second woman’s ovum and transfer of the embryo into the uterus of the first woman who, it is intended, will carry the child to term.

Academic inquiry into preconception arrangements is important for at least six reasons. First, the practice in its simple form is well known but not well understood. Second, the confusion is compounded in the more complex form of the practice where reproductive technology is used. Third, the practice has engendered highly publicized lawsuits which have attracted public attention without always illuminating public understanding. Fourth, there is lively disagreement within the academic legal community as to how to categorize preconception arrangements and how, therefore, legislatures ought to respond. Fifth, a number of commissions have reported on the practice, and legislatures in the common law world have enacted legislation. In Canada, the arrangements have generated considerable legal debate in Ontario and across the nation without yet a decisive result. Sixth, and most significantly, the practice causes harm; as shall be demonstrated, preconception arrangements can have debilitating effects on participants and non-participants alike.

Although the practice is well known, there is considerable confusion as to its nature. The media and many academic investigators claim that it is a treatment for infertility which is as new as the latest reproductive technology and as ancient as the Biblical tale of Sarah and Abraham. The practice is seen as enabling a worthy act of altruism by a "surrogate" to permit a loving, married, childless couple to welcome a baby into their home.

But this understanding is incomplete. In the first instance, the practice does not treat infertility. The woman who receives the child remains infertile even though one of the results of infertility - childlessness - has been overcome. Second, the practice does not, in its simple and more common form, use new technology and does not require the use of any technology at all. The technique of manual insemination was first performed on a woman in 17904 so it is not new; further, such technique is not necessary because the same result can

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2 The only jurisdiction to enact legislation regarding the practice is the only non-common law jurisdiction. In December, 1991, the Quebec National Assembly passed a law to revise the civil code which made preconception arrangements unenforceable. Quebec Civil Code, S.Q. 1991, C. 64.

3 See below, Chapter Three, Section 3.3.

be achieved by sexual intercourse, which is sometimes the method of conception.5

Third, the practice of preconception arrangements is fundamentally different from the Biblical story. There, Abram (as he was then known) had sexual intercourse with a household servant, Hagar, who, being a slave, could not consent.6 This act or series of acts (which are arguably tantamount to sexual assault) resulted in the birth of a boy, Ishmael, for whom Hagar cared.7 When Sarah herself gave birth, she banished Hagar who took her child with her.8 Thus, the story is like a preconception arrangement only in that a man had a child by a woman who was not his wife. But the tale differs importantly in that the mother and her child were not separated; the intended separation of birth mother and child is at the heart of a preconception arrangement. Because, therefore, a preconception arrangement can be initiated without new technology and indeed without any technology at all, and because it has no Biblical precedent, proponents can use neither the progressive argument of scientific advancement nor a conservative argument of ancient religious tradition to justify the practice.

A fourth mischaracterization of the practice is that it enables a woman to perform a worthy act of altruism. In fact, the woman is usually paid, so her alleged altruism is in doubt. Further and irrespective of whether she is paid, the worthiness of conceiving and/or bearing a child with the intention of surrendering it, is the very ethical question at issue.

A final misdescription is that the practice permits a loving, married, childless couple to welcome a baby into their home. This is not a comprehensive portrayal of the practice, for the people who receive a baby are not always loving, married, childless or a couple at all;9 indeed, in a recent case, a recipient who was a single man and initially welcomed

5 See, for example, Kirsty Stevens, Surrogate Mother: One Woman’s Story, London: Century, 1985) and N. Keane and D. Breo, The Surrogate Mother (New York: Everest House, 1981) at 138-139.
6 Genesis 16:3-4.
7 Ibid. 16:15.
8 Ibid. 21:10-14.
9 See below, Chapter One, Section 1.6. As shall be discussed in that section, the relevance of this incomplete description is that most justifications of the practice are based on the worthiness of demand. Either the practice is justifiable as a means for adults to obtain children irrespective of their fertility and marital status, or the proponents must argue in favour of restrictions on who may commission children such that the commissioners fit the narrow descriptions by which proponents justify the practice.
the child, had beat it to death by the time the infant was five weeks old.10

Confusion about the nature of the practice in its simple form is compounded when the pregnancy is initiated by using new reproductive technology. A technique developed in cattle to separate genetics and gestation, IVF with embryo transfer has now become a procedure practised on women. A number of remarkable cases have resulted whereby, for example, a 48 year-old grandmother bore three embryos derived from her 25 year-old daughter,11 and a 20 year-old gestated an embryo from her 48 year-old mother.12 These cases and others like them raise fundamental questions for the first time: "Who is a child's mother?", "By what criteria do we determine maternity?", and "Is it morally acceptable to blur generational distinctions in this way?".

Not only because the practice is misunderstood and raises important new questions, an investigation of preconception arrangements is timely because the practice has engendered sensational law suits which have raised further public issues. The controversial and highly publicized Baby M case13 involved a woman who was both gestationally and genetically the mother of a child which she refused to surrender to the couple who had paid her to bear it. A New Jersey state court decided to uphold the preconception agreement and to terminate the parental rights of the birth mother.14 Although the agreement was later voided on appeal,15 custody remained with the genetic father and his wife because this was held to be in the child's best interests. The woman who had given birth was granted visitation rights.

In a second well publicized case, Johnson v. Calvert,16 the conception occurred in vitro and the resulting embryo was transferred into the body of a black, Native American

10 M. Bowden et al. "The 2 who created life that was taken", Philadelphia Inquirer (22 January 1995) at A1.
14 The conception occurred as a result of manual insemination of the sperm. 525 A.2d at 1170-71.
16 851 P.2d 776 (Cal. 1993).
woman who refused to relinquish the child. The California Supreme Court which heard the case recognized the validity and enforceability of the agreement. It held that when the genetic mother is not also the birth mother, the natural mother is the woman "who intended to procreate the child - that is, she who intended to bring about the birth of a child that she intended to raise on her own". In this way, the California Supreme Court redefined the criteria by which parental responsibility is to be determined and made it possible for birth mothers to be forced to surrender their children without a judicial finding of unfitness.

These two cases have raised further issues of whether to describe the woman who gives birth as mercenary or altruistic; a preconception arrangement as creating business or causing family break up; and the applicable law as contract law or family law.

This latter concern is the fourth reason that it is important to study preconception arrangements; the academic legal community is currently engaged in debate as to how best to categorize the arrangements themselves. Some authors, regard them as akin to contract and enforceable as such. Other writers, consider the agreements to be a species of family law and therefore subject to traditional family law concerns for protecting children's welfare; promoting human well-being and preventing exploitation. In their view, the agreements

17 Ibid. at 782.
ought not to be enforceable and any payment should be illegal.

Academic inquiry into preconception arrangements is important for a fifth and practical reason: though jurisdictions throughout the common law world have examined preconception arrangements and many have passed legislation, the debate in Canada's common law provinces has not yet been resolved by the enactment of laws concerning the practice.

Committees of inquiry have investigated the subject of preconception arrangements in Canada, the United Kingdom, the United States and Australia. There have been at


23 See, for example, Report of the Committee of Inquiry into Human Fertilization and Embryology, Cmd. 9314 (London: HMSO, 1984) (Chair: Dame Mary Warnock).


25 See, for example, Tasmania, Committee of Inquiry to Investigate Artificial Conception and Related Matters in Tasmania, Final Report (Tasmania, 1985) (Chair: Don Chalmers); Family Law Council, Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia (Canberra, Australian Government Publishing Service, 1985) (Chair: Mr. Justice Asche); Western Australia, Committee of Inquiry, Report of the Committee Appointed by the Western Australian Government to Enquire into the Social, Legal and Ethical Issues Relating to In Vitro Fertilization and Its Supervision, (Perth: 1988) (Chair: C.A. Michael); South Australia, Select Committee of the South Australia Legislative Council, Report on Artificial Insemination by Donor, In Vitro Fertilization and Embryo Transfer Procedures, (Adelaide, 1987) (Chair: John Cornwall); New South Wales Law Reform Commission, Artificial Conception: Surrogate Motherhood, Report 3 (Sydney: The Commission, 1988); Australia, National Bioethics Consultative Committee, Discussion Paper on Surrogacy 2 - Implementation, (Canberra, 1990); Australia, National Bioethics Consultative Committee, Surrogacy: Report 1 (Canberra, 1990)
least three committees of inquiry which have argued in favour of regulating and giving legal
effect to preconception arrangements: the Ontario Law Reform Commission,26 the New
York Dunne Report27 and the Australian National Bioethics Consultative Committee.28 Yet,
the majority of commissions of inquiry in these four nations have recommended that the
agreements be unenforceable and that at least the intermediaries, and sometimes also the
principal parties, be subject to criminal sanction for offering, giving or receiving payment in
connection with a preconception arrangement.

Although these four nations vary in the extent to which their constituent jurisdictions
have passed law on the subject, most jurisdictions which have legislated have stated that the
agreements are unenforceable29 and have outlawed the commercial practice of

26 Supra, note 18. The recommendations of the OLRC have not been implemented by
the Ontario Government.

27 Supra, note 24. The New York State Legislature did the opposite of what the Dunne
Report recommended when it passed legislation stating that preconception
arrangements are void and the activities of brokers illegal. N.Y. Dom. Rel. Law
s.121 14 McKinney 1993.

28 Supra, note 25. The National Bioethics Consultative Committee (NBCC) was
established in 1983 by the Australian federal government to advise state and federal
governments through their health ministers, on the social, ethical and legal issues
arising from reproductive technology. In March 1991, the Council of Social Welfare
Ministers rejected the NBCC’s recommendations that preconception arrangements
should be allowed in Australia under strict controls. The council decided instead that
the states and territories should legislate to make preconception arrangements void and
unenforceable. The council cited the exploitation of the women and children involved
in preconception arrangements as the main reason that such arrangements should be
banned. (Resolution of Joint Meeting of Australian Health and Welfare Ministers,
March 1991.) Not only were the NBCC’s recommendations soundly rejected, the
NBCC itself was disbanded. “In the wake of a stunning defeat of the NBCC’s
proposals to legalize and regulate surrogate motherhood”, the federal Minister for
Community Services and Health, Brian Howe, dissolved the NBCC and transferred
responsibility for advising the government on bioethics issues to the National Health
and Medical Research Council. (“The Latest Word” (1991) 21 Hastings Center
Report 44.)

29 In the United Kingdom the agreements are rendered void by the Human Fertilization
and Embryology Act (U.K.), 1990, SI 1990/2165, s.36(1). In the United States, 11
states have legislated that preconception arrangements are void. See 1989 Ariz. Sess.
Laws 14; D.C. Law 9-219, March 17, 1993 at 16-402(a); Ind. Code Sec. 31-8-2-1 to
intermediaries.\textsuperscript{30} There are, however, some notable exceptions. Three U.S. states have adopted a regulatory approach under which the practice is permissible and the agreements enforceable.\textsuperscript{31} Moreover, the Supreme Court of California decision in Johnson v. Calvert gave legal effect to a paid preconception arrangement making it the first jurisdiction to do so in the common law world.\textsuperscript{32}

In Canada, only Quebec has passed legislation regarding preconception arrangements. A 1991 amendment to the Civil Code has rendered the agreements void.\textsuperscript{33} At the moment, Canadians have before them at least three important reports of official bodies of inquiry that advance differing opinions and recommendations for legislation regarding the practice. Whereas the Ontario Law Reform Commission recommends that the agreements be legal and enforceable and that therefore the baby be taken from the woman who gives birth if she refuses to relinquish it,\textsuperscript{34} both the Canadian Law Reform Commission\textsuperscript{35} and the Royal

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\textsuperscript{30} In the United Kingdom, intermediaries are banned by the Surrogacy Arrangements Act (U.K.), 1985, c.49, s.2(1). In the United States, the activities of intermediaries are banned by eight states: 1989 Ariz. Sess. Laws 14; D.C. Law 9-219, March 17, 1993 at 16-402(b); Ky. Rev. Stat. Sec. 199.590 (1988); Mich. Comp. Laws Sec. 722.851 - 722.863 (1988); N.Y. Dom. Rel. Law S. 121, 14 (McKinney 1993); 1989 Utah Laws 140; and 1989 Wash. Laws 404. All three Australian states which have passed legislation on preconception arrangements, have made the paid activities of intermediaries illegal: The Infertility (Medical Procedures) Act (Victoria, Australia) No. 10163, 1984, s.30(2)(a); Surrogate Parenthood Act, 1988, No. 65 (Queensland, Australia) s.3(1)(b); and Family Relations Act Amendment Act, 1988, No. 2, (South Australia) s.10(h)(b).

\textsuperscript{31} See Fla. Stat. at 742.15 (1993); (1990) N.H. Laws 87; and Va. Code Ann. at 20-156 (1994). Under the New Hampshire law, the pregnant woman may resile from the agreement if she does so in writing within 72 hours of giving birth. In Virginia, the pregnant woman may voluntarily terminate the agreement within 180 days after the last performance of any assisted conception.

\textsuperscript{32} Supra., note 16.

\textsuperscript{33} Supra., note 1.

\textsuperscript{34} OLRC, supra, note 18.

\textsuperscript{35} See Derek Jones, "Brief of the Law Reform Commission of Canada to The Royal Commission on New Reproductive Technologies" (1992) Health Law in Canada 119 at 121.
Commission on New Reproductive Technologies\(^36\) argue (inter alia) that the agreements should be considered void, and that the paid activities of intermediaries be illegal; as a result, the birth mother could not be forced to surrender her child except on a finding that it is not in the child’s best interests to be reared by its birth mother.

The debate as to which is the correct approach is not esoteric. In a case mentioned above, a Calgary hospital announced in December, 1995 that it would ignore the recommendations of the Royal Commission and conduct embryo transfer so that women would carry embryos genetically unrelated to them for surrender at birth to the commissioners.\(^37\) Similarly, in October, 1994, a Toronto infertility physician who engages in the practice called upon the federal government to enact legislation which would permit women to be paid to enter a preconception arrangement and which would regulate and give effect to the agreement.\(^38\) In the absence of legislation and despite such calls for government action, the practice carries on in Canada. At least four clinics participate in the more complex form of the practice\(^39\) and advertisements appear regularly for women to enter preconception arrangements.\(^40\)

A sixth reason that the academic inquiry into the practice is important, and indeed pressing, is that the practice causes harm. Although characterized as a means by which suffering might be alleviated, it often creates suffering. As shall be discussed at length in Chapter Three, the practice has effects on a large group of persons who include not just the direct participants but the commissioned child, and the pregnant woman’s other children, partner, parents, and siblings - all of whom lose a family member when the commissioned child is surrendered. Moreover, in seeking deliberately to conceive a child with the intention

\(^{36}\) Royal Commission on New Reproductive Technologies, supra, note 22 at 690-692.

\(^{37}\) Supra, note 1.

\(^{38}\) Mark Quinn, "Fertility expert wants surrogate moms “legalized”", Family Practice (October 10, 1994) at 7.

\(^{39}\) Mark Quinn, "Guidelines and standards needed on preconceptional arrangements" Family Practice (October 10, 1994) at 1; and Walker, supra, note 1.

\(^{40}\) See, for example, Classified Section, The Canadian Jewish News (3 November 1994) at 38: "Childless couple, professionals, seek surrogate mother to bear child under medically supervised procedure (514) 932-2051 after 6:00 p.m. to Mr. Michael, person to person or write Box 621, Canadian Jewish News, 6900 Decarie Blvd., Suite 341, Montreal, Quebec H3X 2T8".
of severing the relationship of mother and child, the practice has an effect, and (as shall be argued) a harmful effect, on society's understanding of the value of women and their reproductive capacities.

Theoretical and Practical Aims

The principle aim of this work is to determine which body of law ought to apply in governing the practice of preconception arrangements. The dissertation demonstrates that the practice is one by which women and men come together to have children. Therefore, this work begins by assuming that the practice is governed by family law - unless and until a convincing case can be made that this instance of human procreation should be governed by another form of legal regulation. To determine whether such a case has been made is the dissertation's main task. It addresses in a detailed fashion the arguments advanced by leading proponents of the view that this unusual practice of attempting to create families should be subject to the rules, not of family law, but of contract law. It concludes that such a case has not been made and, therefore, there is no argument for moving the practice from the branch of law which governs social practices of bringing children into the world. Further, the dissertation argues that there are principled reasons that the practice should be regulated by family law: family law protects those values which contract law would threaten were it to govern. Thus, for two reasons, the dissertation argues that family law ought to regulate preconception arrangements. First, preconception arrangements concern family making - the legitimate province of family law - and no case has been made that another branch of law should oust the jurisdiction of family law or would better govern this practice of family making. And second, family law can protect the important values which are threatened by the practice and its attempted regulation by contract law.

To examine the case for contract law, the dissertation analyses the arguments of the six leading proponents of the practice and demonstrates that they are seriously flawed. These arguments are then considered collectively and demonstrated to share a theoretical base; although they do not all explicitly use the term "contract law", they each hold that the practice is best governed using contract as a model for legal regulation and by enforcing preconception arrangements. A contract model is defined by its assumptions about the nature, effect and function of contract. (It assumes that a voluntary and informed exchange
of promises gives rise to legally enforceable obligations, that these promises create an expectation interest worthy of legal protection, and that the promises secure such expectations and plan for contingencies.) Yet the proponents' reliance (notwithstanding differences in certain details among proponents) upon the contract model as a method to govern the practice of preconception arrangements would have harmful results. These are demonstrated by considering the effect of a specific, draft statute\(^1\) which relies upon the contract model of regulation and to which proponents would, in general, assent. The effect of the draft statute is shown to be potentially seriously harmful. As a consequence of these harmful results, the use of the contract model in the context of preconception arrangements is called into question.

Further analysis reveals the contract model is both inapplicable and inappropriate by demonstrating that it is premised on an incomplete characterization of the nature of persons and that it is used by the proponents in the context of three overlapping ideologies which are open to criticism. These errors lead to flaws in the descriptive and normative analyses of the proponents, further weakening their case for using the contract model to govern preconception arrangements.

Having rejected the contract model of legal regulation, the dissertation turns to the positive, practical task of articulating an alternative model of familial relations and the values which ought to guide policy formation; advancing a general legislative policy to govern the practice in Ontario; and developing and justifying a legislative response to the following specific legal questions to which the practice gives rise:

1. May preconception agreements be enforced at law?
2. May a woman consent to relinquish her rights to, and responsibilities for, a child before conception or birth?
3. May persons offer, give or receive money for the surrender of a child under a preconception arrangement?
4. May persons act as, or hire an intermediary in a preconception arrangement?

\(^1\) "Draft ABA Model Surrogacy Act", (1988) 22 Family Law Quarterly 123. This proposal was not adopted by the American Bar Association House of Delegates at its mid-year meeting in Denver in 1989.
5. May persons advertise for, or their willingness to act as, an intermediary or a woman who will relinquish a child under a preconception arrangement?
6. Who shall be considered the commissioned child's mother?
7. Who shall be considered the father?
8. How should custody be determined in a dispute?
9. May the non-custodial parent have access to the child?
10. May the non-custodial parent be required to pay maintenance for the child?

Outline of Dissertation

The dissertation begins with a description of preconception arrangements. Chapter One defines the practice and estimates its incidence in Canada, the United Kingdom, the United States and Australia. It highlights the significant features of the agreement between the woman who seeks to become pregnant and the man who wishes to rear the child, and the agreement between that man and the intermediary. The chapter then presents demographic data regarding the participants and what is known about their motivations and those of the intermediaries. It concludes by describing the common portrayal of the practice as consisting, on the one hand, of happily married, involuntarily infertile couples; and on the other, of altruistic sisters of mercy who wish merely to alleviate suffering. Because this portrayal does not describe the range of participants' characteristics and desires, and because it takes no or insufficient account of the interests of third parties in promoting the practice, it is shown to be incomplete and misleading and, therefore, unhelpful as a descriptive basis for legislation.

Chapter Two introduces the arguments of six proponents of the practice and categorize them as advancing essentially four views; viz.: that the practice is desirable because it promotes liberty, advances equality, increases aggregate welfare and alleviates suffering. These four arguments as set forth by the six proponents are each demonstrated to be seriously flawed; the practice does not achieve the alleged beneficial effects by which the proponents attempt to justify its legal permissibility. The chapter then considers the arguments collectively and shows that they all share a common basis: a contract model of legal regulation. This model is defined by its central assumptions concerning the nature, effect and functions of contract. Because none of the proponents' arguments have been elaborated in detail in a statute, the chapter considers the potential effects of the contract model by examining the Draft ABA Model Surrogacy Act based on the contract model and to
which the proponents, in general, would assent. The draft statute is examined first to demonstrate that it is based on the contract model and second to show that its effects are serious and potentially seriously harmful.

Chapter Three considers the assumptions that the contract model, the draft statute and the proponents' arguments each make about the nature of the persons who participate in the practice. They all assume that persons are separate, self-interested, rational, and equal and uncoerced. By using feminist theory and evidence of women's experience of the practice, this understanding of the nature of persons is shown to be inadequate. Reliance upon this incomplete characterization of human personhood leads to serious flaws of analysis and undermines the cogency of the proponents' arguments. Because the contract model's presuppositions about the nature of personhood are incomplete, the proponents fail to make a case for the contract model's employment in the context of preconception arrangements.

Chapter Four continues the examination of the proponents' arguments collectively and shows that, in addition to sharing an incomplete and misleading understanding of personhood, the proponents of the practice of preconception arrangements share certain ideologies. These are the ideologies of patriarchy, technology and the market. Within these overlapping contexts, proponents seek to use the contract model. But their ideological assumptions are open to criticism and lead to flaws in their descriptive and normative analysis, further undermining their case for the use of the contract model in the legal regulation of preconception arrangements. The chapter concludes by summarizing the general reasons that the contract model ought to be rejected as inapplicable and inappropriate.

Ibid. Three proponents would disagree with certain aspects of the draft statute in that Trebilcock would grant the birth mother an unspecified period of a few days after birth during which she could disavow the agreement; the Ontario Law Reform Commission would require the prospective participants to seek the approval of a family court judge before the agreement would have legal effect; and the American Fertility Society recommendations that the agreement be legally enforceable against the birth mother would have effect only after an experimental period elapsed and the consequences of the practice might be better known and understood.
Chapter Five then turns to the positive project of proposing an alternative model for legal regulation of preconception arrangements. It articulates five values which ought to form the basis of legislative reform and highlights three areas of particular concern for legislators. The values are those by which the proponents attempted to justify the practice but they are redefined to take into account a richer understanding of human personhood than that assumed by the proponents. To the four redefined values is added the important value of responsible parenthood. The chapter argues further that the values threatened by preconception arrangements already find protection in existing family law. The dissertation concludes by presenting a general policy proposal of discouragement of the practice, and specific legislative proposals (based on existing family law) for adoption by the Ontario legislature to minimize the harm caused by the practice to women, children and society in general.

A Note on Terminology

The practice and the participants in the practice that is the subject of this dissertation are usually described in a manner that impedes inquiry. The practice is popularly known as "surrogate motherhood", which inaccurately suggests that birth mothers are substitutes and not real mothers. The persons who seek to gain custody of children by means of this practice are variously called "the fathers", "the social parents", "the adopting parents", and "the parental couples"; these are each problematic descriptions because they beg the question as to who are, and who ought actually to be considered, the parents of the children commissioned prior to conception. A third difficulty with terminology in this field is that the arrangements and agreements that participants make are called "contracts". This term assumes the very question at issue in legal and ethical analysis, viz.: whether the arrangements and agreements are, or ought to be, legally enforceable.

The terminology adopted in this dissertation is chosen to avoid the problems to which the more popular terminology gives rise. To leave open the question of who ought to be considered a commissioned child's mother and father, the dissertation describes the adult participants with reference to the principal role each plays in the arrangement made before the child's conception. The woman who bears the child is called the "carrying woman". When the origin of the ovum is relevant, she is more particularly described as a "genetic-gestational woman" (when the ovum is of her body); or an "exclusively gestational woman"
(when the ovum originated in body of another). The person or persons who made the arrangement with the carrying woman are called the "commissioner(s)". The person who acts as a ‘middleman’ introducing carrying women to commissioners is called a "broker". "Commercial brokers" are defined as those who operate for profit. To leave open the question of whether the arrangements are or ought to be legally enforceable the practice itself is described as a "preconception arrangement" - that is, the social practice of arranging before the conception of a child for its conception and transfer after birth from the carrying woman to the commissioner(s). When a particular preconception arrangement takes written form, that document is referred to as a "preconception agreement". The term, "contract model", refers to a model of legal regulation which assumes the appropriateness of recognizing three attributes in a preconception arrangement: (1) that the voluntary and informed exchange of promises gives rise to legally enforceable obligations; (2) that these promises create an expectation interest worthy of legal protection; and (3) that the promises secure such expectations and plan for contingencies. In short, the contract model of legal regulation regards preconception arrangements as contracts.

These terms, some chosen in preference to their more popular counterparts, might be thought stylistically cumbersome, and reductionist in (among other ways) describing participants by their function in the arrangement rather than by their hopes, which the arrangement is meant to fulfil. While acknowledging these potential criticisms, this dissertation nevertheless uses the less popular terms in an effort to add clarity to the debate.
CHAPTER ONE

DESCRIPTION OF THE PRACTICE OF PRECONCEPTION ARRANGEMENTS

1.1 Introduction

To provide the background information necessary for the analysis which shall follow, this chapter describes the practice of preconception arrangements. It defines the arrangements; attempts to estimate their incidence in four nations; and considers the principal features of written agreements between the commissioning man and carrying woman, and between the commissioning man and the commercial broker. Further, this chapter presents the available demographic data on the carrying women and commissioners, and outlines what is known of their motives and those of brokers and infertility practitioners. Finally, the common description of the practice is presented and criticized as incomplete and misleading with respect to its representation of commissioners, carrying woman and interested third parties.

1.2 Definition

A preconception agreement is an arrangement whereby a woman agrees to gestate and give birth to a child for the purpose of surrendering that child immediately to another person or persons. At the heart of the agreement are the central promises of the parties. The woman promises to become pregnant either by a manual or technological procedure using the commissioning man's sperm or, much less commonly, by having sexual intercourse with the commissioning man. Further, she agrees to surrender custody of the child irrevocably upon birth. The man promises to accept the child.1

Generally speaking, the purpose of such an arrangement is to permit a heterosexual couple to rear a child genetically related to the man in cases where his partner is unable to

become pregnant and to deliver a healthy child. Much less commonly,² the arrangement is made by a single man or woman, or a homosexual couple.

For the purpose of analyzing preconception agreements, it is helpful to characterize them by the origin of the female gametes, by whether the carrying woman is paid, and by whether there are any intermediaries.

1.2.1 Characterization by the Origin of the Ovum

The ovum that becomes fertilized and gestated can originate either from the woman who carries and delivers the child, from the female partner of the commissioning man, or from a third woman.

In most³ arrangements, the ovum is that of the gestating woman. A preconception agreement usually involves donor insemination of the carrying woman using the commissioning man's sperm. The same result can be achieved by sexual intercourse, which is sometimes the means of conception. By either means, the resulting child is genetically and

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³ Genetic-gestational arrangements are the most common because they are relatively inexpensive in requiring no technology and they are more successful than in vitro fertilization and embryo transfer. Helena Ragoné reports, however, that in at least one brokerage house, the number of exclusively gestational arrangements has increased from less than 5% in 1988-1989 to close to 50% in 1992. The success rate in causing pregnancy by this means was apparently only 25%. Thus, although the absolute numbers of exclusively gestational arrangements might continue to rise, given their relatively low success rates, the number of commissioned children born from such arrangements will likely be much fewer than those born from the more common genetic-gestational arrangements. Helena Ragoné, Surrogate Motherhood: Conception from the Heart (Boulder, Colorado: Westview Press, 1994) at 196, note 12 [hereinafter "Ragoné"].
gestationally related to the woman who delivers it and who has agreed to surrender custody to the man. This form of agreement is referred to as a "genetic-gestational preconception arrangement".

A second form of arrangement is "exclusively gestational". In this arrangement, the ovum originates either from the woman who hopes to rear the child or from a third woman. We refer to the woman from whom the ovum originated as the "genetic woman". The "gestational woman", who carries and gives birth to the child, is not genetically related to the child.

The technique to initiate an exclusively gestational pregnancy is in vitro fertilization and embryo transfer. This requires the sometimes painful hormonal stimulation of the genetic woman and surgery under general anaesthetic by which a surgeon uses a needle to pierce the woman's vaginal wall and to aspirate the maturing eggs. The egg or eggs thereby obtained are fertilized in a petri dish; resulting embryos are transplanted into the uterus of the gestating woman. That woman is expected, under the terms of the arrangement, to surrender the child upon birth to the genetic woman or to a third woman who will rear the child. The technique has a revolutionary result: it divides motherhood so that at least two women and possibly three are involved, a genetic woman (whose ovum is used), a gestational woman (who carries and gives birth to the child), and a social woman (who rears the child).4

1.2.2 Characterization by the Presence of Consideration

In addition to characterization by the origin of the ovum, it is also helpful to describe preconception agreements according to whether the woman who carries the child is paid to do so.

In paid agreements, the typical fee for a carrying woman is said to be between

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$10,000 and $12,000 (U.S.). Some women do not seek a fee, or simply are not paid. In such cases, the carrying woman might be related to the woman who will rear the child, or they might be friends. In both paid and unpaid arrangements, the carrying woman’s expenses will often be covered. Such expenses include the cost of maternity clothes, health care, and foregone employment income.

1.2.3 Characterization by Third-Party Involvement

Third parties who bring the principal parties together are called "brokers". A broker acts on behalf of commissioners and recruits potential carrying women. A broker promotes the parties' mutual intention to create a child to be reared by the commissioning man and his partner, if he has one.

In the United States, brokers charge a fee; in the United Kingdom, they operate on a not-for-profit basis. Those who charge usually earn a substantial sum each time they arrange an agreement: $11,000 (U.S.) is a typical fee. As described more fully below, such an arrangement is properly called "commercial" because it is a business: the broker solicits commissioners, advertises for carrying women, arranges for insemination and delivery of a child, and organizes the transfer of the child’s custody from the carrying woman to the commissioners. Where a broker participates in a preconception arrangement

5 Martha A. Field, in her book, Surrogate Motherhood (Cambridge, Massachusetts: Harvard University Press, 1988), states on page 5 that the typical fee is $10,000 (U.S.). Ragoné claims that the rate is between $10,000 and $12,000 U.S. - a sum which had not increased in the ten year period prior to publication in 1994. (Ragoné, supra, note at 29.) In England, for exclusively gestational arrangements, the "going rate is about £6,000" or $12,500 (Cdn.) according to Professor Malcolm Macnaughton in "Trouble in the Family Way", The Times (23 August 1990).

6 Noel P. Keane with Dennis L. Breo, The Surrogate Mother (New York: Everest House, 1981) at 57 et seq.

7 See below in this chapter, section 1.5.4.1, "Commercial Brokers".

8 Noel Keane’s Infertility Center of New York issued literature in 1989 stating that its fee was $11,000 (U.S.). In 1988, the Center for Surrogate Parenting, Inc. of Beverly Hills, California advertised in its own publication that the amount payable to the Center as its fee was $16,600 (U.S.) "for complete coordination and administration of each case".

9 See below in this chapter, section 1.4.2, "Agreement Between Commercial Broker and Commissioning Man".
for profit, the arrangement is called a "commercial arrangement" irrespective of whether the carrying woman is herself paid.

Not-for-profit organizations, which facilitate preconception agreements, are not common\(^{10}\) but their creation by governments has been suggested by law reform commission members in England\(^{11}\) and Australia.\(^{12}\) Presumably the employees of such undertakings would be paid by the state, from a sum paid by the commissioners, or by money raised through donations.

Preconception arrangements do not necessarily involve intermediaries. The principal parties can come together after placing an advertisement or after hearing indirectly that the other party is interested. For example, in the United Kingdom, where commercial arrangements may not take place, at least three cases of preconception agreements originated without the intervention of third parties.\(^{13}\)

### 1.3 Incidence

The number of preconception agreements cannot be stated accurately. Participants are reluctant to provide concrete information to researchers perhaps because of a lack of general acceptance of the practice and because of the uncertain legal status of the agreements. If

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\(^{10}\) The first British carrying woman in England, who surrendered her child to an American couple in 1985, announced in February 1988 that she was organizing a non-profit "information and help-line service" for people who wish to commission a child or who wish to bear and surrender one. The organization, called "COTS: Childlessness Overcome Through Surrogacy", was formed as a charity so that money would not be involved. The payment of money to a broker would be illegal under English law. Angela Neustatter, "A campaign for compassion", *The Sunday Times of London* (21 February 1988) at C.3; Aileen Ballantyne, "Agency Will Offer Babies Without Birth", *Sunday Times of London* (19 August 1990).


\(^{12}\) One of the questions posed by New South Wales Law Reform Commissioners is whether arrangements, if they are to be regulated, ought to be subject to the approval of the court or of a government agency. New South Wales Law Reform Commission, *Artificial Conception: Discussion Paper 3, Surrogate Motherhood* (Sydney, Australia: New South Wales Law Reform Commission, August 1988) at 130.

\(^{13}\) *A v. C* 1985 F.L.R. 445; *Re: An Adoption Application (Surrogacy)*, [1987] 2 All ER 826; and *Re P (Minors) (Wardship: Surrogacy)*, [1987] 2 F.L.R. 421.
participants do not report their activity, the arrangements are unlikely to come to light because the most typical arrangement (genetic-gestational) can be conducted without attracting public attention. Because the pregnancy is initiated by either sexual intercourse or the technically simple procedure of donor insemination, it involves a relatively small number of people. Arrangements conducted through commercial agencies involve more people and are revealed more often than private arrangements; they are therefore likely to be over-represented in estimates of the incidence of the practice of preconception arrangements.

1.3.1 Canada

A study conducted by Margrit Eichler and Phebe Poole in the summer of 1988 for the Law Reform Commission of Canada estimated there have been at least 118 cases of preconception agreements involving one or more Canadian participants.\(^{14}\) Of the 118 cases cited by the study, at least 76 involved an American commercial agency. The remaining 42 cases took place within Canada and were usually reported by people who did not participate in the arrangement; consequently, details of their exact nature are scant.\(^{15}\)

In the cases involving profit-making American agencies, 13 Canadian women either gestated or were in the process of gestating a child to be surrendered; 62 Canadian couples had received or were waiting to receive a child; and one single Canadian man received a child.\(^{16}\)

The operator of what is perhaps the best-known commercial agency is Noel Keane of Dearborn, Michigan. His agency has dealt with a relatively high number of Canadians. Noel Keane opened his files to Eichler and Poole, who reported details of 32 of the 38 cases Keane had brokered involving Canadian participants.\(^{17}\)

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14 Eichler and Poole, *supra*, note 2.
15 Eichler and Poole, *supra*, note 2 at 15.
16 Eichler and Poole, *supra*, note 2 at 13-14.
17 The 32 agreements were undertaken between March 1980 and March 1989 and involved 32 Canadian couples. Not all the cases resulted in children being born. Of the 32 cases, 13 were completed: each commissioning couple had a child. In three, the commissioning couples were still undergoing adoption proceedings. Three couples had given up after unsuccessful attempts to conceive a child. In 10 cases, insemination was taking place as the report was being written. Two couples terminated the attorney-client agreement before a genetic-gestational woman was
Eichler and Poole concluded that, although they had irrefutable proof with regard to the 118 cases, the actual incidence of preconception agreements was almost certainly much higher. Indeed, despite its concentration on Canadian cases, the study's major finding was of international significance: even conservatively estimated, the number of preconception arrangements was much higher than suggested by other experts.

1.3.2 The United Kingdom

There is no accurate information about the number of preconception agreements in the United Kingdom. In 1985, the United Kingdom passed the Surrogacy Arrangements Act, which made it criminally illegal to advertise concerning preconception agreements. The Act prohibits commercial but not paid agreements. Given that information is easier to obtain about commercial arrangements than about arrangements conducted privately, it is especially difficult to know how many arrangements have been made privately in the United Kingdom since the legislation was passed.

As Derek Morgan has noted, determining the incidence of the practice in the United Kingdom is a matter of conjecture and hypothesis. From an examination of primary selected. In one case, no information was available.

Of the 32 Canadian couples, eight used two genetic-gestational women each, two used three such women, three used four, and one used six. (Presumably, more than one woman was used because conception did not occur in the first woman.) Thus, a total of 55 potential or actual genetic-gestational women were involved in the 32 cases.

Geographical information was available on 27 commissioning couples. Twenty-two were from Ontario, three from Quebec, and one each from Alberta and Manitoba. Of the genetic-gestational women about whom the researchers had information, 19 were from Michigan, two from Ohio, one from North Carolina, and one from London, Ontario. Eichler and Poole, supra, note 2 at 30-34.

18 "In order to appreciate this finding [that there is proof of 118 Canadian cases of preconception arrangements], it must be remembered that we have been extremely stringent in excluding cases if there was any doubt concerning them. We thus feel confident that these numbers represent a very conservative estimate which probably greatly underestimates the real extent of the phenomenon". Eichler and Poole, supra, note 2 at 45.

19 Eichler and Poole, supra, note 2 at 24 and 25.

20 (U.K. 1985, c. 49).

sources (law reports, reports to local social services departments, and academic commentators' reports to social services departments), he concluded there have been 29 cases. From less easily verifiable sources (the correspondence received by carrying women from other potential carrying women or infertile couples), there appeared to be an additional seven cases. Local authorities' social services departments suspected the existence of at least another seven. These three general sources produced a total of 43. "In other words, the cautious observer would state that there have been between 29 definite, 38 probable and 43 possible cases of known [preconception] arrangements in the United Kingdom [between 1976 and 1989]."²² The not-for-profit organization, "COTS" (Childlessness Overcome Through Surrogacy), which acts as a broker in England and Scotland for carrying women and commissioners announced their one hundredth birth in 1994.²³

The number of preconception arrangements made in the United Kingdom is growing because of the new practice in English infertility clinics of implanting embryos in what they call "host mothers". In other words, the clinics now participate in making exclusively gestational arrangements.²⁴

1.3.3 The United States

There has not been a comprehensive study of the incidence of preconception agreements in the United States. Estimates made in the late 1980s indicated that the total

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²² Lee and Morgan, supra, note 21 at 68.
²⁴ An August 1990 article in The Times reported that the Bourn Hall Clinic, near Cambridge, had instituted a program of implanting the embryo of a couple into the uterus of another woman. The service cost couples £2,500 (approximately $5,300 Cdn.) for each attempt at a pregnancy. The clinic does not pay the gestational woman but the commissioners pay her expenses and can compensate her for loss of earnings during the pregnancy. Aileen Ballantyne, supra, note 10. According to an article in The Times that appeared on 23 August 1990, the Bourn Hall Clinic is not the first to implant a frozen embryo into a gestational woman, but it is the first to discuss the issue openly. In August of that year, the clinic had transferred two embryos into gestational women; in both cases, the gestational women were sisters of the genetic women. The practice of implanting embryos into gestational women appeared likely to grow as the clinic was considering commencing the procedure on some of the many people on its waiting list. Ann Kent, "Trouble in the family way", The Times (23 August 1990) at 13.
number of all preconception arrangements was about 600\textsuperscript{25} but by 1997, one broker alone was claimed to have arranged that number of births.\textsuperscript{26} In 1990, the California report of the Joint Legislative Committee on Surrogate Parenting claimed that the approximate incidence in the United States was much higher. The minority report stated that there had been approximately 250 births arranged commercially in California between 1980 and 1990, and a further 250 conducted privately since 1978. It estimated that 2,000 children had been born in conjunction with commercial operations nationwide since 1975, and that a further 2,000 births had been arranged privately. In this way, the minority report estimated that there have been 4,500 genetic-gestational preconception arrangements resulting in children in the United States in the period 1975-1990.\textsuperscript{27} A more recent article estimated that 8,000 babies have now been born in the United States as a result of this practice.\textsuperscript{28}

The California report noted that the number of exclusively gestational arrangements is "fast on the rise" and may eventually outnumber "traditional" (i.e., genetic-gestational) arrangements. It cited the example of the Center for Surrogate Parenting in Beverly Hills, California, where approximately 50 percent of the clients in 1990 were participating in exclusively gestational arrangements.\textsuperscript{29}

\textsuperscript{25} Martha Field estimates the number of births initiated by preconception arrangements to have been 500 at the end of 1986. (\textit{Supra}, note 5 at 5.) The Office of U.S. Technology Assessment Report suggests the figure is 600. U.S. Congress, Office of Technology Assessment, "Legal Considerations: Surrogate Motherhood", \textit{Infertility: Medical and Social Choices} OTA-BA-358 (Washington, D.C.: U.S. Government Printing Office, May 1988) at 267-290 [hereinafter "OTA"].

\textsuperscript{26} This claim was made by Christopher Keane at his father's death. Lawrence Van Gelder, "Noel Keane, 58, Lawyer in Surrogate Mother Cases, is Dead", \textit{New York Times}, Tuesday, January 28, 1997 at B8.

\textsuperscript{27} Joint Legislative Committee on Surrogate Parenting, "Minority Report to the California Legislature", \textit{Commercial and Non-Commercial Surrogate Parenting} (Sacramento, California: Joint Publications Office, November 1990) at M7-M9.

\textsuperscript{28} Mark Bowden et al., \textit{supra}, note 2 at A1.

\textsuperscript{29} See also Ragoné, \textit{supra}, note 3 at 196, note 12 and at 198, note 11. Because the success rate is not high, the number of children born of exclusively gestational arrangements will be significantly less than the number of attempts. See, \textit{supra}, note 3.
1.3.4 Australia

There is no reliable estimate of the number of preconception agreements that have been made in Australia. The New South Wales Law Reform Commission was asked by the Attorney General on 5 October 1983 to inquire into all aspects of artificial conception, including preconception arrangements, but the commission stated that it could not obtain accurate information about the incidence of preconception arrangements in Australia.\(^\text{30}\)

1.4 **Significant Features of Preconception Agreements**

The information available concerning the substance of actual agreements varies: of some agreements, little is known; of others, it is possible to study the written terms. Although we know of verbal agreements if they are litigated,\(^\text{31}\) there are probably many others, similarly private and verbal, that do not come to public attention. According to Bernard Dickens,

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\(^{30}\) New South Wales Law Reform Commission, supra, note 12 at 11.

\(^{31}\) Consider, for example, a private and apparently oral agreement that came to light only because it was the subject of litigation. The facts as found by Mr. Justice Comyn illustrate the informality that can characterize these arrangements and the nature of the obligations. In that case, a 32-year-old divorced mother of two children, Mrs. B., was living with a 27-year-old man (Mr. A), but she was unable to have any more children. She and Mr. A wanted to marry but only if Mr. A could have a child of his own. According to Comyn J.,

Eventually, Mr. A and Mrs. B decided to pick a prostitute and offer her virtually their whole life's savings of £3,500 to conceive a child by Mr. A and to carry, give birth to and then deliver over to Mr. A and Mrs. B the born child ... Mrs. B attended at Bow Street magistrates court one day in about June 1976 to pick a suitable prostitute from those parading to pay their regular fines. She chose a woman who in fact declined the offer but who agreed for an agency fee ... to procure somebody who would accept it. Thus Mr. A and Mrs. B became introduced to Miss C who was only 19 ... She accepted the proposals of Mr. A and Mrs. B, which was now for the sum of £3,000, £500 having gone on the agency fee. She accepted the proposals to be impregnated by Mr. A, and having given birth to the child to hand it over. As additional benefits she was during her pregnancy allowed to occupy with a girl-friend a flat owned by Mrs. B and to have her pregnancy needs seen to. This was all carried into effect.

\(A v. C. \ [1985] \) Family Division 445 at 446-447, 20 June 1978 (Court of Appeal, 18 July 1978). When the carrying woman refused to relinquish the child, the commissioning man sued. The case ultimately was heard by the Court of Appeal where he was denied custody and access.
Anecdotal evidence is ubiquitous that friends, sisters, cousins and others related in a familial and/or social way to wives in infertile unions act as surrogate mothers through artificial insemination ... within particular ethnic populations in Canada's larger cities, sisters or cousins of wives unable to bear children would be artificially inseminated through the husbands, usually with no medical or nursing aid. They would go to hospital under the wives' names and health insurance numbers and on giving birth, register the wives as the mothers. On leaving the hospital, they would surrender the children to the couples.  

At the other end of the spectrum from private, oral arrangements are the agreements brokered by legal or medical professionals for a fee. Such agreements, made usually between strangers, are in writing and can be lengthy. The written document becomes public either through the course of the broker's business (when, for example, he or she sends such an agreement to a prospective client), through legal or professional journals, or when the agreement becomes the subject of litigation as in the Baby M case. About these commercial arrangements, much more is known.

1.4.1 Commercial Agreement Among the Commissioning Man, the Carrying Woman, and Male Partner

The availability of written agreements drafted by American commercial agencies makes it possible to analyze them. An example of such an agreement was published in a 1981 legal journal by its author, Katie Brophy, who drafted it for a Kentucky broker and infertility practitioner, Dr. Richard Levin. A second agreement was drafted by the deceased lawyer, Noel Keane, and was routinely made available by his office to prospective


34 Katie Marie Brophy, "A Surrogate Mother Contract to Bear a Child", 20 (1981-1982) Journal of Family Law 263 [hereinafter "Brophy Agreement"]. According to the article, Ms. Brophy is an attorney "in private practice in Louisville, Ky., where she assists infertile couples in the surrogate procedure through Surrogate Family Services, Inc. a Kentucky Corporation" [at 263]. The corporation's literature states that the firm is run by Richard Levin, a medical doctor who specializes in reproductive endocrinology and infertility.
clients.35

In both these documents, the agreement is between the commissioning man on the one hand, and the genetic-gestational woman and her partner on the other. Both documents ostensibly require that the carrying woman be married. In each case, the commissioning man is represented by the attorney who has drafted the document. Brophy’s agreement does not mention the carrying woman’s counsel. Keane’s agreement advises the carrying woman to seek independent counsel to explain "the legal implications and contractual obligations set forth".36 The documents appear to be standard form agreements.

An examination of three37 commercial agreements drafted for or by American brokers reveals that they contain the following significant provisions:

1. The carrying woman agrees to become pregnant by the commissioning man’s sperm, to carry the fetus to term, and then to transfer custody to the commissioning man and to relinquish her maternal rights to the child.38

2. The carrying woman and her husband promise to take all steps necessary to have the commissioning man’s name entered on the child’s birth certificate as the father, and the carrying woman’s husband (if any) agrees to renounce any legal presumption that he is the child’s father.39

3. Should custody of the child be awarded to anyone not related to the commissioning man (such as, for example, the carrying woman), the carrying woman and her husband (if any) promise to reimburse the commissioning man for all the sums he is ordered to pay in child support.40

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35 The "Surrogate Parenting Agreement" was sent in October 1988 in reply to a letter of inquiry addressed to the offices of Mr. Noel Keane, 930 Mason, Dearborn, Michigan 48124 USA [hereinafter "Keane Agreement"].

36 Keane Agreement, supra, note 35, paragraph 25.

37 Brophy Agreement, supra, note 34; Keane Agreement, supra, note 35; and Appendices A and B of In the Matter of Baby "M", 537 A. 2d 1227 (N.J. Sup. Ct. 1988) at 1265, [hereinafter "Baby M Agreement"].

38 Brophy Agreement, paragraph III: Baby M Agreement, paragraphs 2 and 3; Keane Agreement, paragraphs 1 and 11, supra, notes 34, 35 and 37.

39 Brophy Agreement, paragraphs II and III; Baby M Agreement, paragraphs 2 and 3; Keane Agreement, paragraph 10, supra, notes 34, 35 and 37.

40 Brophy Agreement, paragraph XIII, supra, note 34.
4. Should the commissioning man die before the child's birth, the carrying woman agrees to renounce her maternal rights and to transfer custody of the child to his wife, if any.\(^41\) Should he not be married or should his wife also die before the child's birth, the carrying woman agrees to transfer custody to the person the commissioning man has named in the agreement.\(^42\)

5. The commissioning man promises to pay the carrying woman the specified sum (usually U.S. $10,000) when her maternal rights are terminated by a court order and provided he has custody of the child.\(^43\)

6. The parties agree that the specified fee can be radically reduced if the woman miscarry or gives birth to a stillborn child. In the Baby M Agreement, for example, the carrying woman was to receive no payment if miscarriage occurred in the fourth month or earlier, and $1,000 if the fetus miscarried subsequent to the fourth month or was born dead.\(^44\)

7. The carrying woman promises that she will undergo an amniocentesis test.\(^45\)

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41 Baby M Agreement, paragraph 9; Keane Agreement, paragraph 12, supra, notes 34 and 35.

42 Keane Agreement, paragraph 12; Brophy Agreement, paragraph XXII, supra, notes 35 and 34. Brophy's provision assumes that the commissioning man might not be married and therefore simply enables him to fill in a blank with the name of a person to whom the carrying woman must give the child should the commissioning man be dead.

43 Brophy Agreement, paragraph V; Baby M Agreement, paragraph 4; Keane Agreement, paragraph 15, supra, note 34 and 35. This paragraph in the Keane Agreement states, "the consideration for this Agreement, which is compensation for services and expenses, [is] in no way ... to be construed as a fee for termination of parental rights".

44 Baby M Agreement, paragraph 10. In the Brophy Agreement, paragraph XI, the commissioning man similarly pays the carrying woman nothing if she miscarries prior to the fifth month and pays a non-specified sum if there is a subsequent miscarriage or stillbirth. The Keane Agreement, paragraph 16, presumably to avoid the charge of baby selling, states that the carrying woman will be paid a sum pro-rated to the number of days she was pregnant, supra, note 35.

45 Baby M Agreement, paragraph 13; Keane Agreement, paragraph 9, supra, notes 35 and 37. The Brophy Agreement does not mention amniocentesis.
8. The carrying woman further agrees that she will not abort the fetus but that, if the commissioning man decides on the basis of the amniocentesis results that he does not want the child to be born, she will have an abortion.46

9. The carrying woman promises not to form a parent-child bond with the fetus.47

10. The carrying woman agrees not to drink alcohol or to take any non-prescription, prescription, or illicit drugs without the permission of a named physician,48 and otherwise to adhere to all medical instructions of the attending physician.49

11. The commissioning man agrees to pay a number of expenses incurred by the carrying woman, such as medical, hospitalization, laboratory and therapy expenses; and travel, accommodation, and child care costs.50

The enforceability of these provisions under Ontario law is considered below in Chapter Five.51

1.4.2 Agreement Between Commercial Broker and Commissioning Man

An example of an agreement between the commissioning man and the broker is provided by Noel Keane's "Attorney-Client Agreement".52 Although brokers vary in their practices, it is instructive to examine this agreement both because it is one example of a broker-commissioner agreement and because other such examples are not generally

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46 Baby M Agreement, paragraph 13, supra, note 37. The Keane Agreement, paragraph 9 (doubtless in response to the Baby M decisions, which held that the abortion clause was void), states that the commissioning man may not require the carrying woman to have an abortion.

47 Brophy Agreement, paragraph I; Baby M Agreement, paragraph 1; Keane Agreement, paragraph 11, supra, notes 34, 37 and 35.

48 Brophy Agreement, paragraph XXIV; Baby M Agreement, paragraph 15, supra, notes 34 and 37.

49 Keane Agreement, paragraph 8, supra, note 35.

50 Brophy Agreement, paragraph V(c)(1); Baby M Agreement, paragraph 4; Keane Agreement, paragraph 15(c), supra, notes 34, 37 and 35.

51 See Chapter Five, section 5.3.

52 Which he made available in October 1988 upon written inquiry of the nature of his services.
available. Keane’s Agreement contains two exhibits, "Summary of Costs" and "Statement of Charges Incident to the Surrogate Service".  

The parties to the agreement are the commissioning man and the broker, Noel Keane. Although the agreement is entitled "Attorney-Client Agreement", it appears that Keane acts for the commissioning man in more than a legal capacity. It is appropriate to call him a "broker" in addition to a "lawyer" because he provides services such as advertising for prospective carrying women and arranging for their insemination and support groups, and he handles fees payable by the commissioning man for the carrying woman’s lawyer, maternity clothing, medical insurance, and so on. Thus, the services he performs clearly go beyond the merely legal.

Under the terms of the agreement, the commissioning man agrees to pay Noel Keane "$11,000 as compensation for legal and administrative services". He also agrees to pay costs and expenses to be itemized periodically and billed to him. He promises to appoint Noel Keane as his escrow agent for the money payable to the carrying woman.

In addition to these obligations, the commissioning man assumes a number of risks. For example, he assumes the risk that Noel Keane might not be able to guarantee that the commissioning man’s name will be placed on the child’s birth certificate, or that the carrying woman and her husband’s parental rights will be terminated. The commissioning man agrees to accept that Keane "cannot advise him of all the legal problems and implications which may arise incident to this ... procedure, but [the commissioning man] nevertheless assumes all possible legal risks".

For his part, the broker agrees to act as escrow agent for the fee to be paid by the commissioning man to the carrying woman. He promises to advise the commissioning man

53 One of the largest brokerage houses is operated by lawyer, Bill Handel and called, "The Center for Surrogate Parenting" in Beverly Hills, California. The agreement between Handel and his clients is not publicly available. For a discussion by Handel of his practice, see "Symposium: Women and the Law" (1993) 20 Pepperdine Law Review 1205.

54 Noel Keane, "Attorney-Client Agreement, 1988, Exhibit A". "Statement of Charges Incident to the Surrogate Service" [hereinafter "Keane Attorney-Client Agreement"].
on the progress of the insemination and pregnancy as reported to him by the attending physician. He also undertakes to advise the commissioning man of applicable law as it relates to matters relevant to the practice of making preconception arrangements. The broker agrees to negotiate and represent the commissioning man's interests in the agreement that he drafts and to negotiate with other prospective carrying women should the first carrying woman not fulfil the agreement.

The agreement also specifies what the broker will not do. The broker expressly refuses to refund any portion of the fee paid to him by the commissioning man irrespective of whether the commissioning man "ever conceives or receives custody of a child" pursuant to the agreement entered into by the commissioning man and the carrying woman, provided that the broker complies with his duties and obligations under his agreement with the commissioning man. Further, the broker refuses to guarantee or warrant that the carrying woman will in fact conceive a child fathered by the commissioning man, or that if a child is conceived it will be a healthy child, "free from all defects". The broker does not guarantee that the carrying woman or her husband will comply with the terms of the agreement that the broker drafts.

1.5 Participants in Preconception Arrangements

1.5.1 Carrying Women

1.5.1.1 Limitations of Data

Statistical information concerning carrying women is scarce. Because there is no central register of births initiated by preconception arrangements, the ability of researchers to undertake a thorough national or international study is limited. Consequently, information

55 According to the American Fertility Society, "scientific attention has not been paid to the medical aspects of preconception agreements because the practice has developed in an entrepreneurial setting generally apart from medical institutions". "Ethical Considerations of the New Reproductive Technologies", (June, 1990) 53:6 Fertility and Sterility (Supplement 2) at 68S. An earlier version of this document appeared in 46:3 Fertility and Sterility (September 1986) (Supplement 1). A subsequent version appeared in 62:5 Fertility and Sterility (November, 1994) (Supplement 1). The 1994 document does not relevantly alter the 1990 publication which is cited throughout this dissertation.
about these women is usually anecdotal rather than statistical. The few studies that have been conducted involve women who contracted to surrender children through a commercial broker. These studies are not exhaustive as they necessarily exclude private arrangements and arrangements under which no money is exchanged.\footnote{Eichler and Poole stated that commercial arrangements probably differ in significant ways from private arrangements. For example, in private arrangements involving friends and relatives, it is possible that the friend or relative who agrees to carry the child is much more similar to the father’s wife in terms of age and socioeconomic status than would be a carrying woman whom the commissioning couple met for the first time through a broker. Eichler and Poole, supra, note 2 at 45.}

The studies are limited in a second way: they tell us very little about exclusively gestational women. Because most preconception arrangements to date entail artificial insemination, which is technically much easier to perform than embryo transfer, most carrying women can still be described as "genetic-gestational" as opposed to "exclusively gestational" women even though the number of "exclusively gestational" women is increasing. In other words, in most preconception arrangements, a woman’s ovum is fertilized after artificial insemination with the commissioning man’s semen. Therefore, most of the limited information available concerns the situation where the carrying woman is the child’s mother in every sense, though she agreed before conception to relinquish the child. Thus, she is in a position similar to that of a woman who relinquishes her child for adoption, with the difference that she deliberately conceived the child with the intent to relinquish it to a man who is usually the child’s genetic father. We have some information about the group of women who participate in genetic-gestational preconception arrangements, and about the group of women who relinquish their children for adoption, but we have very little data about women who gestate an embryo to which they have no genetic relationship. It has not been determined whether the pregnancy and delivery experience of such women is significantly different.\footnote{There is one study of exclusively gestational women but it contains no demographic data beyond their ages and their race (all caucasian). The mean age of 59 exclusively gestational women studied was 32.18 with a range between 24 and 37 years of age. The mean age of the commissioning women was 34.50 with a range between 29 and 40. Andrea Mechanick Braverman and Stephen L. Corson, "Characteristics of Participants in a Gestational Carrier Program" (1992) 9:4 Journal of Assisted Reproduction and Genetics 353.}

\textsuperscript{56} Eichler and Poole stated that commercial arrangements probably differ in significant ways from private arrangements. For example, in private arrangements involving friends and relatives, it is possible that the friend or relative who agrees to carry the child is much more similar to the father’s wife in terms of age and socioeconomic status than would be a carrying woman whom the commissioning couple met for the first time through a broker. Eichler and Poole, supra, note 2 at 45.

\textsuperscript{57} There is one study of exclusively gestational women but it contains no demographic data beyond their ages and their race (all caucasian). The mean age of 59 exclusively gestational women studied was 32.18 with a range between 24 and 37 years of age. The mean age of the commissioning women was 34.50 with a range between 29 and 40. Andrea Mechanick Braverman and Stephen L. Corson, "Characteristics of Participants in a Gestational Carrier Program" (1992) 9:4 Journal of Assisted Reproduction and Genetics 353.
A third problem with the available data is that in some cases it has been presented by persons who have a financial or expressed interest in promoting the practice. Two compilations of demographic information concerning women who entered into preconception arrangements through commercial brokers in the United States demonstrate the variety of researchers' interests. One source was published by Philip J. Parker, a proponent of the practice of preconception arrangements, who is a Detroit psychiatrist paid to interview numerous prospective carrying women on behalf of commissioners who hired Noel Keane as their broker and lawyer. (Parker's first study presented demographic and motivational data on 125 women who applied to be carrying women.) A second source is the 1988 United States Congress Office of Technology Assessment (OTA) report, which summarizes the demographic data compiled independently by four researchers (Linkins, Hanafin, Parker, and Franks) and presents data it obtained from "surrogate mothering agencies", which


59 According to authors Malcolm Gladwell and Rochelle Sharp, "Philip Parker, the Detroit psychiatrist who does most of Keane’s testing, processes each applicant in a matter of hours, usually for a flat fee of $250". ("Baby M Winner: Meet the surrogacy entrepreneur", New Republic, 16 February 1987, 15 at 16 [hereinafter "Baby M Winner"]).


61 This report, with a sample size greater than 334 carrying women in commercial agencies, was compiled by the Office of Technology Assessment. It contains only demographic data. OTA, supra, note 25, Table 14.1, at 274.

62 The Office of Technology Assessment summarizes the results reported by Linkins, Hanafin, Parker, and Franks. Although Parker's study is available because it has been published, the other studies have not and therefore cannot be analyzed in this dissertation.
responded to a questionnaire. Hanafin is on staff at the Centre for Surrogate Parenting in Beverly Hills, California.63

Thus, these sources of information are limited in being concerned with commercially brokered arrangements with genetic-gestational women and in being compiled by researchers who are not disinterested. The information is subject to two additional flaws: the research subjects might have incentive to falsify their responses, and each survey incorporates at least some data derived from the same source.

The responses of the research subjects might not be accurately given or reported. For example, Parker’s psychiatric practice involves interviewing prospective carrying women whose desire to participate will be fulfilled or not, partly as a result of their responses to Parker’s questions. The OTA survey collected data given to them by the agencies, not by the carrying women. Moreover, the agencies from whom the information was derived are interested in furthering the practice of preconception arrangements and therefore might have been tempted to give only what they perceived to be favourable information.

In addition, the sources of the three studies to be considered here are not independent, so some data appear to be over-represented. Parker collaborates with Noel Keane; the women he interviews are referred to him by Keane’s Dearborn agency. The OTA’s study involved soliciting information from U.S. commercial agencies, one of which was Noel Keane’s. As discussed above, the detailed information in a third study, the Eichler and Poole report commissioned by the Canadian Law Reform Commission, came partially from studying Noel Keane’s files.64 Therefore, all three compilations report, at least in part, his information. It is difficult to know whether the characteristics of the sample of women reported by Keane vary greatly from those of women affiliated with other agencies or those unaffiliated with an agency. The manner in which the data are reported does not permit such a comparison to be made.

By using the available information, even though it is limited in these ways, one can nevertheless gain some indication of the age, marital status, race, educational attainment, income level, and reproductive history of the genetic-gestational women who seek to enter into preconception arrangements.


64 Eichler and Poole, supra, note 2.
1.5.1.2 Results of the Surveys

In Parker's study, the mean age was 25 years, with a range of 19 to 33 years. Eichler and Poole's study appears not to list the women's ages at the time they gave birth but rather their age in 1988, the year in which the study was conducted. The average age was 26.8 years. The OTA, with a sample of 334, gave an average age of 27 years.

The majority of the women surveyed were married. Parker's study reported that 87 percent were married, Eichler and Poole reported 67 percent, and the OTA reported 60 percent.

The predominant religious affiliation among the women was Christian and, in particular, Protestant. In Parker's study, 53 percent were Protestant and 47 percent Catholic. Eichler and Poole's sample of 18 were 61 percent Protestant and 33 percent Catholic. The OTA reported 67 percent Protestant, 28 percent Catholic, 3 percent Jewish, and 2 percent other.

Most of the carrying women were white. All of the women in Parker's study were white. Eichler and Poole do not give information on race. The OTA reports that 88 percent were white, 2 percent Hispanic, 2 percent Asian, and less than 1 percent Black.

The majority of women either did not finish high school or have only high school education. Parker reports that 20 percent did not complete high school and 53 percent have only high school education. In Eichler and Poole's study, 8 percent did not finish high school and 54 percent have only high school education. In the OTA report these two groups comprised 61 percent of the women. Eichler and Poole state that 16 percent have either a bachelor's degree or completed college. The OTA reports that 35 percent attended or completed college and that 4 percent have some graduate school education.

Parker does not provide information on income levels and occupation of carrying women and their partners in his study of 125 women. Eichler and Poole apparently did not have access to income levels but report the occupations of the carrying women and their husbands. Many of the women (44 percent) were housewives or unemployed. Their husbands tended to have blue collar jobs (e.g., assembly worker in a factory, bricklayer, carpenter). The OTA reported that 13 percent had household incomes of less than $15,000 (U.S.), 53 percent between $15,000 and $30,000, and 30 percent between $30,000 and $50,000. Only 4 percent had combined incomes over $50,000 per annum.
Two surveys reported the women's past reproductive history. Parker states that 93 percent had at least one previous pregnancy. The average number of previous live births was 1.9. Twenty-three percent had a voluntary abortion; 10 percent had relinquished a child for adoption. The OTA reported that 20 percent had a voluntary abortion or miscarriage, 7 percent had relinquished a child for adoption, 12 percent were themselves adopted, and 7 percent previously relinquished a child pursuant to a preconception agreement.

1.5.1.3 Motivations of Carrying Women

Why do women agree to conceive, carry, and deliver a child to surrender it to a couple whom they may never see again (if indeed they ever have)? Again, the paucity of detailed and reliable surveys means that this question cannot be properly answered. Because there has been no comprehensive study of the motivations of these women, the strength of any stated reason in prompting participation is not known.

The first and most frequently cited study of the issue was conducted by Philip Parker, who identified and examined three motivations of applicants: the desire and need for money, the desire to be pregnant, and "the perceived advantages of surrendering the baby".65 This third factor included both the experience of giving the "gift" of a baby to an infertile couple and of repeating a prior voluntary loss of a fetus or child. In Parker's opinion, the repetition of a loss "appeared to help the [genetic-gestational woman] ... Generally these repetitions have often been an attempt to master in a wilful act what was felt to be less in control originally".66 As Parker is a proponent of preconception arrangements and also profits from the practice, his study is not disinterested. Its conclusions are analyzed below in Chapter Three.67

1.5.2 Partners of Carrying Women

Little is known of the motivations of the partners of the carrying women for entering into a preconception arrangement. In a number of cases, it is the woman who has suggested the idea, and her partner has agreed. In some cases the husband has been opposed. For

65 Parker, "Longitudinal Pilot Study", supra, note 60.
66 Parker, supra, note 60 at 7.
67 See below, Chapter Three, section 3.3.4.3.
example, a carrying woman, Elizabeth Kane, spoke to her husband at length about the arrangement before he agreed to enter the arrangement with her. A second woman, Patti Foster, similarly reported that her husband was very much opposed to the idea but eventually agreed to support her.

In other cases, the male partner of the carrying woman appears to agree with her that she enter into the arrangement to increase the household income. A man accompanying his girlfriend to Noel Keane's office said,

I'll take care of her when she's pregnant again, but the baby means absolutely nothing. It's like watching someone's car for nine months. We're in it for the money; it's a business. That's the way we look at it.

The effect of the arrangement on partners of the carrying woman is discussed below in Chapter Three.

1.5.3 Commissioners

1.5.3.1 Commissioners Described

Apart from anecdotal accounts in popular media reports, there is little demographic information concerning the commissioners. The only published systematic investigation of commissioners is that conducted by Margrit Eichler and Phebe Poole, who used data from 32 arrangements made by Noel Keane. These data permit comparisons between commissioning couples and the carrying woman with respect to age, marital status, religious affiliation, educational attainment, and occupations.

Eichler and Poole found that the commissioning man and his wife were much older than the carrying woman.

68 Elizabeth Kane, Birth Mother (San Diego: Harcourt Brace Jovanovich, 1988), 16-31 [hereinafter "Birth Mother"].
69 Patti Foster, interviewed on Shirley, CTV, 1 February 1991.
71 See Chapter Three, section 3.3.1.3.
72 Eichler and Poole, supra, note 2.
Of the [commissioning men], six are in their fifties (the oldest is 59), ten are in their forties, and eight are in their mid to late thirties. [Commissioning women] are a bit younger ... Of the [commissioning women], three are in their fifties, seven are in their forties, and 11 are in their thirties.73

The carrying women were significantly younger: four were in their early 30s and the rest were in their 20s. The youngest was only 21 years of age.74

To put these two sets of ages into comparative perspective, the youngest commissioning man (age 35) and the youngest commissioning woman (age 34) were older than the oldest carrying woman (age 33). The average age of the carrying women, for whom information was available, was 26.8 years. By contrast, the average age of the commissioning man was 42.8 years, and the average age of the commissioning woman was 38.5 years.

Whereas most of the commissioners were married, some carrying women were not married at the time of the arrangement. Of the commissioners, there were 26 couples, one single man, and one about whom there was no information. Of the carrying women, 19 were married, six were single, separated, or divorced, and about three there was no information.75

In examining religious affiliation, Eichler and Poole found a concentration of commissioners first in the Jewish faith, second in various Protestant churches, and third in the Catholic Church. By contrast, there were no Jewish carrying women. Carrying women tended to be affiliated with some Protestant church or the Catholic Church. Only one commissioning couple and no carrying woman declared themselves agnostic.76

The investigators stated that it has often been said of carrying women that they are likely to be from lower socioeconomic strata than the commissioners.77 Their research

73 Eichler and Poole, supra, note 2 at 39. The statistics given were year of birth but do not indicate what year the child was born. It appears, therefore, that the information concerns age at the time the research was conducted.

74 Eichler and Poole, supra, note 2 at 41.

75 Eichler and Poole, supra, note 2 at 34.

76 Eichler and Poole, supra, note 2 at 42-3. Of 20 commissioning couples, seven men and eight women were Jewish, six men and eight women were from various Protestant churches, and five men and two women were Catholic.

77 Eichler and Poole, supra, note 2 at 35.
supports this hypothesis. As a group, commissioners have a significantly higher level of educational attainment than the carrying women. Data were available on the educational achievements of 17 commissioning men. Two (12 percent) had completed only grade 12, 11 (65 percent) had graduated from college or university, and four (23 percent) had completed graduate school. Of 19 commissioning women, one (5 percent) had less than a complete high school education, two (10 percent) had completed only high school, one (5 percent) had some post-secondary education, ten (53 percent) had completed college or university, and five (26 percent) had completed graduate school (among them two had attained doctoral degrees).78

By contrast, of the 24 carrying women, two (8 percent) did not graduate from high school, 13 (54 percent) had completed grade 12, five (21 percent) had some post-secondary education, four (17 percent) had completed college or university, and none had completed graduate school.79 Thus, whereas 88 percent of commissioning men and 79 percent of commissioning women had post-secondary degrees, only 17 percent of carrying women had completed college or university.

With respect to occupation, the sample of commissioners tended to be professionals, whereas the carrying women were "clustered in lower level service occupations and their husbands tend[ed] to be in blue collar or lower level managerial occupations.80

78 Ibid.
79 Ibid.
80 The commissioning men's occupations were: bricklayer, business owner, carpenter, construction business owner, dentist, doctor (internist), doctor, engineer (4), rancher, financial analyst, lawyer (2), optometrist, robotics, self-employed (2), sound systems designer, statistician, teacher. Eichler and Poole, supra, note 2 at 38, 35, and 39.

The commissioning women's occupations were: unknown, business manager, supervisor, nurse, housewife (2), doctor (surgeon), dietician, professor, teacher (6), secretary, quality control manager, bank worker, medical technician, postgraduate work, clerk. Eichler and Poole, supra, note 2 at 38, and 39.

The carrying women's occupations were: accounts receivable collector, cashier, co-owner of a tree service, credit administrator, hostess at a restaurant, housewife (10), inventory clerk, nurse, sales clerk (full-time)(2), sales clerk (part-time), secretary, social worker, student (2), unemployed (2), waitress. Eichler and Poole, supra, note 2 at 36.
The researchers summarized their results by describing a typical commissioning man and woman and typical carrying woman and her partner.

... [T]he typical [carrying woman] is young (an average of 26.8 years), has had at least one previous child and often more than one, is more likely married than not, is either a housewife or holds a pink collar job, and when married is married to a blue collar worker or member of the lower management. She is more likely to be affiliated with a Catholic or Protestant church than to define herself as without religion.

The typical [commissioning man] is ... older (average age 42.8 years). He is highly likely to be married, is a professional or self-employed, and is likely to belong either to the Jewish, Catholic, or some Protestant faith.

The typical [commissioning woman] is somewhat younger than the [commissioning man] but significantly older than the [carrying women] (average age 38.5 years), is highly likely to be employed, mostly as a professional (but at a lower level profession - such as teacher, business manager or dietician - than her husband, who is more likely to work as an engineer, doctor or lawyer).\(^8\)

**1.5.3.2 Motivations of Commissioners**

The common understanding of why commissioners enter into preconception arrangements is that the commissioners are a heterosexual, married couple and the commissioning woman is unable to conceive or bear a child. There are many reasons that a woman might be unable to conceive and carry a live child to term. She might have some congenital abnormality that disables her, or she might have made or been encouraged to make choices that impaired her fecundity (for example, having contracted a sexually transmitted disease that blocked her fallopian tubes; having been exposed to agents that harm fertility, including workplace hazards; and having agreed to a procedure performed by doctors which accidentally left her sterile).

The carrying women's partners' occupations were: assembly worker in a factory, bricklayer, carpenter, co-owner of a tree service, electrician, industrial engineer, labourer, machine operator, machinist, mechanic, mechanical engineer, recreation department sales manager, screen painter, sign painter, student, theatre manager. Eichler and Poole, supra, note 2 at 37.

81 Eichler and Poole, supra, note 2 at 44.
Whatever the cause, the consequences of impaired fecundity and childlessness can be devastating. The pain of one woman was expressed in the first book of the Bible: "When Rachel saw that she bore Jacob no children, she envied her sister; and she said to Jacob, 'Give me children or I shall die!'"82

For many people, the desire to have a child is strong. Human reproduction is an important part of peoples' existence. In enabling the human race to continue, it brings joy to parents, their relatives and friends, and the community. Children care for their parents in their old age, often having grandchildren who enable the family to continue into another generation. For heterosexual couples, it can be a devastating experience to learn that their union is not likely to result in a healthy child or children.83 For some people, impaired fecundity initiates a crisis affecting their feelings about sexuality, self-image, and self-esteem.84 For unmarried and/or homosexual persons, childlessness can also be a painful experience.

Indeed, the loss of the dream of giving birth to and raising (more of) one's own children can be a loss comparable to the loss by death of a loved one. As with death, mourners must go through a series of stages - shock, denial, anger, guilt, depression - to accept the loss and carry on with their own lives.85 Although resolution is normally the last stage of grief, it is seldom so with impaired fecundity, which is unlike death in being private, chronic, and unusual.

82 Genesis 30:1.
Impaired fecundity provides no public event around which family and friends can rally with love and support. Because of the problem’s private nature, persons are often isolated in their grief, sometimes tormented by the well-intentioned comments of others and by family and child-centred celebrations such as Christmas, Chanukah, Mother’s Day, and Father’s Day.

Nor is impaired fecundity final; it carries on indefinitely like a chronic illness. Each month, there is a reminder of the impairment and hope for a pregnancy next month. Throughout the months and years of diagnostic tests and fertility treatments, the disturbing emotions do not depart. As one woman wrote, “Infertility is an emotionally devastating disease, which rears its ugly head over and over again. With each month that goes by, the stakes get higher, and the failure is more painful”.86 Sometimes, the relationship between a couple ends as a consequence of impaired fecundity and its associated stress.

Unlike death, impaired fecundity is seen to disrupt the common life cycle. It causes people to lose their link with the past (for example, they will not have a child who resembles its grandmother) and their link with the future. The biological urge to reproduce is, in a sense, the desire to become immortal by having children who will survive oneself. As one author wrote,

What we come to love in our children is that they enable us to recapitulate the past of our own growing... Children also continue our flesh beyond its wearing out, carry us into the future beyond our mortality just as we bear our parents into a future they never live to see. Family love is this dynastic awareness of time, this shared belonging to a chain of generations ... Love for our children is the means by which, to the degree that we ever can, we reconcile ourselves to the last act ... To be mourned as we go is to feel life coming together into a circle of meaning, the love we received from our parents transmitted intact, through our love for each other, to our children, and their love for us whispering in our ears as we slip into darkness.87

The presence of children and their significance as one means by which we survive

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this life are a comfort denied people who are unable to have children. Rachel's words, taken 
figuratively, are worth pondering.

Although impaired fecundity is not a new problem, the manner of addressing it has 
changed in this generation. In the past, the alternative to childrearing by natural procreation 
was adoption. Though adoption does not give the adopters descendants, it does allow them 
to parent. Yet adoption is not a feasible option for many people today. There 
are fewer babies available than there were 20 years ago. The decline in supply is 
attributable to the increased effectiveness and use of contraception, the increased availability 
of abortion, and the greater likelihood of single women keeping their own children rather 
than surrendering them for adoption. It would be incorrect, however, to state that 
preconception arrangements exist only because adoption is not as promising an alternative as 
it once was. There are important differences.

Preconception arrangements enable the commissioning man (and, in exclusively 
gestational arrangements, the commissioning woman) to be genetically related to the child. 
This has significant implications and consequences. From the perspective of the

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88 That there are fewer babies for adoption in recent times is clear from the number of 
babies placed by government agencies. For example, the Metropolitan Toronto 
Children's Aid Society in 1969 placed 1,239 children for adoption of whom 961 were 
less than one year old; in 1993, despite the increase in the city's population, only 83 
adoptions were completed by the agency. The Children's Aid Society of Metropolitan 
Toronto, "Adoption Today" (Winter 1979), 14:1, Our Children 5; The Children's Aid 
Society of Metropolitan Toronto, Annual Report, 1993; Bruce McDougall, "The Baby 
Brokers" The Financial Post Magazine (March 1990) 22; Roberta Walker, "The 
Market in Babies", 11 Canadian Lawyer (February 1987) 20. See also Bonnie D. 
Fertility and Sterility 548.

89 According to Maureen Corman of the Ontario Ministry of Community and Social 
Services, 283 infants were placed by private adoption in Ontario in the period April 
1993 - March 1994; in that same period 22 women who originally agreed to 
relinquish their babies, changed their minds. Whereas in 1968, 30.1 percent of 
unwed mothers kept their children, 88.3 percent did so in 1977. Ontario, Provincial 
Secretariat for Social Development, The Family as a Focus for Social Policy (1979), 
Table 8 at 19, quoted in Ontario Law Reform Commission, supra, note 1 at 16. See 
also Robert Lindsey, "Adoption Market: Big Demand, Tight Supply", New York 
Times (5 April 1987), A1.
commissioning man, a preconception arrangement enables him to parent his own genetic child.\textsuperscript{90} Indeed, the commercial preconception agreements (introduced above) specifically state that this is the purpose of the arrangement.\textsuperscript{91} For some commissioning women, a preconception arrangement is desirable precisely because it enables them to avoid passing deleterious genes to offspring and yet it enables their husbands to have genetically-related children.

For commissioners, the practice has further advantages over adoption. By entering into agreements with healthy, lower-to-middle-income women whom commissioners often meet in advance, a preconception arrangement enables commissioners to have more control over the prenatal "environment" of the child. As we have seen, the agreement that the parties sign contains a provision prohibiting the carrying woman from smoking, drinking, or taking non-prescription drugs. The commissioners thus might have more power than in adoption to monitor the pregnancy.\textsuperscript{92}

Commentators have often expressed concern that a woman might wish to commission a child to avoid the risks and pain of pregnancy and childbirth, and the disruption of her career.\textsuperscript{93} But only one such case has ever come to light.\textsuperscript{94} On the other hand, there have been cases where the commissioner desired to parent his own genetic child. One commissioning man described the importance to him of rearing a child to whom he is related:

Maybe it's egotistical ... but I want my own child. Adoption leaves me cold. I guess for some women, as long as they have a child, it's fine. But for me, it's like if I see my child do something, I need to know that he's really mine. Keane and Breo, \textit{supra}, note 6 at 29-30.

One woman, upon hearing that the carrying woman had become pregnant, said, "I wanted to put Carol under a glass bowl. You know, don't do this, don't do that. Are you eating right? Are you drinking enough? Are you taking your vitamins?" Keane and Breo, \textit{supra}, note 6 at 82.

In Mary Beth Whitehead's pregnancy, the commissioning woman, Betsy Stern, a physician, seemed to Mary Beth Whitehead "to appropriate the pregnancy, doing things like calling Mrs. Whitehead's doctors, even recommending to him a certain drug [that she] the surrogate should take". Flemming, \textit{supra}, note at p. 87.

Mary Beth Whitehead says she felt that Elizabeth Stern was trying to take over her life ... Stern insisted that Whitehead go ahead with amniocentesis against her obstetrician's advice ... "Who Keeps 'Baby M'?" \textit{Newsweek} (19 January 1987), 44 at 49.

See for example, OLRC, \textit{supra}, note 1 at 237.

Ragoné, \textit{supra}, note 3 at 23.
been at least eleven cases of a single man commissioning a child, suggesting that impaired fecundity and genetic disease are not the only motivators of commissioners.95

From the perspective of the commissioners, exclusively gestational arrangements might be particularly advantageous as they enable a commissioning couple to have a child who is genetically related to both of them. For example, where a commissioning woman does not have a uterus but has functioning ova, an exclusively gestational arrangement permits an embryo created by her egg and her husband’s sperm to develop. The embryo is transferred into the body of a carrying woman who, it is intended, will gestate, give birth, and surrender the child at birth.96 But in addition to the ordinary risks of pregnancy for the carrying woman, this process creates risks for the commissioning woman.

To extract the ova for in vitro fertilization (IVF), doctors often stimulate women’s ovaries artificially. Controlled stimulation by hormones makes it more likely than at natural ovulation that several eggs will be extracted, both because the time at which the eggs ripen is more readily known and the number of eggs released is higher.97 This latter reason is important because the chance of pregnancy increases if more than one embryo is implanted.98 Yet hormonal stimulation also creates the risks of pain in the ovaries and mood changes, as well as other discomfort, inconvenience and expense.99 In addition, the long

95 Supra, note 2. In his book, Noel Keane described an arrangement between a California couple and an East Coast carrying woman. The carrying woman decided that she wanted to keep her child. The couple threatened to sue but changed their minds when she threatened to respond by revealing that the couple were both born male but that the commissioning woman had a sex-change operation. Keane and Breo, supra, note 6 at 29-30.
98 Susan Downie, supra, note 83 at 167.
-term effects of the drugs are not known, the surgical process of egg extraction is invasive, involves some risk and causes, at minimum, discomfort to the woman undergoing the procedure. Moreover, the IVF technique fails between 85 - 90 percent of the time to cause a live birth in a given treatment cycle, though, as shall be discussed below, the failure rate is lower when the embryo is transferred not into an infertile, older woman but into a fertile, young carrying woman.

Thus, the motivations of commissioners in a preconception arrangement are varied. The most commonly discussed is the motivation to have a child despite the commissioning woman's impaired fecundity. Preconception arrangements also enable a commissioning woman to avoid transmitting a genetic disease. Because the practice in its most common form involves reproduction between the carrying woman and the commissioning man, it also enables single men to obtain children. The second form of preconception arrangements (exclusively gestational arrangements) are sought by commissioners who wish the genetic material of both the male and female commissioners to participate in the commissioned child's conception. Though the number of such arrangements is increasing rapidly, there are risks to the commissioning woman and the failure rate is high.

1.5.4 Third Parties

1.5.4.1 Commercial Brokers

From the information available on the subject, it appears that commercial brokers operate only in the United States. Their reasons for participating in preconception arrangements appear to be mixed.

Helena Ragoné distinguishes between the motivations and practices of brokers, referring to one type of practice as "closed" and the other as "open". A "closed" practice is

101 Royal Commission on New Reproductive Technology, Proceed With Care (Ottawa: Minister of Government Services, 1993) at 511 et seq [hereinafter "Proceed With Care"].
102 See below, Section 1.6.2.3.
103 Supra, note 3.
104 Supra, note 3 at 27.
one in which the parties to a preconception arrangement are either not permitted or not encouraged to interact with one another. According to Ragoné, such interaction is viewed by operators of closed programs as unnecessary, and the brokers' approach to the practice can best be summarized as the belief that surrogacy is a business transaction, a legal contract between an infertile couple and a surrogate, not a meaningful social contract (or one with an affectional dimension).105

Ragoné contrasts such practices and motivations with those of "open" programs. In these, parties are encouraged to interact throughout the period of insemination, pregnancy and childbirth, but not after birth.106 According to Ragoné, operators of open programs hold "the belief that surrogacy provides a positive solution to childlessness and that the dissemination of accurate, factual information concerning surrogate motherhood will counteract the negative accounts that until now tended to shape public opinion as well as some scientific or scholarly opinion".107 Yet despite Ragoné's characterization of some brokers as interested primarily in profit and others as helping the childless, it appears that, to a large extent, brokers are motivated by money.

Perhaps the best known broker was Noel Keane.108 He arranged the agreement between Mary Beth Whitehead and Bill Stern through his office, the Infertility Centre of New York in New York City. In addition to Dearborn and New York City, he also maintained offices in Indianapolis and in a suburb of San Francisco.109 Keane said he made the first preconception arrangement in 1978, between a married man and a single woman.110 Keane is the first to have written a book on the subject, The Surrogate Mother, published in 1981.111

105 Ragoné, supra, note 3 at 22-23.
106 Ibid. at 104.
107 Ibid. at 22.
108 Noel Keane died of cancer at his home in Dearborn, Michigan on Sunday, January 26, 1997. Van Gelder, supra note 26. At the time of Keane's death, his firm bore the name "Keane and Keane" as his son, Christopher, had entered the practice. Presumably his son will continue the business.
109 Telephone Inquiry to the offices of Noel P. Keane, 930 Mason, Dearborn, Michigan, 28 February 1991, (313) 278-8775. In July 1993, New York law made brokers' activity illegal in that state (N.Y. Domestic Relations Law s.121 14 (McKinney 1993)).
110 Keane and Breo, supra, note 6 at 57 et seq.
111 Ibid.
Keane operated what Ragoné would consider a hybrid program: he was willing to arrange either an open or closed contract according to the commissioners' wishes. In Ragoné's opinion, a program's willingness to do this "appears to be directly related to the profit motive". According to another broker whom Ragoné quotes but does not name, Keane's attitude toward the practice of preconception arrangements could be characterized as "money, pure and simple. He makes no excuses about it".

Yet it appears that Keane was motivated also by the happiness he brought commissioners and the attention he gained from the media. According to one article, "Keane can pay himself $120,000 to $160,000 in salary from the firm's proceeds". Another press article states,

On Keane's office walls are two framed blow-ups of a magazine cover which asks the question whether Keane is a "baby broker or saint". Naturally enough, he prefers sainthood. Although he makes a "comfortable living" out of it, he claims, "It's not totally business. If I didn't feel good about what I am doing I would get the hell out of it". He has the support of his wife and two sons.

Apart from money and bringing happiness, Keane seemed motivated by the attention he gained from the media. "He swishes about in his open Mercedes and seems to measure success by the number of times he appears on television shows." In reply to criticism by other brokers he said, "They're just a little jealous. I get the notoriety. I get more volume. I'm smarter." And: "I'm a big boy. I understand the issues involved." After his death,

112 Ragoné, supra, note 3 at 26.
113 Ibid.
114 James S. Kunen, "Childless Couples Seeking Surrogate Mothers Call Michigan Lawyer Noel Keane - He Delivers", People (30 March 1987), 93 at 95. This figure is expressed in 1987 dollars just before his business began to grow rapidly and might be considerably more than what he would earn as a sole practitioner of law.
116 Ibid.
117 Malcolm Gladwell and Rochelle Sharpe, supra, note 59. As a consequence of his practice, Noel Keane was subject to criticism such as "he's exploiting women; he's selling babies; he's defying the laws and God and nature". But Keane, a Catholic who attends Divine Child Church with his wife and two sons, contemptuously dismisses his critics. "Who gives a s---? That's my response," he snaps, his reddening face belying his avowed indifference. "Let
his sister, Maureen Keane-Doran, was quoted as saying that Mr. Keane had been hurt by criticism of his work. "People who had the kids gave him such gratitude that he kept going... He knew what he was doing was right and good."\textsuperscript{118}

A second well-known broker, Bill Handel, appears similarly motivated. Handel's Center for Surrogate Parenting, Inc. of Beverly Hills, California apparently "offers the only so-called full-service program in the country",\textsuperscript{119} by which is meant that commissioners can hire women to participate in genetic-gestational arrangements and exclusively gestational arrangements, and to sell ova to be gestated by commissioning women. The centre claims that a prospective carrying woman "is screened and tested for up to six months before meeting a potential couple. The average applicant - apparently only one in 20 is accepted - spends up to two years in the program before giving birth".\textsuperscript{120} By contrast, Keane accepts about 98 percent of the women who seek to become carrying women in his program.\textsuperscript{121}

Although Handel's methods are allegedly different, it seems his centre is also a money-making enterprise. Depending upon the type of arrangement, "the fee ranges from $20,000 to $40,000, with the money divided among the doctors, lawyers, counsellors and everyone else who had a hand in the birth".\textsuperscript{122} It is possible that Handel can charge more than Keane because Handel can state that in none of the approximately 300 births he had arranged by 1993\textsuperscript{123} did the carrying woman refuse to give up the child.\textsuperscript{124} Handel also appears to enjoy public attention as he acts as the host of a daytime television show entitled, "You Be the Judge".

\begin{flushright}
me show you why I can stand up to all this bulls--.--." He reaches for a fat three-ring binder entitled "Dear Uncle Noel", which contains correspondence from satisfied clients. There are letters with pictures of babies splashing in wading pools and babies tossing food from their high chairs ("Next time could you give us one with manners!")...
\end{flushright}

\textsuperscript{118} Kunen, \textit{supra}, note 114.
\textsuperscript{119} Van Gelder, \textit{supra}, note 26.
\textsuperscript{120} Mark Schwed, "Surrogate Mothers of Invention", \textit{Los Angeles Herald Examiner} (23 May 1988), B1.
\textsuperscript{121} \textit{Ibid}.
\textsuperscript{122} Ragoné, \textit{supra}, note 3 at 26.
\textsuperscript{123} Schwed, \textit{supra}, note 119.
\textsuperscript{124} Ragoné, \textit{supra}, note 3 at 24.
Another notable commercial broker in the United States is Richard Levin of Louisville, Kentucky. Levin is a medical doctor who told a U.S. congressional hearing that he is motivated to meet "the needs of infertile couples", though it is not clear that he meets the needs of those infertile couples without sufficient funds to pay his fees. According to Ragoné, Levin runs a closed program which elicits many complaints from carrying women. One woman, for example, complained that Levin threatened to induce her labour early so as to avoid altering his vacation plans. Another woman claimed to have been deceived about the commissioning woman who had never in fact been diagnosed as infertile but simply had not wanted to become pregnant. Levin's alleged motivation of wishing to help infertile couples might therefore be open to challenge.

Commercial brokers in the United States claim to be motivated to help childless couples. Yet, they do not limit their services to the childless but serve only those with funds to pay for a commissioned child; irrespective of whether they operate an open or closed program, they earn considerable money in the process. It appears, therefore, that their motivation is to a large extent pecuniary though they might genuinely also wish to alleviate the suffering of commissioners and to gain public attention.

1.5.4.2 Non-Commercial Brokers and Infertility Practitioners

As previously stated, it is illegal in the United Kingdom to operate a commercial brokerage firm to arrange preconception arrangements. However, there are two U.K. institutions that facilitate arrangements, but do not charge a brokerage fee.

The first, Childlessness Overcome Through Surrogacy (COTS), is a charity established by Kim Cotton, the first woman known publicly to have entered a preconception arrangement in the United Kingdom, and Gina Dodd, a Scottish-born, commissioning woman. COTS "acts as an information and help-line service for people who wish to find a

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126 Ragoné, supra, note 3 at 23.
127 Ibid.
surrogate and who wish to become surrogates." 128 By operating the service ostensibly without remuneration, Cotton and Dodd appear not to be motivated by the desire to make money but by the wish to help others. Cotton has said,

I am not trying to promote surrogacy and I am convinced some people shouldn’t do it, don’t have the emotional strength, don’t understand the implications - over the years. I have certainly talked women out of becoming surrogates simply by telling them blow-by-blow what is entailed. But some women can do it, want to do it and it seems to be that it’s a wonderful gift to offer a couple who cannot have children. I still feel very glad I did it. 129

A second United Kingdom institution, The Bourn Hall Clinic (in which the world’s first IVF conception resulted in a live birth), also facilitates preconception arrangements. In August 1990, the clinic announced that it was prepared to facilitate exclusively gestational arrangements. "Bourn Hall is not the first clinic to implant a frozen embryo into a host mother, but it is the first to discuss the issues openly". 130 The clinic said that it is motivated to facilitate these arrangements by the desire to help certain commissioners. According to Peter Brinsden, the medical director of Bourn Hall, "We believe that patients who are unable to bear children of their own can and should be helped. We will not provide a service for the mother who does not want to interrupt her career by bearing her own child". 131 He also stressed that couples must make their own arrangements with the carrying woman. The doctors at Bourn Hall said that the clinic’s £2,500 (approximately Cdn. $5,300) fee is only for medical services including counselling for the parties. Nevertheless, the "medical service" provides employment, income and research opportunities for the clinic staff. By August 1990, the clinic had transferred two embryos into carrying women, in both cases the sisters of the ovum providers. 132

Physicians in Australia and South Africa have also facilitated arrangements between

129 Ibid.
131 Kent, supra, note 130.
132 Ibid.
commissioning couples and carrying women. In Melbourne\(^\text{133}\) and Perth,\(^\text{134}\) Australia, carrying women gestated the embryos of their sisters and the sisters' husbands. In Johannesburg, South Africa, physicians participated in an IVF conception by which a 48 year-old woman gave birth to two boys and a girl whose genes originated from her daughter and her son-in-law.\(^\text{135}\)

In Canada, newspapers report the existence of four clinics which participate in IVF preconception arrangements.\(^\text{136}\)

1.6 Critique of Common Description of Practice

1.6.1 The Common Description

Preconception arrangements are almost uniformly described both in the media and in scholarly writing as a response to the plight of involuntarily infertile, childless but otherwise happily married couples, who wish to love and rear a child but cannot have one themselves or find one to adopt. This description of the purpose of the practice is almost universally assumed: it is presupposed in brokers' promotional literature,\(^\text{137}\) news

\(^\text{133}\) Ibid.
\(^\text{137}\) See, for example, Surrogate Parenting Associates, Inc., Brochure, Suite 222, Doctors Office Building, 250 East Liberty Street, Louisville, Kentucky, 40205 U.S.A.: "Infertility strikes one in every six to seven couples. There exists [sic] few families who do not understand the pain and suffering involved in the infertility situation. A true understanding of the problem of infertility would in SPA's view, lead to feelings of empathy, understanding and tolerance with respect to the surrogate parenting procedure".
stories, and television talk shows; and it is the premise of debate and commentary in proposed statutes, law reform commission reports, law review articles, medical journals, and books. The practice is commonly believed to be a solution to which

138 See, for example, "Infertility: Babies by Contract", Newsweek, 4 November 1985 at 74: "Thwarted by infertility and the endless snare of the adoption process, a growing number of childless couples are resorting to the costly often angst-ridden alternative of surrogate parenting"; Woman's Own, 11 July 1987 at 1: "[S]urrogacy will remain a highly controversial issue. Should a childless and infertile couple be allowed to have a child through a surrogate mother?"

139 See, for example, ABC Nightline, 6 December 1983, 7 West 66th Street, New York, N.Y. 10023, Show #672 at 2: "[S]o far more than 100 couples in America have used [surrogate motherhood] to solve a problem that affects one out of five couples today: infertility". Joanne Ramirez: "Unless you've ever been in the position where you are infertile or having a difficult time ... having a child, people just don't understand the agony that people go through who want a child and a family lifestyle ... I want to go to the zoo with the toddler, and so does Michael. And so people will go to any lengths to do that, and we think ours is one of the more reasonable ways to do it". See also CBS News West 57th, 11 March 1989, 525 West 57th Street, New York, N.Y. 10019, Show #163 at 2: "When Julie Bouldry gave birth to healthy twins ... [she] left the delivery room with $10,000 for a downpayment on a house. And Steve and Susan Fiter, a childless couple from Oklahoma, left with Alexandra and Stephanie, two children they had been unable to bear on their own".

140 See, for example, Section 1, "Draft A.B.A. Model Surrogacy Act", Section of Family Law of American Bar Association (1988) 22 Family L.Q. 123 at 125.

141 See, for example, OLRC, supra, note 1 at 14-17, 232; and the New York State Task Force on Life and Law, "Recommendations for Public Policy", supra, note 84, Chapter One.


143 See, for example, E. Carl Wood and Peter Singer, "Whither Surrogacy?" (1988) 149 Medical Journal of Australia 426: "The Problem of infertility cannot be met fully by the new medical technology, such as in-vitro fertilization and ovulation induction, or by the adoption of healthy infants, who have become scarce".

married, childless couples are driven in order to have a child in the face of impaired fecundity and a dramatic decline in the number of children available for adoption. The practice is described as the answer to their impassioned plea, "We just want a child to rear".

This presentation of commissioners is sympathetic and arguably invites a positive response to the practice. This is especially so when carrying women, who are prepared to meet the demand, are described\(^\text{145}\) and describe themselves\(^\text{146}\) as able, willing and indeed eager to carry, deliver, and surrender a child to alleviate the suffering of persons who are usually strangers. Upon surrender, the women are described as "wanting nothing further to do with the child".\(^\text{147}\)

This is the common depiction of demand and supply, and on this are based most arguments for the practice of preconception arrangements. Before one can consider the strength of those arguments, however, their premises must be evaluated.

The validity of the common depiction cannot be rigorously tested by using social science evidence for, as discussed above in Section 1.5, there are no comprehensive long-term studies of the practice, its participants, and its outcomes, and some short-term studies have been received with reservation.\(^\text{148}\) The lack of social science data prevents us from

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145 See, for example, Andrews, "Between Strangers", supra, note 63; Keane and Breo, supra, note 6, at 57 et seq.; "Many Eager to Be Surrogates", Calgary Herald (18 February 1988) at C4.

146 See, for example, Patricia Adair, A Surrogate Mother's Story (Toronto: Paperjacks, 1988); Kirsty Stevens, Surrogate Mother: One Woman's Story (London: Century Publishing, 1985).

147 OLRC, supra, note 1 at 72.

148 Indeed, when the majority of the Advisory Panel to the California State Legislature Joint Committee on Surrogate Parenting presented its report, it lamented the paucity of credible research. Professor Vicki Michel presented the majority's report stating, "We need very much, some objective research on surrogacy ... A letter that recruited subjects for [a study] ... called 'Surrogate Mothers - The Relationship Between Early Attachment and the Relinquishing of a Child', ... a doctoral dissertation by Rita Resnick, [read] ... I would very much like to have your participation in my study. My aim is to gain further understanding of the surrogate mother population to hopefully help surrogate programs continue in the future. And then later she says: Thank you so much for your help. It is people like you who make innovative programs possible. I hope I can help secure the future of surrogate mothering programs.
knowing just how often the common picture inadequately describes the practice, yet it is possible to compare the common depiction to individual accounts of actual participation by participants themselves and by commentators. These accounts are available in a wide variety of publications. Because they have not been elicited in a systematic way, they probably do not accurately reflect the number of persons who experience a particular motivation or effect. But the accounts do illustrate the range of experience with the practice and demonstrate clearly that the common depiction is incomplete.

Using these accounts, this section shows that the common depiction inaccurately describes demand and supply in these arrangements; it takes no account of the interests of third parties in promoting the practice and constitutes a misleading depiction of the practice.

1.6.2 Critique of Common Description of Practice

1.6.2.1 A More Complete Description of Demand

The common picture of demand in preconception agreements is that there exist involuntarily infertile, childless couples who are likely to remain married and who wish to have a child or to adopt but cannot. They therefore turn, as a last resort, to preconception arrangements so that they might fulfil the desire simply "to have a baby to hold and to love". This picture of demand in the "surrogate motherhood" industry is both incomplete and misleading.

In the first instance, the commissioners might be fertile. As we have seen, at least one commissioning woman, who used Levin's brokerage house, was allegedly fertile but did not wish to be pregnant. Another woman wished to avoid pregnancy because of feared harm to herself and a third woman conceived at the same time as the carrying woman so...

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The statement of the values and orientation of the researcher cannot help but bias the study ... So I think that we have to recognize that we are operating in ... a vacuum of data". Joint Legislative Committee on Surrogate Parenting, "Majority Report to the California Legislature". Supra, note 27 at 13-14.

149 Ragoné, supra, note 3 at 23.
that she received two children at the end of the pregnancies. Fertile women have initiated a preconception arrangement to avoid transmitting a genetic disease. And even if the commissioning woman is infertile it might be a voluntarily-induced condition because of, for example, a tubal ligation, or it might be the result of the natural aging process with the onset of menopause.

In the second place, not all commissioners are childless. Sometimes they have reared children who are in every sense their own, and sometimes they already have children in their home. Further, there have been instances where commissioning men already have

151 Will Ellsworth-Jones, "Cashing in on the baby boom", supra, note 115 at 33.
152 "Infertility: Babies by Contract", supra, note 138 at 77.
153 For example, Patricia Foster, who relinquished a boy to Mr. Stein and his wife, stated that Mrs. Stein had undergone a tubal ligation after giving birth to three children in an earlier marriage. Although Mrs. Stein's infertility was voluntary and doubtless known to Mr. Stein when they married, he apparently wanted his genetically related child. (Interview with Patricia Foster, Shirley, CTV, 1 February 1991), Patricia Foster attempted to regain custody of her son; "Appendix 10, Case Description of 'Conflicts in Commercialized Childbearing' by the National Coalition Against Surrogacy" in Eichler and Poole, supra, note 4.)
154 For example, Bill and Betty Meadows had raised two children, a grown son and a daughter (who had been killed in a car accident). When they were each 47 years of age and Betty Meadows had reached menopause, they hired two women to give birth to children for surrender to the Meadows couple. Consequently, at age 50, they had a girl aged two and a boy aged one. "Infertility: Babies by Contract", supra, note 138 at 77.
155 Ibid.
156 This was the situation of the Steins (supra, note 153) and a couple whom Noel Keane described as "immensely likable" but "desperate". They were raising three children of the commissioning woman's first marriage but the commissioning man "wanted a child of his own". (Keane and Breo, supra, note 6 at 57.) Sometimes the couple have adopted a child together and also hire a woman to give birth to surrender another child to them. Elizabeth Kane, the first carrying woman to receive public attention, explained that she had agreed to enter a preconception arrangement because "I had always felt ... an empathy for women with empty arms". But the couple receiving the child did not have "empty arms"; they had a three-year-old adopted son. The commissioning man explained that another adoption would have been difficult and "we wanted, if possible, to have a child that was biologically related to me". (Surrogate Mother Elizabeth Kane Delivers Her 'Gift of Love' - Then Kisses Her Baby Goodbye", People (10 December 1980), 52, 53, and 54; "Women Who Have Babies for Other Women", 119 No. 712 Reader's Digest (August 1981) at 77. Quoted in Gena Corea, The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs (New York: Harper and Row, 1985 at 223).
children of whom they do not have custody.157

The depiction of commissioners as always involuntarily infertile and childless is therefore inaccurate. So, too, is the notion that they are always couples who are married.158 Nor is it true that all the commissioners who are married remain so.159 Moreover, as we have seen, it is not always true that there is even a couple commissioning the child. At least eleven single men have commissioned children, one of whom confessed to beating the child to death when it was five weeks old.160

Therefore, it is clear that the common description of the people who commission children is incomplete. It is not always the case that commissioners are members of a couple or that they are happily married, married, childless, infertile or involuntarily infertile. Yet the premise of most arguments in favour of the practice is that it addresses the symptoms of a medical problem: that of involuntarily infertile, childless, otherwise happily married couples.

157 Kate Dunn, "Dilemma of Seeking a Surrogate Mother", Montreal Gazette (13 January 1990) at K1.
158 For example, in an anonymous case, the commissioning man and his girlfriend were not married. Both in their late 40's, they planned to marry once they chose a carrying woman, so that they would "legally be a family when the child [was] born". Ibid.
159 At least four couples have divorced either before or after the birth of the commissioned child. In one case, the commissioners "divorced after the start of the pregnancy and successfully pressed the surrogate to abort", (Richard Lacayo, "In the Best Interests of a Child", Time (13 April 1987) at 50). In a second case, the commissioner, Alexander Malahoff, commissioned a child to be borne by Judy Stiver "to hold his rocky marriage together", but when the child was born "his marriage was even more rocky and the couple separated", (Andrews, "Between Strangers", supra, note 63 at 43). Two other couples divorced after having the child in their home. Six months after the birth of their commissioned child, Robert Moschetta, age 35, of Los Angeles, left his 51-year-old wife and took the commissioned child with him, (Murray Campbell, "Surrogate named baby's legal mother; couple's breakup prompted battle for child", The Globe and Mail (19 April 1991) at A1). In the case of Beverly Seymour and Richard Reams, a separation occurred when the commissioned child had been living in their Ohio home for four years, (Tamar Levin, "A Custody Case with Extra Tangles", The New York Times (26 January 1989) at A12).
160 Bowden, et al., supra, note 2.
The relevance of this incomplete and misleading description is that to the extent it is used to justify the practice it is deceptive. Either the practice is justifiable as a means for adults to obtain children irrespective of their fertility and marital status, or proponents must argue in favour of restrictions on who may commission children such that the commissioners fit the narrow description by which proponents justify the practice.

1.6.2.2 A More Complete Description of Supply

That the common practice of demand is incomplete and misleading is relevant in a second way: it both generates and favourably characterizes supply. The common depiction of supply is of carrying women who are motivated to relieve the commissioners' suffering and who are altruistic, "sisters of mercy".

According to one commentator

Surrogate mothers are not true supply-siders, since they do not let supply create its own demands; they fill a need already there. Infertile people want babies, and surrogate mothers produce them. They understand the needs of others and fill them ... 162

In focusing attention on the plight of the childless and infertile, the common and inaccurate picture of demand deftly elicits an empathetic response from would-be carrying women. As a broker's staff member said, carrying women cannot imagine life without children because motherhood is central to their lives; they feel sorry for the infertile couples whom, they assume, are childless. To generate a supply of women who will sign an agreement to relinquish their children at birth, brokers make appeals through the media for compassionate women who will "give the gift of life" to a childless, infertile couple. 164 Brokers search for

161 And perhaps deliberately so. According to a broker, William Handel, I think that simply for political and P.R. reasons, you've got to play it very conservatively and very safe. It's difficult to take potshots at someone who's doing this for a married couple who cannot have children. But it's easy to criticize someone who's doing it for a gay single male. (Quoted in Corea, supra, note 156 at 217.)

162 Diana Frank and Marta Vogel, The Baby Makers (New York; Carroll and Graf, 1988) at 184.

163 Hanafin quoted in Andrews, "Between Strangers", supra, note 63 at 68.

164 See, for example, Linda Arking, "Searching for a Very Special Woman", McCall's (June 1987) at 55.
women who are compassionate rather than intelligent. They want someone who will put another's needs before her own to make a difference in someone else's life.

The difference these women make to the lives of the commissioners is not always what they think. That the misleading nature of the common picture of commissioners' characteristics and desires might be essential to its power to generate supply is suggested by the outrage some carrying women have expressed when they discover they have been misled. Carrying women have been very bitter upon learning that the commissioned child went to commissioners who were not involuntarily infertile, childless, or members of a couple.

In addition to eliciting the participation of carrying women, the commonly presented portrayal of demand has a second effect on supply: it characterizes carrying women as "the sisters of mercy" of the commissioners and, in particular, of the commissioning woman. In willingly sacrificing themselves and their bodies to fill the "empty, aching arms of the infertile wife", carrying women become, through the power of the common portrayal of demand, altruistic angels. According to a broker's staff member, carrying women are

166 For example, Patricia Foster criticized Noel Keane and his colleagues for deceiving her about the commissioners' true situation. "They play upon your emotions when they talk about the poor infertile couple who have tried everything. We were told that we were their last hope and that this was the most unselfish thing a woman could do. (Shirley, supra, note 153.) Foster claims that Noel Keane was not "up front with [her] about a lot of things". She did not know that the commissioning woman had given birth to and was rearing her three children from an earlier marriage and that she had deliberately sought a tubal ligation to render herself infertile. (Ibid.)
167 For example, Elizabeth Kane argues that she did not know that the commissioning man, who already had an adopted child in his home, wanted not simply a child to rear, but his genetically-related child. (Elizabeth Kane, "Surrogate Parenting: A Division of Families Not A Creation", (1989) 2:2 Reproductive and Genetic Engineering 105 at 107 [hereinafter "A Division of Families"]).
168 Alleged deception caused a North Carolina woman to grieve "silently for several years upon learning her baby broker lied to her. The contracting couple was not a wealthy young couple from Maryland but instead a man from Israel". (Kane, ibid., at 108.)
the most lovely, healthy, functional group of women I had ever seen ... empathetic, sensitive women who emphasized the importance of motherhood in their own lives ... Being a surrogate mother is a way of making what they feel is a dramatic contribution to the world, to alleviate a problem - childlessness - with which they can sympathize. And it's a contribution they can make while still remaining within the surroundings of their own family.169

With this "special" image of carrying women, brokers encourage other women to participate in preconception arrangements. Brokers recruit in such articles as "Searching for a Very Special Woman", published in McCall's,170 and in such videos as "A Special Lady", available at no charge from Noel Keane and shown "to teenage girls in high schools where young girls especially are ripe for this kind of 'specialness'.171

Yet this presentation of carrying women as "special" tends to unravel when it is tested against the actual facts of a commercial preconception arrangement. If carrying women are aptly described as "altruistic angels", why are they paid? The brokers' reply is that the women are motivated not by the money but by the empathy they feel. According to Keane, "Their motivation is to help somebody, though the money would be helpful".172 Broker Bill Handel denies that women do it for the money:

No it certainly isn't the money. Ten thousand dollars that's paid to a surrogate doesn't even begin to compensate two extraordinary years of work. It is pride in their ability to create a child ... they're extraordinarily proud of the fact that they have a family and it's a humanitarian gesture.173

170 Arking, supra, note 164 at 55.
172 "Childless Couples Seeking Surrogate Mothers Call Michigan Lawyer Noel Keane - He Delivers", People (30 March 1987) at 97 [hereinafter "Call Michigan Lawyer Noel Keane"].
173 This Week with David Brinkley, 5 April 1987 (2 John Street, New York, 10038) Transcript #284 at 7. The "two extraordinary years of work" refers to the time during which a prospective carrying woman is screened and medically examined, the months of insemination and pregnancy, and the delivery and post-partum experience. See text above at footnote 120.
But, despite the brokers' denials that the payment of money is essential to generate a supply of carrying women, the fact is that the brokers would not be in business if they could not pay carrying women. Keane himself acknowledged in 1987 that during the time when he dealt exclusively with volunteers, only one woman a year offered to perform the humanitarian gesture. 174 He said then, "If we could pay women $5,000 to $10,000, everyone could have a surrogate". 175 Once he did commence payment, the number of carrying women increased to 20 in each of the first two years he started to pay. 176

A second difficulty with the characterization of carrying women (most of whom are genetic-gestational women) as special, selfless, and altruistic; is that their "act of generosity" consists of exchanging their own baby for cash. If they are in fact family-orientated women, "your normal, middle-American, other-centred Mom", 177 as a broker's staff member, Hilary Hanafin claims; why do they relinquish their children to strangers? To this, the brokers also have an answer. The child is not the carrying woman's baby at all but the commissioners' baby. According to Keane, "[The carrying woman] knows that before she becomes pregnant, she's going to carry this person's child who cannot carry her own baby". 178

Thus, the commissioned act becomes not the surrender of a child but rather the utilization of a female body. As Handel argues, "If there is a uterus available, let us use one". 179 By denying the carrying woman's maternity with the very term "surrogate mother", and by constantly reinforcing the fact that the sperm originated in the commissioning man, the brokers suggest that their "special lady" has little claim to her child. According to Keane, "What you have to keep in mind always is that this baby is always returned to its biological father". 180

A final inconsistency in the characterization of carrying women as altruistically

176 "Surrogate Mothers: Problems and Goals", supra, note 174.
177 Hilary Hanafin quoted in S. Edmiston, Glamour Vol. 89 (November 1991) 235 at 276.
178 ABC Nightline, 2 John Street, New York, 10038, 5 February 1987, Transcript #1488 at 4.
179 Andrews, "Between Strangers", supra, note 83 at 240.
180 Noel Keane, speaking on "Happy Surrogate Moms - A Rebuttal", Geraldo, 2 John Street, New York, 10038, 29 September 1987, Show #7 at 5.
helping a childless, infertile couple, and in particular the commissioning woman, is that the "service" a carrying woman provides most unambiguously benefits the commissioning man rather than the commissioning woman, if any. If the commissioning man is single or partnered by a male, there is obviously no commissioning woman to be helped. Even when the commissioners are married, childless, and incapable of having a child, the commissioning woman might well be ambivalent about the arrangement. For what actually takes place when the pregnancy is initiated by insemination (as are the majority of cases) is that a man conceives a child by a woman who is not his wife and then expects his wife to rear the child. That a commissioning woman might be ambivalent about the proposed arrangement is revealed in the following account:

A lady in Wisconsin recently testified before state legislators. She burst into tears at the end of otherwise glowing testimony when a Senator asked her about her feelings. She sobbed hysterically, "The experience of looking through a catalog with my husband to find him a surrogate was so humiliating".

Keane himself has reported that a man's quest for a child through a preconception arrangement can be injurious to his wife, and that it can precipitate marriage breakdown.  

Although the poignant presentation of demand depicts carrying women as altruistic, family-centred women who are helping infertile, childless couples, and in particular the commissioning woman, is that the "service" a carrying woman provides most unambiguously benefits the commissioning man rather than the commissioning woman, if any. If the commissioning man is single or partnered by a male, there is obviously no commissioning woman to be helped. Even when the commissioners are married, childless, and incapable of having a child, the commissioning woman might well be ambivalent about the arrangement. For what actually takes place when the pregnancy is initiated by insemination (as are the majority of cases) is that a man conceives a child by a woman who is not his wife and then expects his wife to rear the child. That a commissioning woman might be ambivalent about the proposed arrangement is revealed in the following account:

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181 Kane, "A Division of Families", supra, note 167 at 108.
182 According to Keane, one commissioning man for whom he acted was obsessed with having a child, but his wife, who was rather sickly, seemed to care less, although she said all the proper things. The woman had diabetes and kidney problems and it was a full-time job for her to take care of herself. Nevertheless, her husband insisted that they wanted to find a surrogate mother. About two weeks [later, the] wife just up and left to live with a former boyfriend in Florida. She left a note saying that she could not stand the pressure being put on her to have a child. (Keane and Breo, supra, note 6 at 138-139.)
183 Keane describes another case in which he was involved: I heard from a hysterical wife. Seems like the husband and the surrogate mother went to a motel to attempt the insemination and decided, what the hell, why not try it the good old-fashioned way? They liked it so well, they ran off with each other. (Keane and Breo, supra, note 6 at 139.)
commissioning woman; the facts of the arrangements suggest otherwise. The "altruism" is rewarded by cash; the "family-centred woman" relinquishes one of her children who is also her other children's half-sibling and her parents' grandchild; and her "generosity" is not always desired by a commissioning woman. This is not to deny that some, or indeed most, carrying women are compassionate and empathetic. The point is to make clear that the facts of the arrangement might have been used to paint a much darker picture, for example, of a new form of prostitute who sells her body to provide a single man with a child, or a married man with what he is missing at home - childbearing ability. But the power of the incomplete and misleading picture of demand is such that carrying women have become, in the eyes of the public, "special ladies". Among the many effects of this portrayal is to marginalize those women who cannot easily be described as "altruistic angels", and arguably to silence those who regret having relinquished their children and do not feel "special" at all.

1.6.2.3 A More Complete Description of the Effect of Third Parties' Interests and Activities

The common depiction of the practice of preconception arrangements is misleading in yet another significant way: it is insufficiently broad in scope, for it takes no account of the

184 Consider the case of Diane Downs who was a carrying woman for Richard Levin's brokerage house, a case that brokers do not bring to public attention. Downs saw Levin on the television show Donahue, and decided to carry a child for the $10,000. A victim of repeated rape by her father, Downs was evaluated for Levin by a Kentucky psychiatrist who said of her, "There is considerable neurotic interplay, both in [Downs'] marriage and in [her] total adjustment to life". That report and a second were unfavourable so Levin sought a third evaluation from another state. "Diane was examined by a Phoenix psychiatrist at the request of the Louisville clinic ... Diane was accepted into the surrogate program". She enjoyed the pregnancy though she "craved attention" and was accused by her neighbours of neglecting her other three children. When she gave birth on 7 May 1982, she "seemed to have no trace of postpartum depression, no grief over giving up her child. She felt only joy and such a sense of well being". She relinquished her child on 12 May 1982. Almost exactly one year later, on 19 May 1983, she took her other three children, aged 8, 7, and 3, for a drive in the country and, one by one, she shot them. In June of 1984, she was convicted of murder and two counts of attempted murder. Ann Rule, Small Sacrifices (New York: Signet, 1988), at 21-30, 121, 126, 128-129, 132, 134, 140, 436.

185 See Corea, supra, note 156 at 325, where she discredits the view that the lack of protest by carrying women when they relinquish the children and afterwards entails that they are "happy".
career interests of third parties in the practice itself. An understanding of the interests and activities of brokers and infertility practitioners is essential to understanding the current practice of preconception arrangements, particularly as it is conducted in the United States.

Brokers

As described above,\textsuperscript{186} brokers operate publicly in the United States, where there are at least three who often gain media attention: Noel Keane (who had offices in Dearborn, Michigan; New York City; Indianapolis; and in a suburb of San Francisco); Bill Handel of the Centre for Surrogate Parenting, Beverly Hills, California; and Richard Levin of Surrogate Parenting Associates, Louisville, Kentucky. Their fees are substantial. For example in 1989, Keane charged $11,000\textsuperscript{187} and in 1993, Handel charged $16,600.\textsuperscript{188} Although they act as "middlemen", bringing the parties together, they are paid by the commissioners and therefore concentrate on their interests.\textsuperscript{189} Although brokers often claim they are helping infertile couples, they do not act on behalf of infertile couples who cannot afford their services. Preconception arrangements are a business and a sufficiently wealthy commissioning couple is a market opportunity. As Handel said when he described why he became a broker, "I realized that there was something going on there, 100,000 infertile couples and not enough babies to go around".\textsuperscript{190}

In this business, babies are products. Consider, for example, how Keane’s activities were described in a popular magazine:

By devising elaborate contracts and pulling together a supply of surrogates sufficient to meet the demand, Keane has revolutionized the production of babies just as surely as that

\textsuperscript{186} See Section 1.5.4.
\textsuperscript{187} "My office is paid $11,000, and that is a one time fee, and I work with the couple until they have a child no matter how long it takes". Noel Keane on West 57th, CBS News, supra, note 139.
\textsuperscript{188} Ragoné, supra, note 3 at 34.
\textsuperscript{189} Like most agencies, Keane’s primary focus was on the commissioners, since their resources fund the whole operation, and the agreements they sign "are drawn up pretty darn well to represent the couple’s interests". Frank and Vogel, supra, note at 206.
\textsuperscript{190} Woman’s Own, supra, note 138.
earlier son of Dearborn, Henry Ford, revolutionized the production of automobiles.191

The activities of brokers are those of business people. Brokers attempt to create and legitimize demand and to ensure adequate supply; they engage in damage control when public opinion of their activities begins to fall; they seek publicity and they advertise; they shop for jurisdictions in which they may operate; they lobby government for legislation favourable to their business; they seek new markets in other states of the union and abroad; and they identify their products, the children, as belonging to those who can pay to father them.

It is important to demonstrate these activities because they are significant in creating and perpetuating the common picture of demand and supply, and they are instrumental in fostering the notion, that the procreation of human beings might honourably become the production of human beings.

For brokers, the portrayal of the arrangements as legitimate is essential. To place the practice of preconception arrangements in the best possible light, brokers continually reinforce the common depiction. Their promotional literature stresses the plight of "the infertile couple" and "the childless couple", thus seeking to legitimize demand for preconception arrangements.192

Yet, the brokers themselves are aware that the couple will not necessarily be childless; for example, their own application forms ask prospective commissioners to give the names and ages of the children they have had with each other or in previous marriages.193 Brokers do not rely exclusively on sentiment to justify their clients' desires; they also stress that participation in a preconception arrangement is, in fact, a "right". According to Keane, society has a moral obligation to the infertile couple, [and] it hasn't addressed these issues for the longest time. Adoption doesn't solve the problem anymore and if somebody has this

191 "Call Michigan Lawyer Noel Keane", supra, note 172 at 93.
192 Keane's brochure explains how he and his wife suffered from secondary infertility. "Although wife Kathy eventually became pregnant, the experience gave him both insight and sympathy for childless couples". "Alternatives for Childless Couples", promotional brochure available upon request. Similarly, Levin's brochure focuses on the suffering of the infertile. Supra, note 137.
193 See, for example, the application forms available from Levin's Surrogate Parenting Associates and Handel's Center for Surrogate Parenting.
right, this constitutional right, it doesn't seem to me that it can be an immoral right that he has.\textsuperscript{194}

A commissioner might exercise the "right" to rear a child through a broker without first investigating adoption, provided that he has sufficient funds. According to one commentator, only 50 percent of commissioning couples

may have looked into adoption - so strong is their desire for a child that, at least partially, is biologically their own. As long as they can afford the fee, which generally ranges upward of $25,000, it is unlikely that any surrogate parenting group will turn them away.\textsuperscript{195}

Consistent with this "rights" approach, brokers do not screen prospective parents to ensure that the children will be transferred to good homes. As Levin said, "People have certain intrinsic rights and the ability to procreate is one of them. You or I don't have the right to tell people that they can or cannot have a child".\textsuperscript{196} Similarly, Keane told a CBS television news program,

Keane: I may take most couples who walk in the door and I would stand on that position, because they have a right to a family, just as myself or anybody else.
Kroft: I mean, I'm single. If I told you, "Look Noel, I'd like to have a child". You can fix it for me?
Keane: Sure, if I was single and wanted a child, I'd do it for myself. I don't have any problem with that.
Kroft: What else could you do for me? Could you get me a male child?
Keane: Sure.\textsuperscript{197}

Provided always that he can pay.

In this way, the brokers' rhetoric alternates between eliciting sympathy for childless couples unable to have children themselves or by adoption, and stating that commissioners are entitled, as of right, to have a child. They rely on the common depiction of commissioners' characteristics and desires to create a climate of public acceptance for their activities and, when criticized, assert that commissioners are exercising their constitutional rights.

\textsuperscript{194} Keane speaking on ABC Nightline. \textit{Supra}, note 178 at 5.
\textsuperscript{195} Gini Kopecy, "Wombs for Hire", 5 Omni (June 1988) at 18.
\textsuperscript{196} Ibid.
\textsuperscript{197} \textit{Supra, West 57th}, note 139 at 4-5.
Brokers also rely on the common depiction of carrying women, which helps them both to recruit the women and to reassure the commissioners. In their promotional literature, brokers refer to carrying women as "special" and "super", perhaps to attract women who desire so to be known and to convince commissioners that, unlike Mary Beth Whitehead, the carrying women will relinquish the child. Keane's post Baby M brochure claims that

A surrogate is not a superwoman, but she is a super person, motivated to help another woman in an extremely sensitive situation. In most cases, she is married and knows the joy of having her own children and wants to help another woman to know that joy. She values her own family, her own life, and the benefits the payment can bring to her own children.198

Handel's firm describes the women similarly:

Other criteria for participation in our program include her intelligence, stability and sense of self-fulfilment. She understands and believes from the moment of conception, the child she is carrying was conceived so that a childless couple would have a family. The true genesis of the child is it's [sic] creation in the minds and hearts of the intended parents. The typical Surrogate Mother has a great deal of compassion for the plight of the infertile couple and is proud to be able to bring a child into their lives.199

Whether the women actually live up to the description is not something the brokers will warrant. Keane's agreement with the commissioner, which as we have seen200 is publicly available (unlike, for example, Handel's), does not promise that the carrying woman will relinquish the child. Nor do the brokers uniformly ensure from the outset that the women are likely to be capable of doing so. Keane was criticized for inadequately screening prospective carrying women. He apparently turned no one away regardless of the results of

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198 "More About Surrogate Mothers", Promotional Brochure from Keane's Infertility Center of New York, 14 East 60th Street, Suite 1204, New York 10022.
199 "Surrogate Mother Program", Centre for Surrogate Parenting Inc., 8383 Wilshire Blvd., Suite 750, Beverly Hills, California 90211.
200 See supra, Section 1.4.2.
the psychiatric investigation to which the carrying women were submitted under the terms of the arrangement.\textsuperscript{201}

By contrast, Bill Handel claims that no carrying woman "used" by his firm has ever refused to relinquish the child. This might be the result of his tactics; despite how glowingly he describes them, he apparently threatens and intimidates each new recruit. According to one such woman, he said, "If I changed my mind ... he would drag me through the courts, sue me, and take everything I had. He said he would buy me a dog and let my kids fall in

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201 In the Mary Beth Whitehead case, the psychologist, Joan Einvohner, said in her written report that Mary Beth "expects to have strong feelings about giving up the baby at the end". But Keane did not refuse to make the arrangement between Mary Beth Whitehead and Bill Stern. Keane is criticized also for encouraging women to become pregnant almost as soon as they inquire, without considering the physical health of the women. An article in \textit{New Republic} describes one carrying woman's experience in Keane's firm:

A 25-year-old woman from Michigan who is suing Keane under the pseudonym Jane Doe says that when she first came to his office, she wasn't convinced she wanted to [be a surrogate mother enter a preconception arrangement]. She says Keane took her to a room where a childless couple was sitting. For an hour and a half, Doe talked with the couple, while holding her six-month-old son. "They looked like they hadn't eaten in six months and my baby was a hot fudge sundae", Doe says. She put aside her own doubts about her physical and mental readiness and, after several phone calls from the childless couple, decided to [enter into a preconception arrangement].

A review of Jane Doe's medical history would have shown that she recently had an operation for cervical cancer. After the operation, Doe says her doctors warned her not to get pregnant for at least two years. At the age of 25, she had also had five miscarriages out of nine previous pregnancies. What did the doctor working for Keane say about that? According to Doe: "Good, you're really fertile".

Doe endured what can only be described as a harrowing pregnancy. When artificial insemination was scheduled to begin, Doe wasn't fertile because she was still nursing her son. She says Keane's doctors gave her drugs to induce ovulation. Once pregnant, Doe says she had to go to the hospital five times and spend weeks at a time on her back. Twenty-two weeks after conception, she delivered a baby that died one-and-a-half hours after birth. Doe never received the full $10,000 payment for delivering a live baby. Keane initially offered her $1,000 - the standard amount for a miscarriage, which she refused. After seven months of haggling, Keane paid her $7,000.

Gladwell and Sharpe, "Baby M Winner", \textit{supra}, note 59 at 15.
love with the dog and then he would kill the dog".  

Handel's firm claims that it screens prospective carrying women carefully and rejects 95 percent of applicants. Whether in fact these brokers do turn away willing women, their statement that they are very selective is useful in fostering the image of carrying women as "special".

Despite what brokers might do privately, they actively reinforce the common depiction of supply by describing carrying women in glowing terms. Further, they tend to minimize the harm to carrying women of participation and to emphasize the benefits.

Consider, for example, Levin's description of a carrying woman who gave birth to twins,

Andrews, "Between Strangers", supra, note at 87. Further Mr. Handel told carrying women that though the arrangements are not enforceable at law, he will sue them in tort for intentional infliction of emotional distress. He made each carrying woman sign a statement that she understands the baby is the commissioners' child and she is their last resort for a child; and that she and her husband understand if she tries to keep the child, they will have intentionally inflicted emotional distress on the commissioners. Lori B. Andrews quotes him speaking to a prospective carrying woman thus:

If you change your mind, I will nail you to the wall ... I will sue outside of the contract for destroying two human beings in a lawsuit that will probably garnish millions of dollars in judgments and will not be dischargeable in bankruptcy. I will follow you the rest of your lives. You will not have a job, car, or house that I will not go after. It will be the most expensive child you've ever decided to keep.

Andres, "Between Strangers", supra, note 83 at 87. Apparently, the intimidation of women does not stop there. When one carrying woman sought to keep the child the unnamed broker threatened me. He said they'd make things really hard for me to keep my baby. He didn't get explicit. But I knew that he had threatened other surrogate mothers ... Another surrogate said this guy could make your life absolute hell. He'd have a battery of lawyers against you. He'd make sure you had to pay every penny back or get you into jail if you couldn't pay it back fast enough. The broker told me that he had a hunch I was on welfare and that he was going to check the county welfare records and report me for trying to earn money as a surrogate if I backed out of the deal.


"Surrogate Mothers of Invention", Los Angeles Herald Examiner (23 May 1988).
one of whom died. Apparently the woman insisted that she arrange and pay for the child's funeral and burial. Rather than viewing this as a maternal reaction to neo-natal death, Levin claims that the carrying woman was motivated by concern for the commissioner.

She wanted the natural father and his wife to be free to experience their joy and not to dwell on the sad aspects of the case ... That's the kind of outcome you can get if you structure things and screen people properly.\(^\text{204}\)

Similarly, Dr. Philip Parker, who, as stated above, assessed the contractual competence of prospective carrying women for Keane's Dearborn firm "for a flat fee of $250",\(^\text{205}\) minimized their grief reactions in his 1984 longitudinal study of 30 carrying women. He wrote,

After delivery, the surrogate mothers generally expressed transient grief symptoms which were highly variable. One stated that she had almost no consciously experienced feeling of loss. Some described varying degrees of crying and sadness for several weeks. One surrogate experienced crying and sleeplessness for about one month. Another was crying and tearful and had difficulty sleeping for about five months beginning one month after delivery. Of importance in this last case is the fact that she also lost a close family member during the pregnancy.

Some surrogates stated that they felt most of their sadness in connection with the loss of the relationship with the couple rather than the loss of the baby.\(^\text{206}\)

But the experiences of this same group of women are described differently by Nancy Reame, who volunteered for Keane from 1981 to 1985\(^\text{207}\) and assisted in the research.

Nearly all the surrogate mothers confessed that they had underestimated how difficult it would be to relinquish their babies. The symptoms of separation included uncontrollable sobbing, sleep dysfunction, aching arms, profound grief and the inability to look at any baby for several months without experiencing sharp, emotional pain. As a group ... the surrogate mothers lacked adequate legal protection. This was in

\(^{204}\) Quoted in Kopecky, \textit{supra}, note 195 at 143.
\(^{205}\) Gladwell and Sharpe, \textit{supra}, note 59 at 16.
\(^{206}\) Parker, "Longitudinal Pilot Study", \textit{supra}, note 60.
\(^{207}\) Gladwell and Sharpe, \textit{supra}, note 59 at 16.
contrast to the adopting couples, who retained skilled lawyers to draw up contracts which satisfied their needs.208

While they might minimize the harm to women, brokers and their staff tend to stress the "benefits" of participation. According to Hilary Hanafin,

It is not unusual to hear that a surrogate has decided to go back to school and finish her degree, or put a downpayment on a house she's always wanted. I think it's a combination of finances and of also having achieved something unique that really gives that boost, that transition from being a housewife to attacking another career.209

Hanafin has conducted research on carrying women, which apparently demonstrated "a lack of psychopathy in surrogates and no evidence of regret". (It is not clear whether Hanafin included in her study the well-known case of Diane Downs, who relinquished a child and almost exactly one year later murdered one of her remaining children and attempted to murder the other two.)210

In addition to relying on and emphasizing the common portrayals of demand and supply, brokers appear to engage in damage control activities when the media are drawn to a case that deviates from the commonly presented pictures. For example, in the Baby M211 case, the commissioners sued the carrying woman because she refused to relinquish the child to whom she had given birth. The Baby M trial lasted seven weeks, from January to March 1987, and according to critics of the practice interviewed at the time, considerably damaged the public acceptability of the practice.

"I haven't heard any outpouring of people who think that this might be a good thing", a professor of legal issues in pediatrics at the Yale Medical School, Angela R. Holder, said, "I think more people are against it than before".

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209 Lasker and Borg, supra, note 165 at 117-118.
210 Summary of Hilary Hanafin's "Reassessing Human Bonding", summarized by the Center for Surrogate Parenting in its "Catalogue of Position Papers on Surrogacy". For a brief description of the Downs case, see supra, note 184.
"Only in the last month has the full impact of surrogacy been understood", William Pierce, president of the National Committee for Adoption and a foe of surrogacy said, "Many people who saw surrogacy as ethically neutral and socially neutral and legally neutral are having second thoughts".212

Probably as a consequence of the Baby M trial's bad publicity, a number of articles extolling the practice were published in diverse newspapers, copies of which are routinely sent to prospective commissioners by the Center for Surrogate Parenting in Beverly Hills, California.213 Likewise, when the case was appealed and the Supreme Court of New Jersey condemned preconception arrangements in February 1988, brokers attempted to remedy the damage. On 23 May 1988, the Los Angeles Herald Examiner contained an article entitled, "Surrogate Mothers of Invention: Unlike Baby M. Most Cases End Happily", in which Handel's firm was again featured.214

These Baby M damage control exercises were not limited to the print media. Noel Keane appeared on television during the trial and again when the appeal court judgment was rendered. On 5 February 1987, he said on ABC Nightline,

But for that agreement, this child would never have been conceived. And certainly if she found out that she made a mistake at the end, who should be more harmed? The father and infertile wife who brought [sic] this child, and the only reason this child was conceived, or this woman who now changes her mind?215

On the day that the New Jersey Supreme Court delivered its judgment, harshly critical of preconception arrangements, Keane attempted to minimize the effect of the decision on the practice:

212 "Seven-Week Trial Touched Many Basic Emotions", The New York Times (1 April 1987) at B2.

213 In December 1986, the San Diego Tribune ran an article entitled, "Surrogate Mothers: Not all Regret or Renege on the Delicate Pact"; on 1 January 1987 the Los Angeles Times published "Surrogate Mother Extols 'Joy of Life' in Novel Experience". Both describe William Handel and his practice. In June 1987 an article featuring Betsy Aigen's firm appeared in McCall's, entitled, "Searching for a Very Special Woman", supra, note 164.

214 "Surrogate Mothers of Invention", supra, note 203.

215 Supra, note 178 at 5.
Koppel: ... Attorney Noel Keane who's with us now ... helped set up the Baby M contract, as well as some 200 other surrogate mother arrangements. He is known as "the father of surrogate parenting". Mr. Keane, you heard Mary Beth Whitehead refer to today's New Jersey Supreme Court decision as, in effect, discrediting surrogacy. I take it you disagree.

Keane: I think I do. I mean, certainly the case didn't go the way we wanted it to, but overall we can look at the picture and say that surrogate parenting works, and it solves a real need in this country.\textsuperscript{16}

This ability to gain media attention is useful to brokers because it enables them to attempt to restore the common portrayal of the practice that is so essential to the operation of their business. Media attention is beneficial also because it helps defray the costs of advertising for commissioners and prospective carrying women. According to two commentators,

A lot of potential surrogates hear about agencies through the media. Noel Keane and Infertility Associates International [a firm operated by a Washington woman, Harriet Blankfield] get enough self-motivated women through free publicity - articles about the agencies in the news media, appearances on television, etc.\textsuperscript{217}

Although the Whitehead-Stern arrangement brokered by Keane went notoriously awry, "inquiries from couples seeking [Keane's] help ... quadrupled in the wake of the Baby M publicity".\textsuperscript{218}

Yet, brokers are not totally reliant on media attention for publicity. They advertise in newspapers and college newspapers, both in the initial struggle to become known\textsuperscript{219} and even when their brokerage house is "established".\textsuperscript{220} As has been discussed,\textsuperscript{221} Noel Keane

\textsuperscript{16} ABC Nightline, Show #1748, 3 February 1988 at 4.
\textsuperscript{17} Frank and Vogel, supra, note 162 at 214.
\textsuperscript{18} "Call Michigan Lawyer Noel Keane", supra, note 172.
\textsuperscript{19} Frank and Vogel, supra, note 162 at 215. Indeed, Noel Keane placed an ad in 1982 in two Toronto newspapers "seeking prospective carrying women". In response, the then Ontario Community and Social Services Minister, Frank Drea, "threatened to 'knock the bows off (Mr. Keane's) loafers'" if he tried to continue operating in Ontario. He vowed Ontario would not become the spawning ground for a "cottage industry" where babies would be sold "'primarily for the profit of an American solicitor'". Regina Hickl-Szabo, "Baby Broker: Arranging Surrogate Motherhood 'Lot of Fun'", Globe and Mail 7 September at 4.
\textsuperscript{20} Frank and Vogel, supra, note 162 at 215.
\textsuperscript{21} See text above at note 170.
has created a recruitment video entitled "A Special Lady", designed to increase the number of carrying women and commissioners who deal with him. According to Ragoné, advertising is considered [by brokers] to be one of the most important means by which to attract surrogates and couples and to increase revenue, and it is made the subject of serious study by most programs ... The opponents of surrogacy [know] that prohibition [of advertising] would effectively eliminate commercial surrogacy since without it, few couples or surrogates would know where to locate or how to contact these programs.222

In addition to advertising, brokers, like other business people, lobby government for favourable legislation and search for jurisdictions in which they may legitimately operate. Keane worked with Richard Fitzpatrick, a Michigan State Representative, "to attempt to convince legislators to adopt a special surrogacy law".223 Levin and Blankfield testified before the House of Representatives Subcommittee on Transportation, Tourism and Hazardous Materials in October 1987, on a bill that would have made paid and commercial preconception arrangements criminally illegal, and would ban advertising. They both argued the great need and desperation of childless couples. They claimed that the best legislation would be the regulation of brokers rather than a ban that would leave consumers and suppliers without the screening and other protection offered by brokers.224 In 1989, Handel’s firm announced it had been asked by a California legislative task force to provide model legislation for study by the committee.225 Brokers view regulation as necessary for the growth of their businesses. Handel would like to expand his market to include commissioners who are unmarried and fertile but he aims first "to make surrogate parenting as palatable to the general public as possible. We are trying to get legislation passed".226

222 Ragoné, supra, note 3 at 32.
224 Testimony of Harriet Blankfield and Richard Levin in Hearing on a Bill to Prohibit Certain Arrangements Commonly Called Surrogate Motherhood, and for Other Purposes, supra, note 125 at 137-139 and 111-113. With regard to Levin’s testimony that his firm engages in careful psychiatric screening of carrying women, compare text in note 184.
225 Center for Surrogate Parenting Inc., 1:1 Newsletter (Summer, 1989) at 2.
226 Quoted in Andrews, "New Conceptions", supra, note 144 at 211.
In addition to attempting to create a favourable legal climate for their business activities, brokers are apparently willing to shop for a forum in which they may pursue their activities. To carry on business when Michigan passed legislation designed to close his agency, Keane opened an office also in Nevada.\textsuperscript{227}

Brokers have also looked for new markets abroad but have had little success. Harriet Blankfield of Washington, D.C., opened a satellite office in Surrey, England in 1984. When she announced that her goal was to become a multinational enterprise and that her British operation was fully functional, she provoked outrage in Britain.\textsuperscript{228} When, partly in a reaction thereto, the government made the activity of brokers criminally illegal, Blankfield’s operation closed its doors.\textsuperscript{229}

Keane’s foreign enterprise fared no better. On 1 October 1987, he established a firm called United Family International in Frankfurt, which would refer would-be commissioners to Keane’s Michigan office. But German women from a Frankfurt women’s health centre quickly formed a broad coalition with women from an international feminist organization, churches, political parties, associations and trade unions to denounce Keane’s activity.\textsuperscript{230} On 7 January 1988, a West German court ordered the immediate closing of the office on the grounds that it violated West German adoption laws and contravened basic moral principles.\textsuperscript{231} Thus, by attempting to expand their operations, brokers have demonstrated that, like other business people, they will continually seek new markets for their products.

Clearly, brokers transform procreation into production. Even more significantly, their business serves to make irrelevant to the determination of who will rear a child, the

\textsuperscript{227} West 57th, CBS News, Show #163, 11 March 1989, at 6.
\textsuperscript{228} "Three More Surrogate Babies Expected", The Times (22 May 1984); "First Surrogate births are on the way", The Guardian (22 May 1984).
\textsuperscript{229} See above, Introduction, note 30.
central activity of women in procreation. This fact is most obvious in an examination of Handel's firm.

As mentioned above, the Center for Surrogate Parenting offers three means to commission children. The first two, genetic-gestational and exclusively gestational arrangements, are the subject of this study. The third does not sever gestation from rearing and, therefore, has not hitherto been discussed. This third method is "ovum donation". It consists of a woman submitting to egg extraction for a fee (therefore it is not "donation"). The egg is fertilized in vitro using the commissioning man's sperm. Then the embryo is transferred into the commissioning woman's uterus for gestation. If the procedure succeeds, the commissioning woman will give birth to a baby who is genetically related to her husband and the egg seller; the commissioners intend to rear the child.

Given these three ways in which commissioners can buy Handel's "services", how does his firm determine who will be the rearing mother? Handel's practice is designed to ensure that the social mother (the one who rears the child) is not determined with reference to her bodily process of either ovulating an ovum that became the child, or of gestating that child, or both. According to his methods, the social mother is determined by first discovering which man is genetically related to the child and then by looking for the man's wife or partner. Thus, Handel's practices entail that the mother of a child is not identified by biology at all, but by her social relation to the sperm contributor who originally had sufficient funds to set the process in motion. The experience of one genetic-gestational woman illustrates the effect of this commercial method of determining maternity:

The last day I was in the hospital, the gynecologist for the surrogate company came into my room. I was sitting there crying. Alice [the commissioning woman] was holding my baby. She wouldn't let me hold him. She said to the doctor, "By the way, I'm Harry's wife". And he said to her, "Oh, I'd like to congratulate you".233

The production of children entails that a child's rearing parents be identified by tracing contributions of money and sperm irrespective of what a particular woman has endured to bring the child into the world.

232 See, supra, Section 1.5.4.1.
233 Patti Foster quoted by Corea, supra, note 156 at 330.
By generating and legitimizing demand and ensuring supply through reliance on misleading portrayals, which they act quickly to restore when attacked; by seeking publicity and advertising; by shopping for hospitable jurisdictions in which to operate; by lobbying government for favourable legislation; by seeking new markets abroad; and by determining motherhood, not biologically but through social status, brokers make a business of babies. In all these ways, brokers have industrialized procreation.

**In Vitro Fertilization Practitioners**

Apart from brokers, there is a second group of people whose interest in preconception arrangements is significant and, therefore, worth assessing. Although only four Canadian infertility clinics undertake embryo transfer in preconception arrangements, the practice frequently takes place in the United States. Arguably, medical practitioners conducting IVF might encourage the practice of exclusively gestational arrangements for three reasons related to self-interest; namely, to increase the overall success rates of their IVF programs; to increase the opportunities to conduct research; and to increase the market for their services. We shall consider each of these in turn.

IVF is a technology with a high failure rate. In 1993, the Royal Commission on New Reproductive Technology summarized statistics collected from 215 Canadian and U.S. IVF programs. These data showed that for every 100 IVF cycles initiated there were only 13 live births. The United States Congress Office of Technology Assessment hypothesized that clinics that succeed most often might become victims of their own success.

It may be difficult for the most expert IVF programs to sustain their success rates as their good reputations attract patients with the most difficult cases of infertility (e.g., unexplained infertility). Similarly, an increase in the average age of patients would likely trim an IVF program's success rates.

To increase the success rates by which they are evaluated, IVF practitioners might be tempted to have as patients women who are more likely than their average patients to carry a

235 "Proceed With Care" *supra*, note 101, Figure 20.1 at 512.
transferred embryo to term. The practice of exclusively gestational arrangements furnishes such a group of women. In the first instance, gestational women tend to be much younger than commissioning women. Secondly, they participate on the basis of their demonstrated ability to carry a child to term. Thirdly, an embryo is transferred into their bodies, which have not undergone the hormonally-induced egg extraction process that may impair the success of IVF.

Not surprisingly, IVF performed on young, fertile and drug-free carrying women has been reported to be more successful than when performed on older women believed to be infertile whose natural hormone cycles have been chemically altered. A Cleveland IVF practitioner stated,

Our initial results are encouraging in that the six pregnancies reported here occurred in a total of 20 patients [i.e., carrying women], undergoing 33 cycles, and 27 embryo transfers. This provided a 22% conception rate and an 18.5% ongoing pregnancy rate with an average of only 2.3 preembryos per transfer.

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237 Leon A. Sheean et al., "In Vitro Fertilization (IVF) - Surrogacy: Application of IVF to Women Without Functional Uteri", (1989) 6:3 Journal of In Vitro Fertilization and Embryo Transfer 134. In their report of six cases, the commissioners ranged in age from 26 to 37 years and the average age was 30.6; the carrying women ranged from 22 to 29 years, with the average age 25.3 years. Results of clinical experience reported by a second researcher, Wulf Utian, revealed that the "commissioners ranged in age from 26 to 45 years with 58% over 35 years. By contrast, the carrying women were all less than 35 years of age". Wulf H. Utian et al., "Preliminary Experience with In Vitro Fertilization - Surrogate Gestational Pregnancy" (October 1989) 52:4 Fertility and Sterility 633. Bill Handel and Hilary Hanafin reported that the 22 commissioners ranged in age from 33 to 47 years of age. The carrying women were all younger than 32 years of age except one who was 36 years old. William Handel and Hilary Hanafin, "Success Rate of Surrogate Gestational Pregnancies Using In Vitro Fertilization Donor Oocytes", presented at the Sixth World Congress on IVF, Jerusalem, Israel, 6 April 1989.

238 In Sheean's report, the gestational women were required already to have one or more young children. Handel and Hanafin reported that the gestational women were only those "who had successful, uncomplicated pregnancies and who had children of their own". Handel and Hanafin, supra, note 237 at 2.

239 Paulson, supra, note 99. See also Garcia, supra, note 99 at 67.

240 Sheean et al., supra, note 237 at 136.
In another report, Handel and Hanafin claimed that 22 embryos were transferred after IVF, and seven children were born alive.241 This success rate of 31.8 percent using young, fertile, drug-free women as carriers is significantly higher than the 11 percent reported by the average U.S. clinic, and the 15 percent reported by the most expert clinics, all of which tend to practise on older women believed to be infertile and who receive hormone stimulation.242 As Handel concluded before an international assembly of IVF practitioners, "It is clear that placing embryos in young women with unstimulated cycles results in the most favourable situation for pregnancy. The number of gestational surrogate procedures is increasing dramatically".243 By practising IVF - an "infertility treatment" - on young, fertile women, IVF practitioners are likely to claim an increase in the "success" rate of this hitherto largely unsuccessful practice. In the process, IVF practitioners claim success for what nature could have achieved without interference: to render the young, fertile women pregnant.

A second possible advantage to IVF practitioners of exclusively gestational preconception arrangements is that they enable practitioners to conduct research on IVF itself. Practitioners cite the potential for increasing knowledge, and thus arguably also advancing their career interests, as a benefit of gestational arrangements. According to one IVF practitioner,

> These patients [the commissioners and the carrying women] also provide a unique opportunity to examine several facets of human reproduction. Of particular clinical interest is the nature of the embryo-endometrial relationship which permits implantation.244

A third advantage of the practice of exclusively gestational arrangements is that it provides a new market for practitioners’ services. IVF was originally developed to transfer embryos into the woman from whom the ovum originated. The original practice required that the woman have functioning ovaries and a uterus and that she otherwise be capable of carrying a child. When, however, the original technique is altered by transferring the embryo into a second woman, the group of people who might seek IVF is considerably increased

241 Handel and Hanafin, supra, note 237 at 6.
242 OTA, supra, note 25 at 295.
243 Handel and Hanafin, supra, note 237 at 6.
244 Sheean et al., supra, note 237 at 136.
not only to [include] hysterectomized women, but also ... those
with unexplained and recurrent abortion, congenital uterine
anomalies, severe uterine abnormalities after diethylstilbestrol
administration, or uterine disease or scarring that precludes
successfully continuing a pregnancy to term.245

This increased group of women could, according to the President of the Pacific Coast
Obstetrical and Gynecological Society, be attended "with the combined specialty services of
geneticists, gamete biologists, reproductive endocrinologists, perinatologists, and
reproductive surrogates".246

IVF practitioners argue that this augmented group of candidates for their services
require their services as a matter of medical necessity, and present the modified form of IVF
as a form of medical treatment. According to Patrick Steptoe, who assisted in the birth of
the first child conceived by IVF, "There are some couples who need surrogacy on very
strong medical indications".247 Dr. Richard Marrs, an IVF practitioner who works with
Handel's firm, said, "There are some very good reasons why the use of gestational
surrogates is absolutely necessary for certain women".248 In the public hearing of the Royal
Commission on New Reproductive Technologies in Vancouver, Dr. Christos Zouves
(formerly of the IVF program at Vancouver's University Hospital and now in California at a
reproductive technologies centre) was of the same view in his reply to questions put by the
royal commissioners. In an exchange, he suggested that not only are exclusively gestational
arrangements medically indicated, the "treatment" is offered primarily by his team of
physicians and scientists:

Dr. Zouves: ... I believe that there is a medical indication for
surrogacy in certain patients who have medical conditions which
make them unable to carry a pregnancy. So those would
certainly be patients that we would look to offering surrogacy to
in the first instance.

245 Utian et al., supra, note 237 at 638.
246 E.C. Sandberg, "Only an Attitude Away: The Potential of Reproductive Surrogacy"
248 Quoted in "Couples' Own Embryos Used in Birth Surrogacy", The New York Times
(12 August 1990) at A1.
Dr. Jantzen (Royal Commissioner): I'm sorry, I don't understand. How could you offer surrogacy? I would have thought it would have to be a woman who would offer surrogacy.

Dr. Zouves: Given that there would be medical interventions required along the way, I was using the term "us" in that context. It would obviously have to be a woman carrying this pregnancy for another woman ...249

Not only do some IVF practitioners claim that certain women need to have their genetic material brought to birth by another woman (and thus require the practitioners' services), but some proponents also claim that the arrangement is in the interests of the child. According to Bernard Dickens,

"one now finds some physicians speaking about the gestation of choice, that is they are saying surrogacy can be positively good for the individual child". [Bernard Dickens] said. This would include cases where prospective mothers have diabetes. Diabetes does not necessarily preclude pregnancy, but a mother's diabetes could damage a fetus.250

The President of the Pacific Coast Obstetrics and Gynecological Society has also professed a concern for the health of the child in encouraging the practice of exclusively gestational preconception arrangements:

Consider the woman with chronic hypertension, renal disease, or inflammatory bowel disease or others who are condemned, through poor placental perfusion and inadequate fetal nutrition, to produce underweight, undernourished, and marginally healthful fetuses, many of whose growth and development will continue to lag through adulthood. Must we insist that these fetuses be placed at risk for being ill-born and enfeebled for life? They could be wellborn, healthy, and whole simply by being allowed to grow within another woman’s uterus.251

249 Royal Commission on New Reproductive Technologies, Transcripts of Public Hearings in Vancouver, 26 November 1990. The argument that preconception arrangements constitute medical treatment is analyzed at length below in Chapter Two, Section 2.5.


251 Sandberg, supra, note 246 at 1443.
Sandberg rhetorically asks why such women should be "consigned to the abusive production of a thin, pathetically undernourished and possibly embryologically damaged infant"\(^{252}\) when "a healthy, fat, bubbly baby" is possible through the "specialty services" of "surrogate carriers" and medical practitioners. Not only does Sandberg think it wise for such women to avail themselves of his colleagues' services, but he argues that if such women do not, they should be punished by the state:

> should not the woman be held criminally accountable who knowingly permits herself to produce a sickly child whose entire life will be encumbered by imperfections of health and structure when the prevention of such was possible and available?\(^{253}\)

In Sandberg's opinion, a large number of women ought legally to be required to delegate their procreative role to the paid specialists. As he says, "No one need be denied. What a wonderful time in which to live".\(^{254}\)

The practice of exclusively gestational preconception arrangements has the potential to advance the interests of IVF practitioners in increasing the low IVF success rates, the opportunities for IVF research, and the market for their "specialty services".

In summary, this section has demonstrated that by failing to attend to the significant interests of brokers and infertility practitioners, the common depiction of the practice of preconception arrangements is incomplete and misleading.

1.7 Conclusion

This chapter has defined the practice of preconception agreements, estimated its incidence, described its nature and participants, stated what is known about their motives, and described and criticized the common portrayal of the practice.

To assist the legal and ethical analysis that follows in subsequent sections, preconception arrangements were defined on the basis of where the ovum originated, whether the carrying woman was paid, and whether a broker was involved.

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\(^{252}\) Ibid. at 1446.
\(^{253}\) Ibid.
\(^{254}\) Ibid.
Attempts to learn the incidence of the practice revealed the paucity of information on the subject and thus the need for research. What is clear is that the practice is growing, particularly in the United States where an estimated 50 percent of agreements are conducted by commercial agencies and where approximately 8,000 children have been born since 1978 as a result of the practice.

The exact nature of informal, oral agreements is not known, although some commercial brokers' arrangements are available. The agreements drafted for brokers Levin and Keane were introduced, and Keane's brokerage agreement was described in detail.

Demographic data regarding the participants revealed that carrying women and their partners, if any, tend to be younger, much less educated, and less affluent than commissioning couples. The motivations of carrying women, which we have discussed so far, have been identified by a proponent of the practice to include the desire to earn money, to give the "gift" of a baby, and to gain other advantages. Commissioners' motives can be varied. Some might wish simply to have a child to rear; others might want to be sure that the child is genetically related to the commissioners. Commercial brokers and physicians who facilitate exclusively gestational arrangements appear to be motivated to earn money, to fulfil the desire of the commissioners and to gain public attention.

The common picture of the practice is that babies are sought by involuntarily infertile, childless, married couples who are likely to remain married and who cannot find a child to adopt; and that babies are supplied by women who wish to relieve the commissioners' suffering, women who are altruistic, sisters of mercy. This depiction was criticized as being incomplete and misleading. Demand for babies is met for persons who do not fit the politically persuasive description. The characterization of the women who supply babies does not accord with the facts of the transaction. Further, the common depiction of preconception arrangements fails to include any discussion of the considerable interests of commercial brokers and, to a lesser extent, infertility practitioners in promoting the practice.
CHAPTER TWO
PROPELLENTS THEORETICAL JUSTIFICATIONS FOR LEGAL ENDORSEMENT OF PRECONCEPTION ARRANGEMENTS

2.1 Introduction

This chapter begins the detailed examination of the contract model of regulation of preconception which shall be undertaken in this and the following two chapters. Chapter Two examines the arguments of the proponents on their own terms to determine whether the arguments are compelling and concludes that they are not. It closes by introducing the contract model of legal regulation on which all the proponents rely and a draft statute which embodies this model. Chapters Three and Four consider in greater depth the theoretical underpinnings of the proponent's arguments. Chapter Three elucidates the proponents' and the contract model's unarticulated and inaccurate assumptions about the nature of personhood. By providing a richer understanding of personhood, the chapter shows how the practice of preconception arrangements is harmful. Chapter Four examines the ideologies which the proponents share - the ideologies of patriarchy, technology and the market - within which the proponents seek to use the contract model. A critique of these ideologies demonstrates how the practice is harmful in yet other ways, how it does not merit social and legal endorsement (but, on the contrary, discouragement) and how the contract model is both inapplicable and inappropriate.

This chapter, Chapter Two, examines the proponents' arguments on their own terms. The proponents' arguments in favour of the practice are both deontological and consequentialist. The deontological argument is that the practice represents an instance of the exercise of individual autonomy which is a good in and of itself. The principal consequentialist arguments are three in number: that the practice promotes equality, maximizes welfare and alleviates suffering. These arguments as articulated by their main proponents will be described and then shown each to be unconvincing. This chapter will close by examining the contract model of legal regulation on which all the proponents rely and a draft statute which embodies this model, to demonstrate that the effects of this form of legal regulation of preconception arrangements are serious and potentially seriously harmful.

2.2 The Deontological Argument: The Practice is an Exercise of Autonomy

The argument from autonomy, understood as individual self-government, holds that
the individual is the ultimate entity in society and that individual autonomy is per se good. The argument derives from classical liberalism which viewed the good of individual self-government as endangered by the power of the state. Liberal theorists such as Hobbes, Locke and Rousseau claimed that since the individual is prior (both in terms of time and significance) to the state, the state is a creation of individuals and its powers are limited to those granted it by individuals so that they might better realize their freedom. According to these theorists, the purpose of the state is to enhance individual freedom. Just as individuals may consent to civil government to promote their autonomy, so may they consent to limit their freedom by means of contract to achieve an end thought desirable by both parties. The decision to consent is an act of autonomy provided three conditions are met: the decision is voluntary, informed and not harmful to the autonomy of third parties. 1

In the context of preconception arrangements, the autonomy argument shares with its classical liberal antecedents the belief that the state should not impose upon citizens a preferred way of life but should leave them as free as possible to choose their own values and ends consistent with a similar liberty for others. In private matters, understood to include agreements concerning reproduction, the state's role is merely procedural: to interpret and enforce the rules to which individuals have freely consented. It is not for the state to judge the substance of a particular contract for to do so would deprive individuals of a fundamental good: autonomy.

John Robertson is the foremost exponent of the view that the state may not legitimately limit a person's autonomy when he or she chooses to exercise it by entering into a preconception arrangement. 2 This argument is grounded in a theory of rights-based liberalism. 3 According to Robertson, persons are each separate individuals with their own


2 Two other authors, Lori Andrews and Carmel Shalev, advance autonomy arguments for the legal endorsement of preconception arrangements but because they are couched in different terms, they receive consideration below as the argument for equality. Andrews and Shalev claim that women's autonomy must be protected as a means to an end: the advancement of women's equality with men. Because Robertson considers the legal protection of autonomy as an end in itself, his argument is used in analyzing the claim that preconception arrangements promote autonomy.

aims and interests, and they must be free "to pursue their conception of the good without constraint by government".4 He claims that preconception arrangements could be regulated only to ensure that they are knowingly and freely entered into and to prevent demonstrated, tangible harm.5 Thus, Robertson's argument takes the form of a consequential argument in that it hypothesizes that bad consequences could limit autonomy.6 But the argument is, in fact, deontological because, as shall be demonstrated, it so undervalues the actual and potential consequences of preconception arrangements that it does not see that there are any consequences sufficiently serious as to trump the good of autonomy.7

Robertson believes that reproduction is an appropriate and indeed vital subject of the exercise of autonomy because of its importance to individuals. He writes,

4 John A. Robertson, "Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction" (1986) 59 So. Calif. L. Rev. 939 at 1040 [hereinafter "Embryos"]. Since this work was written, John Robertson has published a book which restates his arguments formerly presented in various law review articles. (Children of Choice: Freedom and the New Reproductive Technologies (Princeton, New Jersey: Princeton University Press, 1996)). Because the book does not express an altered evaluation of the practice of preconception arrangements, Robertson's articles continue to be quoted here. Reference is, however, made to his book where it makes clearer his argument or suggests a subtle alteration to a point in his argument.


6 In his book, Robertson states that estimates of harm will vary depending upon who is evaluating them. He writes, "Of course, people may differ over whether an important procreative interest is at stake or over how serious the harm posed from the use of reproductive technology is. Such a focused debate, however, is legitimate and ultimately essential in developing ethical standards and public policy for use of new reproductive technologies." Children of Choice: Freedom and the New Reproductive Technologies (Princeton, New Jersey: Princeton University Press, 1994) at 42 [hereinafter "Children of Choice"].

7 He writes "The freedom to act does not mean that we will act wisely, yet denying that freedom may be even more unwise, for it denies individuals' respect in the most fundamental choices of their lives." Children of Choice, supra, note 6 at 42.
Reproduction... satisfies an individual's natural drive for sex and his or her continuity with nature and future generations. It fulfils cultural norms and individual goals about a good or fulfilled life, and many consider it the most important thing a person does with his or her life.8

In essence, reproduction "is significant because of the biological and social meaning it has for individuals".9

From this appreciation of its primarily individual importance, Robertson defines what he means by reproduction. He views reproduction as consisting of three types of experiences which are distinct both conceptually and in terms of their significance to individuals, viz.: "conception, gestation and labour, and childrearing".10 According to Robertson, "each of [these] has value and meaning independently of the other"11 and therefore an individual might have an interest in having an experience of only one or two but not all three aspects of reproduction. For example, "men and women may want the satisfaction of transmitting their genetic heritage without taking on the responsibilities of gestating or rearing".12 Others might wish to enjoy the second aspect of reproduction; Robertson claims, "Some women find enormous satisfaction and significance in pregnancy and childbirth even if they never see or rear the child".13 And similarly, "childrearing is a rewarding and fulfilling experience [irrespective of whether] the person who rears also provided the genes or bore the child".14 Thus, Robertson argues that "each aspect of reproduction can be a separate source of fulfiment and significance".15

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8 John A. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth" (1983) 69 Vir. L. Rev. 405 at 408 [hereinafter "Procreative Liberty"].
9 Ibid. at 412.
10 Ibid. at 408.
11 Ibid. at 408-409.
12 Ibid. at 424.
13 Ibid. at 409. According to Robertson, "this explains in part why some women are willing to serve as surrogates".
14 Ibid. at 410.
15 Ibid.
Because individuals have a strong interest in seeking reproductive fulfilment, they have, in Robertson’s opinion, a right to "procreative liberty" which he defines as (inter alia) "the freedom to reproduce when, with whom and by what means one chooses". This freedom "includes the right to separate the genetic, gestational or social components of reproduction and to recombine them in collaboration with others". Because the origin of the alleged right to procreative liberty is an individual’s desire for fulfilment, Robertson claims that the right of married persons to fulfil their "reproductive goals must extend to any purpose, including selecting the gender or genetic characteristics of the child or transferring the burden of gestation to another". Robertson believes that "hiring a surrogate gestator is an exercise of procreative liberty" and, therefore, that persons have a right to participate in a preconception agreement.

Not only does Robertson argue that an individual’s interest in reproductive fulfilment creates this broad right to "procreative liberty", he claims that the right is or ought to be a constitutionally protected right. Robertson relies upon the line of privacy cases decided by the United States Supreme Court beginning with Meyer v. Nebraska and including Skinner v. Oklahoma, Stanley v. Illinois and Eisenstadt v. Baird; he concludes that "married

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16 Ibid. at 406. Robertson proposes that "procreative liberty" be given "presumptive priority in all conflicts, with the burden on opponents of any particular technique to show that harmful effects from its use justify limiting procreative choice." Children of Choice, supra, note 6 at 16.
17 Ibid. at 410.
18 Ibid. at 430.
20 Robertson is not consistent on this point. For example, in 1983, he wrote that there was no constitutional right to procreative liberty (see "Procreative Liberty" supra, note 4 at 420) but in 1987 he said, "There is a constitutional right of infertile couples to reproduce by non-coital means that extends to the use of surrogates". "Life, Liberty and Children" (1987) 73 ABA Journal 39 [hereinafter "Life"]. In his book, he writes that the "law has not yet dealt with legal claims of infertile persons to procreate." Children of Choice, supra, note 6 at 38.
21 262 U.S. 390 (1923).
23 405 U.S. 645 (1972).
couples have a fundamental constitutional right to reproduce by coitus". From this uncontroversial premise, he claims a right to the much broader "procreative liberty" for married couples:

If the Supreme Court would recognize a married couple's right to coital reproduction, it should recognize a couple's right to reproduce noncoitally as well. The couple's interest in reproducing is the same, no matter how conception occurs, for the values and interests are equally present.

Because the constitutional right which Robertson seeks to establish is, in his view, based on an individual's interest in finding reproductive fulfilment, he believes the right ought to be extended beyond persons who are married and infertile and thus physically unable to reproduce, to include celibate and homosexual persons. In this way, the constitutional right to procreative liberty resides in an individual independently of his or her relationships. Because Robertson believes that "there is a strong case for a constitutional right to employ a surrogate" he argues that the state may not limit persons' exercise of the right without first discharging the burden to prove a compelling state interest. What counts as a compelling state interest? Robertson contemplates and discounts four: harms to commissioners, to carrying women, to offspring and to society.

Robertson states that commissioners might be harmed physically or psychosocially by (inter alia) participating in a preconception arrangement. The harms could arise from "medical and surgical procedures" and "the guilt, stigma, or conflict that the couple may feel in tampering with nature or involving another person in their reproduction".

Robertson writes, "Procreation may be as central to a single person's identity and life-plan as it is for a married person... Some men and some women, for example, may be unable to find a suitable spouse, be unwilling to marry, or object to heterosexual intercourse, and yet still wish to conceive, bear and rear a child... Noncoital reproduction with collaborators sharing in conceiving, bearing, giving birth to, and rearing children will enable these persons to achieve their reproductive goals".

Robertson, "Collaborative Reproduction", supra, note 8 at 418 and 424.

Robertson, "Procreative Liberty", supra, note 8 at 424.
Similarly, the harm to carrying women might "also be significant" for they "may experience harm through the risks of pregnancy and childbirth and psychological harm through relinquishing the child". 30

Despite the serious nature of possible harms to commissioners and to carrying women, Robertson does not believe that they constitute a compelling state interest which would justify unlimited government intervention. Robertson would not permit government to restrict or ban the practice to prevent the harms to participants which he identifies because he believes that participants, as persons, are free and independent selves. They are not defined by their goals, attachments or relationships, but as persons, they are always capable of surveying and assessing their goals, attachments and relationships possibly to alter them. 31 As rational, autonomous and capable of choice, persons ought to be free to choose to bind themselves even if the choice causes harm to themselves. According to Robertson:

> the state's interest in saving mature adults from the folly of their own choices would not justify total prohibition of collaborative conception and the state arguably could not prohibit persons from paying reproductive collaborators. 32

Robertson also considers and dismisses as insufficiently compelling, the possibility of physical or psychological harm to the commissioned child. He argues that even if one could establish that commissioned children are harmed physically or psychologically by the practice, that proof would not be sufficient to justify banning the practice because a ban would prevent the children from being born. According to Robertson:

> a higher incidence of birth defects in... offspring would not justify banning the technique [of in vitro fertilization and embryo transfer] in order to protect the offspring, because without these techniques these children would not have been born at all. Unless their lives are so full of suffering as to be worse than no life at all, a very unlikely supposition, the defective children of such a union have not been harmed if they could not have been born healthy. 33

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30 Ibid.
31 Sandel, supra, note 3 at 5.
32 Robertson, "Procreative Liberty", supra, note 8 at 433-434.
33 Robertson, "Procreative Liberty", supra, note 8 at 434.
Likewise, psychological harm cannot justify banning the practice of preconception arrangements. Robertson claims,

There is no evidence that a child who knows he has been deliberately conceived by one person for the sake of another, or gestated by one person with another person's egg or sperm, would suffer any more than a child who knows he is adopted.\(^{34}\)

The state could not, therefore, prohibit preconception arrangements but could confine "external fertilization and other techniques to licensed medical personnel" and make "rules regulating disclosure to the child of the nature of and the participants in his conception".\(^{35}\)

In Robertson’s view, "[h]arm to the offspring or the surrogate does not appear great enough to justify limitation of the arrangement"\(^{36}\)

Nor is the fourth harm which Robertson considers sufficient to prevent the practice. Harm to society (which Robertson calls "symbolic harms") includes the concern that preconception arrangements "will confuse family lineage and blur the meaning of the family" and the belief "that it is simply wrong to engineer conception or to pay another for reproductive services".\(^{37}\) These harms are intangible and inadequate in Robertson’s view, to justify state action; "Without a showing of tangible harm to some legitimate interest, the moral views of one group in the community, even a dominant group - are not sufficient to restrict the rights of others".\(^{38}\)

Having canvassed the four potential harms of procreative liberty, Robertson concludes that a compelling state interest to prevent harm exists only if the exercise of procreative liberty is likely to cause harm to a child so great as to make its life not worth living. Robertson holds that the right to procreative liberty may be restricted by the state only in the rarest of cases. Thus whilst Robertson’s argument appears to be consequentialist in contemplating that the exercise of autonomy in reproduction could be limited if that exercise caused harm, the argument is, in fact, deontological because even where there is significant harm it is not enough to limit autonomy.

\(^{34}\) Ibid.
\(^{35}\) Ibid.
\(^{36}\) Robertson, "Collaborative Reproduction", supra, note 19.
\(^{37}\) Robertson, "Procreative Liberty", supra, note 8 at 25.
\(^{38}\) Ibid. at 436.
What duties arise from Robertson's broad right to "procreative liberty"? Robertson argues that a person has only those duties which are related to the specific reproductive right which an individual has chosen to exercise. If, therefore, reproducers chose to rear, they must do so in a manner that ensures the well-being of the child. Where would-be rearers are manifestly unfit, Robertson would override the parties' contractual assignment of rights and duties affecting the child.39 Similarly, if a woman chooses to gestate in the sense that she does not abort in the first trimester, then she must conduct her life in ways which will not injure the fetus. Robertson would permit the state "to punish a woman who refused to take a necessary medication (as, for example, a diabetic mother who failed to take insulin)."40

Consistently with his view that the right to procreative liberty derives from an individual's interest in satisfying his or her reproductive goals, Robertson would resolve any conflict in the exercise of reproductive liberty not according to an external standard (such as, for example, judicial determination of the child's best interests) but according to the intentions of the parties expressed when they chose to enter the arrangement. As he writes,

A strong argument based on the autonomy of couples and surrogates can be made that the preconception agreement of the parties, which made the very existence of the child possible, should prima facie be determinative.41

Thus, if a carrying woman decides to retain her child contrary to her intentions expressed when she entered the arrangement, then she must be forced to relinquish the child.

According to Robertson, "If the parties have a fundamental constitutional right to use non-coital means of forming families, that right should include enforcement of preconception surrogacy contracts."42

The value which Robertson considers paramount is autonomy, in the sense of the unrestrained exercise of informed choice by a rational individual who exists and makes choices independently of his or her relationships. Such individuals choose to have a

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39 Ibid. at 435.
40 Ibid. at 443.
42 Children of Choice, supra, note 6 at 131.
reproductive experience to further an individual end not primarily or necessarily to promote a relationship either with an adult partner or the resulting child. In Robertson's view, each aspect of reproduction as he describes it (genetic, gestational and rearing) has independent and constitutionally protected value in bringing to the individual a rewarding and fulfilling experience.

Robertson's attempt to delineate a broad notion of procreative liberty is ambitious and provocative. However, his argument is open to at least four criticisms. First, his argument relies upon the supposed constitutional status of a right to procreative liberty without a convincing demonstration that such a right exists. Second, he offers no compelling argument that such a right ought to exist. Third, he inaccurately describes reproduction and advances an irresponsible view of its attendant duties. Fourth, he insufficiently appreciates the extent and nature of the actual and potential harms of the practice of preconception arrangements.

Robertson bases his constitutional argument on the premise that, in the United States, married couples have a right to engage in sexual intercourse and thus to reproduce, without the interference of the state. From this uncontroversial point of departure, Robertson argues that the United States Supreme Court should recognize a right of couples to reproduce without sexual intercourse because "the couple's interest in reproducing is the same, no matter how conception occurs for the values and interests underlying coital reproduction are equally present".43 Robertson claims further that one can make strong arguments for extending to single persons the right to conceive because "procreation may be as central to a single person's identity and life-plan as it is for a married person".44 In Robertson's view, reproductive rights derive from the central importance of reproduction in an individual's life and are limited only by a capacity meaningfully to participate and an ability to accept or transfer rearing responsibilities; therefore, everyone who meets this minimum criteria, whether married, single, heterosexual, homosexual or celibate ought to be free from state interference in coital and noncoital reproduction.

43 "Embryos", supra, note 3 at 960.
44 "Procreative Liberty", supra, note 4 at 418.
However, the line of United States privacy cases which Robinson cites neither establishes that such a right exists nor that the test of whether such a right ought to exist is the test which Robertson proposes *viz.*: the couples’ or an individual’s interest in reproducing.

Indeed, Robertson himself acknowledges that the Supreme Court privacy cases do not establish a constitutional right to procreative liberty as he defines it. He writes,

> Although recognition of a right to procreate should extend to any means or technique of reproduction, the right has not been extended in this manner, and it is not inevitable that it will be.  

Yet elsewhere he proceeds from the assumption that a constitutional right to procreative liberty exists. Robertson asserts,

> Because there is a constitutional right of infertile couples to reproduce by noncoital means, that extends to the use of surrogates. This means that the state cannot criminally ban either the use of surrogate arrangements or the payment of money to surrogates. This also means that the contract cannot be declared void on public policy grounds and must be legally enforceable at least by damages.  

Thus, Robertson’s argument rests on the premise of the existence of a constitutional right which he himself has acknowledged does not exist.

Not only is his argument inconsistent in this way, it fails to establish that the test of whether there exists a right "to reproduce when, with whom and by what means one chooses", is a test of individual interests and desires. The privacy cases which he cites do not endorse such a test.

Although the United States Supreme Court has recognized a liberty interest that prevents the state from interfering in certain matters related to procreation, marriage, child-rearing, and retention of parental rights; it has done so within a particular context and

45 "Procreative Liberty", supra, note 8 at 420. In 1994, he writes similarly, "Noncoital reproduction should be constitutionally protected to the same extent as is coital reproduction with the state having the burden of showing severe harm if the practice is unrestricted." Children of Choice, supra, note 6 at 39.

46 "Life", supra, note 20 at 39.

without suggesting that the liberty might never be restricted in a manner contrary to individuals' interests and desires. It is true that in *Skinner v. Oklahoma*, the Court protected reproductive capacity by preventing an operation that would forever eliminate the ability to procreate, and in other cases the Court struck down legislation that prevented marriage on the grounds of race and indigency. Yet, the Court has permitted the freedom to marry to be restricted when it recognized a legitimate state interest in preventing consanguineous or homosexual unions, or the marriages of persons unable to consent for reasons of age or mental infirmity. Although the Court has acknowledged parents' freedom to direct their child's education, it assumed that the exercise of this freedom would be within marriage and for the benefit of the child. Similarly, a father's right to prevent the termination of parental rights was held to be contingent upon whether he married the mother of his child and what was in the best interests of the child. Thus, it is clear that the test of reproductive freedom which these cases use is not simply the interest and desires of adults; the Court has used broader criteria including the best interests of the child and the nature of the relationship between the adult parties.

Robertson relies also on the contraception and abortion cases to establish a right to procreative freedom, but these cases similarly fail to establish that a right to reproduce is based exclusively on adults' interests and desires. The strongest evidence of the existence of a right to procreate without government interference is found in the Supreme Court Case, *Eisenstadt v. Baird* which extended the right to use contraceptives to unmarried persons.

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48 *Supra*, note 22.
52 See *Bowers v. Hardwick* 478 U.S. 186 (1986) (refusing to recognize a fundamental privacy right of consenting adult men to engage in sodomy).
56 *Supra*, note 24.
There, Mr. Justice Brennan said:

If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to beget and bear a child. 57

Although these dicta are expansive, the exact nature of the holding is not. The case stands for the proposition that the right to marital privacy, which prevents state interference in a married couple's access to contraception, extends also to unmarried persons by virtue of the Equal Protection Clause of the Fourteenth Amendment. Not only is the case silent about whether the privacy right, thus expanded, protects a positive right of unmarried couples to noncoital reproduction, it explicitly allows the state to limit persons' right to privacy when the governmental restriction is "warranted".

The privacy right to abortion recognized by the United States Supreme Court also fails to establish a right of persons to procreative liberty. The court held in Roe v. Wade 58 that "the right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy". 59 But again the Court held that the right was not absolute; after the second trimester, the interests of the fetus become sufficiently compelling as to justify state interference in the exercise of the woman's privacy right. 60

Therefore, Robertson fails to demonstrate that United States Supreme Court case law concerning privacy in reproductive matters establishes that the test of the extent of individual freedom in reproduction is the interests and desires of adults. Nor does Robertson present a convincing argument that the interests and desires of adults ought to be sufficient to establish a constitutional right to noncoital reproduction. He claims that an infertile couples' need and interest in forming family may be as strong as fertile couples... Their interest in bearing, begetting or parenting offspring is no less than that of the coitally fertile. 61

Even if this were so, it does not follow that because one has an interest in having what one's body is incapable of providing that the state should recognize the right to have it. For example, persons dying of kidney or heart disease presumably have an interest in continued

57 Ibid. at 453.
58 410 U.S. 113 (1973).
59 Ibid. at 153, per Blackman, J.
60 Ibid. at 164.
61 "Burden of Proof", supra, note 41 at 19.
life which is as great as that of healthy persons. If Robertson’s reasoning were correct that a strong individual interest creates a right to have and to pay to have what one seeks, then dying persons could claim that their interest in continued life grants them a right to non-interference by the state in their attempts to buy kidneys or hearts from willing sellers. But persons may not buy human organs for inter vivos transfer; even dying persons are limited in the ways in which they may save their lives.62 Thus, the compelling nature of an individual’s need or desire is insufficient to justify the establishment of a constitutional right to satisfy that need or desire. The consequences of an individual’s actions in seeking to fulfill his or her desires do count and can justify state limitation on individual freedom.

Robertson’s argument can thus be criticized for relying on a constitutional right to “procreative liberty” without a convincing demonstration that the right either exists or ought to exist. His argument is open also to a third criticism: it is based on a questionable understanding of reproduction and its attendant duties.

As discussed above, Robertson claims that reproduction consists of three separable components which have independent value to individuals: conception, gestation and labour, and childrearing. Robertson’s description of human reproduction is, however, incomplete and misleading. When the process of procreation occurs naturally, it involves at least twelve aspects: menstruation, ovulation, spermatogenesis, copulation, alienation of male gametes by ejaculation, conception, gestation, labour, birth, appropriation of the child, lactation and nurture.63 Of these twelve aspects, men participate directly and discontinuously in five (spermatogenesis, copulation, ejaculation, appropriation of the child, and nurture), whereas women participate directly in all but two (spermatogenesis and ejaculation - and in coital reproduction even the latter takes place inside women’s bodies). Given that human reproduction thus involves for women a prolonged and continuous experience which profoundly affects them physically and psychologically, it is odd that Robertson should

62 Although some authors argue for and some jurisdictions permit the sale of cadaver organs (M. Trebilcock, The Limits of Freedom of Contract (Cambridge, Mass.: Harvard University Press, 1993 at 34-36)), this fact does not raise the same ethical concerns as does the purchase of organs for inter vivos transfer. Sellers of cadaver organs are not tempted to act to the detriment of their health as are sellers of inter vivos organs and carrying women.

describe it as a series of only three disconnected experiences which have independent but not necessarily derivative value.

Having theoretically structured the experience of reproduction in this fractured way, Robertson claims that persons can, and ought to have a right to, choose to participate in one or a combination of the reproductive experiences which he identifies, and that that choice itself defines the extent of one's reproductive duties. For example, Robertson claims that one has the right to choose to contribute genes but to assume no further responsibility for the resulting child. Not only would this argument permit the activity of sperm and egg donors but it would justify the position of a man whose sexual activity makes a woman pregnant but who then decides not to assist her; according to Robertson, persons have a right to have "the satisfaction of transmitting their genetic heritage without taking on the responsibilities of gestation or childrearing". Yet Robertson does not go on to justify what can fairly be described as an attitude of irresponsibility in the face of the vulnerability and neediness of children.

Perhaps because Robertson views the importance of reproduction as lying primarily in its meaning to individuals, he views the duties of reproduction, if any, as determined by choice, and as owed to the child if at all, and not to the other parent. Thus, Robertson argues that a woman's choice to continue to gestate a child would impose upon her responsibilities to ensure the fetus's well-being. He claims that a woman's but not a man's right to freedom of bodily integrity may be limited if the fetus's health is thought to be at risk. For example, if in utero surgery were advocated by physicians and thought safe and effective, a pregnant woman who refused to undergo the surgery would be civilly and criminally liable for any resulting harm to the fetus. According to Robertson, "She waived her right to resist bodily intrusions made for the sake of the fetus when she chose to continue the pregnancy". By contrast, however, the father of the child would not be subject to state intrusion of any kind should he have chosen not to assume any responsibilities toward the child beyond transmitting genetic material. Whereas a diabetic mother could be punished for failure to take insulin, the father of the child would have no duty to the diabetic mother to

64 "Procreative Liberty", supra, note 8 at 410.
65 "Procreative Liberty", supra, note 8 at 445.
66 "Procreative Liberty", supra, note 8 at 443.
provide funds so that she might purchase insulin.

In this way, Robertson’s theoretical structure purporting to define reproduction is misleading because it does not incorporate and assign adequate weight to the prolonged and continuous physical and psychological involvement of the pregnant woman, whereas he assigns great weight to the essential but momentary contribution of the man’s seed. His understanding of reproduction’s responsibilities are limited by his extraordinary view that duties, in the context of human procreation, exist only insofar as an individual has chosen to assume them.

Robertson’s argument may be criticized on a fourth basis: it takes insufficient account of the extent and nature of harms that actually and potentially result from participation in a preconception arrangement. He canvasses the possibility of harm to only four groups - commissioners, carrying women, commissioned children and society generally - thus excluding from any consideration at all the actual and potential harm caused to the carrying woman’s other children, her husband or partner, or her parents. Moreover, he underestimates the nature of the harm to the groups which he does consider. (For example, he does not acknowledge the differing interests of commissioners in a genetic-gestational arrangement; whereas the commissioning man thereby obtains his child, the commissioning woman obtains the child of her husband by another woman. Because he does not consider this difference significant, he does not discuss whether it is harmful.)

With respect to carrying women, Robertson acknowledges that participation might be harmful but dismisses its relevance on the basis that the woman chose to participate. He argues that though "Harm to the surrogate is a real possibility", it is wrong to prevent "informed women from playing such partial procreative roles" because such prevention would deny "them the freedom to decide best how to fulfill their own procreative needs. If they are willing to undergo those risks, it may be unfairly paternalistic to prevent them from doing so".67 According to Robertson, the state may not substitute its understanding of what is in a person’s interest for her understanding of what is in her interest; he argues that this would be paternalistic and therefore wrong. Yet Robertson would not permit a woman to determine and act upon the determination of what is in her interests after she gives birth.

67 "Embryos", supra, note 4 at 1014.
Even if to fulfil her own reproductive needs she must keep the child, Robertson would require her to abide by her preconception choice. Robertson does not explain why a prior exercise of autonomy should trump a subsequent and opposing exercise of autonomy when circumstances change.

With respect to harm to the commissioned child, Robertson argues that the harm is insufficient to justify banning the practice. But his argument is weak in two respects. First, he claims that because the preconception arrangement caused the child to be born, the arrangement cannot be said to be sufficiently harmful to the child except if the child's life is so full of suffering as to be worse than no life at all. Yet this claim makes a logical error in failing to distinguish between justifying a practice and justifying a particular action falling under it. The question under consideration is whether the practice of preconception arrangements is a justifiable method of bringing children into the world. Only if the answer to the question is "yes" would there be children born of the practice with interests to consider. But the question of whether the practice is desirable cannot be addressed by assuming the very point in issue, viz.: that children ought to be born in this way.

The second flaw in his assessment of the ethical weight of the harms to commissioned children lies in his statement that

There is no evidence that a child who knows he has been deliberately conceived by one person for the sake of another... would suffer any more than a child who knows he is adopted.

Yet, the fact that there is no evidence of greater harm of this relatively new practice tells us nothing about whether there is greater harm; there are no studies of the long term effects of preconception arrangements on any of the persons affected by them. Moreover, the

68 See John Rawls, "Two Concepts of Rules" (1955) 64 Philosophical Review 3.
69 This point can be made clearer by analogy. If we are deciding whether a procreative practice which uses thalidomide during pregnancy is a good practice, we do not consider the interests of children who might be born of the practice and conclude that "some life is better than none." On the contrary, we compare that practice of procreation with other practices and choose to endorse the one or ones which will have optimal outcomes for future children. Although we will, of course, care for any thalidomide children who are born, we will not use their existence to claim that the practice of administering thalidomide to pregnant women is desirable. To assume the existence of the children at the evaluation stage is to make a logical error.
70 Robertson, "Procreative Liberty", supra, note 8 at 434.
comparison with adoption is inapposite because whereas adoption is an often regrettable solution to an unintended conception, preconception arrangements intend a conception to separate the child from its mother. The harm caused by the second practice is avoidable. From the point of view of legislative policy, therefore, the practices are relevantly different.

Robertson's evaluation of the fourth harm which he considers is also open to criticism. Harms to society (which he calls "symbolic harms") are in his opinion intangible and of insufficient weight to ban preconception arrangements. He claims that "the main concern [about such arrangements] appears to be a desire to prevent symbolic harm to deeply-felt notions of motherhood and the importance of the gestational bond". To the extent that this harm results, Robertson believes it is the fault of the women who become pregnant. Curiously, he discounts the role of brokers and commissioners and instead condemns only carrying women for

- treating the gestational bond as something to be manipulated and used for selfish purposes - the willingness to gestate a child and then coldly detach oneself from it - may be distasteful to many people... Robertson ironically sees only the carrying woman's actions as potentially distasteful whereas the activities of the commissioners are not criticized. He argues that distaste is an insufficient basis for any public action which would limit the procreative choice of willing parties.

71 Robertson, UK Colloquium.
72 Ibid.
73 In his book, Robertson suggests that brokers' activities might be open to criticism when he claims

surrogacy brokers have special duties to make sure that the women they recruit are well informed and counselled about the risks they face. Although this has not always been the practice, surrogate brokers should inform prospective surrogates at the earliest possible time in the recruitment process...that surrogacy is disappointing and difficult for some women. Brokers should also make clear to prospective surrogates that they represent the infertile couple, not the surrogate, and advise the surrogate to seek her own legal counsel. They should also screen prospective surrogates psychologically, so that women who appear likely to have problems are excluded or so infertile couples have full information on the psychological profile of the prospective surrogate. They may also have legal duties to make sure that medical tests that protect the surrogate are performed.

Children of Choice, supra, note 6 at 139.
That Robertson inappropriately assigns the moral responsibility for ‘manipulating the gestational bond’ to only one of the participants in the preconception arrangement is perhaps consistent with his narrow view that the effects of the practice upon society as a whole are limited. He does not situate the practice in a context of familial and social relationships but focuses almost exclusively on the individual goal of reproductive fulfillment. Thus he fails to address seriously the radical changes potentially caused by the practice including the views that women can be considered as mere gestators performing a mechanical function, a baby might be ordered and purchased, and intention should determine parental responsibility. That these changes are likely to result from the practice of preconception arrangements and are significantly harmful shall be discussed below in Chapters Three and Four.

It has been demonstrated that Robertson’s autonomy argument for the constitutional right to procreative liberty is deeply flawed for it relies on the existence of a constitutional right which he acknowledges does not exist and which he fails to demonstrate ought to exist; it describes human reproduction in a misleading and incomplete way and advances a morally questionable understanding of reproductive duties; and it takes insufficient account of the extent and nature of the harms of the practice of preconception arrangements. From his premise that autonomy is per se good, Robertson fails to demonstrate that preconception arrangements are a legitimate exercise of autonomy and therefore ought to be free from government interference.

2.3 Argument that Practice Promotes Equality

In addition to the deontological argument considered above, there are at least three consequentialist arguments in favour of preconception arrangements. The legalization of the practice is variously advocated on the basis that it will achieve certain beneficial effects: it will promote, or consolidate gains in establishing, sexual equality; it will maximize welfare and it will alleviate suffering. We shall consider the first consequentialist argument here.

Ever since the seventeenth century, women have asked why the Enlightenment’s values of autonomy and recognition of individual human rights did not apply equally to them. From that time, liberal feminists have argued that women, like men, have natural rights and that they ought to have equal rights under the law.74

Inherent in the theory of liberalism which originated during the Enlightenment, was the view that all men are equal because they are equally endowed with the capacity to reason. This capacity to reason is what sets them apart from animals and establishes their equality with each other. Women, however, were not thought to be fully endowed with rationality and therefore were excluded from the role of citizens. Indeed, most Enlightenment thinkers did not challenge the understanding of women that they inherited from the Middle Ages. During that period, St. Thomas Aquinas described women as no more than biological assistants to men. In considering whether women ought to have been created at all, Aquinas concluded that they should have been because nature decrees that men must have "helpers", not in cultural works, but in reproduction. As Thomas Aquinas wrote,

For the good of order would have been wanting in the human order if some were not governed by others wiser than themselves. So by such a kind of subjection woman is naturally subject to man, because in man the discernment of reason predominates.75

Most Enlightenment thinkers accepted the notion that reason is of greater value than emotion and sensation, and that whereas men are rational beings capable of rising above bodily demands, women are governed by their body's nature and their emotions. According to Alison Jaggar,

Hume, Rousseau, Kant, and Hegel all doubted that women were fully rational. Hegel, for instance, believed that women's deficiency in the "universal faculty" was such as to render women as different from men as plants were different from animals.76

This understanding of men and of women was neatly summarized by Ambrose Bierce, "To men, a man is but a mind. Who cares what face he carries or what he wears? But woman's body is the woman".77

76 Jaggar, supra, note 74 at 36.
77 Quoted in Issues in Feminism, supra, note 75 at 93.
This was the philosophical tradition in which feminists fought for recognition of women’s equality with men. Feminists who shared the characteristic liberal belief that individuals are entitled to political rights only in virtue of their capacity to reason, therefore advanced the following argument: if women are allowed the same education and opportunities as men, they will demonstrate that their ability to reason is equal to that of men. Such "liberal feminists" include Mary Wollstonecraft, Harriet Taylor, J.S. Mill, Sojourner Truth and Elizabeth Cady Stanton. Within this school of thought, the contemporary argument is made that the legal permissibility of preconception arrangements will advance women’s equality with men.

The principal exponent of the liberal feminist argument for preconception arrangements is Lori Andrews. Andrews believes that preconception arrangements can promote gender equality both for specific individual women and for women in general. According to Andrews, preconception arrangements are "a predictable outgrowth of the feminist movement". That movement in the 1960’s and 70’s encouraged women to

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78 Jaggar, supra, note 74 at 36.
80 This view is also espoused by Avi Katz, Carmel Shalev and Marjorie Shultz, all of whom claim that the legal consequences of preconception arrangements should be determined as a matter of contract in accordance with the expressed intentions of the parties before conception. Like Andrews, they regard a woman as having a right to enter an enforceable agreement to bear a child and receive money for her services, and view the prohibition or nonenforcement of pregnancy agreements as illegitimate infringements on a woman’s autonomy and self-determination. See Avi Katz, "Surrogate Motherhood and the Baby-selling Laws" (1986) 20 Columbia Journal of Law and Social Problems 1-52 [hereinafter "surrogate motherhood"]; Carmel Shalev, Birth Power: The Case for Surrogacy (New Haven: Yale University Press, 1989) [hereinafter "Birth Power"]; and Marjorie Shultz "Reproductive Technology and Intention-based Parenthood: An Opportunity for Gender Neutrality (1990) 2 Wisconsin Law Review 297-398 [hereinafter "Intention-based Parenthood"].
81 Although Andrews justifies preconception arrangements on the basis of autonomy, her work is considered here as an argument from equality because, unlike Robertson who is concerned with autonomy as an end in itself, Andrews views it as a means to the equal treatment of men and women. It is appropriate to categorize hers as an argument from equality because of its avowed political aim.
postpone childbearing to pursue educational and career opportunities and to use certain contraceptive devices, both of which compromised their fertility. As a consequence, "some of these women found that the chance for a child slipped by them entirely and needed [sic] to turn to a surrogate mother". On the supply side,

Feminism... made it more likely for other women to feel comfortable being surrogates. Feminism taught that not all women relate to all pregnancies in the same way. A woman could choose not to be a rearing mother at all... Reproduction was a condition of her body over which she, and no one else, should have control. For some women, those developments added up to the freedom to be a surrogate.83

Thus, Andrews views preconception arrangements as good for individual women in enabling them to act upon their powers of reason to achieve their goals. They allow women to have a child when they become infertile and they enable women to exercise freedom of bodily integrity by intentionally conceiving a child to relinquish.

Andrews views preconception arrangements also as being good for the women's movement and, therefore, women generally. She claims that a woman's decision to conceive, carry and surrender a child and the execution of that decision demonstrate that biology is not destiny: that women can use reason to triumph over the emotional and bodily. In her view, women are not so governed by maternal hormones that they are incapable of carrying out their rationally designed plans. Like men, they can rationally determine which of their offspring they will rear and which they will leave to others to rear.

Not only does Andrews believe preconception arrangements are positively good for the women's movement in this way, she claims that banning the practice would have serious negative consequences for women generally. Andrews fears that a restriction on preconception arrangements would be the thin edge of the wedge which would result in the denial of existing freedoms "in the contexts of abortion, contraception, non-traditional families, and employment".84 In Andrews' opinion, the argument that gestation is unique and women ought not to be entitled (like men in semen donation) to waive parental rights before conception threatens a return to the belief that women must be protected against

83 Ibid.
84 Ibid.
themselves because their nature is more powerful than their reason. Andrews fears that arguments against preconception arrangements will potentially turn all women into reproductive vessels, without their consent, by providing government oversight for women’s decisions and creating a disparate legal category for gestation. Moreover, by breathing life into arguments that feminists have put to rest in other contexts, the current rationales opposing surrogacy could undermine a larger feminist agenda.85

Andrews therefore advocates that preconception arrangements be regarded as contracts and that they be specifically enforceable in their terms requiring surrender of the child to the commissioning man.86 Andrews favours this approach over that traditionally available in adoption (where the birth mother has a ‘grace’ period in which to change her mind), because, unlike adoption, the woman made her decision to relinquish her child before conception and, in most cases, the child is surrendered to the biological father. The contract model also has the advantage, in Andrew’s opinion, of a clear custody determination; because the child will automatically go to the biological father, there will be no custody litigation with all its damaging consequences.87 According to Andrews, a contract model of preconception arrangements will protect the commissioners from extortion, enable the child to “know from birth who his or her legal parents are”88 and, significantly, allow women to give effect to their rational decision to conceive a child for surrender. For these reasons, Andrews believes preconception arrangements have the potential to be good for individual women, and their legalization and specific enforcement will both consolidate and advance the position of women generally.

85 Ibid. at 78.
87 “Alternative Modes”, supra, note 86 at 383-387.
88 “Adoption Model”, supra, note 86.
Despite the forcefulness with which it is made, Andrews’ argument is not convincing. Andrews’ argument does not demonstrate that preconception arrangements are good for particular women or for women in general, and it fails to establish that the practice enhances the liberty and dignity of women in a manner consistent with the goals of substantive equality.

As a liberal, Andrews believes that each person is the expert in identifying her own interest and would deny that others may legitimately criticize the rationality of an individual’s desires except on formal grounds such as consistency. Thus, she appears to be arguing that preconception arrangements are "good" for particular women not in the normative sense but in the sense that they permit women to rely on their own uncoerced and unindoctrinated judgement, rather than established authority such as the church or the state, to determine how best to fulfil themselves. In her view, preconception arrangements are "good" for commissioners and for carrying women because they enable them to choose what they think is good and then freely to seek it. In assessing whether preconception arrangements are "good" on these terms, the questions to be answered are (1) whether the women freely chose to participate and (2) whether participation will achieve their ends.

Yet, Andrews does not seriously consider whether the choice to participate is free. She collapses the distinction between choosing to participate and freely choosing to participate because she is afraid that such scrutiny might be used to restrict women by, for example, banning abortions. As she argues,

It [has been] suggested that surrogacy [is] wrong because women’s boyfriends might talk them into being surrogates and because women might be surrogates for financial reasons. But women’s boyfriends might talk them into having abortions or women might have abortions for financial reasons; nevertheless, feminists do not consider those to be adequate reasons to ban abortions. The fact that a woman’s decision could be influenced by the individual men in her life or by male-dominated society does not by itself provide an adequate reason to ban surrogacy. 89

89 Andrews, "Challenge for Feminists", supra, note 82 at 75. The falseness of the analogy between abortion and preconception arrangements is discussed at length below in Chapter 5.2.1. It is sufficient here to note that abortion is not justified on the basis that it is acceptable for women to intend to conceive in order to separate the fetus from their bodies. But proponents wish to justify a practice by which women
Given the nature of preconception arrangements, however, it is worth inquiring whether women are likely freely to choose to participate.

On the demand side, it is naive to state that a commissioning woman's decision to participate in a preconception arrangement is inevitably freely taken. In genetic-gestational arrangements, what a commissioning woman receives (if all goes according to plan) is her husband's child by another woman. It is odd for a feminist to claim that a commissioning women's participation inevitably represents the uncoerced, unindoctrinated exercise of choice. Consider Jocelynne Scutt's description of the unequal position of the commissioners:

Because he wants a biological child, his wife has to stand by knowing another woman is doing the job for nine months, then take to her bosom a child born outside the marriage, to which her husband lays possessory claim (after all it's his sperm), whilst she is solely childcarer, childrearer of his offspring. Is not marriage about "in sickness and in health, for richer, for poorer..."?

If the commissioning woman refuses to agree to participate she might, as Andrews acknowledges, risk losing her marriage should her husband decide to "dissolve his marriage and seek another spouse in the style of Henry VIII". Given the disparate positions of the commissioners, it is insufficient for Andrews to claim without more evidence that merely because a commissioning woman has participated in an arrangement, her participation represents an uncoerced exercise of choice. On the demand side, therefore, it is at least worthy of inquiry whether preconception arrangements are "good" for the commissioning women in that they enable them freely to achieve their goals albeit at considerable personal cost.

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intend to conceive in order to separate themselves from their children and parental responsibilities. People do not choose to have abortions in the sense that they say, "Today I will become pregnant so that next month I can experience an abortion." Abortion is the chosen solution to the problem of an unwanted and usually unintended pregnancy. Preconception arrangements intend the pregnancy. Abortion concerns an existing unwanted relationship, preconception arrangements create an unwanted relationship to sever it. The two practices are therefore relevantly different.

90 Jocelynne A. Scutt, "Book Reviews" (1990) 3:1 Issues in Reproductive and Genetic Engineering 73 at 75.

On the supply side, the question is much more problematic. Again the fact of participation per se does not establish voluntariness. Moreover, given the nature of the carrying woman's obligations, it is possible that her decision to participate is not fully informed.

Andrews responds to the argument that payment can induce participation by poor women by stating that

this harsh reality... must be guarded against in part by vigilant efforts to assure that women have equal access to the labour market, and that there are sufficient social services so that poor women with children do not feel that they must contract to create and give up another child just to provide for their existing children.92

But since these idyllic circumstances do not exist, it is curious that Andrews does not at least require regulation to ensure that women do participate freely. She does not do so for two reasons. First, she believes that the voluntariness of only poor women could be compromised by the promise of payment and that poor women do not, in her view, represent the majority of carrying women. As she argues,

The vast majority of women who have been surrogates do not allege that...they have done it because they needed to obtain a basic of life such as food or health care. Mary Beth Whitehead wanted to pay for her children's education. Kim Cotton wanted to redecorate her house.93

Yet what is relevant is not why the women wanted the money, but the fact that they apparently did not have other ways to obtain it. The relevant question in determining whether women participate freely is not "Is this woman desperately poor?" but "Would this woman have participated without the promise of payment?"94 If participation by carrying

93 Ibid. at 372 (footnotes omitted).
94 The question of voluntariness turns on one's view of the practice. If one believes that the activity of being a carrying woman is a job, then the promise of payment is not coercive but might properly be described as remuneration. But if, as shall be argued below, the activity is a severe limitation of one's freedom and autonomy (see Chapters 3.3.1.2, 4.2 and 5.2.1) akin to cutting off one's leg, then the question is not, "Is she paid enough?" but "What could have caused her to do such a thing?" On such a view, the promise of payment can be seen to compromise voluntariness.
women is really just another form of exercising reproductive autonomy like having intercourse, buying contraceptives and obtaining donor insemination, then we could expect to have seen hundreds of thousands of instances of women throughout the world choosing to conceive a child intentionally to relinquish it. But because the numbers of American carrying women relative to the general population were so few prior to the offer of payment\textsuperscript{95} and the practice is almost unknown in other nations like Canada and the UK where payment is banned,\textsuperscript{96} it is likely that payment plays a significant role in inducing participation and therefore compromising voluntariness.

The second reason that Andrews does not recommend the passing of legislation to ensure that at least poor women participate voluntarily is that she fears the consequences of such legislation for upwardly-mobile women. Andrews views a carrying woman’s participation as employment and is afraid of any restriction on employment based on women's reproductive capacity. Women ought to be permitted to work, in her opinion, because work is liberating and women should be paid for their work just like men. She writes,

One potential surrogate has asked me, "Why is it exploitation to go through a surrogate pregnancy... if I am paid but not if I am not paid?" If indeed the underlying activity is one that we can countenance or even want to encourage, our focus should not be on banning payment, but on making sure the surrogate gets paid more.\textsuperscript{97}

\textsuperscript{96} Although there are no international studies of the nationalities of carrying women, because the brokerage industry exists only in the United States, it is fair to say that most carrying women are American. Commissioners can and do travel from other nations to the United States to obtain a child. See, for example, Steven Dickman, "West German ructions over U.S. surrogacy company", (1987) 329 \textit{Nature} at 577 where the author writes "Although Infertility Center of Michigan customers have come from as far away as France, Italy, Israel, Greece and Australia, all of the surrogate mothers so far have been from the United States and Canada". For the participation of Canadian women, see Margit Eichler and Phebe Poole, \textit{The Incidence of Preconception Contracts for the Production of Children Among Canadians} (Toronto: Institute for Studies in Education, 1988).
\textsuperscript{97} "Alternative Modes", supra, note 86 at 371.
Andrews views being a carrying woman as an activity worthy of encouragement and a form of employment. As a form of employment, it is a means for a woman to advance. Andrews would not restrict this opportunity because to do so would be to define and protect "women in terms of reproductive capacity" and this stereotyping "has been the basis for women's inequality and lack of economic and political power". The speciousness of this argument will be considered in more detail in Chapter Four where its underlying assumption that being a carrying woman is a job will be analysed. Here it is sufficient to make clear that the argument is not logical. Andrews claims that if legislation is passed preventing poor women from being induced to participate in preconception arrangements, the security of all women's ability to be well-paid and to advance in their employment is endangered. The prohibition would be construed as endorsement of the view that women are governed by emotion not reason and are therefore unreliable employees. Andrews would not permit any restrictions on this "job opportunity" because such restrictions (based as they would be on the importance of not separating mother and child) could be used to restrict women in other lines of employment. Thus, even though, preconception arrangements might not be "good" for particular women whose voluntary participation might seriously be in doubt, Andrews would not recommend any regulation to ensure voluntariness because of the feared consequences of such legislation for women generally.

Nor would she countenance regulation to ensure that preconception arrangements are "good" for particular carrying women in that they help them achieve their goals. For a carrying woman to 'get what she wants' from the arrangement, she must fully appreciate the nature of the bargain and its effects on her. If she has inadequate information, then her participation might not be "good" for her in the sense of enabling her to achieve her ends. Andrews, herself, acknowledges the risk:

"With surrogacy, the potential for regret is thought by some to be enormously high. This is because it is argued (in biology-is-destiny terms) that it is unnatural for a mother to give up a child. It is assumed that because birth mothers in traditional adoption situations often regret relinquishing their children, surrogate mothers will feel the same way. But surrogate mothers, whom Andrews quotes with approval in "Alternative Modes", supra, note 86 at 371."
mothers are making their decision about relinquishment under much different circumstances. 99

Among the circumstances that are different is that a birth mother in adoption effectively decides to relinquish after giving birth, not before. Andrews believes a preconception decision is more reliable because it is informed in the sense that the woman has cognitive information. She states, "The surrogacy contracts contain lengthy riders detailing the myriad of risks of pregnancy ... [and] with volumes of publicity given to the plight of Mary Beth Whitehead, all potential surrogates are now aware of the possibility that they may later regret their decisions". Andrews would not, however, permit women to act on that new information and refuse to relinquish the child. Even if the overwhelming experience of carrying a child and giving birth with all its attendant bodily changes cause a woman to wish to rear her child, Andrews would advocate legislation making the agreements specifically enforceable. Andrews quotes with approval Joan Einwohner, who interviewed carrying women on behalf of Keane's Infertility Center of New York:

Women are fully capable of entering into agreements in this area and of fulfilling the obligations of a contract. Women's hormonal changes have been utilized too frequently over the centuries to enable male dominated society to make decisions for them. The Victorian era allowed women no legal rights to enter contracts... Victorian ideas are being given renewed life in the conviction of some people that women are so overwhelmed by their feelings at the time of birth that they must be protected from themselves. 100

In this way, Andrews claims that feminists should not suggest that women surrender their liberty to relinquish a child before it is conceived. Again Andrews concedes that participation in a preconception arrangement will not be "good" for a particular woman who cannot obtain from it what she wants - that is, to earn money at an (under)estimated cost to herself. But despite the harm forced relinquishment might cause a particular woman, Andrews claims that it is justified because of the danger to women generally of regulation.

Thus, even though Andrews claims that the practice of preconception arrangements is "good" for particular women in enabling them to choose without coercion the means to fulfill themselves, she acknowledges that situations can arise in which lack of voluntariness or

99 Andrews, "Challenge for Feminists", supra, note 82 at 75.
100 Ibid. at 75.
information can prevent the arrangement from being "good" for particular women. Not only is her argument flawed in this way, it is revealed to be concerned not primarily for the interests of particular women but for those of women in general. In her view, legislative restriction to protect the individual, would harm women as a whole. Preconception arrangements must be permitted because, in Andrews' opinion, the practice advances and consolidates the interests of women generally. But Andrews' argument fails to demonstrate that the practice is "good" for women generally.

Andrews claims that the practice is positively beneficial because it grants women the same reproductive freedom as men have. She quotes, apparently with approval, Carol Sanger who suggests that society improperly regards fathers and mothers unequally:

We don't particularly care whether men give away fatherhood before they masturbate away their heirs. Why not? In part, because the bonding has not occurred, but also because we have different expectations of fathers and their children than we do for mothers and their children.101

Preconception arrangements enable a woman to be like a man in choosing which of her children she will rear and which she will leave to others to rear. The prescription that this is good for women generally appears to be based on unarticulated assumptions not only that women can and, want to, be like men, but that they should want to be like men.102 Yet it is not clear that social endorsement of a practice of making such choices about offspring will enhance the dignity of either women or men. According to one critic of this position, Jocelynne Scutt,

If our expectations are that a man can masturbate into a bottle for an IVF programme, go away and not care what comes of any child who may be born as a result, or that a man can swive around as much as he likes, distributing sperm willy nilly throughout the community of women without anyone, and particularly not he, caring about the outcome of each ejaculation, is this good reason for attempting to replicate or applauding as [a] heroic,... "feminist" or "non-moralistic" advance such a lack of responsibility, caring, and compassion in women?103

101 Andrews, Between Strangers, supra, note 88 at 253.
102 This is a criticism launched against liberal feminism generally. See Tong, supra, note 79 at 32.
103 Scutt, supra, note 87 at 75.
Insofar as the participation of a carrying woman demonstrates the triumph of women's reason over emotion, Andrews believes this act in itself provides evidence of women's inherent rationality and this is "good" for women generally. Yet Andrews' premise is open to question because she does not make clear how it is good for women generally that a particular woman act on reason when it is uninformed by emotion, in preference to reason informed by emotion.

Nor is Andrews' argument with respect to women generally convincing in its second and negative aspect. She claims that it would be bad for women generally if there were a law rendering preconception agreements void. Andrews sees a carrying woman's participation as a private matter of individual choice concerning reproduction. To encumber a woman's decision to enter such an arrangement would wrongly place reproductive decision-making power in the hands of government. Moreover, just as a woman ought to be permitted to consider such an agreement a contract, so should the agreement be enforceable against her. To hold otherwise would be to treat women as less than rational agents. As she argues, "It would seem a step backward for women to argue that they are incapable of making decisions". 104 Andrews claims that "feminists should be wary of hormone-based argument" 105 for "we're never going to end up with a woman in the White House if we feel that raging hormones make women feel bad about their decisions". 106

There are a number of curious aspects to this argument. In the first instance, it is not accurate to view the denial of a woman's right to determine custody of a child in advance of conception (which a preconception arrangement entails), 107 as a sexist limitation on reproductive freedom. The legal restriction is primarily an expression of state concern for the interests and well-being of the child. Such a prohibition applies in Ontario to both

104 Andrews, "Challenge for Feminists", supra, note 82 at 75.
105 Ibid.
107 This is a feature of a contract model of legal response which Andrews advocates. Andrews, "Adoption Model", supra, note 86 at 19.
women and men. Secondly, it is odd to regard a woman's ability to relinquish a child under agreement as a test of her competence in commercial and public matters. Relinquishment of children has hitherto been a matter of family law, the subjects of which are both peculiarly important and peculiarly subject to emotions that are hard to comprehend, predict, or control. Family law is sensitive to the vagaries of human desire, emotion, and vulnerability. It does not permit the fulfillment of all desires, nor does it require that promises solemnly made must forever be honoured. Family law does not require a person to remain in a marriage that he or she has come to regret, because of, for example, love of another. If love of another can disrupt a voluntary agreement, why not the love of a child of one's body? Thirdly, why should a woman's broken promise to strangers with respect to her child bar the doors of the White House to her and other women? More than one man has occupied it despite a history of broken promises. In an attempt to advocate that women be treated equally, Andrews would require women to conform to a different standard of behaviour than men. For all these reasons, Andrews' argument is inconsistent and fails to demonstrate that it would be bad for women generally if the law refused to treat preconception agreements as enforceable contracts.

In summary, Andrews' argument for the legal recognition and enforcement of preconception arrangements is based on the notion that the practice is good for individual women and for women in general because it permits the free and informed exercise of reproductive liberty in a manner which both advances and consolidates women's equality

108 The Child and Family Services Act ("CFSA") governs the circumstances in which parents in Ontario may relinquish their rights and duties toward children in adoption. Section 131(2) stipulates that, to make an order for adoption, the court must first have the written consent of every parent. Under s.131(3) a parent may not give consent to adoption before the child is seven days old and, by virtue of s.131(8), may revoke that consent in writing within 21 days thereafter. Therefore neither mothers nor fathers may consent to relinquish a child before it is conceived. CFSA, S.O. 1984, c.55 as amended.


110 A man is not permitted to be married at the same time to two women no matter how much he might wish to take another wife whether for love or for her childbearing abilities in the face of his first wife's infertility. Criminal Code, R.S.C. 1985, c. C-46, s.293.
with men. But whilst Andrews acknowledges that the agreements will, in some circumstances, be entered into without adequate freedom and information and, therefore, they are not "good" for particular women, she rejects state intervention to attempt to ensure that they are. In her view, such intervention would threaten women's equality by suggesting that women are governed not by reason but emotion and that they cannot be relied upon to keep their promises in matters of commerce and public life. Yet, as has been demonstrated, her view of what is good for women generally requires assent to the questionable presupposition that women should be like men and the conflicting view that they should be held to different standards than men. Andrews' argument that the practice of preconception arrangements has beneficial effects in advancing women's equality is, therefore, unconvincing.

2.4 Argument that the Practice Promotes Aggregate Welfare

A second consequentialist argument in favour of the practice of preconception arrangements is that the practice promotes aggregate welfare, defined as the maximizing of satisfactions determined by economic criteria. This argument, derived from economics, is based on two assumptions: (1) that the people involved with the legal system act as rational maximizers of their satisfactions;\(^\text{111}\) and (2) what people want is, by definition, what they are willing to pay for. This school of thought, known as "law and economics", holds that because the legal system organizes the choices available to individuals, it is potentially in a position to cause the limited resources of society to satisfy the maximum number of preferences. In determining individual preferences and how the maximum number might be satisfied, law and economics uses two different forms of analysis: positive and normative.\(^\text{112}\)

The positive (that is, predictive or descriptive) analysis attempts to establish the likely effects of a legal proposal. It asks,

> if this (legal) policy is adopted, what predictions can we make as to the probable economic impact, allocative (the pattern of economic activities) and distributive (winners and losers) of the policy; given the ways in which people are likely to respond to the particular incentives or disincentives created by the policy.\(^\text{113}\)

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113 Ibid. at 3.
In predicting individual behaviour, the analyst assumes that individuals respond to market forces in a manner which rationally promotes their self-interest. No importance is placed on what end an individual actually seeks; in this respect, the positive analysis of law and economics is said to be value neutral. But this analysis can be criticized for being based on a highly individualistic and self-interested view of human nature which is not falsifiable; it is not possible to disprove the characterization of humans as rational calculators of their self-interest. For example, even the action of the Polish priest who went to the gas chamber instead of a fellow prisoner, would be described as advancing his self-interest in aiding others.

Law and economics employs a second form of analysis - normative analysis - which also focuses on the individual and his or her subjective preferences. This normative analysis (known as welfare economics) attempts to evaluate the effects of the legal proposal. It asks,

Is it likely that this particular transaction, or this particular proposed policy or legal change, will make individuals affected by it better off in terms of how they perceive their own welfare (not how some external party might judge individual's welfare)?

In assessing welfare, normative law and economic analysis uses a utilitarian framework: an individual's preference is to count for only one; people's preferences are taken as given (as mentioned above, preferences are not evaluated on the basis of their worthiness); and the goal is to promote aggregate welfare.

There are two important methods of evaluating welfare. The first uses the concept of "Pareto efficiency" which asks of a proposed bilaterally voluntary and informed transaction, policy or legal change, "Will this transaction or change make somebody better off while making no one worse off?" A transaction or proposal which does this and is otherwise voluntary and informed, is thought to be unobjectionable.

The second method of evaluating welfare is more complex and responds to the facts that private exchanges can require legal rules to ensure that the exchange benefits both parties, and that state decisions must be taken in ways which cause some parties to lose and

114 Ibid. at 7.
115 Ibid. at 7.
which cause harm to third parties. This concept of welfare is called "Kaldor-Hicks efficiency" and asks:

Can the gainers from the decision or rule gain sufficiently from it that they could hypothetically fully compensate the losers, so as to render the latter indifferent to the decision or rule, while still preserving some gains for themselves?

The Kaldor-Hicks concept of efficiency, in effect, requires a cost-benefit analysis and recognizes only preferences that are backed by a willingness to pay.

Cost-benefit analysis is, however, open to controversy. It is least controversial when a monetary value can be placed relatively easily on benefits as well as costs. For example, the benefits of technical and industrial projects such as an engineering proposal to reduce the cost of electricity can be evaluated relatively easily in monetary terms. Other proposals such as providing a certain medicine or establishing a fertility control program present difficulty to a cost-benefit evaluation because one must ultimately place a value on human life in order to assess the program benefits in monetary terms.

This is not the only reason that efficiency analysis can be impractical or unwise. According to Rossi and Freeman, evaluators may have insufficient data or methodological sophistication properly to evaluate a project or proposal. Moreover, different costs and outcomes are required to be taken into account depending on the perspective from which the proposal is evaluated. There are, for example, at least three such perspectives from which to evaluate a proposal to regulate preconception arrangements: from the perspective of the participants themselves, the legal system qua regulator, and the community as a whole. The latter is the most comprehensive perspective and implies that special efforts are made to account for the secondary and indirect effects of the proposal. Controversy can develop, however, when one perspective is ignored.

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116 Trebilcock et al., supra, note 1 at III-13.
117 Ibid.
119 Ibid.
120 Ibid. at 399.
121 Ibid. at 391.
Despite these reservations about the usefulness of efficiency analysis to evaluate social programs, at least two arguments from law and economics have been advanced in favour of the practice of preconceptual arrangements. Richard Posner evaluates the practice of preconceptual arrangements in terms of efficiency, concludes that it is efficient, and advocates a regime of private ordering with specifically enforceable agreements. Michael Trebilcock also evaluates the practice in efficiency terms; he views preconceptual arrangements as potentially capable of increasing aggregate welfare and recommends a system of private ordering with a short interval after birth in which a carrying woman could "opt out" of her agreement. The arguments of both Posner and Trebilcock are, however, unpersuasive because, among other reasons, they do not demonstrate that the practice is likely to increase aggregate welfare.

According to Richard Posner,

The case for allowing people to make legally enforceable contracts of surrogate motherhood is straightforward. Such contracts would not be made unless the parties to them believed that surrogacy would be mutually beneficial... The father and his wife must believe that they will derive a benefit from having the baby that is greater than $10,000, or else they would not sign the contract. The surrogate must believe that she will derive a benefit from the $10,000 (more precisely, what she will use the money for) that is greater than the cost to her of being pregnant and giving birth and then surrendering the baby.\(^{122}\)

Posner justifies specific performance of the arrangements on the same basis: that it permits the realization of preferences known in advance of the contract's performance and thus benefits the carrying woman, the commissioning man and the commissioning woman.

Posner considers specific performance a benefit to the carrying woman because he believes that carrying women are motivated to participate in a preconceptual arrangement by a desire for money, and that in negotiating the agreement, the carrying woman will weigh her desire for money against the possible development of a wish to keep the child. According to Posner, the woman's weighing of these competing desires will be reflected in the price to which she agrees. To enable her to gain the best possible price, the negotiations

must take place with the knowledge that, if she signs the agreement, the carrying woman will relinquish the child. Since Posner believes her goal is to gain money, he claims it is in her interest that the agreements be specifically enforceable against women who wish to keep the children. As Posner explains,

Because surrogacy is so much less attractive to the father and wife when it is not enforceable, they will not be willing to pay nearly as much as they would if it were enforceable - so the surrogate is hurt. After all, the surrogate always has the option of offering to accept a lower price in return for retaining the right to keep the baby if she wants. If she surrenders that right in exchange for a higher price, it is, at least presumptively, because she prefers the extra money to the extra freedom of choice. Her preference is thwarted if the contract is unenforceable.123

The specific enforceability of the agreement also benefits the commissioning man. Posner argues that without specific performance, a carrying woman, "has an incentive to threaten [to renge] to obtain a higher price than the one she agreed to accept back when the contract was signed".124 According to Posner, this is serious. He claims, "If the law refuses to enforce contracts of surrogate motherhood, it empowers surrogate mothers to commit extortion".125

Specific performance is, in Posner's opinion, also beneficial to commissioning women. He argues,

Not only are they hurt if their ability to obtain a baby (necessarily not borne by them) is impeded by a ban on the enforcement of contracts of surrogate motherhood, but their already weak bargaining position in a marriage to a fertile husband is further weakened, for under modern permissive divorce law he is always free to "walk", and seek a fertile woman to marry.126

In this way, preconception agreements and their specific enforcement would, according to Posner, be beneficial to carrying women, commissioning men and

123 Ibid. at 23.
125 Ibid.
commissioning women. Would there, however, be a net benefit? Posner evaluates the benefits and costs to a range of affected parties and concludes that the benefits indeed outweigh the costs.

Against the benefits to the commissioning man of having his own child, to the commissioning woman of overcoming "the consequences of her infertility,"\textsuperscript{127} to the carrying woman of earning money and providing happiness to the commissioners, and to the commissioned child of life itself; Posner weighs the costs. He sees none to the commissioning man or woman beyond the payment itself which is, in his opinion, obviously less than the benefit they hope to derive or they would not have entered the agreement.

Nor does Posner view the costs to the carrying woman to be significant. According to him, her participation is both voluntary and informed. It is voluntary because she knowingly chooses to enter the arrangement. Although he considers it possible that desperation for money might constrain voluntariness, Posner argues that

\[\ldots\] there is no evidence that surrogate mothers are drawn from the ranks of the desperately poor, and it seems unlikely they would be... A couple would be unlikely to want the baby of a \textit{desperately} poor woman; they would be concerned about her health, and therefore the baby's.\textsuperscript{128}

Even if the woman were desperately poor, Posner argues that the legal system ought not to intervene. He claims,

To someone who is desperately in need of $10,000, a court's refusal to allow her to obtain it will seem a hypocritical token of concern for her plight, especially since the court has no power to alleviate her plight in some other way.\textsuperscript{129}

Thus, for Posner, the agreements are voluntary because the women are unlikely to be desperate for cash and even if they are, that is insufficient reason to ban the practice.

Posner similarly argues that the agreements are informed. Carrying women know what they are getting into because most of them have children and few are under 20 years of age. As evidence that the carrying women do not underestimate their ability to relinquish the commissioned child, Posner cites the fact that "very few of these arrangements have been

\textsuperscript{127} Posner, \textit{Sex and Reason}, note 124 at 424.
\textsuperscript{128} Posner, "Ethics and Economics", \textit{supra} note 122 at 25.
\textsuperscript{129} \textit{Ibid}. 

Even if carrying women do suffer in unanticipated ways from giving up the child, Posner claims that this "regret... is balanced by the empathy for the father's infertile wife".

The benefits of the practice outweigh the costs also from the perspective of the commissioned child. According to Posner,

it is very likely that the baby is made better off by the contract of surrogate motherhood and certainly not worse off. For without the contract, the baby would not have been born at all.131

He views the situation of a commissioned child as analogous to that of a child whose mother dies during the baby's infancy; of a child whose mother was inseminated by the sperm of a man not her husband;132 and of a child whose parents divorce and whose father remarries, gains custody and his new wife adopts the child terminating the natural mother's rights.133 Posner asserts, "If there is any evidence that such babies, when they become adults, decide they'd rather not have been born, I am not aware of it".134 Posner also considers the argument that the commissioned child could be harmed by the knowledge that "his natural mother gave him up for money".135 He dismisses the argument claiming that children are not sold despite the cash exchange and that children of the next generation will not be harmed by practices which seem weird and unnatural only at present.136

Posner briefly contemplates that the other children of the carrying women might suffer but he claims that the psychic costs, if any, to those children must be balanced against the possible gains to them from their mother’s having a higher income, as well as against the gains to the father of the surrogacy child, to his wife, and to the child.137

130 Ibid.
131 Ibid. at 23.
132 Ibid.
133 Posner, Sex and Reason, supra, note 124 at 423.
135 Ibid. at 24.
136 Ibid.
137 Posner, Sex and Reason, supra, note 124 at 423.
Posner also evaluates the effect of the practice of preconception arrangements on two groups - to women and to society as a whole and concludes again that any costs are outweighed by benefits. This form of assisted reproduction will, Posner claims, benefit women in general because it enables women to receive income for their reproductive labour and allows those who can earn more money elsewhere to contract out the gestational work. Posner concludes that "the technological revolution has increased and will continue to increase the full income of women relative to men".138

With respect to the cost to society as a whole, Posner considers that preconception arrangements do not fundamentally harm society by putting formerly intimate relationships and interactions on a strictly pecuniary basis. He does not believe that this will extinguish altruism or foster anomie because the degree of selfishness in a society is determined more by evolution than by market principles. Moreover and significantly, "allowing the enforcement of contracts of surrogate motherhood isn't going to have any effect on underlying norms and attitudes in our society" because the numbers of potential participants will not be large.

Having canvassed the benefits and costs of the practice of preconception arrangements, Posner concludes that the practice ought to be lawful and the agreements should be specifically enforceable. In his opinion, the practice will increase aggregate welfare.

Posner's argument does not, however, accomplish what he claims. Its normative analysis fails to demonstrate that the practice will increase aggregate welfare by either the Pareto or Kaldor-Hicks method of evaluation. Moreover, Posner's use of a cost-benefit form of evaluation is not convincing because of its limitations especially in the context of evaluating social programs, viz. the problems of (1) placing a monetary value on human life; (2) relying on insufficient data and unsophisticated methodology; and (3) examining the practice from all possible accounting perspectives.

Posner's argument does not demonstrate that preconception arrangements are Pareto efficient: that they make at least one person better off whilst making no one worse off. For an exchange to be Pareto efficient it must be voluntary and informed. As Posner himself

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138 Ibid. at 425.
states, the voluntariness of the arrangement is in doubt when payment is offered to a woman for her child because it is difficult to distinguish between compensation and inducement.

Nor is Posner convincing when he claims that women can and do know in advance the cost to them of relinquishing their child. He says that, "A mature woman who has borne children should be able to estimate the psychic cost to her of giving up a baby".139 But it is not clear how having given birth to and rearing children can inform one about the very different experience of relinquishing and thus losing a child. Just as having good health does not prepare us for losing it, it probably is true that ‘we don’t know what we’ve lost ’til it’s gone’. Further, Posner’s argument wrongly states that "There is no persuasive evidence or convincing reason to believe that, on average, women who agree to become surrogate mothers underestimate the distress they will feel at having to give up the baby".140 Despite the rareness of a "Baby M" case, there is such evidence. As discussed above,141 Dr. Nancy Reame who conducted research on 41 carrying women concluded that "nearly all the surrogate mothers confessed that they had underestimated how difficult it would be to relinquish their babies".142 This information failure undermines the agreement’s capacity to be efficient. As Posner himself concedes, "contracts cannot be depended on to maximize welfare if parties signing them don’t know what they’re committing themselves to".143

Posner’s argument thus fails to demonstrate that preconception arrangements are likely to be bilaterally voluntary and informed and, therefore, Pareto superior. Nor does the argument demonstrate that the practice increases aggregate welfare by the Kaldor-Hicks method of evaluation. That method, it will be recalled, asks of a proposal or transaction whether the winners could hypothetically compensate the losers so that the losers became indifferent to the proposal or transaction and the winners still have some gains left for themselves. For the practice to be Kaldor-Hicks efficient, a number of aspects of the practice would have to be other than they are.

140 Ibid. at 25.
141 Supra, Chapter 1.6.2.3.
142 Sidney Katz describing Reame’s research in "The new reproductive era: Doctors will face ethical challenges" 136 Canadian Medical Association Journal (15 June 1987) at 1293.
In the first instance, the carrying woman would need equality of bargaining power so that she could negotiate to achieve an efficient price. But it is naive to assume there exists such equality. Indeed if, as Posner incorrectly assumes, there were "perfect competition", carrying women would be in a superior bargaining position because demand greatly exceeds supply. But the disparity in socioeconomic status among carrying women, commissioners, and (in commercial arrangements) brokers means that from the perspective of the carrying women, the agreement is a contract of adhesion. In practice, a carrying woman has no power to alter its terms.144

144 As Nancy Reame found, "Surrogate mothers [as a group] lacked adequate legal protection. This was in contrast to the adopting couples, who retained skilled lawyers to draw up contracts which satisfied their needs". Katz, supra, note 142. Consider also Susan Ince's description of her undercover investigation of the practice when she surreptitiously attempted to become a carrying woman for a "surrogate company".

The contract itself repeated three times that a surrogate might seek her own legal counsel, fee to be paid by the program, to further her understanding... [Because of the high cost of independent legal consultation and because] surrogates had come back from their consultations with new doubts and questions... I was strongly encouraged to see a nearby lawyer "not associated" with the program... To my surprise, the independent consultation was held within earshot of the (broker) who was called on by the lawyer to interpret various clauses of the contract, and who kept a record of the questions I asked.

Ince asked many questions of the lawyer and challenged a clause requiring her to undergo amniocentesis and to abort if the commissioners did not like the test results. The "independent" lawyer said, however, that the clause must remain.

He paraphrased the company officials: "The program works because it works the way it is. We cannot make big changes for the surrogate or the parents". Before the final signing of the agreement, Ince was telephoned by the broker, who had become concerned while listening to her consultation with her lawyer. She admonished Ince for asking too many questions:

The program works because it is set up to work for the couple. You have to weigh why you are participating in the program. For the money only, or to do the service of providing the couple with a baby. To be very frank, we are looking for girls with both these motivations. I felt after the last visit that this is a gal looking for every possible way to earn that money, and that concerns me... emotionally and in every other way that baby is not yours... No contract is perfect for anyone, for anything.

Secondly, for the practice to be Kaldor-Hicks efficient, the losses suffered would have to be compensable in monetary terms. But how is it possible monetarily to compensate a mother for losing her child, grandparents for losing their grandchild, and children for losing their half-sister or brother? If it were possible to compensate the losers for such a loss with cash, then Posner would not have advocated that the agreements be specifically enforceable; money damages would have been an adequate remedy. His concern to prevent extortion implies an understanding that a child can be beyond price. If the commissioned item were a custom-built chair that the furniture maker decided to retain pending payment of higher price than that originally agreed on, then the buyer could rationally determine, despite the furniture maker's unfairness, whether the new price was acceptable. The buyer could take it or leave it. But if the commissioned item is a child, the demand for more money is like extortion; when love of a child is involved, there is no price a prospective parent will not pay. Thus, whilst Posner acknowledges that the value of the commissioned item can grow so high as to make commissioners insensitive to price, he inconsistently maintains that the value lost by the carrying woman, her parents, and her other children, when they lose the child can be compensated in monetary terms.

Even assuming there is a price at which some such people would be content to lose an infant, to speak (if only in hypothetical terms) about monetary compensation for that loss requires that the price be negotiable within a wide range depending upon the losers' utility functions. But, as discussed above, there is no equality of bargaining power in the present practice of preconception arrangements. For these reasons, the practice is not likely to be Kaldor-Hicks efficient.

Not only does Posner's argument fail to demonstrate that the practice of preconception arrangements will increase aggregate welfare, its cost-benefit method of evaluation is revealed to have severe limitations when applied to this social practice. Posner's cost-benefit analysis of preconception arrangements is impractical and unwise because of its requirement of monetary evaluation of human life (as just demonstrated) and also because of its insufficiency of data, methodological problems and difficulty in assessing the practice from all possible accounting perspectives.
Posner himself acknowledges that there is not much data on the subject of preconception arrangements. As he writes, "the evidence is casual and anecdotal and a more systematic study is necessary and indeed urgent".\textsuperscript{145} Given the very nature of a cost benefit analysis which requires careful evaluation of rigorously-obtained data, it is odd that Posner purports to assess the practice before, as he claims, "a rational judgement of its pros and cons could be made".\textsuperscript{146}

A third limitation of Posner's cost-benefit analysis is its unresolved methodological problems which are numerous. The very assumption that persons are rational promoters of their self-interest is open to challenge and will be discussed in detail below in Chapter Three.\textsuperscript{147} Another methodological problem is that Posner assumes without justification that an \textit{ex ante} preference ought to prevail over an \textit{ex post facto} preference. He claims that the carrying woman must be held to her preconception promise to relinquish the baby even if, after birth, her preference is to keep the child. This requirement of adherence to \textit{ex ante} preferences is selective; Posner uses as a justification for the remedy of specific performance the fact that "under modern permissive divorce law [a commissioning man] is always free to 'walk' and seek a fertile woman to marry".\textsuperscript{148} Yet Posner does not explain why husbands but not carrying women should be free to walk. If the commissioning man can abandon his marriage agreement because he wants a child, why should not the carrying woman be entitled to abandon her preconception agreement because she wants her child? As Louis Seidman powerfully argues, "any institutional arrangement that treats the birth mother's preferences as important requires a theory that explains when the question should be asked".\textsuperscript{149} A third methodological problem is Posner's assumption of the child's existence in his evaluation of whether children ought to be born in this way. It is illogical to assume that the child is in being and therefore would suffer if the practice were banned when one is attempting to evaluate the practice as a method to bring children into the world.\textsuperscript{150} A fourth

\begin{itemize}
\item \textsuperscript{145} Posner, "Ethics and Economics", \textit{supra}, note 122 at 28.
\item \textsuperscript{146} ibid. at 29.
\item \textsuperscript{147} See Chapter Three, section 3.4 and 3.5.
\item \textsuperscript{148} Posner, "Ethics and Economics", \textit{supra}, note 122 at 28.
\item \textsuperscript{149} Seidman, "Baby M and the Problem of Unstable Preferences" (1988) 76 Georgetown Law Journal 1829 at 1834.
\item \textsuperscript{150} See text above at note 69.
\end{itemize}
methodological problem lies in Posner’s dismissal of the argument that the carrying woman’s other children might suffer from the practice. Posner claims that the "psychic costs, to them, if any"\(^{151}\) must be balanced against the financial gain to the carrying woman (and indirectly her other children) and the gains to the commissioners and the commissioned child. But Posner provides no method of weighing these costs and benefits. This is problematic because the cost of losing a half-sibling is likely to grow over time just as the value of the fee paid to the carrying woman will diminish over time. How does one calculate the future and possibly increasing unhappiness of the carrying woman’s other children? A fifth problem is his inconsistent assessment of empathy as a potential benefit and loss. He claims that "For many surrogate mothers..., regret at giving up the baby is balanced by empathy for the father’s infertile wife"\(^{152}\), suggesting that the carrying woman’s sadness is nullified by her happiness. But when it comes to including the commissioning woman in the assessment of aggregate welfare, Posner does not consider whether she also might suffer unhappiness which would nullify her happiness. The presumed happiness of the commissioning woman at receiving her husband’s child by another woman might be nullified by sadness for the carrying woman who thereby lost her child. A sixth methodological problem in Posner’s assumption is that an increase in a carrying woman’s income results in an increase in welfare.\(^{153}\) What if the cash fee is quickly dissipated by the costs of grief counselling for herself and her other children? Even using economic criteria to assess welfare, it is not clear that an increase in income per se increases welfare.

Not only is a cost-benefit analysis of preconception arrangements likely to be impractical and unwise because of its monetization of the value of human life, the insufficiency of data and its numerous methodological problems; there is difficulty in assessing the practice from all possible accounting perspectives. As stated above, there are at least three such perspectives from which to evaluate preconception arrangements: from the perspective of the participants and the child, the legal system, and the community as a whole. Posner’s argument adopts the perspective only of the first; it ignores the second and inadequately addresses the third.

\(^{151}\) Posner, *Sex and Reason*, supra, note 124 at 423.
To examine the practice of preconception arrangements from the perspective of the legal systems qua regulator or enforcer of these agreements, would require an assessment of the benefits and costs to the legal system of participating in this practice. The benefits might, as Posner argues, lie in increased confidence of commissioners and perhaps also carrying women in the legal system as a method of giving effect to their ex ante intentions. The costs to the legal system might, however, be high. Effectively to enforce the agreements might at times require litigation which is expensive in the sense that it diverts the court from attending to other matters. It might also be expensive in the sense that enforcing the agreements could cause the administration of justice to fall into disrepute because the practicalities of specific enforcement are arguably distasteful. They might require surveillance of the carrying woman whilst she is pregnant, the presence of court officials in the delivery room as she gives birth and their forcible and permanent separation of the baby from its lactating mother who is fit to care for the child. The costs to the legal system of giving effect to Posner's proposal might be very high and might outweigh the benefits. Posner's argument does not address these costs because it does not evaluate the practice from the perspective of the legal system.

Nor does the argument adequately consider the practice from the perspective not just of the direct participants but of the community as a whole including, but not limited to, the interests of the carrying women's other children (if any), her husband, her parents, her brothers and sisters and their children. Moreover, it frames the community's interest in a curious way; Posner claims, "What is at stake is an infertile woman's right to compensate a fertile woman for the cost... of assisting the former to overcome the consequence of her infertility". Another and arguably more appropriate statement of what is at stake is whether commissioners or brokers have the right monetarily to induce women to become pregnant intentionally, in order to relinquish the resulting child and thereby to treat the maternal-child relationship as open to sale. When framed in this way, the interests of the community become more apparent. As shall be discussed below in Chapter Three, the effects on society at large of the practice might be great. Posner's inadequate assessment of the costs and benefits to the indirect participants and to society fails to justify his conclusion

154 Posner, Sex and Reason, supra, note 124 at 424.
that the practice "isn't going to have any significant effect on the underlying norms and attitudes in our society".155

In summary, Posner's argument is that the practice is likely to promote aggregate welfare if unregulated and if the agreements are specifically enforceable. But his argument is not convincing. It does not demonstrate that aggregate welfare will be increased by either the Pareto or the Kaldor-Hicks method of evaluation. Moreover, Posner's very use of cost-benefit evaluation of this social practice is ineffective. His evaluation requires placing a monetary value on human life, which he implicitly acknowledges is difficult if not impossible; assessing sufficient data which Posner concedes he does not have; resolving many methodological problems which he encounters; and adequately evaluating the practice from the perspective of more than the direct participants. For these reasons of internal inconsistency and flawed analysis, Posner's argument for the legal permissibility and specific enforcement of preconception agreements is not persuasive.

A second law and economics argument for the legal permissibility of preconception agreements has been advanced by Michael Trebilcock.156 Like Posner, Trebilcock prefers private ordering to regulation as a legal regime to govern preconception arrangements. But unlike Posner, Trebilcock denies that the unlimited exercise of autonomy will increase aggregate welfare. Trebilcock believes that certain problems will tend to arise in the life of a particular preconception agreement and, therefore, the law should address these problems in advance. Trebilcock calls these difficulties "transaction-specific failures" and advocates the establishment of certain legal rules, in the shadow of which a private ordering regime would operate. Yet despite its sensitivity to some problems to which preconception arrangements are likely to give rise, Trebilcock's argument does not demonstrate that his private ordering regime will increase aggregate welfare.

Trebilcock sees three types of problems which would prevent the preconception agreement from being mutually advantageous: information failure, lack of voluntariness and externalities. In Trebilcock's view, information failure can occur if the carrying woman underestimates the "emotional costs and psychological damage"\textsuperscript{157} that she will suffer at relinquishment. There might be a lack of voluntariness if the woman is impoverished and the commissioners and the broker exploit her constrained choices "in effect coercing the birth mother into entering into an arrangement... [or] exacting unfair terms from her, especially with respect to the level of remuneration".\textsuperscript{158} Trebilcock sees a third problem in that the parties might fail to address certain externalities, in particular, negative effects of the transaction suffered by the commissioned child. These include the possibility of being rejected by the commissioner because of the commissioning woman's pregnancy, the commissioners' separation or the child's disability; and the harm caused the child by custody litigation.

To obviate the negative effects of these problems (and thus to enable the agreements to increase aggregate welfare), Trebilcock argues that the problems be addressed specifically in advance by law. He advocates that the agreements be considered contracts and therefore legally enforceable, presumably by both money damages and specific enforcement. But the agreement would be subject to the commissioning woman's right (by analogy to a similar right in door-to-door sales) to rescind within a certain short period after her labour and delivery. To rescind, the carrying woman would presumably be required to perform some positive act such as signing a document. (It is not clear whether a speech act or simply refusing to relinquish would be sufficient.) If the carrying woman does not repudiate the contract within the specified "cooling-off" period, then the agreement would be fully enforceable.

Trebilcock claims that this regime will obviate the first two problems of information failure and lack of voluntariness and thus enable the agreement to be Pareto optimal.\textsuperscript{159} If

\begin{itemize}
\item \textsuperscript{157} Trebilcock, "Private Ordering", supra, note 156 at 56.
\item \textsuperscript{158} Ibid. at 57.
\item \textsuperscript{159} Ibid. at 59.
\end{itemize}
the carrying woman has underestimated the suffering she will endure by relinquishment, then she may simply keep the baby. Her voluntariness would be ensured because her ability to keep the child would "minimize the degree of coercion".160

Potential harm to the child would be avoided by legal resolution in advance of other issues. The possibility of rejection would be prevented by a rule requiring the commissioners to accept the child despite unanticipated circumstances arising. Possible harm to the child by custody litigation would also be avoided by the clear presumption of custody in the carrying woman if she repudiates the agreement and she is not proven unfit.

Trebilcock advocates the regulation of other issues to increase the agreement's tendency to augment aggregate welfare. The carrying woman could not be required by contract to waive her right to abortion because "natural mothers in other relationships now have such a right".161 If the mother chose to repudiate the contract she would not be entitled to support from the commissioners and, in fact, would be required to return sums already paid her by the commissioners. Finally, brokers who are agents of the Children's Aid Society would be permitted to act as intermediaries; it appears that Trebilcock would not allow brokers to operate for profit.162

In summary, Trebilcock views the practice of preconception arrangements as likely to increase aggregate welfare provided the few problems to which it might give rise are eliminated in advance by legal regulation designed to limit the range in which the parties might bargain. In his proposal,

160   Ibid. There is a similarity in Trebilcock's proposal to Ontario adoption law (see Child and Family Services Act S.O 1984 c.55 s.131) in that both would allow a period to lapse during which the mother might revoke her consent to adoption. But there is an important difference between the two regimes. Under Ontario adoption law, a birth mother is assumed to be charged with parental rights and responsibilities and must take a positive step to relinquish those rights and responsibilities irrespective of any agreement made before conception. Under Trebilcock's proposal, the birth mother would be deemed not to have any rights or responsibilities because of her preconception agreement and only if she were to take a positive step of revoking her agreement within a limited (but unspecified) period, could she gain those rights and responsibilities.
162   Ibid. at 63.
Bargaining parameters have been constrained in the light of potential contracting failures, leaving room for bargaining principally on the choice of birth mother and the surrogacy fee. 163

"With these background legal rules in place", Trebilcock is "optimistic that most surrogacy contracts that would be entered into would generate mutual gains for all concerned". 164

Although Trebilcock’s argument evinces greater sensitivity than Posner’s to the potential harmful effects of preconception arrangements, it fails to demonstrate that the practice, even when constrained by the proposed legislation, would increase aggregate welfare. The principal reason that the argument is unconvincing is its failure to consider the practice from the perspective of the direct participants over time, and from the perspective of parties indirectly affected.

Trebilcock’s proposal to legislate a ‘cooling-off’ period would certainly permit the carrying woman to reconsider after giving birth whether she will suffer by relinquishment. But the ‘cooling-off’ period will not correct the ex ante information failure. It will merely give her time to realize perhaps that she was wrong to have believed before conception that she ought to conceive, carry and relinquish a child in exchange for cash or the satisfaction of helping others. In this type of arrangement, correction of information failure requires correction ex ante because unlike a cooling-off period in door-to-door sales, there are serious consequences of having entered into the agreement in the first instance; repudiating the purchase of a vacuum cleaner is nothing like repudiating a promise to relinquish one’s child. The effect of the first repudiation is that one does not have a new vacuum cleaner; the effect of the second is that one now has a child to rear and one does not have the promised sum of approximately $10,000. Which raises the question of how the proposed ‘cooling-off’ period could lead to an increase in aggregate welfare. If the woman chooses to repudiate, she would, under Trebilcock’s proposal, forfeit what she sought from the bargain in the first place, for example, to give the gift of life and to earn money. If these were her goals, then presumably she will suffer from denying the commissioners the child they desperately sought, and from foregoing the money she wanted or needed. Although the carrying woman and her other children will not suffer the loss of a family member, rearing the infant might

163 Ibid.
164 Ibid.
cause other problems; by introducing the child of another man into her household, she might risk her marriage or partnership and will likely increase the stress on the original family unit as the child, which was intended to bring money into the unit by its exchange, will now drain the family's financial resources by requiring food and clothing. Thus, it is not clear that, even with the right of repudiation, a woman who regrets her decision to enter into a preconception arrangement and her family will be better off (and quite likely, will be significantly worse off) after the transaction than they were before the conception. A 'cooling-off' period is, therefore, unlikely adequately to correct the ex ante information failure and thereby to make preconception arrangements capable of increasing aggregate welfare.

Nor will Trebilcock's proposal ensure that the transaction is voluntary. Trebilcock's concern is that a woman's poverty might make her vulnerable to the commissioners' or broker's desire to exploit her constrained choices. But his proposal does not protect an impoverished woman from such exploitation. A poor woman might still see the exchange of her child as a means to feed herself and her other children. No matter how great her desire to keep the child, she might choose not to exercise her right to repudiate in order to obtain the payment which Trebilcock concedes is likely to be re-apportioned "from the pre-delivery period to the delivery juncture in order to induce waivers of the right of repudiation". A poor woman might relinquish her child simply because she does not have enough money to feed it. For these reasons, Trebilcock's proposal does not ensure that a woman's decision to enter a preconception arrangement or to relinquish the child is voluntary and therefore likely to increase aggregate welfare.

Trebilcock's argument also addresses the potential harm caused a child should the commissioners reject it. The proposed solution is to require the commissioners to accept the child. But how would this increase aggregate welfare? The commissioners would thereby be compelled to accept and rear a child they do not want and the child would be forced into a home where he or she is not welcome. What is more, the carrying woman, as the child's birth mother, would probably suffer by witnessing the child's plight and might in reaction choose to rear the child herself - thus potentially raising all the problems discussed above of

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165 Ibid. at 60.
bringing the commissioned child back into the carrying woman's existing family.

Trebilcock's proposal is flawed also in its selective application of existing law. The proposal would make it unlawful for a woman in a preconception arrangement to waive her right to abortion because "natural mothers in other relationships now have such a right" and, therefore, "the position should be no different in the case of surrogate motherhood". But though a right to abortion would continue to exist, a right to child support would not. Trebilcock argues, "I am inclined to think, in principle, [the carrying woman] should not be entitled to support payments from the biological father in cases where she repudiates the contract". In failing to explain why one existing legal right (the right to abortion) should be immune to bargaining but not another (the right to child support), Trebilcock does not address the moral desirability of permitting an impecunious mother to waive her child's right to financial support from its father. Nor does he explain how the denial of a child's right to financial support and the requirement that the carrying woman return any sums paid her by the commissioners when she might need what money she has to feed the child, will enhance the well-being of the child and thereby increase aggregate welfare.

Trebilcock's law and economics argument, like Posner's, attempts to justify legal permissibility of the practice of preconception arrangements on the basis that if few restraints are placed on the exercise of autonomy, aggregate welfare will thereby be increased. Unlike Posner, however, Trebilcock identifies and seeks to redress three categories of problems (information failure, lack of voluntariness and externalities) which might impede a preconception arrangement's ability to increase aggregate welfare. For this reason, he proposes limited constraints on bargaining. Trebilcock's argument does not, however, demonstrate that the practice of preconception arrangements, given the problems he identifies and even when constrained as he proposes, is likely to increase aggregate welfare.

166 Ibid. at 61.
167 Ibid. at 62.
168 A child's right to support from both its parents is established by both Ontario and Canadian law: Family Law Act, S.O. 1986, c.4, s.31; Divorce Act, S.C. 1986, c.4, s.15(8).
2.5 The Argument of Medical Necessity

There is a third and final consequentialist argument for the legalization of the preconception arrangements.169 This argument holds that the practice alleviates suffering and, therefore, can be justified as medical treatment for commissioners. The argument is espoused by, among others,170 the Ontario Law Reform Commission (OLRC)171 and the Ethics Committee of the American Fertility Society (AFS).172 This argument is open to criticism on at least three grounds. First, it does not provide adequate criteria to determine who may and may not participate in the "medical treatment" that is the preconception arrangement. Second, it does not take into account or justify that while all the risks and pain of pregnancy and parturition are borne by the carrying woman, all the benefit accrues to the commissioners. Third, it fails to demonstrate how participation is medically related.

Both the OLRC and the AFS view participation in a preconception arrangement as a

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169 This section is derived from Juliet Guichon, "Surrogate Motherhood: Legal and Ethical Analysis" in Legal and Ethical Issues in New Reproduction Technologies: Pregnancy and Parenthood (Ottawa: Ministry of Supply and Services, 1993) at 564-569.


171 Ontario Law Reform Commission, Report on Human Artificial Reproduction and Related Matters (Toronto: Ministry of the Attorney General, 1985) [hereinafter "OLRC"]. Of the five men who served as Law Commissioners when the report was written, one, the Vice Chairman Allan Leal, dissented from the majority’s decision to permit and give effect to preconception arrangements.

172 Committee on Ethics of the American Fertility Society, "Ethical Considerations of the New Reproductive Technologies" (1986) 46 Fertility and Sterility, Supplement 1; (1990) 53:6 Fertility and Sterility, Supplement 2; and (1994) 62:5 Fertility and Sterility, Supplement 1. The recommendations of the AFS with respect to preconception arrangements are virtually the same in all three documents; [hereinafter cited to (1990) 53:6 Fertility and Sterility and cited as "AFS"]: The AFS does not recommend widespread clinical application of the practice but suggests that it be conducted as a clinical experiment.
privilege that derives from a medical need, rather than as a right. For the OLRC, the practice is justifiable because "in the context of surrogate motherhood... recourse to medical means of alleviating the effects of infertility or genetic impairment cannot conscionably be forbidden". The AFS similarly considers participation necessary for persons requiring "medical treatment" when they have "indications" such as the inability to gestate because of the absence or malformation of the uterus, or severe hypertension. Both committees are adamant that the privilege should not accrue to a woman who prefers "not to disrupt other endeavours, such as a career, or who [wishes] to avoid the physical effects of pregnancy". These "reasons of convenience" are insufficient because, according to the OLRC,

Our sole purpose in allowing individuals to pursue surrogate motherhood arrangements under strict controls is to respond to infertility, not to afford individuals the opportunity to satisfy their lifestyle preferences.

According to the AFS, "reasons of convenience or vanity" are insufficient to justify participation because they, inter alia, create "speculation that a woman's refusal to carry the pregnancy calls into question her ability to care for the child after its birth".

Yet these criteria for granting the privilege of participation on the one hand, and denying it on the other, are insufficiently determinative and illogical.

Consider, for example, a case where a commissioning man wishes to participate in an agreement because he has married either a post-menopausal woman or a woman who, having had three children in an earlier marriage, voluntarily underwent a tubal ligation. In such cases, is the man's desire to hire a woman to become pregnant with his child a

173 OLRC, supra, note 171 at 232.
174 AFS, supra, note 172 at 64S and 69S.
175 OLRC, supra, note 171 at 237.
176 Ibid. at 237.
177 AFS, supra, note 172 at 65S.
178 An example of such a case is that of commissioners Robert Moschetta, aged 35 and Cynthia Moschetta, aged 51. Matt Lait, "Judge Orders Co-Custody in Surrogate Case", Los Angeles Times (27 September 1991) A3.
179 According to carrying woman Patti Foster, these were the circumstances of the commissioners in her preconception arrangement with the Stein family. Shirley (CTV: 1 February 1991). On this point, see also Margrit Eichler, Families in Canada Today: Recent Changes and Their Policy Consequences (Toronto: Gage Publishing, 1988) at 301.
response to infertility or is he attempting to satisfy a lifestyle preference? The criteria provided by the OLRC are not adequate to determine who ought to be granted the privilege of participation.

Moreover, it is illogical that a commissioning woman’s decision not to become pregnant for career reasons should call into question "her ability to care for the child after its birth", whereas a commissioning woman’s decision to protect her frail health by avoiding pregnancy does not raise the same concern. Indeed, in the first case, the commissioning woman might be well positioned to care for a child because, unburdened by the pregnancy and delivery, she might be healthy and rested when the newborn arrives, and the financial remuneration of her career would provide resources for the child’s adequate care. By contrast, a commissioning woman suffering from "a serious heart condition"180 or "severe diabetes or hypertension"181 - all "medical indications" for participation - might be too ill to care adequately for the commissioned child. Thus, on the basis of the best interests of the child, the AFS would illogically grant seriously ill women, but deny healthy women, the privilege of agreeing to rear a commissioned child. Further, the committee appears not to question whether a commissioning man’s desire to have a genetically related child despite his wife’s serious illness is, in itself, a desire prompted by reasons that the AFS condemns as "reasons of convenience or vanity".

A second criticism of the argument of medical necessity is that it neglects to provide any justification for the fact that all the medical risks and pain of pregnancy and parturition are borne by the carrying woman and yet all the benefits accrue to the commissioners.

Both the OLRC and the AFS claim that this discrepancy in the allocation of "treatment" burden and benefit can be justified in the same way as we justify inter vivos organ donation. According to the OLRC, "We do not find [organ donation] offensive to fundamental values, even though, in the case of a kidney transplant the donor may be taking a risk, since the remaining kidney may later fail."182 According to the AFS, "Just as society

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180 This is one of the "medical reasons why a couple may seek the assistance of a surrogate mother" because the "illness would render a pregnancy a risk to her life or health". OLRC, supra, note 171 at 236.

181 These are some of the "medical indications" for a woman to "call on a surrogate gestational mother to carry the pregnancy for her". AFS, supra, note 172 at 64S.

182 OLRC, supra, note 171 at 231.
approves of organ donations to save lives, here there is a functional donation to foster a potential life".\(^{183}\)

But the analogy is not apposite; there are important differences between organ donation and preconception arrangements. Unlike renal failure, infertility is not life-threatening. Unlike the case of organ donation where the donor is, by definition, unpaid,\(^{184}\) both the OLRC\(^{185}\) and the AFS\(^{186}\) foresee that carrying women would be paid. Unlike the case of organ donation, where a donor might withdraw consent at any time up until the operation to remove the organ, the carrying woman under both the OLRC and the AFS proposals would be compelled to surrender the infant.\(^{187}\) Finally, and most significantly, whereas an organ is merely a body part, a child is a human being with whom a woman develops a relationship in the process of nurturing and giving birth to it.\(^{188}\) It is misguided to argue that the relationship of a kidney donor to one of his or her kidneys is similar to that of a mother to her child; kidneys are fungible, children are not. For these reasons, arguments that may justify organ transfer to save a life are irrelevant to the practice of preconception arrangements, which purport to conceive a human being for transfer from

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183 AFS, supra, note 172 at 65S.
184 Payment to organ donors is prohibited in Ontario by the Human Tissue Gift Act, R.S.O. 1980, c.210, s.10. In the United States, payment is condemned by the Transplantation Society. In 1984, it announced: "The International Transplantation Society, The American Society of Transplant Surgeons, and The American Society of Transplant Physicians strongly condemn the recent scheme for commercial purchase of organs from living donors. This completely morally and ethically irresponsible proposal is rejected as abhorrent by all members of the Transplantation Societies. Removal of organs and transplantation of organs obtained commercially will not be handled by any member of the Transplantation Societies, and anyone doing so will be expelled". (1984) 16:1 Transplantation Proceedings.
185 OLRC, supra, note 171 at 253-255.
186 AFS, supra, note 172 at 65S at 73S.
187 OLRC, supra, note 171 at 249-253. Under the proposal of the AFS, preconception arrangements would be pursued as a clinical experiment and then "if surrogate motherhood turns out to be useful, a change in the law would be appropriate for assurance that the couple who contract with the surrogate mother are viewed as the legal parents". AFS, supra, note 172 at 73S.
188 The AFS inconsistently argues that what the carrying woman "donates" is a "function": her ability to gestate and give birth. But, of course, it is the child who is the subject of the donation, otherwise the AFS would not contemplate forced transfer of the child once the carrying woman had exercised her reproductive function by gestating and giving birth.
its birth mother to commissioners, not to save their lives but to fulfill their desire for a genetically related child.

The striking disparity in health risk and benefit brings us to the third criticism of the argument of medical necessity: that the practice of preconception arrangements does not constitute medical treatment. The AFS states, "the primary reason for the use of surrogate motherhood [by artificial insemination] as a reproductive option is to produce a child with a genetic link to the husband".189 If this is the goal of the practice, do the means to achieve this goal constitute medical treatment? To this question, both the OLRC and the AFS would answer yes. In their view, preconception arrangements are "medical means"190 and "a medical solution".191 But their view is open to question.

For a procedure fairly to be characterized as "medical treatment", arguably it must, at minimum, be performed on the person who suffers from disease or impairment, and it must aim to cure the disease or remedy the impairment, or to alleviate the symptoms of the disease or impairment. By this definition of "medical treatment", however, neither artificial insemination nor embryo transfer in the context of preconception arrangements constitute medical treatment. That this is so can be demonstrated by examining each case in turn.

Consider, first the case of artificial insemination of a carrying woman. Is it performed on a person who suffers from disease or impairment? The insemination procedure is performed on the carrying woman, who does not need medical aid to become pregnant. Because she is fertile, she might more easily become pregnant simply by having sexual intercourse with the commissioning man.192 If she chooses not to do that, she can achieve the same result by inseminating herself with the commissioning man's sperm. Therefore, the procedure that the OLRC and the AFS consider "medical" is unnecessarily performed on a healthy woman. Who, then, is the patient and what is the disease? According to the OLRC and the AFS, the commissioning woman suffers from impaired fecundity, which necessitates the "medical" intervention. But neither the OLRC nor the AFS explains why the commissioning woman, the person with the impairment, is not the subject of the "medical"

189 AFS, supra, note 172 at 68S.
190 OLRC, supra, note 171 at 232.
191 AFS, supra, note 172 at 67S.
192 The obvious reason is not medical necessity but a commitment to avoid sexual intercourse.
procedure. Moreover, they do not distinguish between commissioning women with medical problems and those without - for example, commissioning women who have ceased menstruating as the natural result of the aging process.

Further, the procedure of artificial insemination does not aim to remedy the commissioning woman’s impaired fecundity. Even if the procedure, once performed on the carrying woman, results in the birth of a child that the commissioning woman will raise, the commissioning woman remains infertile.

It might be argued, however, that the activity of inseminating a third party does constitute medical treatment because (though conducted on a woman who is not the patient) it alleviates the symptoms of the patient’s impaired fecundity.

To examine this argument, we must establish what are the symptoms of impaired fecundity that, if treated, would render the treatment medical. On a narrow definition of "symptom", the symptoms of impaired fecundity might include a disruption of a bodily process such as amenorrhoea or anovulation, or a defect in a reproductive organ such as a blocked fallopian tube. But the OLRC and the AFS do not confine themselves to this narrow definition of the symptoms of impaired fecundity. The OLRC recommends that Ontario recognize the practice and legally enforce the agreements to alleviate childlessness:

[The majority of the Commission is of the view that recourse to medical means of alleviating the effects of infertility or genetic impairment cannot conscionably be forbidden. It does not see the endorsement of this practice as foreshadowing the dissolution of the family, nor does it accept that only harm can come to the child or children involved. Indeed, by assisting an otherwise childless couple, surrogate motherhood may be the sole means of affirming the centrality of family life.]

The AFS believes the practice is medically "indicated", not only to alleviate childlessness but also to alleviate a second symptom of impaired fecundity: unhappiness in, and the threat of dissolution of, the commissioning couples’ relationship. According to the AFS,

The use of a surrogate mother allows the infertile woman who wishes to rear a child the opportunity to adopt an infant more rapidly than by waiting several years for a traditional adoption. In addition, it allows her to rear her husband’s genetic child.

For the husband of an infertile woman, the use of a surrogate may be the only

193 OLRC, supra, note 171 at 232.
way in which he can conceive and rear a child with a biologic [sic] tie to himself, short of divorcing his wife and remarrying only for that reason or having an adulterous union. Certainly, the use of a surrogate mother under the auspices of a medical practitioner seems far less destructive of the institution of the family than the latter two options. 194

Clearly, the AFS believes that among the symptoms of impaired fecundity are childlessness and the possible dissolution of relationship between wife and husband or partners. Thus, both the OLRC and the AFS justify the participation of physicians on the basis that the intervention of medical practitioners might alleviate the potential social effects of the impairment.

This adherence to a broad definition of the "symptoms" of impaired fecundity to include the social effects of the ailment has significant consequences. If childlessness and the possibility of dissolution of a relationship are symptoms of disease or impairment, and the treatment of these symptoms constitutes medical treatment, then adoption and marriage counselling are medical treatment. Yet, the response to the social effects of disease and impairment, even the response of physicians, is not, for that reason, medical treatment. In the context of preconception arrangements, there is a distinction to be made between, on the one hand, the treatment of a disruption of a bodily process or defect, and on the other, the treatment of the social effects of the disruption or defect. Though both treatments might be applauded as conscientious efforts to reduce suffering, only the first (provided it is performed on a diseased or impaired person) can properly be considered medical treatment. It is important to distinguish between medical practices, such as treating amenorrhoea or repairing a damaged fallopian tube, and social practices such as adoption and preconception arrangements. This distinction is important to the development of coherent social and legislative policy because the justifications for, and in Canada the methods of financing, most medical practices are different from the justifications for and methods of financing social practices.

Nor is it correct to understand the second form of preconception arrangements as medical treatment. The procedure of embryo transfer involves artificial hormonal stimulation of, and egg extraction from, the commissioning woman; fertilization of the egg in a glass

194 AFS, supra, note 172 at 64S.
dish; and then the transfer of the embryo into the carrying woman. In this second form of preconception arrangement, therefore, and unlike the first, some of the practitioner's activities are actually conducted on the body of the person who might be impaired, viz.: the commissioning woman. But embryo transfer cannot be considered medical treatment, because it fails to meet the second criterion: it aims neither to remedy the impairment nor to alleviate its medical symptoms (properly defined). Like artificial insemination of a carrying woman, embryo transfer aims to alleviate only the social effects of the commissioning woman's lack of fecundity. In addition, and under the guise of improperly defined "medical treatment", the carrying woman who has no symptoms of disease or impairment assumes the risks of pregnancy and parturition without commensurate health benefit to herself.

Because, therefore, the procedures of artificial insemination and embryo transfer in the context of a preconception arrangement are not performed on the commissioning woman to cure a disease or remedy an impairment, or to alleviate her symptoms (if any) of bodily disruption or defect, the procedures, despite the participation of physicians, do not constitute medical treatment.

Thus, the argument of medical necessity fundamentally mischaracterizes preconception arrangements. With indeterminate and illogical criteria, proponents of the argument would countenance the subjection of a healthy woman to physical and psychological risks without commensurate health benefit to herself to fulfill the desire of commissioners to have a genetically-related child. Proponents claim that this activity constitutes medical treatment. Yet, in attending to social issues (the desire for a[nother] child and the threat of a relationship's dissolution), the primary motivation for the practice is not medical. What is more, the practice of working on a third person's healthy body, seeking neither to cure nor to remedy the patient's disease or impairment (if any), is not medical. For these reasons, the argument of medical necessity is inadequate to justify the practice of preconception arrangements.

195 For other arguments that preconception arrangements are not medical treatment, see Margrit Eichler, supra, note 179 at 300; and John La Puma, David Schiedermayer, and John Grover, "Surrogacy and Shakespeare: The Merchant's Contract Revisited" (1989) 160:1 American Journal of Obstetrics and Gynecology 59.
2.6 Common Outcome of Proponents' Arguments: A Contract Model of Legal Regulation

As has been demonstrated the four general arguments for preconception arrangements fail to justify the practice. The deontological argument from autonomy relies on a putative legal right which does not exist, adopts a questionable understanding of human reproduction and reproductive duties, and disregards the extent and range of harms potentially caused by the practice. The consequentialist arguments are similarly unconvincing because they attempt to justify the practice on the basis of alleged beneficial effects which are not proven to result; it is not evident that the practice advances equality, increases aggregate welfare or constitutes medical treatment. Therefore, these arguments have little merit in attempting to justify the legal permissibility of preconception arrangements.

Although the arguments are unconvincing in different ways, they each rely upon the contract model of legal regulation. This is significant. Given the subject matter of preconception arrangements - the coming together of women and men to have children - the practice ought prima facie to be regulated by family law. Why should this area of law be overthrown in favour of contract law? Is contract law an appropriate means to regulate the practice of preconception arrangements? This is the subject of the following two chapters which shall argue that the contract model of regulation is wholly inappropriate in this context.

First, however, it is essential to describe what is meant by the contract model. The remainder of this chapter shall be devoted, first to defining the contract model; second, to illustrating that each of the proponents whose work we have considered adopts the contract model (though there are slight variations among their proposals); and third, to presenting an example of the contract model of regulation as embodied in a proposed statute.

2.6.1 Contract Model Defined

The contract model of legal regulation can be defined by its assumptions concerning the nature, effect and functions of an agreement which is given the legal status of "contract". According to the American Restatement of the Law of Contracts,
A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.\textsuperscript{196}

As Anson argues, this definition is broadly acceptable provided it is understood that, in law, a promise includes an assurance that a thing has been or is, as well as that a thing will be; and provided that it is understood that most contracts are an exchange of promises.\textsuperscript{197} For example, a car owner will exchange the promise of payment for the mechanic’s promise that the car’s engine will be in good working order after repair. In this way, the contract model presupposes the existence in an agreement of a legally enforceable promise or set of promises.

The contract model also assumes that the act of entering into a contract has the effect of creating an interest in each party that the contract will be performed. It presupposes that because of the interest created, one party will suffer a loss when the other fails to perform in whole or in part. This loss can be variously assessed as either the loss of value (such as money spent in reliance or money transferred to the defaulting party for which restitution must be made), or the loss of expected value, that is, money or other benefit which would have been realized if the promise had been performed. Compensation for this loss of expected value recognizes that a contract creates an expectation interest which is legally protected in a way which distinguishes contract from other forms of private agreement such as an agreement of marriage. Indeed, the contract model of regulation assumes, as Anson argues, that "the basic object of damages in contract is to put the injured party in the same position as he would have been, had the contract been duly performed".\textsuperscript{198}

It follows from this understanding of a contract’s creative power, that the contract model assumes a contract to have instrumental power as well. The contract model presupposes that the legal enforceability of a promise or set of promises will achieve two important functions which Anson describes.\textsuperscript{199} The first is to secure that the expectations created by a promise of future performance are fulfilled, or that compensation will be paid

\textsuperscript{197} Ibid. at 2.
\textsuperscript{198} Ibid. at 7.
\textsuperscript{199} Ibid. at 2-3.
for its breach. Although it is assumed that people will generally fulfill their promises without the need for intervention by law, in the last resort, the promisee will rely upon the law to reinforce by appropriate sanctions the promise of performance given. The promise is reinforced by, inter alia, requirement to pay money damages or by specific enforcement of the promise itself, both of which sanctions protect the expectation interest created by the contract. The act of entering into the contract enables the promisee to have recourse to these sanctions.

The contract model assumes a second important function of a contract: to facilitate planning of the transaction and for contingencies. First and most obviously, a contract will normally establish the value of the exchange, that is, how much is to be paid for the goods or services promised. Second, a contract will determine the respective responsibilities of the parties and the standard of performance to be expected of them. Third, a contract enables the economic risk in the transaction to be allocated in advance between or among the parties. Finally, a contract may provide for what will happen if things go wrong by, for example, specifying when an innocent party may consider default as bringing the agreement to an end and establishing liquidated damages for failure to complete within the promised period.²⁰⁰

The contract model is therefore based upon three significant assumptions concerning the nature, effect and functions of agreements which the law recognizes as contracts: first, that the promise or promises exchanged are legally enforceable; second, that a contract creates an expectation interest such that failure fully to perform will cause the injured party to suffer a loss of the promise of value and that this loss ought to be redressed by attempts to place the injured party in the position he or she would have occupied had the agreement been duly performed; and third, that by securing expectations and facilitating the planning of the transaction and for contingencies, the contract explicitly establishes and reconciles the separate and conflicting interests of the participants in such a way as to bring them to a common goal.

2.6.2 How the Proponents Each Adopt the Contract Model

Understood in this way, the contract model can be shown to have been adopted by each of the proponents of preconception arrangements whose work we have considered,

²⁰⁰ Ibid.
though the proponents vary in the degree of contractual freedom which they would permit the parties.

Consider first the proposal of Michael Trebilcock who explicitly adopts the contract model of legal regulation though it would constrain the parties' freedom in some ways. He advocates that legal effect be given to preconception arrangements. He recognizes that an expectation interest would be created in the parties by the agreement: the commissioners would expect to receive a child and the carrying woman money. Trebilcock also recommends that these expectations be secured by legal sanctions in the event of failure fully to perform. Trebilcock would, however, limit the parties' freedom to agree upon, *inter alia*, the nature of the sanction. He proposes that the carrying woman be granted a short period after birth during which the commissioners may not insist upon specific performance. If, in that period, she decided not to relinquish the baby, then the commissioners would not be entitled to insist that they be placed in the position that they would have been in had the carrying woman performed; in short, she could keep the baby. With respect to other terms, however, the agreement would be enforceable. For example, if the carrying woman did not repudiate the agreement within the specified period, it would be specifically enforceable. If she did properly repudiate, than she would be bound by the agreement, for example, to make restitution of sums paid and she would be prevented from instituting proceedings against the commissioning man to receive child support. In this way, the agreement would aim to secure preconception expectations and facilitate planning of the transaction and for contingencies.

The OLRC likewise would place constraints on parties' freedom to contract but nevertheless also adopts the contract model of regulation. Under the OLRC proposal, the commissioners and the carrying woman would need the approval of a family court judge before the agreement would have legal effect. If, however, the judge granted approval of

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201 See discussion above in Section 2.4 and Trebilcock, *Limits of Freedom of Contract*, supra, note 109 at 53-56.
202 Trebilcock would also limit parties' freedom to circumscribe the carrying woman's right to abortion and the commissioners' freedom to refuse a commissioned child who was, for example, handicapped.
203 Ibid.
204 OLRC, supra, note 171 at 281.
the proposed arrangement and the proposed payment, the agreement would be specifically enforceable in its terms and, in particular, the term which required the carrying woman to relinquish the baby.\textsuperscript{205} The OLRC's adoption of the contract model is apparent also in that the OLRC envisions that the parties would negotiate aspects of the transaction and would plan for contingencies. Thus the OLRC advises that the parties come to agreement regarding, \textit{inter alia}, health and life insurance protection for the carrying woman and arrangements should one or both of the commissioners die before the child's birth.\textsuperscript{206}

The remaining and majority of proponents adopt what might be considered the pure contract model for they do not explicitly suggest any limitation on the freedom of parties to contract beyond the common law and equitable defenses based on fraud, misrepresentation, mistake, duress and undue influence. For Robertson,\textsuperscript{207} Andrews,\textsuperscript{208} Posner,\textsuperscript{209} and the AFS,\textsuperscript{210} the preconception agreement would be legally enforceable and the expectation interests it created would be protected by, \textit{inter alia}, specific performance of the promise to relinquish the baby. The parties would be free to negotiate other aspects of the agreement including the value of the exchange, the parties' respective responsibilities,\textsuperscript{211} allocation of the economic risks and how they will proceed if their plans are not realized by, for example, the birth of a handicapped child. Thus, the majority of proponents whose work we considered adopt the contract model of legal regulation.

\begin{itemize}
\item \textsuperscript{205}Ibid. at 283.
\item \textsuperscript{206}Ibid. at 284.
\item \textsuperscript{207}Robertson, "Collaborative Reproduction", \textit{supra}, note 19 at 190; and Robertson, "Embryos", \textit{supra}, note 4 at 1011-1015.
\item \textsuperscript{208}Andrews, "Adoption Model", \textit{supra} note 86 at 19. See also a subsequent publication in which Andrews states that if the carrying woman is not given decision-making power over the conduct of her pregnancy, she would not be obligated to relinquish the child, Andrews, "Alternative Modes", \textit{supra}, note 86 at 387.
\item \textsuperscript{209}Richard Posner, "Ethics and Economics", \textit{supra}, note 122 at 22-23.
\item \textsuperscript{210}The AFS explicitly adopts contract language but recommends that the arrangement be conducted initially as a clinical experiment. The Committee does envision payment to the carrying woman and "If surrogate motherhood turns out to be useful, a change in the law would be appropriate for assurance that the couple who contract with a surrogate mother are viewed as the legal parents". In other words, as the "legal parents" they would be entitled to custody which would entail specific enforcement of the agreement. AFS, \textit{supra}, note 172 at 67S.
\item \textsuperscript{211}In general, the proponents would not permit parties to limit the constitutional right of abortion, but a carrying woman would be subject to payment of money damages should she abort.
\end{itemize}
2.6.3 An Example of the Contract Model as Embodied in a Draft Statute

Although none of the variations of the proponents' proposed regulations have been adopted by a legislature,\textsuperscript{212} the contract model does form the basis of a proposed statute entitled, the "Draft Model Surrogacy Act",\textsuperscript{213} which was approved in principal by the American Bar Association Section of Family Law.\textsuperscript{214} This proposed statute is worthy of detailed consideration as an instantiation of the contract model and is an example of a statute to which the majority of proponents of preconception arrangements would likely assent. It is necessary first to show that the ABA draft statute does indeed adopt the contract model of legal regulation.

Consistent with the contract model, the ABA proposal is based on the notion that persons ought to be free to enter and to be held to their agreements provided, of course, that they entered them voluntarily and with adequate information. Indeed one of the explicit purposes of the ABA draft statute is to "facilitate informed and voluntary decision-making".\textsuperscript{215} Therefore, the proposal specifically requires that "No minor may be a party to an agreement"\textsuperscript{216} and "prior to entering into any surrogacy agreement all parties must have full and informed consent".\textsuperscript{217} For the purposes of the proposal,

\textsuperscript{212} New Hampshire, Virginia and Florida have each enacted regulation governing preconception arrangements which have some elements of the contract model. The principal difference is that none of these states permits the carrying woman to receive a fee for the commissioned child. The New Hampshire statute grants the woman a grace period of seventy-two hours in which she can choose to keep the child. The Virginia statute will allow a carrying woman in a court-approved arrangement to change her mind only 180 days after the last insemination or embryo transfer was performed: that is, in the first and second trimester. If the arrangement is not court approved she may relinquish her parental rights only 25 days after giving birth. The Florida statute provides that the commissioners will be presumed to be the legal parents at birth if at least one of them is genetically-related to the child. The carrying woman would not be entitled to resile from the agreement once conception occurred. N.H. Rev. Stat. Ann. 168-B (Equity Supp. 1991) and VA Code. Ann. 20-160 (Michie Supp. 1992) as quoted in Katharine Lieber, "Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?" (1992) 68 Indiana L.J. 205. Fla. Stat 742.15 (1993).
\textsuperscript{213} "Draft ABA Model Surrogacy Act", (1988) 22 Family Law Quarterly 123 [hereinafter "ABA Proposal"]. This proposal was not adopted by the American Bar Association House of Delegates at its mid-year meeting in Denver in 1989.
\textsuperscript{214} "ABA Proposal", supra, note 213.
\textsuperscript{215} Ibid. s.1(c).
\textsuperscript{216} Ibid. s.3(d).
\textsuperscript{217} Ibid. s.3(f).
Informed consent consists of all parties being apprised of their rights and liabilities under the agreement by legal counsel; all parties being apprised of the medical risks involved by a licensed physician; all parties being apprised of psychological risks by a licensed registered mental health practitioner; and that the surrogate has had a previous history of childbirth.\textsuperscript{218}

If any of the parties have not been fully informed of their legal rights, responsibilities and consequences of entering into the arrangement, of all medical risks and of the psychological risks, then a court has power not to give effect to the agreement.\textsuperscript{219}

If, however, the agreement is voluntary and informed as provided in draft statute, then it would be effective. Because the draft statute aims to "facilitate private reproductive choices by effectuating [sic] the parties' intentions while minimizing the risks to the parties",\textsuperscript{220} an agreement which is voluntary and informed and otherwise satisfies the provisions of the draft statute "shall be valid as a matter of public policy".\textsuperscript{221} Thus, the draft statute clearly adopts the first assumption of the contract model: that a voluntary and informed exchange of promises will give rise to legal obligations.

The ABA Proposal also adopts the second assumption of the contract model: that contract creates an expectation interest which ought to be protected. The expectation interest recognized to be created by a preconception arrangement is that the commissioners will receive a child carried by the carrying woman, and the latter will receive payment. For these reasons, the draft statute explicitly aims to "facilitate the creation of a parent/child bond"\textsuperscript{222} between the child and the commissioner.

The proposed statute also adopts the contract model's assumptions regarding the first instrumental function of contract: that the contract secures expectations. The expectation interests are secured by provisions which grant the carrying woman the right to sue the commissioners to accept the child\textsuperscript{223} regardless of any mental defect or deformity or whether the child is alive or dead.\textsuperscript{224} The commissioners also are granted the right to

\textsuperscript{218} Ibid.
\textsuperscript{219} Ibid. s.18(f)
\textsuperscript{220} Ibid. s.1(b).
\textsuperscript{221} Ibid. s.3(a).
\textsuperscript{222} Ibid. s.1(a)
\textsuperscript{223} Ibid. s.6(c).
\textsuperscript{224} Ibid. s.5(g).
specific performance of the carrying woman’s promise to surrender the child.\textsuperscript{225} If the carrying woman exercises her constitutional right to an abortion, then she would be subject to suit for money damages to compensate the commissioners for loss of expectation that the fetus would be carried to term and relinquished.\textsuperscript{226} Likewise if the carrying woman conceives a child by, for example, her husband rather than by the commissioning man, then the commissioners would be relieved of their obligation to accept the child\textsuperscript{227} and they would be entitled to sue the carrying woman for breach of contract and loss of the expectation that the child would be genetically related to at least one of the commissioners.\textsuperscript{228}

The ABA Proposal also assumes that contract will facilitate the planning of the transaction and for contingencies. The proposal limits, however, the freedom of the parties in the negotiation of certain contractual provisions. The value of the exchange must be stated in the agreement and must be the sum mandated by a body to be created and called "[Name of State] Surrogacy Fee Agency". The Agency would set the fee at a rate between US $7,500 and 12,500 to be reconsidered every two years.\textsuperscript{229} The respective responsibilities of the parties would similarly be outlined in the agreement. These would include promises by the commissioners to "take custody of and parental responsibility for" the commissioned child;\textsuperscript{230} by the carrying woman to accept the medical and psychological risks of pregnancy;\textsuperscript{231} and by the parties not to reveal or be required to reveal their identities to one another.\textsuperscript{232} The economic risks of the transaction would be allocated by the agreement in part in a manner mandated by the draft statute. For example, that statute requires that the commissioners buy term life insurance for the carrying woman to the benefit of persons she chooses\textsuperscript{233} and for themselves for the benefit of the commissioned child.\textsuperscript{234} It further requires that the money to be paid for the expenses of the carrying woman be placed in a

\textsuperscript{225} Ibid. s.6(c).
\textsuperscript{226} Ibid. s.6(a).
\textsuperscript{227} Ibid. s.11(b).
\textsuperscript{228} Ibid. s.11(c).
\textsuperscript{229} Ibid. s.3(b).
\textsuperscript{230} Ibid. s.5(g).
\textsuperscript{231} Ibid. s.5(h)(3).
\textsuperscript{232} Ibid. s.5(h)(3).
\textsuperscript{233} Ibid. s.5(d)(1).
\textsuperscript{234} Ibid. s.(d)(2).
trust fund prior to insemination so that the risk of non-payment will not be borne by the carrying woman,\textsuperscript{235} and that, should the carrying woman choose not to relinquish the child, the cost of hiring a private detective to locate her and the baby and the commissioners' costs of bringing the matter to court are borne by her.\textsuperscript{236} Finally, the draft statute assumes, like the contract model, that contract can make provision for future contingencies. For this reason, the ABA Proposal requires the parties to agree that the carrying woman need not relinquish the child if the commissioners should die before relinquishment\textsuperscript{237} or if she learns that a commissioner has been convicted of a crime which a court decides renders him or her unfit as a parent\textsuperscript{238} or the commissioners have not assumed responsibility for the child despite notice of the child's birth.\textsuperscript{239} This right of the carrying woman to keep the child should the commissioners die before relinquishment is described as an "option" which the carrying woman may "exercise". If she does exercise her option in the specified way she may keep the child and receive payment of her fee and expenses from the estate of the deceased commissioner or commissioners.\textsuperscript{240} In these ways, the ABA Proposal presupposes contract can help plan the transaction and make provision should things go wrong.

Thus by assuming first, that a set of promises to conceive, relinquish and accept a commissioned child, when exchanged voluntarily and with information, are legally enforceable as a contract; second, that the contract creates an expectation interest such that the injured party will suffer a loss; and third, that it is important to secure the parties' expectations and to facilitate the planning of the transaction and for contingencies; the ABA Proposal adopts the contract model of legal regulation of preconception arrangements. Like the proponents of the practice whose work we have considered, the ABA Proposal assumes that contract can satisfactorily reconcile the separate and conflicting interests of the participants and bring them to a common goal.

The question remains, however, whether the reconciliation achievable by contract can, in fact, be satisfactory when its results are serious and potentially seriously harmful.

\begin{itemize}
\item \textsuperscript{235} Ibid. s.5(f).
\item \textsuperscript{236} Ibid. s.6(c).
\item \textsuperscript{237} Ibid. s.18(a).
\item \textsuperscript{238} Ibid. s.18(c).
\item \textsuperscript{239} Ibid. s.18(e).
\item \textsuperscript{240} Ibid. s.6(f).
\end{itemize}
Consider the actual effect of the ABA Proposal. On the assumption that preconception arrangements are best regulated by the contract model, the ABA Proposal would facilitate procreation of a child by two people unknown to each other and who may agree to keep their identities secret from one another which will have the effect of preventing the carrying woman from continuing her relationship with the child after relinquishment. If the carrying woman exercises her constitutional right to abortion, the commissioners would be entitled to sue her for money damages. If the woman gives birth to a child but refuses to relinquish it, the proposal would enable the commissioners to track her down and take her to court to force her to give them the baby which doubtless she would be nursing. Despite the probability that she will have much less money than they, the commissioners would be entitled to extract from her payment for their lawyer and the private detective they hired without regard for whether she needs money to rear the child. The proposal also would cause the carrying woman to lose custody of the child and cease to be legally related to it after a hearing to give effect to the preconception agreement by judicial order that the commissioners "shall retain or assume custody and full legal responsibility for the child". This transfer of legal responsibility, though in effect an adoption, is to be ordered not on the basis of the best interests of the child (of which no inquiry is made), but rather on the basis of whether the parties knowingly and voluntarily entered the agreement and whether it conforms to the requirements of the draft statute. Moreover, the commissioners may refuse to accept the child if, even though the child is in good health, its genetic parentage is not what they contracted for. Despite the proposal's claim that it aims "to facilitate the creation of a parent/child bond", and without regard for the child's wellbeing, the proposal would permit the commissioning man to send the child back if tests revealed that his sperm did not participate in the child's conception. What is more, the commissioner could then sue the carrying woman for conceiving a child by her own husband rather than by him and claim money damages even though the woman might need the money properly to care for the child. Despite all of these consequences, a preconception arrangement that conformed to the

241 See above, Chapter One, Section 1.5.1.2 "Participants in Preconception Arrangements, Carrying Women: Results of Surveys".
242 ABA Proposal, supra, note 213, s.9(b)(2).
243 Ibid. s.1(b).
proposed statute would be "valid as a matter of public policy". How is it possible that these activities could ever be thought justifiable as a matter of public policy? The answer lies in the assumptions that preconception arrangements exist within the framework provided by the incomplete and misleading picture and that the contract model of legal regulation is appropriate. Because the actual effects of the proposed legislation are serious and potentially seriously harmful, and because the effects flow naturally from the adoption of the contract model; the appropriateness of the contract model is called into question. That the contract model is, in fact, a wholly inappropriate basis from which legally to regulate preconception arrangements shall be demonstrated in the following two chapters.

2.7 Conclusion

This chapter has considered the arguments of six proponents of preconception arrangements and has shown that they are each seriously flawed. Robertson's deontological argument from autonomy is weak because of its reliance on a non-existent legal right, its questionable understanding of human reproduction and reproductive duties, and its disregard for the extent and range of the harms potentially caused by the practice. Likewise, none of the consequentialist arguments are convincing for they fail to demonstrate that the practice achieves the results by which they justify the practice; Andrews does not prove that the practice advances equality, Posner and Trebilcock fail to show that it increases aggregate welfare, and the OLRC and the AFS wrongly claim it constitutes medical treatment.

Although flawed in various ways, the proponents' arguments share a common basis: the contract model of legal regulation preconception arrangements. This model is defined by its central assumptions concerning the nature, effect and functions of contract. Each of the proponents' arguments was shown to have shared these assumptions.

Because none of the proponents' arguments have been elaborated in detail in a statute, this chapter considered the potential effects of the contract model by examining a draft statute

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244 Ibid. s.3(a).
245 See above, Chapter One, section 1.6 "Critique of Common Description of the Practice".
based upon the model. The ABA "Draft Model Surrogacy Act" represents legislation to which the majority of proponents (Robertson, Andrews, Posner and the AFS) would likely assent. The ABA Proposal was examined, first, to show that it is based on the contract model and, second, to consider its effects. These effects were demonstrated to be serious and potentially seriously harmful. Because the effects flow from the model itself, the appropriateness of the contract model as a basis for the legal regulation of preconception arrangements was called into question. To that question, we now turn.
CHAPTER THREE
CRITIQUE OF THE CONTRACT MODEL: ASSUMPTIONS ABOUT PERSONHOOD

3.1 Introduction
The preceding chapter demonstrated that though the proponents advance differing justifications for the practice of preconception arrangements, they share a common view as to the appropriate model of legal regulation - the contract model. This model is the focus of this chapter and the one which shall follow. Chapters Three and Four examine in detail the contract model's theoretical foundations: its assumptions and the ideologies with which it is used. This chapter, Chapter Three, will elucidate the unarticulated assumptions about the nature of persons which the choice of the contract model entails, and demonstrate that these assumptions incompletely and, therefore, inadequately describe human personhood. The chapter which follows will show that the contract model is used in the overlapping contexts of three ideologies which lead to flaws in analysis.

3.2 Inadequacies of Liberal Assumptions About Human Personhood
The contract model, the ABA proposal and the proponents' arguments each choose as their point of departure the individual (rather than, for example, the family or the community) who is assumed to be a separate, self-interested, purely rational, equal and uncoerced agent. These presuppositions, widely shared by liberals,1 are central to the construction of individuals. These assumed characteristics of human personhood have, however, increasingly come under attack by feminists and non-feminist theorists. As Jennifer Nedelsky writes, "The now familiar critique by feminists and communitarians is that liberalism takes atomistic individuals as the basic units of political and legal theory and thus fails to recognize the inherently social nature of human beings."2 As critics argue, persons are not self-made but come into being in a social context which literally constitutes them. To

2 "Reconceiving Autonomy" (1989) 1 Yale Journal of Law and Feminism 7 at 8.
combat the image of humans as self-determining creatures, feminist critics\(^3\) of liberal theory have adopted a variety of approaches.

Nedelsky, for example, has begun the task of offering an alternative definition of autonomy. She argues that whilst freedom is centrally important to feminists who are concerned to foster conditions in which women can shape their own lives and define themselves, any good theorizing must start with people in their social context. The problem she recognizes is to combine the claim of the constitutiveness of social relations with the value of self-determination. The version of autonomy she advocates is a value which takes its meaning from the recognition of and respect for the inherent individuality of each person and (importantly) from the recognition that individuality cannot be conceived of apart from the social context in which individuality comes into being. In rejecting the liberal view of separate and isolated individuals and the value of autonomy which seeks to safeguard that isolation, Nedelsky offers a reconceived value of autonomy which is inseparable from the relations which make it possible. This more sophisticated understanding of autonomy is not naive. Nedelsky acknowledges that the presence of the social component does not mean that the value cannot be threatened by collective choice. Autonomy's vulnerability to democratic decision-making requires some way of making these decisions accountable to the person-in-relationship which the reconceived value of autonomy would protect.\(^4\)

A second critique of the liberal theory is made by Margaret Jane Radin.\(^5\) She rejects the liberal view of human personhood which conceives of the self as pure subjectivity standing wholly separate from an environment of pure objectivity. For Radin, there are three overlapping aspects of personhood: freedom, identity and contextuality. Freedom focuses on will, or the power to choose for oneself. To be autonomous individuals, we must at least be able to act for ourselves through free will in relation to the environment of things and other people. Identity focuses on integrity and continuity over time. Contextuality

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3 Non-feminist critiques of liberalism have been advanced by *inter alia*, Michael Sandel, Charles Taylor and Alasdair MacIntyre. Their work is beyond the scope of this dissertation which uses feminist analysis to criticize the legal endorsement of preconception arrangements.


focuses on the necessity of self-constitution in relation to the environment of things and other people. To be differentiated human persons, unique individuals, we must have relationships with the social and natural world.

Radin develops this understanding of personhood in part to combat the view that everything is and ought to be capable of sale. Universal commodification holds that freedom is the ability to trade everything in markets free from the interference of others. Radin rejects this purely negative definition of freedom; instead she adopts a positive conception of freedom which includes proper self-development as necessary for freedom. On this view, inalienabilities needed to foster that development can be seen as freedom enhancing rather than freedom denying.

A more radical challenge to liberal theory is presented by Carol Pateman. In her book, The Sexual Contract, she confronts the "hypothetical voluntarism" that plays an important role in the democratic state and argues that the very notions of the liberal individual, of self-ownership, of contract and of social relations that include contract depend on the prior subjection of women and are rendered totally incoherent by the serious inclusion of women as human subjects. Her view is that the social contract not only was, but cannot be anything but, a fraternal contract. This claim is crucially important since it entails the impossibility of a society of contracting individuals that could include women. She concludes that it is simply misguided to try to extend the concept of liberal individualism to women.

The critiques of liberalism made by these three authors (Nedelsky, Radin and Patemen) though different in focus are useful in analyzing the contract model of preconception arrangements for they provide a common tool by which to view the basis of the model. This tool is a skeptical attitude toward the unquestioned assumption that human personhood has the characteristics liberalism has ascribed to it and the view that any restraint on human endeavour is by definition a denial of freedom.

One aspect of the contested view of personhood has been termed the "separation thesis". According to Robin West, the separation thesis holds that "a 'human being', whatever else he is, is physically separate from all other human beings. I am one human

being and you another, and that distinction between you and me is central to the meaning of the phrase 'human being'. 7 The separation thesis is one which a second feminist theorist, Alison Jaggar, attributes to liberal theory generally. 8 Liberal theory, according to Jaggar, assumes that "each individual has desires, interests, etc. that in principle can be fulfilled quite separately from the desires and interests of other people". 9 But as Nedelsky, Radin and Pateman make clear this persuasive assumption of abstract individualism is not, if true at all, universally true. As West argues, "[t]he cluster of claims that jointly constitute the 'separation thesis'...while 'trivially true' of men, are patently untrue of women". Women are not disconnected, autonomous entities. According to West,

Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly "connected" to another human life when pregnant. In fact, women are in some sense 'connected' to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and "connecting" experience of heterosexual penetration, which may lead to pregnancy; the monthly experience of menstruation, which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding. Indeed, perhaps the central insight of feminist theory of the last decade has been that women are "essentially connected", not "essentially separate", from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life. 10

The view that women are not, and do not necessarily perceive themselves to be, separate from others is the reason that a second strand of the liberal theory of personhood is under attack. Some feminist theorists, led by Carol Gilligan, argue that from women's sense of connection with others comes an accompanying sense that one must care for others. Whereas, liberal thinkers view humans as inhabiting an environment of relative scarcity and, therefore, confronted by situations in which one chooses to further one's own interests rather than those of others, 11 Gilligan argues that women have a tendency to further the interests of

7 West, supra, note 1.
8 Jaggar, supra, note 1 at 28.
9 Ibid. at 30.
10 West, supra, note 1 at 2-3.
11 Jaggar, supra, note 1 at 44.
others. She claims that though boys favour abstractions, rights, autonomy and separation; girls are inclined to focus on responsibility, context and connection.\textsuperscript{12} According to Gilligan,

\begin{quote}
The moral imperative...[for] women is an injunction to care, a responsibility to discern and alleviate the "real and recognizable trouble" of this world. For men, the moral imperative appears rather as an injunction to respect the rights of others and, thus, to protect from interference the rights to life and self-fulfilment... The standard of moral judgement that informs [women's] assessment of self is a standard of relationship, an ethic of nurturance, responsibility and care... Morality is seen by these women as arising from the experience of connection and conceived as a problem of inclusion rather than one of balancing claims.\textsuperscript{13}
\end{quote}

Thus, far from being separate, self-interested persons, women, according to this school of thought, define their identities "in a context of relationship" and judge them "by a standard of responsibility and care".\textsuperscript{14} Indeed this standard, in the opinion of Nel Noddings, is the standard of morality which she views as being concerned with "affirming one's own interests through the process of affirming others' needs. When we act morally (engage in ethical caring), we act to fulfil our 'fundamental and natural desire to be and to remain related'".\textsuperscript{15} In Noddings' view, because women are not predominantly self-interested but caring and to care is a moral injunction, evil lies not in disobeying rules or other figures of authority. On the contrary, according to Noddings, evil exists in (among other things) "inducing the pain of separation [and] neglecting relation so that the pain of separation follows or those separated are, thereby, dehumanized".\textsuperscript{16} Far from being the natural state of humans which the separation thesis claims, separation is, according to Noddings, an evil itself.

A third strand of the liberal view of personhood is also the subject of criticism by feminist theorists. This is the notion that persons are essentially rational agents and that what

\begin{itemize}
\item \textsuperscript{12} Cass R. Sunstein, "Introduction: Notes on Feminist Political Thought",\textit{ Feminism and Political Theory} (Chicago: University of Chicago Press, 1990) at 2.
\item \textsuperscript{13} Carol Gilligan, \textit{In a Different Voice} (Cambridge: Harvard University Press, 1982) at 100, 159-60
\item \textsuperscript{14} \textit{Ibid.} at 60.
\item \textsuperscript{15} Rosemarie Tong, \textit{Feminine and Feminist Ethics} (Belmont, Ca.: Wadsworth, 1993) at 112.
\item \textsuperscript{16} \textit{Ibid.} at 122.
\end{itemize}
is particularly valuable about persons is their capacity for rationality. Liberals conceive of
the autonomous self either as purely rational, with body and emotions irrelevant to its nature
and to its autonomous decisions; or as divided against itself, with rationality reigning over
base physicality and unruly emotion.\textsuperscript{17} The corollary of this view that reason is the pre-
eminent and defining human capacity, is that the body and emotions are deemed irrelevant or
untrustworthy as a means of gaining knowledge. Radical feminists challenge the supremacy
of reason on the basis that it constitutes patriarchal thinking; by opposing reason to emotion,
mind to matter, self to other, it imposes dichotomies on reality, conceptually separating
aspects of reality which are in fact, inseparable.\textsuperscript{18} One version of radical feminism claims to
be nondualistic and argues that women recognize that they are part of nature rather than
separate from it. Consequently, they trust in their intuitive and direct ways of knowing
which perceive the unity and wholeness of the universe. Radical feminists claim that women
are indeed closer to nature than men and that this is a source of special strength, knowledge
and power.\textsuperscript{19}

Radical feminists are not alone in challenging the view that the mind is of much
greater moral significance than the body and the emotions. David Hume claims that feeling
is significant in moral judgement and that morality rests ultimately on sentiment. Sentiment
is a special motivating feeling we come to have once we have exercised our capacity for
sympathy with others’ feelings and also learned to overcome the emotional conflicts which
arise in a sympathetic person when the wants of different fellow persons clash or when one’s
own wants clash with those of one’s fellows.\textsuperscript{20} In Hume’s view, "a human heart, as well as
human reason, is needed for the understanding of morality, and the heart’s responses are to
particular persons, not to universal principles of abstract justice".\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{17} Mary Gibson, "Contract Motherhood: Social Practice in a Social Context" (1991) 3:1
  Women and Criminal Justice 55 at 81.
  \item \textsuperscript{18} Jaggar, \textit{supra}, note 1 at 96.
  \item \textsuperscript{19} Jaggar, \textit{supra}, note 1 at 97.
  \item \textsuperscript{20} Annette C. Baier, "Hume, the Women’s Moral Theorist?", E.F. Kittay and D.T.
  Meyers, eds., \textit{Women and Moral Theory} (Savage, Md.: Rowman and Littlefield,
  1987) at 41.
  \item \textsuperscript{21} \textit{Ibid}.
\end{itemize}
The pre-eminent role given to reason by liberals generates a fourth and final strand of the liberal conception of personhood which similarly is contested by feminist thinkers.

According to Jaggar, the liberal account of reason assumes it to be a capacity possessed in approximately equal measure by at least all men and that, therefore, they are worthy of equal treatment. Further, liberals conceive of reason as a property of individuals rather than of groups. This assumption is connected with an underlying metaphysical assumption that humans are ontologically prior to society. Liberals presuppose that persons could logically (if not empirically) live outside a social context and, therefore, their essential characteristics, needs, interests, capacities and desires are given independently of their social context and are not created or even fundamentally altered by that context. In other words, persons are assumed to be equal to each other and capable of exercising rational choice without coercion by other persons or society in general.

Yet the claim that persons are equal because possessed of equal capacity to reason is false. In the first instance, persons include not just able-bodied adults but infants, toddlers, the mentally handicapped and the aged. If equality is based on ability to reason, then these persons are (or might be) insufficiently rational and therefore unequal. Moreover, persons also include women and women have been considered incapable of full rationality by virtue of the weaknesses of their sex and have been, and are, the victims of systematic oppression in their economic, sexual, reproductive and political lives. The claim that women make rational choices free from coercion is undercut by the fact of sexual inequality and by the socialist feminist view that women's inner lives as well as their bodies and behaviour are structured by gender. When persons are in a subordinate position in society, free choice is compromised. Many options are actually foreclosed to them by virtue of their subordination, and other options are perceived desirable by them only because they believe themselves worthy merely to pursue goals which would be, and are, rejected by persons of higher status.

22 Jaggar, supra, note 1 at 29.
23 Jaggar, supra, note 1 at 29.
24 For a discussion of this point, see for example, Susan Sherwin, supra, note 1 at 39; and Kathryn P. Morgan, "Women and Moral Madness" Feminist Perspectives: Philosophical Essays on Method and Morals, L. Code, S. Mullett and C. Overall, eds. (Toronto: University of Toronto Press, 1988) at 146.
25 Sherwin, supra, note 1 at 13-19.
Thus, the liberal understanding of human personhood is open to serious challenge. The foregoing discussion has demonstrated that personhood must be more fully described before a credible moral and legal evaluation of a social practice may take place. This chapter shall use this critique of liberalism to analyze the assumptions of the contract model, the ABA Proposal and the proponents’ arguments to demonstrate that they each rest on a false premise about the nature of personhood. This common reliance on a thin understanding of personhood shall be shown to lead to serious flaws of analysis.

3.3 Inadequacies of Assumptions About Personhood Adopted by the Contract Model, the ABA Proposal and the Six Proponents

3.3.1 Participants Are Separate and Without Relationships

Liberal theory assumes that persons are distinct and atomistic individuals who, devoid of their social context, form the basic units of society. This presupposition is essential to the contract model of regulation for contract law assumes that contracts are made between individuals and not between relationships - for example, between families. Even when persons do join together collectively to assume legal responsibility, such as in a commercial company, the status of "legal personhood" is bestowed upon the relationships among the company members, conceptually viewing their relationships as embodied in a single individual with a notional mind and will. The corollary of contract law’s assumption of individual legal personhood is that contractual obligations are owed by the person who agreed to be bound and not by others with whom the person is in a relationship, whether it be as a

26 As Susan Sherwin argues,
From a feminist perspective, one can see clearly the significance of the social situation of persons to moral deliberations. In place of the isolated, independent, rational agent of traditional moral theory, feminist ethics appeals to a more realistic and politically accurate notion of a self as socially constructed and complex, defined in the context of relationships with others. Moral analysis needs to examine persons and their behaviour in the context of political relations and experiences, but this dimension has been missing so far from most ethical debates.
Sherwin, supra, note 1 at 53.

daughter or son, wife or husband. Unless the individual is a party to the contract and has agreed to be bound thereto, she or he is free of liability. Thus, a creditor may not sue a mother for the debts of her son despite their relationship, unless she voluntarily agreed to as guarantor and bound herself accordingly. Contract law focuses on individuals as abstracted from the context of their relationships and views responsibility as individual and originating in consent.

This theory of consensual individual responsibility underlies the ABA Proposal. The ABA Proposal assumes that parenthood can and should be determined by intention; the parties' obligations to the commissioned child and to each other should be capable of limitation by agreement between the adults; and the obligations are assumed by individuals not by an aggregate of persons such as a family. Thus, among the stated purposes of the draft statute are to "facilitate private reproductive choices by effectuating [sic] the parties' intentions while minimizing the risks to the parties"; and to "define and delineate the rights and responsibilities of the intended parent or parents, the providers of genetic materials, the surrogate and her husband, if any". Because separation and individuality are presumed to be inherent in the nature of parties, the individual is regarded as the locus of control and decision-making. Hence, there is no requirement that the prospective parents (the commissioning man and the carrying woman) consult or seek permission from family members such as prospective grandparents, aunts, uncles and siblings of the commissioned child. Because intention as expressed by the agreement is considered the source of obligation under the ABA Proposal, the parties' obligations survive not despite, but because of having engendered, the pregnancy and birth. For example, notwithstanding any relationships which might have developed during the pregnancy and which might be seen to create an independent, conflicting and superior source of obligation, the ABA Proposal would require the parties' preconception intentions to be effected by forcibly taking the baby from its mother. Perhaps to avoid the very possibility that relationship might become a source, and a superior source, of obligation; the draft statute provides that the parties may remain

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29 Ibid. s.1(a).
30 Ibid. s.1(d).
31 Ibid. s.6
anonymous to each other. Thus, the proposal would legally sanction a situation which would ordinarily occur only in "donor" insemination, rape or prostitution, viz.: that the mother has no relationship with, and does not know the identity of, the father of her child. In the ABA Proposal, this lack of relationship of the prospective parents with each other and with each others' families appears intended to ensure that the obligations of the prospective mother and father to the child and to each other originate solely in the agreement (not by virtue of their relationship as prospective parents), and that decision-making power is individual and not collective or familial.

These assumptions are shared by the six cited proponents of preconception arrangements. Like the ABA Proposal, the proponents assume that persons are separate and without relationships. Therefore, they argue that parenthood in a preconception arrangement should be determined by the intention of the parties expressed before conception and limited by consent, and that the consent of the parties is the most relevant consideration in evaluating the appropriateness of the practice. But this focus on the individual as separate leads to three flaws in the proponents' arguments. First, they do not challenge the normative assumption that parenthood should be determined by intention and that reproductive obligations ought to be capable of limitation by consent. Second, they attach too much importance to negative liberty, whilst according none to the value of being free to maintain relationships. Third, they appear unaware of the relationships in which the parties are situated and imagine that only the interests of the parties and the commissioned child are significant in evaluating the practice. Therefore, they either discount or fail to see the harm to persons caused by the planned rupture of relationships.

3.3.1.1 Claim That Parenthood Should be Determined by Intention and Parental Obligations Limited by Consent

Proponents argue that moral obligations in reproduction can be determined and limited by individual consent. According to Robertson,
A strong argument based on the autonomy of couples and surrogates can be made that the preconception agreement of the parties, which made the very existence of the child possible, should prima facie be determinative, just as it would with sperm or egg donors.33

Likewise, Andrews believes that a commissioned child’s parents should be those intended by the agreement. She writes,

the third party participants [sic] in procreation, such as a surrogate mother and her husband, are not the family of the child she is bearing. Starting before conception, all parties have agreed that the child is a part of the other couple’s family.34

Not only does Andrews thus deny the obvious (viz.: that a pregnant woman is not a third party participant in procreation and that at least during her pregnancy the child is a part of the carrying woman’s family), Andrews argues that the carrying woman’s obligations to the commissioned child may be relinquished before conception. The carrying woman’s right to be viewed as the commissioned child’s mother is, in Andrews’s opinion, exchangeable "based on the gestator’s ability to waive that right in advance".35

Similarly, Posner36 and Trebilcock believe that parenthood may be determined by intention and parental rights exchanged by individuals unimpeded by the wishes of others. Indeed from the presumption that preconception arrangements are "socially beneficial", Trebilcock argues that "once the surrogate mother has allowed the period for repudiation to


35 Ibid. at 19.

lapse and has handed over the child, the contract is fully enforceable and her rights with respect to the child are presumably fully terminated”. 37 If she does not exercise her option to rescile from the agreement, her preconception intentions would be effective to determine that she is not to be considered a parent and that her rights and responsibilities to the child end.

For the OLRC and the AFS, parenthood may be determined by intention and parental obligations limited by agreement, because to do so constitutes medical treatment. For this reason, the OLRC aims to create a legal regime to regularize the "relationship between the child and the intended social parents" 38 by, inter alia, requiring that "immediately following the birth of a child, consistent with the agreement, the surrogate mother...surrender custody of the child to the approved parents”. 39 The OLRC recommends that the carrying woman’s rights and duties to the child be terminated, and "the surrogate mother should have no legal relationship to the child". 40 The AFS also would create legal parenthood by intention and limit rights and responsibilities by agreement. In fact, the AFS views the carrying woman not as a parent but as an instrument for the parenthood of others. It claims that,

In general, a surrogate serves as a substitute to make up for a reproductive deficit on the part of the woman who will rear the child. The surrogate gestational mother makes up for a deficit in function and also for a deficit in gamete by providing the egg, as well as the womb, for gestation.41

Described in this way, the carrying woman is assumed not to be a mother but the means by which another or others can be parents. Therefore, she would not have any legal rights to or responsibilities for the child. Under the AFS Proposal, "if surrogate motherhood turns out to be useful", the carrying woman’s rights and duties would end at birth by a change in law to

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39 Ibid. at 235.
40 Ibid. at 260.
41 Ethics Committee of the American Fertility Society, "Ethical Considerations of the New Reproductive Technologies" (1990) 53:6 Fertility and Sterility Supplement 2 at 73S [hereinafter "AFS"].
ensure "that the couple who contract with a surrogate mother are viewed as legal parents".42

Thus, each of the proponents believe parenthood should be determined by intention43 and parental duties limited by consent. This is, however, a seriously flawed prescription for legislation. Blinded by the false assumption that persons are separate and self-sustaining, this view minimizes the vulnerability of children and their need to have persons clearly determinable who will be held responsible for their care. Proponents assume that parental relationships with children consist primarily of benefits not burdens and that these may, in the interest of adults, be traded for cash or otherwise. But the issues of how to determine parenthood and whether parental obligations can be limited and traded by agreement should be resolved not on the basis of the interests of adults who are wrongly presumed to be separate, self-interested, rational and equal, but on the basis of the interests of children whom we know are vulnerable, needy, irrational and unequal.

Indeed, when the point of departure of legislative policy is the needs of children rather than the interests and desires of adults, the proponents' reliance on preconception intent to determine parenthood and parental responsibility can be seen more clearly as inappropriate. The most significant legislative reason for establishing rules to determine parenthood is to provide a reasonably certain method of resolving who shall be responsible for the care and protection of children. Family law requires a method which is of universal application. Preconception intent is not a good method for determining legal parenthood because it has only limited usefulness; whereas all children are procreated, not all are intended to be procreated. As Katha Pollitt writes,

A doctrine of pre-conception intent could... turn ordinary family law into fruit salad. Most pregnancies... after all, are not intended by either partner. They occur for dozens of reasons: birth-control failure, passion, ignorance, mixed messages, fear. The law wisely overlooks these sorry facts. Instead it says, here is a child, here are the parents, next case. Do we really want to threaten a philosophy aimed, however clumsily, at protecting children from pauperism and abandonment?44

42 Ibid.
43 The California Supreme Court despite a strong dissent endorsed intention as the method to determine who is the mother as between the genetic and the gestational women. Johnson v. Calvert 19 Cal. Rptr. 2d 494 (Cal. 1993).
44 Pollitt, "When Is A Mother Not A Mother?", The Nation, December 31, 1990.
Moreover, what test of intention would be used: subjective or objective? Some carrying women could claim that what they really intended when they signed the preconception agreement was that they would serve in every respect as the mothers of their children regardless of any documentation to the contrary.

It might be argued that the general family law rules for determining parenthood could be superseded by contractual agreement to the contrary. In other words, only in preconception arrangements would parenthood be determined by intention. Yet the problem of universal applicability would remain. Even though preconception agreements clearly state who the intended parents are to be, carefully laid plans are not always realized. The carrying woman might conceive by someone other than the commissioning man, for example, her husband. In such a case, the commissioned child would not be "as intended" (in the ABA Proposal's parlance). The draft statute provides for that event only by considering the interests of the adults. It states that in such a case, "the intended parent or parents shall not be required to retain or assume custody of the child"45 and "the surrogate may assume custody of the child if she chooses [emphasis added]".46 Surprisingly and indeed reprehensibly, the draft statute does not state who would be legally responsible for the child. The problem of plans going awry becomes even greater when the commissioned child is the child neither of the commissioning man nor the carrying woman because of a laboratory error involving the implantation of the wrong embryo. The ABA Proposal provides for such a situation by stating that the commissioners would not be responsible for the child and "the surrogate may not assume custody".47 Apparently preoccupied with concern for the adult parties, the draft statute again fails to state who would be considered the parents of the child "not as intended due to physician or laboratory error"48 or by what legal criteria that question would be resolved. Clearly "contracting out" of the present family law regime and substituting intention for biology as a prima facie method for determining parenthood create the possibility that the unintended children will be born without identifiable, legally responsible caregivers. Moreover, adopting intention as the determinant of parenthood does not resolve the issue of whether the test is to be subjective or objective. Some carrying women could claim that what they really intended when they signed the preconception agreement

45 ABA Proposal, supra, note 28 s.11(b).
46 Ibid. s.11(c).
47 Ibid. s.11(c).
48 Ibid. s.11(c).
was that they would act in every way as the mothers of their children despite any
documentation to the contrary.

Current Ontario family law avoids all these issues by determining parenthood on the
basis not of the mind's intent but the body's actions. By virtue of Section 1 of the
Children's Law Reform Act, and apart from adoption,

...a person is the child of his or her natural parents and his or
her status as their child is independent of whether the child is
born within or outside marriage.49

Such a provision is useful and desirable in the context of preconception arrangements not just
because it has the virtue of near50 universal application, but also because it accords with
moral intuition. The bodily relationship between the parents created the child. As the cause
of the child's creation, it is the moral source of their obligation toward the child for whose
vulnerability the parents are responsible. According to Helen Nelson and James Nelson,

In choosing to give birth, parents bring about the presence of a
new individual who is both extremely important and extremely
needy. As they brought about these needs, parents are primarily
responsible for seeing to their satisfaction. Looked at in this
way, procreation is more like running someone over in one's car
than like signing a contract. Where I create a vulnerability, I
have at least a prima facie obligation to stand by the victim.51

On this view, parental responsibility is a moral obligation not created by contract between
adult parties but engendered by procreation and owed to the child. In being causally
connected to procreation, the obligation attaches to the procreators.

It might be argued that even if one were to reject intention as the method of
determining parenthood and to rely upon biology as the Children's Law Reform Act requires,
one might evaluate the practice of preconception arrangements favourably. On this view, the
reason for approving of the practice is that it permits those persons determined by biology to
be parents to relinquish their parental rights to another or others just as happens frequently in
adoption. This opinion is expressed by John Robertson:

49 R.S.O. 1980, c. 68.
50 Embryo transfer creates a situation in which the question of who is the natural female
parent is open to debate. This issue shall be discussed in Chapter Five which shall
argue that the gestational woman be considered the mother for legal purposes.
51 Nelson and Nelson, "Cutting Motherhood in Two: Some Suspicions Concerning
Surrogacy" (1989) 4:3 Hypatia 85 at 87.
Since the transfer of rearing duties from the natural gestational mother to others is widely accepted [in adoption], the unwillingness of the surrogate mother to rear her child cannot in itself be wrong. As long as she transfers rearing responsibility to capable parents, she is not acting irresponsibly.\footnote{52} But there are two problems with this view. First, analogies with adoption are not apposite because adoption is a response to an already existing pregnancy and is a response generally viewed as unusual and unfortunate. Whereas relinquishment in adoption is not planned before conception, the very purpose of the conception in a preconception arrangement is to relinquish the child at birth. Further, whereas placement in adoption is decided on the best interests of the child, placement in preconception arrangements is determined on the basis of the best interests of adults. Second, a planned relinquishment prior to conception is irresponsible for the obligation to care for the child is the obligation of the parents (the carrying woman and the commissioning man) themselves. The point is not whether the transferees would be capable parents, it is that the carrying woman is the maternal parent and rearing the child is her responsibility (just as it is the responsibility of the paternal parent). If, however, she is unable to care for the child, then she may entrust that care to another in adoption. Adoption is, however, a wholly different situation than a preconception arrangement. In the latter practice, the transfer is intended before conception, and it is more properly described as the trading, rather than the entrusting, of parental responsibilities. From the perspective that parental responsibilities arise in preconception arrangements from procreation itself and attach to the procreators, the practice can be seen wrongly to encourage one parent to trade her responsibilities to her child. As Nelson and Nelson argue,\footnote{53}

To engineer a situation in which the biological father can discharge his responsibility daily, but the mother cannot, is to put her under an obligation to the child that she does not intend to meet. Apart from making deceitful promises to Nazis, there would seem to be few cases where we can legitimately act in such bad faith.\footnote{53}

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\footnote{52} "Surrogate Mothers: Not So Novel After All" Hastings Center Report, October 1983, 28 at 32 [hereinafter, "Not So Novel"].

On this analysis, parental obligations in preconception arrangements are owed not to adults but to children and may not be limited by agreement between adults.54

When analysis begins from human biology rather than from a false model of separate, self-sustaining individuals, then the proponents' argument for an intention-based method for the *prima facie* determination and limitation of parenthood is revealed as flawed. We are not born all grown up. Persons come into the world as acutely needy and vulnerable. For their protection, it is vital that society and the law be able immediately to determine who are responsible for the care of each infant. Thus the fact of having procreated and not the intention to do so is the practicable means to determine *prima facie* who are a child's mother and father because whereas all commissioned children are procreated, only some are intended to be procreated. The corollary of this view is that the source of parental obligation lies not in consent but in procreation *per se* and that the obligation is owed to the child. It follows that parental duties may not be exchanged or limited by adult parties prior to conception though they may, after birth and because of inability to parent, be entrusted to persons who can discharge those duties.

The present discussion of whether parental duties may be limited by agreement has focused on the duties owed by parent to child. The question remains as to whether duties owed by the adult parties to each other might be limited by agreement. If one rejects the assumption that persons are separate entities, one can accept that persons are connected, interdependent individuals who respond to each other's needs and desires for relationship. To the extent that relationships have the power to influence the individuals involved, arguably a relationship in which persons procreate another human being has the potential substantially to affect the procreators. Moreover, the female procreator is thereby rendered vulnerable to all the commonplaces and risks of pregnancy which, if all goes well, will bring the child of two people to life. What can the one party made vulnerable expect from the other party who will benefit from this vulnerability and effort? Is it appropriate for the prospective father to limit his obligations to the prospective mother to the provision of cash?

54 For further discussion of and arguments against determining parenthood by intention, see Melinda A. Roberts, "Good Intentions and A Great Divide: Having Babies by Intending Them" (1993) 12 Law and Philosophy 287.
To this question, the proponents answer, "Yes". Their view is expressed most powerfully by Lori Andrews. In her popular book, *New Conceptions: A Consumer's Guide to the Newest Infertility Treatments*, she gives prospective commissioners the remarkable advice, "Before rushing in to meet the woman who will carry your child, think carefully about whether it is really necessary". Andrews appears sensitive to the ability of relationship in general to create mutual obligation, and of the relationship of prospective mother and prospective father, in particular, to create special obligations of the father to the mother. Therefore, she advises the commissioners not to permit their relationship with the carrying woman to develop:

Although there may be a great temptation to get close to the surrogate, think carefully about whether that will really be best for you. If you do not get involved, the surrogate will not become part of the "family". She can then be thought of...as a human incubator. In Andrews' opinion, the commissioners' moral duties to the carrying woman may be satisfied by monetary payment.

Yet this opinion, which underlies the proponents' support for preconception arrangements, is problematic. Arguably, the fact of procreation is a source of obligation of the parties *inter se*, and is a source quite independent of any agreement. What a carrying woman might need, particularly if she alone is rearing her other children, is companionship and support throughout the pregnancy and afterward. If these are her needs and these needs are created by the conception, then it arguably falls upon especially the man who participated in the conception to meet these needs. In expressing such needs, one carrying woman of twins who was undecided as to whether to relinquish the babies, wrote to their father thus:

...I haven't even got over having the babies. I sit and wonder if any of you have really thought how I feel... I was ill for 8 months, I carried those babies, I gave birth to those babies...because I love you so much makes it also a little easier. I would hate myself if I ever hurt you... What I ask you to remember, is that after all I have done for you I am still a loving, caring person who needs to be loved. I have so much love to give, but never get anything in return but hurt...57

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55 (New York: Ballentine Books, 1985) at 198 [hereinafter "New Conceptions"].
56 Ibid. at 199. See also, Robertson, "Not So Novel", supra, note 52 at 30.
Clearly this emotional statement invites a response which is other than just the provision of money. The response must reckon with the vulnerability the arrangement creates in the carrying woman and the fact that she might need not only cash but care. Arguably, a man who is unprepared, or does not wish, to respond to the emotional needs of the woman he would make pregnant, ought not to set out to have a baby with her.

3.3.1.2. Negative Liberty

... and she wondered if freedom were more important than love, and indeed if love was at all possible without someone taking it from her.\(^{58}\)

The proponents' assumption that persons are separate and disconnected, leads to a second problem: their arguments attach too much importance to negative liberty whilst according none to the value of being free to maintain relationships.

The liberal presumption of humans as separate from others entails, according to Robin West, "first and foremost, an existential state of highly desirable and much valued freedom: because the individual is separate from the other, he is free of the other".\(^{59}\) He is free of the other in the "negative" conception of freedom which holds that a person's liberty is simply the extent to which he or she can act unconstrained by literal obstruction or interference from others.\(^{60}\) As separate and disconnected from one another, persons are believed to have different ends, therefore government must act in a way which protects individual freedom and ensures that persons may determine and pursue their own goals and aspirations. As West describes this belief, "Our separation entails our freedom which in turn entails our right to establish and pursue our own concept of value, independent of the concept of value pursued or favoured by others".\(^{61}\) The protection of negative liberty is therefore a moral injunction. Sir Isaiah Berlin describes this view accordingly:

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59 West, *supra*, note 1 at 5.
60 Waldron, *supra*, note 1 at 130.
61 West, *supra*, note 1 at 6.
There ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstumped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone make it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority. 62

In short, separation entails freedom which entails a political right to autonomy in choosing the good life.

This is the point of departure of the six proponents of preconception arrangements who each claim that commissioners and carrying women ought to be free from interference in what they consider a private matter. The proponents reject arguments for the prohibition of the practice on the basis (inter alia) that prohibition would wrongly limit the participants' freedom and wrongly impose the state's or society's conception of the good life on those who hold a different view.

Thus, John Robertson claims, "Public policy efforts to deal with noncoital reproduction must recognize the strong presumption in favour of private choice which the use of these techniques necessarily requires". 63 He argues further that persons ought to have a legally protected right to freedom in reproduction which would include the ability to contract with others for their sperm, ovum, uterus, or child and the ability to forge an agreement for assigning the entitlements and duties that affect the child. 64

Similarly, Andrews claims, "In surrogacy, the fundamental right to privacy protects people whose reproductive decisions we might disagree with and find offensive". 65 Likewise Posner 66 and Trebilcock view participation as a private choice. In their opinion, private ordering is preferable to state interference in such matters. According to Trebilcock,
In a secular and increasingly pluralistic society, private ordering holds out the possibility for individuals to fashion life plans for themselves and those with whom they share relationships that meet their aspirations in a way that no across-the-board legal norms or expansive ad hoc judicial discretion exercised by others who are not privy to those life plans or aspirations are likely to achieve.  

The OLRC and the AFS place even greater emphasis on the assumed privacy of the matter as they believe it to be a method of medical treatment. The OLRC views prohibition as unjustified interference with liberty. It writes, 

In principle, prohibitory action is warranted only where there is an extremely powerful justification; the onus should be on those who would advocate such action not on those whose conduct is to be the subject of legislative or other interference.

Although the proponents thus claim, on the one hand, that the state ought to leave the parties alone; on the other, they advocate that the state take positive action to give effect to the preconception arrangement even if that entails sending state officials to remove the baby from its mother. A conceptual problem thereby arises: the forced relinquishment clearly causes a carrying woman to do something she does not wish to do and is thus a violation of her freedom. This conceptual problem is, however, resolved by the liberal view that freedom can lie in binding oneself. According to Jeremy Waldron, the enforcement of an agreement freely chosen is not a violation of liberty in any sense in which liberty is thought to be important. On the contrary, it is "something more like the consummation of...freedom than a violation of it" for the act of freely consenting to be bound affirms "the capacity of human agents to determine for themselves how they will restrain their conduct in order to live in community with others". By this logic, the forced removal of an infant

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68 See AFS, supra, note 41 at 72S. "Laws that...attempt to prohibit the use of surrogate mothers would likely be struck down as unconstitutional for violating the couple's right to privacy in making procreative decisions."
69 OLRC, supra, note 38 at 232
70 Trebilcock, of course, differs here in recommending that there be a period during which a mother could change her mind after the birth of the child.
71 Assuming voluntariness and full information.
72 Waldron, supra, note 1 at 133.
73 Ibid.
from an unwilling mother is not state interference with her freedom but a very instrument of her freedom.

On this view, therefore, to prohibit the practice (by making participation illegal or simply by stipulating that the agreements are unenforceable) is to deny participants an important freedom viz.: to make enforceable private agreements. Consequently to ban the practice on the grounds that women cannot or should not make such a decision about their children before they are conceived, is to deny women the capacity for human agency. According to Carmel Shalev whom Andrews74 quotes with approval,

The paternalistic refusal to force the surrogate mother to keep to her word denies the notion of female reproductive agency and reinforces the traditional perception of women as imprisoned in the subjectivity of their wombs...[A pregnant woman’s] special condition in no way justifies the condescension that denies her autonomy as a human being.75

But this understanding of liberty as freedom from interference, when applied to the case of preconception arrangements, is of little value in respecting or promoting human dignity. Negative liberty is a value which protects the separate self not the person in relationship. That negative liberty is an impoverished value in this context can clearly be seen in the Baby M case which sought to advance it. Consider how Mary Beth Whitehead describes the state’s attempt to give effect to her agreement to surrender her child once born:

When I refused to give Sara up, five cops stormtrooped my house to get her while [the commissioners] Bill and Betsy Stern waited outside in the car. I was in my nightgown breastfeeding the baby when they came. I was still bleeding from the delivery. They put me in handcuffs and threw me in the police car while the neighbours stood around and watched. Tuesday, my 11-year-old daughter, ran to the Sterns’ car and said to

74 "Policy and Procreation, supra, note 65 at 24.
75 Carmel Shalev, Birth Power: The Case for Surrogacy (New Haven: Yale University Press, 1989) at 121-122. Quare whether Shalev would regard the state’s refusal to force a Roman Catholic priest to honour his promise of celibacy as reinforcing the perception of men as imprisoned in the subjectivity of their hormones. Obviously, the point is not whether refusing to enforce promises compromises human agency, but whether some promises ought not to be legally enforceable.
them, "Please don't take my mother's baby". They said nothing.76

By its references to the 11-year-old daughter and the neighbours, and to breastfeeding and bleeding, and by its emotional appeal, this quotation belies the liberal assumption that persons are separate, disembodied and rational. Indeed, according to Barbara Katz Rothman, we have in every pregnant woman

the physical embodiment of connectedness...the living proof that individuals do not enter the world as autonomous, atomistic, isolated beings, but begin socially, begin connected. And we have in every pregnant woman a walking contradiction to the segmentation of our lives: pregnancy does not permit it. In pregnancy the private self, the sexual, familial self, announces itself wherever we go. Motherhood is the embodied challenge to liberal philosophy, and that, I fear, is why a society founded on and committed to liberal philosophical principles cannot deal well with motherhood.77

Clearly, an understanding of liberty that accords with human dignity in this context must be based on a richer account of personhood and of freedom. Such an account shall be developed here by advancing three arguments: first, pregnancy entails the development of a significant relationship; second, this relationship is relevant to a woman's autonomy; and third, the importance of the freedom to remain in or resile from relationships, which has been recognized in other areas of family law, ought therefore to be recognized in preconception arrangements; such recognition would prohibit persons from waiving or being denied that freedom.

That pregnancy entails the development of a significant relationship between mother and child is a truism. As Rothman puts it,

Children...come from mothers. They enter the world in a relationship, a physical and social and emotional relationship with the woman in whose body they have been nurtured. The nurturance of pregnancy is a relationship, one that develops as a fetus becomes more and more a baby.78


78 Ibid. at 242.
This intimate relationship is one which the proponents’ arguments imply is either insignificant or subject to the carrying woman’s control. For example, Lori Andrews denies that the relationship is important. She quotes with approval Lisa Newton who claims that the carrying woman merely performs a service that "is a simple extension, as far as I can see, of babysitting and other child-care arrangements which are very widely practiced". Andrews claims further that the pregnant woman can control her feelings for the child she carries. She writes,

> When the baby first begins to move inside the surrogate...[and she develops feelings of anticipated sadness] the surrogate must begin to erect an emotional barrier...so that she experiences the child not as hers but as the child of the couple.80

Yet the evidence that pregnancy and childbirth are like babysitting and that maternal emotions are controllable is very slim. If what the carrying woman does in bringing a child into the world were of little importance and if she could control the development of her relationship with the child, then we could expect to see in carrying women the same sort of reaction as babysitters experience when they leave their charges once the children’s parents return home, viz.: relative indifference. But the response of carrying women to relinquishing commissioned children is nothing like the reaction of babysitters when their shift ends. As we have seen, a five year study of 41 carrying women showed that the women suffered deeply when they severed their relationship with the commissioned child.

Whether this grief and sadness is transitory is not known because there are no long-term studies of the consequences of relinquishment for carrying women. In the relevantly

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81 *Supra*, Chapter 1.6.2.2, text at note 208.
similar\textsuperscript{82} practice of adoption,\textsuperscript{83} however, research\textsuperscript{84} reveals that the event is not a transient one. On the contrary, it can be of major and enduring significance in the relinquishing

82 Some important aspects of adoption are descriptive also of preconception arrangements:

1. Although usually construed as "voluntary", relinquishing mothers can feel that relinquishment is their only option in the face of financial hardship, pressure from family or professional persons.

2. The child continues to exist and develop while remaining inaccessible to the relinquishing mother who might one day be reunited with the child. It might be difficult to say goodbye with any sense of finality.

3. Lack of knowledge about the child can permit the development of a variety of disturbing fantasies, such as the child being dead, ill, unhappy or hating her or his relinquishing mother. The guilt of relinquishment, if any, can thereby be augmented.

These traits were used to distinguish adoption from other forms of perinatal losses. John T. Condon, "Psychological Disability in Women Who Relinquish a Baby for Adoption" 144 Medical Journal of Australia at 117. Condon includes a fourth trait arguably inapplicable here: "women perceive their efforts to acquire knowledge about the child (which would give them something 'to let go of') as being blocked by an uncaring bureaucracy".

83 The purpose of considering adoption here is to determine whether it is likely that the profound grief and sadness which carrying women suffer is likely to endure. Since adoption and preconception arrangements are relevantly similar in entailing the separation of mother and child, it is appropriate to consider the one to inform our understanding of the other. Some might argue, however, that the suffering caused by these two practices is irrelevant to determining whether legislatively to limit the practice. The reason offered is that if suffering could limit a practice then abortion could be rendered illegal on the grounds that woman can suffer emotionally when they undergo an abortion. But the argument being made here is that if suffering is likely to result from a separation of mother and fetus/child, then why permit people to conceive a child with the intention of separating mother and fetus/child? Neither the practice of abortion nor adoption entails an intentional conception for abortion or for adoption, whereas preconception arrangements intentionally conceive a child for separation. In the first two practices, the unwanted pregnancy leaves the woman with three options: to abort, to relinquish the child or to rear it herself. It might be that any of these three options would cause her to suffer emotionally; given the conception, however, there is no way to prevent the suffering. But with preconception arrangements, the suffering is foreseeable prior to an intended conception and, therefore, it is appropriate to rely on the existence of the suffering as reason to prevent the conception by discouraging the practice of preconception arrangements.

women's lives and can have prolonged effects on subsequent life functioning. According to one researcher,

Relinquishing a child for adoption presents the mother with a discordant dilemma of separation and loss. First, the separation is permanent and was initiated by the relinquishing mother. Second, the loss is irresolvable because the child continues to exist. The [permanent] and volitional disengagement from her infant, who is alive and developing, inaugurates a significant maternal stress.86

This maternal stress was evident in a study of 334 relinquishing women which demonstrated a very high incidence of pathological grief reactions that remain unresolved even though many years had elapsed since the relinquishment.87 Another study of 218 women claimed that

The effects of relinquishment on the mother are negative and longlasting. Approximately half the women reported an increasing sense of loss over periods up to 30 years, with a sense of loss being worse at particular times, e.g. birthdays, Mother's Day. For the sample as a whole, this sense of loss remained constant for up to 30 years. Relinquishing mothers compared to a carefully matched comparison group of women had significantly more problems of psychological adjustment.88

In a study of 20 women, the most striking finding was that the majority reported no diminution of their sadness, anger, and guilt over the considerable number of years since


85 Deykin et al., supra, note 84 at 271. Deykin notes that the applicability of her findings might be limited since the study sample consisted of a volunteer subset of an already self-selected population. Most of the women were participants in a support group called "Concerned United Birth Parents".

86 Renearson, supra, note 84 at 338.

87 Deykin et al., supra, note 84 at 271.

88 Winkler and Van Keppel, supra, note 84.
relinquishment. Over half of the women suffered from severe and disabling grief reactions that were not diminished with time and that manifested themselves predominantly as depression and psychosomatic illness. The study of 334 relinquishing mothers concluded that to relinquish a child for adoption is to suffer a serious permanent loss and that "grief over a surrendered child appears to remain undimmed with time". Clearly, maternal grief after relinquishment in adoption is not a transitory event.

Whether these findings are applicable to preconception arrangements, where a woman conceives with the intention to relinquish the child, is not known. The point is, however, that studies of the practices are alike in suggesting that pregnancy and childbirth are significant events in the life of a woman and that the development of maternal feelings for the child is sufficiently difficult to control as to cause (many) women who relinquish children

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89 Condon, supra, note 82 at 117.
90 Deykin et al., supra, note 84 at 280.
91 Longitudinal research ought to be conducted to determine the long-term effects of relinquishment on carrying women. It is significant, however, that Parker's 1984 study of 30 women revealed a number of reactions to relinquishment that were similar to those described by researchers examining relinquishment in adoption. His findings show that, like the women who relinquish children in adoption, carrying women can suffer grief, anger, and sadness, which are accentuated on the child's birthday; and they can have difficulty in resolving the grief, a desire to be reunited with the child, and a desire to have a replacement child to retain or to relinquish. Phillip Parker, "Psychology of the Surrogate Mother", paper presented at the American Orthopsychiatric Association General Meeting, Toronto, Canada, April 9, 1994 at 11-12.
92 The practice of exclusively gestational arrangements raises the issue of the long-term effects of relinquishment on women who carry an embryo genetically unrelated to them. There is no research on this subject. Some medical practitioners have argued that the carrying woman will not grow emotionally attached to the child because of its different genetic origin. (See Patrick Steptoe, Letter, (1987) 294 British Medical Journal and J. Leeton, C. King and J. Harman, "Sister-Sister In Vitro Fertilization Surrogate Pregnancy with Donor Sperm: The Case for Surrogate Gestational Pregnancy" (1988) 5:5 Journal of In Vitro Fertilization and Embryo Transfer 245 at 247). But it is not clear that the carrying woman's maternal feelings will be any less for a baby that she is not genetically related to. In both cases, the woman's body is engaged for nine months in nourishing, protecting, and then delivering the child. After delivery, her body is prepared to continue to feed the baby. The physical effects of pregnancy, childbirth and lactation on the woman are great and are no different if the ovum comes from another woman. Whether the effects of relinquishment on her will be the same as the effects of relinquishment on birth mothers in adoption is not known; again, longitudinal research is needed to determine the outcomes of exclusively gestational preconception arrangements.
serious consequences such as grief, sadness, anger and guilt. These consequences are known to be long-lasting in adoption; it is probable that they will endure also in the case of relinquishment under a preconception arrangement.

Understanding that persons can change in important ways because of pregnancy and that suffering the loss of the relationship between mother and child causes disabling grief reactions leads to the second argument for a rejection of the concept of negative liberty as a value by which to assess preconception arrangements. The second argument is that the maternal-infant relationship is important to a woman's autonomy. This argument (which shall be developed in greater detail below in Chapter Five) is based on the notion that autonomy entails both the capacity to make important decisions for oneself and the freedom from interference in deciding. The value of negative liberty protects only the second aspect of autonomy. The first aspect of autonomy (solely deciding for oneself) is threatened by the rupture of a significant relationship. When a woman is disabled by grief in reaction to the loss of her infant she is not autonomous for she is unable solely to decide matters of importance to her. To protect her autonomy in the first sense entails protecting her freedom to remain in relationship.

Which brings us to the third argument for the rejection of negative liberty as a value for assessing preconception arrangements: negative liberty has no power to provide the positive protection needed to preserve relationships. A more appropriate understanding of liberty acknowledges that for a person (richly defined) to be free, she must be free to remain in relationship with her child. Moreover, the freedom to remain in relationship can have greater value than the freedom to be left alone by the state.93

The freedom to remain in relationship is recognized already in Ontario adoption law which prevents a woman from surrendering a child for adoption prior to a period at least

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93 Imagine that a person has a choice between being separated forever from her or his child or being placed under house arrest with the child. It is plausible to assume that many would choose house arrest over separation for freedom from interference might not be as important to them as freedom to remain in the relationship.
seven days after birth. It is apparent also in societal condemnation of kidnapping whose harms lie not just in the deprivation of negative liberty of the direct victim but also in the deprivation of the victim's family members' freedom to remain in relationship with their loved one.

That freedom to remain in relationship has independent and potentially greater value in certain contexts than negative liberty, can be seen also by considering a hypothetical example. If two people agreed to marry but stated clearly that their relationship would end one year later, no court would give effect to the agreement if the parties wished to remain together. Their prior consent freely given would be irrelevant and could not cause them to separate because inter alia the court would recognize the value of their remaining free to exercise choice over time. If, on the other hand, and despite solemn promises to remain together forever, the couple sought a divorce, the court would not hold them to their earlier promise. Nor would it prohibit the formation of a new relationship and remarriage. In refusing to hold persons to earlier promises regarding marital relationships, the law recognizes that significant relationships can change persons and therefore it is wrong in the family law context, to bind a person to a promise given before the relationship altered the promisee.

Just as the rules governing adoption, the condemnation of kidnapping and divorce law recognize the value of being free to remain in (and to alter) relationships, so too should this value be honoured in the context of preconception arrangements. To prevent a woman

94 Child and Family Services Act, S.O. 1984, c. 55, s.131(3). It might be argued that Trebilcock's proposal similarly permits this freedom by granting the carrying woman a period during which she could take some positive step to assert her maternal rights and duties. But for reasons stated above (supra, note 83 and Chapter 2.4 text at notes 164 to 165) and because adoption is a practice which places children in their interests and preconception arrangements place them in the interests of adults, the grace period in Trebilcock's proposal does not render the proposal acceptable.

95 As Mary Lyndon Shanley argues:

A legal rule enforcing a pregnancy contract would reinforce notions of human separateness and insularity rather than recognize that the development of individuality and autonomy takes place through sustained and intimate human relationship.

from revoking her consent during pregnancy or at birth ignores both the possibility of an analogous change in the woman and the significance of the relationship for her.\(^{96}\)

In summary, on the assumption that persons are separate and disconnected from one another, proponents argue that persons ought to be free from state interference in their decision to enter a preconception arrangement, and that the state ought to give effect to that decision once made. In advancing this argument, the proponents rely on negative liberty as a pre-eminent value and the view that an enforceable agreement is an instrument of individual freedom. In the context of preconception arrangements, however, this argument is flawed. In wrongly viewing persons as separate, it does not credit the power of significant relationships to alter persons in such a way as to make their earlier promises ones which would later enslave them. Attending to persons as connected not separate makes it clear that (1) pregnancy and childbirth create a significant relationship which can cause the mother serious harm if it ends at birth; (2) this harm is a threat to her autonomy in the first sense; (3) to protect autonomy entails recognizing that the freedom to remain in (or resile from) significant relationships, despite earlier promises to the contrary, has greater value in the familial context than the freedom to bind oneself to an agreement which the state will enforce. For these reasons, the proponents' arguments wrongly place too much weight on negative liberty whilst placing none on the value of freedom to maintain relationships.

3.3.1.3 Lack of Attention to Parties' Relationships

Thus, we have seen that the proponents' understanding of persons as essentially separate from, rather than connected to, others has caused two major flaws in their arguments: they wrongly assume that parenthood should be determined by intention and reproductive obligations limited by consent; and they value negative liberty at the expense of liberty to remain in relationships. Their incorrect assumption causes a third and related error: by focusing on the parties to a preconception arrangement, they are either unaware of, or place little importance on, the relationships in which the parties are situated. Therefore, they fail to see, or they discount, the harm to persons caused by the relationships which are generated and ruptured by the preconception arrangement.

\(^{96}\) Ibid. at 630.
A man and a woman who enter a preconception arrangement do not come to the arrangement devoid of prior relationships. At minimum, the parties have parents. Usually they also have spouses or partners, children and siblings. All these people are affected in varying degrees by a preconception arrangement. Because, however, the proponents focus on persons as separate from others, they do not see or they consider of little importance the web of relationships in which the parties live. In evaluating the practice favourably, the proponents tend to assess it only with respect to the interests of the parties to the arrangement.

Robertson, for example, considers only the commissioners and the commissioned child when he argues that the state ought to enforce preconception arrangements "to allow infertile couples to have families and to enable surrogates to have the satisfaction of being surrogates" and to enable "a child to live who otherwise would not have been born." He does not examine the differing interests of the commissioners (the man's in having his genetically-related child, the woman's in rearing his child by another woman), and the interests of the carrying woman's other children, spouse or partner, parents and siblings.

Andrews is the one proponent who does seem acutely aware of the differing interests of the commissioning woman and the carrying woman's extended family. For her, these harms ought to be taken into account when making an individual decision whether to proceed but they are not sufficient to establish an argument against the practice. If one decides to proceed, then, in Andrews' opinion, the harms can be managed. She gives advice as to how this management might be conducted. A discussion of Andrews' appraisal of the practice's harmful effects on related parties will be undertaken below.

Like John Robertson, Richard Posner ignores the interests of most of the persons with whom the carrying woman has a significant relationship. He assumes that her children's and husband's (or partner's) interests will be satisfied by the payment of money

97 Robertson, "At Issue - Surrogate Parenthood" (1987) 73 ABA Journal 38 at 39. The logical error of evaluating positively a practice of bringing a child to life in terms of a life created by the practice, has been examined above in Chapter Two, section 2.2.
98 See text below at footnote 114 et seq.
99 Posner acknowledges the differing interests of the commissioning parties but claims that it is in the commissioning woman's interest to agree to the arrangement otherwise her husband "will walk" and find a fertile woman to marry. See discussion Chapter Two, Section 2.4.
without serious discussion of the effects of the arrangement on these people. But Posner does not explain or justify his assumptions that a temporary increase in economic welfare is commensurable with the permanent loss of a half-sibling and that the interests of adults should be weighed equally with the interests of children. Nor does he evaluate the practice at all from the perspective of the carrying woman's parents and siblings.

Likewise, Trebilcock focuses almost exclusively on the parties to the arrangement. He does not address the interests of the carrying woman's partner, parents or siblings. Trebilcock does consider that the carrying woman might have other children and a partner when he hypothesizes that a preconception arrangement "will enhance the quality of life of the other children of the birth mother and her spouse" by its "pecuniary returns". Yet he does not weigh their non-financial interests nor does he consider the interests of the prospective grandparents and aunts and uncles of the commissioned child when he concludes that preconception arrangements "entered into would generate mutual gains for all concerned".

The OLRC does consider the effect of the arrangement on the carrying woman's children and husband but not the other affected parties. It would grant the court reviewing a preconception arrangement application to consider whether the children might be harmed by the arrangement. The OLRC recommends that if there are "indications" of potential harm, then "a court should not approve her involvement". With respect to the husband or partner, the OLRC suggests that the court consider his "disposition" to her participation. The OLRC claims that its concern is not for him but for the child. It argues,

Where a partner is opposed to her participation, this may auger badly for the woman's state of mind during the pregnancy. This, in turn may be harmful to the fetus and deleterious to the stability of the surrogate mother's family.

100 Indeed as we have seen, Posner claims "The psychic costs, if any, to those children must be balanced against the possible gains to them from their mother's having a higher income, as well as against the gains to the father of the surrogacy child, to his wife and to the child". Posner, Sex and Reason, (Cambridge: Harvard University Press, 1992) at 423 [hereinafter "Sex and Reason"].


102 Ibid. at 56.

103 OLRC, supra, note 38 at 242.
The OLRC's concern is curious in three ways. First, it suggests that the problem of potential harm to non-party family members does not need to be considered in an evaluation of the practice itself but implies instead that the problem can be managed by the court on an ad hoc basis. Second, the OLRC provides no criteria for the court's assessment of whether, for example, a four-year-old child will be badly affected by the disappearance of its "mommy's baby". Third, it would, in effect, establish a husband's or partner's veto on the basis that his attitude would affect the carrying woman's state of mind which would, in turn, affect the fetus. This third point is odd because the OLRC does not address the carrying woman's state of mind and its potentially harmful effects on the fetus and the rest of her family when it creates a regime requiring her to surrender her baby once she becomes pregnant under an approved arrangement. If anxiety about her husband's disapproval can harm the fetus, then anxiety about surrendering the child can harm the fetus. Apart from this curious consideration of the interests of the other children and the husband (or partner), it is important to note that the OLRC does not address the unequal position of the commissioners in genetic-gestational arrangements, or the interests of the carrying woman's parents, siblings, nieces and nephews.

Departing from the same position that persons are separate and disconnected from one another, the AFS addresses only superficially the web of relationships in which the carrying woman and the commissioners are situated. Although it concludes that the practice, if it is to occur at all, should be conducted as a clinical experiment, it arrives at this conclusion without a discussion of the interests of all affected parties. Adopting the contract model's focus on parties to an agreement, it assesses the risks only to the parties and to the commissioned child. The AFS claims that "those risks can be understood by the prospective participants [who] thus informed, can engage in competent decision-making about whether to pursue this reproductive option".104 Then it concludes that the practice be the subject of clinical research considering inter alia "the effects on the surrogate's own family of her participation in the process".105

104 AFS, supra, note 41 at 70S.
105 Ibid. at 73S.
This reasoning is inadequate because, first, it does not specify whether "family" is understood to include only the carrying women's children and husband (or partner) or whether it also includes her extended family. Second, it suggests that the potential harms, if any, to that group (however defined) can be known only by conducting an experiment. If, however, the AFS had considered the interests of the carrying woman's family in its discussion, it might have concluded that the harms were so great as to be obvious. On the ethical principal that physicians should first do no harm,\textsuperscript{106} the AFS might have concluded that research ought not to be conducted. Even if this conclusion were not reached, the AFS ought to have considered the special interests of the carrying woman's children when it proposed that the practice could proceed as an experiment. The \textit{World Medical Association Declaration of Helsinki 1989} sets forth recommendations guiding physicians in biomedical research concerning human subjects. It requires that

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\item in the field of biomedical research a fundamental distinction must be recognized between medical research in which the aim is essentially diagnostic or therapeutic for a patient, and medical research, the essential object of which is purely scientific and without implying direct diagnostic or therapeutic value to the person subjected to the research.\textsuperscript{107}
\end{itemize}
\end{quote}

As persons who are scheduled to witness their mother lose her child, the carrying woman's other children are research subjects who will not benefit from the research (except temporarily and financially). Moreover, they are not able, as minors, to consent to such research being conducted upon them. It is, therefore, odd that the AFS does not address the problems of designing research which could conform to the Helsinki Declaration when it proposes that preconception arrangements be conducted as a clinical experiment. The AFS's consideration of the interests of persons with whom the parties are related is, therefore, inadequate.

Thus, the proponents are unaware of or place little importance on the relationships in which the parties are situated and on the interests of the parties' family members. This is the reason that the proponents' arguments fail to address or they discount the harm potentially

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\item \textsuperscript{106} \textit{Primum non nocere} is a traditional medical norm. Roberta Simmons, Susan Klein, Richard Simmons, \textit{The Gift of Life} (New York: John Wiley, 1977) at 39.
\item \textsuperscript{107} As quoted by Tom L. Beauchamp and Leroy Walters, \textit{Contemporary Issues in Bioethics} (Belmont: Wadsworth, 1994) at 49.
\end{itemize}
caused related persons by the preconception arrangement. These potential harms must, however, be recognized and discussed by any consequentialist analysis of the practice which purports to be ethical.

A preconception arrangement affects more than just the parties to it and the commissioned child. As in any family, relatives of the prospective child have an interest in the new life. The period of insemination, gestation and birth undoubtedly have an impact on the carrying woman's other children, her husband (or partner) and her extended family (parents, siblings, nieces and nephews), and the commissioning woman. Two Ontario researchers, Dr. Jennifer Steadman, a psychiatrist, and Gillian Tennant McCloskey, a social worker, have recognized as clinical concerns the possible negative effects of a preconception arrangement on family members. In their view,

The system is a complicated one and involves all members of the "incubating family" and the child-rearing family. The people affected include the surrogate mother's husband whose thoughts, wishes, and perceptions have often not been considered, and the surrogate mother's children who were frequently ignored.  

As we have seen, however, the interests of the carrying woman's other children are not seriously addressed by the proponents. According to one study, a child is capable, even at 18 months, of understanding that its mother is gestating a new life. Steadman and McCloskey argue that "increased abandonment anxiety is a distinct possibility in the children of surrogate families who see their parents willingly giving away children after birth".108

Children who experience sibling loss as a result of death, family breakdown, or child

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110 Steadman and McCloskey, supra, note 108 at 547. Carrying woman, Nancy Barrass, claims that the relinquishment has frightened her elder child:

My child bonded with this baby. She used to put a receiving blanket on my belly at night and say, "Night-night"... She felt it kick and bonded with that. And now, when I got home from the hospital, my daughter said to me, "Mommy, if I'm a bad girl, are you going to give me away?"

(Nancy Barrass, speaking on Donahue, Transcript 03127, Multimedia Entertainment, 1987 at 14 [hereinafter "Donahue Transcript 03127"]).
protection litigation tend to have serious depressive reactions.111,112 Literature on sibling perinatal loss recommends that the loss be acknowledged openly by the parents rather than denied. "If the loss is not accurately understood and resolved, deleterious effects can happen over time, as additional meanings and distortions occur...[for example] the child may wonder, 'If this can happen to a baby, why not me?'"113

In response to this concern, Andrews argues that harm to the carrying woman's other children can be avoided if the situation is managed properly. She claims that "the other child ought to be told from the beginning that this is the contracting couple's child - not a part of their own family".114 The fact remains, however, that at least for nine months, the child is a part of their own family. Andrews states, nevertheless, that an explanation will cause the

111 Steadman and McCloskey, supra, note 108.
112 Elizabeth Kane claims that her three-year-old son, Jeffrey, suffered from the relinquishment of his half-brother:

I left the house in labour, frightened and enormous with the weight of the child within. One week later, I returned home slimmer, tired, trying to be cheerful. The child had disappeared. Jeffrey would look at pictures of babies and grow sad. "Oh. Baby's gone." He would shake his head sadly and stroke my flat abdomen, no longer able to feel a tiny foot kicking against his hand. It was impossible for him to understand.

Further, Kane argues, her son's suffering has not diminished over time:

Today, at the age of eleven, he...is a clinging, fearful child plagued by constant nightmares. Recently, he has become afraid of death - especially mine. He will cry and be unable to fall asleep if he hears of the death of an unknown person on the evening news. His behaviour completely bewilders me.

A psychologist apparently explained to her that her child's problems lie in his inadequate understanding of what happened:

"Your son is undergoing classic symptoms of grief and loss. It's as though you gave birth to a dead child, came home empty-handed, and never mentioned the baby again. There was no funeral, no family grieving and little mention of the loss of his brother...get immediate professional help to draw out the denial in this child."


113 Leon, supra, note 109 at 2 and 8.
children to "realize that they themselves are not in danger of being relinquished".115 But there are two problems with Andrews' advice. First, it is not clear that the children will understand and believe what they are being told when they see that their parents actually have relinquished a child.116 Second, and perhaps more significantly, it is strange to argue that the pain which children suffer when one of their siblings dies should intentionally be caused by parents. It hardly reduces the unethical nature of the deliberate infliction of this harm to claim and to believe that it can be managed.117 Although Posner argues that the

115 Ibid.
116 Ironically, Andrews cites as proof of the effectiveness of her advice (that if children are told they will not also be relinquished they will understand), the case of Donna Regan. Regan relinquished three children in total and told her first child not to worry that he might one day be surrendered. Regan told her child, "The reason we did this was because they [the commissioners] wanted a child to love as much as we love him." (Andrews, Between Strangers, supra, note 79 at 177). Yet Regan is quoted elsewhere in a manner that casts doubt on Andrews' theory that an explanation will quell a child's fears of abandonment and desire for a sibling. Regan told the New York Times that her oldest child, Steffyn, 

...is a gifted child and you cannot snow this kid... Our main explanation was that we loved him very much and that we wanted Sherill and Bob to have a child they could love, too... he immediately said, "You're not going to give them me, are you?" ... And we said, "No" and we had to start all over. [When Steffyn was told that his mother was carrying twins for a second preconception arrangement, he] responded, "Fantastic, now you can give them one and we can keep one," his mother said, "So we had to explain it to him all over again".

Steffyn has recently started seeing a child psychologist Mrs. Regan said, but not because of her surrogacy. She said his behavioral problems stemmed from her inability to give him as much time as normal when she was pregnant. ("Surrogate Mothers Vent Feelings of Doubt and Joy" New York Times (12 March 1987) B2.)

With this example, Andrews fails to demonstrate that the carrying woman's other children will not suffer when carrying women attempt to manage the situation by careful explanation.

117 The carrying woman's other children might be at risk also from the lobbying efforts of the commissioners. For example, one woman relinquished a child to commissioners who later wanted another. The carrying woman said that her oldest child, Chris, who remained with her wanted "a baby brother of his own". The commissioning woman, Rhonda, decided to persuade the child. Rhonda, who had spoken to Chris a number of times, asked for him to be put on the phone.
children's interests might be trumped by the interests of their parents and the commissioners.\textsuperscript{118} and Andrews claims the children can be shielded from pain by discussing the matter, it is probable that the carrying women's other children will suffer, potentially over a long period,\textsuperscript{119} by the facts that their mother has endangered their sense of security by abandoning a sibling, and has deliberately caused them to lose their sibling. As Steadman and McCloskey argue, "It would be naive to think that the children of the incubating family will be unaffected by loss."\textsuperscript{120}

The effect of a preconception arrangement on the carrying woman's husband or partner might similarly be serious. As we have seen, the OLRC recognizes this possibility by recommending that the reviewing court consider his feelings before approving an application to participate in a preconception arrangement. Andrews, on the other hand, assumes that husbands or partners will be supportive when she advises prospective commissioners. In her popular book under a section entitled "What to Look for in a Surrogate Mother", Andrews suggests that a "good candidate for surrogate parenting" is a

"I'll come to Amarillo and I'll take you to the toy store and buy you anything you want, anything", Rhonda told Chris.
"Okay, she can have another baby", he said.
Carol reports on [the] visit. "They went to the toy store together. I stayed home, cringing with terror, because she quite literally would have bought him anything", explains Carol. "He picked out a $25 or $30 G.I. Joe airplane. There are things in the store that cost $400, $500, and $600 and my son only spent $30. Maybe I was a little disappointed, I don't know, but I was so proud that he didn't try to wring her for all she was worth. That airplane was his pride and joy."
In May 1983, Carol conceived again with [Rhonda's husband's] sperm.
(Andrews, \textit{Between Strangers}, supra, note 79 at 50-51.)

This account does not report how the boy has coped with the fact that his parents put him, at the age of five, in a position to determine whether he would know his half-brother.

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\textsuperscript{118} See Posner, \textit{Sex and Reason}, supra, note 100 at 423.
\textsuperscript{119} According to Irving Leon, \textit{supra}, note 109 at 2.
woman with a stable home life and a "stable routine with husband and family to return to once the pregnancy [has] ended". But Andrews does not consider the effect of the agreement on the carrying woman's partner and their relationship.

The carrying woman's husband or male partner is probably affected by the arrangement. Like the male partner of any other pregnant woman, he must make accommodation for the physical and psychological changes that the woman experiences. When the child is the man's own, his interest in adapting to her changed circumstances is usually great. When she is carrying the child of another man, it is possible that he will feel excluded, resentful, and jealous. Research on donor insemination suggests that "problems can arise for him in the sexual area beginning with a feeling that 'adultery' has occurred upon his wife's insemination".

There is anecdotal evidence that a preconception arrangement has the potential to have serious negative effects on the partner and the relationship. Susan Downie, an Australian researcher, found that carrying women had many stories of difficulties. One American woman tells how her fiancé left her for another woman, another said her husband could not look at her after she was inseminated. 'He calls me a whore, prostitute and rent-a-womb.' One commented, 'My husband first felt it threatened his manliness'. Another said, 'His attitude has turned against me. We're hardly having any sex at all now', and one reported that her husband wished she had never become involved in surrogacy and that their sex life was non-existent.

121 New Conceptions, supra, note 55 at 195.
123 Susan Downie, Babymaking: The Technology and the Ethics (London: Bodley Head, 1988) at 124. Carrying woman, Elizabeth Kane also describes how the very different roles she and her husband played in the creation of her son had a divisive effect on their relationship:

I have lost a child. Kent has not. We no longer relate to each other in the same manner we once did. The closeness and respect have diminished. There is little real communication after twenty-one years of marriage...
The psychologist...confirmed my feelings about the difficulties that surrogacy had presented in our marriage. "Each time your husband looks at a photograph of Justin, he is reminded of your bond with another man. As though you had taken a lover. Your son by this stranger might very well have qualities that Kent wished his own son had. This could only add to feelings of low self-esteem.
Direct interference with marital relations is required by the practice itself so that the commissioners might thereby obtain a child "as intended" - a child genetically related to the commissioning man. One broker requires that the carrying woman abstain from sex approximately two weeks before the first insemination attempt until there is a pregnancy and that can be many months. The psychological impact of this form of interference with the relationship of husband and wife might be great though data are not available. The foregoing anecdotal evidence, however, suggests that a preconception arrangement can have serious effects on the male partner's self-image and on the relationship of the carrying woman and her partner.

Although there are no studies to confirm the hypotheses, it is likely that the extended family of the carrying woman suffers also from the deliberate creation and relinquishment of a member of their family. It appears from personal accounts that the carrying woman's

(Elizabeth Kane, *Birth Mother*, supra, note 112 at 281-82.

Similarly an Argentinean carrying woman described the negative effect of the arrangement on her relationship with her husband.

Amelia:...The whole thing did not go well for my husband, specially at the time to go to bed. He did not even touch me for a long while and if I would reach for him he would reject me. Afterwards he started to drink more than usual, and then he would not get angry, but he was weird, different from how he had always been...and I did not like that, that scared me a lot...and I felt that he was doing it because he thought I had betrayed him, as if it was a punishment.

Eventually, according to Amelia, her husband came to think of her pregnancies as money-making enterprises. Though she suffered a great deal by relinquishing her child and she appeared unwilling to do it again, she feared displeasing her employers and her husband:

Amelia:...I am afraid to get into too much trouble, specially with my husband.

Reporter:  He does not want to?

Amelia:  No, on the contrary, he thinks it is a good idea, he says that with the money that we could get we could live in some other place.

"100 Questions to a Woman Who Rented her Uterus", *Emanuelle*, translated by Rita Arditti and appearing in "Surrogacy in Argentina" (1990) 3:1 Issues in Reproductive and Genetic Engineering 40 at 42-43.


125 Whether the loss of a child carried by a family member but not genetically related to the family would cause harm is not known. Some might view an exclusively genetic child as unrelated to the extended family; others might hold that by virtue of being carried by their daughter, sister and aunt, the child is a family member.
parents can be harmed when they have a grandchild whom they cannot grow to know and love.\textsuperscript{126} It is possible that the carrying woman’s brothers and sisters and their children will be harmed by the relinquishment of their niece or nephew and cousin though the degree of harm will likely be related to the closeness of their relationship with the carrying woman.

In addition to either ignoring or placing little importance on the interests of the carrying woman’s immediate extended family, the proponents do not include in their evaluation of the practice that the commissioning woman might not actually benefit from the arrangement in any way other than possibly to keep her husband happy.

Because in genetic-gestational arrangements, the commissioners benefit in unequal ways (the commissioning man receives his genetically-related child and the commissioning woman receives a stranger to her), a commissioning woman might not want to participate in such an arrangement at all. She might not wish to do so because, for example, she is too ill to rear a child\textsuperscript{127} or because she finds it humiliating that her husband wishes to go outside their marriage for a solution to his problem but not hers which is her unfulfilled desire to conceive and carry her child.\textsuperscript{128} Further, she might agree to participate only to avoid

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  \item \textsuperscript{126}See, for example, Crawford, \textit{Toronto Star} (12 April 1987) Fl. "Her parents were unhappy about the arrangement particularly her father who is concerned that he has a grandchild who doesn’t know him." See also \textit{Woman’s Own} (11 July 1987) 1: "Her own mother was upset because she felt she was losing a grandchild and her father-in-law disinherited her."
  \item \textsuperscript{127}See Noel Keane’s report on such a case, supra, Chapter One, section 1.6.2.2, note 182.
  \item \textsuperscript{128}For example, see Elizabeth Kane’s account of a commissioning woman’s embarrassment at her husband’s desire to participate. See, supra, Chapter One, section 1.6.2.2, text at note 181. Kane, "Surrogate Parenting: A Division of Families, Not a Creation" (1989) 2:2 Reproductive and Genetic Engineering 105 at 108.
\end{itemize}

Another woman who commissioned a child did so only after considerable pressure from her husband:

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  \ldots John would not drop the subject, and I soon realized that I had underestimated his desire to have another child. [She could not conceive again after delivering a boy.] He continued to bring home articles on the subject of surrogate mothers… But the idea was so distasteful to me that I could hardly bring myself to read the material. I was bitterly resentful that John would even consider having a child with another woman - which was, after all, what surrogate parenting was all about.

  Even after she and her husband left the broker’s office, she "still had mixed feelings about what we were doing". Eventually they received a girl, the daughter of her
\end{quote}
a divorce. This unequal relationship of the commissioners to the child might cause problems. The very process of procreation has the potential to create a relationship between the commissioning man and the carrying woman that results in the man abandoning his wife.\textsuperscript{129} If the couple remain together and accept the commissioned child it can become for the commissioning woman a symbol of her husband’s relationship with another woman, her perceived inadequacy to do what other women can do, and the extent to which she is prepared to sacrifice herself for her husband and marriage. According to one commentator,

[Commissioning] women often feel that they are giving a gift to their husband, instead of fulfilling their own desire to have children. The woman may be forced by external pressures such as a "lack of alternatives to child-rearing", "fear of social ostracism", and fear of "emotional and economic abandonment by her husband".\textsuperscript{130}

Moreover, if the marriage does break down before the commissioning woman has formally adopted the commissioned child, the difference in the commissioners’ relationships to the child might become painfully obvious. In one case, the commissioning woman lost even visitation rights to the child.\textsuperscript{131}

Thus, if one shifts perspective to focus not on isolated selves but relationships and persons in relationship, one sees the effect of a preconception arrangement differently. It ceases to be a neutral bargain between adult commissioners and the carrying woman, and

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\item husband and a carrying woman. The account does not discuss how this experience affected their marriage and whether the commissioning woman relates differently to this child than to her son. "I Had to Pay Another Woman to Have My Baby", 202 Good Housekeeping (April 1986) 32 at 34.
\item \textsuperscript{129} See Keane’s account of such a case, supra, Chapter One, section 1.6.2.2 at note 183.
\item \textsuperscript{130} Lori Savory, "At what price, freedom? - the surrogate motherhood debate", 2:2 Waterlily (Fall 1990) 20.
\item \textsuperscript{131} In the California cases involving a commissioning 35-year-old man and his 51-year-old wife, joint custody of the 15-month-old girl was awarded to the commissioning man and to the carrying woman who had not signed adoption papers to relinquish the child. The commissioning woman was granted no visitation rights. According to Judge Nancy Wieben Stock, the commissioning woman is the one most victimized by the present circumstances...[she] has experienced the most profound losses a human being can experience all within the span of 16 months. She has lost her child, her husband, her family.
\end{itemize}

becomes a potentially highly problematic decision to create a child outside a marriage (or stable relationship) with the purpose of detaching the child forever from one of its families. The procreation of and promise to relinquish the child may be harmful to the carrying woman’s immediate and extended family. That the procreation of the commissioned child in a genetic-gestational arrangement excludes the commissioning woman but requires her later to rear the child, might be damaging to the commissioning woman and her relationship with her husband. A shift in focus from separation to relationship highlights potential difficulties with preconception arrangements which the proponents’ argument either do not address, or discount.

This section has demonstrated that the proponents’ arguments adhere to what Robin West has called the “separation thesis” of liberal philosophy. They assume that persons are separate, disconnected entities who (at least) theoretically exist prior to society. By challenging this assumption and arguing that persons are born into relationships and are situated in relationships throughout their lives, and that these relationships can be and usually are significant, this section has shown that the proponents’ reliance on the inadequate separation thesis leads to three flaws in analysis. First, their arguments wrongly assume that, in the context of a preconception arrangement, parenthood should be determined by intention and reproductive obligations limited by consent. Second, they value negative liberty in the familial context at the expense of liberty to remain in relationship. And third, by being unaware of, or placing little importance on, the parties’ relationships, they fail to address or they discount the harm to persons and relationships caused by participation in a preconception arrangement.

3.3.2 Participants are Self-Interested

In addition to its view that persons are separate, disconnected entities, liberal philosophy assumes that we live in a world of scarcity and behave in a way which advances our own self-interest at the expense, if necessary, of the interests of others.132 This assumption is shared by the contract model. On the belief that human nature is self-seeking rather than fundamentally altruistic, contract law holds that one will not promise to perform an act, or forbear from performing, unless one receives something of value in

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132 Jaggar, supra, note 1 at 44.
return. Thus, when a plaintiff seeks to establish that an expectancy interest has been created and is worthy of legal protection, the plaintiff must show that he or she paid a price for the alleged promise. In seeking evidence of consideration, the court asks, "Does the promisor receive any benefit or the promisee sustain any detriment, present or future, in respect of the promise?" If not, the promise was gratuitous and is not legally binding.\textsuperscript{133} The reason that the courts will enforce only non-gratuitous promises is because they believe the power of state sanction in contract should be used to enhance a person's freedom not to limit it, and they assume that an agreement freely entered, will promote one's self-interest rather than harm it. Since, in a gratuitous promise, the court sees no benefit to the promisor, it refuses to enforce because to do so seems likely to deny rather than to enhance the promisor's liberty.

The ABA Proposal similarly assumes that people are self-interested, and therefore requires evidence of consideration before a preconception arrangement is legally binding.\textsuperscript{134} The presumed self-interested nature of the agreement is ostensibly apparent in the fact of payment to the carrying woman.\textsuperscript{135} The one who promises to relinquish her child receives a benefit in return - money - the payment which is a detriment to the promisee. Likewise, the ABA Proposal contemplates self-interested action by the commissioners when it requires that they place sufficient funds in trust before the carrying woman's insemination takes place to cover the known and estimated expenses of her pregnancy and delivery.\textsuperscript{136} Because (inter alia) of the view that the parties would not have entered the agreement if to do so were not in their interest, and because of evidence (in the form of consideration) that their respective interests are being satisfied, the ABA proposal would require the court specifically to enforce the agreement\textsuperscript{137} (even though this is not the usual remedy for agreements of personal service which the ABA proposal claims to be).\textsuperscript{138}

\begin{itemize}
\item[134] ABA Proposal, s.3(a), supra, note 28.
\item[135] Ibid. s.3(b) and 5(e).
\item[136] Ibid. s.5(f).
\item[137] Ibid. s.6(c).
\item[138] Guest, supra, note 133 at 519.
\end{itemize}
This presumption of self-interestedness makes sense on what Carol Gilligan has called the "justice perspective".\(^{139}\) On this view, separate, morally autonomous persons use reason to determine which principles ought to be followed. Because they are morally autonomous, people are morally entitled and ought to be legally entitled to conduct their own lives as they wish. In the justice tradition, the basic injunctions are non-interference defined as respect for others' rights and self-determination defined as the pursuit of one's own good in one's own way.\(^{140}\) In establishing and respecting the rights of the other party, and in permitting the parties to pursue their own good in their own ways, the ABA Proposal operates within the justice tradition and provides a means by which the parties' varying self-interests might fairly be reconciled.

By contrast, however, Gilligan has described a different moral voice which is used primarily by women. What she calls the "care perspective" is one in which the basic elements of moral judgement (self, others and the relationship between them) are organized differently. She writes,

> From a justice perspective, the self as a moral agent stands as the figure against a ground of social relationships, judging the conflicting claims of self and others against a standard of equality of equal respect (the Categorical Imperative, the Golden Rule). From a care perspective, the relationship becomes the figure, defining self and others. Within the context of relationship the self as moral agent perceives and responds to the perception of need. The shift in moral perspective is manifest by a change in the moral question from "What is just?" to "How to respond?"\(^{141}\)

The inclination to consider a situation not in terms of rights and respect for self-interest, but in terms of what the situation requires of the person by way of response, is an inclination to care. Gilligan argues that a focus on care in women's moral thinking highlights the presence of care concerns in the moral thinking of both women and men and reveals that there are at least two moral orientations. But, she claims, people tend to focus on one orientation and to lose sight of the other perspective in arriving at a moral decision. In fact, according to


\(^{140}\) Ibid. at 22-23.

\(^{141}\) Ibid. at 23.
Gilligan, the most striking aspect of her empirical findings is the virtual absence of care focus reasoning among the men whom she studied.142

Using Gilligan's theory that there are at least two moral orientations, it is possible to challenge the assumptions of the proponents which are used to justify preconception arrangements as a fair method of gratifying self-interest. This section shall argue that an almost exclusive focus on self-interest protected by rights, causes the proponents variously to make three errors.143 First, they view reproduction as a means of gratifying self-interest and either ignore or discount that it invites a response to care. Second, they frame the abortion issue narrowly as concerned with a woman's right to bodily integrity and then use that right to justify her participation in a preconception arrangement without considering that both issues might more helpfully be viewed as concerning how best to care. Third, they inconsistently recognize the desire to care in justifying the practice but deny or forget it exists in justifying specific performance.

Both Robertson and Posner focus on self-interest rather than on care when they argue that the moral concerns to which reproduction gives rise are primarily related to rights not to care. As we have seen,144 Robertson claims that persons ought to be free from state interference in their decisions to reproduce and more particularly to separate the genetic, gestational, or social components of reproduction and to recombine them in collaboration with others. This is just, he believes, because, among other reasons,

A gene contributor may find genetic transfer a vital source of feelings connecting him or her with nature and future generations. These feelings persist even if gestating and rearing, the biological and social aspects of reproduction, do not accompany the genetic transfer.145

In other words, the state ought to protect a person's right to procreate children without concern for the need of those children for care. Likewise, Posner argues that cloning is justified on the basis that it frees men from reproductive reliance on women. He claims,

142 Ibid. at 26.
143 Not all the proponents make each error. This section considers the most obvious examples of these errors.
144 See Chapter 2, section 2.2.
145 Robertson, "Procreative Liberty and the Control of Contraception, Pregnancy and Childbirth" (1983) 69 Virginia Law Review 405 at 409. [hereinafter "Procreative Liberty"].
Liberated by the power to clone from dependence on women for offspring, men will become excessively masculine. They will be liberated, in fact, "to celebrate, like the ancient Spartans, a violent, misogynistic, and narcissistic eroticism" - epitomized by a Marine Corps boot camp.146

But, again, who will care for the children? This focus on rights and autonomy is so intense as to exclude any concern for care.

The second error which occurs from a focus on self-interest is the argument advanced by Posner and Trebilcock that the freedom to have an abortion represent a woman's right to bodily autonomy and that the same right protects her freedom to participate in a preconception arrangement. Posner claims "it is odd that [feminists] should think it all right to kill a fetus but immoral to allow rights over it to be sold to a couple who want it to live."147 Similarly, Trebilcock argues that the abortion and preconception arrangement debates are concerned with rights. He asserts,

given that many feminists and others strenuously argue that women should have full dominion and autonomy over their bodies in deciding whether to abort a fetus or not, it is not clear on what principle those who take this view would hold that women should not have the same freedom to decide whether to enter a surrogacy contract. To assume or assert that women should not be free to exercise such a right if they wish is to imply a degree of paternalism that is rejected vehemently as invidiously patronizing in the abortion context, where at least on one view, life is being terminated, when in the case where life is being created, such a right is denied.148

Yet, the ethical nature of abortion and the practice of preconception arrangements is not helpfully discussed by reference only to rights. As Gilligan argues, the language of the public abortion debate reveals only a justice perspective.149 According to Gilligan,

Whether the abortion dilemma is cast as a conflict of rights or in terms of respect for human life, the claims of the fetus and of the pregnant woman are balanced or placed in opposition.150

146 Posner, Sex and Reason, supra, note 100 at 429.
147 Ibid. at 424.
This opposition of selves causes the morality of abortion decisions to turn on the scholastic or metaphysical question of whether the fetus is a life or a person, and whether its claims take precedence over those of the pregnant woman. But when abortion is framed as a problem of care, the moral dilemma posed by abortion shifts. According to Gilligan,

The connection between the fetus and the pregnant women becomes the focus of attention and the question becomes whether it is responsible or irresponsible, caring or careless, to extend or to end this connection. In this construction, the abortion dilemma arises because there is no way not to act, and no way of acting that does not alter the connection between self and others. To ask what actions constitute care or are more caring directs attention to the parameters of connection and the costs of detachment, which become subjects of moral concern.

When the ethical nature of preconception arrangements is similarly viewed from the care perspective, the subjects of moral concern also shift from conflicts of rights to connection and the cost of detachment. The question is no longer "Does the woman have a right to be a carrying woman?" It becomes instead, "Is it responsible or irresponsible, caring or careless to conceive a child in order to detach oneself from it forever?" and "If a pregnancy is initiated to help commissioners, is there any way of acting that will not alter the connection between self and others?" These are important ethical questions, the answers to which suggest that from a care perspective, a carrying woman once pregnant cannot succeed: to relinquish the child is to sever the connection between mother and child, and carrying woman and commissioners; not to relinquish the child is to sever painfully the anticipated connection between commissioners and hoped-for child, and between carrying woman and commissioners.

When viewed from the care perspective, the abortion and preconception arrangement debates are alike - but not in the way Posner and Trebilcock claim. Both issues present the dilemma of how to respond to the possibility of severing a connection of fetus and pregnant woman, child and mother. They are different, however, in that whereas abortion involves an unwanted pregnancy, preconception arrangements intend the pregnancy. Abortion requires a woman to decide whether to end or to extend an existing connection. A preconception

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151 Ibid. at 24.
152 Ibid.
arrangement presents a woman with the possibility of creating a connection by conceiving a fetus with the very purpose of severing the connection at birth. There is a moral difference between the state's leaving the woman alone to decide whether to preserve or sever an existing connection, and the state's refusing to participate in a practice by which a woman creates a connection with the sole purpose of severing it.

Thus, the moral perspective of rights rather than the concern to respond to persons to whom one feels connected is relied upon to argue that women may freely control their bodies in both abortion and preconception arrangements. A care perspective, however, demonstrates how the first might be thought morally justifiable but not the second. A care perspective is concerned to grant women the freedom to decide how to deal with the overwhelming fact of an unwanted pregnancy given the significance of the relationship between mother and child and the fact that the fetus is not yet a child. But relying upon the significance of the maternal-infant bond, a care perspective would discourage a woman from conceiving a child with the intention of severing her relationship with the child once born.

The care perspective is, however, relied upon briefly by two proponents when they justify the practice of preconception arrangements. This is the third error caused by a primary focus on self-interest rather than care: although some proponents' arguments recognize and value the response to care, they do so only inconsistently.

Both Andrews and the AFS justify the practice, in part, by arguing that it enables women to care for others. Andrews writes, "Being a surrogate offers [women] the chance to be altruistic and to perform a social good (similar to being an organ donor)." In almost the same words, the AFS claims, "As in the case of organ transplantation, surrogate

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153 Andrews, "Adoption Model", supra, note 34 at 17. The claim that surrendering a child under a preconception arrangement is like organ donation has been refuted in Chapter Two, section 2.5. It is worth recalling that unlike an organ donor who may withdraw her consent at any point before being anaesthetized, a woman in preconception arrangement ought not, in Andrew's opinion, be entitled to withdraw from her promise. On this point Mary Gibson rhetorically asks, "Suppose you had consented to be a kidney donor and then changed your mind; could they say "sorry, you gave a valid consent; you were competent, informed, and not coerced; therefore, you must go through with it?"

Gibson, supra, note 17 at 99.

154 Andrews was a member of the Ethics Committee of the AFS which wrote the report. AFS, supra, note 41 at iv.
motherhood offers the woman a chance to be altruistic.\textsuperscript{155} The implication of this argument is that it is natural and desirable (for at least women) to be altruistic, and that altruism is an attribute worth encouraging. By "altruism" is understood devotion to the welfare of others.

Ironically, however, the caring response to pain or need which is lauded in women when they offer to participate, is denied altogether when they wish to continue to care for their children and to stay in relationship with them. A carrying woman’s desire to be devoted to the welfare of her child, and therefore to refuse to relinquish it, is described in terms that suggest the once altruistic woman has become a selfish, self-interested horror. For example, Andrews decries existing law which recognizes the carrying woman as the mother because carrying women might use their legal position to extort more money from the commissioners before signing the adoption papers.\textsuperscript{156} The AFS claims that the "altruistic" woman could become a threat to the commissioners and their relationship;\textsuperscript{157} when she acts on her desire to continue her relationship with her child, her actions are to be viewed as "harassment".\textsuperscript{158} For these reasons, in the view of Andrews and the AFS, specific performance would be required.

By applauding a woman’s desire actively to respond to the pain and need of adult commissioners and denouncing the desire actively to respond to the pain and need of her vulnerable child, Andrews and the AFS are inconsistent in their appreciation of caring as a moral response. Andrews and the AFS attempt to justify a practice which requires a woman to respond compassionately, extraordinarily and superrogatorily to strangers and to suppress a desire to respond readily, ordinarily and naturally to her child. In this way, they

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\item[A155] AFS, \textit{supra}, note 41 at 65S. Trebilcock also argues that the practice benefits women by allowing them to give effect to their altruism but because he recognizes that concern for the child might cause the woman to change her mind, his views on this matter are not discussed here.
\item[A157] According to the AFS, The couple might be at risk of harassment from the surrogate in those rare instances in which she learns the couple’s identities and seeks them out after relinquishing the child. Or, if the surrogate is a friend or relative, her continued involvement with the couple may cause tension in their marital relationship.
\item[A158] AFS, \textit{supra}, note 41 at 69S.
\end{enumerate}
inconsistently cast the carrying woman as altruistic and selfish and thus vulnerable to the charge of being unstable and irrational.\textsuperscript{159} These proponents use her alleged altruism to justify the practice, and her alleged selfishness to justify specific performance.

This section has demonstrated that the contract model and the ABA proposal are predicated on the assumption that persons are self-interested and self-seeking. If one acknowledges that there are at least two moral orientations, the care perspective becomes clearly visible as a form of moral thinking that does not focus on the rights of individuals but on the needs of others and the desire to maintain relationships. The ethic of care pays considerable attention to the affective components of the moral life with special emphasis on empathy and concern for the needs of others. The care perspective is useful to an ethical analyses of preconception arrangements because it illuminates important issues to which the practice gives rise. By underscoring the moral importance of relationships and the responsibilities to which they give rise, the care perspective reveals three flaws in the proponents' thinking: first, reproduction is viewed as a means to gratify self-interest without adequate attention to the fact that it creates a vulnerable human in need of care; second, abortion and preconception arrangements are justified on the basis of a right to bodily integrity when the practices might more helpfully be viewed as concerning how best to care; and third, the desire of the carrying woman to care is inconsistently described as both altruistic and selfish.

3.3.3 \textbf{Participants Are Rational}

In addition to its assumption that persons are separate and self-interested, liberal philosophy holds that they are rational. Indeed, according to Jeremy Waldron, "liberalism is bound up in large part with respect for rationality".\textsuperscript{160} What, however, does it mean to be rational? In the opinion of the liberal philosopher, John Rawls, rational persons are those who

\textsuperscript{159} Carol Smart argues that this inconsistent portrayal underlay the characterization of Mary Beth Whitehead as an unfit mother: "It was her willingness to use her body to meet the needs of the Sterns which could then be used against her and fed into a picture of her as an unstable woman, a woman unsuitable for motherhood (albeit that she had other children)." \textit{Feminism and the Power of Law} (London: Routledge, 1989) at 103.

\textsuperscript{160} Waldron, "Theoretical Foundations of Liberalism", \textit{supra}, note 1 at 133.
know their own interests more or less accurately; they are capable of tracing out the likely consequences of adopting one practice rather than another; they are capable of adhering to a course of action once they have decided upon it; they can resist present temptations and the enticements of immediate gain. 161

This understanding of rationality is assumed by the contract model. In viewing contract as serving to secure expectations and to facilitate planning of the transaction and for contingencies, the contract model shares with liberalism the belief that persons have the discipline of self-knowledge and clear sightedness to plan and to organize their affairs. Presupposed in the exercise of judicial power to enforce contracts is that people will rationally pursue their self interest,162 that their heads will rule their hearts. Further, it assumes that the proper exercise of reason is impeded if contracting parties have inadequate information. Therefore, lack of information can defeat contractual liability in, for example, circumstances of fraud, misrepresentation and mistake. 163

The ABA Proposal similarly assumes that persons are purely rational. The requirement that parties be over 18 years of age is meant to ensure that parties are sufficiently mature to know their own interests.164 That the carrying woman must already have a child is an attempt to guarantee that she understands the consequences of participating.165 Other sections of the draft statute presuppose that she can adhere to a course of action and that she ought to resist the temptation to have sex with her husband or partner whilst she is being inseminated with the commissioner’s sperm,166 and the urge to keep her child once she gives birth.167 Moreover, lack of information may defeat

162 This is one reason that the courts will not inquire as to the soundness of the bargain and the adequacy of consideration is not subject to judicial review. For dicta see Haigh v Brooks (1839) 10 A. & E. 309, Bolton v. Madden (1873) L.R. 9 Q.B. 55 at 57.
163 Guest, supra, note 133 at 209-291.
164 ABA Proposal, supra, note 28 s.3(d).
165 Ibid. s.8(c)(2)(B).
166 Section 6(a) establishes a cause of action against the carrying woman if she conceives a child genetically unrelated to the commissioners and not because of a laboratory of physician’s error. Ibid.
167 Section 6(c) grants (inter alia) commissioners the power to seek specific performance of the carrying woman’s promise to surrender the child.
contractual liability. If any of the parties have not been fully informed of their legal rights, all medical risks as well as the psychological risks, then the carrying woman may be awarded custody.\textsuperscript{168}

The presupposition of this view of rationality is that the mind and its activities are superior to the body and its experiences. On this understanding, reason is aligned with matters of the mind and emotion with bodily experience. Emotion, it is believed, clutters and constrains the efforts of reason in performing its essential task: that of arriving at certainty in knowledge. Further, emotion is not trustworthy because it is associated with the particular, and is not subject to rule or regulation. This understanding of rationality excludes the experiential, emotional, practical and subjective elements.\textsuperscript{169}

The problem with viewing persons as agents who are rational in this way is, of course, that persons do not consist solely of a mind. The organ which permits rational thought, the brain, is situated in a body which through sensation and emotion informs the brain. The liberal conception of the separate, self-interested, purely rational self would have us believe that the body and emotions are impediments to knowledge and must be discounted and circumvented.\textsuperscript{170}

Yet, in the context of preconception arrangements, person’s bodies and emotions are at the forefront. The commissioners’ bodies together are unable to conceive a child which, it is claimed, causes them intense emotional pain. The carrying woman’s body, to be eligible to receive the commissioning man’s sperm, must be of demonstrated fertility. Her bodily and emotional reactions to the pregnancy, labour, delivery and post-partum period are not discussed or are minimized, and her emotions (which might run riot) are sought carefully to be controlled by the instrument of the agreement which would limit the ways in which she may act on her emotions. To be created, is the body of the child which must have a physical (ie. genetic) link with the body of the commissioning man and which must physically be transferred to the commissioners. Standing quietly on the side, is the body of the commissioning woman, ineffective and passed over by her husband in favour of the body of

\textsuperscript{168} Ibid. s.18(f).
\textsuperscript{170} Gibson, supra, note 17 at 81.
a fertile woman, but presumed to be waiting with open arms to receive and become dedicated to her husband's child by another woman. As we have seen, her emotions are assumed only to be those of happiness and fulfilment. If the arrangement is exclusively gestational, then the commissioning woman like her husband, is perceived merely to be receiving her child back after delivery. The chemically induced and painful process of egg extraction is not discussed. The bodily processes of the carrying woman which nurture and support the growth of the embryo to fetus and to child are trivialized and characterized as womb rental.

If we reject a focus on a limited conception of rationality and include in our vision the fact that persons are embodied and emotional, it is possible to see that the proponents' preoccupation with limited rationality leads to three errors. First, they view the agreement as that which brings the child to life; second, they believe that rational deliberation in advance can make the risks knowable and emotions manageable; and third, they believe that their evaluation of the practice is an expression of reason and therefore non-emotive.

In the opinion of Robertson and Andrews, it is primarily the agreement which gives birth to the child. Robertson claims that the agreement should determine custody and parentage because it "made the very existence of the child possible." Similarly, Andrews argues that "the conceptus [sic] being carried by a surrogate mother or a surrogate carrier would not even exist were it not for the couple's decision to create a child as part of their relationship." Clearly, Robertson and Andrews wish, by this agreement, to discredit the body as the determiner of parental duties and rights, and to replace it with the mind. But their logic is seriously flawed.

These proponents use a "but-for" test to determine parentage: but for the agreement, but for the couple's decision, the child would not have been born. Yet they do not justify their application of this test or apply it rigorously. Robertson and Andrews believe it to be

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171 See section 3.3.1.3 above.
172 For a study of this limited understanding of rationality, see Lorraine Code, What Can She Know? Feminist Theory and the Construction of Knowledge (Ithaca: Cornell University Press, 1991).
173 Not all proponents make each error. This section uses representative examples.
self-evident that the test should be "but-for the intention of the commissioners." As we have seen, 176 however, intention is an inadequate determiner of parenthood in the context of preconception arrangements because it cannot provide for the care of the children who are not intended. Moreover, there is no principled reason to stop at commissioners' intention so the test might be applied without limit. One could just as reasonably argue that "but-for the commissioners' parents' willingness to have the commissioners, the commissioned child would not have been born." Or, and more to the point, "but-for the carrying woman's provision (in most cases) of her gamete and genetic heritage, and (in all cases) of her bodily effort, discomfort and pain, the child would not have been born." In other words, to apply the "but for" test to determine parentage requires justified criteria of applicability. The two proponents claim the criteria exist in intention. Because those are inadequate to protect the welfare of children, 177 others must be advanced and must take into account the need of children for care and, therefore, reliably identifiable persons responsible for that care.

The second flaw in the proponents' presupposition that persons are exclusively rational is the belief that an agreement (the presumed embodiment of rational deliberation) can ensure that the risks are knowable and emotions manageable. Andrews writes that the carrying woman can know the risks of participating, 178 and that one need not have the experience before consenting to it. 179 Likewise, the AFS argues that the fact of the agreement can govern the carrying woman's body and emotions. According to the AFS,

Because the surrogate's responsibilities are set out in a contract before the conception occurs, she is more likely to understand and abide by them and less likely later to harass the couple with a change of heart. 180

Of course, it is possible that rational deliberation might have this effect. But why should one count on it? Pregnancy and childbirth are affairs of the body and emotions.

176 See above section 3.3.1.1.
177 Supra, Chapter 3.3.1.1.
179 "The legal doctrine of informed consent presupposes that people will predict in advance of the experience whether a particular course will be beneficial." Ibid.
180 AFS, supra, note 41 at 72S.
Much of what occurs during those periods in a woman's life is at once conscious and extending beyond her control. As Mary O'Brien describes it, pregnancy and delivery are in varying respects like the activities of an architect and a bee:

Mother and architect are quite different. The woman cannot realize her visions [to have, for example, a child of average mental ability] cannot make them come true, by virtue of the reproductive labour in which she involuntarily engages, if at all. Unlike the architect, her will does not influence the shape of her product. Unlike the bee, she knows that her product, like herself, will have a history. Like the architect, she knows what she is doing; like the bee, she cannot help what she is doing.

A pregnant woman knows that she is carrying a child but cannot use her mind or will to make that child like her vision of what an ideal child would be. Clearly, fetal growth and childbirth do not occur as a result of rational deliberation. Given that "performance" of the agreement is thus not entirely within the control of the carrying woman, the activity is unlike other matters which are the subject of contract such as an agreement with an architect for the construction of a building.

In addition to being not consciously directed, fetal growth and childbirth also give rise to strong emotions. Whether or not maternal instinct exists, more women fall in love with their babies than ever thought they would. It is, therefore, odd that Robertson and Andrews claim that this bodily and emotional matter can and ought to be governed by the dictates of reason expressed in advance of conception. Moreover, these proponents do not explain why an agreement of marriage, which is similarly an affair of the body and emotions, ought to be freed of past dictates of reason in cases of divorce, but similar

181 Of course, a woman may terminate the pregnancy, or in continuing with it she can reduce the risks to the child by refraining from ingesting, inhaling or injecting herself with harmful substances, and taking adequate care of her health. Beyond this minimum, the woman cannot control what type of child she will have, or the development of a relationship between her and the child.


183 In "Surrogate Motherhood: An Argument for the Denial of Specific Performance" (1989) 22:3 Col. J. of Law and Soc. Prob. 357, Maurice Suh argues that women bond with their children, that bonding is enforceable and has a psychological impact if the child is forcibly removed from the mother's care, all of which have legal consequences.

184 Katha Pollitt, supra, note 44 at 844.
freedom should not be accorded to participants in preconception arrangements. For these reasons, the argument that rationality can and ought to control the body and emotions is unconvincing.

A third flaw in the proponents' argument is their assumption that their evaluation of the practice is rational and therefore non-emotive. Posner claims, "the beginning of wisdom is a determination to evaluate surrogate motherhood rationally" implying that he has demonstrated that determination whereas critics of the practice have failed. Likewise, the OLRC dismisses arguments of opponents by stating,

> the understandably deep emotional feelings associated with surrogate motherhood, while deserving of respect, should not displace the balanced, reasoned analysis that is crucial to the development of recommendations within our Terms of Reference.

Posner and the OLRC attempt to give legitimacy to their respective arguments by claiming that their arguments each constitute an unemotional, objective assessment of the practice. But Posner and the OLRC appear unaware that their evaluations are themselves emotional and subjective. How else can one describe their proposed regimes which would permit a man to go beyond his agreement of marriage which is, after all, a promise of sexual fidelity and reproductive exclusivity, to enter into a reproductive agreement with another woman so that the man might, by these extraordinary means, obtain his genetically-related child? The regimes they propose make possible the realization of the emotional and arguably irrational desire of men to have children. Therefore, counter arguments that mothers and children ought not to be separated, cannot be dismissed by Posner's and the OLRC's solemn assertions that, whereas opponents of preconception arrangements are emotional, proponents are not. On this subject, concerned as it is with body and emotion, neither side has a monopoly on rationality.

By their focus on persons as rational selves and their choice to ignore, discount or discredit the bodily and emotional; the proponents variously make three errors: they curiously see the child's birth as principally caused by the expressed will of the commissioners rather than by the bodily efforts of the carrying woman; they inadequately

186 OLRC, supra, note 38 at 219.
demonstrate that reason can and ought to govern a woman's bodily and emotional reactions to pregnancy and childbirth; and they incorrectly hold that their evaluation is an expression of reason and is unemotional unlike those of their critics. For these reasons, their arguments are not persuasive.

3.3.4 Participants are Equal and Uncoerced

Just as liberals hold that persons are separate, self-interested and rational, so do they claim that people are inherently equal to one another. Liberals believe that in political and social life, persons should be equally free to vote and to seek positions of power and prestige. This assumption of individual equality is also that of the contract model of legal regulation. It is understood that persons may freely enter into contractual relations with others and that once so bound, they are equally bound. On this premise of the formal equality of persons, the ABA Proposal recommends that any person of full age be permitted to initiate a preconception arrangement and to consent to the exchange of cash. Provided that the parties are fully informed,187 they may enter the arrangement and will be held to its terms.188 Consent to be bound must, however, be voluntarily given. The contract model assumes that persons are not coerced into entering into their bargains. To prevent the possibility of coercion, contract law has created the legal concepts of duress and undue influence to vitiate a putative contract in which lack of voluntariness is demonstrated. To ensure that parties enter a preconception arrangement freely, the ABA Proposal would similarly require evidence that participation by the parties was voluntary and informed.189

The assumption that participants are fundamentally equal and uncoerced is shared in varying ways by the six proponents of preconception arrangements. Partly because of the power they attribute to rationality properly to guide action, they place little emphasis on the ways in which the parties are unequally situated. As a consequence, the proponents' arguments minimize the incidence of economic inequality and fail to address seriously the possibility that carrying women are unequal in other significant ways. Yet inequality in the context of a preconception arrangement is important because it can undermine the voluntariness of an agreement and cause it to be exploitative.

187 ABA Proposal, supra, note 28 s.3(f).
188 See, for example, ABA Proposal, supra, note 28 s.6(a).
189 Ibid. ss.3(f), 4 and 5.
Inequality is a necessary condition of exploitation. This is clear from the fact that unequal bargaining positions are assumed in definitions of "exploitation". Wertheimer, for example, claims that "A wrongfully exploits B when A takes unfair advantage of B" where "A benefits from the transaction in a manner which is unfair to B and B's choice is somehow compromised". 190 Likewise, Gibson defines "exploitation" as requiring inequality. She writes, "Exploiting other persons often involves turning to one's own advantage the situation of persons who are vulnerable in one or more respects". 191 People might, in her opinion, be vulnerable in various ways; they might be vulnerable economically, socially and/or psychologically. Arguably, therefore, if one party to an agreement is unequally situated with respect to the other because of economic, social and/or psychological vulnerability which compromises choice, the potential for exploitation arises.

Because inequality can thus lead to exploitation, it is important to consider whether carrying women are in a relevantly similar position to the commissioners, 192 and to challenge the general assumption of proponents that they are. It shall be argued that the parties to a preconception arrangement can be (and probably usually are) unequally situated economically, socially and psychologically. 193 Because of the carrying woman's greater

191 Gibson, supra, note 17 at 70.
192 and, in particular, to the commissioning man who is the other contracting party.
193 Most commentators assume that exploitation could arise only because of financial inequality and therefore suggest that carrying women not be offered money to participate or that they be offered only enough money to compensate them for their expenses; on the latter view, compensation does not induce the participation but merely makes possible an uncoerced act. (Trebilcock et. al., (1994) 32 Osgoode Hall Law Journal 613 at 666.) Yet both responses to economic exploitation (banning payment or permitting compensation only) ignore the fact that other forms of inequality can exist which can lead to exploitation viz.: social and psychological inequality. Therefore, the issue is not payment or compensation per se, but whether the parties are unequally situated such that the carrying woman is exploited. Moreover, even if carrying women were not exploited (financially, socially or psychologically), there are values other than equality which are not respected by a preconception arrangement (autonomy, maximization of welfare, minimization of suffering and responsible parenthood - all of which are discussed below in Chapter Five). Therefore the ethical acceptability of the practice is determined not by simply finding a resolution to the payment problem (the problem of whether to induce participation or merely enable it), but by evaluating the practice using the five values which should be respected. These values shall be described and the evaluation undertaken in Chapter Five.
vulnerability in these three ways and because of the nature of the transaction, she is likely to be exploited.194

3.3.4.1. Economic Inequality

The proponents believe that, in general, the agreements are not exploitative. Two proponents view them quite simply as fair bargains between relevantly equal parties.195 Four believe there might be cases in which the parties would be relevantly unequally situated, and therefore, constraints would be necessary to prevent poor women from being exploited.196 In the proponents' view, however, the cases of problematic inequality will be

194 I use the term, "exploited", in Wertheimer's sense viz.: a carrying woman is wrongfully exploited when the broker and/or the commissioners take unfair advantage of her in a manner by which they benefit, she is treated unfairly and her choice to enter the transaction is somehow compromised. Wertheimer, supra, note 190.

195 Robertson argues that though carrying women might need money more than the commissioners, the offer of money in exchange for her participation is not per se exploitative. (Robertson, "Burden of Proof", supra, note 33 at 22.) Likewise, Posner assumes that the parties are sufficiently equally situated that their bargain will be to each party's advantage; in his opinion, the arrangement enables both parties to act on their belief "that surrogacy would be mutually beneficial". (Posner, "Ethics and Economics", supra, note 36 at 22.) These arguments are, however, defeated by those of the remaining four proponents.

196 The four other proponents acknowledge it is possible for the parties to be so disparately situated financially, that the carrying woman might be exploited. Andrews states that the arrangements might exploit poor women and therefore she argues for regulation under which "a woman in desperate financial straits would not be allowed to be a surrogate". (Andrews, "Policy and Procreation", supra, note 65 at 16.) Trebilcock also recognizes that financial exploitation might occur. He writes,

To the extent that a birth mother faces both severely constrained alternative choices as to income generation and immediate, pressing subsistence, financial needs, there is a clear danger of the commissioning parents or their agent opportunistically exploiting these circumstances and, in effect, coercing the birth mother into entering an arrangement that in less constrained circumstances she would not have considered. Alternatively there is the possibility of their exacting unfair terms from her, especially with respect to the level of remuneration. (Trebilcock, Limits of Freedom of Contract, supra, note 37 at 52-53.)

Trebilcock regards these concerns as legitimate but claims, like Andrews, that the arrangements should not be banned but regulated to reduce the possibility of economic exploitation. (Ibid., at 53.) The OLRC similarly sees payment as potentially exploitative of poor women and recommends that "all payments relating to a surrogate motherhood agreement must receive the prior approval of the court." The OLRC
rare because they believe the extent of class difference is not great and there is always a certain amount of inequality between employer and employee which is not inherently exploitative. Proponents attempt to minimize the extent and significance of inequality by advancing an argument from lack of class difference and an argument from employment. But neither of these arguments is persuasive.

The first argument is that though poor women could be exploited, carrying women, in general, are not poor. This argument is advanced by Andrews. She asserts that the fact of differing income levels between the carrying woman and the commissioners is not as significant as critics suggest. First, she claims that carrying women have less money than commissioners simply because they are younger. Andrews implies that carrying women will have more money in their thirties by comparing their situation to hers: "I certainly make more money now in my late thirties than I did in my late twenties". What Andrews does not, however, take into account is the probability that the income levels of carrying women are not likely to rise significantly because (unlike Andrews) most do not have both an undergraduate and a law degree. The socioeconomic disparities between carrying women and commissioners cannot be dismissed by reference to their differing ages.

Andrews second claim is that the alleged class differences have been greatly exaggerated. As an example of this exaggeration, she uses the case of the parents of "Baby M" who were claimed by critics of the practice and the media to be from completely different classes. Andrews argues, on the contrary, that there was hardly any difference at all. She writes,

claims that "this prophylactic measure will reveal any financial exploitation of a surrogate mother. (OLRC, supra, note 38 at 255.) Some members of the AFS state that to pay a woman more than repayment of her expenses is to risk exploiting her. (AFS, supra, note 41 at 67S.)

197 "Policy and Procreation", supra, note 65 at 14.

198 For data on carrying woman’s educational attainment see Margit Eichler and Phebe Poole, The Incidence of Preconception Contracts for the Production of Children Among Canadians, A Report for the Law Reform Commission of Canada (Toronto: Ontario Institute for Studies in Education, 1988). See also, Nancy E. Reame and Philip J. Parker, "Surrogate pregnancy: Clinical features of forty-four cases" (1990) 162:5 American Journal of Obstetrics and Gynecology 1220 at 1222 where the authors write, "The most common annual income category reported by the subjects was ≤ $10,000 (46%) which is comparable to the national poverty level for a family of four...". 
Bill Stern, the biological father, was not from a privileged family, nor was surrogate Mary Beth Whitehead from a lower-class one. Mary Beth's father had a master's degree, and taught school. Bill's father worked as a short-order cook. Yet the Baby M case is generally described as a battle between the classes.199

Curiously, however, Andrews draws attention to the participants' parents rather than the participants themselves. If one looks at the relative education and income levels of the participants, the class difference is abundantly apparent. According to one commentator,

The Sterns [the commissioners] have a joint income of more than $90,000 a year. Mary Beth Whitehead [the carrying woman] is married to a sanitation worker with a salary of $28,000 a year. The Sterns are highly educated professionals. Mary Beth Whitehead, sixth of eight children of a schoolteacher and a beautician, left high school before graduation, married at age sixteen, and had two children before her nineteenth birthday.200

Although Andrews attempts in these two ways to minimize the class differences of the participants, the available statistical data,201 the anecdote she uses, and many others202 suggest that the practice tends to move children from the homes of the less advantaged to those of the more advantaged; economic hardship can, in fact, induce participation encouraging some mothers to provide for their children by trading another for cash.

201 As discussed in Chapter One, the only published comparative research revealed that, as a group, the carrying women had significantly lower levels of income and educational attainment than had the commissioners. Eichler and Poole, supra, note 198 at 236.
202 In the first case involving Canadian commissioners to attract media attention, the carrying woman was a 20-year-old from Florida. She and her husband had 17-month-old twins for whom they were finding it difficult to provide. According to the Toronto Star,

[she] was frank about why she offered herself as a $10,000 hired womb to a Scarborough couple desperate for a child: "We needed the money badly. My husband is a student and works two jobs nights and weekends to keep us going. I work on call as a cocktail waitress. We earn less than $10,000. And some days we only see each other for 20 minutes." Toronto Star (21 August 1982) A1.
The second argument of proponents to minimize the significance of economic inequality is the argument from employment, viz.: that the arrangement represents a job opportunity for a carrying woman. Although the employment relationship entails inequality between employer and employee this inequality does not, in the proponents’ opinion, necessarily engender exploitation. Robertson, for example, writes,

A choice about how to use one’s reproductive capacity is not coerced just because it is motivated in part by a desire for money. Also, it is unclear how surrogates are any more exploited than men and women who decide to join the military, be professional athletes, work in the petrochemical industry, or labour in the Texas sun - activities that impose risk and use the body in varying ways.203

Likewise, Posner claims, "The opportunity to hire a surrogate mother and the opportunity to be a surrogate mother are two unconventional opportunities now open to women.204

Similarly, in Australia, among the first women to apply to participate as a carrying woman was "a 23-year-old whose husband was terminally ill and who said that she urgently needed the $10,000 to provide some security for her child". Amy Zuckerman Overvold, Surrogate Parenting (New York: Pharos Books, 1988) at 121-122.

Some other women who appear motivated primarily by the money are single mothers. One woman in New England gave birth to her first child when she was 17. Because she could not provide a home for the baby, she put her in foster care and then entered into two preconception arrangements. She gave birth again at the ages of 19 and 21. With the fees earned by surrendering the second and third babies, she purchased a mobile home and brought her three-year-old daughter home. She said that she would enter yet another preconception arrangement if the money would help “bring consistency into my three-year-old’s life.” But because she found a steady job as a daycare worker, she said she would not do it a third time. (Overvold, supra, note at 121-122.)

A single mother in Staffordshire, England, also agreed to enter a preconception arrangement to provide for her child, a seven-year-old boy. According to Sir John Arnold, Mrs. P. initially entered into the arrangement because she was entirely dependent on social security; she was “impecunious and hard put to provide satisfactorily for [her son].” The commissioners in that case exhibited a "far larger degree of affluence than [could] be demonstrated by Mrs. P. ... [and] the intellectual quality of the environment of [the commissioners'] home [was] far greater than the corresponding features in the home of Mrs. P.” (Re P (Minors) (Wardship: Surrogacy), supra, note 57. Sir John Arnold gave judgement in her favour when she refused to relinquish the twins.)

203 Robertson, “Burden of Proof”, supra, note 33 at 22.
Similarly, the AFS views participation as a job which is socially beneficial. According to the AFS,

Those women who become surrogate mothers for a fee are benefited by having another income option. For example, some divorced women with young children have chosen to be surrogates in order to support their children and to remain at home to care for them.\footnote{205}

In essence, therefore, the argument is that the inequality of employee and employer is like that which obtains in other jobs. Because it, in general, raises no concern for exploitation in other situations, it ought not to raise such concerns here. Yet this argument from employment which attempts to minimize the significance of the participants' inequality, is not convincing.

If being a carrying woman were a job, what kind of a job would it be? According to many proponents, it is a form of wage or professional labour. As we have seen, Robertson likens it to the work of military personnel, professional athletes, petrochemical workers and agricultural labourers. Andrews compares the carrying woman’s efforts to those of an infertility practitioner,\footnote{206} implying that just as the physician works and receives payment so ought the woman’s work be considered worthy of payment. Posner explicitly equates the employment of a woman’s reproductive capacity with a marketable skill. He states, "Fertility is just another asset, like a professional degree or other job-market human capital."\footnote{207} Similarly, Trebilcock views the carrying woman’s activities as a form of professional or wage labour. He claims she provides,

a service involving considerable labour and time, a dramatic change of lifestyle, and additional responsibilities toward a potential human being. In any other context, the failure to remunerate would likely be considered unconscionable.\footnote{208}

For these proponents, therefore, being a carrying woman is a form of wage or professional labour.

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\begin{itemize}
\item\footnote{205}{AFS, supra, note 41 at 70S.}
\item\footnote{206}{Andrews, "Policy and Procreation", supra, note 65 at 3 and 22.}
\item\footnote{207}{Posner, "Sex and Reason", supra, note 100 at 425.}
\item\footnote{208}{Trebilcock, Limits of Freedom of Contract, supra, note 37 at 52.}
\end{itemize}
}
But being a carrying woman is not a "job" like any other. It cannot be compared to various forms of employment in which employees exert themselves in return for payment. The process of human conception, gestation and birth are distinguished from other kinds of productive work by the ways in which it involves both a woman's physical and psychological being and by the difference between the infant which results from the process and other kinds of "products." Unlike other forms of labour, carrying a child intrudes on every aspect of a woman's life in ways which increase as the pregnancy progresses. Activities not ordinarily considered "part of the job" alter as a consequence of pregnancy. These include breathing, eating, eliminating, engaging in sexual intercourse, sleeping, walking and taking other forms of exercise. During the course of the pregnancy, the carrying woman may not take a holiday from her labour nor may she "walk off the job" without undergoing a medical procedure - an abortion - which at least one proponent advocates should leave her open to civil suit. For twenty-four hours each day for approximately nine months, the carrying woman's whole person is involved in the "job". Not only is her physical freedom to leave the work, whether temporarily or permanently, significantly less than that of wage and professional labourers, she has much less control than most labourers over the result of her efforts. Apart from watching her diet, avoiding alcohol and drugs, and attending to the potentially harmful consequences of activities she might engage in (sky diving, for example), she can do little to determine the "quality" of the child which results from her labour. Moreover, the fact of being pregnant and giving birth will cause her body to change in ways that are permanent.

Thus, the labour in which the carrying woman engages intrudes increasingly on every aspect of her life, twenty-four hours each day without vacation, and the control she has over

209 Shanley, supra, note 95 at 626. Proponents also argue that the "product" - the child - is not sold. This argument shall be addressed below, Chapter Four, section 4.4.4.
211 Her lack of relief from the job and her relative inability to control its outcome distinguish her activity from that of assembly line workers and professional athletes contrary to the arguments of Debra Satz who claims that reproductive labour is a form of labour. "Markets in Women's Reproductive Labour" (1992) 21 Philosophy and Public Affairs 107.
212 Supra, text at note 182.
the outcome is very limited. It is, therefore, fair to say that if what a carrying woman does can be called "labour", it must be acknowledged that it is different from the labour of, for example, professional athletes, petrochemical workers and doctors. Unlike these people, a carrying woman cannot leave her work, even briefly, to return to it later, and she has no opportunity to deliberate about and to choose the means by which she performs the task of gestating the child. Her work, therefore, not just a job. Indeed, so different is a carrying woman's effort from that of employees, that it is more properly described as the use of a woman's body than the employment of her professional services.

This appears to be the view of the OLRC and the AFS.\textsuperscript{213} Indeed, the AFS actually claims that payment may be viewed not as a salary or a wage but as rent.\textsuperscript{214} It is the body of the woman not her unique abilities or talents which is being employed.\textsuperscript{215} As Kelly Oliver argues, a carrying woman's "body itself is seen as a machine which can be rented out". Unlike [assembly line] workers, she is not an appendage of a machine. She is the machine.\textsuperscript{216} A carrying woman is thus described as that which can be rented.

But it makes no sense to suggest that a woman can rent her body. To rent space or equipment requires vacant possession and a distinction between the owner and the rented object. Neither of these obtains in the case of a pregnancy. The woman cannot grant the commissioners vacant possession of her body as she would, for example, an apartment. Nor

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\textsuperscript{213} Because the OLRC and the AFS claim that the practice constitutes medical treatment, they view the activity of a carrying woman from a different perspective than the other proponents. As a "medical means" (OLRC, \textit{supra}, note 38 at 232.) to alleviate infertility and a "functional donation to foster a potential life", (AFS, \textit{supra}, note 41 65S.) a carrying woman's efforts are viewed by the OLRC and the AFS as like the administration of a drug, or the use of a dialysis machine; her activity is defined primarily in terms of the perceived medical need of the commissioners. Neither the OLRC nor the AFS explicitly endorse payment. The former would require court approval of any payment; (OLRC, \textit{supra}, note 38 at 254-5.) the latter deems it "preferable that surrogates not receive payment beyond compensation for expenses and inconvenience" but recognizes that "in some cases payment will be necessary for surrogacy to occur." (Ibid.) Such payment, in the AFS's opinion "may be viewed as rent."

\textsuperscript{214} AFS, \textit{supra}, note 41 at 67S.

\textsuperscript{215} Christine Overall, "Surrogate Motherhood", \textit{Ethics and Human Reproduction} (Boston: Unwin Hyman, 1987) at 126.

\textsuperscript{216} Kelly Oliver, "Marxism and Surrogacy" (1989) 4:3 \textit{Hypatia} 95 at 106.
is the "owner" of the rental property distinct from the property itself. She and her body are the same. Robertson suggests that it is only the uterus which is "rented". This is untrue. As Gibson argues, a woman is pregnant with her whole self: physical, mental, and emotional. Her entire body is involved: nausea, swollen ankles, aching back, and so on. A woman cannot rent her body because she is her body, and she does not "rent her womb" in pregnancy because the pregnancy takes place in her entire body.

Thus, the proponents' arguments that women's reproductive capacities may be sold as services or rented as space or equipment are not convincing for there is no distinction between the woman and the "services" she is said to sell, or the space or equipment she is said to rent. As Overall concludes, being a carrying woman "is no more a job than being occupied, for a fee, is a job".

Contrary, therefore, to the majority of proponents, the practice does not present a carrying woman with a job opportunity. This is evident also from the very arguments of proponents to restrict the practice. It will be recalled that Andrews, the OLRC and the AFS variously suggested constraints on both who may participate and how much they may receive, to prevent the exploitation of poor women. But if being a carrying woman were a job, why should we be concerned that poor women might be attracted to it and that they might be highly paid? Being a petrochemical worker, a professional athlete or a doctor does not generate similar concern. Indeed, if, as Robertson and Andrews argue, the practice is liberating for carrying women, why should this "liberty" be denied to poor women? If the "job opportunity" and the salary are to be restricted to exclude the participation of certain women, then there must be something about the practice which the majority of proponents recognize is unlike the jobs to which they claim the practice is analogous. The difference is, of course, obvious. Unlike professional athletes,
petrochemical workers and doctors, carrying women are not offered work to feed their families. They are offered money to relinquish a family member. The proposed restrictions on who may participate and the fee they may be offered is, therefore, an implicit recognition that being a carrying woman is not a job for it offers a woman money for her child, rather than employment.

Quite independent of the arguments from lack of class difference and from employment which attempt to minimize the inequality of participants, is the argument from the "double bind" which recognizes the women's financial inequality and justifies the practice (temporarily) on that very basis. Trebilcock\(^{224}\) cites Margaret Jane Radin\(^{225}\) who argues that to prevent women from entering into preconception arrangements might decrease rather than increase their welfare. She argues that a woman who commodifies her reproductive capacities or her baby, might find this preferable to her other choices in life.\(^{226}\) This creates, in Radin's opinion, the problem of the "double bind". If, on the one hand, we permit this commodification, we might exacerbate the oppression of women who supply the services or child. If, on the other hand, we disallow commodification without increasing women's welfare and opportunities and redistributing wealth and power, we force women to remain in circumstances which they believe are worse than being carrying women.

The problem of the double bind is, however, misconceived. It concerns the welfare of women, how such welfare is to be enhanced and who is to judge this question in a non-ideal world. The problem seems intractable when presented in a discussion of whether preconception arrangements are financially exploitative of carrying women. Yet it is important to recall that the welfare of women is not the only issue in preconception arrangements; of obvious concern also is the welfare of the commissioned child. The problem of the double bind is misconceived because it rests on the premise that there is nothing intrinsically wrong with selling or giving away one's children, or, if there is, the wrongness can be overlooked because of the advantages to be gained by the wrongful act.

\(^{224}\) Trebilcock, Limits of Freedom of Contract, supra, note 37 at 53.
\(^{225}\) Radin, "Market Inalienability" supra, note 5. Although Radin discusses the possibility of temporarily legalizing preconception arrangements, she concludes that only unpaid arrangements should be permissible. (Ibid. at 1932-33).
\(^{226}\) Ibid. at 1930.
But, of course, as has been argued, there is something intrinsically wrong with selling or giving away one's children. Parents who do so impermissibly fail to assume their parental responsibilities and impermissibly treat their children as commodities - as less than human. Can this wrongness be overlooked because of the advantages gained? The answer is no. Even if one were to concede (which this dissertation does not) that a carrying woman is better off once she has conceived and eventually relinquished a child for payment or otherwise, any increase in her welfare cannot justify the commodification of her child for the interests of the children trump those of adults. What about the hypothetical limit case where the welfare of the carrying woman's other children is sought to be advanced by the sale or exchange of a commissioned child? Where a single mother needs money to rear her other children who are starving, is it permissible for her to conceive a child to sell it? Again the answer is no. A woman cannot fulfil her parental duties to her children by selling their sibling. The obvious solution to the woman's need for financial resources is to require her children's father to fulfil his duties to his children and to enlist the aid of the state. Even the hypothetical limit case (which is bound to be rare even in a decreasingly generous welfare state) cannot justify the commodification of children. Since the underlying activity is wrong in ways damaging to children, it is otiose to discuss whether we ought to permit women to participate in a preconception arrangement because the women believe doing so will advance their welfare.

In summary, the practice of preconception arrangements has the potential to exploit women financially by offering them money in exchange for the use of their bodies and for their children. Two of the proponents do not regard the practice as exploitative; the remaining four claim it is not necessarily exploitative because participation and payment can be restricted to prevent poor women from being exploited. In effect, the majority's argument is that the practice generally is not exploitative because the participants' positions are relevantly similar; only in rare cases (in cases of poverty) is it financially exploitative. To buttress this argument, the proponents minimize the inequality of the parties. First, Andrews claims that the alleged class differences are not great even though the available evidence suggests the difference is significant. Second, they argue that the inequality, if any, is no different from that between employee and employer; but this argument also fails

227 Chapter 3.3.1.1.
because being a carrying woman is not a job and, therefore, the analogy with employment is inapposite. A different argument, the argument from "double bind" relies on the fact of the carrying woman’s financial inequality to suggest that though the practice might be exploitative, she might perceive her alternative to be worse. This argument is inadequate, too, because it is incorrectly premised on the false view that her activity in conceiving a child to sell or exchange is either not intrinsically wrong or its wrongness is justifiable given the advantages either to the carrying woman or her other children. Notwithstanding these flawed arguments which would minimize it or use it, the financial inequality of carrying women exists and creates the potential for their exploitation.

3.3.4.2. Social Inequality

Although the majority of proponents acknowledge that carrying women can be in an unequal financial position with respect to the commissioners, her inequality in other ways is overlooked. The fact is, however, that carrying women are socially and psychologically different from the men with whom they enter an agreement, and these differences are relevant to an analysis of whether the practice is exploitative.

The social inequality of carrying women has been indirectly addressed above. It is because the carrying women come from a lower socioeconomic class than the commissioners that they have less money and are therefore open to financial exploitation. In addition to being unequal to the commissioning men financially, carrying women qua women are subject to systemic discrimination; gender inequality is one form of social inequality which arguably permits the exploitation of carrying women. Workplace hierarchy also enables commissioners to take advantage of their employees by asking one of their employees to become a carrying woman. Racial inequality allows whites to profit from discrimination against people of other races. These three forms of social inequality are, of course,

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228 This is the principal reason that arguments denying the practice’s exploitation of women are unconvincing; they do not address the social and psychological inequalities which can be capitalized on. Such arguments are advanced by Arneson and Wertheimer. (Richard J. Arneson, "Commodification and Commercial Surrogacy" (1992) 21 Philosophy and Public Affairs 132; and Alan Wertheimer, "Two Questions About Surrogacy and Exploitation", supra, note 190.

229 Supra, section 3.3.4.1.
interconnected. A woman has less earning power because she is a woman which causes her to be placed low in the workplace hierarchy. If she is not caucasian, these inequalities are exacerbated. Sex, class and race are thus entwined in the way they function in preconception arrangements. For the purpose of discussing their effects, however, each will be discussed in turn.

As has been well demonstrated by Susan Sherwin, women as a group are subject to systematic oppression. Economically, they earn two-thirds of what men earn with access to fewer benefits and less job security than men. Women and children constitute the majority of the poor in the developed world. According to Seager and Olson,

In the USA, 78 per cent of all people living in poverty are women or children under 18 years old. Statistics from all over the world tell the same story; no matter how poverty is measured, the poor population is largely and increasingly comprised of women and their dependent children.

In addition to economic disadvantage, women are subject to injustice in their domestic situations. Even though most women work outside the home, they are still responsible for household management and child-rearing which create a double work day for the majority of women. Further, they are expected to tend to the emotional needs of colleagues and family members without payment because their emotional work is treated as natural to them and, therefore, not work. What is more, women are subject to a pervasive pattern of violence and sexual dominance and to rules governing their sexual and reproductive lives which are dictated by powerful men in the church, courts, medical societies and legislatures.

One effect of sexual inequality in the context of preconception arrangements is that a woman's interests are subordinated to a man's whose point of view is privileged. This privileging of the male point of view is obvious in the very description of the parties to a genetic-gestational arrangement. Whereas he is called the "father" or the "biological father",

230 Supra, note 1 at 13 et seq.
231 As quoted by Sherwin, Ibid. at 15.
232 Ibid.
she is called a "surrogate mother" as if when she is pregnant or giving birth, there were someone else more truly the mother than she. Second, the proponents' arguments regard it as acceptable and indeed laudable for a man to go to extraordinary lengths to further his genetic lineage, yet they view the desire of a woman to maintain her relationship with her child as an instance of harassment. Third, a false equation is made between the female and male "factors of reproduction". As we have seen, Robertson argues that there are three factors of reproduction: genetics, gestation and rearing. Procreative liberty in his opinion requires permitting, on the one hand, a gene contributor to gain satisfaction without assuming responsibility for the resulting child; and, on the other hand, enabling women to find "enormous satisfaction and significance in pregnancy and childbirth even if they never see or rear the child. Thus, being a sperm seller is equated with being pregnant and giving birth. According to Andrews, the difference is one of degree; she writes,

Like a sperm donor, the surrogate mother provides a biologic component that cannot be provided by one spouse in the couple. But she is unlike a sperm donor in the greater duration and intensity of her involvement in the creation of the child.

The difference, in Andrew's opinion, is one not of quality but of duration and intensity. The irony of this false equation of sperm provision and pregnancy and childbirth, is that (assuming these activities of men and women were equivalent) men's labour is much more highly rewarded than women's. Overall makes clear that men are paid unconscionably more than women. Sperm sellers generally "receive $50 for three to five minutes of presumably not unpleasant work" which amounts to the equivalent of $600 per hour. Carrying women, on the other hand, receive $10,000 for their twenty-four-hour-a-day "job" which is

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234 See, for example, Posner, Sex and Reason, supra, note 100 at 422; OLRC, supra, note 38 at 245.
235 See, for example, AFS, supra, note 41 at 72S.
236 See Chapter Two, section 2.2, above.
237 Robertson, "Procreative Liberty", supra, note 145 at 409. That proponents discount the significance of gestation shall be discussed more fully below in Chapter Four, section 4.2.
239 Overall, "The Case Against the Legalization of Contract Motherhood" Debating Canada's Future: Views from the Left, S. Rosenblum and P. Findlay, eds (Toronto: James Lorimer, 1991) [hereinafter "Case Against"].
$1.54 per hour. Even if carrying women received only one-half the wage of men (ie. $300 per hour), the fee paid them would be $1,944,000 which is almost 200 times what they currently receive. Thus, proponents argue that the activities of sperm sellers and carrying women are relevantly similar, but they do not advocate that the women be even remotely as well paid as the men. The point is not that if carrying women were paid at the same rate as sperm sellers the practice would be acceptable, but that the liberal feminist argument from formal equality is not consistently made. It is inconsistent to equate being pregnant and giving birth to ejaculation and then not to value them equally.240

Proponents nevertheless claim that to participate as carrying women is a method of being treated equally with men. Andrews claims that women must be permitted to participate as carrying women to demonstrate that, like men, "they are [capable] of making decisions".241 Trebilcock states that prohibiting women from participating risks "infantilizing women and reinforcing perverse gender stereotypes".242 Similarly, Posner argues that women should be given the freedom men have and that to deny them the right to be carrying women is patronizing; he writes,

Few would argue that a gigolo or a sperm donor or a man who marries for money or a male prostitute is "exploited". These men might not be admirable, but they are not victims. The idea that women are particularly prone to be exploited in the marketplace harkens back to the time (not so long ago) when married women were deemed legally incompetent to make enforceable contracts.243

Given, however, the nature of preconception arrangements (that they use women and women's bodies in a manner which can take advantage of poverty and reduced job opportunity for payment which is much less than the minimum wage), it is odd to suggest that participation will advance women's social position with respect to men. On the contrary, the practice does not prepare a carrying woman for enhanced job opportunities and it removes them from the job market during pregnancy thereby increasing their difficulty in

240 As shall be argued in Chapter Five, it does not matter how much a carrying woman is paid or whether she is paid at all, the practice should be discouraged because it violates five important values.
241 Andrews, "Challenge for Feminists", supra, note 114 at 75.
242 Trebilcock, Limits of Freedom of Contract, supra, note 37 at 53.
finding employment once the child is born.\textsuperscript{244}

Because of the disparity between the exploitative nature of a carrying woman's task and the rhetoric which suggests that it enhances women's equality, some critics question the sincerity of those who advance the argument. Andrea Dworkin, for example claims,

\begin{quote}
You never hear the freedom to choose to be a surgeon held forth with any conviction as a choice that women should have, a choice related to freedom [and autonomy]. Feminists make that argument and it is, in the common parlance, not a "sexy" argument. Nobody pays attention to it. And the only time you hear institutional people - people who represent and are part of the establishment - discuss women's equality or women's freedom [or women's autonomy] is in the context of equal rights to prostitution, equal rights to some sort of selling of the body, selling of the self, something which is unconscionable in any circumstance, something for which there usually is no analogy with men, but a specious analogy is being made.\textsuperscript{245}
\end{quote}

Independent of this criticism, the issue of whether it is patronizing to deny women the right to participate in commerce is irrelevant. For the question is not whether women are to be regarded, like men, as sufficiently mature to enter commercial contracts. The question is whether a preconception arrangement is an agreement which it is desirable for society to encourage, to consider a contract, and to permit to be commercial. If the answer to this question is no (which this dissertation argues it is), the commercial competence of prospective participants is entirely beside the point.

In summary, sexual inequality exists and is capitalized upon to subordinate the interest of the carrying woman to the commissioning man; to privilege his point of view; to suggest that sperm selling, on the one hand, and pregnancy and childbirth, on the other, are relevantly similar even though the latter is grossly underpaid in comparison; and even to argue that women ought to be free to participate in this exploitative practice.

\textsuperscript{244} Overall, "Case Against", supra, note 239 at 219.  
Workplace inequality (a difference of class) can create a second form of social inequality which engenders exploitation. On more than one occasion, women have been approached by their male employers to be carrying women. That a woman's inequality of power in this context can be taken advantage of is apparent and indeed was clear to the dissenting member of the OLRC. Allan Leal wrote, "Quite obviously, surrogate agreements have the potential for exploitation even in circumstances where direct payments are not being made." Ironically, Andrews counsels prospective commissioners to approach employees to be carrying women. She advises commissioners, "Perhaps there is even someone you know personally who would agree to be a surrogate for a fee. Jane and John asked John's secretary, Mary, if she would serve as a surrogate for them." Clearly this advice can exploit women who depend on their jobs for their livelihoods.

Apart from sexual and class exploitation, preconception arrangements can take advantage of racial discrimination. The advent of embryo transfer means women impregnated in this way make no genetic contribution to the child. The technique of embryo transfer substantially increases the range of potential carrying women for the largely white and more affluent commissioners to include non-white women as gestators. As one commentator writes, the new technology eliminates the need for "the barrier of racism that might have kept whites from using Black and Hispanic women as surrogates." Moreover, by permitting the "use" of minority women to gestate "white embryos", the technology widens the range of women whose economic circumstances make them vulnerable to

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246 For descriptions of these examples, see OLRC, supra, note 38 at 290; New Conceptions, supra, note 55 at 184; and "100 Questions to a Woman Who Rented Her Uterus" Emanuelle, translated by Rita Arditti and appearing in "Surrogacy in Argentina" (1990) 3 Issues in Reproductive and Genetic Engineering 35.
247 "Vice Chairman's Dissent", OLRC, supra, note 38 at 290.
248 New Conceptions, supra, note 55 at 184.
249 For further discussion of class exploitation, see section 3.3.4.1, above.
250 Leila McDowell-Head, "On Surrogate Motherhood", Essence, July 1987, 136. As the Anna J. v Marc C. case demonstrated, it is possible for a White/Filipino couple to hire a Black/Native American woman to give birth to a child genetically-related to the commissioners (19 Cal. Rptr. 494 (Cal. 1993)). See also Sunera Thobani, "More Than Sexist..." (1991) 12:1 Health Sharing 10.
Indeed, one broker, John Stehura, told Gena Corea that he was "bringing girls in from the Orient... From Korea, Thailand and Malaysia" and was planning not to remunerate the women for being pregnant and giving birth beyond paying for travel and living expenses. The women, according to Stehura, were vulnerable to accepting such an arrangement because "they're looking for a survival situation - something to do to pay for the rent and food" for, in their home countries, "food is a serious issue." That minority women, both in North America and abroad, are often poor and the new technology permits their "use" to gestate genetic material, create the potential of preconception arrangements to take advantage of racial discrimination. Not only can commissioners and brokers pay the minority women less because their "opportunity costs" are lower, the likelihood of the white commissioners winning a custody case is greater than in a genetic gestational arrangement with a white woman. The commissioners and their agents can tap into racist assumptions that it is not in the best interests of a white child to be reared in the home of a poor black woman. The unfairness of racism which limits the opportunities of minority women can thus be taken advantage of by white commissioners who can use minority women's unequal position to offer them money (and probably less money than to a white woman) for the child of their body and to gain custody of that child even when the woman wishes to rear it.

The social inequality of women is of at least three types: sex, class and race. These are entwined in the ways they function to promote preconception arrangements. Though ignored by the proponents or used to argue in favour of the practice, the existence of social inequality is an important reason that preconception arrangements can be exploitative.

251 According to Anita Allen, a 1989 study showed that 43.2% of all Black women under the age of eighteen in the United States lived below the poverty level. "The Black Surrogate Mother" (1991) 8 Harvard Blackletter Journal 17.
253 Ibid.
254 Allen, supra, note 251 at 31.
3.3.4.3 Psychological Inequality

In addition to economic and social inequality, psychological inequality can also be a difference between carrying women and commissioners which is exploited in particular by the agents of the commissioners. By "psychological inequality" is meant emotional vulnerability on the part of the carrying woman which can be taken advantage of in preconception arrangements. There are at least three forms of emotional vulnerability of carrying women viz.: a strong sense of inadequacy and desire to feel special; a conscious or unconscious wish to overcome an event or events in the women's reproductive or sexual past; and a desire to respond to suffering by giving "the gift of life".

The only study of the motivations of carrying women was conducted by Philip Parker, a psychiatrist who is in favour of preconception arrangements and is remunerated for his participation in the practice. He claims that personal and psychological factors might be significant in prompting carrying women's participation. On the basis of data obtained from the first 125 women he interviewed, Parker identified three such factors which operate in addition to the desire for money. These are (1) the perceived degree of enjoyment and desire to be pregnant; and the perceived notion that the advantage of participation outweigh the disadvantages. According to Parker, this includes both (2) the experience of "repeating a prior voluntary loss of a fetus by abortion or a baby by relinquishment" and (3) the experience of giving "the gift of a baby to an infertile couple".

According to Parker, most of the women studied enjoyed being pregnant and enjoyed the special attention they received by being pregnant. These women felt a strong sense of

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257 P.J. Parker, "Psychology of the Surrogate Mother", supra, note 91 at 6-7.
258 Ibid.
inadequacy and sought to be appreciated and admired. Because they lack the power to achieve some worthwhile status in their own right, they must, as Anderson argues, "subordinate themselves to others' definitions of their proper place (as baby factories) in order to get from them the appreciation they need to sustain a sense of self-worth". But the self-worth a woman can gain as a carrying woman is limited and unlikely to last. This is because the carrying woman and the commissioners and their agents have different understandings of the relationship created by the preconception arrangement; whereas the carrying woman might attempt to establish personal ties to sustain her emotionally, the commissioners view the relationship as an impersonal commercial one which will end in the severance of all ties once each side has performed. The commissioners generally do not

259 That brokers take advantage of this sense of inadequacy is argued also by Anderson. According to her, the broker, Noel Keane, was "remarkably open about reporting the desperate emotional insecurities which shape the lives of so many surrogate mothers, while displaying little sensitivity to the implications of his taking advantage of these motivations to make his business a financial success." Elizabeth Anderson, "Is Women's Labour a Commodity?", (1990) 19:1 Philosophy and Public Affairs 71 at 85 [hereinafter "Anderson (1990)"].

260 Ibid. at 85-86.

261 Consider, for example, the complaint of one carrying woman who was denied a warm relationship with the commissioners. According to Kirsty Stevens,

It was all very well for me to be detached from the baby, but I was fed up with Robert and Jan's detachment from me. In those early months, they hardly ever rang me up as they used to, and that really upset me...

I'm disappointed in this whole thing", I told him.

"Disappointed in what sense?" he asked. He sounded a little alarmed.

"Well, it's just not what I expected. I thought we were going to be good friends while this was happening, that we were going to share the pregnancy and everything else. And now I feel as if the relationship is growing colder instead of warmer. This isn't what I wanted, and it's worrying me." Robert didn't agree.

...After that, I decided not to press the issue... I think that this was when I realised I might not get what I had wanted from surrogate motherhood in the first place.

(K. Stevens with E. Dally, Surrogate Mother: One Woman's Story (London: Century, 1985) at 72.).

262 Anderson (1990) supra, note 259 at 86. See also Helena Ragoné, Surrogate Motherhood: Conception in the Heart (Boulder, Colorado: Westview Press, 1994) at 80-86.
seek a long-term relationship with the carrying woman because her presence is a threat to their unity as a couple and she is a rival for the affections of the commissioned child.\footnote{263}

There is anecdotal evidence confirming that carrying women have expressed a strong need for attention which if it is attended to by commissioners\footnote{264} and the broker\footnote{265} can encourage the woman to conceive and gestate. After the baby is transferred, however, the needs of the carrying woman are, in general, irrelevant to the commissioners\footnote{266} and the

\footnote{263} Ibid.

\footnote{264} If the need for attention is not met prior to conception, a carrying woman might decide to withdraw from participation. Noel Keane quotes a woman who, after miscarrying a fetus fathered by a commissioning man, ultimately decided to become pregnant by another commissioner because he and his partner exhibited more concern for her:

I was surprised at how powerful my feelings were. I mean, I had been saying to myself all along, "it's their baby. It's Judy's baby. I am only carrying it for them" But when I lost the baby, I was depressed for weeks. That was the beginning of the end for me and the dentist and his wife. I guess I expected them to send me a flower or a card or at least ask, "Donna, how are you?" But it was like they didn't give a damn. I tried twice again to get pregnant for them, but my heart wasn't in it. After the second time when the insemination didn't take, I told them, "I don't want to do this anymore"...I just walked away. "Then, through [Noel Keane] I met Thomas and Cindy Sue. They care about me, and it shows. I really want to give them a baby".


\footnote{265} At least one broker, Bill Handel, recognizes this need for attention and concern and its power to enhance or deny a particular carrying woman's participation. In compulsory group therapy sessions at his Centre for Surrogate Parenting, carrying women and prospective carrying women express their feelings, which the group leader (employed by the broker) can then act on. Consider, for example, the account of one pregnant woman who felt the commissioners were insufficiently attentive:

Kate, who [was] four months pregnant, had been feeling a bit neglected by her couple, but once Donna, the group leader, called and encouraged them, the husband and wife have become far more attentive. "A letter, two phone calls and a basket of fruit - all in one week", Kate [said]. "What more could you want?"


\footnote{266} One carrying woman, Nancy Barrass, claims that she was led to believe that her relationship with the commissioners would continue which was why she agreed to enter the arrangement, but the commissioners discarded her once they had custody of the baby. She said that she had a relationship with the commissioners for two years. Their parents, their relatives, their friends, their neighbours, their co-workers have all met me, all had me into their homes. I was in their life on a weekly
broker.\(^{267}\) That the carrying woman might be well treated when she is attempting to conceive or is pregnant, but not afterward, perhaps reflects the view of commissioners and brokers that the carrying woman is a producer of a desired child and useful only up to that point.\(^{268}\) If carrying women are peculiarly vulnerable to the need for attention and affection, they might also be peculiarly vulnerable to feeling hurt when the arrangement and thus the

**basis for two years until I gave birth...they did lead me to believe that we would continue our weekly relationship. Why did they see me on a weekly basis and then all of a sudden drop the relationship?**

(\textit{Donahue Transcript 03127 (1987)} at 2.)

\(^{267}\) Once carrying women have provided the "gestational services", they can find they are no longer deemed special. Two writers report that:

Some women donors mention as a benefit the attention they receive from prestigious people. They are courted and cared for - if only temporarily - by physicians and lawyers, and may even appear on television. This need for attention may ultimately backfire. [Broker’s] staff remark that some women return regularly for favours and advice, expecting to receive continued support. They do not always get what they are looking for and end up feeling angry and disappointed.

(\textit{J.N. Lasker and S. Borg, In Search of Parenthood: Coping with Infertility and High-Tech Conception} (Boston: Beacon Press, 1987) at 117.)

\(^{268}\) The mother of a carrying woman, who died because of complications of the commissioned pregnancy, claimed that neither the commissioners nor the broker retained any interest in her daughter once she was no longer of use to them because of her death. On television, the mother said:

Mrs. Mounce: - we never heard from the broker, the doctor, the - nobody the adopting couple, nobody. Nobody sent flowers, no cards, no phone calls, and nobody asked to have that baby to bury it. Grandma, who’s ignored, who’s neglected, who’s not... considered in a surrogacy parenthood program - the program shattered her, the doctor shattered her, the adopting couple shattered her, and Grandma was left to pick up the pieces, bring them home together and bury them together...

Dr. Betsy Aigen, Director, Surrogate Mother Program of New York: You know, in the surrogate program that I run, this would never have happened. Your daughter went to a very unreputable program.

Mrs. Mounce: I don’t believe that. I believe that it could happen to any baby broker, because they do it for the money.

attention and the relationship, cease.\textsuperscript{269}

Thus, the desire to receive special attention, which Parker claims is a motivation to enter a preconception arrangement, is a form of psychological inequality which can be exploited. If this desire is, in fact, to receive affection and recognition of one’s unique personhood, it is unlikely that a preconception arrangement will truly satisfy that desire. Such an arrangement contemplates the production of a child by a woman whose essential value to the commissioners and the brokers lies in her reproductive capacities. If she fails to exercise those capacities, she might be of no value. If she succeeds in becoming pregnant and surrenders the child, her value to them will likely diminish even though her need to feel valued will probably have increased.

A second form of psychological inequality arises through a carrying woman’s unresolved guilt and grief related to her reproductive and sexual past. According to Parker, carrying women can be motivated to participate in a preconception arrangement because (inter alia) of the perceived advantage of repeating a prior voluntary loss of a fetus by abortion or a baby by relinquishment.\textsuperscript{270}

In Parker’s sample of 30 women, 10 had voluntarily lost a fetus or a child either by abortion (7) or by relinquishing a child for adoption (3). Parker claims,

\begin{quote}
the experience of relinquishing the baby sometimes appeared to help the surrogate deal with prior unresolved voluntary loss of a fetus or child - either their own loss or that of a close family member (mother) with whom she identified.\textsuperscript{271}
\end{quote}

There is anecdotal support for Parker’s theory that a prior loss of a fetus\textsuperscript{272} or

\begin{quote}
It will be recalled that the Staffordshire single mother of a seven-year-old revealed this vulnerability in a letter written to the commissioner after the births: "What I ask you to remember, is that after all I have done for you I am still a loving, caring person who needs to be loved. I have so much love to give, but never get anything in return but hurt". (Re P (Minors) \textit{supra}, note 57 at 424).
\end{quote}

\begin{quote}
Parker, "Psychology of the Surrogate Mother", \textit{supra}, note 91 at 6-7.
\end{quote}

\begin{quote}
Ibid. at 7.
\end{quote}

\begin{quote}
In an article in Women’s Own, prospective commissioners described the motivations of a prospective carrying woman thus: "She explained that she’d had an abortion when she was much younger, and she wanted to repay it with another life." (Women’s Own (11 July 1987) at 1).
\end{quote}

Similarly, another woman said, "I had an abortion several years ago which still troubled me. It was traumatic and I couldn’t get it out of my mind. I had wanted
child is causally connected to some women's decision to enter a preconception arrangement. Yet Parker does not make clear how the repetition of the loss actually benefits a woman. If the first loss causes intense suffering, a second or subsequent loss will probably do so, too. Parker himself acknowledges that some carrying women after relinquishing the commissioned child, "consciously expressed a desire to have their own replacement child to help deal with the feelings of sadness and loss. If a carrying woman who surrenders the commissioned child benefits from a "replacement child", arguably what she needed to overcome the first loss was a child, not a second loss from which she would also need to recover. Despite Parker's implication that preconception arrangements are good for carrying women, they are obviously of questionable therapeutic benefit to women suffering from a previous abortion or relinquishment. On the contrary, the guilt and grief apparently suffered by these women may cause them to respond by wishing to have a(nother) child; this is an emotional vulnerability upon which it is possible for brokers and commissioners to capitalize.

In addition to being vulnerable because of her reproductive past, a carrying woman may be exploited because of her sexual past. Although there are not yet any social science studies to confirm it, carrying women who have suffered sexual abuse in the form of rape by their fathers or others are probably also vulnerable to wishing to participate in another child, but it was impossible for us economically to raise another one. I couldn't replace the aborted child, but I wanted to compensate for it in some way". ("A Surrogate's Story of Loving and Losing", U.S. News and World Report (6 June 1983) at 77.).

273 A woman surrendered four children pursuant to preconception arrangements after she had given up two children for adoption:

When I was sixteen, I'd become pregnant and had married my high school sweetheart. Four years later, my marriage was over and I was alone with a three-year-old and a one-year-old, and no way to support them. I had no skills; I'd never held a job. My ex-husband had joined a motorcycle gang, and I couldn't count on him for any kind of financial support, nor could my parents afford to help - I would give my children up for adoption.

Eight years later she met her second husband with whom she immediately had a child. She wanted to have another child but "we couldn't support a bigger family on his income as a construction worker, and I was determined to stay at home full time with my son." She claims to have fulfilled "that yearning" to be pregnant by carrying and surrendering four more children. ("A Woman Today: Giving the Gift of Life", Ladies Home Journal (February 1989) 22 and 28).

274 Parker, "Psychology of the Surrogate Mother", supra, note 91 at 12.
preconception arrangement. At present, there is anecdotal information that suggests the guilt engendered by having been sexually abused and the desire to overcome it prompt participation.\(^{275}\) It is possible also that the skill which abuse survivors develop to separate their bodies from their mind and emotions during the abuse, is employed again by them in carrying and then relinquishing children.\(^{276}\)

It appears likely, therefore, that women who believe that carrying a child and giving up that child is an effective way to overcome or to punish themselves for having had an abortion, relinquished a child for adoption or survived sexual abuse, are not likely to be sufficiently strong to resist manipulation by baby brokers and are, as a result, open to exploitation.\(^{277}\)

A third way in which carrying women are psychologically unequal to the commissioners and the brokers is that they can be motivated by compassion to give the "gift of life". As we have seen, Gilligan has demonstrated that the moral voice of women asks

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275 Phyllis Chesler argues that sexual abuse might make a woman vulnerable to a wish to participate in a preconception arrangement:

Phyllis: What happened once it was clear the Frank and Dawn weren't going to let you have a relationship with them or with Jason?
Sally: I got very blue. I started seeing a psychiatrist. She got me to thinking about how my body had been used by men over many years, and I never had anything to say about it. Because I was a victim of incest. My father had incest with me for six years, since I was eight years old.
Phyllis: Would you say that deciding to be a "surrogate" is related to being an incest victim?
Sally: Definitely, I hadn't reckoned how to cleanse my soul. How do I get my father's semen out of my body? I could accomplish this in the surrogate process. I could offer my body. This time, I was the one offering. Freely. This would somehow cleanse my soul.

It is not known how many women who have acted as carrying mothers are, in fact, victims of incest. (P. Chesler, Sacred Bond: The Legacy of Baby M (New York: Times Books, 1988) at 66.)

276 Recall the case of Diane Downs who was a carrying woman for Richard Levin's brokerage house, and a victim of repeated rape by her father. When she gave birth to a commissioned child, she "seemed to have no trace of postpartum depression, no grief over giving up her child". Yet almost exactly one year after she relinquished the child, she killed and attempted to kill her other children. A Rule, Small Sacrifices (New York: Signet, 1988), 21-30, 121, 126, 128-129, 132, 140. See also, supra, Chapter One, section 1.6.2.3, note 179.

277 Anderson (1990) supra, note 259 at 85.
"How ought I to respond?" and "How best can I care for another?" As we have seen, the desire of carrying women to respond to suffering and to care are apparently well understood by brokers and used as important strategic devices to entice women to enter preconception arrangements and to ensure that they comply with their promise to relinquish the baby. To generate a supply of women who will sign an agreement to relinquish their children at birth, brokers make appeals through the media for compassionate women. They want someone who will put another's needs before her own; hence, they recruit in publications such as *Nurses Week*, appealing to

> a population [that the Center for Surrogate Parenting] encourages as prime candidates for the most delicate of jobs... [Nurses are ideal because they are] compassionate, empathetic women who are responsible and have the desire to make a difference in someone's life.

Yet the compassion and empathy of certain women, can, however, be manipulated by brokers who seek to profit from the practice. A number of cases are recorded in which brokers have withheld significant information in order not to decrease the role that compassion and empathy play in the negotiations with a potential carrying woman. In other words, brokers have allegedly lied to the carrying woman or failed to tell the whole truth about the commissioners so that the commissioners would appear worthy of compassion - the necessary condition for the carrying woman's participation.

If caring can cause women to agree to enter a preconception arrangement, the desire for and significance of their relationship with the commissioners can encourage them to relinquish the baby. For example, at least one broker, Bill Handel, encourages carrying women and commissioners to develop a relationship during the pregnancy. As staff member

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278 See text, *supra*, at note 13.
279 See *supra*, Chapter One, section 1.6.2.1 at note 158 et seq. This character trait, to be compassionate, is a virtue of which advantage can be taken. The suffering of the commissioners elicits a compassionate response in the carrying woman. This response (surrendering her child) causes the carrying woman to suffer. But her suffering elicits no similar compassionate response in the commissioners.
281 For instances where brokers withheld relevant information see, *supra*, Chapter One, section 1.6.2.1 at notes 166-168.
Hilary Hanafin said, "It works for us because [the carrying woman] cannot imagine hurting this couple whom she knows and likes so much. When the child is born, however, a carrying woman can become torn between competing relationships and competing inclinations to care. To prevent carrying women from choosing the child over the commissioners, one broker allegedly uses a tactic which capitalizes upon a woman's sensitivity to relationship. According to Andrews, Bill Handel requires carrying women to sign a statement confirming that the baby is the commissioners' child, and that she and her husband understand that if she tries to keep the child, they will have intentionally inflicted emotional distress on the commissioners.284

By capitalizing upon and manipulating the carrying woman's desire to respond to the suffering of people whom she assumes to be infertile and childless, the practice takes advantage of carrying women. As Anderson makes clear, this exploitation lies in one party being orientated toward the exchange of gift values while the other party proceeds in accordance with the norms of the market exchange of commodities.285 Gift values include love, gratitude and concern and respect for others which cannot be purchased or obtained by calculating one's own advantage. Their exchange requires a repudiation of a self-interested attitude, a willingness to give to others without demanding something in return in exchange

282 Quoted in Lasker and Borg, supra, note 267 at 79.
283 Consider what carrying woman, Mary Beth Whitehead said about the commissioners, the Sterns:
   I felt a really big obligation to them, not because of the contract but because of them... I really started out wanting to do this. It hurt me to know I was going to hurt the Sterns not to give them the baby. But the obligation I felt to my child was stronger.
284 Andrews, Between Strangers, supra, note 79 at 87. What is more, Handel allegedly threatens to disrupt the emotional well-being of the carrying women's children by creating and destroying their relationship with a pet. According to one carrying woman quoted by Andrews, "If I changed my mind, Bill said...he would buy me a dog and let my kids fall in love with the dog and then he would kill the dog." (Ibid. at 86).
285 Anderson (1990), supra, note 259 at 84-85. The norms of the market and whether they ought to govern the practice of preconception arrangements are discussed at length below in Chapter Four, section 4.4.
for the gift. The brokers and many commissioners operate according to market norms by attempting to obtain the best deal for their clients and themselves. The empathetic and caring women brokers seek must also be submissive and will be criticized if they wish also to operate according to market norms. The implication of the brokers’ criticism is that if the carrying woman were really caring and generous, she would not be so interested in pressing her personal advantage.

This system by which carrying women are expected to operate according to one set of norms, and the brokers and the commissioners according to another, means that the carrying woman cannot win. If her motives are purely altruistic, she is entitled to expect the commissioners to respond in kind by maintaining their relationship with her and enabling her to maintain her relationship with the commissioned child. Yet, because the commissioners operate according to market norms, they are entitled thereby to terminate the relationship. If, on the other hand, the carrying woman’s motives are (like theirs) to gain the best deal possible, then she is entitled to ask considerably more for her effort. But such an argument is not permitted to be advanced by a woman who is expected to be altruistic, self-effacing and caring. Consider, for example, how Mary Beth Whitehead was required by the trial judge to operate exclusively according to the norms of gift giving and altruism even when faced with the court’s view that the agreement was "a valid and enforceable contract pursuant to the laws of New Jersey". The counter argument advanced on her behalf was that the agreement could not be a contract because the fee paid was so low as to be unconscionable. To this Sorkow J. replied,

286 Ibid.
287 Some commissioners do, however, create a family-like relationship with the carrying woman who is often invited into their home. Overvold, supra, note at 131. But it is not clear how long the carrying woman's welcome endures after relinquishment.
289 Ibid., Ince, at 108-109.
290 In the Matter of Baby "M", a pseudonym for an actual person, 525 A. 2d 1128 (N.J. Super. Ch. 1987) at 1166 [hereinafter "Baby M"].
...not all services can be compensated by money. Millions of men and women work for each other in their marital relationship. There may even be mutual inequality in the value of the work performed but the benefits obtained from the relationship serve to reject the concept of equating societal acts to a monetary balancing. Perhaps the risk was great [compared to the amount] to be paid but the risk was what Mrs. Whitehead chose to assume and at the agreed fee. And it is assumed she received other intangible benefits and satisfaction... Her original application set forth her highly altruistic purpose. Notwithstanding amicus' position, all in this world cannot be equated to money.\(^291\)

Thus, whereas Mary Beth Whitehead's maternal rights and duties were severed because of an alleged contract, she was precluded by her required altruism from arguing that the contract was unconscionable and therefore void. Whereas she was held to the self-giving standards of a marriage, the Sterns were held to the self-seeking standards of a commercial arrangement.

This inequality in treatment is apparent also in the argument of the OLRC. As will be recalled, the OLRC recommends the adoption of a regulatory scheme under which all who participate in an unauthorized preconception arrangement would be penalized. According to the OLRC, "liability for violation of [the requirement to abide by the regulatory scheme] should be visited on all persons involved in the impugned arrangement".\(^292\) Curiously, however, the OLRC contradicts itself and its premise of the equality of participants by recommending that even though the carrying woman might be sentenced to jail,

it would be inappropriate to provide for incarceration of prospective parents who seek to avoid the proposed regulatory scheme. Such persons may be considered misdirected in their efforts, but not so inherently vicious as to warrant imprisonment.\(^293\)

Whereas the self-giving actions of the carrying woman are conceptualized as the free choices of an autonomous agent and therefore punishable when illegally made, the self-seeking and potentially exploitative actions of the commissioners are judged by a lower standard and found to be the "misdirected" and "not inherently vicious" manifestation of an assumed

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\(^{291}\) Baby M., supra, note 290 at 1160.

\(^{292}\) OLRC, supra, note 38 at 268. The OLRC contemplates that violators would be liable to penalties such as those imposed by the Child Welfare Act, viz.: a fine of not more than $2,000 or imprisonment of not more than two years. (Ibid. at 270).

\(^{293}\) Ibid.
understandable desire for genetic continuity and biological fulfilment. Whereas the carrying woman would be liable to incarceration for her efforts on their behalf, the commissioners would be subject only to a financial penalty for pursuing their self-interest illegally.

Clearly, carrying women are open to having their altruism and desire to care exploited. Their concern for suffering and wish to help can be used to entice them into the arrangement. Those same motives in combination with intimidation can cause them to relinquish the child. Whereas the carrying woman is thus motivated by, and required to operate according to the norms of gift giving, the deal is framed as a contract governed by market norms. The competing sets of norms operate to grant the carrying woman the worst of each, and the commissioners the best. The carrying woman has the obligations of altruism (to care, create and preserve relationships, and give of herself for the benefit of the commissioners) and the entitlements of the market (to receive only money payment). The commissioners, on the other hand, have the entitlements of altruism (to receive care and the gift of a relationship with the carrying woman and the baby) and the obligations of the market (to pay and dismiss her).294 Whereas the carrying woman must be endlessly self-sacrificing, other-directed and self-effacing; the commissioners have the contractual right to be self-interested, self-seeking and unconcerned for her long-term welfare.

This section has demonstrated that in addition to being unequal financially and socially, a carrying woman can be unequal psychologically. She may be vulnerable to a sense of inadequacy and have an unusually strong desire to feel appreciated; to guilt and grief concerning her reproductive and sexual past; and to a desire to respond to perceived suffering by giving "the gift of life". These vulnerabilities are not protected but capitalized upon by brokers and commissioners in a preconception arrangement. When the arrangement ends and she relinquishes the child, she is likely to be discarded by the other parties and therefore no longer appreciated; to have her guilt and grief increased; and to be trapped by the most restrictive aspects of the norms of gift giving, on the one hand, and the market, on the other. In these ways, a preconception arrangement exploits a carrying woman's

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294 When commissioners, Bill and Betsy Stern first took "Baby M" from Mary Beth Whitehead, Bill Stern said, according to Whitehead, "I always knew the day would come when you would be left with nothing." Mary Beth Whitehead and Loretta Schwartz-Nobel, A Mother's Story (New York: St. Martin's Press, 1989) at 24.
psychological inequality.

In demonstrating that carrying women may be exploited because of three forms of inequality (economic, social and psychological), this section makes it possible clearly to see that exploitation does not arise solely in the context of a paid arrangement with strangers. Social and psychological inequality may be capitalized upon even when no money is exchanged and the parties are in a familiar of personal relationship with each other.

For example, where a woman enters a preconception arrangement with her sister and her sister's husband, her compassion for her sister and her desire to continue to care for her might to lead to exploitation. As Janice Raymond argues,

The potential for women's exploitation is not necessarily less because no money is involved and reproductive arrangements may take place within a family setting. The family has not always been a safe place for women. And there are unique effective "inducements" in familial contexts that do not exist elsewhere. Although there is no "coercion of contract" or "inducement" of money, there could be the coercion of family ties in which having a baby for a sister or another family member may be rationalized as the "greatest gift" one woman can give to another.295

Moreover, within family situations, it may also be considered selfish, uncaring, and even dishonourable for a woman to deprive a relative of her gestating abilities.296 For these reasons, the possibility of the exploitation of women's social and psychological inequality may occur also in family contexts and when no money is offered or exchanged.

In summary, the contract model, the ABA Proposal and the proponents' arguments wrongly assume that the parties are relevantly equal in their bargaining power. A majority of proponents concede the possibility that the parties might be financially unequal and suggest regulation to prevent impecunious women from being coerced into the arrangement. Yet this argument is not compelling. The other forms of inequality which exist are not addressed by proponents. These are social and psychological differences between carrying women and the other parties and their agents which create vulnerabilities upon which preconception

arrangements capitalize - irrespective of whether money is offered in exchange for the baby.

3.4 Conclusion

This chapter has demonstrated that the contract model, the ABA Proposal and the proponents' arguments each assume the liberal understanding of persons. This understanding is that persons are separate, self-interested, purely rational, and equal and uncoerced. The liberal conception of persons is, however, inadequate. Theorists have challenged its presuppositions arguing that persons are connected, caring, embodied and emotional, and unequal and subject to domination. This alternative view exposes the proponents' arguments as seriously flawed. Reliance on persons as separate causes them: (1) to fail to challenge the normative assumption that parenthood should be determined by intention and reproductive obligations limited by consent; (2) to attach too much importance to negative liberty whilst according none to the value of being free to maintain relationships; and (3) to focus almost exclusively on the parties to the agreement and, therefore, to miss or to underestimate the harm to persons caused by participation in a preconception arrangement. The understanding of persons as self-interested, rather than caring, leads the proponents incorrectly: (1) to view reproduction as a means of gratifying self-interest and to ignore or discount that it invites a response to care; (2) to frame the issues of both abortion and preconception arrangements as concerned with the right to bodily integrity without considering that they might more helpfully be addressed as concerned with how best to care; and (3) inconsistently to recognize the desire to care in justifying the practice but to deny or forget it exists in justifying specific performance. The privileging of the purely rational over the embodied and emotional causes proponents wrongly: (1) to view the intentions of the commissioners, rather than the bodily efforts of the carrying woman, as the principal cause of the commissioned child's birth; (2) to assume that rational deliberation can make risks knowable and emotions manageable in the context of pregnancy and childbirth; and (3) to assert that whereas their (emotive) evaluation is rational, the response of opponents of the practice of preconception arrangements is emotional and therefore less worthy. Finally, the proponents' premise that persons are equal and uncoerced leads them incorrectly to argue either that women are not exploited financially or that the practice can be regulated to prevent exploitation which they imagine to be merely financial and not also social and psychological. All these claims of proponents were demonstrated to be false which seriously undermines the cogency of their
As we saw in Chapter Two, the proponents rely on a contract model of regulation to advance their argument for the legal recognition and enforcement of preconception arrangements. This chapter has demonstrated that the contract model and its instantiation, the ABA Proposal, are based on the liberal understanding of persons which inadequately describes human personhood. Because the contract model’s presuppositions have been shown to be incomplete, the proponents fail to make a case for its employment in the context of preconception arrangements.
CHAPTER FOUR

CRITIQUE OF THE CONTRACT MODEL:
IDEOLOGICAL ASSUMPTIONS IN PRECONCEPTION ARRANGEMENTS

4.1 Introduction

In addition to sharing an incomplete and misleading understanding of human personhood, the proponents of the practice of preconception arrangements whose work we have considered share certain ideologies. These are the ideologies of patriarchy, technology and the market. Within these overlapping contexts, proponents seek to use the contract model. Their ideologies are, however, open to criticism and lead to flaws in their descriptive and normative analysis of the practice of preconception arrangements.

4.2 Inadequacies of Patriarchal Assumptions

"Patriarchy" has a variety of meanings. Literally, it means "rule of the fathers".\footnote{Sheila Ruth, "The Dynamics of Patriarchy" in Sheila Ruth, ed., Issues in Feminism (Mountainview, California: Mayfield, 1990) at 45.} It also connotes institutionalized male supremacy\footnote{Marilyn French, The War Against Women (London: Penguin Press, 1992) at 9.} and a society in which formal power over public decision and policy making is held by adult men and exercised from the male point of view.\footnote{Ruth, supra, note 1.} In patriarchy, kinship is determined by reference to men and, more specifically, by reference to the transmission of genetic inheritance.\footnote{Barbara Katz Rothman, Recreating Motherhood: Ideology and Technology in a Patriarchal Society (New York: Norton, 1989) at 29 [hereinafter "Recreating Motherhood"].}

Patriarchal ideology arguably arises in reaction to the nature of human reproduction.\footnote{Mary O’Brien, The Politics of Reproduction (London: Routledge, 1981) at 8 [hereinafter "Politics of Reproduction"].} Male reproduction is fundamentally different from female reproduction in that men are separated from their seed to engender a conception, whereas women embody the conception which grows as part of them and women labour to bring the child to birth. Even after birth, the child is periodically attached to the woman’s body for continued nourishment by lactation. The reproductive process is, therefore, primarily a female process from which
men, by their separation from their seed, are at once included and excluded.\(^6\)

Among the many consequences\(^7\) of a man's lack of continuous bodily participation in human reproduction is that whereas a woman always knows when she has become a mother, a man does not always know that he has become a father.\(^8\) Moreover, a man might believe a particular child was fathered by him when in fact the genetic father is someone else. In short, man's separation from his seed in reproduction results in paternal uncertainty.

Arguably there are two important consequences of paternal uncertainty. The first is that men respond by creating social and legal practices to reduce uncertainty by, for example, limiting women's freedom and mobility.\(^9\) The second consequence of paternal uncertainty is a strong focus on a man's genetic participation in conception as evidence of parenthood. Whereas women's participation in conception is obvious in the undeniable fact of pregnancy itself, men's participation is apparent only in the physical resemblance of the child to the putative father and (recently and because of technological developments) by the use of blood and deoxyribonucleic acid (DNA) tests. Men focus on seeds as carriers of their genetic heritage and, therefore, as the means of their procreation.

This preoccupation with genetics has been studied by Barbara Katz Rothman. She distinguishes between two types of patriarchy: that in which it is assumed only men contribute seeds in procreation (what we shall call "primitive patriarchy"), and that in which it is understood women also contribute genetically ("modified patriarchy").

Primitive patriarchy, Rothman argues, discounts gestation and determines kinship exclusively on the basis of the genetic contribution of the male. According to Rothman,
The essential concept here is the "seed", the part of men that grows into the children of their likeness within the bodies of women ... In a patriarchy, because what is valued is a man’s relationship to his sons, women are a vulnerability that men have: to beget sons, men must pass their seeds through the bodies of women.10

In such a system, a person is what grows out of men’s seed. The essence of the person is in the seed when it is planted in the mother.11 By contrast, a matriarchal system holds that a person is what a mother grows, and that people are made of the care and nurturance which gives them life and transforms a baby into a member of society.12 Thus in primitive patriarchy, kinship and personhood are determined by genetic contribution which is assumed to be exclusively male; in matriarchy, kinship and personhood are determined by the physical and social relationships of pregnancy and the web of relationships in which the mother is situated and into which she introduces her child.

Whereas primitive patriarchy holds that only males contribute seeds, modified patriarchy acknowledges the fact of female genetic contribution. According to Rothman, this discovery did not fundamentally alter patriarchy in causing it to value the physical and social relationships created by pregnancy and within which pregnancy develops. On the contrary, the discovery was incorporated into patriarchal ideology by extending the concept of the seed to women. Thus, Rothman argues,

when the significance of women’s seed is acknowledged in her relationship with her children, women, too, have paternity rights in their children... they can be seen to own them, just like men do.13

Rather than valuing more highly the unique and substantial contribution of women to their children,14 modified patriarchy reduces it to the less substantial contribution of men. In modified patriarchy, children become "half his and half hers - and might as well have grown

10 Rothman, supra, note 4 at 30.
11 Ibid. at 35.
12 Ibid.
13 Rothman, supra, note 4.
14 What Rothman describes as the unique nurturance, the long months of pregnancy, the intimate connections with the baby as it grows and moves inside her body, passes through her genitals, and sucks at her breasts.

Ibid.
in the back yard". By this reckoning, women are related to their children in the same way as men are related: genetically. In modified patriarchy, therefore, "women do not gain their rights to their children as mothers but as father equivalents, as equivalent sources of seed".

Thus, the separation of the male seed from men and its result, paternal uncertainty, have two important consequences in patriarchy: the creation of structures to reduce paternal uncertainty and the focus on genetics as the criterion of parenthood. Each of these patriarchal responses is evident in the proponents' arguments and leads to four flaws in analysis. First, the arguments portray the practice as enhancing reproductive freedom when, in fact, it increases control over women to reduce paternal uncertainty. Second, the arguments discount the significance of gestation in human reproduction. Third, they rely on the view that genetics are centrally important to claim that genes alone establish significant relationships. Fourth, the arguments suggest that true maternity is the paternity equivalent.

That the proponents believe preconception arrangements enhance carrying women's freedom has been demonstrated above. According to the proponents, the practice permits women freely to enter enforceable agreements concerning private matters. As we have seen, however, the liberty which the practice promotes is merely the negative liberty to be left alone by the state when making private agreements. When the substance of the agreement is analyzed, it is apparent that the agreement is one of control: control of the carrying women's sexual relations and reproductive behaviour in order to ensure that the commissioning man ultimately receives a child of his genes.

Given man's separation from reproduction, for him to obtain a child of his sperm, three aspects of female reproduction must be controlled: "input", "process" and "output". The sperm must be his, the woman must be prevented from aborting the fetus or otherwise harming it during gestation, and she must be forced to relinquish it if she refuses to do so willingly. Although the proponents do not each discuss in detail the input and process aspects of the arrangement, they each assume that the practice, in Posner's words, enables

15 Ibid.
16 Ibid. at 36-7.
17 Supra, Chapter Three, section 3.2.2.
18 This crude nomenclature reflects the segmentation and objectification of procreation presupposed by the practice.
"the man to satisfy his desire to replicate his genes". For this reason, the proponents either imply or explicitly state that a commissioning man need not accept a child which is genetically unrelated to him. With regard to the process of gestation, Andrews and Trebilcock claim not to countenance the denial of a woman’s right to abortion; Posner and the AFS do not consider the matter and the OLRC does so inconclusively. Robertson, 


20 Robertson implies this by phrases such as "surrogate contracts meet the desire of a husband and wife to rear a healthy child, and more particularly, a child with one partner’s genes .... [This] intense desire [has] deep-seated psychosocial and biological roots". "Surrogate Mothers: Not So Novel After All", Hastings Center Report, October 1983 28 at 29 [hereinafter "Not So Novel"]. Andrews, Trebilcock and Posner also imply that commissioners need not accept children unrelated to the commissioning man by their focus on preconception arrangements as a means by which commissioning men can conceive and rear their children. Supra, note 19. OLRC and the AFS explicitly state that commissioners have no duty to accept unrelated children when they advocate that blood tests be taken at birth to be sure that the commissioners do not receive what the AFS describes as "the wrong child". OLRC, supra, note 19 at 245 and AFS, supra, note 19 at 66S and 72S.

21 Andrews, "Adoption Model", supra, note 19 at 18; Trebilcock, "Limits of Freedom of Contract", supra, note 19 at 61; Posner does not address this point in his article, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood" (1989) 5:21 J. of Contemp. Health Law and Policy 21 [hereinafter "Ethics and Economics"] or in "Sex and Reason"; the OLRC refused to make a recommendation concerning whether women might be restricted from having abortions, supra, note 19 at 257-8; the AFS does not discuss the issue except to suggest that becoming a carrying woman may help a woman psychologically in overcoming, inter alia, a past abortion. In this
however, would permit an exclusively gestational woman to be sued if she has an abortion.\textsuperscript{22}

With respect to output, all the proponents except Trebilcock contemplate that the carrying woman be forced to relinquish the child if she refuses voluntarily to do so.\textsuperscript{23}

In making their claim that the practice promotes liberty, the proponents do not consider in depth the practicalities of controlling "input", "process" and "output" so that a man will obtain his child by a woman who is usually a stranger to him. For that goal to be achieved, aspects of the woman's life which are personal and intimate must be regulated by the agreement. It is in these details that it can best be seen whether, in fact, the practice enhances the freedom of the parties.

The practicalities of the arrangement have been documented in detail by the ABA Proposal and by the brokers who currently engage in preconception arrangements. Both the ABA Proposal and the brokers pay particular attention to input, process and output and seek to control carrying women to reduce paternal uncertainty and ensure that the commissioning man receives his child.

With respect to input, the ABA Proposal and the agreement drafted by broker Noel Keane\textsuperscript{24} require that the commissioned child be conceived by the sperm of the commissioning man.\textsuperscript{25} As we have seen, under the ABA Proposal, if the child is conceived by sperm from other than the commissioner,\textsuperscript{26} then the commissioners need not accept the claim, the AFS rely on the research of a proponent of and participant in the practice, Philip Parker. AFS, \textit{supra}, note 19 at 65-66S.

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\textsuperscript{22} Robertson, "UK Colloquium", \textit{supra}, note 19 at 17-18. \\
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\textsuperscript{24} Keane, "Surrogate Parenting Agreement" available upon request to 930 Mason, Dearborn, Michigan 48124 [hereinafter "Keane Agreement"].
\textsuperscript{25} Keane Agreement, \textit{supra}, note 24, paragraphs 1 and 11; and American Bar Association, Section of Family Law, "Draft ABA Model Surrogacy Act" (1988) Family Law Quarterly 123 s.6(a) [hereinafter "ABA Proposal"].
\textsuperscript{26} and this is not the result of laboratory or physician's error.
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child and they may sue the carrying woman for breach of contract. To attempt to ensure that the carrying woman conceives by the commissioning man, the brokerage firms seek to restrict women’s liberty to engage in sexual relations. One proponent, the OLRC, addresses this practicality by suggesting that the carrying woman "be asked to give undertakings that sexual relations will be avoided at the time of insemination, in order to ensure that the sperm then used will account for any pregnancy that ensues".

In addition to attempting to control input and penalizing carrying women by civil suit if the controls fail, the ABA Proposal and current practice seek to control the process of pregnancy. To obtain his child, a commissioning man must stop a carrying woman from eliminating the fruit of his seed from her body until the resulting fetus can survive independently. The ABA Proposal recognizes the commissioning man’s vulnerability here by granting him the right to sue the carrying woman should she exercise her constitutional right to an abortion. The control which some brokers seek over pregnancy is even greater. Even though the Baby M trial court struck down the provision, at least one broker requires genetic-gestational women not only to refrain from aborting but also to promise to undergo an amniocentesis test. If the results of the test are unsatisfactory to the commissioning man, then she is required to have an abortion. In exclusively gestational arrangements, it is also true that carrying women are required to agree to amniocentesis and abortion if requested by commissioners. In effect, the power to make an abortion decision is, by the agreement, transferred from the carrying woman to the commissioning man. Brokers seek to control the

27 Supra, note 25, s.11(b).
28 Ibid. s.11(c).
29 For example, Bill Handel’s firm requires that the carrying women abstain from sexual intercourse from approximately two weeks before the first insemination until she becomes pregnant which can take many months, and that she be subject to a penalty of $25,000 if she fails so to abstain. D. Frank and M. Vogels, The Baby Makers (New York: Carroll and Graf, 1988) at 166.
30 OLRC, supra, note 19 at 245.
31 ABA Proposal, supra, note 19 at s.6(a).
34 Ibid. at 75.
process of pregnancy also by means beyond the written word. At least one broker, Bill Handel, threatens and intimidates carrying women to ensure compliance with the agreement,\(^{35}\) monitors them by requiring their attendance at monthly meetings\(^{36}\) and insists that they inform him of their whereabouts throughout the pregnancy.\(^{37}\)

With regard to controlling output, the ABA Proposal\(^{38}\) and existing practice\(^{39}\) require the carrying woman to relinquish the child and to promise not to attempt to continue her relationship with the baby.

Thus, a consideration of the control of "input", "process" and "output" necessary to give effect to the proponents' arguments, reveals that the claim that the practice is liberty enhancing is false. The biological facts of reproduction entail that for a man to receive his child, he must have the prolonged cooperation of a woman. To realize the man's "freedom to be a father" where a carrying woman refuses to (continue to) cooperate, the woman must be controlled. As is clear from the ABA Proposal and current practice, the instruments of control in the context of a preconception arrangement are the agreement, the actual or


\(^{36}\) Amy Zuckerman Overvold, \textit{Surrogate Parenting}, (New York: Pharos Books, 1988) at 137. These monthly meetings are described as "support group sessions" but provide an opportunity to monitor the carrying woman for possible defection from the "program".

\(^{37}\) Handel claims this is necessary because a carrying woman is carrying my client's child. It's nice to know where she is at all times. If she moves, we have to know. If she changes employers or insurance, we have to know. If anything traumatic happens in her family such as a death or a job loss - anything that could materially affect the contract in any way whatsoever - we have to know. If anything comes up, we deal with it. She breaches the contract if she does not tell us.


\(^{38}\) ABA Proposal, \textit{supra}, note 25 at s.6(c).

\(^{39}\) K. M. Brophy, "A Surrogate Mother Contract to Bear a Child" (1981-82) \textit{Journal of Family Law} 263, paragraph III [hereinafter "Brophy Agreement"]; Keane Agreement, paragraphs 1 and 11; and Appendices A and B of \textit{In the Matter of Baby M}, 537 A. 2d 1227 (N.J. Sup. Ct. 1988) at 1265-1273 in paragraphs 2 and 3 [hereinafter "Baby M Agreement"].
threatened power of the legal system to enforce it, and the intimidation, monitoring and surveillance conducted by brokers. These controls are directed to ensure that the sperm which participates in conception is the commissioner's, the fetus will not be aborted (except on the commissioner's demand), and the woman will give him the baby and relinquish all her rights and responsibilities. If these goals are achieved, the commissioner's reproductive freedom will have been realized - but only at the cost of the carrying woman's freedom. Even if she agreed before conception to surrender her freedom, her consent does not alter the fact that the practice substantially reduces her freedom. It prevents her from expressing and advancing her significant relationship with her husband or partner by limiting her sexual activity. It denies her right to bodily autonomy in attempting to restrict her freedom to refuse amniocentesis and to have an abortion, and it limits her reproductive liberty by prohibiting her from remaining in the significant relationship which has developed between herself and the child during gestation.

In sum, the proponents argue that preconception agreements are an instrument of reproductive freedom because "contract facilitates the exercise of procreative liberty by giving certainty of the performance bargained for". Such certainty, however, and the attendant liberty of the commissioning man are achieved only by denying the liberty of the carrying woman.

A patriarchal focus on genetics as the criterion of parenthood generates three more flaws of proponents' analysis: the proponents (1) discount the significance of gestation, (2) claim that genetic contribution alone establishes important relationships and (3) argue that maternity is the paternity equivalent.

The choice to use genetic contribution as the criterion to determine parenthood implies that gestation and giving birth are of little real significance when compared to the contribution of genetic material. This discounting of pregnancy and parturition becomes particularly apparent in proponents' discussion of exclusively gestational arrangements but is evident also in their analysis of the more common practice where the carrying woman contributes both her genes and gestation.

Robertson and Andrews, for example, appear to regard genetic material as the precious stuff of life which needs to be housed or overseen temporarily by a person who might not be trustworthy. Robertson refers to the carrying woman as a body part by calling her "a uterus", and suggests her sustained effort, discomfort and pain are in fact equivalent to the passive activity of a provisional custodian of valued property; according to Robertson, "regarding her as a trustee who then must turn over the child should be acceptable and may even be constitutionally required". Similarly, Andrews views exclusively gestational women as providing a necessary but relatively insignificant service. In Andrews' opinion, the genetic material is what counts; "a surrogate carrier" merely "bears it, and then turns it back over to the couple", suggesting that the zygote is sufficiently similar to a child to be considered the same at conception as it is at birth. Not only does Andrews here imply that the carrying woman is simply a repository of property, she suggests that acting as a repository involves only one part of her body: "she just rents her womb".

But Robertson and Andrews present an inadequate representation of the effort, time, discomfort, pain, and physical and psychological effects of gestation and parturition. Because these are discounted by all the proponents, it is worth quoting at length one attempt to describe what they entail:

pregnancy and childbirth are the source of intense social, somatic and psychological change. The role of the pregnant woman is accompanied by shifts in status, social and career orientation, and relationships. Others' perceptions of her may expand, contract or otherwise alter. The host of possible physical effects of pregnancy include nausea, vomiting, fatigue, decreased sexual activity, crying, sleep disturbances, backaches and unusual food cravings. At least as significant is the range of possible emotional responses, which include anxiety or excitement, enhanced or diminished self-esteem, despondency or happiness. The experience of bearing a child is frequently painful, sometimes euphoric or disturbing, but in any event a powerful one for most women. Postnatally, too, substantial numbers of women undergo psychological and physiological

41 Ibid. at 956.
42 Robertson, "UK Colloquium", supra, note 19 at 18.
44 Ibid. at 234.
vicissitudes. The emotional impact of institutional confinement in itself can be prodigious. Finally, the phenomenon known as "bonding" has its inception at quickening and is fortified during and immediately after childbirth. In short, for the birth mother, having a child is a major life event.45

Given the enormity of this experience it is curious that it is diminished and discounted in proponents' theories. As has been argued above, one explanation for the elevation of genetic over gestatory contribution is that men participate only in the former.46

Like Robertson and Andrews, Posner focuses on genetic contribution rather than on the significance and effects of gestation. He claims that a genetic-gestational woman who relinquishes a commissioned child for cash is merely acting (inter alia) like "a sperm donor who receives cash, but no parental rights in exchange for his donation".47 But what a sperm "donor" loses when he sells sperm is nothing like what a carrying woman loses when she surrenders or sells a baby. This is apparent in Mary Beth Whitehead's description of her reaction to relinquishing her child:

As I stood at the door, they drove away. I collapsed on my front steps ... All I did was sob and cry. I just couldn't stop crying. It just kept coming and the emptiness I felt was something I never wanted to feel again. Eventually, I fell asleep. Suddenly I opened my eyes. The room was dark and I was lying in a pool of milk. The sheets were full of milk. I knew it was time to feed my baby. I knew she was hungry, but I couldn't hear her crying. The room was quiet as I sat up in the bed, alone in the darkness, with the milk running down my chest and soaking my nightgown. I held out my empty arms and screamed at the top of my lungs, "Oh god, what have I done - I want my baby!"48

By tracking only genes, Posner's argument incorrectly suggests that a genetic-gestational woman loses, like a sperm donor, merely a gamete grown into a child rather than a child of her whole body and her emotions.49

46 Supra, Section 4.2 and O'Brien, "Politics of Reproduction", supra, note 5.
49 The point that sperm donation is not analogous to pregnancy, childbirth and lactation is revisited below, Section 4.4.4.
Trebilcock minimizes the importance of gestation in a slightly different way, viz.: by arguing that it is not as significant as childrearing. He claims:

The real task of parenting begins with the birth of the child. The care, love and nurturing demanded by children involves substantial resources, many years of a parent’s life, endless degrees of energy, patience and understanding and ongoing financial commitments.  

Although it is correct to argue that rearing children requires care, love, nurturance, time, energy, patience, and financial resources, this is true also of gestating a child and giving birth.

In its discounting of gestation, the OLRC adopts a notably strong patriarchal position. It claims that the practice of preconception arrangements which transfers a child from its mother to its father "may be the sole means of affirming the centrality of family life". This argument implies that the physical embodiment of the child within the mother’s body is of no significance in establishing a relationship between them. Apparently, the OLRC views "a family" to consist of a male adult, a female adult and a child or children. But families exist even in the absence of a male, where, for example, there is a female adult and a child or children. For this reason, the practice of preconception arrangements does not affirm the centrality of family life but, on the contrary, requires its rupture.

Like the OLRC, the AFS focuses on patriarchy’s preferred method of having a family: genetic contribution at the expense of gestation. The AFS claims that the experience of an exclusively gestational woman in gestating and giving birth involves less of herself than does gestating and giving birth to a genetically-related child. It is, of course, true that an exclusively gestational woman does not contribute genetic material. But the AFS does not demonstrate that this significantly alters the effort and effects of pregnancy. From the
pregnant woman's point of view, the origin of a single cell, the ovum, might appear insignificant when compared to the nausea, swelling of her breasts and abdomen; the movement of the fetus experienced during pregnancy; and the labour, delivery, bleeding and lactation of parturition.

Not only do the proponents discount the significance of gestation and childbirth in the life of the carrying woman and in its power to create an important relationship between her and the child, some proponents claim that genetic contribution itself establishes relationships. According to Andrews, a commissioning man who might never have met the mother of his child is not a stranger to the baby; as a contributor of genes, he is "the child's father".55 Likewise the OLRC views the contributor of sperm as wrongly described as a stranger to the child.56 Andrews57 and the OLRC, therefore, agree that commissioners ought not to undergo a home study by the state. According to the OLRC, "since [the commissioning man] is the natural father of the child, we do not consider it appropriate that he be treated as a stranger and that he and his partner be subject to invasive scrutiny".58

The question this argument raises is what constitutes a "stranger"? According to the Oxford English Dictionary, a "stranger" is a "person one does not know".59 On this definition, and contrary to Andrews and the OLRC, it is entirely possible for a man who contributes genetically to a child - a sperm donor or the mother’s lover - to be a stranger to the child notwithstanding the contribution. In the practice of preconception arrangements, the parties might be unknown to each other (as the OLRC itself contemplates60) and the commissioners unknown to the child. As shall be argued in greater length below,61 this lack of social relationship is relevant to whether the state should investigate whether the commissioners ought to rear the child. In the practice of adoption, the purpose of a home

55 Lori B. Andrews, "Policy and Procreation: The Case of Surrogate Motherhood", "Feminism and Law Workshop Series", University of Toronto 27 March 1992 at 3 [hereinafter "Policy and Procreation"].
56 OLRC, supra, note 19 at 234.
58 Ibid. at 234.
60 OLRC, supra, note 19 at 244.
study is to ensure the proper care of the child. The fact of genetic contribution alone does not ensure this. As Tomlinson argues,

> We might question whether the biological father will develop the necessary emotional commitment to the child’s welfare by the time it is born. For ... he will not usually be intimately present during the pregnancy. He will not be the one lying in bed in the morning feeling the child kick and move; he will not be the one who takes care during intercourse in the final months; in short, he will not be the one who experiences and makes decisions that encourage and imply a love for the child that will be born.62

The fact of genetic relatedness does not create a social relationship of care and connection that will ensure the well being of a child. To claim that genetic contribution prevents a man from being a stranger is simply false; one is a stranger until a social relationship has been established.

By focusing on genetics, the proponents discount gestation’s significance and incorrectly claim that genetic contribution alone can establish a relationship. This focus on genetics leads also to a final and related flaw in analysis: the proponents claim that maternity can and ought to be determinable in the same way that paternity is determined.

In the context of exclusively gestational preconceptual arrangements, the genetic and gestational aspects of motherhood are separated: one woman contributes an ovum; another gestates, labours, gives birth and lactates. In such a situation, who is to be regarded as the mother? The proponents who consider the issue argue that the social mother should be determined by intention.63 As we have seen,64 however, intention is an inadequate criterion for determining parenthood because not all children are intended and yet all of them need identifiable caregivers responsible for their care. Moreover, if intention were the accepted criterion, there would be a period after birth during which it would be unclear whether the parties' intentions were realized. The AFS anticipates this situation by recommending that the uncertainty be resolved by genetic testing. The AFS claims,

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61 See section 5.3.3.
62 Hastings Centre Report, June 1984 at 42.
63 Robertson, "UK Colloquium", supra, note 19 at 18; Andrews, New Conceptions, supra, note 43 at 234; neither Posner, Trebilcock nor the OLRC addresses the issue; AFS, supra, note 19 at 72S.
64 Supra, Chapter Three, section 3.3.1.1.
Of particular importance is the issue of determining paternity [sic]. It is possible that a surrogate might inadvertently become pregnant with her own partner, rather than with the transferred embryo. So that the contracting couple can avoid rearing the wrong child, human leukocyte antigen typing can be done to establish that they are the actual genetic parents of the child born to the gestational surrogate.

On an intent-based method of determining parenthood in exclusively gestational arrangements, therefore, no one will be identifiable as the child's parents until the results of the blood test arrive. As the AFS's choice of words makes clear, the problem of "determining paternity" thus becomes a problem for women, too.

Not surprisingly, therefore, it is suggested that this new problem be resolved in the same way as it is for men. According to Andrews:

Generations of men have been able to establish their legal parenthood to a child without having to give birth. This has been accomplished in part, through statutory presumptions about paternity. It takes no great leap in legal doctrine to enact further presumptions about preconception intent regarding legal parenthood in alternative reproduction cases to assure that a woman or a man who has not gestated a child is nonetheless considered the legal parent.

Thus, patriarchy comes full circle. The intractable misfortune of men that they are separated from reproduction and therefore cannot be certain of their paternity leads to attempts to control women to reduce uncertainty, and to focus on genetic contribution. This focus on genetic contribution, in turn, leads to the view that a mother is someone who contributes genes but not gestation. By this argument, women, like men, can be separated from reproduction and uncertain of their parenthood.

But is this extension of paternal uncertainty to women in the interests of women or children? If the maternity of a pregnant woman can be doubted, the pregnancy experience of all women will change. For example, a pregnant woman would become vulnerable to arrest at border-crossings and be required to demonstrate her genetic relatedness to the fetus she bears to disprove allegations of kidnapping. Similarly, the precious period after birth might

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65 Curiously, the AFS is concerned only with genetic paternity in embryo transfer and not also with genetic maternity. Or perhaps by the term "paternity", the AFS means to include genetic maternity?
66 AFS, supra, note 19 at 66s.
be altered for all women, as hospital personnel might prevent the birth mother from taking the child into her arms pending the result of blood tests. Children, too, are at risk from a policy that would make maternity uncertain. Although it is not strange to learn that the father was absent at the time of birth, it has hitherto been impossible to say that the mother was away when the child was born. With embryo transfer, the genetic parents might be on another continent. The child might therefore be born into a room of people none of whom is to be legally responsible for its welfare. What is more, determining maternity on the basis of genetic contribution would require us, when looking for the mother, to discount what is obvious to the unaided senses and to rely instead on technology to inform us of the details of microscopic particles. In this way, the criterion of genetic contribution not only renders maternity uncertain, but it distances us from the means by which we might render it certain. Clearly, the extension of paternal uncertainty to maternity is of questionable value to women and children. Thus, the proponents fail to demonstrate that maternity ought to be determinable in the same way as paternity is known.

This section has demonstrated that the arguments of proponents are advanced in the context of a patriarchal ideology which is rooted in human reproduction. Because men are separated from reproduction and therefore uncertain of their paternity, they respond by attempting to limit women's sexual and reproductive freedom to reduce paternal uncertainty and by focusing on genetic contribution as the criterion of parenthood. These patriarchal responses are evident in the proponents' arguments and lead to four flaws of analysis. They incorrectly claim that the practice of preconception arrangements enhances reproductive freedom when, in fact, it increases control over women to reduce paternal uncertainty. Moreover, they unjustifiably discount the significance of gestation, wrongly state that genetic contribution alone establishes social relationships, and unwisely argue that maternity ought to be determinable by the same means as paternity.

4.3 Inadequacies of Technological Assumptions

Like "patriarchy", "technology" has a variety of meanings. According to John Kenneth Galbraith, "technology" is

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68 Ragoné reports that "in 1991 the first frozen embryo was shipped from England and implanted into the womb of an American surrogate". (Ragoné, supra, note 33 at 6). This development makes it possible that the genetic parents could be on another continent when the commissioned child is born.
the systematic application of scientific or other organized
knowledge to practical tasks, with its most important
characteristic the division and subdivision of tasks into
component parts, thus allowing organized knowledge to be
applied to performance. 69

A second writer, Talcott Parsons, focuses on efficiency and rationality as the key
characteristics of technology. 70 The ideology of technology, in Barbara Katz Rothman’s
opinion, has as its consistent theme a connotation of order, productivity, rationality and
control. 71

That the proponents adopt a technological method of viewing human reproduction is
clear from the fact that they claim procreation is severable into component parts which may
be manipulated and controlled in a manner rationally directed to increasing efficiency.
Consider, for example, how Robertson describes human reproduction as consisting of three
distinct experiences viz.: "conception, gestation and labour, and childrearing" which each
have "personal value and meaning independently of the others". 72 These separable
experiences consist themselves of smaller parts. For example, conception, when it takes
place in a laboratory, consists in "removing an egg from an ovarian follicle, fertilizing it in a
dish and then transferring the developing zygote to a uterus". 73 Outside the laboratory, the
process of procreation can be subdivided into parts in which, the proponents argue, various
persons may participate. According to Andrews:

The woman who has neither the genetic nor the gestational
component for reproduction, but has a male partner, can call
upon a surrogate mother. Her partner’s sperm is then used to
inseminate the surrogate mother who carries the pregnancy and
releases the infant upon birth to be reared by the couple. 74

69 Quoted in Rothman, supra, note 4 at 52.
70 Ibid.
71 Ibid.
72 John Robertson, "Procreative Liberty and the Control of Conception, Pregnancy and
Childbirth", (1983) 69 Vir. L. Rev. 405 at 408 [hereinafter "Procreative Liberty"].
Robertson’s technological assumptions are evident also where he refers to pregnancy,
labour and childbirth as a "technique". He writes,
... bans on paying surrogate mothers, though arguably a clear interference
with procreative liberty, may prevent many infertile couples from using this
technique to have children [emphasis added].
73 Robertson, "Embryos", supra, note 40 at 943.
This division and subdivision of reproduction into component parts reinterprets a process by which the carrying woman becomes a mother, into a process by which she merely contributes "the genetic and gestational components of reproduction".75

Not only does a technological ideology divide and subdivide procreation into component parts, it suggests that these parts might be manipulated in a variety of ways. According to the AFS, for example, the "components" of genetics, and gestation and delivery can be manipulated so that they take place in and from the bodies of two different women:

The existence of a preembryo outside the body of the woman who provides the egg ..., creates the possibility for the preembryo to be gestated by a second woman and then returned [sic] to its genetic parents after its birth.76

The ability of technology so to manipulate these aspects of reproduction lends credence to the view that they might be reified as "factors of reproduction"; once expressed as things, they become objects to which people are entitled. In Robertson's opinion,

The right of a couple to raise a child should not depend on their luck in the natural lottery if they can obtain the missing factor of reproduction from others.77

For these "factors of reproduction" to be available for use by others, they must be subject to control. As we have seen in considering the effect of patriarchal ideology, for a woman to conceive and/or gestate a child for commissioners, she must be managed so that she does not conceive by her husband or partner.78 Although the factor of gestation is merely "any physiologically receptive uterus",79 the uterus is housed in a body which therefore must be controlled.

The effects of applying a technological approach to reproduction are at least five in number. A technological approach prompts proponents to argue that preconception arrangements are a technological advance, that they can be a clinical experiment, and that the demands of technology should on occasion trump concerns for coercion and exploitation.

75 Ibid. See also AFS, supra, note 19 at 64S.
76 AFS, supra, note 19 at 64S.
77 Robertson, "Not So Novel", supra, note 20 at 32.
78 Supra, section 4.2.
79 Robertson, "UK Colloquium", supra, note 19 at 15.
More significantly, a technological ideology views women as machines and babies as products, and thus transforms procreation into production.

It is a common assumption that the practice of preconception arrangements represents a technological advance. For example, the OLRC claims the practice is an "artificial conception technology". In their words, "what distinguishes surrogate motherhood from the other artificial conception technologies is not the technology itself, but the special circumstances of its employment". 80 Similarly, the AFS argues that "surrogate motherhood depends ... on the technology of artificial insemination". 81 But the practice of preconception arrangements, in its most common form, does not depend on any technology at all.

There are, of course, two forms of the practice. The "genetic-gestational arrangement" is the most usual. For the conception to occur, the carrying woman can be inseminated by a "technological" device such as a syringe 82 or, more simply, she might engage in sexual intercourse with the commissioning man. The purpose of using a syringe is not, therefore, to achieve that which would otherwise be impossible. On the contrary, a "technological" device is used because without it, the practice might be unpalatable. A syringe is employed instead of a penis to sanitize the practice, to suggest that it is a new technological process and therefore subject to different ethical and legal norms than the practice of sexual intercourse. So complete is the characterization of genetic-gestational arrangements as technological, that the question of whether the arrangements ought to be exempt from the application of norms governing sexual intercourse is not seriously addressed. 83 (The question shall, however, be considered below 84 where it will be argued that the practice of preconception arrangements in its most common form is a social, not

80 OLRC, supra, note 19 at 218.
81 AFS, supra, note 19 at 68s.
82 Some women inseminate themselves using a turkey baster.
83 The ABA Proposal, for example, begins with the view that preconception arrangements are about new reproductive technologies when it states in Section 1, "Medical knowledge and technology ... have created an increasing demand for surrogacy". Likewise the OLRC regards the simpler form of preconception arrangement as a technological advance which therefore requires new law: "existing law has not adequately met the challenge presented by the advent of the new reproductive technologies. This conclusion applies with even greater force in the case of surrogate motherhood". OLRC, supra, note 19 at 221.
primarily a technological practice, and ought therefore to be subject to the same legal rules which govern similar practices of extra-marital conception.) Moreover, arguments which attempt to justify the practice of genetic-gestational arrangements on the basis that it is a technological advance are irrelevant because the practice is not technological.

Whereas the first form of preconception arrangements requires no technology, the second depends upon it. Exclusively-gestational arrangements obviously rely heavily on new reproductive technologies for conception in vitro and embryo transfer cannot also be achieved by sexual intercourse. Yet whilst the less common form of the practice is technological, it is not clearly an advance. The fact that the technology exists and has been newly developed does not mean that its employment entails an advance in human progress. The arguments of proponents in favour of the practice of exclusively gestational arrangements do not seriously address the many concerns articulated by those who view in vitro fertilization as a technology which increases the ability of doctors and others to control reproduction at the expense of women and women's interests. With its uncomfortable and painful hormonal stimulation, invasive techniques, high failure rates and employment on fertile women to circumvent male infertility, in vitro fertilization is criticized as a technology which puts women at risk and undermines a holistic view of women's health. These arguments must

84 Chapter 5, section 5.3.
85 See, for example, Robertson, "Embryos", supra, note 40 at 961; Andrews, "Adoption Model", supra, note 19 at 13; Posner, "Sex and Reason", note 19 at 421; Trebilcock confines his attention to the more common form of the practice, "Limits of Freedom of Contract", supra at 48; OLRC, supra, note 19 at 263-265; AFS, supra, note 19 at 65S-66S. The AFS approved of the practice only as a clinical experiment.
be considered and refuted before one can claim that exclusively-gestational arrangements represent technological progress and are, therefore, good.

The second effect of technological thinking is the proposal that genetic-gestational arrangements be conducted as a clinical experiment, which is the recommendation of the AFS. To conduct an experiment entails the performance of procedures on research subjects to assess how the procedures affect the subjects in a controlled setting. Genetic-gestational arrangements do not, as has been demonstrated, require clinical procedures to initiate them. The observation of the effects of such arrangements is, therefore, more appropriately described as a social rather than a clinical experiment.

A third effect of technological ideology is to regard the reproductive process as one which ought to be pursued according to the dictates of technological imperatives rather than concern for human well-being when these two goals conflict. Such a situation is contemplated by the OLRC. It will be recalled that the OLRC recommended the establishment of a legislative scheme by which carrying women and commissioners would be judicially screened to reduce the potential harmful effects of participating in the practice.

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87 AFS, supra, note 19 at 73. See also criticism of the AFS proposal's violation of the Helsinki Declaration. Supra, Chapter 3.3.1.3.
The OLRC imagines, however, an exclusively gestational arrangement in which the prospective carrying woman decides at the last minute she no longer wishes to participate. In such a case, an embryo might already have been created. Because it would perish if not frozen or transferred into the body of a woman within a limited period, the OLRC recommends that "owing to the exigencies of the situation, the suitability of the replacement surrogate mother may properly be assessed in a summary hearing". Not only because it places the birth mother at two removes from the child by the extraordinary name "replacement surrogate", this recommendation is remarkable. Whereas the OLRC stresses in its report the importance for the carrying woman, her husband or partner and her children of inquiring into her "suitability" to participate and the prevention of her exploitation, the "comprehensive judicial screening" of the woman could be hastily set aside when the commissioners' embryo is in a petri dish in danger of perishing if a "replacement surrogate" is not quickly found. In this way, the OLRC recommends, in effect, that the imperatives of technology should trump ethical concerns for the well-being of the carrying woman and her family.

Even more significant than the three effects just described are the effects of technological ideology in characterizing women as machines and babies as products. In preconception arrangements, the carrying woman provides either two or one "missing factor of reproduction": she is said to contribute genetically and gestationally, or gestationally alone. As a provider of "reproductive factors", she is conceptualized as an instrument for the creation of the commissioned child. For example, Robertson describes her body as "a baby-making machine", Andrews calls her a "human incubator" and Posner claims she is

88 AFS, supra, note 19 at 265.
89 OLRC, supra, note 19.
90 Ibid. at 234, 240-242.
91 Ibid. at 264.
92 Recommendation 61, OLRC, supra, note 19 at 285.
93 Robertson, "Not So Novel", supra, note 20 at 32.
a "living incubator". These characterizations of carrying women misrepresent the active role which a mother plays in bringing a child to life and portray her instead as the passive receptacle whose function is to produce and surrender a perfect product no matter how great the physical and emotional pain she might suffer.

A technological ideology thus characterizes the carrying woman as (or part of) a baby-producing machine. On this view, the product is the child. These are points which Posner freely concedes. He states, "surrogate motherhood is a frankly commercial agreement for the production of a baby". According to Posner the child is brought to life because of the commercial agreement, because of "the productive function of contracts".

By this way of thinking, the commissioners order a product to meet their specifications. For example, according to Andrews, "The child is not being created as "her" child but as the commissioners' child. Because the child is viewed as an ordered product it is possible to refer (as does the AFS) to a baby which does not conform to specifications as "the wrong child". Not only may the baby have the "wrong" genetic lineage, it might not be in

95 Posner, "Sex and Reason", supra, note 19 at 421. Indeed genetic-gestational women themselves refer to their pregnancy in a way which suggests they are not the mothers of their children. Examples of such statements by carrying women are "I feel like a vehicle, just like a cow; it's their baby, it's his sperm", Ragoné, supra, note 33 at 77; "I was the carrier, a postman delivering a very special parcel", Toronto Star (31 July 1985), p. 20; "Motherhood is not biological", "Sandra", speaking on Geraldo, 29 September 1987, Show #7, note 77 at 9; "I loved that child for nine months, but I didn't fool myself into thinking it was mine", Andrews, Between Strangers, supra, note 35 at 277; "I wanted the wife to experience her pregnancy - I do not think of it as my pregnancy", D. Frank and M. Vogel, supra, note 29 at 158; "It's the father's child ... I'm simply growing it for him"; "Surrogate Mother Elizabeth Kane Delivers Her 'Gift of Love' Then Kisses Her Baby Goodbye", People (10 December 1980) 52 at 53.

96 Kelly Oliver, "Marxism and Surrogacy" (1989) Hypatia 95 at 106.


100 AFS, supra, note 19 at 68S.
perfect condition; it might be sick or handicapped.101

The problem of what to do when (what Robertson describes as) "a defective child"102 is born is addressed variously by proponents. Robertson, Trebilcock and the OLRC claim it is not really an issue because parents of children who are not commissioned by a preconception arrangement might also reject sick or handicapped children.103 This response is odd because in suggesting that existing law already deals with the situation, the argument does not explain why existing law's response to extra-marital births is inadequate to govern preconception arrangements. Both these situations (the birth of a handicapped child and the birth of a child outside marriage) are known to occur and are subject to existing law. A case, therefore, must be made to justify the application of existing law to the first situation but not the second. Moreover, it is inconsistent to argue that the law ought to adopt a contract model to regulate preconception arrangements, and then to prevent the commissioners from inserting terms in the agreements such as that the child must be of a merchantable quality. Indeed, the contract model would, with the proponents's approval, permit commissioners to reject a child which does not meet the specifications with respect to paternity. It is illogical for the proponents then to argue that commissioners be prohibited from requiring that the commissioned child meet other minimum criteria before they will accept it as the "product" they ordered.

It has been demonstrated that the proponents adopt a technological method of understanding human reproduction in the context of preconception arrangements in that they regard procreation as a process which can be divided and subdivided into component parts which, in turn, might be manipulated and controlled. Grounded in a technological ideology, the proponents' arguments, however, mischaracterize preconception arrangements as

101 When such a commissioned child was born to a carrying woman, the commissioning man refused to accept it and ordered the doctors not to treat an infection because lack of treatment would put the baby's life at risk. It was subsequently discovered that the child was conceived with the sperm of the carrying woman's husband so the commissioning man rejected the child on the basis that it did not meet the specifications regarding paternal lineage. Andrews, Between Strangers, supra, note 35 at 43-44. This point is discussed at greater length below in section 4.4.2.

102 Robertson, "Not So Novel", supra, note 20 at 32.

103 Robertson, "Not So Novel", supra, note 20 at 32; Trebilcock, "Limits of Freedom of Contract", supra, note 19 at 61-2; OLRC, supra, note 19 at 255-6.
necessarily technological and fail to show that even when technological, the practice represents an advance in human progress. Further, technological ideology causes the AFS incorrectly to suggest that the practice in its simple form could be conducted as a clinical experiment when, in fact, it would be a social experiment; and leads the OLRC to argue that the imperatives of technology ought, in certain circumstances, to override concerns for the well-being of the carrying woman and her family. Most significantly, a technological ideology views women as machines and babies as products thus implying that procreation might honourably become production.

4.4 Inadequacies of Market Assumptions

4.4.1. Introduction

Just as a technological ideology divides reproduction into component parts, a market ideology holds that it is appropriate that the parts be the subject of sale for valuable consideration. As was demonstrated in Chapter Two, the proponents believe that the market, as a system of private ordering among individuals, is the best means to enable those capable of supplying "reproductive components", to meet and to be encouraged to trade with those who lack them. The proponents favour a system of legally enforceable private agreements among individuals because they believe it would enable commissioners to obtain the children they desire, ensure that women are remunerated for the use of their reproductive capacities, and cause children to come into being who would not otherwise have been procreated. In other words, the proponents hold that the market is the appropriate method of governance because it permits individuals to give effect to their desires in a manner assumed thereby to promote autonomy and dignity, and to maximize social welfare.

As was demonstrated in Chapter Two’s critique of the law and economics argument

104 It might be argued that the OLRC and the AFS do not hold this view because each claims that the practice is medically necessary and because the AFS would allow it initially to proceed only as a clinical experiment. But both the OLRC and the AFS do, in fact, embrace a market model because they assume that, were the practice to be granted legal endorsement, preconception arrangements would be conducted according to the norms of market relations and not according to a medical model of caregivers responding to disease and illness irrespective of the patient's financial means.
for preconception arrangements, and in Chapter Three, a market-based approach to
preconception arrangements is flawed. It wrongly assumes (inter alia) that only the parties to
the transaction are affected by it, and that persons are, by definition, separate, self-interested,
rational and relevantly equal. Building upon these arguments, this section shall
show that a market ideology is inappropriate in this context also because it necessarily
assumes that the practice of preconception arrangements ought to be governed by market
norms which would dictate the method by which the transacting parties might properly interact.

The norms of the market have been identified by Elizabeth Anderson\(^{105}\) who has shown that they have four\(^{106}\) characteristics. First, market relations are impersonal ones.
Second, the market is understood to be a sphere in which one is free, within the limits of the
law, to pursue one's personal advantage unrestrained by any consideration for the advantage
of others. Third, the goods traded on the market are exclusive and rivals in consumption.
Fourth, the market is purely want regarding: from its standpoint all matters of value are
simply matters of personal taste.\(^{107}\)

We shall examine each of these characteristics in turn to demonstrate, first, that the
proponents assume these market values ought to apply both to the relationships among the
parties and the child which the agreement calls into being; and second, that such an
assumption is questionable.

### 4.4.2 Impersonal Relations

According to Anderson, the most characteristic feature of market relations is that they

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105 Elizabeth Anderson, "The Ethical Limitations of the Market" (1990) 6 Economics and
Philosophy 179 [hereinafter "Ethical Limitations"].
106 Anderson actually identifies a fifth characteristic which is not relevant to
preconception arrangements. Anderson's fifth characteristic of market relations is that
an individual's influence on the provision and exchange of commodities is primarily
exercised through "exit" not "voice" (in Hirschman's terminology). This description
applies to market relations in "spot contracts", for example, the purchase of a
newspaper at a newsstand, but is inapplicable to exchanges that take place over a long
period of time as do preconception arrangements.
107 Anderson, "Ethical Limitations" supra, note 105 at 182.
are impersonal. Impersonal relations entail that the producers of economic goods are typically strangers. As such, neither party is concerned with the other’s personal characteristics, life circumstances, relationships, hopes and dreams. Each party to a market transaction views one’s relations to the other as a means to satisfy ends defined independently of the relationship and of the other party’s ends; a market relationship justifies the self-seeking activity of each party. This contrasts sharply with a personal relationship in the context of, for example, a family where members variously perform selfless acts to aid the others within the family to realize their hopes and dreams.

That the first characteristic of market relations may properly obtain in a preconception arrangement is assumed by the proponents. Each believes that the arrangement might involve an impersonal relationship between the carrying woman and the commissioners. Robertson, for example, takes for granted that the parties usually will not have met before they come together to conceive a child; he states, "In most cases, the [carrying woman] will be a stranger, and may never even meet the couple". Moreover the impersonal nature of the parties’ relationship means that their respective goals are not defined in terms of the relationship between them. The birth mother and biological father unite not so that they together will be parents of the commissioned child, but so that they will each achieve their separate ends. These ends are, according to Robertson, "the desire of a husband and wife to rear a healthy child, and more particularly, a child with one partner’s genes" and the

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108 Not all market transactions can be characterized as impersonal. For example, franchise contracts, employment contracts and requirement contracts are all highly personalized. But these personalized contracts are different from preconception arrangements. In personalized contracts, for both buyer and seller, the costs are short-term and the benefits long-term. Long-term personalized contracts are therefore characterized by mutual forbearance and the absence of opportunistic behaviour. This is not true of preconception arrangements where such symmetry is absent. For the commissioners, the costs are short-term, the benefits long-term but for the carrying women, a preconception arrangement has short-term benefits and long-term costs. Therefore, though not all market transactions are impersonal, personal transactions have attributes which are different from preconception arrangements and so are not relevant to the present discussion.

109 Ibid.

110 Robertson, "Not So Novel", supra, note 20 at 29.

111 Ibid.
desire of the carrying woman to earn "the fee [which] provides a better economic opportunity than alternative occupations, [and also to] enjoy being pregnant and the respect and attention it draws".112

Andrews similarly assumes that the parties might be strangers to each other and that their purposes in conceiving a child are different. In Andrews' consumer guide for commissioners under a section headed "Choosing a Surrogate", she counsels commissioners to be careful in selecting the stranger who will be the birth mother of their child. She writes,

... unlike the choice of mate, you won't have months or years to get to know a surrogate mother before you enter this unique relationship. You may have to decide rapidly; on the basis of a two-page written application; sometimes a photo, or perhaps a brief meeting.113

Andrews presupposes also that the parties have different goals. Whereas the commissioner(s) seek a child,114 the carrying woman's purposes are varied. According to Andrews, a carrying woman in addition to wishing to earn money, wants "the chance to be altruistic and to perform a social good".115

Likewise, the other four proponents assume that the first characteristic of market relations obtains in preconception arrangements. Posner,116 Trebilcock,117 the OLRC118 and the AFS119 agree that the parties will be strangers to each other and that they will use each other to achieve their different ends: the commissioners to rear a child and the carrying women variously to earn money, enjoy the pregnancy, gain attention and perform an altruistic act.

It is, however, inappropriate to regard a preconception arrangement as justifiably governed by the norms of impersonal relations. First, such norms fail accurately to describe and fairly to govern the relations between the partners. Second, they would characterize the

112 Ibid.
115 Ibid.
118 OLRC, supra, note 19 at 244 (strangers) and 219 (different ends).
119 AFS, supra, note 19 at 68S.
relation of the parties to the commissioned child in a manner which is not consistent with the child's interests.

That one of the carrying woman's goals is to perform an altruistic act demonstrates the first problem with the notion that impersonal relations are appropriate in the context of preconception arrangements: the parties do not regard each other in similarly impersonal ways. On the contrary and particularly in commercial arrangements, whereas the commissioners typically adopt an impersonal attitude toward the carrying woman, she is encouraged to develop a personal attitude toward them. This lack of reciprocity in the attitude of the parties has been discussed in Chapter Three, and shown potentially to lead to exploitation. Here we return briefly to the issue of lack of reciprocity to demonstrate, first, how a commercial preconception arrangement is actually structured to encourage a disparity in attitude among the parties; and, second, how this is unfair and unjust.

We have described the market transaction which is a commercial and paid preconception arrangement as having three stages: input, process and output. At each stage, a carrying woman is encouraged to think of the commissioners in a personal way, whereas the commissioners generally tend to view the carrying woman impersonally.

At the first stage when the transaction is initiated, the strategy of the brokers is to stimulate the carrying women to envision the commissioners in the context of their personal, familial lives. The theme constantly reinforced is the alleged infertility of the commissioners and its devastating effect on their lives. To a degree unusual in an ordinary transaction, the "demand" of the purchasers in the bargain is presented as need. Commissioners are marketed as needy, worthy and loving persons. Against this background not simply of

120 Supra, Chapter Three, section 3.3.4.3 "Psychological Inequality", where it was demonstrated that in a preconception arrangement the commissioners and their agents operate according to market norms by attempting to gain the best deal for themselves and their clients. The carrying woman, on the other hand, is orientated toward the exchange of gift values which include love, concern and the repudiation of self-interest.

121 Supra, section 4.2.


123 See, for example, Frank and Vogel, supra, note 29 at 127-154.
want but of deep emotional pain and suffering, carrying women are elevated beyond the status of suppliers of a desired good to become the answer to a prayer. This status is apparently vitally important in motivating carrying women. Indeed, the brokers understand that money and the promise of an impersonal transaction are not sufficient to cause a woman to enter a preconception arrangement. A key motivating factor of carrying women is not to meet a commercial demand but to fulfill a deep, personal need of the commissioners. Whereas commissioners are presented as needy persons in an emotionally vulnerable situation, carrying women are depicted as independent, responsible commercial parties. As Noel Keane’s brochure states, the majority of carrying women studied “are intelligent, self-aware, consenting adults who are fully capable of entering into contracts freely and fulfilling their contractual obligations completely”. Although the brochure claims that 80% of carrying women have had "at least one live birth", there is no discussion of the personal, familial context of the carrying woman’s life. Whereas the commissioners’ emotional state is of great significance to the carrying women, the commissioners are not encouraged to consider the emotional and psychosocial aspects of the carrying woman’s life and how her participation might affect her health, her marriage, her other children and her parents. In contrast to the commissioners who are described in the context of their relationships and their emotional needs, carrying women are portrayed either

124 Ragoné, supra, note 33 at 60-61; and see, for example, Laurie Yates, "Don’t Take My Babies From Me!" Good Housekeeping, March 1988, 114 at 183 and 187.
125 Richard Levin states that the financial motive is not strong. He views the payment as "a stipend, an honorarium, a little thank-you. You couldn’t pay this woman what her services are worth". (Gini Kopecky, "Wombs for Hire", Omni, June, 1983, 18 at 22). Hilary Hanafin who is employed by broker, Bill Handel, claims that a carrying woman cannot be satisfied merely by the payment of money because financial compensation alone is not adequate. (Edinston, supra, note 122 at 276). Keane similarly argued that money is not the principal motivating factor. He said, "Their motivation is to help somebody though the money would be helpful". (James S. Kunen, "Childless couples seeking surrogate mothers call Michigan lawyer Noel Keane - he delivers", People, March 30, 1987, 93 at 97.
127 See also a second ICNY brochure "More About Surrogate Mothers", promotional literature distributed by the Infertility Center of New York, 14 East 60th Street, Suite 1204, New York 10022, USA; and "Surrogate Mother Program" Center for Surrogate Parenting Inc., 8383 Wilshire Blvd., Suite 750, Beverly Hills, California 90211, USA.
in a manner which excludes discussion of their relationships and the havoc participation might cause them, or as having relationships which will indirectly benefit the commissioners, such as a husband to support her through the pregnancy and children to return to once the commissioned child is surrendered.\textsuperscript{128}

Just as the carrying woman is encouraged to adopt a personal attitude, and the commissioners an impersonal attitude, toward each other at the time the agreement is initiated, so too does this disparity in attitude continue during the second or "process" stage of the agreement: during the pregnancy. Whilst pregnant, the carrying woman encourages herself and is encouraged by the broker to think of the commissioners in their personal capacity - the man as the father of the baby and the woman as the adopting mother.\textsuperscript{129,130} By contrast, the commissioners and the broker view the carrying woman not in a personal but in a disembodied way. The very name she is given, "surrogate", denies her maternity, and she is deemed unworthy of the emotional responses toward a pregnant woman typically seen and expected in a prospective father, viz.: companionship, support, esteem, honour and love.\textsuperscript{131}

In the third stage of the agreement - the output or surrendering stage - the carrying woman is expected to continue to regard the commissioners personally. After

\textsuperscript{128} Richard Levine's brochure, for example, explains that a prospective carrying woman undergoes psychiatric and psychological evaluation to determine, \textit{inter alia}, whether she has a "stable marital relationship". (Publicity brochure available from "Surrogate Parenting Associates", Suite 222, Doctors' Office Building, 250 East Liberty Street, Louisville, Kentucky, 40205 USA at page 10.) Lori B. Andrews suggests that potential commissioners look for a carrying woman who is married and has other children. (Andrews, "What to Look for in a Surrogate Mother", "New Conceptions"; \textit{supra}, note 43 at 195.

\textsuperscript{129} See, for example, Frank and Vogel, \textit{supra}, note 29 at 158 and 172.

\textsuperscript{130} To ensure that the woman will transfer the child to the commissioners, some brokers operate what Ragoné describes as "open programs". These require the commissioners to develop and maintain a relationship with the carrying woman during insemination and pregnancy but permit the relationship to terminate after relinquishment. (Ragoné, \textit{supra}, note 33 at 24-26, 102-104.)

\textsuperscript{131} Indeed, according to one commissioning man, the carrying woman's very humanity is emotionally problematic; as he complained, "In some ways, it would have been easier if we didn't meet her and know what a wonderful human being she is. It's more difficult than just renting a womb so to speak". Lasker and Borg, \textit{supra}, note 122 at 84.
relinquishment, the carrying woman must persevere in attending to the commissioner's needs, now for privacy, and therefore remove herself and any emotional expectations she might have of the commissioners, from their lives.\textsuperscript{132} If she had emotional needs for a relationship with them and that need was in fact met during the first two stages of the agreement, it is unlikely to be met thereafter.\textsuperscript{133} The terms of the agreement and the market norms of the transaction require the woman to surrender the child and to leave the commissioners alone. These norms make irrelevant any claim she might have for personal consideration or for love and concern.\textsuperscript{134} Similarly, market norms justify the attitude of the commissioners in completing the agreement and accepting surrender of the child. The agreement does not require them to attend to the emotional needs of the carrying woman, to alleviate her suffering or to meet her deep emotional need by, for example, returning the baby to her. The impersonal nature of market relations entitles them to disregard her once the agreement is at an end.\textsuperscript{135}

\textsuperscript{132} As Ragoné writes, "All programs recommend eventual termination or severe attenuation of the surrogate-couple relationship" (Ragoné, \textit{supra}, note 33 at 103.

\textsuperscript{133} Once the carrying women have surrendered the child, there is little incentive for the brokers and commissioners to attend to them. (See Lasker and Borg, \textit{supra}, note 122 at 117).

\textsuperscript{134} One woman claimed that she was promised an auntie relationship with the child and it was implied that she would continue to be welcome in the commissioner's home. When she was dismissed from their lives, she sued unsuccessfully for visitation rights to the commissioned child. The California Court of Appeal ruled that any duties the commissioners owed her were in the "contract", beyond which they were not obliged. Thus, in the market context, arguments that she grew attached to the child, its father and his wife had no value. The only capacity in which she could be heard was in her contractual capacity - not as a mother excluded from the lives of her son and his father. \textit{In re Adoption of Matthew B.-M.}, 284 Cal. Rptr. 18 (Cal. App. 1 Dist. 1991). See also "Donahue" Transcript #03127, 1987 at 2.

\textsuperscript{135} According to Ragoné,

My research shows that the couple most readily relates to their surrogate as "the woman who is carrying our child", and once she gives birth they are ready to begin parenting without her assistance. The surrogate, however, relates to the couple more as friends with whom she feels a bond ...; to the surrogate's way of thinking, that relationship should not change or end once the child has been born, no matter how well she has been prepared for this eventuality by the program.

\textit{Supra}, note 33 at 44.
The notion that impersonal relations are appropriate in the context of preconception arrangements must contend with the fact that the transaction is structured so the parties do not regard each other in similarly impersonal ways. Whereas the carrying woman is motivated, at least in large part, by concern for the personhood and emotions of the other(s), the commissioners may use the impersonal nature of market relations to absolve themselves of any commitment to the carrying woman beyond the payment of money. As was demonstrated in Chapter Three¹³⁶ this lack of reciprocity leads to injustice, for the carrying woman assumes the obligations of altruism and gains the entitlements of the market, whereas the commissioners gain the entitlements of altruism and assume the obligations of the market. Therefore, the description of preconception arrangements as consisting of impersonal relations is both inaccurate and would permit unfairness. As American legal philosopher Edmond Cahn wrote,

To possess the end and yet not be responsible for the means, to grasp the fruit while disavowing the tree, to escape being told the cost until someone else has paid it irrevocably: this is … the chief hypocrisy of our time.¹³⁷

There is a second reason that it is inappropriate to view a preconception arrangement as justifiably governed by the norms of impersonal relations: not only do such norms fail accurately to describe, and fairly to govern, the relations between the parties, they would characterize the relation of the parties to the commissioned child in a manner which does not accord with the child’s interests.

A preconception arrangement by its very nature attempts to create an impersonal relationship between pregnant woman and fetus and increasingly to attenuate the relationship between mother and child so that, almost immediately after birth, there is no longer any relationship at all. The preconception intent of the parties is that the child be not the carrying woman’s but the commissioner’s, and this desire is meant, by means of the agreement, to become a reality. Therefore the agreement stipulates that the carrying woman

¹³⁶ Supra, section 3.3.4.3.
shall not bond with the fetus,\textsuperscript{138} implausibly requiring her to have an impersonal relationship with her fetus as it grows and moves inside her. This clause reveals that she is to be considered merely the producer of the commissioned child, not its mother. Indeed, precisely because she agrees in writing to form an impersonal relationship with the child (irrespective of whether she acts, or is capable of acting, on the promise), she can be deemed unfit to rear it.\textsuperscript{139} But, of course, it is descriptively untrue that a pregnant woman has an impersonal relation with her fetus despite any obligation she might have assumed to attempt to create such a relation.

Not only is the carrying woman required by the agreement to have an impersonal relationship with the fetus, the agreement is structured so that the commissioners' relationship with the fetus, will also be impersonal. An impersonal relationship between commissioners and the fetus is effected by two provisions in commercial arrangements. The first is the clause requiring the carrying woman to undergo an amniocentesis test\textsuperscript{140} and to abort the fetus if the commissioning man requests.\textsuperscript{141} The consequence of this term is that


\textsuperscript{139} Even when she denies the impersonality of the relationship and recognizes the child as her own, her previous assent to regard her offspring impersonally can be seen to entail her maternal unfitness. This was the decision of the lower court in Baby M. Although Mary Beth Whitehead denounced the agreement she was condemned for having entered it in the first instance. (Baby M, 1987, supra, note 138 at 1168. See also Sharyn L. Roach Anleu, "Reinforcing Gender Norms: Commercial and Altruistic Surrogacy" (1990) 33 Acta Sociologica 63 at 67.)

\textsuperscript{140} Baby M Agreement, paragraph 13; Keane Agreement, paragraph 9, supra, note 138. Brophy does not mention amniocentesis.

\textsuperscript{141} Baby M Agreement, paragraph 13, supra, note 138. The Keane Agreement, paragraph 9 (doubtless in response to the Baby M decisions which held that the abortion clause was void), states that the commissioning man may not require the carrying woman to have an abortion. Despite this admission, it remains practically possible for the commissioning man and the broker to threaten a carrying woman whose fetus has been discovered to have an anomaly, so that she will decide to have an abortion. The threat can be a refusal to accept the child and a refusal to pay her.
those commissioners who insist on the performance of the test are only provisionally committed to the growing fetus; because the child might be handicapped and therefore aborted, the commissioners might be tempted to await the test results before allowing themselves to develop any emotional attachment to the fetus. The second clause which creates an impersonal relationship between the commissioners and the fetus is that which states the commissioners have no obligation whatsoever to the child should the commissioning man’s sperm not have participated in the child’s conception. The commissioners will be unlikely to know whether the child is related to the commissioning man until after birth when blood tests are performed; therefore, during the entire period of pregnancy, the commissioners will not be confident that they will rear the child. The effect of these two clauses is to distance the commissioners emotionally from the fetus. Moreover, the practicalities of the arrangement will often entail that the commissioners are physically distanced from the fetus as well. Because the relationship of the commissioners to the carrying woman is intended to be impersonal, it is unlikely that they will be in a position physically to speak to the fetus or to stroke it through the carrying woman’s abdomen. Thus, a preconception arrangement under the assumption of market norms implausibly requires that, during its gestation, a commissioned child should have a personal relationship with no one.

Clearly this is not in the child’s interest. If no adult is to be personally involved with the fetus during pregnancy, who will be primed to be responsible for it at birth? Of course, if the fetus is carried to term and blood tests verify that the commissioning man provided the sperm, then the commissioners will, under the terms of the agreement, assume

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143 Brophy Agreement, paragraph VI; Keane Agreement, paragraphs 10 and 15 (c)(3) and Baby M Agreement, paragraph 4 (c)(3), supra, notes 138. See also ABA Proposal, section 6, supra, note 25.
144 Of course, whether the commissioning man is the father can be determined using the fetal cells in the amniotic fluid and a sample of his blood. But amniocentesis probably does not often take place because it is a procedure with a risk of miscarriage, is not usually medically indicated for women under 35 (most carrying women are under 35) and for reasons to be detailed in the next chapter in section 5.3.1, it may not legally occur without the carrying women’s consent.
responsibility. But if, as has happened, the child is born with a handicap and/or is shown not to be genetically related to the commissioning man, it is likely that no one will be prepared to care, and make important medical decisions, for the child.

Market relations in preconception arrangements require that impersonal relationships obtain both between the parties to the agreement, and between the parties and the fetus. But because the relations between the parties are not in fact bilaterally impersonal, it is both incorrect and unfair so to characterize them. Moreover, the agreement's attempted imposition of impersonal relations between pregnant woman and fetus, and between commissioners and fetus entails that, during pregnancy, no one is to have a personal relationship with the fetus; this is not in the interests of the child. For these reasons, and contrary to the proponents, it is descriptively inaccurate and morally impermissible to assume that, in the context of preconception arrangements, the relations between the parties and between them and the commissioned child, are and ought to be impersonal.

4.4.3. Pursue Own Advantage

The second characteristic of market relations is that participants are free to pursue their individual interests unrestrained by any consideration of other people's advantage. According to Anderson, each party to a market transaction is expected to take care of

145 On January 10, 1983 in Lansing, Michigan, Judy Stiver gave birth to a baby boy with an abnormally small head which is usually a sign of mental retardation. He also developed a life-threatening streptococcal infection. The physician asked Judy Stiver for permission to treat the baby with antibiotics; Mrs. Stiver claimed that she could not grant permission because she was a carrying woman and felt "no maternal bond to the child". When the commissioning man was contacted in New York, he refused to allow the baby to be treated because his marriage had dissolved and he did not wish to care for a seriously ill child. Unwanted by both the carrying woman and the commissioner, the child became a ward of the state. (Eventually it was revealed that Malahoff's sperm had not participated in the child's conception and the Stivers assumed responsibility as parents of the boy. They sued the broker Noel Keane arguing (inter alia) that he neglected to screen the semen for disease. The broker claimed he owed no such duty of care. The Michigan Court of Appeal disagreed. Stiver v. Parker 975 F.2d 261 (6th Cir. 1992)) Louis Waller, supra, note at 120; "A Surrogate Mother's Story" Newsweek, February 14, 1983, at 76; and Lori B. Andrews, Between Strangers, supra, note 35 at 42-43. See also discussion above at note 95.
himself and not to depend on the other to look after his own interests.\textsuperscript{146} This characteristic is assumed by proponents of preconception arrangements. As we have seen in the discussion of patriarchal ideology,\textsuperscript{147} three aspects of female reproduction must be controlled in order for a man to gain his child through a preconception arrangement: the sperm must be his, the woman must be prevented from aborting the fetus or otherwise harming it during gestation, and she must be forced to relinquish it if she refuses to do so willingly.\textsuperscript{148} Thus, to gain the advantages which the commissioning man seeks, he must pursue them at the cost of the carrying woman's bodily autonomy.

Even though the proponents assume that at least the commissioning man has limited freedom to pursue his own individual advantage, it is not descriptively true that parties to a preconception arrangement each have such freedom. In practice, carrying women have much less freedom than commissioners to gain the best deal possible for themselves. As we have seen,\textsuperscript{149} carrying women do not have bargaining power equal to that of commissioners despite the fact that they ought to be in a superior bargaining position given that demand exceeds supply. Moreover, and also as demonstrated above,\textsuperscript{150} the financial, social and psychological inequality of carrying women as a group entails that they are expected to be submissive, caring and generous and therefore not desirous of altering any terms of the standard form agreement. Indeed, they have been criticized for their selfishness in

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\textsuperscript{146} "Ethical Limitations", \textit{supra}, note 105 at 183. \\
\textsuperscript{147} \textit{Supra}, text at notes 1-5 \textit{et seq}. \\
\textsuperscript{148} Each of the proponents assumes that a commissioning man is entitled to pursue at least two of these three advantages to the greatest extent possible with relatively little limitation. All the proponents either imply or expressly state that a commissioning man need not accept a child which is genetically unrelated to him. (\textit{Supra}, note 20.) One proponent expressly states that he would permit an exclusively gestational woman to be sued if she has an abortion. (Robertson, "UK Colloquium", \textit{supra}, note 19 at 17-18.) And all the proponents except Trebilcock contemplate forced relinquishment of the child. (Trebilcock, \textit{supra}, note 19.) Trebilcock does, however, contemplate forced relinquishment if, by the end of the opting-out period, the carrying woman has not taken positive steps to renounce her promise to surrender the child. \\
\textsuperscript{149} \textit{Supra}, Chapter Two, section 2.4., "Argument that Practice Promotes Aggregate Welfare". \\
\textsuperscript{150} \textit{Supra}, Chapter Three, section 3.3.4.
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attempting to negotiate better terms.\textsuperscript{151}

Not only is it descriptively inaccurate to claim that the parties to a preconception arrangement are each free to pursue their own advantage to the greatest extent possible, it is not normatively appropriate that the parties to such an arrangement have such freedom. The freedom commissioners seek would unjustifiably limit a carrying woman's freedom in an area which is central to her human dignity, \textit{viz.}: her sexuality and reproduction. As shall be argued below in Chapter Five, a background condition for autonomy is the existence of a web of relationships; the unwanted severance of significant relationships jeopardizes autonomy. In seeking to have control over the carrying woman's sexual relations with her husband or partner, her decision-making power concerning the procedures of amniocentesis and abortion, and her on-going relationship with her child once born, the agreement threatens the carrying woman's autonomy in a manner which is morally unacceptable. Moreover, the fact that the carrying woman decided to cede control over intimate aspects of her life to the commissioners does not render the decision morally acceptable; a decision which disempowers an actor to make important decisions in the future concerning the maintenance of significant relationships is not one which can be described as "autonomous" for it threatens the existence of autonomy in the future. In sum, it is descriptively untrue that both parties pursue their own advantage to the greatest extent possible and it is unacceptable normatively for the commissioners to be permitted to do so. Thus and despite the proponents' assumptions to the contrary, it is not demonstrated that the second characteristic of market relations does or should prevail in preconception arrangements.

4.4.4.  \textbf{Exclusive and Rival in Consumption}

The third characteristic of the social norms governing market relations identified by Anderson is that the parties' interests can be defined only with respect to goods that are exclusive and rivals in consumption. An exclusive good is one where access to its benefits can be limited to the purchaser. A good is rival in consumption if the portion that one person consumes reduces the total amount of it available to others.\textsuperscript{152}

\textsuperscript{151} See Chapter Two, note 144 and Chapter Three, text at notes 288-289.
\textsuperscript{152} Anderson, "Ethical Limitations", \textit{supra}, note 105 at 183.
The proponents' arguments each assume these characteristics of the commissioned child. They presuppose that the carrying woman's relationship with the child will end when she relinquishes the child to the commissioners at birth; thus, the arguments assume that the child is "exclusive" insofar as they do not contemplate that custody be shared or that the carrying woman have access to the child. The arguments also presuppose that the child is a rival in consumption insofar as its years of childhood and early adulthood, when enjoyed exclusively by the commissioners, cannot later be retrieved to be enjoyed by the carrying woman.

In positing that the commissioned child has these characteristics, the proponents' arguments treat the child as a commissioned product. Once born, it is to be surrendered forever to the commissioners so they might find exclusive gratification from its life and growth independently of the supplier of the good (the carrying woman) who is not to share in any of the pleasures and responsibilities of its existence. This treatment of the commissioned child as a good rather than a person is consistent with the norms of market relations, and raises two important questions. First, is it appropriate for a private agreement among strangers to determine in advance of conception who shall have custody of a child? Second, does the agreement to relinquish the child in exchange for payment constitute the sale of a baby and, if so, can such treatment of a human being be justified?

It is not appropriate for a private arrangement among strangers to decide before conception who shall rear a child. When adults come together deliberately to bring a child into the world and then to separate it from one of its parents, they are doing two unacceptable things. The first is that they are knowingly creating the conditions in which their child cannot live with both of its parents. This situation, which ordinarily occurs because of death or divorce, is unfortunate for children and causes them considerable sadness. For this reason, it ought not deliberately to be brought about. Secondly, the parties determine who shall have custody on the basis of what they want rather than what the child needs; an agreement about custody could be made only in the adults' interest because the child, as yet unconceived, has interests which are not know with any specificity. Yet, as has been argued above, the utter dependence and vulnerability of children require that their
interests be placed above those of adults. Their interests, not adult desires, should determine custodial arrangements.

The second question raised by the proponents' assumption that a commissioned child can be treated as a market good, is whether the agreement to relinquish the child in exchange for payment constitutes the sale of a baby and, if so, whether this is justifiable.

All the proponents contemplate that the transaction will or might involve the payment of money by the commissioners to the carrying woman. Four of the proponents specifically address the nature of this payment and deny that it constitutes payment for a baby. Robertson argues that the money paid to the carrying woman is payment for "renting her womb to another couple"; and is compensation "for [her] considerable efforts". In Robertson's view, "it is only fair to pay [carrying women] for their labour, especially when sperm donors and all sorts of other physical labourers are paid".

Andrews agrees with Robertson that the payment represents a fee for service, but argues in the alternative that if it is payment for a purchase, that which is purchased is not a baby. She states, "The money is being paid to enable a man to procreate his biological child; this hardly seems to fit the characterization of a sale". Alternatively, she argues, if it is a sale, "At most ... I am buying not a child, but the pre-conception termination of the mother's parental rights". This is, in Andrews' view, no different than what happens in donor insemination where "for decades, the pre-conception sale of a father's parental rights has been allowed".

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153 Supra, Chapter 3.3.1.1.
155 Robertson, "Embryos", supra, note 40 at 1023.
156 Robertson, "Burden of Proof", supra, note 154 at 22.
157 Ibid.
158 Andrews, "Challenge for Feminists", supra, note 154 at 73.
159 Ibid.
Trebilcock argues in a similar fashion. First, he claims that the payment represents a legitimate fee for service. He writes,

The birth mother is providing a service involving considerable labour and time, a dramatic change in lifestyle, and additional responsibilities towards a potential human being. In any other context the failure to remunerate would likely be unconscionable.\(^\text{160}\)

Then, like Andrews, he argues in the alternative: if anything is purchased, it is a right to a relationship with a human being not a human being itself. Trebilcock quotes with approval Eric Mack who writes,

What is paid for when one "buys" a child is the opportunity to become a parent to the child (the child it will become through one's parentage of it); one does not buy that developing child and one's relation to it. The costs incurred for such an opportunity can hardly be identified with the value (even the discounted value!) one enjoys in the child.\(^\text{161}\)

Posner, too, denies that payment constitutes payment for a baby, but he does so in a slightly different way. First, he states that a carrying woman could not sell the baby if she wanted to for "the surrogate mother no more 'owns' the baby than the father does".\(^\text{162}\) Secondly, like Andrews and Trebilcock, he claims that.

What she sells is not the baby but her parental rights, and in this respect she is no different from a woman who agrees in a divorce proceeding to surrender her claim to custody of the children of the marriage in exchange for some other concession from her husband or from a sperm donor who receives cash, but not parental rights, in exchange for his donation.\(^\text{163}\)

Thus, the four proponents who address the issue all deny that the money paid by the commissioners to the carrying woman is payment for a baby. As shall be demonstrated, however, none of their arguments is compelling.

The first argument is that the payment is a fee for service, the services being the carrying woman's time and effort in pregnancy. Yet, if it were true that the agreement is a

\(^{160}\) Trebilcock, "Limits of Freedom of Contract", \textit{supra}, note 19 at 52.
\(^{163}\) \textit{Ibid}.
service agreement then it would make no sense for the proponents to argue that the child be surrendered by force if necessary. Specific performance of an agreement for gestational services would entail simply requiring that the woman carry the child to term; by the end of the pregnancy she would have successfully fulfilled the agreement to provide gestational services. But there are two problems with this characterization of the agreement as one for services only. First, a court will not compel the performance of contracts of personal service because it is considered improper to make a person serve or employ another against his or her will. Second, the commissioners would not in fact be content with mere performance of a promise to gestate a child. They do not seek only the satisfaction of knowing that a child has been brought to birth; they want actual custody of the child. This requires more of the carrying woman than the provision of gestational services; it requires her to provide and transfer a human being.

The fee for service argument fails for two other reasons. The first is that it assumes that pregnancy is a form of labour which can be hired. But, as has been demonstrated in the previous chapter, being a carrying woman is not a job in any ordinary sense of the word. Second, the argument posits that being pregnant is a service that a woman performs for a man: in Andrews’ words, "to enable a man to procreate his biological child". To treat gestation and childbirth as a service that individual women provide to individual men is, however, to perpetuate a patriarchal conception of the relations between women, men and children. On this view, what a man provides in a brief physical act is of greater significance than the women’s similar genetic contribution and nine months of gestation, labour and childbirth. Such a view holds that women bear and rear children for men. It is odd that, as a feminist, Andrews should advance such an argument. If a preconception arrangement involves merely the performance of gestational services, then it is work greater than that of men in conceiving children and it is that which all birth mothers perform. If it is a service for anyone, it appears to be a service not for men but for the child.

165 Supra, Chapter Three, section 3.3.4.1.
168 Ibid.
In the alternative, proponents argue that if the payment is for goods rather than services, then the good purchased is not a baby. Posner makes this claim by using a definitional approach. He states that a mother cannot sell a baby because she cannot own a baby. But it simply does not follow that if one does not own something, one cannot sell it. If it did, no one could be convicted of selling stolen property. 169

The second argument that the good purchased is not a baby holds that what is purchased is the preconception termination of the mother’s rights to the child and that this is permissible by analogy with sperm selling and separation agreements. Neither analogy succeeds however. To claim that the preconception termination of a carrying woman’s maternal rights is analogous to the preconception termination of a sperm seller’s paternal rights is to equate ovulation, gestation, labour, childbirth and lactation with ejaculation. But, of course, the first is not comparable to the second. Egg selling is more comparable to sperm selling though even this procedure is physically invasive and potentially dangerous in a way which sperm selling is not. Further, whereas selling semen is risk-free and involves relatively little emotional attachment of the man to his sperm, being a carrying woman involves the risks of pregnancy, labour and childbirth in addition to the emotional attachment which the woman usually has to her child. Therefore, no meaningful analogy can be made between being a carrying woman and selling sperm. 170

Nor is it persuasive to attempt to justify the preconception termination of maternal rights on the basis that this is no different from a "woman who agrees in a divorce proceeding to surrender her claim to custody of the children of the marriage in exchange for some other concessions from her husband." 171 As has just been argued, parents ought not surrender their rights and duties to their children in exchange for a personal benefit; they ought to act only in the interest of the children. 172 Moreover, the preconception termination

169 Ibid. at 75.
170 This point was discussed above in section 4.2 at footnote 44 and is considered in greater length in Paul Lauritzen, "Parenting for Profit", Pursuing Parenthood: Ethical Issues in Assisted Reproduction, (Bloomington, Indiana: Indiana University Press, 1993) at 98 et seq.
of maternal rights is unlike the termination of maternal rights at separation or divorce because in the latter instances, the mother is in a position to know the child and to assess how her obligations to it might best be fulfilled - by continued custody or access, or by termination of her rights and duties. In a preconception arrangement, the carrying woman does not know the child at the time she agrees to relinquish it for it is not yet in being, and therefore she cannot take the decision with regard to its interests.

A third variant of the argument advanced by proponents that if something is sold it is not a baby, is that what is sold is the "opportunity to become a parent to that child ... One does not buy that developing child and one's relation to it".173 This argument is, however, weak for there is no meaningful difference between purchasing a child and purchasing the right to become a parent to the child. Consider the sale of land; there is no difference between saying "I purchased Blackacre" and "I purchased the right to be Blackacre's landowner, to guide its development and to form a relationship with it". Of course it is true, as Robertson argues,174 that there are limits to the way one may treat a commissioned child. But that doesn't prove the child was not purchased. There are numerous restrictions also on how landowners might use their land and still landowners can sensibly be said to have purchased the land.

In sum, proponents claim that payment in a paid preconception arrangement is a fee for service or, in the alternative, a payment for something other than a child. These arguments are weak. The fact is that money is exchanged for the baby175 which entails that

174 "The purchasers do not buy the right to treat the child or surrogate as a commodity or property. Child abuse and neglect laws still apply, with criminal and civil sanctions available for mistreatment". Robertson, "Not So Novel", supra, note 20 at 33.
175 In the brokerage agreements quoted above, it is clearly stated that "the fee shall be paid upon the birth of the child". (Keane Agreement, paragraph 15(A); Baby M Agreement, paragraph 4(A), supra, note 138). See also Brophy Agreement, paragraph V, supra, note 138. If the payment is made on a monthly basis during the pregnancy, it might be argued that the fee is for providing the service of pregnancy. But such restructuring of the payment is merely a strategy to disguise the nature of the agreement - which is one of sale. For the reasons described above (there can be no specific performance of service agreements, the commissioners want the outcome - the baby - not the service of gestation, and gestating a baby is not properly understood as labour), making monthly instalment payments for the baby will not transform the sales agreement into a service agreement.
the transaction might simply and accurately be called a sale.

Are sales of babies morally permissible? The answer, of course, is no. Paying women for their children is wrong for at least two reasons. The first concerns the woman herself and the possibility of exploiting her; the existence of this possibility has been demonstrated above in Chapter Three. The second reason selling babies is morally wrong has to do with the commissioned child itself. The preconception arrangement is not primarily concerned (as it ought to be) with the child's interests because it treats the child as a commodity. That the wrongness of baby selling lies in the commodification of children shall be addressed in the next section.

This section has shown that the proponents assume the third characteristic of market relations defined by Anderson: that a commissioned child is exclusive and rival in consumption. In other words, the proponents presuppose that the child will be surrendered at birth into the exclusive custody of the commissioners and the commissioners' enjoyment of the years of childhood and early adulthood will be unrivalled by any similar enjoyment on the part of the carrying woman. Such an understanding of a child and of how one may deal with a child is morally impermissible. It is not appropriate that parents decide before conception who shall have custody of a child because this decision cannot be taken in the interests of the child as is required by a defensible understanding of right action. Further, to decide upon custody by agreeing that one parent shall pay the other for the child is baby selling which is contrary to ethical principles because it permits the exploitation of carrying women and the commodification of children.

4.4.5 Purely Want Regarding

The fourth characteristic of market relations identified by Anderson is that the parties' wants or desires are deemed sufficient to justify their participation in the market. The market responds to "effective demand", that is, desires backed by the ability to pay. This means that the market has no method of discriminating among the reasons people have for wanting or providing things because it does not regard any individual's preferences as less

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176 See section 3.3.4.
worthy of satisfaction than anyone else's provided one can pay for one's own satisfaction. In other words, the market can draw no distinction between wants and needs.\textsuperscript{177}

This want-regarding nature of demand is presupposed by the proponents. Robertson claims the existence of a right to "procreative liberty" which entails, among other things, the right of married and single persons "to enlist the aid of gamete and womb donors"\textsuperscript{178} and to pay those "donors" for the goods and services they provide. For Robertson, it is sufficient that the commissioners wish to purchase the "missing factor of reproduction" to justify its provision. Andrews similarly argues that the commissioners' desires backed by their ability to pay is enough to justify their participation.\textsuperscript{179} For Posner and Trebilcock, the very fact that the arrangements gratify wants is sufficient reason for the existence of the market. The OLRC and AFS adopt a slightly different approach in arguing that the intense desire for a commissioned child is a medical need. In this way, they suggest that the practice is not market-based (that is, not responsive to demands backed by the ability to pay), but is a medical response to medical need.\textsuperscript{180} But this suggestion is false. Neither the OLRC nor the AFS recommend restrictions to limit commissioners to those with "medical need".\textsuperscript{181} Obviously, and contrary to the expressed view of the OLRC and the AFS, the practice is not based on medical need but on demand backed by willingness to pay.

A corollary of the view that demand for a commissioned child may be justified on the basis of want is that demand ought to be satisfied irrespective of reasons commissioners might give for wanting the child. For all the proponents, the commissioners' reasons for participating in a preconception arrangement are irrelevant (apart from the OLRC and AFS's concern to limit the participation of vain or busy career women.\textsuperscript{182}) Indeed, it would be, in

\begin{enumerate}
\item Anderson, "Ethical Limitations", supra, note 105 at 183.
\item "Embryos", supra, note 40 at 961.
\item Robertson, "Challenge for Feminists", supra, note 154 at 73.
\item Andrews, OLRC, supra, note 19 at 232; AFS, supra, note 19 at 68S.
\item For example, as we have seen, the OLRC and the AFS view as legitimate the "need" of a man for a genetically-related child where his wife or partner is simply too ill to be pregnant. In such circumstances and where the ill woman is expected to rear the child from infancy, the agreement might satisfy his wants but not her medical needs. (Supra, Chapter 2.5.)
\item OLRC, supra, note 19 at 237; AFS, supra, note 19 at 65S.
\end{enumerate}
the opinion of the majority of proponents, an unacceptable limitation on commissioners’
freedom to inquire into their reasons for seeking a commissioned child. The proponents’
arguments are primarily concerned with establishing that participants should be free to satisfy
their desires rather than ensuring that the practice promotes the interests of children.

This focus of attention on the adults’ desires rather than the prospective child’s needs
and interests highlights the chief problem with preconception arrangements. A practice of
procreation must be evaluated according to whether it is a good means to bring children into
the world. One criteria of evaluation is how the practice encourages the prospective parents
to regard the child. A good practice is one which, among other things, views the child as
a valued, vulnerable human being and therefore encourages responsible parenthood. A
practice of procreation which does not consider children’s interests or considers them to be
insignificant is therefore unlikely to be a good way to bring children into the world. That a
preconception arrangement aims to meet the desires of the parties at the potential expense of
the child and in this way treats the child as a commodity is apparent in a consideration of
both the agreements and its notable lack of the requirement of a home study.

Preconception arrangements aim to transfer custody of the commissioned child in
circumstances that suggest the self-interest of the parties is the central goal. For example,
where the carrying woman receives a financial benefit or other consideration for
relinquishing custody, her self-interest arguably motivates her decision to enter the
arrangement rather than any concern for the proper discharge of her parental duties. Where
she receives no financial benefit, or where she is principally concerned to help the
commissioners, her motivation is nevertheless to gratify the desires of adults and not
personally to attend to the child once born. The commissioning man similarly appears not to
be motivated by the needs of the child. By requiring the carrying woman to reimburse him
for any child support he is ordered to pay in the event he does not gain custody, the

183 Robertson, “Embryos”, supra, note 40 at 962-963; Andrews, “Challenge for
Feminists”, supra, note 154 at 73; Posner, “Sex and Reason”, supra, note 19 at 425
and 429; and the OLRC, supra, note 19 at 238.
184 See Chapter 5.
185 Brophy Agreement, paragraph XIII, supra, note 138. Trebilcock specifically
advocates that the commissioning man not be obligated to pay child support should he
not have custody of the commissioned child. “Limits of the Freedom of Contract”,
supra, note 19 at 56.
commissioning man evinces a lack of concern for the child’s well-being; if the carrying
woman needs the court-ordered support to care for the child, her attempts to reimburse the
commissioning man will be to the detriment of the child. Further, to the extent that the
commissioning man reserves the right to refuse to accept a child born because of the
agreement (in that she conceived - perhaps inadvertently - by the sperm of another man), he is not concerned with the child’s interests but his own self-interest in fathering a
genetically-related child.

Not only do specific terms of the typical preconception arrangement permit the self-
interest of the adults to prevail over the needs of the child, the agreement itself does not
require, and the majority of proponents do not advocate, that the commissioners be
studied to ensure they will rear the child caringly, competently and in the child’s interests.
The agreement and the arguments of the majority of proponents appear not to address
seriously the question of whether the commissioned child will be transferred into a good
home. It seems that the intended genetic link between the commissioning man and child is thought to be sufficient to establish that the child will be well cared for by the
commissioners; as the AFS argues, "because the child will be reared by the genetic father
and his wife, it may be more likely that the rearing father will have a greater sense of
responsibility for the child than if the child were turned over to a stranger". Yet, this
assertion raises two questions: (1) Is it, in fact, so probable that a genetic link will ensure

186 This refusal of the commissioning man to take any responsibility for a child not
     genetically-related to him is endorsed by all the proponents. See supra, text at note 20.
187 See argument against home studies advanced by Andrews, "Adoption Model", supra, note 19 at 14-15. The OLRC recommends that the court charged with approving an
     arrangement in advance of conception should be required
to be satisfied that the intended child will be provided with an adequate
upbringing, and, in making this determination, the court should be required to
consider all the relevant factors, including the marital status of the applicants,
the stability of their unions, and their individual stability.
OLRC, supra, note 19 at 239. Nevertheless, the OLRC would not permit a home
study to be conducted for the purposes of this determination. OLRC, supra, note 19
at 234.
188 and, in exclusively gestational arrangements, the intended genetic link also between
commissioning woman and child.
189 AFS, supra, note 19 at 72S.
competent rearing, that the state need not yet the commissioners to ensure that the child will be cared for?; and (2) Is it appropriate to regard the commissioned child as an item which can be allocated to persons on the basis of their desire for the child?\textsuperscript{190}

For a child to be treated as a human being and not an item of commissioned property, its interests not only must count but they must prevail over the interests of adults. In the practice of preconception arrangements, it is not self-evident that the contribution of gametes by adults will guarantee that a resulting child will be satisfactorily attended to by the gamete provider(s) and that they will thereby fulfil their duties toward the child. Such a case must be made because, in the context of a preconception arrangement, the commissioners do not generally have any connection other than possibly a genetic one to the commissioned child. It shall be argued that it is the existence of a nurturing relationship which ought to prevent state inquiry into the custodial ability of parents. Where no nurturing relationship exists, the child’s interests will be served by state consideration of the child’s prospective home.

As we have seen, the activities of begetting a child by gamete donation are insignificant compared to the sustained and lengthy period of nurturance undertaken by every pregnant woman.\textsuperscript{191} A carrying woman’s parental role is assumed during pregnancy because she is caring for the child in a manner constitutive of parenthood. Begetting a child or commissioning a child do not entail caring for the child and thus are not evidence of responsible parenthood. To be sure, a commissioning man might be as capable or more capable than the carrying woman of attending to the child’s needs. But he is not yet a social parent and therefore has not demonstrated the same level of commitment as the carrying woman. That he cannot himself be pregnant is beside the point. If caring for a child is morally significant in evidencing commitment to a child, then we must acknowledge that only women care for children in their bodies prior to birth.\textsuperscript{192} Of course, a man can care for the fetus by attending to the pregnant woman, but not by simply contributing genes and then removing himself for nine months. That activity of detached, and often geographically distanced waiting, entails no actual caring for the child and thus no evidence of whether the

\begin{footnotes}
\footnote{190} This situation arises where the commissioners have no fertile gametes to contribute.  
\footnote{191} \textit{Supra}, text at notes 44 and 188.  
\footnote{192} Paul Lauritzen, "Parenting for Profit", \textit{supra}, note 170 at 109-110. 
\end{footnotes}
commissioners will care for the child if they assume custody. Clearly, the focus of ethical concern in cases where commissioners want a child, ought to be on the child itself. In attempting to determine whether a person will care adequately for the child, it is relevant to look for past acts of nurturance. When there are none, it is morally justifiable for the state to inquire further into the home life of the commissioners.

Secondly, to regard the commissioned child as an item to be allocated to persons who want it without consideration of whether the transferees will care for it or of whether the child will suffer from the rupture of its relationship with the woman who bore it, is to treat the child as a thing without interests of its own worthy of respect. This commodification of children is morally unacceptable for at least two reasons. First, it unfairly promotes the desired relationships of adults whilst deciding for the child in the interests of adults that the child’s important relationships shall be discontinued. Second, it puts a market value on a human which as Radin argues, might harmfully affect the child’s ability “to develop a self-conception as a unique and unfungible human being.”\textsuperscript{193} This is most important. If children as persons can be detachable, saleable, tradeable, equatable with dollars and therefore fungible, then their personhood is fungible.\textsuperscript{194} But since personhood is by definition unique, to sell a person is to disregard its very essence. To treat a child as an object for sale is to deny its humanity. This is obviously morally unacceptable.

In sum, the proponents assume that the fourth characteristic of market relations obtains in preconception arrangements, \textit{viz.}: that the parties’ desires will and ought to be satisfied simply because the desires exist and are backed by the ability to pay. But to accept that commissioners ought to have custody and be charged with all parental rights and responsibilities towards the commissioned child simply because they want the child and without regard to the child’s welfare, is to adopt a market view of parenthood (that the status may be achieved solely on the basis of desire backed by the ability to pay) and to view the child as a commodity. Neither view is morally tenable.

\textsuperscript{194} \textit{Ibid.} at 144.
4.4.6 Market Assumptions: Conclusion

We have seen that the proponents regard preconception arrangements in the context of a market ideology. This ideology adopts four norms of market relations: relations are impersonal; persons are free to pursue their own advantage to the greatest extent possible; the goods traded are exclusive and rivals in consumption; and the market is purely want regarding. Yet it is not descriptively true that the relations between the parties to a preconception arrangement fulfil their market norms. Moreover, such relations between the adult parties and between the parties and the commissioned child are morally impermissible. First, the relations between the adult parties are not bilaterally impersonal nor is it just that they be viewed as impersonal. Whereas the carrying woman is primarily motivated by concern for the personhood and emotions of the commissioners, they use the impersonal value of market relations to absolve themselves of any commitment to the carrying woman and her personal needs beyond the payment of money. This lack of reciprocity leads to injustice because the commissioners have the benefits of altruism and the market but the carrying women has only their burdens. Further, to require, as the preconception agreement does, that no adult have a personal relationship with the child during pregnancy is not in the interests of the child. Second, the freedom to pursue one's own advantage is a freedom granted in practice only to the commissioners, and such freedom of the commissioning man to limit the carrying woman’s sexual and reproductive autonomy (her choice of sexual partners, what surgical procedures she will undergo, and whether she will relinquish her child for adoption) is not morally justified. Third, private arrangements between parents may not morally treat a child as a commissioned product and assign custody of it in advance of conception because such a decision cannot be taken in the best interests of the child for the child is not yet in being. Moreover, the arrangement involves the sale of a baby which is contrary to moral norms which would prevent the exploitation of mothers and the commodification of children. Fourth, the notions that it is appropriate for adults to order a child if they want a child and that their motivations ought not to be scrutinized, are circumscribed by the ethical principle that requires the interest of children to prevail over those of adults. Even though proponents argue that the strength of the commissioners' desire for a child and the fact of genetic relation between the child and the commissioners are enough to guarantee that the child will be adequately cared for, the argument is not
sufficient. The strength of the desire for something is not per se evidence that the thing will be cared for, and genetic relatedness in itself does not entail any acts of nurturance which would create a social relationship between commissioners and the child and from which the state could determine whether the child's interests will be served in the commissioners' custody. Thus, to regard (as do the proponents) custody of the child purely from the perspective of the commissioners is to treat the child as a market good with no interests of its own or with interests which are properly subordinated to those of adults.

4.5 Ideological Assumptions: Conclusion

This chapter so far has argued that the proponents of preconception arrangements share certain ideological assumptions concerning patriarchy, technology and the market. Within these overlapping contexts, proponents claim that the contract model would best govern the practice of preconception arrangements. But their ideological assumptions are open to criticism and lead to flaws in their descriptive and normative analysis.

The proponents' patriarchal assumptions cause them (1) incorrectly to claim that the practice of preconception arrangements enhances reproductive freedom when, in fact, it increases control over women to reduce paternal uncertainty; (2) unjustifiably to discount the significance of gestation; (3) wrongly to state that genetic contribution alone establishes social relationships; and (4) unwisely to argue that maternity ought to be determinable by the same means as paternity.

The proponents' technological assumptions lead them variously (1) to mischaracterize preconception arrangements as necessarily technological and to fail to show that, even when technological, the practice represents an advance in human progress; (2) to suggest that the practice in its simple form could be conducted as a clinical experiment when, in fact, it would be a social experiment; (3) to argue that the imperatives of technology ought, in certain circumstances, to override concerns for the well-being of the carrying woman and her family; (4) to describe women as machines and babies as products; and (5) thus to transform human procreation into the production of humans for market.

The proponents' market assumptions encourage them to view the relations between the carrying woman and the commissioners, and between the adult parties and the commissioned child, as market relations. Yet in the context of procreation which creates profound vulnerability in the adult parties and brings a needy and dependent human to life,
such relations are morally impermissible.

4.6 Summary of Critique of Contract Model

As has been stated, the dissertation's principle task is to determine whether a case has been made that family law's jurisdiction over social practices of human procreation should be disregarded and that contract law should govern preconceptions arrangements. The case has been advanced in six leading arguments. Each of these arguments has been demonstrated in Chapters Three and Four to rely upon a contract model of regulation which is flawed for being premised on a thin understanding of persons and on unquestioned patriarchal, technological and market-driven assumptions. This section will summarize the general reasons that the case has not been made that contract law should govern preconception arrangements; it will do so by showing that the contract model of legal regulation of preconception arrangements is both inapplicable and inappropriate.

4.6.1 Inapplicability of the Contract Model

It will be recalled that the contract model is defined by its assumptions about the nature, effect and function of contract. A contract is assumed to be a voluntary and informed exchange of promises which give rise to legal obligations. If the promises are not fulfilled, the defaulting party will be liable to make restitution to the innocent party of sums given him or her, and to reimburse the innocent party for expenses incurred in reliance. Importantly, contract law protects a third interest, the expectancy interest, which requires the party in default to put the innocent party in the position he or she would have been in had the promise been fulfilled. In other words, a legally-recognized effect of contract is to create an expectation interest which the court will protect. A third aspect of contract is that it secures the parties' expectations by its instrumental power to facilitate planning for transactions and contingencies.

Examples of agreements which have these three characteristics of the contract model, are agreements of bailment, lease, service and sale. An agreement which does not have the characteristics of the contract model is an agreement of marriage. Although a marriage

195 See the Introduction to this work, "Theoretical and Practical Aims".
196 Supra, Chapter 2, section 2.6.
agreement must be voluntary and informed to be valid and it gives rise to legal obligations, the law does not recognize it to create an expectation interest which the legal system ought to protect. What the parties agree to in marriage is to love each other, to live together and to be sexually faithful to each other. The classic expectation of almost every couple who exchange wedding vows is that they will live happily ever after. This is not an expectation which the law can protect, nor does the law consider it desirable to force people to live together who no longer wish to do so. Although the reliance and restitutionary interests may be secured by the court in divorce settlements, the expectation interest, given its emotional content, is not susceptible to legal protection. For this reason, the contract model is inapplicable to a marriage agreement.

For similar reasons, the contract model is inapplicable to a preconception arrangement. Proponents argue, to the contrary, that preconception arrangements are in fact analogous to agreements which have the three characteristics of the contract model - agreements of bail, lease, service or sale. But none of these arguments is valid.

The analogy with bailment is made by Robertson and Andrews. As we have seen, each regards the carrying woman as the repository of valued property (i.e., the genetic material) which she merely bears and must "return" after birth. Yet a preconception arrangement is not like a bailment agreement because the subject matter of the alleged bailment (the gametes or the embryo) is wholly different from what is required to be surrendered at birth: the child. A preconception arrangement is no more a contract of bailment than an agreement to lend an artist paints is an agreement for the bailment of the painting which the artist creates with those paints. Whilst the paints are a necessary condition for creation of the painting, they are not a sufficient condition. So, too, are gametes or an embryo a necessary but insufficient condition for the birth of a baby. Only by discounting the creativity and effort of gestation and by regarding a pregnant woman as like a machine, can one argue that a preconception arrangement is a contract of bailment of gametes or an embryo.

Nor can it be argued, as does the AFS, that a preconception arrangement is

197 Supra, Chapter 4, section 4.2.
198 Supra, note 19.
analogous to a lease. Chapter Three demonstrated it makes no sense to suggest that a woman can rent her body because to rent space or equipment requires vacant possession and that the leased property be distinct from the person of the lessor. Neither of these situations obtains when a woman is pregnant. She cannot grant vacant possession of her body for she and her body are the same.

Proponents have argued that a preconception arrangement is analogous to yet a third type of contract: a contract for services. But the analogy is inapposite first, because the proponents do not wish the carrying woman only to perform the service of gestation; they desire the resulting child to be transferred at birth. Second, even if one could agree that a service agreement can entail the transfer of property, then the forced transfer of the child would constitute specific performance of the agreement which is a remedy unavailable in contracts of service.

A fourth type of contract to which a preconception arrangement is said to be analogous, is a contract of sale, either the sale of a baby or the sale of parental rights to the baby. But, as we have seen, it is morally impermissible to sell a baby and custody of a child ought to be transferred only in the child’s interests and not because parents wish to receive a personal benefit.

Thus, a preconception arrangement is not analogous to agreements which have the three characteristics of the contract model; a preconception arrangement is not like a contract

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199 Supra, Chapter 3, section 3.3.4.1.
201 Guest, supra, note 164 at 519. See earlier discussion of this point supra, Chapter 4, section 4.4.4.
203 Supra, Chapter 4, section 4.4.4.
204 As shall be discussed in Chapter 5, the sale of a baby is also illegal. See s.159 of the Child and Family Services Act, S.O. 1984, c. 55 as amended.
205 As shall be discussed in Chapter 5, this is also the legal position in Ontario, see Chisholm v. Chisholm; Re Cartlidge and Cartlidge; Reid (Gray) v. Gray, supra, note 172.
of bailment, lease, service or sale. On the contrary, a preconception arrangement is like an agreement of marriage in that the high, emotional and bodily expectations created by the agreement are not susceptible to legal protection. Just as when a marriage has irretrievably broken down, a court cannot and ought not to force the parties to love each other and to live together harmoniously; so, too, in a preconception arrangement is the expectation interest incapable and unworthy of legal protection in the event of default.

That the expectation interest attempted to be created by a preconception agreement is incapable and unworthy of legal protection can be demonstrated by examining again certain terms of the agreement. Recall that a carrying woman in a typical arrangement promises:

(1) not to "have any sexual intercourse from the signing of [the preconception arrangement] and preceding that time at least one cycle (one period) until the pregnancy has been confirmed in writing by the inseminating physician;"208

(2) not to smoke cigarettes, drink alcoholic beverages; use any illegal drugs, non-prescription medication or prescribed medication without the consent of the physician designated by the broker;209 and otherwise to adhere to all medical instructions of the attending physician;210

(3) to undergo an amniocentesis test211 and to submit to any medical test or procedure deemed necessary including but not limited to amniocentesis;212

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206 Section 9 (1) of the Divorce Act (1985, s.c. 1986, c.4) does impose upon lawyers who act for divorcing parties the duty to discuss with the party the possibility of reconciliation and the sections of the act that have as their object the reconciliation of spouses. Although the Act recognizes reconciliation as a desirable goal, it acknowledges that "the circumstances of the case" might be of "such a nature that it would clearly not be appropriate" for a lawyer to attempt to effect a reconciliation. Ibid. s. 9(1).

207 These terms were articulated above in Chapter One, section 1.4.1, and discussed in Chapter Four, section 4.4.3.

208 "Sample Contract", Appendix B, in Ragoné, supra, note 33 at 141 at 145, paragraph X.

209 Ibid, paragraph XI; paragraph XXIV in "Brophy Agreement", supra, note 138; "Baby M Agreement", paragraph 15, supra, note 138.

210 Paragraph 8 "Keane Agreement", supra, note 138.

211 Baby M Agreement, paragraph 13, supra, note 138; Keane Agreement, paragraph 9, supra, note 138.

212 Ragoné Agreement, paragraph XI, supra, note 208.
(4) not to abort the fetus but, if the commissioning man decides on the basis of the amniocentesis results that he does not want the child to be born, to undergo an abortion; 213

(5) not to form a parent-child bond with the fetus; 214

(6) to transfer custody of the commissioned child at birth to the commissioning man and to relinquish her maternal rights to the child. 215

To protect the expectation interest of the commissioning man in this agreement would require the court either to give damages for any breach of these terms or specifically to enforce them. But none of these terms can or ought to be legally protected. This is because either the promise is not capable of legal enforcement (for example, the promise not to form a parent-child bond with the fetus) or because it is not worthy of enforcement. Indeed, legally to enforce any of the aforementioned terms would violate the carrying woman's sexual and reproductive freedom as will be demonstrated below, 216 and would bring the administration of justice into disrepute. Consider, for example, the absurdity of permitting a litigant to claim damages against a woman for having sexual intercourse with her husband. Imagine the intrusive surveillance mechanisms which would be required to detect a breach of that term and the promise of the carrying woman not to smoke, drink alcohol or take non-prescription drugs. Consider also the physical force and police power which would be necessary to compel a carrying woman against her will to undergo amniocentesis and/or abortion, and to surrender her newborn. To require a carrying woman to pay damages for not abiding by these promises and the practicalities of attempting specifically to enforce them, are both intrusive and abhorrent. 217

213 Ragoné Agreement, paragraph XII, supra, note 208; Baby M Agreement, paragraph 13, supra, note 138. The Keane Agreement, paragraph 9, supra, note 138 and the Ragoné Agreement (doubtless in response to the Baby M decisions which held that the abortion clause was void) state that the commissioning man may not require the carrying woman to have an abortion.

214 Brophy Agreement, paragraph I, supra, note 138; Baby M Agreement, paragraph 1, supra, note 138; Keane Agreement, paragraph 11, supra, note 138; Ragoné Agreement, paragraph IV, supra, note 208.

215 Brophy Agreement, paragraph III, supra, note 138; Baby M Agreement, paragraphs 2 and 3, supra, note 138; Keane Agreement, paragraph 10, supra, note 138; Ragoné Agreement, paragraphs I and IV, supra, note 208.

216 Supra, Chapter 5, section 5.3.1.

217 This conclusion was reached also after extensive discussion above in Chapter Four, section 4.4.
For these reasons, the expectation interest which might be created in a party to a preconception arrangement is like the expectation interest created in an agreement of marriage; concerned as it is with intimate aspects of the body and emotions, the expectation interests of a preconception arrangement are incapable and/or unworthy of legal protection. Thus, a preconception arrangement does not fit the contract model because it does not create, and ought not to have the effect of creating, a legally enforceable expectation interest; the contract model of legal regulation cannot, therefore, be applied to preconception arrangements.

4.6.2 Inappropriateness of the Contract Model

Not only is the contract model inapplicable, it is inappropriate as a means to govern the practice for it would facilitate the creation of harm to individual women, children and other participants, and to women and children in society more generally. Although this point has been argued throughout Chapters Three and Four, it is worth summarizing the five general reasons that the contract model is a harmful means of regulating the practice.

The first reason that the contract model is inappropriate is that it discounts relationships and their value by its view that the freedom to bind oneself in advance is an important freedom. But negative liberty - the freedom (inter alia) to be left alone to enter agreements and to have them enforced - is a value which focuses primarily on the separate, isolated self, not the person in relationship. The contract model does not protect the freedom of the person in the new relationship which is the result of the agreement. Despite the harmful potential consequences of rupturing the relationship between mother and child and the fact that the mother may no longer wish to relinquish the child, the contract model can view the rupture only as an instance of personal freedom.\(^{218}\) It will be argued, on the contrary, that the undesired rupture of the mother-infant relationship is a violation of the mother’s autonomy.\(^{219}\)

Not only is the contract model insensitive to the relationship of mother and fetus and mother and child, it is inattentive to the effect of the arrangement on the other people with whom the direct participants are in relationship. These include the carrying woman’s other

\(^{218}\) This conclusion was reached also after extensive discussion above in section 4.4.4.

\(^{219}\) See Chapter Five, section 5.2.1.
children, her husband or partner, her parents, siblings and nieces and nephews - all of whom are potentially affected by the loss of the family member. Likewise, the contract model does not attend to the relevantly different position of the commissioners in a genetic-gestational preconception arrangement: whereas the commissioning man obtains a genetically-related child, the commissioning woman obtains her husband's child by another woman.\textsuperscript{220} If the commissioning woman views the problem as that they cannot together have a child, it is possible that she will regard such an arrangement not as a solution but as a form of rejection by her husband or partner. In these ways, the use of contract law to regulate preconception arrangements can cause harm to particular individuals, other than the carrying woman and child.

Further, the contract model in conjunction with a market ideology suggests that impersonal relations are appropriate in a preconception arrangement. But is not descriptively true that the parties have a bilaterally impersonal relationship and it is odd to argue that persons who come together to procreate ought to regard each other impersonally. Moreover, to the extent that the agreement requires or encourages the parents of the child each to have an impersonal relationship with the fetus during the pregnancy, the agreement is contrary to the child's interests.\textsuperscript{221} Thus, because it discounts the significance of relationships, the contract model's use in regulating preconception arrangements would cause harm to the carrying woman, the commissioned child, the commissioning woman and to relatives of participants.

The second general reason that the contract model is inappropriate to govern preconception arrangements is that it would cause harm to participants by permitting the exploitation of one party to the agreement; in this way, and as will be argued below,\textsuperscript{222} contract law regulation of the practice would violate the principle of equality. From a false premise that persons are equal and uncoerced the contract model is inattentive to the unequal positions of the parties to the agreement. The arrangement is said to provide the carrying women a novel form of employment yet, though it might provide her means to feed her family, it does so by requiring her to relinquish a family member.\textsuperscript{223} Moreover, the

\begin{itemize}
  \item \textsuperscript{220} Supra, Chapter Three, section 3.3.1.3.
  \item \textsuperscript{221} Supra, Chapter Four, section 4.4.2.
  \item \textsuperscript{222} See Chapter Five, section 5.2.2.
  \item \textsuperscript{223} Supra, Chapter Three, section 3.3.4.1
\end{itemize}
agreement takes advantage of the inequalities of sex, class and race;\textsuperscript{224} and it capitalizes on certain women's emotional vulnerability to feel special, to overcome an event or events in their reproductive or sexual past, and to respond to suffering by "giving the gift of life".\textsuperscript{225} In these ways, and despite the contract model's assumption that the parties are equal, a preconception arrangement can and does take advantage of the economic, social and psychological inequalities of carrying women. This is harmful to the individual women so exploited and it has the potential harmfully to alter the way all women of reproductive age are viewed.

A third general reason that contract law is not appropriate to govern preconception arrangements, is that it would harm women and children generally by altering our understanding of women's reproductive roles and the place of children in society; by changing procreation into production, the practice fails to maximize welfare. As a form of legal regulation of preconception arrangements, the contract model conceptualizes a carrying woman as an incubator which merely houses the fetus; as a vessel, she is required to abdicate her decision-making power over her own body as well as the pregnancy and she is deemed either to have no emotional reactions or to have emotional reactions which are of no relevance. This understanding of women as fetal containers is harmful to all women as it encourages their evaluation in monetary terms on the basis of their reproductive capacity and racial heritage, and renders them thing-like; commodified by this practice, they are more likely to be regarded as objects in other aspects of pregnancy and childbirth and in ways that will increase the suffering of women generally.

When women are perceived as baby-making machines, the child becomes a product. As such, the child is used as a means of exchange to satisfy the parents' desires and not as an end in itself. Moreover, once understood as a product, the child will doubtless be required to meet minimum consumer specifications before it will be accepted as the commissioners' child; the possibility that it will be rejected by both parents exists and indeed has occurred.\textsuperscript{226} Such occurrences encouraged by the contract model of procreation increase

\begin{itemize}
\item \textsuperscript{224} Supra, Chapter Three, section 3.3.4.2.
\item \textsuperscript{225} Supra, Chapter Three, section 3.3.4.3.
\item \textsuperscript{226} Supra, note 145.
\end{itemize}
the suffering of specific children and threaten the role of children in society generally by creating a climate of opinion which holds that it is appropriate to regard children as commodities. In these ways, the use of the contract model in preconception arrangement helps render procreation production, creating harm to women and children generally.227

The fourth reason that the contract model is inappropriate to govern preconception arrangement is that it causes harm to particular individuals and to society generally by making individual what is fundamentally a public concern, viz.: how to reduce the suffering of the infertile and childless. To claim that a preconception arrangement is a private commercial matter between private parties has the effect of ignoring prior unresolved issues. These are, first, whether in fact the matter significantly affects other specific individuals (such as the carrying woman's family) and society in general, and second, whether a private legal remedy is appropriate here to address the social and political problems of infertility, childlessness and inequality especially given that preconception arrangements violate the autonomy of the carrying woman.228 In failing to address these unresolved issues, the practice does not minimize suffering but at best transfers it from the commissioners to the carrying woman.229 At worst, it transfers pain from the commissioning man to the carrying woman, her partner, other children and parents and to the commissioning woman.

The fifth general reason that the contract model is inappropriate to govern preconception arrangements is that it would cause harm to women and children generally in its attempt to alter the method by which parenthood is determined. The practice advocates a test either of intention or of genetic relatedness. Yet a test of parental intention to assume responsibility for a child is not an appropriate means to determine parenthood. It cannot be universally applied because not all children are intended. Further, the subjective intention of the parties might be different from their intention objectively determined - raising questions of which test of parental intention to apply. More significantly, a test of parental intention to assume parental responsibility is inappropriate for it focuses on the interests of adults rather than the needs of children. Because of the vulnerability of children, their needs ought to be regarded as prior to adults' interests when choosing a method to assign legal responsibility

227 Supra, Chapter Four, section 4.3.
228 Supra, Chapter Four, section 4.5 and Chapter Five, section 5.2.1.
229 Supra, Chapter Three, section 3.3.1.2.
for children. As a consequence, parental responsibility ought not to be regarded as originating in an agreement between adult parties but as having been engendered by procreation and as creating a moral obligation owed to the child. Reproductive duties ought not, therefore, to be determined by intention and capable of limitation by consent expressed in a preconception agreement.

A second method of determining parenthood - that of genetic-relatedness - is also flawed because it would change the method by which maternity is determined. This is harmful to women generally in at least four ways. First, it devalues the substantial and real relationship between a mother and the child she carries in favour of an abstract relationship. Second, a decision that a pregnant woman is not the mother of the child she bears can lead to enormous restriction on her behavior and medical choices, particularly when her interests and those of the fetus conflict. Third, a genetic standard of maternity will permit even greater exploitation of minority women. Fourth, it will alter the experience of pregnancy for women by rendering maternity uncertain for the first time in human history.

Not only is the genetic standard for determining parental responsibility harmful to women, it is not in the best interest of children. It would create a situation in which a child can be born without at least one of its parents being present and it would prefer as parents those who merely intend to care for the child over those who have demonstrably cared for the child.

The genetic standard of maternity would also have potentially negative consequences for society generally. It would be unworkable in cases of gene splicing when the child's genes originate from more than two people. And in making maternity uncertain for the first time, it would distance us from the means by which we would render it certain by requiring the use of technology rather than our unaided senses. For all these reasons and because of concern for the important value of parental responsibility, the attempt to alter the existing standard of determining maternity is not in the interests of women, children and society.

230 This point will be argued further below in Chapter Five, section 5.2.5.
231 Supra, Chapter Three, section 3.3.1.1.
233 Supra, Chapter Four, section 4.2.
4.6.3. Basis for Rejection Summarized: Contract Model's Use Would Cause Harm and Violate Important Principles

A sustained analysis of the proponents' arguments and of the contract model on which they all rely, has revealed that the contract model is both inapplicable and inappropriate to regulate preconception arrangements. The arrangements are not analogous to agreements which do conform to the contract model: agreements of bailment, lease, service or sale. Further, the contract model is inapplicable because preconception arrangements do not give rise to expectation interests which are either susceptible to, or worthy of, legal protection. The contract model is inappropriate because when applied to preconception arrangements it causes or threatens harm to specific individuals (participants and non-participants in the arrangements) and to society at large, in particular women and children, in at least five ways: it (1) discounts relationships and their value; (2) leads to exploitation; (3) renders individual what is of public significance; (4) changes procreation into production; and (5) harmfully alters the method by which parenthood is determined. The demonstration that harmful consequences will or can result, introduces the claim, which shall be made more fully below in Chapter Five, that the use of the contract model to regulate preconception arrangements violates five important principles: autonomy, equality, welfare maximization, suffering minimization and responsible parenthood.

Thus, Chapters Two to Four have demonstrated that there are two sets of objections to using contract law to regulate preconception arrangements: first, it would facilitate the creation of harm to participants, non-participants and to society generally; and, second, it would violate five important ethical principles. This second objection and its relationship to the first shall be developed in the next chapter.

4.7 Conclusion

The foregoing three chapters considered the case for the endorsement and legal regulation of preconception arrangements using contract law. Chapter Two demonstrated that the arguments advanced by six proponents of preconception arrangements are seriously flawed and that the contract model of regulation which they advocate has a harmful outcome. Chapter Three elucidated the unarticulated assumptions about the nature of persons which the proponents and the contract model presuppose, and showed that this thin understanding of persons leads to flaws in analysis. Chapter Four demonstrated that the proponents'
arguments share certain ideological assumptions concerning patriarchy, technology and the market which are open to criticism and again lead to flaws in their descriptive and normative analysis. Chapter Four further criticized the contract model as both inapplicable and inappropriate.

Thus, Chapters Two to Four demonstrated that the case for using contract law as a means to regulate preconception arrangements has not been made, and has raised doubts about whether the practice should be socially endorsed. No convincing argument has been advanced that this practice by which women and men come together to have children - presumptively a family law affair - should be regulated by an area of law which has hitherto concerned itself with matters of commerce, with buying and selling. The foregoing three chapters have shown that the contract model of regulation should not be regarded as applicable or appropriate to govern preconception arrangements.
CHAPTER FIVE

THE WAY FORWARD: VALUES, THEIR ENDANGERMENT AND A PROPOSAL FOR LEGISLATIVE REFORM

5.1 Introduction

Having achieved the dissertation’s main task of determining whether a case can be made for contract law to regulate preconception arrangements, this chapter makes the claim that family law ought to apply. Although it might be argued that family law should govern because no argument has been successfully advanced to the contrary, it is important to make clear that there are additional, principled reasons for using family law to regulate this procreative practice. This chapter elaborates upon the five important values introduced in Chapter Four which should form the basis of legislative policy, and articulates three areas of special attention for legislators in this field. It further demonstrates how when preconception arrangements are viewed as contracts they endanger the values which deserve protection in human procreation. The chapter then argues that existing law - in particular, existing Ontario family law in the context of adoption and custody - is the best instrument for regulating the practice of preconception arrangements in Ontario for it would avoid much of the harm and potential harm threatened by contract law’s regulation and it already protects the important values which are likewise threatened. Moreover, this body of law attends to the three vital concerns (for women, children and society), is based on a richer understanding of human personhood than the contract model, and rejects the ideologies which have led to flaws in evaluating the practice. The chapter considers and dismisses the argument for legislative inaction, and concludes by relying upon existing law to present a specific proposal for legislative regulation of preconception arrangements.

5.2 Guiding Values and Particular Concerns

Preconception arrangements require a model of legislative regulation of the practice based on family law. The model proposed here assumes that women and men who procreate are responsible for the children which their bodily actions bring into the world and that the recognition of this responsibility exists in family law which provides social acceptance and support for human procreation. Although family law has been challenged as inappropriate by brokers and infertility practitioners (both of whom need contract law to engage profitably in
the practice of preconception arrangements), and by proponents (who view contract law as a beneficial form of regulation), contract law's regulation of the practice causes harm and threatens important values. For these reasons, the practice should be governed by a form of regulation which minimizes harm and protects the threatened values. The regulation which achieves this end is not fundamentally new but is derived from the values which underlie existing family law.

These values have already been introduced;¹ they are: autonomy, equality, welfare maximization and suffering minimization and responsible parenthood.² They will now be defined and it will be argued that these values support a socially responsible regulatory model consistent with family law and thus provide a sound basis for specific legislative proposals for the legal regulation of preconception arrangements.

5.2.1. Autonomy

"Autonomy" means self-governance. As Jenny Nedelsky writes, "to become autonomous is to come to be able to find and live in accordance with one's own law."³ This definition is a description of both a capacity possessed by a person and the conditions which make possible the existence of that capacity. To be autonomous entails both solely deciding as in "I alone decide how to realize my aspirations" and being unimpeded in deciding meaning "I am not prevented from deciding about my aspirations". The first aspect of the definition concerns a process within the individual; the second has to do with external constraint on the process or the outcome of the process. To the extent that the proponents are concerned with autonomy, their focus is on the second aspect of the

¹ Supra, Chapter 4.6.2.
² It will recalled that the proponents' arguments attempt to justify the legal permissibility of preconception arrangements on the basis that the practice accords with one of four principles: autonomy, equality, welfare maximization and suffering minimization. This dissertation challenges not the values used by the proponents but the content which proponents have given to them. Their definition of the values are too narrow chiefly because of their incomplete understanding of persons and their ideological assumptions. Not only are the proponents' values too narrowly defined to be adequate, the list of values is not exhaustive. Wrongly ignored is the value of responsible parenthood which shall be examined more fully below in section 5.2.5.
description of autonomy and they have a view of the first which is limited by their thin understanding of persons. It is the first aspect of autonomy which will be considered in order to claim that there are four conditions necessary for its existence: interdependence, lack of harm to others, adequate information and voluntariness.

As this dissertation has argued, to the extent that proponents view autonomy as an internal process, they regard it as concerning self-sufficient, independent, self-reliant, self-realizing individuals whose efforts are directed toward maximizing personal gain. Because, on this view, independent individuals are threatened by other self-serving individuals, rules are needed to protect themselves from undue intrusions. This heightened concern for unwelcome, external constraint on self-governance generates talk of rights, rational self-interest, expediency and efficiency. The result is that autonomy has become understood as individualism (a connotation which shall be called "individualism-autonomy"). Yet, as the dissertation has attempted to make clear, this depiction of the abstract individual is flawed because, inter alia, it does not illuminate important concerns. A notion of self-seeking, separate selves fails to assist us in appreciating the conditions in which persons become capable of solely deciding how to realize their aspirations. Further, the understanding of individualism-autonomy as the central or supreme value, suggests that interdependence is a threat to autonomy. Yet as numerous feminist philosophers have noted, individuality is not born, but created. Annette Baier observes,

> Autonomy is not something one has and which she then chooses relationships to suit, but something that develops out of a series of dependencies and interdependencies, and responses to them [emphasis in the original].

Indeed, Baier correctly argues that "A person, perhaps, is best seen as one who was long enough dependent upon other persons to acquire the essential arts of personhood." Because

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4 Supra, Chapter 3.
5 Ibid.
one could not grow into anything recognizable as autonomous without first relying upon others, human relationships are central to shaping the environment necessary for autonomy in the first sense.

Thus solely to decide about one's aspirations, there must exist a web of relationships which nurtured and continue to nurture the individual. The capacity to find one's own law can develop only in the context of relations with others.\(^9\) The web of relationships constitutes the interdependence which permits a person to grow to be creative, expressive and self aware; and to this web, persons continually turn back for affirmation and continuation.\(^10\) Persons require this web not only during infancy and childhood but throughout their lives for persons are constantly learning the art of personhood.\(^11\)

This understanding of autonomy (as, on the one hand, both solely deciding and being unimpeded in deciding, and on the other, the existence of what is necessary to make the first possible) refocuses attention from the lone figure (the individual) to the ground of its being (the web of relationships which are a necessary condition for individuality). This refocusing highlights not only that persons are enmeshed in relationships but that they are embodied, emotive and empathetic selves: that they are born naked and vulnerable from the body of a woman and (ideally) embraced with emotion and empathy in a manner which furthers the first of many enduring relationships.

This interdependence of embodied and emotional persons thus forms one of the background conditions for autonomy. Without it, there can be no possibility of finding one's own law for there would be no capable agent. This condition therefore functions as a set of circumstances with which the self must always reckon. For example, one might decide to exercise one's autonomy by taking flight but one must reckon with the facts of embodiment and gravity and develop plans accordingly. More to the point, one might decide to exercise one's autonomy by conceiving a child for relinquishment. But the facts of embodiment, emotionality and enmeshedness in relationships mean persons are subject to overwhelming

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9 Nedelsky, supra, note 3 at 11.
10 Lorraine Code, supra, note 4 at 361.
11 Lorraine Code, supra, note 4 at 363.
feelings of loss if they give birth and lose all connection with the infant. The loss of a child fundamentally alters the web of relationships in which persons live and thrive; as a consequence, energy must be redirected from discovering one's own law to adjusting to the new background conditions necessary for such discovery. A concept of autonomy which assumes embodiment, emotionality and emmeshedness of each person in a web of relationships recognizes that the severance of connection between a child of one's body does not enhance one's selfhood but damages it. It is a blow from which one must recover.

Nevertheless, it might be the least damaging option in a situation where the conception was unwanted or has become unwanted. In the face of a growing yet undesired relationship between mother and fetus, a woman usually has three options - to suffer an abortion, to surrender her child for adoption once born or to rear it herself. Whatever the pregnant woman chooses is a choice only within the context of severely restricted options. The best choice is no longer available and that obviously was not to have become pregnant in the first place. To argue in favour of permitting women to choose among abortion and adoption given an unwanted pregnancy is not to argue that women ought to be encouraged to conceive a child with the intention of relinquishing it. Just as we cannot use the existence of a fire department to justify arson, we cannot cite social practices which unfortunately separate mother and fetus or child as justification for a social practice which intends that

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12 Some authors have recognized that carrying women develop strategies to cope with the threatened rupture of relationship between mother and child by focusing on their relationship during pregnancy with the commissioners. That this second relationship is vital underscores the poignancy of the fact that all brokers recommend that relationship too should come to an end. Helena Ragoné, Surrogate Motherhood, Conception from the Heart (Boulder, Colorado: Westview Press, 1994) at 44, and supra, Chapter 3.

13 This point is evidenced by social science studies which make clear that the grief associated with relinquishment is both severe, disabling and long-lasting. See supra, Chapter 3.3.1.2.

14 Only the last entails keeping the relationship. On this analysis emphasizing the importance of relationship, that option might be the best for the self. But it raises other complexities for the woman such as whether she would be capable of discharging her responsibility to the dependent child.
Whereas abortion and adoption are each a sad solution to a crisis in a woman's life, a preconception arrangement intends the crisis because it purposefully creates a relationship to sever it. For these reasons, the practices of abortion and adoption are relevantly different from preconception arrangements.16

The observation that the separation of mother from child is harmful seems so obvious as to be trite. Yet some argue that a carrying woman can have control over her emotions such that her autonomy in the first sense will not be negatively affected.17 They might be right. There might be some carrying women who are so able to split their mind from their

15 A fire causes damage which justifies the fire department's intervention. An unwanted pregnancy creates an unwanted relationship which abortion or adoption sever. It is illogical to say that one ought to be encouraged to start a fire because the fire department will act to limit the damage. Likewise it is illogical to claim that a woman who does not intend to maintain a relationship with her child ought to be encouraged to conceive because she can sever the relationship through abortion or adoption. In both the cases of the fire and the conception, what justifies the response is the damage which will result without the intervention given the existing perception of a threat (to life and property, on the one hand, and to the pregnant woman because of the growth of an unwanted relationship, on the other). The fact that there is a fire department cannot justify arson; the fact that pregnant women may choose abortion and adoption cannot justify deliberately conceiving a child with the intention of relinquishing it (or aborting it - but that is a subject which I do not intend to address.) The point here is not that abortion or adoption are self-evidently good practices as are those of firefighters. The point is that the social practices of abortion and adoption are not available to be used to justify preconception arrangements.

16 Nor can one borrow from the practice of adoption the grace period during which a woman can change her mind about relinquishment, apply it to preconception arrangements and thereby render them morally acceptable. As has been argued (see supra, Chapter 2.4.), the option of keeping one's child does not restore the situation prior to conception. It simply gives the carrying woman a choice between hurting the commissioner(s) deeply or hurting herself, and (probably) between placing her child in a home with great financial resources and keeping it with her thus potentially jeopardizing her own finances and her relationship with her partner. Certainly a grace period would give a carrying woman choices, but only within unacceptable constraints. The better solution is not to encourage pregnancies initiated with the intention of severing the relationship either between mother and child, or between father and child.

bodies that they can refuse to acknowledge what has taken place when they relinquish their child or they can acknowledge it whilst deciding that it is good. But such an attitude might better be described as either a pathology or a survival technique in the face of a tragedy like incest. Longitudinal studies are needed but it is almost certain that just as in adoption, women who relinquish their children under preconception arrangements will be shown to have suffered significantly by the rupture of the relationship.\textsuperscript{18}

On the assumption that the loss of one’s child, even the intended loss, is a severe blow from which one must recover, one can argue that a practice which has the purpose of achieving this result is not one which promotes autonomy. This is not a claim that paternalism is justifiable, that the state should protect carrying women from themselves. Indeed, the argument is not about the second aspect of autonomy at all, viz.: freedom from restraint in deciding. On the contrary, the argument is that autonomy in its first aspect - solely deciding - cannot exist or is severely constrained when a woman has lost her child.\textsuperscript{19}

In seriously altering the background condition necessary for the exercise of autonomy - the sense of wholeness, peace and well-being which comes from interdependence, from loving connection with significant others - the practice of preconception arrangements would endanger the autonomy of carrying women.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{18} See results of social science studies, \textit{supra}, Chapter 3.3.1.2.
\item \textsuperscript{19} This argument is akin to that made by J.S. Mill in his book \textit{On Liberty} where he claims one ought not to be allowed to sell himself into slavery because to do so would be to destroy his future autonomy ((New York: Penguin Books, 1984) at 173.) But this argument differs from Mill’s in that Mill regarded slavery as an external constraint and contemplated that it would limit future autonomy in the second sense. The claim made here is that by damaging the conditions in which one can solely decide, preconception arrangements limit future autonomy in the first sense.
\item \textsuperscript{20} Indeed, as has been demonstrated, Philip Parker concedes that relinquishment of a child is a serious setback from which one must recover; he claims that an earlier relinquishment of a child can cause a woman to wish to become a carrying woman. (\textit{Supra}, Chapter 1.5.1.3.) Thus, even this advocate of the practice of preconception arrangements implicitly acknowledges that the loss of a child can generate in a woman the desire to have another child. In such cases, a carrying woman is not motivated to participate in the practice from a desire to realize her capacities and aspirations but from a desire to heal. Therefore, among women who have already relinquished a child, the wish to have a commissioned child is not an expression of autonomy but a remarkably misguided attempt to find therapy.
\end{itemize}
It might nevertheless be argued that the autonomy of the commissioners might be fostered by this practice for, in purchasing or obtaining a child to rear, they will create a stronger web of relationships from which to exercise their autonomy. This is not a compelling argument because the commissioners' action in initiating a preconception arrangement would, as has been demonstrated, have harmful effects. A second precondition for an act to be autonomous is that it not cause harm to others. The action causes the birth mother and her family to become childless in the sense that they lose a child of their family, and it removes the child from the maternal web of relationships which are arguably important to his or her sense of place. By, inter alia, transferring the pain of childlessness from one woman to another and by using the child as a means to an end without considering whether his or her ability to be autonomous will be jeopardized by this disruption of relationships, the commissioners' participation in the practice causes harm to others and therefore is not an action which can be described as promoting autonomy.

The practice of preconception arrangements fails to promote autonomy also because the third precondition of autonomy is absent, viz.: adequate information. At the time of making the arrangement, the woman has only partial information - she does not have a child for whom she will be responsible and she does not have any emotion for that non-existent child. But once she is pregnant, she is connected to the fetus who is profoundly her responsibility. Her knowledge of this fact and her emotional reaction to it are important sources of information in making a decision about procedures and practices which would affect the fetus and child such as whether she will undergo amniocentesis or abortion, or whether she will relinquish her child.

Some deny that emotion is a legitimate source of knowledge. Individualism-autonomy has an epistemological precept that knowers pursue inquiry as a solitary rational endeavour.

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21 See, for example, Chapter 3.3.
22 in addition to the condition of the existence of a web of relationships.
24 The importance to children of knowing their family of origin is evident in the attempts of adopted children to investigate the circumstances of their birth and to meet their birth parents.
25 Trebilcock et al., supra, note 23 at 626.
and embark upon that pursuit by freeing themselves both from their previously accumulated beliefs and from the influence of their own material being. But if we take seriously that certain background conditions are necessary to the ability solely to decide about one's own law and if these background conditions include interdependence which nurtures that ability, then emotion must be credited with power to inform the knower. Emotions are, after all, sometimes the first signal that a new, significant relationship is being formed or that an existing one is being threatened. The emotions of a carrying woman faced with the fact of an imminent amniocentesis, abortion or relinquishment (rather than a theoretical one) are a relevant source of information about whether to proceed with the procedure or practice. Because this information is unavailable before conception, an ex ante decision about the procedure or practice lacks adequate information and therefore cannot be described as autonomous.

A fourth precondition of autonomy is that the action be undertaken voluntarily. Because the separation of mother and child is an action against the interests of the mother, the question arises as to why she would engage in such an action. Her voluntariness is suspect when she is offered payment for her child in cases where she desperately needs money, and where, in the context of significant relationships (whether employment, friendship or the family), she exchanges her child without payment. Because of her concern for others, a mother may not feel she can refuse money when she needs it for her other children, or refuse to give her child to her employer, friends or family when they claim they desperately want it. Whilst it will not always be true that a woman agrees to be a carrying woman in a manner that is not fully voluntary, it is possible that this will be the case and, therefore, it is worth inquiring whether her participation is voluntary.

Thus for a person to take an action which is autonomous in the first sense, four background conditions must exist. The action must not intentionally sever or significantly disrupt the interdependence of the actor in such a way as to jeopardize the sense of wholeness, peace and well-being created by that interdependence. Moreover, the action must not cause harm to others, must be undertaken with adequate information, and must be

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26 Code, supra, note 4 at 374.
27 Trebilcock et al., supra, note 23 at 625.
initiated and carried out voluntarily. Because a practice which requires a woman to conceive a child and to relinquish it disrupts interdependence by severing important relationships, causes harm to others, is not adequately informed and can be of questionable voluntariness, it threatens autonomy.

Therefore, to protect women's autonomy it is important that legal regulation of this practice of procreation seek to preserve relationships, minimize harm to others create conditions in which the important decision to relinquish is made with adequate information and in a voluntary manner. Legal regulation which approximates these goals will substantially respect autonomy. But autonomy is not the only value to be protected. Legal regulation of preconception arrangements must also respect four other values which we now consider.

5.2.2 Equality

The principle of equality entails that all persons are entitled to equal concern and respect as equally possessing human dignity. This means that in moral decision making, each person matters and matters equally. Though equally possessing human dignity, people are different and their differences are relevant to treating them with equal concern and respect. Children are like adults in being human; but they are different from adults in being dependent and vulnerable. As a consequence, children may not be viewed as products and they must receive special consideration in social practices. Their interests can require that those of adults be subordinate.

The vulnerability of children creates a vulnerability in mothers to want to care for them; this impulse is a valued part of our humanity. A mother's human dignity should not be debased by using her as a fetus production unit. To treat mothers with concern and respect sometimes requires "special" treatment; it means recognizing the unique bond engendered during pregnancy and keeping mother and child together insofar as possible.

The principle of equality also entails that gender, race and class differences ought not to be capitalized upon to cause persons in groups which have historically been subject to disadvantage, to be vulnerable to exploitation by the more advantaged of their reproductive capacities which constitute an important part of their human dignity. Moreover, the political goal of achieving equal concern and respect for all members of society means that social practices which affect women and children must be specially scrutinized. We must ask of
the practice: (1) Will it support any existing systemic injustice? (2) Do any persons potentially affected by the policy belong to oppressed or disadvantaged groups? (3) Whose interests will be promoted by the practice? (4) Whose voice has dominated the discussion and advocacy of this practice?28

Clearly preconception arrangements violate equality. They do not treat children with equal concern and respect but as products whose particular interests are not worthy of consideration. In regarding mothers as producers they fail to acknowledge the importance of preserving and fostering the relationship between mother and child. In capitalizing on gender, race and class inequalities,29 the practice would support existing systemic injustice, negatively affect women and children who are traditionally disadvantaged, and promote the interests of primarily affluent, well-educated white professionals whose voices have dominated the advocacy of preconception arrangements. For these reasons, the practice does not advance equality.

5.2.3 Maximizing Welfare

This principle holds that a practice may be judged beneficial if all affected parties are benefitted by the practice. In applying the principle, it is important to be attentive to who is included in the group of affected parties and what is thought to constitute a benefit. Concern for all affected parties entails consideration for participants and non-participants alike. The criterion for inclusion in the group of persons whose welfare counts is not whether the persons participated in, or were subject to, the agreement but whether they are affected by it. Thus, the class of persons whose interests must be considered is large. Secondly, to know whether persons have benefitted by the practice, it is insufficient to inquire whether their preconception preferences (if any) have been realized. Welfare consists of more than mere preference realization; it is not simply the satisfaction of wants of specific participants, but the achievement of net benefits for the whole set of affected parties.30 When considering

29 Supra, Chapter 3.3.4.
30 For example, the practice might bring money into the carrying woman’s home which would realize her preconception preference but that money might then be spent in dealing with her grief and that of her other children who mourn the loss of their half-sibling.
who are the affected parties, the interests of the class of prospective commissioned children must count in a special way. It is inappropriate to weigh the benefit to the children of the practice positively on the theory that some life is better than none. To do so would illogically assume the existence of the practice in the process of trying to decide whether the practice should exist. When judging the morality of a practice of procreation, the appropriate question is, "Is this a good way to bring children into the world?" Only if the answer to that question were yes and, therefore, the practice were socially and legally endorsed, would there be interests of specific living children to consider. Moreover, in assessing the benefits of the practice we must consider the effects on society as a whole. For example, the effect of the practice in altering the method by which maternity is determined would have serious repercussions for all women, not just for those who agree to engage in the practice. For these reasons, and those discussed above, the practice does not maximize the welfare of all those affected by it.

5.2.4 Minimization of Suffering

To minimize suffering is to reduce the physical and psychological pain of people to the greatest extent possible. A social practice designed to alleviate suffering ought not merely to relocate the suffering to a person other than the one originally afflicted, or to create suffering by its indirect effect on non-participants. As has been argued, preconception arrangements transfer the pain of childlessness from one woman to another, they purposefully conceive a child for separation from its mother and maternal family, and they cause the members of the carrying woman’s family to suffer the loss of their family member.

The principle of alleviating suffering has a corollary which is also relevant to the ethical assessment of preconception arrangements. As a criterion for moral action, the principle of alleviating suffering is subordinate to the notion that people must first do no harm. If in alleviating suffering one will concomitantly do harm to another, then one must not attempt to alleviate the suffering. Further, (as shall be argued immediately below), one’s moral obligations are higher to some than to others. Parents have more onerous obligations

31 Supra, Chapter 2.4.
32 Overall, supra, note 28 at 1.
to their children than they do to adult strangers or loved ones. Thus, a carrying woman moved to alleviate the suffering of commissioners must consider both that her duty to do no harm is prior to the obligation to do good, and that her duty to care for and to prevent the suffering of her vulnerable children is higher than her duty to be concerned with the non-life-threatening unhappiness of others.

5.2.5 Responsible Parenthood

The fact that autonomy in the first sense of solely deciding is a capacity which is not born but created gives rise to the moral obligation of adult human beings to foster the autonomy of children. Recognition of this duty is the core of the fifth value - the value of responsible parenthood.

Parents (both male and female, genetic and gestational) are responsible for the children they bring into the world. They are responsible not because they intended for them to be born but because of their bodily actions which caused them to be born. This responsibility attaches to adults even if they took precautions to avoid the conception or they agreed with third parties prior to conception that they would have no rearing obligations. The moral source of the obligation is not the adults' intentions or wishes, but the extraordinary vulnerability of the infant and its need for continuous care; having created that vulnerability, parents may not attempt to abdicate their responsibility for reasons of self interest such as profit and convenience, or even for reasons of love for another adult and the desire to alleviate the adult's suffering. A child is not a product to be traded to generate income or a gift to be given to alleviate suffering. The duty to care for the child is

33 In the case of rape, the rapist has a moral duty to provide financially for any children procreated as the result of his crime. The rape victim, if she becomes pregnant and carries the fetus to term, has a duty, if she does not wish to rear the child, to entrust its care to another.
34 See, supra, Chapter Four, section 4.4.3.
that of the parents and is owed to the child whose interests are paramount.\textsuperscript{35}

As has been argued,\textsuperscript{36} recognition of and attention to dependency and interdependency are necessary for autonomy. To become autonomous, a child needs the ongoing care and concern of adult caregivers. Therefore the interests of the child are not limited to physical care, and the duty of a parent to a child does not end with infancy. Parents are responsible (though not wholly responsible) for how a child survives its teenage years, how it "turns out". Responsible parents care not only about doing their part in a limited sense but are disposed toward expanding and redefining the demands of their role as necessary to accomplish the best possible result for their child. Parental responsibility is therefore a self-enlarging, open-ended commitment which endures at least until the child reaches adulthood.\textsuperscript{37}

This important value of responsible parenthood is respected not by giving effect to an arrangement to trade a child or to abdicate or surrender its care to another. The value is affirmed by recognizing that wanting to keep one's children, even where one has previously agreed otherwise, is not pathological or wrong, but rather understandable, defensible and desirable. It also entails rejecting the notion that pregnancy should be a calculated choice between bearing a child with whom the mother will have a relationship (without pay) or bearing a child for another (for pay or psychic reward).\textsuperscript{38} Such a notion focuses on the needs and interests of individual adults, bargaining for their own advantage, rather than on the general norm that one's pregnancy is the beginning of an ongoing, responsible parent-child relationship. This value of responsible parenthood would recognize, however, that a

\begin{footnotes}
\item[36] \textit{Supra}, Section 5.2.1.
\item[38] \textit{Ibid.} at 335.
\end{footnotes}
child's interests might better be served if someone other than the mother and father assumed responsibility for the child; if the parents are unable to rear the child, they may transfer custody within the social and legal institution of adoption. In such circumstances, the interests of the child justify entrusting the child's care to another.

It is important to note that the value of responsible parenthood does not only encapsulate the notion that we care about children. It entails also the belief that we care about the kind of society in which we live. A society in which parent-child relationships are strong, secure and nurturing, will be a better society. As Bartlett argues

If we have to choose between children and adults, we may prefer to be a society which puts the child's interests first, but our larger concern is how the interests of both parent and child link together in relationships. Responsibility is a critical dimension of these relationships. Parents being responsible for children, in other words, fits the best picture we have of ourselves.39

Therefore, social practices should encourage the conception and birth of children in the context of relationships which are likely to endure. Knowingly to conceive a child with the intentions of not assuming any parental duties toward the child and rupturing its relationship with either of its parents is irresponsible. It may be that the long-term consequences of such an action are not terribly harmful in that the mother and child overcome their separation from each other and the child is adequately reared by its adoptive parents. But a parent who relinquishes her or his child can never be sure that the child's care will be adequate. The only way for parents to ensure the adequacy of their child's care is for parents to provide responsible and loving child care themselves, or to be in a position constantly to supervise the care given by a substitute and to intervene for the sake of the child when things go wrong. Should parents be unable either to care for the child or to supervise its care, the responsible alternative is to place the child for adoption or in foster care though, as has been argued,40 this is a sad solution to a crisis not a situation deliberately to be created. When, therefore, parents cannot assume these duties themselves or when they are demonstrated unfit

39 Ibid. at 304.
40 Supra, section 5.2.1.
to carry out these duties, it is (ideally\textsuperscript{41}) in the interests of children to be placed for adoption or in foster care under state supervision. For parents deliberately to conceive children with the intention of assuming a position in which they cannot either care for their children or supervise their care is irresponsible. Since, when regulated by the contract model, the practice of preconception arrangements does just that, it is a practice which violates the principle of responsible parenthood and should not, therefore, be encouraged by the state.

It might be claimed that this argument puts great weight on the element of intention. By way of analogy, it might be asked whether it is appropriate for the state to grant its imprimatur to a marriage recklessly entered by young people. The answer is that the value of autonomy requires state recognition of marriages that otherwise meet state age, capacity and consanguinity requirements, and a recklessly-entered marriage does not \textit{per se} violate any of the other important principles. Indeed the newly-weds do not violate the duty of responsible parenthood by marrying. They might have no intention of having children and, if children do result, they might have every intention of caring for them properly. Even if they fail to care for them adequately and thereby fail to fulfil their duty of responsible parenthood, this failure is not attributable to the marriage and was not certain to result when the state recognized the marriage. In the case of preconception arrangements regulated using the contract model, the very instrument of the contract gives effect to the intention to fail to assume the responsibilities and the failure is certain to result at the time that the state recognizes the agreement as a contract and enforces it. Likewise, it might be asked if it is irresponsible for a couple to engage in casual sexual intercourse without any regard to how they might care for a resulting infant. The answer is yes but there is a moral difference between wilful blindness to the possibility of responsibility arising from an activity, and conducting the activity with the intention of bringing about the responsibility with the purpose of not assuming it. Further, the state may not intervene to prevent the couple from engaging in sexual intercourse (provided the participants consent and are of the age of consent) because to do so would violate their right to autonomy. There is no argument for

\textsuperscript{41} It is conceded that children are not always well cared for and are even abused in foster care and when placed for adoption; this is also true when they are reared by their natural parents. In such cases, the adult caregivers obviously do not carry out their duty of responsible parenthood or substitute parenthood.
state intervention because their sexual activity does not violate any of the other important values, notably the value of responsible parenthood. The couple may be heedless of the fact that a child might be conceived, but they are not engaging in the activity with the purpose of conceiving a child for adoption. If a child is conceived and the couple decide to place it for adoption, that again, is a sad solution to a crisis; such an unfortunate situation is no argument for creating a crisis as occurs in preconception arrangements. Similarly, it might be asked if, by this argument, semen and egg sellers and donors are not also failing to assume their duty of responsible parenthood. The answer is yes; they participate in a procreative practice without any intention of taking responsibility for their children. But to claim that sperm and egg sellers do not assume their duty of responsible parenthood, is not to make a claim about what law should govern the practice. 42 Finally, some might argue that the following two cases are analogous and therefore ought to be regarded similarly: in the first (the situation which occurs in preconception arrangements) a child is deliberately conceived with the

42 It is not within the scope of this dissertation to consider the appropriate regulation for the sale and donation of sperm and eggs. Nevertheless, given that these practices violate the value of responsible parenthood, it might be thought reasonable for the law not to facilitate sperm sales and donations but to make regulations to determine who would bear parental responsibility for the child should the practices nevertheless occur. As will be discussed below in section 5.5, recommendation 6 argues in favour of prohibiting the transfer of an embryo into the body of a woman from whom the egg did not originate if she has no intention of rearing the child. The principle concern here is to prevent a pregnant woman from being regarded as someone other than the mother. This concern does not arise in the case where a woman received the egg of another by which a conception occurs and the woman thus pregnant intends to rear the child (the case commonly referred to as "ovum donation"). In this case, there is no separation of gestation and rearing and so it is not the focus of this dissertation. Nevertheless, "ovum donation" does raise the issue of responsible parenthood to the extent that the ovum seller or donor does not intend to care for her child. As in the case of sperm sales or donations, it might be thought the appropriate state regulation would be not to enforce the duty of parental responsibility by preventing sales or donations - because this would violate the principle of autonomy - but not to facilitate the abdication either. But the state should, in the interests of the child, make clear who bears parental responsibility for children born of these practices. Further, it would be appropriate to recognize that the child has an interest in coming to know its genetic parents; therefore the state should provide a register by which the child can determine its genetic parents' identity at any age if there is medical need and otherwise when the child attains the age of majority. The sperm and egg sellers or donors might have an interest in keeping secret their identities but, where there is a conflict, the interests of the children ought to prevail.
purpose of surrendering it at birth, and in the second, a child is accidentally conceived, the pregnant woman decides not to abort but to carry the fetus to term and to relinquish it for adoption. To hold that these two cases are analogous, however, one would have to agree that not conceiving is like abortion; but, whatever one's view of abortion, not conceiving is morally neutral whereas abortion is not. On one view of abortion, the woman in the second case would be assuming her duty of responsible parenthood by "doing the right thing" in not killing the fetus, carrying it to term and entrusting its care to responsible caregivers because she cannot care for it herself.

5.2.6 Discussion

The five values - autonomy, equality, welfare maximization, suffering minimization and responsible parenthood - are each important in assessing the best means of regulating the practice of preconception arrangements. It is significant that all five values must be taken into account. For example, autonomy ought to be pursued but only in the context of consideration of the other values. Thus even if one were to decide that a method of regulating the practice promotes autonomy, one would need to assess also whether it advances equality, maximizes aggregate welfare, minimizes suffering and conduces to responsible parenthood.

These five principles used together to evaluate the appropriate regulation of the practice of preconception arrangements cause us to have special concern for three groups: women, children and society in general:

1. Women - Regulation ought to be assessed with regard to the integral and extensive role of women in reproduction and their intimate relationship with the children they bear. It is important to recognize that although a child might be born of a preconception arrangement, such an arrangement always affects women by restricting their sexual and reproductive freedom; requiring insemination in genetic-gestational arrangements and chemically-altered menstrual cycles in exclusively gestational arrangements; and by resulting sometimes in miscarriages, other pregnancy complications, and even the death of the woman.

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43 Of course, the argument being made here is that the practice does not promote autonomy.
2. Children - The welfare of the child should be central in regulating procreative practices and in decisions regarding a child’s custody and upbringing. Children are community members who are at once vulnerable and of independent standing. They are not the property of parents but are human beings whose peculiar vulnerabilities repose in their parents (and, in default, the state) an obligation to provide care and protection.

3. Society - the public good requires that social practices be regulated in a manner that does not threaten human dignity, and that the meaning and value of children, procreation and parenthood in society do not become so altered as to debase our common humanity. Procreation ought not, therefore, to be the subject of commerce and ideologies which support the use of reproductive technologies are a matter so important to require public scrutiny.

Thus, the five values and the three special concerns (for women, children and society) which the values generate are centrally important in choosing a model of legal regulation to govern preconception arrangements.

Analysis of the contract model of regulation and the present discussion has yielded two tests of the appropriateness of proposed regulation: whether it causes harm and whether it protects important values. These tests seldom operate independently of each other. For example, this work has claimed that the practice, if regulated by contract law and subject to its rules of specific enforcement, would cause suffering and, therefore, harm to a woman who changed her mind about relinquishing her infant; yet legislatively-mandated relinquishment where a birth mother is fit to rear her child would also violate the principles that government should respect autonomy\(^\text{45}\) and aim to minimize suffering.\(^\text{46}\) Likewise, legislatively-sanctioned placement for adoption without any concern for the child’s interests has great potential to cause harm to the specific child and would violate the principles of welfare maximization\(^\text{47}\) and the child’s right to equal concern and respect and therefore the

\(^{45}\) Supra, section 5.2.1.
\(^{46}\) See section 5.3.4.
\(^{47}\) See section 5.3.3.
principle of equality.48

The first normative test of proposed regulation - whether it causes harm to persons particularly and generally - can be elaborated by considering the extent to which it may be described as consequentialist. Whether a proposed form of regulation may cause harm to specific individuals (the carrying woman, the commissioned child, the carrying woman's other family members) can be proved or disproved by enacting the regulation and examining whether the feared harm results. Yet it is worth emphasizing that if the feared harmful consequences do result and, therefore, we assess the regulation as being immoral, it is not easy to right the wrong that will thereby occur; of course, we might repeal the legislation but the bad consequences which prompted the repeal will be serious. The other concern that harm may result from a particular type of regulation - harm to society generally - is also assessed on the basis of consequences but arguably it would be unwise to create the conditions which would actually render it possible to make that assessment. Recall that the feared harms to society generally include the concerns that if the practice is regulated by contract law, women will be regarded as fetal production units, children will be regarded as commodities and we will accept as a moral measure of a practice of human procreation whether it maximizes efficiency and serves the interests of adults rather than whether it minimizes disaster and serves the interests of children. If we permit the practice to be regulated by contract law, it might not (though this is doubtful) result in these feared consequences - but if it does, the situation will be irretrievable. Like eliminating an old-growth forest, we will change society in ways which cannot be remedied should we later decide that the changes are unacceptable. This type of harm might be termed "quasi-consequentialist": the normative evaluation of the regulation is indeed based on a consequentialist assessment but the feared consequences are so serious and irreversible that it would be unwise to enact the regulation so that an actual assessment might be made.

The second normative test of a proposed regulatory model - that it should respect the five important values - might also be categorized as consequentialist though at a second level. The consequences being assessed here are not whether particular persons or persons generally are harmed, but whether a value is harmed. The articulation of this test makes

48 Supra, section 5.2.2.
plain the important interests which participants and non-participants have and which might be threatened by a proposed form of regulation. Whether the interests are violated can be evaluated by looking at the predicted consequences of enactment. (For example, that the value of autonomy is violated by contract law's regulation of preconception arrangements is arguably evident from the predicted results; it would put the state in the position of regarding the birth mother as not necessarily the mother of her child and forcing a woman to undergo amniocentesis, to undergo or abstain from having an abortion, and to surrender her child at birth.\textsuperscript{49} Similarly, if contract law were to govern, it would violate equality by permitting the flourishing of a market in reproductive capacities; children would be regarded as products and minority women especially would be disadvantaged in that their lower opportunity costs and the growing practice of exclusively gestational arrangements would combine to cause them to be sought for reproductive service.\textsuperscript{50} Likewise, the consequence of regulating preconception arrangements by contract law would be to facilitate and thereby to legitimize a practice by which parents abdicate their duty of responsible parenthood. This abdication might not prove harmful in a particular case because, for example, the mother and child overcome their separation from each other and the child is adequately reared by its adoptive parents. But the abdication is nevertheless a moral wrong.\textsuperscript{51} The question for the state is what form of

\begin{itemize}
\item \textsuperscript{49} Trebilcock claims that the use of contract does not necessarily entail forced relinquishment. But it would create the conditions under which a mother is not regarded as such for legal purposes, for the regulation proposed by Trebilcock would require her to take some positive act to establish her maternity and it would regard paternal duties toward the child as based on what the father receives in return (evincing a concern for bargain and exchange), not on the basis of what the child needs (which would demonstrate concern for parental responsibility in light of children's vulnerability) (\textit{supra}, Chapter 2.4).
\item \textsuperscript{50} Similarly, the principles of welfare maximization and suffering minimization would be violated (\textit{supra}, sections 5.2.3 and 5.2.4).
\item \textsuperscript{51} It is worth noting that the claim that parents violate their duty of responsible parenthood when they deliberately conceive a child to abdicate their responsibilities toward it, is a claim that does not rely upon proof of harm to the child. It therefore illustrates that there can be wrongs that are not also harms. Just as persons are wronged but not harmed when, unbeknownst to them, a sexual voyeur views them undressing, a child can be wronged but not harmed by a mother who conceives with the intention of abdicating her maternal responsibilities and yet transfers her child to adequate caregivers. (For further discussion of the value of responsible parenthood see, \textit{supra}, section 5.2.5).
\end{itemize}
regulation would respect the value of responsible parenthood by encouraging parents not to wrong their children.)

To offer a test of regulation that it respect certain moral values is to make plain what is at stake in regulating preconception arrangements. The test is consequentialist in being both causal and evaluative. Yet it is likely to generate debate because whether the bad consequences occur is not open to objective determination; people will differ in whether they believe a particular value is likely to be violated and in their evaluation of the normative implications of the value's violation.

Nevertheless, this dissertation contends that contract law would indeed violate the five values, and that the violation of even one of these values is sufficient to justify the conclusion that the case for contract law's regulation has not been made. More positively, and as shall be argued below, there is a regulatory model which minimizes the harm which might occur from preconception arrangements, respects these values, and attends to the special concerns. This is the area of family law, and in particular, family law in the context of adoption and custody, and constitutional law regarding security of the person (hereinafter "existing law"). By examining relevant provisions, we can see how existing law would regulate preconception arrangements in such a way as to minimize harm and protect the important values.

The question that might be raised here is whether there is any evidence which might come to light through further social science studies which would alter the conclusion that regulation of preconception arrangements by contract law would not be beneficial. Even if future, unbiased, longitudinal studies demonstrate that the actual and potential harms to particular individuals caused by using the contract model to regulate the practice has been overstated, a case would have to be made that contract law's use would not harm society generally and would not violate the important values. Because, as has just been stated, should the feared harms to society occur they would not be correctable, it would be unwise to create the situation in which the harms might result. Further, since the practice when regulated by contract law always violates the value of responsible parenthood, and the violation of this duty is a wrong even without a showing of harm, the proponents of contract law would have to make a case for a form of regulation that encourages parents to wrong their children.
5.3 How Existing Law Already Minimizes Harm, Protects the Five Values and Attends to Special Concerns

5.3.1 Autonomy

The value of autonomy,\(^ {53}\) which is threatened by certain aspects of preconception arrangements, finds protection in existing Canadian and Ontario law, and in particular, Ontario family law. One threat to a woman's autonomy in both senses lies in the arrangement's restrictions on the carrying woman's freedom to decide matters concerning her body and her relationship with her fetus. This threat is contained in the provisions requiring the carrying woman to undergo amniocentesis and to suffer an abortion if the test results are unacceptable to the commissioning man and to refrain from seeking an abortion should she wish one.\(^ {54}\) To force her to submit to a procedure which invades her uterus and to sever the connection between her and her fetus when the relationship has become one which she wishes to foster is fundamentally to threaten her sense of wholeness, peace and well-being. Such limitations on a woman's autonomy are not tolerated by existing law.

The promise to undergo amniocentesis constitutes, in effect, consent to a surgical procedure. Such consent cannot effectively be given prior to conception because legally it may be revoked at any time prior to or during the performance of the procedure.\(^ {55}\)

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53 As redefined above, Chapter 5.2.1.
55 The Supreme Court of Canada held that not only is consent to a surgical procedure necessary, it may be withdrawn at any time - even during the procedure. As Cory J. stated, Everyone has the right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent ... If, during the course of a medical procedure a patient does not consent to that procedure, then the doctors must halt the process. This duty to stop does no more than recognize every individual's basic right to make decisions concerning his or her own body.
Further, any provision compelling or preventing abortion at the instance of the commissioning man is also unenforceable. The right of a woman to make decisions about whether she will carry a fetus to term on the basis of her own priorities and aspirations is constitutionally protected by section 7 of the Canadian Charter of Rights and Freedoms. Because a woman's priorities and aspirations might change, a putative waiver of the constitutional right to abortion in advance of conception would invalidly limit the exercise of a fundamental freedom and is, therefore unenforceable. For the same reason, a cause of action for damages against a woman who exercises her right to abortion would also be unconstitutional.

Not only would a commissioning man be thwarted in an attempt to rely on the agreement to have standing to prevent or compel an abortion, or to sue for damages; he would have no independent status as a prospective father to achieve such a goal. In a unanimous decision, the Supreme Court of Canada in Tremblay v. Daigle stated that there was no jurisprudential basis for the argument that "a father's interest in a fetus which he helped create could support a right to veto a woman's decision in respect of the fetus she is carrying." In making this statement, the court relied, inter alia, upon Paton v. British Pregnancy Advisory Service Trustees which held that a husband has no rights in law or in equity to prevent his wife from having an abortion or to stop doctors from carrying out a lawful abortion. Clearly a woman's right to bodily autonomy with respect to surgical procedures has been recognized in law and is not subject to limitation even by an agreement of marriage. If the intimate and socially endorsed practice of procreation which is marriage is not granted the right to limit a woman's bodily autonomy then it is certain that preconception arrangements would not be granted the right to limit a woman's bodily autonomy.

Another threat to autonomy in the first sense is contained in the term of a preconception arrangement requiring the carrying woman to relinquish the child permanently.

57 This was the only aspect of the Baby M preconception arrangement which the trial court held void and therefore unenforceable. Baby M, 525 A2d 1128 (N.J. Super. Ch. 1987).
into the custody of the commissioning man. Forced relinquishment also causes suffering and is therefore discussed below under the value, "Minimization of Suffering".

5.3.2 Equality

The value of equality is threatened in many ways by a preconception arrangement’s use of women’s bodies as reproductive machinery and its use of the child as a product. Existing law has already specifically addressed one threat paid preconception arrangements pose to equality viz.: that contained in the provision that the baby be traded for cash. Where money is exchanged for the commissioned child, the transaction is appropriately described as a sale. But to sell a child is to treat it without concern and respect - to regard it as a product. This is not permitted under Ontario adoption law. Section 159 of the Child and Family Services Act provides in very broad language that payment for adoption is prohibited. It states, in part:

No person, whether before or after the child’s birth shall give, receive or agree to give or receive a payment or reward of any kind in connection with,
(a) the child’s adoption or placement for adoption;
(b) a consent under section 131 to the child’s adoption; or
(c) negotiations or arrangements with a view to the child’s adoption.

Section 160(4) provides that a contravention of this provision is an offense punishable by a fine of not more than $25,000 or by imprisonment for a term of three years or both.

Because paid arrangements involve payment for the carrying woman’s consent to relinquish her parental rights and for an arrangement with a view to the child’s adoption by the commissioning woman, they threaten the value of equality. Existing law would protect that

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60 This point has been demonstrated in Chapter 4.4.4.
61 R.S.O. 1990 c.C.11. Some jurisdictions permit the expenses of a pregnant woman to be paid so that, should she wish to carry a child to term rather than to abort an unwanted pregnancy, it will be financially possible to do so. This fact does not, however, raise the same concern for the respect of the personhood of the child as do baby sales; payment of expenses do not entail that the birth mother will relinquish her child and the people who pay the expenses know this at the outset. Further the placement, if any, of the child with them is still subject to state supervision to ensure that the placement is in the child’s interests.
value by rendering the sale of a child illegal.

5.3.3 Maximizing Welfare

The value of maximizing welfare is threatened by preconception arrangements which regard the commissioned child as a product and do not attend to its interests in a proposed adoption by the commissioning woman. Existing Ontario adoption law would not permit an adoption without inquiry into whether the adoption would be in the best interests of the child. A placement which is good for the child maximizes welfare because it protects all the parties to an adoption. By inquiring into the nature of the adopters’ home, the state gives assurance to the birth mother that her child will be well cared for, it attempts to protect the adopters from the possibility arising that the child will be removed from their home because of their inability to care for the child, and, more centrally, it protects the child by attempting to secure good care. Arguably, existing law would protect the value of maximizing welfare by refusing to recognize a preconception arrangement because such arrangements do not contemplate the need for the commissioners to be vetted.

Ontario family law seeks to protect the welfare of the child in adoption. The Child and Family Services Act (the “CFSA”) governs the practice of adoption in Ontario. Under its provisions, when one or both parents relinquish their rights and duties toward the child and it is proposed that someone else assume them, the state must approve the adoption. When a child is placed for adoption with a person who is neither a relative, a parent nor the spouse of a parent of the child, adoption agencies and licensees supervise the process and match adoptive parents and children. This process of "stranger" adoption requires, inter alia, the preparation of "a report of an adoption home study of the person with whom placement is proposed". The appropriate state official who receives the report must consider it and either approve or refuse to approve the placement.

Adoption by a relative, a parent or the spouse of a parent of the child does not require supervision by a state agent. Nevertheless, it does require that a court approve the

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62 Ibid. s.136(1).
63 Ibid. s.136(2).
64 Ibid. s.135(8).
adoption. In considering whether to approve the family adoption, the court may order that the appropriate state official prepare a report on the child's adjustment in the home of the proposed adoptees. Because of the broad powers of the court to make an adoption order in the child's best interest, the court under s.146(6), may require in effect that a family adoption application be treated in part as a "stranger" adoption application. Section 143(6) gives the court power to order that the state-approved director file a written opinion based on a report of the child's adjustment in the applicant's home, indicating whether the director believes it is in the child's interests to make the adoption order.

Irrespective of whether the intended adoption is a "stranger" or family adoption, the interests of the child govern. The parties must apply to the provincial Court (Family Division) for an adoption order. In making that order, the judge is governed by legislative restriction set out in sections 140-147 of the CFSA, the most important of which is that the adoption order may be granted only if it is in the child's best interests. Thus existing law would invalidate any attempt to place a commissioned child for adoption without concern for the child's welfare and state supervision of the placement.

Some claim that no inquiry is needed of the commissioners because the child is going to the home of the biological father and no state supervision of his parenting ability is warranted legally or in principle. This argument is not compelling. In the first instance, if one or both parties are related genetically to the child, it is not evident that the genetic link will be enough to establish legal parenthood. This is especially so in the case of a genetic-gestational arrangement where the carrying woman is married and refuses to acknowledge the commissioning man. Second, even if (in genetic-gestational arrangements) the

65 Ibid. s.140(2).
66 Ibid. ss.143(6) and 143(5).
67 Ibid. s.140. Prospective adopting parents who are refused are entitled to a hearing. Ibid. s.136(3).
68 Ibid. s.140(1).
69 See Juliet Guichon, "Who is the Legal Mother?" and "Who is the Legal Father?" in "Surrogate Motherhood": Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood, Vol. 4, Research Studies of the Royal Commission on New Reproductive Technologies (Ottawa: Minister of Supply and Services, 1993) at 483-490.
commissioning man establishes both a genetic link and legal paternity, his case will fall under either the stranger or family provisions of the CFSA because what he seeks, provided he is married or in a stable relationship, is for the child to be placed with him so that it might be adopted by his wife or partner.

Not only is the argument weak from the point of view of existing law, it is weak in principle. Although the commissioning man usually is the biological father, that fact does not quell the concerns for the child’s welfare which arise from the unusual nature of a preconception arrangement. Unlike most biological fathers, the commissioning man has little or nothing to do with the child until it is born and therefore has not demonstrated his willingness to care for the child. A man can care for a fetus by attending to the pregnant woman. But in contributing genes and then removing himself for nine months, his detached and often geographically distanced waiting, entails no actual caring for (as opposed to caring about) the child and thus no evidence of whether he will care for the child if he assumes custody. To be sure, a commissioning man might be as capable or more capable than other biological fathers of attending to the child’s needs. But he is not yet a social parent and therefore has not demonstrated the same level of commitment as a husband or partner of a pregnant woman. Moreover, and unlike most biological fathers, the commissioning man wishes to remove the child from its mother. Instead of encouraging a relationship between mother and child which ordinarily is centrally important for the child’s welfare, the commissioning man seeks to sever the relationship forever. Given these two facts - his lack of physical care for the fetus through a relationship with its mother, and his desire to sever the relationship between mother and child - there is reasonable concern for the child’s welfare.

Clearly, preconception arrangements threaten the value of maximizing welfare because they do not consider the commissioners’ parenting ability which is vital to the child’s welfare. A preconception arrangement’s attempt to place a child for adoption would be

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70 This concern is illustrated by the 1995 case of the commissioning man who beat his five-week-old commissioned child to death. M. Bowden et al. “The 2 who created life that was taken”, Philadelphia Inquirer (22 January 1995) at A1.

71 This argument holds, mutatis mutandi, in the situation where the commissioning woman is also the ovum donor.
ineffective in gaining state recognition of the placement because it cannot demonstrate any state supervision of that placement in the child’s interests. Likewise an attempt to claim that there is no need for state supervision as in adoption because the child is to be transferred to the biological father would also be ineffective. The lack of nurturing relationship between commissioning man and child, and the commissioning man’s desire to sever the relationship between mother and child generate apprehension for the welfare of the child. Since the arrangements do not evince any such concern and provide no evidence that the commissioners will care for the child, existing law which vets parenting ability in adoption placements would render preconception agreements void.

5.3.4 Minimization of Suffering

To lose a child is to suffer significantly. Yet this type of suffering is intended in a preconception arrangement insofar as it is the inevitable result of the separation of mother and child and that separation is intended. Existing law would protect the value of minimizing suffering against the threat of a separation of mother and child. Under the child protection provisions of the CFSA,72 a mother can be forcibly separated from her child only once a court has decided on reasonable and probable grounds73 that the child is in need of protection.74 In other words, it must be demonstrated that the child is suffering unacceptably at the hands of the parent or parents before the child can be removed from its home. This provision thus minimizes suffering by putting the child’s interests above those of adults whilst recognizing that an adult will suffer by losing a child and therefore the harm from the parent to the child must be demonstrated before a forced separation may occur.

In this way existing law would prevent commissioners and brokers from seeking, and judges from granting, an order which would forcibly remove a child from a carrying woman without a finding of maternal unfitness.

In the case of an exclusively gestational arrangement, the question arises as to who is the "real mother." This question is misconceived. The technology whose use permits the

72 Supra, note 61 s.37-83.
73 Ibid. s.40(3).
74 The type of actual or threatened harm which permit a court to act is detailed in s. 37(2) of the CFSA.
separation of the genetic and gestational aspects of maternity creates a situation in which two women have legitimate claims to the status of mother. If one woman rears the child to the exclusion of another, inevitably one woman will suffer. The child will also suffer by not maintaining contact with its birth mother or by not being in a position to learn about its maternal genetic heritage and to know its relatives. Because of the problems to which it gives rise, this separation of genetics and gestation ought not to be permitted. Should it nevertheless occur, the birth mother ought to be considered the primary mother with the rights and duties of motherhood. Given that she is most intimately connected to the child physically and emotionally and that it is in interest of children to have a parent who is always easily identifiable and present at the time of birth, the value of minimizing suffering is best protected by acknowledging the birth mother as the primary mother. But social assistance in the form of counselling and mediation should be provided to help the two women develop a relationship which would enable the child to come to know its genetic mother and her family.

Thus the value of minimizing suffering is protected by Ontario family law's prevention of forced removal of children without a finding of parental unfitness. Where, because of the inappropriate use of technology, two women have a legitimate claim to be regarded as the mother, the value of minimizing suffering requires the birth mother to be considered the primary mother and the ovum provider to be assisted in developing a relationship with the mother such that her access to the child would be in the child's interest.

75 *Supra*, Chapter 4.2.
77 The suffering engendered by a rupture of the maternal-infant bond has also been recognized by international law. The United Nations Declaration of the Rights of the Child, 1959 to which Canada is a signatory, states in Principle 6 states, that "a child of tender years shall not, save in exceptional circumstances, be separated from his mother." *Basic Documents in Human Rights*, ed. I. Brownlie (Oxford: Clarendon Press, 1971).
5.3.5 Responsible Parenthood

This value is threatened in many ways by preconception arrangements. Indeed, the threat to this value is so great as to be sufficient alone to warrant state discouragement of the practice. By transferring custody of one’s child, one cannot care for it oneself. But this duty belongs to parents who may not morally transfer their parental obligations except if they cannot discharge them themselves. If one were to imagine the child were two years old rather than an infant, the objection to transferring custody because to do so is good for the adults becomes clearer. Just as with a two-year-old, the mother of an infant has parental duties toward the child and the child itself has interests of its own which require consideration above those of the adults. Therefore, it does not matter whether a carrying woman is paid or unpaid, if the ovum was her’s or another’s, or if the commissioners are strangers, friends or family; the moral obligation a mother has to her child is to protect it and to see that it advances in this world as best it can. This duty means that one cannot trade, exchange or give away one’s child; one may relinquish it for adoption but only in the child’s interest.

Ontario family law recognizes this. It does not permit parents to treat their children as items of property which might be more "valued" or more "useful" elsewhere.

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78 The recognition of this parental duty by a carrying woman has been described in this way:

Her. It is a girl. I ... lay her against my chest so that she can hear my heart and be warmed by my body. She is a tiny little girl; light as a cat in my arms. Lighter ... She stares up at me with eyes big as a lemur’s. This is what I could never have expected. That I would look into the face of my child and find someone I knew; but I do. I see my eyes in her small face and finally know them for what they are: the eyes of a dreamer ... I know this child and I know what she needs. I see her future [with the commissioners] more clearly than I see [the other people in the labour room]. I see that a black and white world, no matter how stimulating will be a prison to this child. That if she is nourished with the latest and the best, that her spirit will float right of the leaded glass windows of the [commissioners’] mansion. I see that [the commissioners] will not know how to protect her dreamer’s soul ... I cannot let this happen to the fragile being curled against my breast.

Preconception arrangements threaten the value of responsible parenthood in at least two ways which existing law will not allow. First, such arrangements contemplate the separation of birth mother and child before the child is conceived. Second, they attempt to allocate custody as between the mother and the father in the interests of the participating adults and before the interests of the child are known. Existing Ontario family law would protect the value of responsible parenthood by removing these threats to it.

Ontario law does not allow a mother to agree to sever her relationship with her child before it has begun. The CFSA governs the circumstances in which parents may relinquish their rights and duties toward children in adoption. Section 131(2) stipulates that, to make an order for adoption, the court must first have the written consent of every parent. A parent may not give consent to adoption before a child is seven days old.79 The principles underlying this provision appear to be two. The first concerns the emotional response of the new mother. The law assumes that a woman cannot know the depth of her desire to rear her child until she has given birth and that, because giving birth is an exhausting and emotional process, she ought to be given at least one week to recover before any decision to relinquish the child has legal force. The second principle underlying the requirement that consent to adoption may be given only after birth, is arguably an understanding of the moral nature of the relationship between mother and child. On this understanding, giving birth brings with it the obligation to carry out a set of moral responsibilities best described as custodial; a birth mother has the moral duty to care for her vulnerable child. Only once she has given birth can a mother properly assess whether she is in a position to assume the relentless and demanding custodial obligations of mothering an infant or whether someone else is better able to care for the child.80

By attempting to give consent to adoption prior to conception, a preconception arrangement would deny the birth mother any means by which to take into account her emotional response to the child.81 Moreover, it would place her in a position where she

79 Supra, note 61, s.131(3). A birth mother may revoke her consent in writing within 21 days of having given it. Ibid. s.131(8).
81 This point has been considered above in a discussion of the proponents' assumption of rationality. See Chapter 3.3.3.
cannot discharge her moral duty toward the child which arises at birth; that duty is to care for the child herself or to realize that someone else ought, in the best interest of the child, to care for it. A preconception arrangement thus attempts to sever the connection between giving birth and having full parental custodial responsibilities.

The practice of preconception arrangements threatens the value of responsible parenthood not only in requiring a woman to consent to relinquishment before she understands her parental role, but also because it attempts to decide custody in the interests of adults before conception and before the interests of the child can be known. This would not be allowed by Ontario family law which thus protects the value of responsible parenting in a second way.

In Ontario, an agreement to transfer the custody of a child is not enforceable if the transfer is not in the child's best interests. Although judicial and legislative interpretations of what constitutes a child's best interest have varied over time, consideration for the welfare of the child has long determined the enforceability at common law, and now also by statute, of agreements to transfer the custody of children.

At common law, the right to the custody of legitimate children historically resided in the father, even when contested by the mother, because it was believed to be in the child's best interests to remain in the care of its father. According to Lord Chancellor Eldon in 1803, the father's right "was thrown upon him by the law, not for his gratification, but on account of his duties". Custody was a right granted to the father so that he could fulfil his responsibilities toward his children. For this reason, agreements by which fathers transferred custody of their children even to the children's mother were generally regarded as

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83 Lord St. John v. Lady St. John (1805), 11 Ves. Jun. 525, 32 E.R. 1192 (Ch.) at 1194. This presumption of custody in favour of the father gave way to a presumption in favour of the mother (the tender years doctrine). Today there is no presumption other than that the best interests of the child should govern the determination of custody.

84 Vansittart v. Vansittart (1858), 2 De G. & J. 249, 44 E.R. 984 (C.A. Ch.)
contrary to public policy and therefore void. As the Master of the Rolls explained in 1865,

... a covenant by a father that he will abstain from seeing and exercising any control over his children, is bad, because it is against the policy of the law, which holds that it is desirable that a father should exercise superintendence over his children, and that he cannot therefore by contract deprive himself of this inherent right and duty.85

Most of the cases concerned agreements by fathers to surrender custody. Dicta however, made it clear that the judicial position that parental rights were not transferable by agreement extended to mothers as well.86

While generally holding that agreements to transfer the custody of children were not in a child’s best interests and therefore unenforceable, courts recognized that the welfare of the child sometimes required the enforceability of an agreement to transfer parental rights and duties. For example the court refused to interfere in a custody arrangement consented to by the father under which a child was thriving in the home of a maternal aunt.87 Likewise, the court refused to nullify an agreement by which the father transferred custody of his two children to their mother where the father was suspected of sexually abusing his daughter.88 When the custody agreement conferred a positive benefit or avoided harm, court recognized it; to do so was in the best interest of the child. Thus, both the general rule of non-enforceability of custody agreements and the exceptions were based upon the same principle: the welfare of the child.89

86 The Queen v. Barnardo (1889), 23 Q.B.D. 305 (C.A.) and Humphrys v. Polak and Wife, [1901] 2 K.B. 385 (C.A.), where Lord Justice Stirling held that, when the law gives mothers rights with respect to their children it does so "not for the benefit or gratification of the mother, still less as part of her property, but in order to enable her to discharge the duties which the law imposes upon her in respect of the infant, and for its benefit. That being so, it is impossible that ... the mother of the child, should divest herself of those rights in favour of another person", at 389-90. The Ontario Law Reform Commission, Report on Artificial Reproduction and Related Matters (Ontario: Ministry of the Attorney General, 1985) at 93.
87 Lyons v. Blenkin (1820) Jacob 246, 37 E.R. 842 (Ch.).
88 Swift v. Swift, supra, note 85.
89 As the Master of the Rolls expressed it in Swift v. Swift, "The advantage and benefit of the child is the foundation of both the rule and the exception". Supra, note 85 at 639.
Canadian courts adopted this common law rule of giving effect to agreements to transfer custody only if they were believed to be in the best interests of the child. In the 1882 Ontario decision, Roberts v. Hall,90 Chancellor Boyd affirmed the existence of the general rule that "the Court will not allow or assist a father to make an arrangement which will preclude him from acting according to his judgement and discretion in the most advantageous manner for the welfare of his child".91 Boyd C. also recognized that exceptional circumstances could arise that would justify a custody agreement, such as where the transfer was intended to benefit the child or to remove him or her from harm. The question for the court was whose interests were aimed to be served by the agreement. As Boyd C. stated, "the real point is, was the arrangement one bona fide intended for the benefit of the child, or was it a colourable attempt to contravene the policy of the law?"92 The policy of the law was that parents should act in the interests of their children.

Whether parents are indeed acting in the interests of their children is open to question when their own interests are advanced by the custody transfer. For this reason, Canadian courts have been highly suspicious of custody agreements that profit the transferring parent. As long ago as 1908,93 the Supreme Court of Canada expressed its hostility toward custody transfer agreements that benefit the parent. In enforcing an agreement by which a mother transferred legal guardianship of her daughter to her father-in-law so that the child could have a good education, the Court nevertheless stated emphatically that a custody transfer arrangement that fostered the interest of the parent would be void:

If all these family arrangements were a mere cloak to hide and cover up an improper attempt to contravene the policy of the law, as by a natural guardian selling her right as such to another for a consideration, or a mother formally abdicating alike her rights over and her duties towards her child for a personal benefit to herself the argument against the validity of the arrangement so far as it so attempted to contravene such policy would be irresistible [emphasis added].94

90 (1882), 1 O.R. 388 (Ch.).
91 Ibid. at 404.
92 Ibid. at 407.
94 Ibid. at 122 per Davies J.
Judicial suspicion of custody arrangements that profit the transferring parent has remained strong. In 1973, an Ontario Provincial Court Judge refused to enforce an agreement whereby the father waived his rights of access in order to avoid his obligation to pay maintenance. Likewise in 1976, the British Columbia Supreme Court held void an agreement by which the father relinquished his paternal rights to the child in exchange for the mother’s conveyance to him of her interest in the former matrimonial home. In the court’s opinion, the agreement was not a "proper general 'family arrangement' by which the parties composed their differences over property matter and children" because there [was] not the slightest indication in the evidence that, in agreeing to give his consent to adoption, the defendant father was motivated by any consideration involving the welfare of his children but, to the contrary, in my view, he was wholly motivated by his desire to acquire his former wife's interest in their property ... He sold his consent; in practical effect he had bargained way his rights and duties as a father for a valuable consideration.

The court held that the arrangement between the former spouses was prejudicial to family life, involving the abrogation of parental duties and rights, and was therefore void as being contrary to public policy.

Thus at common law the test of the enforceability of a custody transfer agreement is whether the agreement promotes the best interests of the child. This common law test has been adopted and codified by Ontario and Canadian statute law. Under the Family Law Act (FLA), The Children’s Law Reform Act (CLRA), and the Divorce Act, agreements regarding the custody of children are enforceable only to the extent that they promote the children’s best interests.

The FLA specifically permits persons in intimate relationships to enter into agreements concerning domestic matters. These "domestic contracts" are of three types: cohabitation agreements, marriage contracts and separation agreements. A cohabitation

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95 Re Cartlidge and Cartlidge (1973), 3 O.R. 801.
96 Reid (Gray) v. Gray (1976), 29 R.F.L. 63 (B.C.S.C.), at 68.
97 Ibid. at 68 per Aikens J.
agreement may be made by a woman and a man who are living together in a conjugal relationship or are intending so to do.\textsuperscript{101} A marriage contract may be entered into by a woman and a man who are married or are intending to marry.\textsuperscript{102} Women and men who have cohabited but are living apart may enter into separation agreements.\textsuperscript{103}

Under the FLA, the parties to cohabitation agreements and to marriage contracts may not agree about the right to custody of, or access to, their children.\textsuperscript{104} It appears that the legislature limited the parties' freedom in this way because it assumed that custody and access provision in these domestic contracts might not be in the interests of the children. The children of cohabiting or married couples either are not yet in being or are living with the adult parties; the children's interests in the possible event of the parents' separation cannot be known in advance of the event. Because, therefore, a provision in a cohabitation or marriage agreement regarding custody or access could not be made with respect to the best interests of the child at separation, such a provision is void.

Consistent with the view that the best interests of children at separation can be known only at the time of the separation, the FLA does permit parties who have cohabited but are living apart to enter into an agreement to govern custody and access to children.\textsuperscript{105} But even though these two parties are permitted to decide between themselves who shall have custody and access to the child upon separation, the FLA provides that "the court may disregard [their] agreement ... where, in the opinion of the court, to do so is in the best interests of the child".\textsuperscript{106}

Just as the child's best interests limit adults' freedom to agree about custody in advance of separation, and determine the enforceability of an agreement made at separation, so too does the best interests test govern judicial orders for custody. Adults may apply to a court for custody under s.21 of the CLRA\textsuperscript{107} or s.16 or s.17 of the Divorce Act.\textsuperscript{108} Both Acts

\begin{flushleft}
101 FLA supra, note 98, ss.1(1) and 53(1).
102 \textit{Ibid.} s.52(1).
103 \textit{Ibid.} s.54.
104 \textit{Ibid.} s.52(1)(c) and 53(1)(c).
105 \textit{Ibid.} s.54(d).
106 \textit{Ibid.} s.56(1)
107 CLRA, supra, note 61.
108 Divorce Act, supra, note 100.
\end{flushleft}
require that the court decide custody on the basis of the best interests of the child.\textsuperscript{109} Section 24(2) of the CLRA sets out statutory criteria to assist the court in determining what constitute the best interests of the child. It states:

\ldots a court shall consider all the child's needs and circumstances, including,

(a) the love, affection and emotional ties between the child and,
   (i) each person entitled to or claiming custody,
   (ii) other members of the child's family who reside with the child, and
   (iii) persons involved in the care and upbringing of the child;
(b) the child's views and preferences, where such views and preferences can reasonably be ascertained;
(c) the length of time the child has lived in a stable home environment;
(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education and the necessities of life and to meet any special needs of the child;
(e) any plans proposed for the child's care and upbringing;
(f) the permanence and stability of the family unit with which it is proposed that the child will live; and
(g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

With this range of considerations in mind, a judge acting under the CLRA is required to make a custody order that will promote the best interests of the child.

Thus, at both common law and by statute, Ontario determines the enforceability of agreements regarding the custody of children on the basis of a single test: the best interests of the child. When one turns to consider preconception arrangements against this background, it appears such agreements fail to meet this test.

Preconception agreements give rise to the same concern as cohabitation agreements and marriage contracts that purport to determine custody in advance of the possible event of separation: in both preconception arrangements and these domestic contracts, the adult parties at the time of the agreement have an inadequate appreciation of the child's interests. To make a custody arrangement in the best interests of the child, the adult parties would arguably need to be in a position to consider the range of issues set forth in the CLRA to assist the court in determining what constitutes a child's best interests.\textsuperscript{110} Yet because in a preconception arrangement the child is, by definition, not yet in being, its particular needs

\textsuperscript{109} CLRA, supra, note 61 s.24(1); Divorce Act, supra, note 100 at ss.16(8) and 17(5).
\textsuperscript{110} CLRA, supra, note 61 s.24(2).
and circumstances cannot be known. For example, it is not possible for the parties to appreciate before conception the emotional ties that will develop between the child and the other members of the carrying woman’s family. Similarly the carrying woman is not well positioned before conception to assess the parenting ability of the commissioning couple whom she might not know and who might not have children, and of the person named in the agreement whom the carrying woman might never have met, who is to have custody in the event of the commissioner’s death. Moreover, if the child is born with a handicap such as blindness, its special needs might be completely other than can be met by the agreement.

Because the participants in a preconception arrangement do not know the child when they make their agreement, they cannot make a decision in the knowledge that it will be in the child’s best interests. Thus preconception arrangements threaten the value of responsible parenthood. For the same reasons that Ontario law renders unenforceable agreements about custody made in advance of separation, so too would it render void such agreements in advance of conception.

5.3.6. Implications of the Protection of these Values by Existing Law

We have seen that the five values - autonomy, equality, maximizing welfare, minimizing suffering and responsible parenthood - are threatened by various aspects of a preconception arrangement. Because the practice threatens these values, it does not deserve social or legal endorsement. As a practice of human procreation which has this harmful result, it ought to be discouraged. Ontario ought to adopt a legislative policy to discourage the practice in all its forms - paid and unpaid, commercial and non-commercial, genetic-gestational and exclusively gestational. In other words, it does not matter whether the woman is paid for the child, whether a broker acts as an intermediary or whether the child is conceived with her ovum or that of someone else. In each of its forms, preconception

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111 As is required by CLRA, s.24(2)(a)(ii), supra, note 61.
112 Keane Agreement, paragraph 12; Brophy Agreement, paragraph XXII, supra, note 54. Brophy’s provision assumes that the commissioning man might not be married and therefore simply enables him to fill in a blank with the name of a person to whom the carrying woman must transfer custody would the commissioning man be dead. The requirement to assess parenting ability is contained in the CLRA, supra, note 61 s.24(2)(d).
113 CLRA, supra, note 61 s.24(2)(d).
arrangements violate the five important values with the result that the practice is not a good way for children to be brought into the world.

How should the practice be discouraged? Because, as we have just seen, the values threatened by a preconception arrangement would already find protection in existing law, it is prudent to use existing law to carrying on protecting these values in the context of preconception arrangements. It is wise to use existing law because such law has been refined by the experience of the common law and has already received legislative endorsement through its adoption by the representatives of the citizens of Ontario sitting in the legislature. Because the law already exists and applies to human procreation, it should be used explicitly to apply to preconception arrangements.

It is prudent to use existing Canadian and Ontario law to discourage preconception arrangements also because it has the effect of attending to the three special concerns for women, children and society. By preventing forced surgical procedures of amniocentesis and abortion, by protecting a woman’s freedom to choose to have an abortion and to relinquish her child for adoption, existing law has concern for women. By prohibiting the sale of babies, their treatment as products with no interests of their own and their custody transfer before their interests can be known, existing law attends to children. Finally by rendering void a preconception arrangement’s attempts to engineer a practice which threaten the basic principles underlying family law - autonomy, equality, welfare maximization, suffering minimization and responsible parenthood - existing law evinces regard for society. This is especially so in that existing law attempts not to create a situation where the gains of winners will be greater than the losses of losers, but where everyone wins. In assuming that children have important needs and interests to consider, family law tries to encourage the birth of children in a situation in which no relationships are severed viz.: in marriage or in a stable relationship between the mother and father.

Existing law is a good choice to govern preconception arrangements also because it demonstrates a much richer understanding of persons than does contract law. For example, in presuming that parents will care for their children and thus requiring them to take a positive and measured step to relinquish a child,114 Ontario family law recognizes that

114 CFSA, supra, note 61 s.131.
persons are connected to others, that they care for and about others, and that they are embodied, emotional and vulnerable. By invalidating central aspects of preconception arrangements, existing law recognizes significant relationships, prevents exploitation, preserves our means of determining parenthood, protects procreation from becoming commercialized production, and does not allow the public issue of infertility to be treated as a matter which can find "easy" solution in private commerce.

There is a final reason that existing law should be used to govern preconception arrangements: it cannot be manipulated by the ideologies of the proponents. In its protection of women's decision-making power concerning their own pregnancies, it has the effect of rejecting the patriarchal view that a preconception agreement enhances a woman's reproductive freedom; it recognizes instead that such an agreement severely restricts carrying women's reproductive freedom. By viewing the practice of preconception arrangements, not as an application of technology but as a form of human procreation, it focuses not on technology but on the social facts of the conception and birth in the interests of the child; in other words, it does not allow the use of artificial insemination or in vitro fertilisation under a preconception arrangement to oust the jurisdiction of family law. And it entirely rejects the application of market norms to childbirth. Existing law assumes that a child is the result of personal relations between adult parties, it prevents adults from pursuing their own advantage at the expense of the child, it regards the child not as a product but a vulnerable human being whose important relationships with family members are entitled to protection, and it rejects the notion that a child may be placed with adults for adoption simply because adults want the placement; it asks instead whether the placement is in the interests of the child.

5.4 The Case For Legislative Action

This proposal sets forth the case for a legislative policy of discouragement of the practice of preconception arrangements. Having decided that using existing law is the best means to govern the practice, there are still two legislative options to choose between. The Ontario legislature could do nothing, relying on existing law to govern the rights and responsibilities of participants in an arrangement, or Ontario could pass legislation which would adapt existing law specifically to regulate the practice. The latter option is required
by the record of societal problems currently being created because of the lack of regulation of preconception arrangements.

For the legislature of Ontario to reject the contract model but do nothing in response to the practice of preconception arrangements would fail to discourage the practice. Such inaction would suggest that the practice is either beneficial or at least insufficiently harmful to require legislative action. Moreover, to adopt such a position would require a favourable evaluation of preconception arrangements as a societal practice by which children are brought into the world. But, as has been demonstrated, the values which should be respected in a practice of human procreation viz.: autonomy, equality, maximizing welfare, minimizing suffering and responsible parenthood, are actually threatened by preconception arrangements. This threat exists now and justifies immediate legislative action. The value of responsible parenthood, in particular, is presently at risk by preconception arrangements. To understand why it is necessary for the legislature to take positive steps to adopt the legislative proposal which follows, it is important to understand the enormous difficulties the practice currently presents both to parents who wish to assume their duty of responsible parenthood, and to courts which aim to resolve custody disputes in a manner which would permit responsible parenting by the parents of the commissioned child.

The difficulties presented by the practice to adult participants are at least four. The first concerns the relationship between the adult parties. Under the arrangement, the adults who will become parents usually have no relationship with each other beyond the commercial one. As a result, they are unlikely to have developed the mutual respect and understanding which would provide a good basis upon which jointly to take decisions in the child’s interest. Even if they have a relationship (for example, they might be colleagues, friends or family members before entering into the arrangement) that relationship will likely be jeopardized by the unusual strain placed upon it. For example, a woman who has a child with her employer or brother-in-law is unlikely to find it easy to rear a child with him especially when the man will usually be married to someone else.

The second obstacle to responsible parenthood presented by the practice is that there usually exist adult third parties whose interests might conflict with the child’s. For example, the partner of the carrying woman might have no desire to have the child in their home; he might resent the fact that what was intended to be a money-making arrangement resulted in
the diversion of family assets to the rearing of a child who is not his own.

Whilst lack of mutual respect and understanding and the existence of significant others are not unique occurrences in the rearing of children after marriage or relationship breakdown, the practice of preconception arrangements cannot be likened to child rearing after divorce and in "blended" families. The important difference is that the practice of preconception arrangements aims to bring children into a situation characterized by attributes similar to the unintended and regrettable results of relationship breakdown which are seldom ideal for children. The difference between the consequences for children of relationship break down and of a preconception arrangement is the difference between the consequences of an accident and the consequences of an intended event.

A third potential threat to responsible parenthood arises from the possibility of bifurcating maternity and thus having two people who might appropriately be described as the mother - the ovum provider and the gestational woman. As has been argued, both women can reasonably be thought to have parental rights and duties toward the child and ought morally to exercise their rights and fulfill their duties. But this bifurcation of maternity makes it very difficult for women to assume their parental responsibility where, as is typical of preconception arrangements, they do not live together and do not wish the other to develop, or to continue to have, a relationship with the child.

A fourth potential threat to responsible parenthood but unique to preconception arrangements is the fact that the commissioning man (and the commissioning woman in exclusively gestational arrangements) usually has no relationship with the child through its mother prior to the child's birth. Usually a prospective father who wishes to participate in the rearing of his child, assists in nurturing the fetus by caring for the pregnant woman. The man might attend to the consequences of the fetus' development by coping with, and helping to alleviate, the pregnant woman's discomfort. By caring for her, the man arguably becomes predisposed to care for the child once born. By contrast, a commissioning man is like an adopting father in not having a nurturing relationship with the child prior to birth. The commissioning man might not be prepared to nurture the child. The state screens prospective adopting fathers partly for this reason.115 Although a commissioning man may

115 For discussion of this point see, supra, section 5.3.3.
grow to love the child just as many adopting fathers do, he is absent during pregnancy - a period in which he might establish a nurturing relationship with the child which would conduce to responsible parenthood.

Not only does the practice give rise to serious problems \textit{ab initio} to the exercise of responsible parenthood, it would, by its very nature, present enormous difficulties to a court faced with a custody dispute. The first legal problem would be to establish parenthood. Who would be considered the father at law? This question would be resolved differently depending on whether the carrying woman is married and whether she is prepared to submit herself and the commissioned child to blood tests.\textsuperscript{116} In the context of exclusively gestational arrangements, who is the mother? Although this dissertation has argued that the legally recognized mother should be the birth mother, an exclusively gestational arrangement would cause a Canadian court to be faced for the first time with the challenge of articulating a legal test of maternity in this novel situation.

Having established parentage, by what criteria should the court determine custody? This is an intractable problem in the relatively common case of relationship break down, but is even more complex in the unusual situation of litigation concerning custody of an infant in a preconception arrangement. Should the judge decide on the basis of maternal preference, paternal preference, or primary caretaker preference?\textsuperscript{117} If the last, does pregnancy count as already having taken care of the child?

\textsuperscript{116} See Guichon, \textit{supra}, note 69 at 483-490.
A third problem is to confront the issue of economic disparity between the parents. Although marriage breakdown almost always leaves men financially better off and women financially worse off, a paid preconception arrangement, by its very nature, brings together a man with more money than the woman. A judge might be torn between wishing to provide the best home for the child (believing that it is the one with the most money) and concern for the injustice to the carrying woman who, almost by definition, has less money than the commissioners. If a judge considers the relative affluence of a parent as a factor in favour of that parent's custody, then the carrying woman will almost always lose custody.

A fourth problem concerns access and mobility. How shall a judge determine access when, as is likely, the parents live far from each other? The practice of preconception arrangements facilitates the birth of a child to parents who not only are strangers to each other, and might not ever have met, but also who might live on different continents. Frozen sperm and embryos can be and are routinely transported by aircraft. To be sure, a parent in traditional relationship breakdown might move far away from the other, but again preconception arrangements are different in that they aim to procreate children by avoiding the intimate (or indeed any) coming together of the parents.

Whilst divorced parents in rearing children, and judges in custody disputes, must inevitably face serious problems and take difficult decisions, society ought to be loathe to endorse a practice of procreation which, by its very nature, presents severe obstacles to the

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118 The extent to which women suffer economically because of divorce has been the subject of controversy. Leonore J. Weitzman famously claimed that the average standard of living for women who divorced in Los Angeles in 1977 declined by 73 percent after divorce whereas men's standard of living increased by 42 percent ("The Economics of Divorce" [1980/81] 28 U.C.L.A. L.Rev.). Weitzman has since conceded that this report was inaccurate ("The Economic Consequences of Divorce Are still Unequal: Comment on Peterson" [1996] 61:3 American Sociological Review 537). More reliable interpretation of the same data suggests that divorce produces a 27 percent decline in women's standard of living and a 10 percent increase in men's standard of living (Richard R. Peterson, "A Re-evaluation of the Economic Consequences of Divorce" [1996] 61:3 American Sociological Review 528). This revision therefore reports a 37 percent difference between the average standards of living of women and men after divorce.

119 Helena Ragoné, supra, note 12.
exercise of responsible parenthood and the just resolution of custody disputes.

Thus, by taking no legislative action, Ontario would fail to discourage a social practice of procreation which threatens the important values, in particular the value of responsible parenthood, and this would inevitably lead to custody disputes that, as in the Baby M case, give rise to numerous difficulties and pit affluent and educated commissioners against relatively poorer, less educated women.

5.5 Legislative Proposal

Having rejected the contract model as a means of legal regulation and endorsed a policy of active discouragement, this dissertation concludes by making a specific legislative proposal. The proposal is simple and conventional in advocating that existing Ontario family law be specifically applied to preconception arrangements in legislation that would address the central legal questions to which the practice gives rise:

1. May preconception arrangements be enforced at law?
2. May a woman consent to relinquish her rights to, and responsibilities for, a child before conception or birth?
3. May persons offer, give, or receive money in connection with the relinquishment of parental rights and responsibilities?
4. May persons act, as, or hire, a broker?
5. May persons advertise for, or advertise their willingness to act as, a broker or a carrying woman?
6. How shall legal maternity be determined?
7. How shall legal paternity be determined?
8. How should custody be determined in the event of a dispute concerning a commissioned child?
9. May the non-custodial parent have access to the child?
10. May the non-custodial parent be required to pay maintenance for the child?

Taken together, the answers to these questions constitute a proposal for legislation specifically to address preconception arrangements. To the extent that existing Ontario family law has not already addressed one of the issues to which preconception arrangements give rise, this proposal relies upon the five values and the proposed legislative policy of discouraging the practice. It might be thought that this proposal will virtually prohibit the

120 525 A. 2d 1128 (NJ Super. Ch., 1987); 537 A. 2d 1227 (NJ 1988).
121 Guichon, supra, note 69 at 590-597.
practice of preconception arrangements. In fact, it would not ban the practice but would subject it to the same rules as apply to other births. In other words, this proposal would prevent payment to carrying women, render void agreements to relinquish maternal rights and duties made before a child's birth, provide opportunity for the birth mother to change her mind, and grant protection against the award of custody or placement for adoption that is not in a child's best interests. Carrying women would therefore be free to surrender their children in unpaid preconception arrangements but they may not look to the state to enforce the arrangement should a dispute arise.122

5.5.1 Recommendations

1. May preconception arrangements be enforced at law?

Legislation should be enacted that specifically declares that preconception arrangements are void and of no legal effect.

As evidenced by the Ontario Family Law Act (FLA),123 the Ontario Children's Law Reform Act (CLRA),124 and the Canada Divorce Act,125 the test of the validity of an agreement regarding the custody of children is the best interests of the child. Chapter 5.3.5 demonstrated that a preconception agreement cannot satisfy this test because the child (by definition) is not even conceived at the time the agreement is made and therefore its interests are not knowable. A second reason that a preconception agreement cannot meet the best interests test is that the agreement aims to promote the interests of the adult parties and only incidentally those of the child. For these reasons, legislation ought clearly to state that preconception agreements are a legal nullity and are therefore unenforceable at law.

2. May a woman consent to relinquish her rights to, and responsibilities for, a child before conception or birth?

122 This proposal is similar to that advocated by Professors Capron and Radin. "Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood" (1988) 16 Law, Medicine and Health Care 34.
123 Supra, note 98.
124 Supra, note 61.
125 Supra, note 100.
The statutory rules that dictate when a woman may validly relinquish her maternal rights and responsibilities so that her child may be adopted should be made specifically applicable to all mothers, including those who have signed preconception agreements or who have otherwise entered into a preconception arrangement. Ontario family law states clearly that no parent may consent to the surrender for adoption of his or her child until the child is seven days old, and grants consenting parents the right to withdraw their consent within 21 days thereafter. By making these provisions specifically applicable to preconception arrangements, the proposed legislation would affirm that any putative consent to relinquish parental rights and duties prior to conception is void. Further, the proposed legislation would require a birth mother to take positive steps to relinquish her child; her maternal rights and duties would not be lost merely by the lapse of time.

3. May persons offer, give, or receive money in connection with the relinquishment of parental rights and responsibilities?

Legislation ought to declare it illegal to offer, give, or receive money in connection with the relinquishment of parental rights and responsibilities toward a child commissioned by a preconception arrangement. In so doing, the legislation would merely make it clear that the statutory prohibition against payment for the relinquishment of parental rights in adoption applies also to preconception arrangements.

The penalty for violating this provision would be a fine to a maximum of $25,000, imprisonment of up to three years, or both. This penalty already exists in Ontario family law and aims to prevent persons from offering or giving financial inducements to parents to part with their children, and to prevent parents from accepting such payment.

126 CFSA, supra, note 61.
127 Ibid. s.131(8).
128 Ibid. s.159.
129 Ibid. s.160(4). It was recommended by the majority of the Law Reform Commission of Canada that there be no criminal sanction imposed on commissioners or carrying women for participating in an arrangement. They argued that subjecting the infertile couple, who have already experienced the anguish of infertility, and the surrogate, who is trying to provide a solution to their problem, to the stigma of criminality and the ensuing consequences seems excessive and might still not dissuade couples who are only seeking to realize
4. May persons act as, or hire, a broker?

It should specifically be declared illegal to act as, or to hire, a preconception arrangement broker, and to offer, give, or receive payment for a broker's services. This recommendation would make apparent that it is an offence for anyone who is not a government-approved children's aid society or a licensee to place a child for adoption, and that it is illegal to agree to receive or to receive payment or reward of any kind in connection with "negotiations or arrangements with a view to the child's adoption".

It is proposed that the penalty for violating these provisions ought to be a fine of not more than $25,000, imprisonment for a term of not more than three years, or both. This penalty is provided by Sec. 160(4) of the CFSA.

5. May persons advertise for, or advertise their willingness to act as, a broker or a carrying woman?

Legislation should declare it illegal to advertise for, or of one's willingness to act as, a broker or a carrying woman, and to publish such an advertisement. Although Ontario family law does not appear to have a direct precedent for a ban on advertising in matters related to adoption, such a ban is consistent with the goal of preventing procreation from becoming production and with the legislative policy of discouraging the practice of preconception arrangements. Moreover, there is precedent for prohibiting advertising regarding preconception arrangements in other common law jurisdictions that have passed

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The proposal made here, however, is not that a new criminal offence be created but that an existing regulatory offence be made clearly applicable to preconception arrangements. The justification for so doing is that the harmful activity sought to be prevented by adoption law (financial inducement to part with children) can occur also in preconception arrangements.

The argument that commissioners and carrying women ought to be exempted from penalty for having offered, given, or received money for relinquishing parental rights and duties toward a child is not strong. No one, no matter how great is their suffering from infertility, is entitled in Ontario to offer, give, or receive money for a child. Whilst the Law Reform Commission of Canada is correct to point out that the desire of commissioners to have children is legitimate, the means by which they seek to realize their desire might not be.

130 CFSA, *supra*, note 61, ss. 135 and 176(2).
131 *Ibid*. s.159(c).
132 *Supra*, note 61.
legislation concerning the practice. It is proposed that the penalty for advertising or for publishing an advertisement regarding a preconception arrangement be a fine of not more than $2,000, imprisonment for a term of not more than two years, or both. This is the penalty provided by Sec. 160(1) of the CFSA for unlawful attempts to circumvent the statutory adoption scheme by making unauthorized placements. Arguably, advertising is another form of circumventing the statutory adoption scheme and therefore ought to attract the same penalty.

6. How shall legal maternity be determined?

Legislation ought specifically to declare that the mother of a child is the person who has given birth to the child, irrespective of the origin of the ovum. This recommendation is consistent with the particular concerns for women and children viz: that there be no market in women's reproductive capacities and that the best interests of the child be paramount.

When a carrying woman conceives within her own body (whether by sexual intercourse or artificial insemination) the question of maternity is not at issue. She is the child's mother in every sense. Yet when a carrying woman gestates an embryo derived from another woman's ovum, how should maternity be determined? The only case to have considered the matter decided that maternity should be determined by testing for genetic relatedness. If the birth mother is not genetically related to the child then, the mother is determined by preconception intent. This rule is not, however, in the interests of women or

133 A ban on advertising exists both in the United Kingdom and in the three Australian states that have legislated on the issue. See Surrogacy Arrangements Act 1985 (U.K.), 1985, c. 49, s. 3; Infertility (Medical Procedures) Act, Victoria, Australia, No. 10163, 1984 s. 30(2)(a); Surrogate Parenthood Act, 1988, Queensland, Australia, No. 65 s. 3(1)(a); and Family Relationships Act Amendment Act, 1988, South Australia, No. 2, s. 10(h)(c).

134 Supra, note 61. The unauthorized placements are forbidden by s. 135.

The better rule, which states that the woman who gives birth is the mother, would prevent the exploitation of poor women in Canada and elsewhere, and the development of the notion that women are merely vessels or incubators of fetuses, to be treated as such. The rule has the advantages also of relying for its application on the unaided senses rather than costly laboratory work, and of being incapable of error. Further, the rule ensures that there is no period during which maternity is undetermined. This has important repercussions for all women.137

Moreover, the rule that legal maternity is determined by giving birth is also in the interests of children. It would ensure that at least the female adult who is responsible for the child is known at the time of the child’s birth and is present as the child enters the world.138

Whilst acknowledging that a commissioning woman might suffer terribly from not being recognized as the legal mother despite her longing for a(nother) child, the pain she endured by having her egg(s) extracted, and the fact that the child might look just like her, this proposal’s purpose is not to increase her suffering. It recognizes the even greater contribution of the gestational mother, the growth of relationship between the gestational mother and child, and that the technology that separates genetic and gestational motherhood is itself the cause of much of the resulting harm.139 This proposal aims to discourage the practice of transferring embryos by preventing the further suffering and exploitation of women, and by favouring the interests of children rather than the interests of adults. As a consequence, legislation should be enacted to make it illegal for physicians and others to transfer an embryo conceived in vitro into the body of a woman who is not the ovum provider where the woman has no intention of rearing the child. Further, if a child is conceived in a

137 See discussion, supra, Chapter Four, section 4.2.
138 Ibid.
139 For a strong argument for prohibiting embryo transfer in the context of preconception arrangements, see K.H. Rothenberg, "Gestational Surrogacy and the Health Care Provider: Put Part of the 'IVF Genie' Back into the Bottle" (1990) 18 Law, Medicine & Health Care 345.
manner contrary to this proposal and therefore has both a birth and a genetic mother, the two women should receive support in the form of counselling and mediation to enable them to develop a harmonious relationship such that access to the child by the genetic mother will be in the child’s interests.

7. How shall legal paternity be determined?

It is proposed that legal paternity in preconception arrangements be determined in the same manner as it is in other births.

Ontario family law presumes that the husband or common law husband of a mother is the child’s father. That presumption prevails unless rebutted on the balance of probabilities with evidence of blood tests. By presuming that the father is the man who has an intimate relationship with the mother, this principle of family law aims to recognize existing conjugal units and their value for child rearing. The rule also permits a man willing to acknowledge and take responsibility for the child to challenge the presumption. The presumption and the possibility of rebutting it both serve the interests of the child in identifying a man to whom the law will attach the duties of fatherhood.

8. How should custody be decided in the event of a dispute concerning a commissioned child?

If, despite a legislative policy of discouragement embodied in these proposals, a child is commissioned and born under a preconception agreement and is the subject of a custody dispute, the birth mother should have custody of the commissioned child unless, based on clear and convincing evidence, it is in the best interests of the child to be reared by another person.

Because a carrying woman would in all cases be considered the legal mother of a commissioned child, any custody contest would be between the legal mother and the sperm provider. If the sperm provider established his paternity at law, then the contest would resemble other custody battles in being between the legally recognized mother and father.

140 CLRA, supra, note 61 s. 8(1).
141 Ibid. It is not clear, however, that a commissioning man would be successful in attempting to rebut the presumption. His success would ultimately depend upon on the court’s estimation (in light of the carrying woman’s marital status and willingness to relinquish the child) of the child’s best interest and the ethical nature of the preconception arrangement. See Guichon, supra, note 69 at 484-490.
There are, however, significant differences that justify a high standard of proof (i.e., the existence of clear and convincing evidence) before a court should order that the child be removed from its mother.

In ordinary custody battles, it is rarely true that the child was deliberately conceived to be separated from one of its legal parents. Because (among other reasons) this is the purpose of a preconception arrangement, the proposed legislative policy is to discourage the practice. This policy might be defeated were it possible for fathers to sue for custody in the ordinary way. The reason is that a custody dispute between a commissioning man and a carrying woman would, as the available statistics suggest, almost always pit older, more affluent, and better educated fathers against younger, less affluent, and less educated mothers. The socioeconomic advantages of a commissioning man might be viewed by the judge as evidence that the child’s interests would best be served by being reared in his home. Thus, relying upon their material and educational advantages to gain custody, commissioning men would not be discouraged by the unenforceability of the preconception agreement itself.

To prevent the very characteristics that make women vulnerable to agreeing to a preconception arrangement (viz.: their relative youth, poverty, and limited education) from being the reasons that they cannot renounce the agreement, it is proposed that there exist a strong legal presumption in favour of the carrying woman’s custody of the child.

This presumption would also serve the child’s interests, for there is a second important way in which preconception arrangements differ from ordinary custody battles. Rarely does an ordinary custody battle concern a newly born infant; usually both parents have developed a relationship with the child, and the child with them. In a preconception arrangement, only the mother (and perhaps also other members of her family) will have developed a relationship with the child prior to birth. This relationship is significant, if not essential, to a child’s very survival. The importance of maintaining existing relationships is recognized in the statutory test for determining a child’s best interests in a custody dispute.

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142 This is the standard of proof recommended and defended by the NY Task Force, The New York State Task Force on Life and the Law, Surrogate Parenting: Analysis and Recommendations for Public Policy (Albany, 1988) at 137.
143 Supra, Chapter One, section 1.5.
To resolve such a case, an Ontario judge must consider "the love, affection and emotional ties between the child and each person entitled to or claiming custody ... [and] other members of the child's family who reside with the child". 145 Given that an infant is usually best cared for by its mother, with whom it has the strongest relationship, it should be very difficult for a father to succeed in persuading a court that the child's best interests would be served by taking the infant from its mother.

9. May the non-custodial parent have access to the child?

To make clear that existing legislation applies also to preconception arrangements, it is proposed that legislation specifically state that parental entitlement to access is unaltered by the fact of a preconception arrangement.

Under Ontario family law, the fact of living apart does not deny parents the right of access to their children. 146 This entitlement includes the right to visit with and be visited by the child and the same right as the custodial parent to make inquiries and to be given information as to the health, education, and welfare of the child. 147 However, the right of access is not absolute. It is granted by court order only in the best interests of the child. 148

Thus, a commissioning man who is recognized as the legal father and who does not have custody of the child may seek access. It is not certain, however, that access will inevitably be granted. Given that the mother and father of a commissioned child will not usually have had an intimate or otherwise personal relationship but merely a commercial one, and given also that the mother's refusal to relinquish her child might have created animosity, the father's continued presence in the mother's life might cause considerable disruption to her and to her relationships with the child, her partner, and other children. This disruption might be harmful to the commissioned child and ought to be an important factor to be considered in a decision as to whether access by the commissioning man will serve the child's best interests.

145 CLRA, supra, note 61 s.24(2)(a).
146 Ibid. s.20(4).
147 Ibid. s.20(5).
10. May the non-custodial parent be required to pay maintenance for the child? Legislation should make apparent that the financial obligations of parenthood exist also in the case of a preconception arrangement. Ontario law states that "Every parent has an obligation to provide support, in accordance with need, for his or her unmarried child ... to the extent that the parent is capable of doing so". The Supreme Court of Canada has affirmed that a child's right to financial support from its parents is a right that inheres in the child; a parent "cannot barter away his or her child's right to support". Thus, a parent's financial obligations are unaffected by a preconception arrangement. Both mother and father have a legal duty to support their children "in proportion to their respective incomes and ability to pay". Since the practice of preconception arrangements tends to encourage relatively poor women to have children by wealthy men, the resulting child will likely require financial support from its father. This right cannot be waived by the child’s parents in any agreement between themselves.

5.5.2 Discussion

The ten specific proposals presented here are based on the view that preconception arrangements constitute a social practice of human procreation, which, like other such practices, is appropriately regulated by family law. That the practice can be discouraged by applying existing family law and principles derived therefrom demonstrates that aspects of the practice that are likely to cause harm (such as, for example, the offering of financial inducements to a mother to part with her child) have already been foreseen and rendered unlawful by family law. The embodiment of these proposals in legislation would make it abundantly clear that preconception arrangements are governable by the rules that apply to every other birth.

The practical effect of this proposal would be to discourage the practice of preconception arrangements. Commercial brokerage agencies would be prohibited from

149 Family Law Act, supra, note 98 s.31(1).
150 Richardson v. Richardson (1987), 7 R.F.L. (3d) 304 at 312 (S.C.C.) per Wilson J.
151 Ibid.
152 See supra, Chapter One, section 1.5.
operating and thus promoting the practice. Infertility practitioners would be prevented from separating the genetic and gestational aspects of maternity where the gestational woman has no intention of rearing the resulting child. Prospective commissioners, forbidden from advertising and offering payment, would be unlikely to find a carrying woman. Even if a woman agreed to enter an arrangement without payment, she would be considered the legal mother of the child irrespective of the origin of the ovum and, as the mother, she would be entitled to custody. If she chose not to relinquish her child, the commissioning man (assuming he could achieve recognition as the legal father) could gain custody only by presenting clear and convincing evidence that the child’s interests required the child to be taken from its mother. Provided that he established his legal paternity, the commissioning man would have the other rights and duties of fatherhood, such as the right to seek but not necessarily to be granted access, and the financial obligation to support his child.

Among the advantages of this proposal is that it draws upon existing law to prevent harm and to discourage harmful activity. It attempts to minimize the harm caused by contract model’s regulation of the practice in two ways. First, the proposal would refuse to recognize the agreements as valid contracts and thereby would reject their attempts to cause a mother to be viewed as a "surrogate" and a child as a product. Second, it would ban the exchange of money for commissioned children and thereby seek to eliminate the exploitation of women, the commodification of children and the commercialization of reproduction. Thus, by simultaneously refusing to recognize certain aspects of the agreement and banning others, the law would not yield to the contract model’s view of procreation as being a matter of bargain, exchange and sale of goods. It would regard a commissioned conception as it does other extra-marital conceptions and regulate it similarly in the interests of the child.

The law would, therefore, maintain its view that every birth mother is legally responsible for her child and that all mothers and children should have legal protection. If, however, an unpaid woman chose to relinquish her child at birth, she would be subject to the protection and requirements of legislation governing adoption and the child’s placement would be required to be demonstrated to be in the child’s interests. But importantly, the law would give the proper names to what occurs in such an arrangement. In disregarding the contract model’s understanding, it would regard the carrying woman as the mother not as a "surrogate" and the person who adopts as an adopting parent not as "the real parent".
Thus, it would attempt to protect the interests of the parties, and in particular the interests of the child. Similarly, a sister who altruistically agreed to act as a carrying woman for her sister would be regarded as the mother, not as the child’s aunt. As the mother, she would have all the maternal rights and duties concerning the child unless she surrendered them or was proven unfit to have them.

The purpose of adapting and applying existing law has been explained. It is that existing law already would prevent the harm to persons (individually and generally) and to the five values which the practice, when regulated by contract model, would cause. It might be asked why this work does not recommend criminal legislation to govern the practice. This dissertation’s goal is to provide specific recommendations for legislation in Ontario and criminal law is not within the jurisdiction of Canadian provinces. Yet there is no reason in principle that the regulatory offenses provided by family law could not also be criminal law offenses. Indeed, the Parliament of Canada currently has before it a bill which would make criminal certain aspects of preconception arrangements; its provisions are similar to those which the present proposals would view as regulatory offenses. For example, Recommendation 3 of this work is that it should be illegal to offer, give, or receive money in connection with the relinquishment of parental rights and responsibilities toward a commissioned child.153 Section 1 of Bill C-47 similarly states that “No person shall give or offer consideration to a woman to act as a surrogate mother.”154 Recommendation 4 in this

153 Supra, section 5.5.1.
154 Bill C-47, Human Reproductive and Genetic Technologies Act, First Reading, June 14, 1996, Website: http://www.parl.gc.ca/bills/government/C-47_1/17946bE.html, updated December, 1996. The reasoning behind excluding the carrying woman from the provisions of this subsection is presumably that the carrying woman is the most vulnerable party and is, in an important sense, a victim of the arrangement; criminal law should not punish the victim. This work takes a different view which is that existing law prevents people from offering or accepting money for their children and that the sanction should apply to both buyers and sellers. If there are mitigating circumstances which suggest that the carrying woman and indeed the commissioners are not blameworthy even though they committed the prohibited act, that is an issue to take into account in either granting a discharge or in sentencing.
work is that it should be unlawful to offer, give, or receive payment for a broker's services; the offense would be punishable by a fine of maximum $25,000 and imprisonment of 3 years. In much the same way, sections 5(2) and 5(3) of Bill C-47 prohibit the commercial activity of brokers. Section 5(2) states that "No person shall give or offer consideration to another person to obtain the services of a surrogate mother." Section 5(3) states that "No persons, other than the surrogate mother, shall arrange or offer to arrange, for consideration, the services of a surrogate mother." All section 5 violations would be punishable on summary conviction by a fine of $250,000 and imprisonment of a maximum of 4 years; and on indictment to a fine of $500,000 and imprisonment of 10 years. Just as with these recommendations, the criminal law proposal before Parliament would attack the transfer of money for the creation of a child or for the procurement of a woman to create a child for sale. To ban paid and commercial arrangements is this way reduces autonomy to the extent it limits what one may do to seek a child and to earn money, but because the resulting harms are so great, the restriction is justifiable. Even though the penalties in the draft Bill C-47 are significantly higher than those in existing Ontario family law and proposed here, given the nature of harm caused by paid and commercial arrangements, it is arguably appropriate not only to track the existing regulatory legislation within provincial jurisdiction but also to criminalize such arrangements.

Yet it is important to emphasize that it would be inappropriate to ban unpaid arrangements. Although a woman who agrees before conception to surrender her child violates her duty of responsible parenthood, there is a point where the law would

155 This provision creates a loophole which would permit former carrying women to serve as commercial brokers. It was drafted to exempt from sanction carrying women who receive payment but it has the presumably unintended effect of permitting one-time carrying women to open a commercial "surrogacy" business. This loophole is created by the definition of "surrogate mother" provided in Section 5(4) which would include women who once acted as carrying women. Section 5(4) reads, "For the purposes of this section, a surrogate mother is a woman who carries a child, conceived from an ovum, sperm or zygote provided by a donor, with the intention of surrendering the child after birth." The section should be altered to include a subsection defining the term "broker" and then altering sections 5(2) and 5(3) to prevent anyone from paying a broker or acting as a broker for payment.

156 Section 8, supra, note 154.
regulate at the cost of a severe violation of a woman's autonomy.\textsuperscript{157} To regulate or criminalize unpaid arrangements, the activity to be attacked as unlawful would (in genetic-gestational arrangements) be sexual intercourse or donor insemination with the intention of not rearing the resulting child. How would the law successfully enforce such a regulation? The state would need to know when women were about to engage in intercourse or undergo insemination and to inquire of their plans for any resulting child. Such surveillance and inquiry would be so intrusive as severely to violate a woman's autonomy in the second sense. For this reason, it is not proposed to ban unpaid arrangements and therefore criminalization of unpaid arrangements would also be inappropriate.\textsuperscript{158}

\textsuperscript{157} This appears to be a view not shared by the states of Queensland and Arizona which have criminalized unpaid arrangements. The Surrogate Parenthood Act, 1988 (Queensland, Australia, No. 65) defines a "prescribed contract" as one in which a woman agrees before conception, or during gestation, to surrender her child to another person or persons irrespective of whether she is paid or otherwise rewarded. The Act makes it a criminal offense to enter, or to offer to enter, into a "prescribed contract" (Section 3(1)(c). Further the act operates extraterritorially; it applies to non-residents of Queensland who do the prohibited acts in Queensland, and also to residents of Queensland who go outside the state to do the prohibited acts (Section 4). The penalty for doing the prohibited acts is 100 penalty units, three years imprisonment or both. Queensland is unique among the three Australian states that have passed legislation on the issue (the others are Victoria and South Australia) in making it a criminal offense for carrying women to enter into a preconception arrangement even when they are not paid to do so. Arizona is the only other jurisdiction in the common law world which also makes it a criminal offense to act as a carrying woman without payment, though the legislation does not provide a penalty. (1989, Ariz. Sess. Laws 14 as published in California, Joint Legislative Committee on Surrogate Parenting, Commercial and Noncommercial Surrogate Parenting (Sacramento: Joint Publications Office, 1990), 30-31.)

\textsuperscript{158} Given that this proposal would not ban unpaid arrangements, a further question might arise as to whether parties such as the commissioners may give the carrying woman money or gifts in kind not to induce her to become pregnant but, should she wish altruistically to do so, to ensure that she does not lose money in the process. Since this work argues that existing family law should apply to regulate preconception arrangements, and such law does not presently permit women to receive any form of consideration with a view to surrendering a child for adoption, it is not proposed to deviate from existing law. Yet, were Ontario family law to change and attempt to distinguish between compensation and inducement by permitting offers and gifts to pregnant women who intend to relinquish their children, this present proposal would
The result of this proposal in banning paid and commercial arrangements and asserting that the carrying woman is the legal mother of the child might appear harsh to persons who deeply wish to have a child to rear by means of a preconception arrangement. Whilst acknowledging the suffering of prospective commissioners, this proposal rests on the belief that the social problems of infertility and childlessness are not new. The law has not hitherto considered these problems as sufficient to justify changing procreation into commercialized production or commodifying women's reproductive capacities and children themselves. There is no reason for the law to do so now.

5.6 Conclusion

This chapter has undertaken the positive task of proposing alternative legislative policy toward the practice of preconception arrangements. The chapter defined the five values which should guide evaluation of the practice and articulated three areas of special concern for legislators. It demonstrated how preconception arrangements when regulated by contract law endanger the values which deserve protection in human procreation and claimed, therefore, that the practice ought to be discouraged. It argued that existing Canadian and Ontario law - in particular existing family law in the context of adoption and custody - is the best instrument for regulating the practice for it already protects the important values which preconception arrangements threaten. Moreover, this body of law attends to the special concerns for women, children, and society; it has a rich understanding of persons as being connected, caring, embodied, emotional, unequal and vulnerable; and it disallows patriarchal controls over female reproduction, it disregards technology in favour of the child's best interests and it utterly rejects the application of market norms to human procreation. For these reasons and because the practice currently threatens the important values, Chapter Five argued that Ontario legislators should act to adapt existing law to govern the practice and, in so doing, discourage preconception arrangements. The Chapter concluded by presenting a detailed proposal for legislative reform. The proposed legislation makes ten specific

alter to continue to track family law - provided, however, that the law reform stipulated that the offers and gifts to the pregnant women do not put them in a better financial position than were they not pregnant, and the offers and gifts are not made contingent upon relinquishment.
recommendations which would both discourage the practice in Ontario by regulating it and provide judicial guidance to resolve custody disputes concerning commissioned children which might nevertheless arise. The purpose of the general legislative policy of regulation by family law and the proposal itself is not to increase the existing suffering of the infertile and childless, but rather to protect the values which should govern human procreation and thereby to prevent harm to women, children and society in general.
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