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**"It Hain't the Money but the  
Principle o' the Thing" --  
Some Problems for Surrogate  
Motherhood**

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"When a feller says it hain't the money but  
the principle of the thing, it's the money."  
Abe Martin

I should begin by confessing that although my title is taken from Abe Martin's aphorism, the point of the paper is not quite that of the saying. The truth to which Abe Martin draws our attention is that we should be wary of appeals to principle when money is at stake. Yet, while it is true (and troubling) that supporters of surrogate motherhood often speak of the principles at issue in the practice of surrogacy and rarely, if at all, of the money, I do not wish to suggest that what lies behind support for surrogacy is only a concern for money. Indeed, in a way, I am to be the proverbial "feller" who announces at the start that the matter is one of principle, only to concede in the end that it is really about money. In fact, it is about both. I can state the central thesis of the paper in the form of a principle that highlights this dual focus: Human relationships should not be for sale.<sup>1</sup>

If the aphorism at the start is misleading, I apologize. Still, I couldn't resist the temptation of a catchy -- some would say campy -- title. All the more since it was Kin Hubbard, a native Ohioan, who put these words into the mouth of the mythical Indiana farmer, Abe Martin, whose pithy observations on the human condition, "direct from the Paw Paw belt of Indiana," were syndicated in more than 300 newspapers in the early decades of this century. So as another Ohioan who came to Indiana to reflect on the relation of principles and money in connection with surrogate motherhood, I hope you will forgive any part of the

appeal to Abe Martin that is inapt.

Let me begin by noting that the case for paid surrogacy has often been made by comparing surrogacy to other forms of assisted reproduction that are legally permissible and indeed facilitated by state law, and then pointing to the inconsistency of supporting certain forms of assisted reproduction but not others. The most common, if not the most precise, analogy compares surrogacy to artificial insemination with donor sperm (AID). Surrogacy is said to be the "converse" of donor insemination,<sup>2</sup> its "reverse,"<sup>3</sup> its "flipside,"<sup>4</sup> and its "mirror image."<sup>5</sup> These comparisons are invoked as if it followed from the fact that surrogacy is, say, the mirror image of donor insemination, that surrogacy should be treated morally and legally as we treat donor insemination.

But does it follow? Should we reach the same moral conclusions about surrogate motherhood? I do not believe that we should. I want to make the case that surrogate motherhood differs from donor insemination in morally significant ways. As we explore the comparison between these two forms of assisted reproduction, I hope to show that two of the central principles invoked to defend surrogacy are inadequate to the task.

A consideration of the relation of surrogate motherhood to donor insemination leads us, first, to the legal battle over surrogacy. For the court cases on surrogacy have frequently turned on the question of whether surrogate motherhood is like or unlike donor insemination. One of the comparisons I just cited, for example, came from a Kentucky Supreme Court opinion that held that payment to a surrogate did not violate Kentucky statutes

against baby selling in part because the man who contracts with the surrogate is the biological father and in part because surrogacy does not differ essentially from the legally sanctioned activity of donor insemination. As the court put it, surrogate motherhood "is not biologically different from the reverse situation where the husband is infertile and the wife conceives by artificial insemination."<sup>6</sup> If the one is legally permitted, the court reasoned, so should the other be.

Similarly, in the famous Baby M case, the Superior Court of New Jersey held that a constitutionally protected right exists to procreate through surrogate parenting agreements. Again, justification for this position relied on an explicit comparison to donor insemination agreements. The court wrote:

Currently males may sell their sperm. The "surrogate father" sperm donor is legally recognized in all states. The surrogate mother is not. If a man may offer the means for procreation then a woman must equally be allowed to do so.<sup>7</sup>

Thus, like the Kentucky Supreme Court, the New Jersey Superior Court held that surrogate contracts were legally valid in part because they are similar to donor insemination arrangements. By contrast, the New Jersey Supreme Court rejected the comparison between surrogate motherhood and donor insemination and ruled that the surrogate mother contract was not only unenforceable, but void and possibly criminal.

Clearly, then, the comparison to donor insemination is important to the legal controversy over surrogate

motherhood. Where the similarity to donor insemination is stressed, we can expect to see a legal ruling in favor of surrogacy. Where the dissimilarity is highlighted, surrogacy will be regarded less favorably.

Although I do not wish to undertake an extensive review of the legal issues surrounding surrogacy, it is worth considering why, legally, so much appears to turn on the question of whether surrogacy is like donor insemination. The reason is nicely illustrated by the case of Baby M.

The basic facts of the case are undisputed and well known. In February 1985, William Stern signed a surrogate parenting contract with Mary Beth and Richard Whitehead. Under the terms of the contract, Mary Beth Whitehead agreed, for a fee, to be inseminated with William Stern's sperm, carry any child so conceived to term, surrender the child to Mr. Stern at birth, and relinquish at that time any parental rights to the child. On May 27, 1986, Baby M, the child of Mary Beth Whitehead and William Stern, was born. Mary Beth Whitehead then refused to abide by the terms of the contract (i.e., she refused to turn over Baby M or to relinquish parental rights and responsibilities), and William Stern filed suit to have the surrogate contract enforced. On January 5, 1987, the highly publicized case of Baby M went to trial.

From the start of the trial, one of the central questions was whether William Stern had a constitutionally protected right to procreate through the use of a surrogate mother contract, and it was in relation to this question that the comparison to donor insemination became important. William Stern argued that to invalidate the

surrogacy contract would be to deny him equal protection of the law as guaranteed by the Fourteenth Amendment. The logic of equal protection claims explains why the comparison to donor insemination was crucial. To establish a violation of the equal protection clause, one must demonstrate that a particular group has been disadvantaged by the law as compared to a similarly situated group.<sup>8</sup>

William Stern claimed that he was in the same position as a woman who seeks AID to overcome her husband's infertility. In both cases, a person with an infertile spouse seeks to procreate with a third party who relinquishes all parental rights and responsibilities. So long as donor insemination is legal, Stern reasoned, surrogate mother contracts must be legally protected. If they are not, the state would unfairly favor couples with male infertility over couples with female infertility.

The New Jersey trial court accepted this argument because it accepted the comparison between surrogacy and donor insemination. As Judge Sorkow wrote,

Classifications of persons to be sustained for equal protection purposes "must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."<sup>9</sup>

Since Judge Sorkow found no reasonable difference between surrogacy and donor insemination, he concluded that disallowing surrogacy contracts would deny equal protection to "the childless couple, the surrogate, whether male or

female, and the unborn child." We can certainly see how Judge Sorkow came to this conclusion. To be sure, the formal similarities are striking. Both donor insemination and surrogate motherhood, for example, involve preconception termination of parental rights. Indeed, the two procedures can be described isomorphically: a form of assisted reproduction in which artificial insemination is used to produce a child who is genetically related to at least one partner in an infertile couple. The similarities are indisputable.

Yet, if we look more closely at the analogy, we can also see very good reasons to question both the appeal to the equal protection clause and the comparison of surrogacy to donor insemination, despite the formal resemblance. Capron and Radin have pointed out, for example, that the comparison fails to ground an equal protection claim even on a formal level, because the laws adopted to facilitate donor insemination can be applied in the context of surrogacy. In fact, although it is rarely framed in this way, surrogacy typically requires donor insemination. Describing the man who initiates the contract as something other than a "donor" does not change the fact that a woman consents to being artificially inseminated with the sperm of someone other than her husband. That, of course, precisely describes what happens in donor insemination, and state laws that cover this form of procreation apply equally to surrogate parenting arrangements. That state laws governing donor insemination do apply in the context of surrogacy is demonstrated by the fact that the husbands of surrogates typically sign a statement of nonconsent to their wives' insemination.

If such a form is not signed, the husband of the surrogate will be presumed to be the legal father of the child under donor insemination laws. So even granting the similarities between donor insemination and surrogacy, cause remains to question the equal protection claim.

More importantly, however, we must go beyond the formal similarities between donor insemination and surrogacy to their substantive differences. We can see these differences by changing our frame of reference. In highlighting their similarities, we compared donor insemination and surrogate motherhood from the point of view of the contracting couple. Seen from this perspective, the two forms of assisted reproduction may appear nearly identical.<sup>10</sup> In both cases an infertile couple turns to a third party for help in procreating a child, and the third party agrees to terminate all parental rights. Seen from the point of view of the third party, however, things look very different: Gestating and bearing a child simply is not comparable to donating semen. Egg donation is more comparable, although even that procedure is considerably more burdensome and dangerous than semen donation.

When we compare the surrogate mother's role to that of the semen donor we see a difference in kind, not only in degree. Certainly in a responsible donor insemination program a donor will be required to undergo an extensive screening process. But the act of providing semen itself is risk-free, nonburdensome, and simple. By contrast, the activities that the surrogate mother undertakes are neither risk-free, without burden, nor simple. Women have rightly opposed the medicalization of pregnancy and the

corresponding conceptualization of pregnancy as an illness. Nonetheless, there can be no doubt that the physical burdens and risks of pregnancy and childbirth are so much greater than those associated with semen donation that there can be no meaningful comparison of the two. Further, when we compare the emotional attachment we can expect the woman to have to her child with the emotional attachment we can expect the donor to have to his semen, we can appreciate how flawed the comparison really is.

Indeed it was precisely the recognition that this comparison was flawed that led the New Jersey Supreme Court to reject the Sterns' equal protection claim, and thus to overturn the trial court's holding in this regard. As the Court reasoned, even if the only difference between donor insemination and surrogate motherhood was the difference in time invested in donating sperm and carrying a child to term, there would be "more than sufficient basis to distinguish the two situations."<sup>11</sup> The response of proponents of surrogacy to the decision of the New Jersey Supreme Court is instructive. Although the terms of the debate are still nominally those of constitutional law, the debate itself points beyond the narrow legal questions raised by surrogacy to broader questions of morality and public policy.

Consider, for example, the response of the feminist legal scholar, Lori Andrews, to the oft-cited passage in the New Jersey Supreme Court ruling that the fact that Mary Beth Whitehead agreed to the surrogacy arrangement was irrelevant. "There are, in a civilized society," the Court wrote, "some things money cannot

buy." In short, there are values, the Court continued, "more important than granting to wealth whatever it can buy, be it labor, love, or life."<sup>12</sup> Andrews agrees that not everything is for sale in our society, but she points out that the cases and statutes cited by the Court at this point involve restrictions that apply equally to men and women. Restrictions on surrogacy, however, do not apply equally. A policy against paid surrogacy, Andrews writes, "applies disparately -- men are still allowed to relinquish their parental rights in advance of conception and to receive money for their role in providing the missing male factor for procreation."<sup>13</sup>

Andrews is reasoning within an equal protection framework. Notice, however, that the real issue here is not whether the different treatment of surrogacy and donor insemination would meet the intermediate standard of review necessary to justify gender classifications.<sup>14</sup> Rather, the issue concerns the consequences that follow from acknowledging that pregnancy is an experience men cannot have, vastly different from anything men could experience in donating sperm. The real issue, in other words, concerns the significance of pregnancy. In Andrews' view, to acknowledge that pregnancy is a reproductive experience unlike any other, certainly unlike donor insemination, is to open the door to systematic discrimination against pregnant women. "The other side of the gestational coin," she writes,

. . . is that with special rights come special responsibilities. If gestation can be viewed as unique in surrogacy, then it can be viewed as unique in other areas.

Pregnant women could be held to have responsibilities that other members of society do not have -- such as the responsibility to have a caesarean section against their wishes in order to protect the health of a child (since only pregnant women are in the unique position of being able to influence the health of the child).<sup>15</sup>

In other words, to oppose surrogacy would be to create a disparate legal category for gestation that would undermine hard-won feminist victories on other legal issues.

I believe that Andrews is properly worried that opposing surrogacy by appealing to the distinctiveness of pregnancy may have some unwelcome consequences. We need only recall the recent Supreme Court case involving the fetal protection policy of Johnson Controls to appreciate Andrews' concern.<sup>16</sup> Acknowledging the distinctiveness of pregnancy could provide employers with a convenient justification for discriminating against women. But the alternative to recognizing the significance and distinctiveness of pregnancy is not attractive either. It is to deny the reality of gestation in order to ensure the ideology of equality understood as equivalence.<sup>17</sup> Unfortunately, just such a denial underwrites the equal protection argument for surrogacy and many of the arguments in support of surrogacy in general.

It is one thing to say that the law must treat men and women equally, but quite another to say that it must treat them identically -- even where there is substantial difference between them. The latter view involves an almost willful blindness to the facts of biological difference, a blindness that would be

absurd and comical, if it were not dangerous. When the trial court in the Baby M case compares surrogacy to donor insemination and concludes that they are essentially the same because "the donor or surrogate aids the childless couple by contributing *the factor* for conception and gestation that the couple lacks," it turns its gaze away from the concrete, bloody, messy reality of pregnancy and childbirth to the clean and clear-cut abstraction "aiding the childless couple."<sup>18</sup> This abstraction is misleading. To describe the surrogate's role as "contributing a factor for conception and gestation" is to deny the reality of gestation and thus the reality of a woman's life.

I think that feminists and others who have opposed surrogate motherhood on the ground that surrogacy reduces a pregnant woman to a sort of glorified container are correct. The arguments in support of surrogacy depend upon discounting the significance and distinctiveness of pregnancy.

We have seen this strategy in the case of the arguments that rely on the comparison of surrogate motherhood to AID, but it is true for other arguments in support of surrogacy as well. For example, attacks on state restrictions on surrogacy as unjustifiably paternalistic, ultimately rest on a false or misleading view of pregnancy. This conclusion may not be clear at first, but a careful examination shows it to be true. The force of the paternalism charge rests on the comparison of potential state restrictions on surrogacy to past state restrictions on women's activities that were grounded in offensive and sexist assumptions that women were incapable of making rational decisions for themselves.

Ruth Macklin has put the point succinctly. The charge that surrogacy exploits women and therefore should be prohibited, she writes, "questions women's ability to know their own interests and to enter into a contractual arrangement knowingly and competently."<sup>19</sup> The fact that a woman may come to regret her agreement to be a surrogate or that she may agree for reasons we may not approve is no reason to make exception to the general legal policy allowing competent individuals to provide services for a fee. Thus, to prohibit surrogacy is paternalistic and wrong.

Once again, supporters of surrogacy point to a legitimate concern. If the case against surrogate motherhood rests on the claim that women need to be protected against themselves, then prohibitions of surrogacy are indeed disturbing. Yet, the charge of paternalism misstates the case against surrogacy at this point, as we can see if we attend to the logic of the paternalism argument more closely. The charge of paternalism is premised on the assumption that surrogates are undertaking paid labor no different in kind from any other physical labor. In this view, women have a right to control what happens in and to their bodies. To interfere with this right by outlawing surrogate mother contracts is to disparage women's abilities to make rational decisions about the use of their own bodies.

The argument against surrogacy, however, does not call into question women's right to bodily autonomy, nor does it question women's decision-making capacities. Rather, the argument is that certain rights should be inalienable because putting a price on these rights and offering

them for sale is essentially dehumanizing. Larry Gostin puts the point this way:

There are certain things that we can contract about — property, goods, and services. But there are other things so important to human flourishing and self-respect that they should not be specifically enforceable by contract, whether the subject is male or female.<sup>20</sup>

In my view, parental rights are precisely the sort of rights that should be inalienable. In particular, a woman's right to continue an intimate, caring relationship with the child she has nurtured for nine months and to whom she has given birth should not be for sale. Far from seeking to restrict a woman's right to bodily autonomy, opposition to surrogacy rather attempts to ensure that a woman's right as a parent to continue to care for her child cannot be overridden by contract. As I said earlier, the charge of paternalism ultimately rests on a particular (and inadequate) view of pregnancy. For it should now be clear that the plausibility of the paternalism charge comes about in part from the fact that it conceptualizes surrogacy as providing a service for a fee. In other words, the anti-paternalists make their case by discounting both a gestating woman's relationship to the developing fetus and the way in which pregnancy involves the whole person. By focusing exclusively on the decisions a surrogate makes before she conceives, the anti-paternalists draw attention away from the realities of gestation and childbirth and avoid asking whether paid surrogacy is in fact dehumanizing in the way opponents say it is.

By contrast, if we attend to the

actual experiences of pregnancy and childbirth, we can see good reasons to question both the picture of surrogacy painted by the anti-paternalists and the practice of surrogacy itself. We see, for example, that the surrogate contract encourages a woman to think of herself not as a whole or complete person, but as "simply a container carrying a precious cargo that she dare not injure."<sup>21</sup> How else do we explain the fact, for example, that the contract Mary Beth Whitehead signed required her, among other things, to agree not "to form or attempt to form a parent-child relationship with any child or children she may conceive"; nor to abort any children once conceived; nor "to smoke cigarettes, drink alcoholic beverages, use illegal drugs, take non-prescription medications or prescribed medications without written consent from her physician"? How else are we to interpret the fact that the contract required her to undergo amniocentesis and to abort a defective fetus at the request of William Stern?

But a pregnant woman is not a container; she is not an inert incubator. To treat surrogacy as roughly comparable to renting a room in one's home distorts the reality of pregnancy beyond recognition. To defend surrogacy, however, one has no choice but to treat pregnancy as a sort of reproductive good or service for sale. Barbara Katz Rothman has pointed out the way in which this position discounts the reality of pregnancy. In the context of surrogate motherhood, she writes:

We talk openly about buying services and renting body parts -- as if body parts were rented

without renting the woman. But pregnancy isn't a condition for an isolated organ. Women experience pregnancy with their whole bodies. . . .<sup>22</sup>

We need not invoke any mystical notions about pregnancy or infant-mother bonding to acknowledge that pregnancy is both unique and not properly described by the language of "gestational services." A pregnant woman does not simply provide a womb for rent, she puts her entire body to the task of nurturing the developing fetus for nine months. Further, this physical relation often gives rise to a social relationship. For whatever mystification has surrounded notions of infant-mother bonding, many, perhaps most women, experience a powerful identification with and bond to a child born of their bodies. Unfortunately, paid surrogacy obscures this reality: Gestational motherhood is not really a service, certainly not a commodity; rather, it is a relationship.<sup>23</sup>

Once we acknowledge the reality of pregnancy, however, the charge of paternalism begins to appear as almost a diversionary tactic, as a way for supporters of surrogacy to change the subject when confronted with the differences between surrogacy and donor insemination. Rather than acknowledging these differences or responding to the argument that these differences make a difference, supporters of surrogacy take the view that the best defense is a good offense. They thus go on the offensive by accusing opponents of surrogacy of disparaging women by restricting their autonomy.

But the case against surrogacy does not depend on treating women as insufficiently rational during pregnancy

and thus in need of state protection. Rather, in my view, the strongest argument against surrogacy rests on the conviction that certain rights recognized by the state as fundamental to human flourishing should be inalienable and that a woman's right to care for a child she has carried and nurtured for nine months is such a right. Thus, the charge of paternalism simply misses the point. The question is not primarily whether women are capable of making informed decisions about relinquishing a child prior to having conceived it, as the anti-paternalists would have it. The issue is whether allowing for the sale of parental rights is so demonstrably dehumanizing and so clearly an instance of treating persons as things that we should oppose the practice.

To oppose surrogacy is not to accept paternalism; it is to reject the dehumanization of placing women and children, and the relationship between pregnant women and their children, in a cash nexus. Paid surrogacy is dehumanizing because it treats women and children as essentially fungible commodities. Consider Margaret Radin's description: "A fungible object," she writes, "can pass in and out of the person's possession without effect on the person as long as its market equivalent is given in exchange."<sup>24</sup> This definition aptly describes surrogacy supporters' view of the fetus, when they deny the significance of the relationship of pregnancy. So long as the surrogate is sufficiently well paid, the child can pass in and out of her possession -- literally in and out of her body -- without an effect on her. The woman also is treated as fungible, for one surrogate can be replaced without loss by another if she fails to

conceive quickly or fails to bring to term a child quickly conceived.

Yet, as Radin points out, to treat persons as fungible objects does violence to our commonly agreed-upon view of persons as unique individuals who should be treated as ends in themselves and not simply as means to the ends of others. Because surrogacy encourages us to think of women and children as less than whole, because it encourages us to think of wombs rather than women, of the characteristics children may have rather than of the children themselves, it is fundamentally at odds with our considered views about personhood and human flourishing. The anti-paternalists, of course, will respond that treating a person as an end in herself requires respecting her autonomy and thus respecting her right to contract to be a surrogate. The problem with that response is that it offers an impoverished account of human autonomy, one that essentially equates freedom and alienability in markets. Indeed, we can see that the anti-paternalists treat all rights as roughly analogous to property rights that can be bought and sold in markets; they see freedom as the individual's ability to maximize wealth by trading in markets. On this view, any restriction of a woman's ability to enter a contract fundamentally violates her freedom to maximize her economic interests.

Once again, however, Radin has pointed out how profoundly at odds such a conception of freedom is with our considered views about personhood. Indeed, Radin has offered a devastating critique of the attempt to cast all human interaction in market terms. To adopt market rhetoric to describe human interactions or to adopt a market

methodology to assess these interactions is to view human life from an alien perspective, one that most of us would reject upon close examination. Radin attempts to show that this is the case by examining an example of the attempt to understand noneconomic activity in market terms. The example she chooses is Richard Posner's analysis of laws against rape. The example is extreme but useful.

For Posner, rape should be conceptualized as the theft of a property right. Thus, in his view, "the prohibition against rape is to the marriage and sex 'market' as the prohibition against theft is to explicit markets in goods and services."<sup>25</sup> In other words, we need laws against rape to protect a woman's right to offer her body (i.e., her self) for trade, whether in marriage (or in noncontractual sexual relations) or in prostitution, just as we need laws against theft to insure the stability of markets in general.

As Radin points out, to talk about rape in these terms is to treat bodily integrity as "an owned object with a price."<sup>26</sup> The problem is that we simply don't think of ourselves in these terms. It is not a woman's body that has been raped; it is she. The violation of bodily integrity, in other words, is deeply personal in a way that simply cannot be accounted for in market terms. As Radin puts it, "we feel discomfort or even insult, and we fear degradation or even a loss of the value involved, when bodily integrity is conceived of us a fungible object."<sup>27</sup>

Not only does market rhetoric misdescribe rape from the point of view of the victim, it is also inadequate to describe rape from the point of view of the rapist. For, as usual, to speak in market terms

will be to use the language of cost benefit analysis and thus to speak of rape as benefiting the rapist, as indeed Posner does. Yet, under what plausible account of human flourishing could rape possibly be understood to benefit the rapist? The answer is clearly, "None." We are led to conclude that to analyze certain human actions in market terms is to adopt an inadequate account both of personhood and of human flourishing.

In drawing on Radin's critique of Posner, I do not mean to suggest that the anti-paternalists are *necessarily* committed to accepting an economic analysis of rape or a similarly crude analysis of surrogate motherhood. Rather, the point is to highlight the fact that in opting for a view of freedom as negative liberty and defining liberty as the ability to relinquish rights for a fee, the anti-paternalists will be hard-pressed to offer an analysis of surrogacy that does not echo Posner's treatment of rape. Thus we should not be surprised to discover that the anti-paternalists' view depends in part on discounting the significance of pregnancy to the surrogate by seeking to separate the woman from the womb, much as Posner's analysis turns on detaching a woman from her body and treating her body as impersonal property. The problem in both cases is that to undertake the necessary separation requires us to deny a recognizable and real human experience: on the one hand, the rape victim's sense of personal violation; on the other hand, the surrogate's experience of relation to the fetus.

By contrast, if we acknowledge the way in which pregnancy engages the whole person, and if we refuse to define freedom narrowly as the liberty to sell anything for a price, then restrictions on surrogacy will

cease to appear paternalistic. On the contrary, eliminating surrogacy may be seen as freedom-enhancing in that it fosters respect for a woman's bodily integrity understood not as owned property, but as a deeply personal matter central to human flourishing. Here we see clearly that anti-paternalist arguments rely on discounting the significance and distinctiveness of pregnancy, just as equal protection arguments do. Indeed, both disparage pregnancy and, consequently, both are frequently combined with the view that surrogacy is essentially comparable to AID. Both treat gestating and giving birth to a child as involving no greater personal and emotional involvement than providing semen in a lab, and, therefore, both believe that paid surrogacy is acceptable. For both, surrogacy is a service, not a relationship. Both ignore the fact that gestation differs profoundly from semen donation, and the fact that the surrogate's relationship to a child is utterly unlike the semen donor's.

Once we acknowledge the relationship that pregnancy involves, however, we see that we cannot move too quickly from an assessment of AID to an assessment of surrogate motherhood. To be sure, surrogacy shares a number of characteristics with AID. For example, both surrogacy and AID separate genetic and social parenthood by introducing third party gametes into the process of procreation. So both introduce an asymmetry between the parents in relation to their child. With donor insemination the social father will not be the genetic father, although his spouse will be both genetic and social mother; with the most common types of surrogate motherhood the social mother will not be the genetic

mother, although her spouse will be both genetic and social father.

In both cases, too, parents will face the question of whether to tell their child the facts of his or her conception. So the problem raised for donor insemination by secrecy and asymmetry will be raised for surrogate motherhood as well.<sup>28</sup> We can expect, for example, that to keep the truth from a child born through surrogate motherhood will have the same corrosive effects on the family unit as does secrecy in donor insemination. Further, because the child's father is both the genetic and social father while his spouse is only the social mother, we can expect that tensions will be introduced into the marriage and into the mother's relationship with the child. Yet, if we consider only the similarities between surrogate motherhood and donor insemination, we may reach the same conclusion about surrogacy that our society seems to have reached about donor insemination: Surrogate motherhood, although problematic and not for everybody, may be morally acceptable.

I have suggested, however, that we must not look just to the similarities between surrogacy and donor insemination -- we must attend to their differences as well. We have seen that perhaps the most fundamental difference is that surrogacy involves a relationship with a child in a way that donor insemination does not. At best, we might say that the semen donor has a relation to the resulting child, but a relation of genetic connection is not a relationship of care. Providing gametes to assist in the conception of a child is not equivalent to nurturing a developing fetus for nine months. Nor is genetic connection likely to ground an emotional attachment to the fetus in the way that

gestational relation often does. Nor does donor insemination involve a commitment of the whole person in the way that surrogacy clearly does. Although the donor admittedly may -- and ideally would -- consider his sperm to be a personal gift, the gift does not require a sustained physical or emotional commitment.<sup>29</sup> Thus, donating sperm does not promote the sort of detachment from embodied existence that surrogacy, understood as a gestational service, requires.

When we combine a recognition of these differences with a conviction that I can here only state and not defend, the contrast between surrogacy and AID becomes even clearer. The conviction is that we ought to assign greater moral significance to what might be called the "social" activities of parenting than to genetic connection. In other words, in my view the activities of caring for and rearing a child are constitutive of parenthood in a way that simply begetting a child is not. On this spectrum, gestating a child falls somewhere in the middle. It is certainly more significant than simply begetting a child, yet it is not exactly rearing a child in any full social sense either. Nevertheless, it is closer to social parenting than to genetic parenting, and I believe it follows both that a surrogate mother's parental role is more important than that of a surrogate father's in donor insemination, and that when conflict arises between a surrogate mother and a contracting father over parental rights and responsibilities, the surrogate's claim, at least initially, should be given greater weight.

This is not to say that the contracting father is incapable of caring for the child as well as the gestational

mother. It is, rather, to highlight the fact that the child's father is not yet a social parent and thus has not demonstrated the same level of commitment as the gestational mother. I realize that to assign the gestational mother priority on this basis is to turn a temporal difference (i.e., the fact that the surrogate is the first individual to care for the child) into a moral prerogative.<sup>30</sup> That is true, but justified. For it is not mere temporal difference that is here assigned moral significance. Rather, I wish to assign priority to the rearing component of parenthood. Unless we ignore reality, we must acknowledge and respond to the fact that only women currently rear children in their bodies.

If I am right in arguing that parenthood is constituted primarily in the activities of caring for and nurturing a child, i.e., in relationship, then a surrogate mother is unquestionably a parent of the child, even in the case where the child is not the genetic offspring of the surrogate. If the relationship makes the parent, the decision to become a surrogate is the decision to become a parent. To repeat: At the very least the surrogate will have a nurturing relationship with the fetus she carries; often she will have much more, including a developing emotional relationship with the fetus.

This last point is likely to be overlooked if we hold either of two views. If we believe that the fetus is not a person, we are likely to dismiss the possibility that a pregnant woman can have any meaningful emotional relationship with it. Alternatively, if we believe that it is possible to choose not to form a relationship with the developing fetus, then we may hold the view that (social) parenthood is avoidable simply through an

act of the will.

I do not believe that either view is plausible. Even if we wish to deny -- as I do -- that the fetus is a person from conception, even if we insist on distinguishing between a "fetus" and a "child" for much of the pregnancy, at some point it will not be plausible to make this distinction and to insist that the fetus is not a person. At some point, the surrogate mother is carrying a child with whom something more than a physical relationship is possible. Nor is it plausible to suggest that the surrogate may simply choose not to enter the relationship. As David Smith has pointed out, when humans interact with animate beings over time, they tend to become personally involved, whether we are talking about "4-H kids and livestock, or a researcher and a mouse tested over several months."<sup>31</sup> Can we reasonably suppose that a woman could knowingly have the most intimate interaction with a fetus for nine months and not form a relationship with it?

Consider asking the same question of surrogate motherhood and donor insemination: Will a child conceived through this form of assisted reproduction be properly cared for by its parents? We will get a different answer in the two cases. In the case of surrogate motherhood, we will not be inquiring simply about the contracting couple, but about the surrogate mother as well. Is she capable of meeting the demands of parenting? Can we reasonably expect the fetus/child to flourish in her care?

Supporters of surrogacy seek to avoid questions of this sort when they talk about the surrogate as a provider of a service rather than as a parent. To admit that the surrogate is a parent is to invite an

assessment of her parenting; it is to acknowledge that she may parent well or badly and that gestation requires commitment.

By contrast, once we acknowledge that becoming a surrogate is becoming a parent, we also begin to see more clearly what is wrong with surrogacy and why it is not morally on a par with donor insemination. Surrogacy requires us either to deny the surrogate's parental relationship to the child or to treat this relationship instrumentally, as transferable for a price. George Annas points to a central difficulty with surrogacy when he correctly notes that surrogacy "can create one parent-child relationship only by destroying another parent-child relationship."<sup>32</sup> Here we glimpse a hidden but disturbing truth about surrogacy: In undertaking surrogacy, the surrogate mother creates a parent-child relationship with the intention of severing it.

The surrogate contract, of course, obscures this fact because it seeks to frame the mother's relationship to the child she carries as supervenient upon the father's relation to the child, as if the surrogate's relationship to the child were somehow a function of the father's consent. Thus, for example, Mary Beth Whitehead signed a contract that stipulated that she would not form a parent-child bond with any child she conceived. This attempt to create a legal fiction, however, does not change the reality of pregnancy. Every mother is engaged in social interaction with her fetus, whether the pregnancy is wanted or not.<sup>33</sup> The fetus will make demands on her, and she will respond. She may be joyful or resentful; she may angrily try to deny its existence or she may give the

fetus a nickname and talk to it regularly, but she is unlikely to be distant from the fetus in the way that the language of surrogate contracts implies.

Given that the surrogate mother will inevitably have a parent-child relationship with the fetus she carries, we must ask whether such a relationship can be responsibly undertaken when the surrogate is expected to perceive her responsibility to the fetus solely as an artifact of her contractual relation to the biological father and his spouse.<sup>34</sup>

Notice that this question is not applicable in the case of donor insemination, because the donor is not responsible for the care of the fetus in the way that the surrogate unavoidably is: In providing sperm the donor is not, even implicitly, making a commitment to care. By contrast, because the surrogate will necessarily care for the fetus, it is reasonable to ask about the grounding for that care. How committed can we expect the surrogate to be to the care of her child? In most cases, the answer is likely to be that the surrogate is only marginally and provisionally committed. On her own, she does not wish to conceive a child; she does not plan to raise the child; she even agrees not to bond with the child. Under these conditions, can we expect a surrogate properly to care for the child?

When we add to these considerations the fact that the surrogate is paid to enter into a parental relationship with the fetus she carries -- though as we saw, the contract obscures this fact -- and to end that relationship for a price, we see how instrumentally surrogacy treats the parent-child relationship. The problem with commercial surrogacy is thus not simply that it requires a woman to treat

her bodily integrity as owned property available for sale to a buyer, but also that it places human relationships -- indeed, one of the most intimate human relationships -- in the marketplace. And the problem with commercializing relationships is that truly committed, caring relationships are not something we can simply buy and sell. The prospect of buying or selling a friend, for example, is both repugnant and ultimately impossible. It is repugnant because to suggest that one could rent a friend as one does, say, a car, debases the value we place on friendship; it is impossible because someone who agreed to be a "friend" for a price, would not in fact be a friend.

That is not to say that those who are paid to care for others cannot genuinely care for those whom they help, but to the extent that paid caregivers do genuinely care, they will have placed more importance on the relationships they have with their charges than on the goods they receive in payment for their services. Here Nel Noddings' distinction between types of caring is illuminating. According to Noddings, we should distinguish between two types of caring, "caring-for" and "caring-about." "Caring-for," on Noddings' view, is a full-bodied caring that involves a reciprocal relationship with the "cared-for" and includes an emotional attachment to, and identification with, the "cared-for." It typically involves a "displacement of interest" and a movement of the caregiver away from the self toward the reality of the other. By contrast, "caring-about" is a thin and wan form of caring. It does not involve emotional attachment; there is no displacement of self-interest; indeed, one needn't even know the person for whom one is

caring.<sup>35</sup>

If an ideal of genuine caring is caring-for, then we will expect parents to care-for their children because, at the very least, responsible parenthood involves genuine caring. Unfortunately, commercial surrogacy, at least, is at odds with genuine caring, for the relationship of the surrogate to the child is made secondary to the contract and is valued only instrumentally as something for which the surrogate will be paid. Indeed, if Noddings is correct about what genuine caring involves, we could even say that the surrogate is paid *not* to care for the child. For, as we have seen, the surrogate agrees not to form an emotional attachment to, or a relationship with, the child.

The case of noncommercial surrogacy is less clear. I can certainly imagine a case in which a woman whose own children fill her life with joy and who treasures the experience of being pregnant offers to be a surrogate for a childless friend. Such an offer might indeed come from a desire to ease the pain of her friend by providing a gift of great value. To be sure, the case differs significantly from the typical commercial transaction of surrogacy. We cannot say that the unpaid surrogate values her relationship with the fetus/child only instrumentally, that she values the child only for what she receives in payment for it. Nor can we say that unpaid surrogacy places human relationships in the marketplace. Indeed, it is precisely because the surrogate values her relationship to her friend so highly and because she appreciates the importance of the parent-child relationship itself that she is willing to be a surrogate. Thus, she values pregnancy and the child that results from the pregnancy independently of

financial rewards or incentives.

Nevertheless, even unpaid surrogacy requires a sort of emotional schizophrenia of the surrogate that is at the very least troubling. The surrogate is supposed to care for the child she carries and to maintain the requisite emotional distance in order to be able to relinquish the child at birth. So even here difficult questions about instrumentalization arise. The surrogate's relationship to the fetus is still contingent upon the father's desire to have a child through the use of her body, and she must not allow herself to think or feel entirely otherwise.

We can ask of surrogacy the question we ought to put to any form of assisted reproduction, including donor insemination, namely, whether there is something about conceiving a child in this way that intrinsically conflicts with the very purpose for which responsible parents conceive children. We get a decidedly different answer from the case of surrogate motherhood than we do from AID. Because surrogacy requires a mother to attempt to maintain an emotional distance from the fetus she carries, because it demands that she treat the child as that of the biological father and his spouse but not her own, because it treats her relationship to the child as parasitic upon her agreement with the biological father, surrogacy is fundamentally in conflict with the commitment to care that is at the heart of responsible parenthood.

One objection to my argument at this point will certainly be that the only reason I reach different conclusions about donor insemination and surrogacy is because I posed the question to different parties in these two contexts. In the case of donor insemination, I ask whether the

procedure conflicts with the contracting couple's commitment and ability to care, but not the donor's. In surrogacy, in contrast, I ask the question of both the contracting couple and the surrogate.

This distinction is certainly true, and noting it highlights what I have suggested throughout this paper: that one's view of surrogacy depends in large measure on whether one thinks it is like or unlike donor insemination. I have argued that surrogacy is fundamentally unlike donor insemination because the surrogate has a relationship to the child, is a parent to the child, in a way that a sperm donor does not and is not. I have also suggested that to deny the difference is to deny the reality of pregnancy and thereby deeply to discount its significance and uniqueness. If we acknowledge the reality of pregnancy, if we attend to the relationship between the surrogate and the child, then we see why we must ask whether the circumstances of conception conflict with the surrogate's commitment to care for the child, even though we do not ask this question of the sperm donor. The fact of the matter is simply that the donor occupies a different moral space than the surrogate in relation to the child conceived through these two forms of assisted reproduction. She has a relationship to the child that he does not. Consequently, we must judge the two cases differently.

Focusing on this relationship helps us to see, for example, why paying a surrogate is so much more troubling than paying a semen donor. We have seen the trouble with commercial surrogacy. By placing human relationships in a cash nexus, paid surrogacy treats women and children as fungible commodities and is thus essentially dehumanizing. By

contrast, because donating sperm does not involve establishing a relationship with a child, paying a donor is not yet to commercialize human relationships. That is not to say that paying for sperm ought to be encouraged. On the contrary, in my view, a system of voluntary sperm donation would be greatly preferable to the current American system of paid donation. Still, there is a difference between paying for sperm and paying for pregnancy and, once again, the difference has to do with the creation of a caring relationship.

Unfortunately, supporters of surrogacy have discounted the relationship of pregnancy and have thus averted their gaze from the fact that commercial surrogacy involves payment for a relationship, not merely a service. They have invoked as a fundamental axiom a principle of consistency ("Treat like cases alike") and have argued that support for surrogacy is a matter of principle. If I am right, however, when supporters of surrogacy say, "It hain't the money but the principle o' the thing," they are only half right. Our response to surrogate motherhood should be a matter of principle, but the principle should be that foundational human relationships should not be for sale.

1. For a discussion of surrogacy that also assigns importance to the relationship of pregnancy, see Rosemarie Tong, "The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements," *Journal of Social Philosophy* 21 (Nos. 2 and 3, Fall/Winter 1990).
2. Shabir Bhinji, "Womb for Rent: Ethical Aspects of Surrogate Motherhood," *Canadian Medical Association Journal* 137 (December 1987): 1132-1135, at p. 1132.
3. *Surrogate Parenting Associates, Inc. v. Kentucky*, 704 SW2D 209 (KY 1986).
4. Peter Bowal, "Surrogate Procreation: A Motherhood Issue in Legal Obscurity," *Queen's Law Quarterly* 9 (No. 1): 13.
5. Carmel Shalev, *Birth Power -- The Case for Surrogacy* (New Haven: Yale University Press, 1989), p. 87.
6. *Surrogate Parenting Associates, Inc. v. Kentucky*, 704 SW2D 212 (KY 1986).
7. *In Re Baby M*, 525 A 2D 1165 (NJ Superior Court 1987).
8. For a useful discussion of equal protection laws as applied to surrogacy, see A. M. Capron and M. J. Radin, "Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood," *Law, Medicine and Health Care* 16 (Nos. 1-2, Spring 1988): 38f. This issue of *Law, Medicine and Health Care* focused on surrogacy. The essays have been collected, with some additional materials, in Larry Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1990). In my view, this book is the best single volume on surrogacy.
9. *In Re Baby M*, 525 A 2D 1128, 1165 (1987).
10. Even from this point of view, however, very significant differences are evident. For example, an infertile woman may regret not bearing a child as well as not begetting one. That sort of regret is not relevant in the case of AID.
11. *In the Matter of Baby M*, 537 A2D 1227, 1255 (NJ 1988). The Court also disputed the Sterns' claim that the sperm donor section of the New Jersey Parentage Act implies a legislative policy that favors surrogacy. In the Court's words, "The Parentage Act's silence, however, with respect to surrogacy, rather than supporting, defeats any contention that surrogacy should receive treatment parallel to the sperm donor artificial insemination situation." (1250)
12. *Ibid.*, p. 1249.
13. Lori Andrews, "Surrogate Motherhood: The Challenge for Feminists," *Law, Medicine and Health Care* 16 (Nos. 1-2, Spring 1988), p. 78.
14. On the standards for gender classifications, see Rotunda, Nowak and Young, *Treatise on Constitutional Law: Substance and Procedure* (St. Paul: West Publishing Company, 1986).
15. Andrews, "Surrogate Motherhood," p. 78.
16. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al. v. Johnson Controls*, 111 S. Ct. 1196. The Court ruled that Johnson Controls' fetal protection policies barring fertile women from jobs that exposed them to potentially dangerous lead violated Title VII of the Civil

Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978.

17. For an assessment of men's responsibilities to fetuses, see Thomas H. Murray, "Moral Obligations to the Not-Yet Born: The Fetus as Patient," *Ethical and Legal Issues in Perinatology* 14 (No. 2, June 1987): 329-343.
18. *In Re Baby M* at 1164; my emphasis.
19. Ruth Macklin, "Is There Anything Wrong With Surrogacy?", *Law, Medicine and Health Care* 16 (Nos. 1-2, Spring 1988), p. 60.
20. Larry Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements," *Law, Medicine and Health Care* 16 (Nos. 1-2, Spring 1988), p. 14.
21. George Annas, "Fairy Tales Surrogate Mothers Tell," *Law, Health and Medicine* 16 (Nos. 1-2, Spring 1988), p. 27.
22. *Recreating Motherhood* (New York: W. W. Norton, 1989).
23. *Ibid.*, p. 238.
24. "Market Inalienability," *Harvard Law Review* 100 (No. 8, June 1987): 1849-1937, p. 1880.
25. As quoted by Radin, "Market Inalienability," p. 1863.
26. *Ibid.*, p. 1880.
27. *Ibid.*, p. 1881.
28. I have discussed the problems raised by secrecy and asymmetry for donor insemination in "Pursuing Parenthood: Reflections on Donor Insemination," *Second Opinion* 17 (No. 1, July 1991): 57-76.
29. Lisa Sowle Cahill has argued that genetic relation itself grounds moral obligation here, so that the donor is improperly making a commitment he has no intention of keeping. See Lisa Sowle Cahill, "The Ethics of Surrogate Motherhood: Biology, Freedom, and Moral Obligation," *Law, Medicine and Health Care* 16 (Spring 1988): 65-71. I respond to this argument in "Pursuing Parenthood."
30. Thanks to Richard B. Miller for pointing out this insight to me.
31. David H. Smith, "Wombs for Rent, Selves for Sale?", *The Journal of Contemporary Health Law and Policy* 4 (1988): 23-36, p. 31.
32. Annas, "Fairy Tales That Surrogate Mothers Tell," p. 28.
33. I am not talking about pregnancies that end in abortion or miscarriage, but about pregnancies in which a woman carries a developing child to birth.
34. On this point, see Lisa Sowle Cahill, "Ethics of Surrogate Motherhood," p. 66.
35. Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984).