PRECOMMITMENT IN FREE-MARKET PROCREATION: SURROGACY, COMMISSIONED ADOPTION, AND LIMITS ON HUMAN DECISION MAKING CAPACITY

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If people make systematic errors, perhaps government has, more often than anti-paternalists think, good reason to override their choices.[1]

My argument here is that surrogacy contracts are suboptimal because the surrogate cannot ex ante have perfect, or even minimally adequate, information. It is not, then, her ex post regret that drives the analysis. It is that she cannot have predicted accurately what the situation will be at closing time. She cannot have gauged precisely the longterm effects of what she promised before conception. Specific enforcement of the terms of the surrogacy contract is, therefore, inappropriate.[2]

I. INTRODUCTION

The question of whether surrogacy contracts should be enforced is one of the more controversial topics in family law today.[3] Opponents of surrogacy enforcement worry about the potential for exploitation of the surrogate,[4] the commodification of women[5] and children,[6] and the potential psychological harm to the surrogate child[7] and children

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1. Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 751 (2003) (book review).

2. Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2388 (1995).

3. *See* HELENA RAGONE, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 13 (1994).

4. *See* Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 232 (1992) (asserting that "[i]t is unrealistic to believe that all of the harms associated with surrogacy can be eliminated"); *see also* Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies*, 60 TENN. L. REV. 135, 209–17 (1992).

5. *See* Margaret Jane Radin, *Reflections of Objectification*, 65 S. CAL. L. REV. 341, 351 (1991) ("The feminist argument against the market is roughly that in this nonideal world of ours, treating women like anonymous fungible breeders objectifies them and recreates subordination."). Carol Pateman wrote, "The political implications of the surrogacy contract can only be appreciated when surrogacy is seen as another provision in the sexual contract, as a new form of access to and use of women's bodies by men." CAROL PATEMAN, THE SEXUAL CONTRACT 209–10 (1988).

6. *See* THOMAS A. SHANNON, SURROGATE MOTHERHOOD: THE ETHICS OF USING HUMAN BEINGS 156–57 (1988) (suggesting that surrogacy is the moral equivalent of baby-selling); *see also* LARRY GOSTIN, *A Civil Liberties Analysis of Surrogacy Arrangements*, SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 3,

of the surrogate mother.[8] Proponents, on the other hand, argue that failure to enforce these contracts undermines a woman's ability to contract freely for the use of her body[9] and that women should be given the opportunity to provide this service to childless couples. To date, commentators on both sides of the debate have, for the most part, failed to take advantage of the rich wealth of knowledge available from those who study psychology, and more broadly, human behavior. Specifically, while human beings' tendency to use heuristics and to be subject to biases is directly relevant to the surrogacy debate, behavioral research on heuristics and biases has received little attention by those who write about surrogacy and adoption. This omission is important because research reveals that human beings have limited capacity to make "rational" decisions pertaining to precommitments—a topic that is directly relevant to a decision about whether to allow women to bind themselves in surrogacy agreements.[10]

This Article will argue that women who enter surrogacy contracts can never truly give informed consent because there is no way that they can know before conceiving the child how they will feel about giving up the child once the time comes.[11] Supporters of the enforcement of surrogacy contracts have argued that detailed disclosure of the risks and implications of surrogacy, along with the highly publicized stories of surrogacy arrangements gone bad, provide fair warning to potential surrogates.[12] However, behavioral research suggests that individuals are unable to accurately predict what will be in their best interest at some future point in time.[13] Specifically, two heuristics are particularly pertinent to surrogacy contracts: the optimistic bias and the endowment effect.[14] The optimistic bias relates to individuals' tendency to underestimate risks or negative consequences down the road.[15] In

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13 (Larry Gostin ed., 1990) (proposing that surrogacy is a form of baby-selling if the surrogate contract is specifically enforced).

7. Michelle Pierce-Gealy, Comment, *"Are You My Mother?": Ohio's Crazy-Making Baby-Making Produces a New Definition of "Mother,"* 28 AKRON L. REV. 535, 563–64 (1995) (arguing that "[w]hen the gestational mother is denied parental status, her bundle of responsibilities far outweighs her vested rights. She is a legal stranger to the fetus/child. As such, she risks tort liability to both the genetic parents and the fetus, criminal liability, and is in danger of sacrificing her individual right of privacy for the fetus's well-being.").

8. Joan H. Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REF. 865, 902 (1985); *see also* Brinig, *supra* note 2, at 2384–85 (providing examples of children's fear of being given away by their parents).

9. Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 76 (1988) [hereinafter Andrews, *Surrogate Motherhood*]; *see also* Ruth Macklin, *Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis*, 16 L. MED. & HEALTH CARE 57, 60 (1988) ("Feminists who oppose surrogacy presume to speak for all women. But what they are really saying is that those who elect to enter surrogacy arrangements are incompetent to choose and stand in need of protection.").

10. *See infra* Part III.

11. From a psychological standpoint, writers express their concern that surrogates, particularly those who have not yet gone through childbirth, cannot know in advance how difficult it will be to give the child up. *See, e.g.*, Brinig, *supra* note 2, at 2381.

12. Well known examples of papers making these types of arguments are Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995) and Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978), both of which will be discussed in detail in this Article. *See also* Andrews, *Surrogate Motherhood*, *supra* note 9, at 74 (arguing that "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").

13. *See* notes 49–71 *infra* and accompanying text.

14. *Id.*

15. *See generally* Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOCIAL PSYCHOL. 806 (1980).

economic terms, the endowment effect captures the idea that people place particular value on goods that they already hold, and value them above other goods with equivalent market values.[16] In the context of child bearing, this theory would predict that surrogates, by virtue of carrying a child for nine months, value that child above and beyond what would be rationally predicted. The status quo bias and optimistic bias together suggest (a) that surrogates will initially fail to predict their level of attachment to the unborn child and will discount the risk that they will not want to surrender the child after birth and (b) that nobody (including the surrogate) will be able to foresee how much the surrogate will value the child once she has gestated the child for nine months.[17] Consideration of these biases suggests additional reasons to advise caution in permitting and enforcing surrogacy contracts.

In addition to these two biases, a third psychological phenomenon called "cognitive dissonance" is also relevant to any discussion of surrogacy. Cognitive dissonance theory posits that individuals experience discomfort when their beliefs and their actions are discrepant.[18] This discomfort is resolved when the individual eliminates or minimizes the discrepancy between the belief and the action, either by modifying the belief or by changing the action. Because the gestation period for human beings is nine calendar months, surrogates have quite a long time to experience discomfort about their decision. Even if a surrogate started out being comfortable with the idea of giving up the baby at the conclusion of the pregnancy, social influence may cause her to experience a shift in attitude over the course of the nine months. The modification in her beliefs may be difficult or impossible to reverse because the social influence is ever-present. Therefore, the surrogate may end up resolving the dissonance by altering her "action" in order to bring it into line with her attitude by changing her mind about releasing the baby to the intended parents.

Many arguments against enforcement of surrogacy contracts have been advanced. This Article focuses on one particular argument: surrogacy arrangements are a bad idea because it is impossible for the surrogate mother to be fully informed at the time that she agrees to enter the surrogacy contract. This is not an original idea. Others have advanced the notion that some measure of paternalism is necessary in the case of surrogacy arrangements for this very reason.[19] These commentators typically point out that abandoning rights in a child is not equivalent to abandoning rights in an automobile, a tract of land, or a piece of abstract art.[20] According to this line of

16. *See* Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspective on Pain and Suffering Awards*, BEHAVIORAL LAW & ECONOMICS 259, 261 (Cass R. Sunstein, ed., 2000).

17. Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, BEHAVIORAL LAW & ECONOMICS 116 (C. Sunstein, ed., 2000) (for a discussion of the status quo bias); *see also* Cass R. Sunstein, Introduction, BEHAVIORAL LAW & ECONOMICS, 1, 4 (Cass R. Sunstein, ed. 2000) (describing the optimistic bias).

18. *See generally* LEON A. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (discussing cognitive dissonance theory comprehensively).

19. One judge said, "[S]uch consents [before the birth of the child] fail to allow for one of nature's strongest instincts. Who knows what the reaction will be of a mother once she sees her baby?" Johnson v. Cupp, 274 N.E.2d 411, 418 (Ind. Ct. App. 1971) (Buchanan, J., dissenting) (citations omitted).

20. Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT. L. REV. 303, 309 (1993) ("On the other hand, enforcement means increased commodification of women's bodies. It means that we are willing to treat what is an essential aspect of a woman's being, her relationship with a child at the end of pregnancy, as something that is fungible and traded on a market.").

reasoning, traditional property alienation rules are simply inappropriate in the context of a surrogacy contract.

Some have argued that viewing surrogacy contracts as involving the sale of a (parental) right is the wrong way to think about them. Instead, these pro-surrogacy advocates generally characterize surrogacy as the providing of a service.[21] However, this portrayal is somewhat misleading. Certainly, surrogacy involves providing a service. However, it also involves abandoning a very important right. Rights attached to parenthood have consistently been characterized by courts, including the Supreme Court, as fundamental.[22] If providing a service was all that was involved in a surrogacy arrangement, then presumably the surrogate would retain rights in the child along with the biological father. She would have performed the service necessary to make the biological father a parent. However, this is clearly not what is intended when a couple seeks out a surrogate. Normally, at the moment of conception, a woman gains parental rights in a potential child.[23] A surrogacy contract specifically asks a woman to give up the right to raise that child. The intended parents have little interest in the surrogate's services without this relinquishment. It is clear, therefore, that what is at stake in a surrogacy contract is rights to a child, and not merely the performance of a service.

Part II of this Article discusses the similarities between free market (or contract) adoption and surrogacy. Part III characterizes surrogacy as a form of precommitment, laying out the philosophical and practical difficulties with precommitments generally. The heart of the Article, Part IV, explains the optimism bias, endowment effect, the problem of market manipulation, and cognitive dissonance. This Article illustrates how the existence of these empirically supported principles of human behavior preclude true informed consent where surrogacy contracts are concerned. Specifically, Part IV demonstrates that women who enter surrogacy contracts are subject to a specific set of heuristics and biases that make them particularly likely to make errors about how willing they will be to relinquish rights in the baby after it is born. Part IV also explains how the intended parents, who generally have more resources than the surrogate mother, by controlling the purse strings, are in a position to manipulate the market. Specifically, couples, desperate to become parents, are able to present information to the potential surrogate in ways that exploit existing biases, putting candidates for surrogacy in an especially bad position to enter a precommitment. Part V addresses famous arguments in favor of surrogacy contracts written by Richard Epstein and

21. *See* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (stating that payment to the surrogate was for "her services in gestating the fetus and undergoing labor, rather than for giving up 'parental' rights to the child."). It is important to note that this was a gestational surrogacy situation, where the surrogate was not biologically related to the child. However, it is not clear that the lack of a biological connection between the surrogate and the child is sufficient to terminate parental rights of the surrogate. In fact, the court acknowledged that both women had presented acceptable proof of maternity.

22. *See* Troxille v. Granville, 530 U.S. 57 (2000) (holding that a Washington statute, Wash. Rev. Code § 26.10.160(3), unconstitutionally interfered with the fundamental rights of parents to rear their children. The Court concluded that the Due Process Clause did not permit a state to infringe on the fundamental right to make child-rearing decisions.).

23. I use the term "potential child" throughout this Article to refer to an unborn child, or fetus. I am acutely aware of the potential objection in referring to a fetus as a child, but given the forward-looking nature of surrogacy contracts, it seems inappropriate to use the term "fetus"—particularly when many surrogacy contracts involve the forfeiture of payment if the surrogate miscarries or the baby does not survive the birth process.

Richard Posner, pointing out not only the inconsistencies and flawed logic in the two arguments, but also Epstein's and Posner's failure to address concerns raised by behavioral research. Part VI includes other arguments *against* surrogacy from the legal scholarship. Finally, the Conclusion calls for courts and legislatures to pay heed to findings from the fields of psychology and behavioral law and economics and to not enforce surrogacy contracts.

II. SURROGACY AND ADOPTION IN THE "FREE MARKET"

Surrogacy and adoption are both methods that childless people (usually same-sex or opposite-sex couples) turn to in an attempt to get a child when other avenues are not open to them. Surrogacy has long been controversial in a way that adoption has not[24] for the reason (among others) that surrogacy is considered morally tenuous.[25] Because the adoption contract occurs after the child is already in existence and needs a home, adoption is viewed as a solution to a pre-existing problem. Surrogacy, on the other hand, involves the creation of a child for purposes of exchange, and therefore can be viewed as creating a potential problem. Adoption, as we currently know it in the United States, involves providing a home for a child when the biological parent(s) is (are) unable to care for the child. Because the arrangement is made after it is a *fait accompli*, and because there are strict regulations against giving the child to the highest bidder, adoption is not generally characterized as "babyselling." Surrogacy, on the other hand, is arranged in advance and involves a surrogate voluntarily entering into a pregnancy where the sole purpose is to provide a child for someone else. In order to induce a woman to perform such a task, payment is usually provided to the surrogate. This has led some to characterize surrogacy as a form of babyselling.[26] In addition, at least in theory, surrogates are not free to decide to keep the child. This differs from adoption in that the birth mother in the adoption context is free to keep the child until the moment that she signs away her parental rights (and in practice, this time period is often extended).

The difference between the two practices has made surrogacy and adoption look very different. However, in a truly free market, the two might resemble one another. In a hypothetical world in which the marketing of children was protected and enforced, a woman could arrange to provide a child for a couple by conceiving the child with an unrelated man (or sperm donor) or by being artificially inseminated with the sperm of a man in the couple (traditional surrogacy) or by being implanted with a fertilized egg

24. This is not to say that there is nothing controversial about adoption, however.

25. Evidence for this comes from the fact that adoption is widely accepted and regulated, whereas surrogacy is not. In fact, one objection to surrogacy arrangements is that they undermine adoption laws. *See In re* Baby M, 525 A.2d 1128, 1157–58 (wherein the court questioned the validity of surrogacy on the grounds that it contravenes state adoption statutes and parental rights termination statutes); *see also* Catherine DeLair, *Ethical, Moral, Economic, and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 170 (2000) (referring to the controversial nature of surrogacy).

26. *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 17 (expanded ed. 1990) (pointing out that surrogacy contracts "might be considered to violate prohibitions against baby selling"); John J. Mandler, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1290 (1985) ("Critics of surrogate parenthood have pointed to the facial similarities between babyselling and surrogate parenthood arrangements involving compensation of the surrogate.").

from the couple (gestational surrogacy). The heart of the contract in all three situations would be the same: the woman (and perhaps the unrelated sperm donor) would agree to relinquish all rights to the child, and the woman would agree to carry the fetus to term, observing whatever precautions and agreeing to whatever medical procedures the parties bargained for during the contract negotiations. In such a world (in which surrogacy arrangements were strictly enforced), it is difficult to see how contract adoptions would differ much from surrogacy arrangements. Indeed, contract adoptions would amount to little more than traditional surrogacy agreements in which a sperm donor was utilized. This Article will discuss surrogacy and contract adoption together because both of these phenomena involve similar risks and behavioral characteristics.[27]

III. PRECOMMITMENTS AND PSYCHOLOGICAL PRINCIPLES

When commentators voice objections to the enforcement of surrogacy contracts, they generally object on either symbolic or practical grounds, or both. Arguments about symbolic reasons often boil down to the assertion that surrogacy results in the commodification of babies and women (or an important aspect of women, their reproductive ability).[28] Because commodifying a "good" that is ordinarily viewed as unique or priceless results in the devaluation of that thing,[29] commodification is almost uniformally perceived as insidious in this context.[30] A second line of attack against surrogacy contracts involves their potential to leave the surrogates worse off than they were prior to entering into the contract.[31] This argument states that women who are contemplating entering surrogacy contracts cannot adequately protect themselves against the potential for psychological harm that could result from carrying a child for nine months only to have to surrender the child to relative strangers.[32] Specifically, the concern is that the surrogate will experience a change of heart and be unable to extricate herself from the contract. Whereas a birth mother in a traditional adoption situation may wait until the birth or after the birth to figure out how she feels about giving up the child, in a contract adoption or surrogacy situation, the birth or gestational mother does not have that luxury.

One way to think about surrogacy and contract adoption involves the idea of precommitment. Precommitment strategies are controversial because of the debate over the degree to which the self at Time 1 should be able to commit the self at Time 2 to a binding decision. Much of the discussion on precommitment strategies is somewhat philosophical in nature, [33] and includes questions such as: who is the real self, the Time

27. It is important to keep in mind that surrogacy is a real, on-going phenomenon, whereas contract adoption, a strict form of "babyselling," does not appear in any legally recognized form in the United States.

28. *See, e.g.*, Becker, *supra* note 20, at 309–10; *see also* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, THE ETHICS OF REPRODUCTIVE TECHNOLOGY 205, 206–08 (Kenneth D. Alpern ed., 1992).

29. Commodification involves placing a price on something. By definition, as soon as something that is priceless is assigned a price, its value is reduced.

30. Imagine, for example, how most people react to the notion of "baby selling" and it is clear that this is true.

31. *See* Becker, *supra* note 20, at 309; *see also* Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L.J. 1811, 1820–21 (1988).

32. *See* Jackson, *supra* note 31, at 1819.

33. *See, e.g.*, Dan W. Brock, *Precommitment Theory in Bioethics and Constitutional Law*, 81 TEX. L.

1 self or the Time 2 self; and how much control should one self be able to exert over another?[34] Many of the concerns voiced by those who oppose strict enforcement of surrogacy contracts are captured by the philosophical underpinnings of this debate. As one commentator has noted, "[t]o give the present self the authority to act in ways that ignore the expected wishes of his future self, as well as his past self's wishes, appears to constitute a tyranny of the present."[35]

Where the present self (the self as Time 1) is able to trade away the parenting rights of the future self (the self at Time 2), the stakes are particularly high, and the danger great. Concerns about protecting autonomy and freedom of contract pale in comparison to the suffocating loss of freedom a surrogate must feel when bound by a contract that severs all ties between herself and the child she carried and birthed. As Jackson put it,

> A rule precluding specific performance of maternal-surrender clauses limits the surrogate's freedom to contract away her right to change her mind and may result in lower "prices" for her services because of increased uncertainty on the part of the "purchasing" parents. Yet such restrictions may promote her future autonomy more profoundly, avoiding impairment of the sense of self-identity that could result from being compelled to honor a deeply regretted promise made by a "former self."[36]

Research in the area of human behavior, while not useful for addressing the philosophical or existentialist questions about what self should prevail, can provide critical information about how good individuals are at predicting their own future attitudes. Discussions of surrogacy incorporate notions about the psychological well-being of the surrogate and child, but they fail to tap much of the psychological and behavioral literature on future-oriented decision. Empirical research on how human beings make decisions should be central to any discussion about contractual enforcement.[37] Perhaps nowhere is the application of such empirical research as critical as in the area of surrogacy, where the appropriateness of allowing one contracting party to commit herself is at issue.

This Article contends that several behavioral principles argue against enforcement of surrogacy contracts. Specifically, these principles suggest that women who agree to give up a child before the child is conceived cannot possibly know how they will feel at the end of the pregnancy. As a result, surrogates are not fully informed, and therefore, are incapable of possessing the requisite knowledge at the time the contract is formed.[38] The following sections of the Article address problems with precommitment in the context of surrogacy by describing aspects of human behavior that suggest either (1) that it may be difficult for a woman to know how she will feel about her

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REV. 1805 (2003); *see also* John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989 (2001).

34. For a more detailed discussion of this question, *see* THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 99, 106 (1984).

35. Brock, *supra* note 33, at 1810.

36. Jackson, *supra* note 31, at 1818.

37. A number of scholars discuss behavioral research in the context of contract formation. *See, e.g.*, Korobkin, *supra* note 17.

38. *See* Bershad v. Curtiss-Wright Corp., 535 A.2d 840 (Del. 1987) (the decisive issue for the court was whether the plaintiff was fully informed at the time that he entered a merger agreement).

precommitment to give up the baby at the outset or (2) that there are reasons why a woman might change her mind over the course of a pregnancy, ultimately deciding to keep her child.

IV. PSYCHOLOGICAL RESEARCH AND ITS RELEVANCE TO THE SURROGACY QUESTION

The fields of economics and psychology compete for attention in legal scholarship. Economic theory, because it includes an uncomplicated, comprehensive model of human behavior, has gained the most attention from legal scholars.[39] This theory has centered on the "rational actor" model in explaining human behavior. The notion behind the rational actor model is that human beings act in rational ways to maximize their expected utility.[40] Psychology, which attempts to account for as many factors as possible in order to arrive at a model that has predictive validity, has not received the same type of attention from the legal arena. As Donald Langevoort explained, "both psychology and sociology have suffered from the inability to generate a unified behavioral model rivaling the simplicity, elegance, and testability of the economist's utility-maximizing rational actor."[41] However simple and easy to apply economic theory is, it proves inaccurate in predicting human behavior. Human beings are simply not perfectly logical machines who operate on a rational basis according to the rules of logic and economics.[42]

The flawed premise inherent in the rational actor model was first demonstrated by psychologists Daniel Kahneman and Amos Tversky. In the early 1970's, Daniel Kahneman and Amos Tversky authored several groundbreaking papers on the mental shortcuts people take when making decisions.[43] These shortcuts, or heuristics, are adaptive in the sense that they may shorten the time it takes to make good decisions under some circumstances. However, in some cases, the reliance on these heuristics lead to "severe and systematic errors."[44] These errors lead people to misattribute the reasons for their decisions, to overweigh certain factors in making decisions, and to exhibit unwarranted optimism during the decision-making process.[45]

While other professional disciplines (e.g., business and accounting) adopted the behavioral principles offered by psychology far sooner than did law,[46] empirical evidence of biases and proof of the suboptimal outcomes resulting from decision making under the influence of these biases have led numerous legalscholars to call for a reexamination of the economic model of decision making.[47] Furthermore, as the work

39. For further discussion of the law and economics approach, *see* Gary S. Becker, *The Economic Approach to Human Behavior* 14 (1976).

40. *See id.*, for a detailed explanation of this theory.

41. Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1500 (1998).

42. *See* BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); *see also* Jeffrey J. Rachlinksi, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003); *see also* Langevoort, *supra* note 41, at 1499.

43. *See* Amos Tversky & Daniel Kahneman, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Kahneman, Slovic, & Tversky, eds., 1982).

44. *Id.* at 3.

45. *See* Langevoort, *supra* note 41, at 1502–07.

46. *See id.* at 1502 (for a more thorough discussion of these developments).

47. In fact, our reliance on the notion of rationality may, in and of itself, be a bias. Jon Elster asserts that

of Tversky and Kahneman 'have gained momentum, an increasing number of legal commentators have incorporated psychological findings on behavioral decision theory into their scholarship. The growing focus on behavioral theory calls into question the economic model based upon the rational actor. Moreover, policy suggestions are increasingly turning to a more complex, but perhaps more accurate, model of human behavior based upon psychological theory and empirical evidence.[48] For example, Cass Sunstein remarked, "If human beings use identifiable heuristics, and if they make systematic errors, we might better understand why law is as it is, and we might better generate strategies for ensuring that the law actually promotes social goals."[49] One of the most common themes arising out of Tversky and Kahneman's work is the need for more government and judicial oversight in certain areas of decision making. Specifically, "[i]f parties to a contract suffer from cognitive limitations that prevent them from making wise commitments, then there is at least a prima facie case for more paternalistic forms of judicial intervention rather than strict reliance on freedom of contract."[50]

A. The Optimism Bias

The optimism bias captures the idea that human beings are unrealistically optimistic.[51] Specifically, individuals systematically underestimate the likelihood of negative future outcomes. For example, people underestimate the likelihood that they will be in a car accident or that they will be a victim of a flood or an earthquake.[52] Baruch Fischoff demonstrated this phenomenon in an early study on individuals' reactions to warnings in product liability cases.[53]

Many of the risks that people underestimate involve events that are beyond their control, such as natural disasters. However, quite often, individuals underestimate the possibility of a bad outcome stemming from controllable behavior, such as getting fired or being in an automobile accident.[54] Furthermore, research demonstrates that people are poor predictors of their own future attitudes, as evidenced by studies showing that individuals systematically underestimate their chance of ever being divorced.[55]

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rationality creates a comforting illusion of control when we apply the rational actor model to law. Jon Elster, *Alchemies of the Mind: Transmutation and Misprepresentation*, 3 LEGAL THEORY 133 (1997). The idea is that the rational actor bias, along with the other biases we have seen demonstrated, help human beings to bring a sense of order to an otherwise chaotic world. The irony is that in relying on rationality as a basis for human behavior, we make policy based upon predictions that ultimately turn out to be incorrect. *Id.*

48. *See* Langevoort, *supra* note 41, at 1529–40 (for a partial bibliography of legal work that has employed behavioral decision theory).

49. Sunstein, *Hazardous Heuristics*, *supra* note 1, at 752.

50. Langevoort, *supra* note 41, at 1511 (citing Cass Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986)); *see also* Cass Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997).

51. SHELLEY E. TAYLOR, POSITIVE ILLUSIONS: CREATIVE SELF-DECEPTION AND THE HEALTH MIND 6–11 (1989) (advancing the notion that an optimistic outlook is necessary for a healthy self-concept).

52. Christine Jolls, *Behavioral Economics Analysis of Redistributed Legal Rules*, 51 VAND. L. REV. 1653, 1658–62 (1998).

53. Baruch Fischoff, *Cognitive Liabilities and Product Liability*, 1 J. PROD. LIAB. 207 (1977).

54. Christine Jolls, *Behavioral Economics of Redistributive Legal Rules* in BEHAVIORAL LAW AND ECONOMICS: HEURISTICS AND BIASES 288, 291 (Cass R. Sunstein ed. 2000).

55. *See* Weinstein, *supra* note 15. Certainly some of the people who underestimate their chances of

If people underestimate risk when they enter contracts, perhaps the legislature and courts should take this into account when deciding whether to strictly enforce certain types of contracts. An argument can be made that surrogacy contracts are fundamentally different from other types of contracts and that the same rules that apply to contracts generally should not apply in surrogacy situations. While there is no reason to believe that the optimistic bias is particularly influential in surrogacy decisions, there is reason to believe that the effects of regret in a surrogacy situation are likely to be particularly devastating for the surrogate, and potentially for the intended parents.[56]

B. The Endowment Effect

The endowment effect relates to the notion that when individuals hold a good, they demand a higher price to release that good than they would if they did not hold it.[57] In other words, simply possessing a commodity increases its subjective value to the possessor. This means that all things being equal, there will be a gap between what buyer is willing to pay for a good and what seller is willing to accept for that same good.[58] This empirically tested phenomenon renders inaccurate the basic economic assumption that initial allocation is irrelevant, and calls into question the Coase theorem, at least in some situations.[59]

The endowment effect was demonstrated most clearly in a series of experiments described by Daniel Kahneman, Jack Knetsch, and Richard Thaler.[60] In one particular experiment, participants were divided up into three groups: sellers, buyers, and choosers. Sellers were given a mug and asked whether they would be willing to sell the mug for a series of prices ranging from $0 to $9.25. The buyers were asked whether they would be willing to buy the mug for each of these same prices. Finally, the choosers were asked whether they would prefer to receive the mug or the money for each of these prices. The endowment effect predicted that the sellers, who already possessed the mug, would assign a higher price to the mug than would the buyers or the choosers. This is precisely what happened. The sellers assigned an average price of $7.12, the choosers assigned a price of $3.12, and the buyers a price of $2.87.[61] The

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divorce are not the catalyst for the divorce, and the termination of the union is therefore not a reflection of their own feelings about the marriage. However, given the overwhelming prevalence of the tendency to miscalculate the risk of divorce, it stands to reason that many of those polled do end up feeling differently about their spouse down the road.

56. Justification for these assertions appear in the following discussions of the status quo bias and the cognitive dissonance theory.

57. Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem* in BEHAVIORAL LAW & ECONOMICS 211, 226–27 (Cass R. Sunstein ed., 2000). For discussion of a related phenomenon, the status quo bias, *see generally* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998) [hereinafter Korobkin, *Status Quo and Contract*] (arguing that the desire to maintain the current state of affairs hampers negotiations to alter default contract rules).

58. *See e.g.*, Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

59. *Id.* The Coase Theorem states that assuming zero transaction costs, initial allocation is unimportant because ultimately, the parties will bargain around the initial allocation to achieve the most efficient allocation of assets. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); *see also* Russell Korobkin, *Status Quo and Contract*, *supra* note 57, at 608.

60. *See* Kahneman, *supra* note 57, at 233.

61. *Id.*

dramatic difference between the sellers and the buyers (and choosers) in how the mug was valued illustrates the tendency of those who hold a good to assign a higher value to the good than would be assigned by those who do not hold that good.

Quite often, the endowment effect is discussed in the context of evaluating default terms. How legal rules determine initial allocation is important because whoever receives the initial allocation will demand a higher-than-expected price to part with it. This notion is related to a close cousin of the endowment effect, the status quo bias.[62] The status quo bias represents human beings' preference for the status quo, and their reluctance to opt for change.[63] A penchant for maintaining the current state of affairs is important in the context of default terms because it suggests that parties will tend to keep whatever terms are the default.[64] Korobkin asserts in his paper, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, that the emphasis should be not upon parties' preference for default or other terms, but rather, that the emphasis should be on the choice between action or inaction.[65] He contends that a "bias in favor of inaction minimizes possible future regret that a negotiator might experience if agreed upon contractual terms turn out, in hindsight, to be undesirable."[66]

It might appear that the status quo bias is inapplicable to the surrogacy situation because the default is that a woman keeps her baby. In contracting away that right, she is expressing satisfaction with the terms of the contract. One might ask how this situation is like determining default rules. In both situations, the status quo bias influences feelings of regret. In the classic contract situation, a party rejects a fair price for a good in favor of holding onto the good because of the fear of regretting the loss of the good. In the surrogacy situation, *after* the contract is entered, the status quo changes from one in which the woman is not a mother to one in which she is. By the time the surrogate becomes a mother, she has committed herself to losing the status quo; changing the situation, giving up the baby. In other words, in the typical contract situation, a party would hold out for a higher than market price prior to entering the contract, but upon receiving that higher price, would happily make the deal and suffer no regret. However, the unique nature of a surrogacy agreement is such that the contract is entered before the "seller" has possession of the "good." At the initial point (when the contract is entered), her valuation of the "good" is equal to that of a non-possessor. It is only after conception, when she is carrying the fetus, that a surrogate "possesses" the good and will therefore experience the increase in value.

The increase in subjective value is particularly likely because of the unique nature of a surrogacy arrangement. Importantly, unlike a true "good," a potential child is not fungible. Once a child is lost, that child can never be replaced. The child is unique,

62. The status quo bias and the endowment effect are essentially different names for the same phenomenon. The endowment effect can be thought of as a particular manifestation of the status quo bias.

63. *See* Korobkin, *Status Quo and Contract*, *supra* note 57, at 608; *see also* Russell Korobkin, *Inertia and Preferences in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1584 (1998) [hereinafter, Korobkin, *Inertia*].

64. *See generally*, Korobkin, *Status Quo and Contract*, *supra* note 57.

65. *See* Korobkin, *Intertia*, *supra* note 63, at 1586.

66. *Id.*

one-of-a-kind, and "priceless."[67] Moreover, characteristics of a pregnancy can result in emotional connections forming between the potential child and the pregnant woman. This emotional connection can emphasize the uniqueness of the potential child in the surrogate's mind.[68] For instance, a fetus' motions *in utero* are widely said to create a bond between mother (surrogate) and child.[69] These characteristics increase the chances that the surrogate will attach a higher value to the potential child after conception, and perhaps especially after she feels the potential child begin to move.[70] Furthermore, even if the surrogate's attachment to the potential child were not greater than that of the intended parents (who, admittedly, probably desperately want the child), the surrogate is unable to bargain effectively at the time of contract formation because at the time she does not yet have any connection to the potential child. To ask a woman to pre-commit to forfeiting her rights in a child who has not yet been conceived is tantamount to asking a merchant to determine the selling price for an extremely precious item that he has never held, touched, or seen.[71]

Of course, a child is not an object, nor is a child *like* an object.[72] It is this very dissimilarity between a potential child and an ordinary good that makes the sale of a parental right prior to the creation of the potential child so problematic in the first place.[73] Given the mug experiment, described above, we know that human beings grow attached to objects simply by virtue of possessing them. It stands to reason that this bias would be particularly acute when the "possession" was a potential child.

C. The Problem of Market Manipulation

In a thoughtful article published in the New York University Law Review, Jon Hanson and Douglas Kysar argue that the market is not passive in the face of cognitive biases, but rather that economic and other incentives drive players to exploit these biases.[74] They assert that the presence of these heuristics "makes individual decision-makers susceptible to manipulation by those able to influence the context in which the

67. This notion that a human being is priceless is particularly complicated in a surrogacy arrangement, where a price must necessarily be assessed. Of course, one might deal with this issue by asserting that the monetary exchange is not for the baby, but for the service performed. See my discussion, however, refuting this notion at *supra* note 2 and accompanying text.

68. *See* Jackson, *supra* note 31, at 1811 (emphasizing the strong emotional connection the mother makes with a child she carries).

69. *See generally* HEIDI MURKOFF, ET AL., WHAT TO EXPECT WHEN YOU'RE EXPECTING 174 (3d ed. 2002); GLADE B. CURTIS & JUDITH SCHULER, YOUR PREGNANCY WEEK BY WEEK 248–49 (4th ed. 2000); MIRIAM STOPPARD, CONCEPTION, PREGNANCY, & BIRTH 194 (2000).

70. Even if the child was originally unwanted, these feelings of attachment may develop in some women throughout the pregnancy, especially after quickening. *See* M. H. KLAUS & J. H. KENNELL, PARENT-INFANT BONDING 263 (1982); *see also* M. H. KLAUS & J. H. KENNELL, MATERNAL-INFANT BONDING 46 (1976) (quickening refers to the stage of gestation at which fetal motion is felt).

71. This analogy does not take into account the emotional factor involved with the bonding process that most woman experience with their unborn children during pregnancy.

72. However, Posner analogizes the sale of babies to the sale of an ordinary good. *See* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 64 (1987).

73. The argument that surrogacy does not involve a sale lacks credibility. This is addressed below. *See supra* Part II.

74. Jon H. Hanson & Douglas A. Kysar, *Taking Behaviorism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

decisions are made."[75] According to Hanson and Kysar, the party who has control is the party who has the power to control the flow of information and the presentation of options.[76]

Just as it has been demonstrated that government regulators and product manufacturers can "shape people's behavior in desired directions,"[77] potential parents and their agents might use tactics to exert undue influence on a potential surrogate. In the course of negotiating a surrogacy contract, the intended parents typically pay all of the associated expenses.[78] This puts the intended parents in a better position than the surrogate to control many aspects of the negotiation situation. While ultimately it is true that the surrogate may decline to sign on the dotted line, a party to *any* negotiation is likewise free to reject a contract in a free-market system. The bottom line is that the party who holds the most resources is the party who has the greatest ability to manipulate the situation.[79]

D. Social Influences on Self Knowledge and Cognitive Dissonance

Human beings are highly dependent upon the social world. Social psychologists have developed a series of empirically supported theories that propose that an individual's concept of self is largely shaped by feedback from others. In a paper by William Swann and Stephen Read, this phenomenon is illustrated by a series of studies that demonstrate that individuals seek verification of their own self-conceptions through social feedback.[80] The concept that individuals learn about themselves by observing others' impressions of them is not a new one. This appraisal process has been termed the "looking glass self."[81] In fact, the tendency of people to look outward for information to evaluate themselves is so strong that in one series of studies, it was found that observers (who were strangers) were as accurate at determining the reasons for an actor's behavior as the actor was himself.[82] This finding suggests that human beings, rather than having a unique insight into their own minds, look for explanations concerning their own behaviors in the same places observers do—the social conscience. In other words, the social self is so fundamental to our own self-comprehension that we

75. *Id.* at 635.

76. *Id.*

77. Christine Jolls et al., *A Behavioral Approach to Law and Economics,* 50 STAN. L. REV. 1471, 1536 (1998); *see also* Hanson & Kysar, *supra* note 74, at 637.

78. See James J. Dalessio & Weldon E. Havins, *Reproductive Surrogacy at the Millennium: Proposed Model Regulating "Non-Traditional" Gestationa Surrogacy Contracts,* 31 MCGEORGE L. REV. 673, 675 (2000).

79. *See generally,* Hanson & Kysar, *supra* note 74. Hanson and Kysar make the point that, "the presence of unyielding cognitive biases makes individual decision makers susceptible to manipulation by those able to influence the context in which decisions are made." *Id.* at 635.

80. *See* William B. Swann, Jr. & Stephen J. Read, *Self Verification Processes: How We Sustain Our Self-Conceptions,* 17 J. OF EXPERIMENTAL SOC. PSYCHOL. 351 (1981).

81. *See generally,* C. H. COOLEY, HUMAN NATURE AND THE SOCIAL ORDER 183–84 (2d ed. 1902). *See also* G. H. MEAD, MIND, SELF, AND SOCIETY 138 (1934).

82. *See generally* Timothy D. Wilson & Julie I. Stone, *Limitations of Self-Knowledge: More on Telling More Than We Can Know* in SELF, SITUATIONS, AND SOCIAL BEHAVIOR: REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 167 vol. 6 (P. Shaver ed., 1985).

draw our explanations for our own attitudes and behaviors from a common pool of understanding that is shared with other members of society.[83]

Women who agree to be surrogates are likely to encounter social disapproval of their decision. In a recent survey conducted by Harris Interactive for RESOLVE (the National Infertility Association), only 13% of respondents from the general population in the United States would consider surrogacy, as opposed to 66% who would consider adopting a child. This general hesitancy to promote surrogacy as a reproductive alternative is echoed in state legislation across the United States. The vast majority of states either have no legislation to provide for enforcement of surrogacy contracts, expressly refuse to enforce surrogacy contracts, or criminalize paid surrogacy.[84] Right or wrong, much of the country expresses ambivalent feelings over the issue of surrogacy, a sentiment that is likely to have profound effects on the women who enter surrogacy contracts. The obviousness of the (pregnancy) condition makes it likely that surrogates will have to choose between allowing people to treat them as the typical expectant mother or explaining their somewhat unique situation. Either choice is likely to lead the surrogate to face some painful obstacles. Whether the surrogate "plays along" and is drawn into the anticipation of impending motherhood, or faces criticism from those who disagree with surrogacy on principle (or simply cannot understand the decision), she is likely to encounter social disapproval that could cause her to begin to rethink her decision.

The theory of cognitive dissonance provides an explanation for how a surrogate facing such difficult circumstances might resolve her dilemma. This theory addresses the processes that individuals undergo when faced with a situation in which their behaviors and their attitudes are incongruent. According to dissonance theory, all human beings are driven to maintain consistency between and among their attitudes and behaviors.[85] As a result, when attitudes or beliefs and behavior are inconsistent, individuals feel profound discomfort. This feeling of "dissonance" causes them to do whatever is necessary to achieve a resolution—to bring the attitude and the behavior into line.[86] Therefore, when such an incongruity exists, an individual will either change the cognition (the attitude or belief) to make it consistent with the behavior or alter the behavior so that it matches the cognition.[87]

A surrogate who encounters repeated negative feedback regarding her decision will likely experience dissonance, which she will have to resolve. Her cognition that she has made a good decision will conflict with the messages she is getting about how wonderful it would be to keep the baby or how strange (or wrong) it is for her to be willing to give up the child. Particularly because there are limited support systems for surrogates,[88] she may have difficulty finding support for her decision as a mechanism for eliminating dissonance.

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83. *Id.*

84. *See* http://www.surrogacy.com/articles/news_view.asp?ID=76 for an overview of state legislation on surrogacy (last visited Feb. 26, 2005).

85. *See generally* Festinger, *supra* note 18.

86. *Id.*

87. *Id.*

88. Evidence for this comes from the relatively large number of states who fail to have any type of legislation whatsoever regarding surrogacy.

V. FAMOUS ARGUMENTS AGAINST PATERNALISM

A. Richard Epstein

Richard Epstein, in his article *Surrogacy: The Case for Full Contractual Enforcement*, argues for specific enforcement of surrogacy contracts.[89] He addresses three objections to surrogacy contracts: the first relates to defects in the bargaining process that could undermine the mutual gain assumption; the second relates to adverse external effects; and the third pertains to problems of coordination, freeriding, and holdouts. Because this Article argues that surrogacy is problematic specifically because the surrogate cannot adequately predict what her state of mind will be at the end of the pregnancy, I will focus on Epstein's discussion of the mutual gain assumption.[90]

In the first step toward his ultimate conclusion that surrogate's interests are adequately protected, Epstein asserts the validity of a system of voluntary exchange.[91] Epstein focuses on Aristotle's view of exchange. Epstein notes that although Aristotle believed in tipping the balance in favor of free exchange, he was wary of situations in which a weakness in one party created the potential for exploitation.[92] From here, Epstein leaps to the conclusion that "the safer presumption by far is that people know their own interest well and that contract usually are mechanisms to achieve mutual gain, not mutual exploitation."[93] His reasoning centers on the rational actor model notion that people only enter voluntarily into contracts where there is the prospect of mutual gain.[94]

Epstein grudgingly admits that where adequate safeguards do not exist, free exchange should be restricted. Nevertheless, he concludes that "these problems do not offer any serious argument for the prohibition or regulation of surrogacy arrangements."[95]Because of the particularly sensitive nature of the exchange, Epstein *assumes* that the contract contemplates any potential risks or contingencies.[96] He argues that because the intended parents care deeply about the well being of the future child, they select the surrogate mother carefully.[97] Likewise, he points out that any potential surrogate will exercise caution in selecting the intended parents.[98]

It may be true that the parties will *generally* be vigilant in screening one another. However, if one imagines a world in which Epstein's conception of surrogacy reigns, where there are no restrictions on surrogacy whatsoever, it is not difficult to imagine

89. Epstein, *supra* note 12, at 2305.

90. Even assuming that Epstein is correct in dismissing concerns related to external effects and transaction problems, a cogent rebuttal to his assertion that surrogates interests' are adequately protected is sufficient to undermine his premise that surrogacy contracts should be enforced. In fact, one of the most powerful arguments against enforcement of surrogacy contracts is the potential for exploitation of the surrogate.

91. Epstein, *supra* note 12, at 2310–16.

92. *Id.* at 2312.

93. *Id.* at 2313.

94. *Id.*

95. *Id.* at 2316.

96. *Id.* at 2317.

97. Epstein, *supra* note 12, at 2317.

98. *Id.*

disadvantaged women with few or no resources entering ill-advised surrogacy arrangements. More importantly, a surrogate's carefully reasoned selection of intended parents would do little to protect against the type of unanticipated regret discussed earlier in this Article. Accordingly, the fact that most surrogates and intended parents will voluntarily search out the appropriate characteristics in one another is not sufficient to argue in favor of enforcement of surrogacy contracts.

Ironically, it is Epstein's admission that surrogacy arrangements are special, and not like other types of exchanges, that leads to his next argument that the government should stay out of this sphere. In a somewhat undeveloped and circular argument, Epstein seems to maintain that because surrogacy arrangements are particularly delicate, parties will take special care in drafting the contract, and therefore, all parties will enter the contract fully protected.[99] Epstein buttresses this conclusion by adding that "the norms of disclosure dominate."[100] It would appear that this argument rests upon the counterintuitive notion that the more protection the parties need, the fewer regulations should be imposed. Moreover, the blanket assertion that the norms of disclosure dominate seems no more likely to be true than one might expect in any number of transactions that are already heavily regulated or banned.[101]

Epstein asserts that "the need for . . . precautions . . . should be quite apparent to contracting parties, making it quite dangerous to pile on additional restrictions, whose major purpose is typically to stymie the transaction under the guise of supplying full information to the potential surrogate."[102] However, it is difficult to understand why the intended parents in Epstein's world would be at all concerned about precautions aimed at assuring that the surrogate be fully informed. After all, under this regime, the contract would be fully and specifically enforced. Would it not be tempting then for a childless couple to encourage a potential surrogate to enter the agreement with as little information as possible? Because there would be no recourse for the surrogate once the contract was signed and the child conceived, there would be little for the couple to lose in risking that the surrogate would regret her decision. Epstein's assertion that the intended parents would not seek out a surrogate who was easy to exploit because they would have an interest in selecting a gestational mother who could fend for herself is unconvincing. Given the choice between finding a woman who would agree to serve as surrogate or remaining childless, no reasonable couple would forfeit the opportunity at parenthood because the surrogate seemed to agree too readily to make them parents. Furthermore, presuming that the surrogate was entering the agreement with the purpose of making money, the precautions suggested by Epstein would come entirely at the expense of the intended couple. Although Epstein agrees that "no one will (as no one has) believe that caveat emptor is the appropriate rule for surrogacy contracts,"[103] it is difficult to see how Epstein's system would provide the intended couple with any incentive to provide the potential surrogate with the cautionary voices of counselors or

99. *Id.* at 2317.

100. *Id.* at 2318.

101. Examples include prostitution, where both parties have a profound interest in making sure the other is disease free, and mercy euthanasia, where one would expect a free exchange of information between the actor, the physician, and the patient.

102. Epstein, *supra* note 12, at 2318.

103. *Id.*

other professionals. Furthermore, psychological and behavioral research illustrates the inherent fallacy in the presumption that warnings are sufficient to assure that individuals entering precommitments are able to accurately gauge how they will feel at performance time.

Finally, Epstein addresses the argument that the "mere fact that the woman chooses to enter into such a contract shows that she occupies a subordinate sphere and has allowed her self to become debased, or at least exploited . . . ."[104] He argues against the notion that surrogacy arrangements are base, defending the position of the childless couple, for whom surrogacy is probably a last and desperate attempt to become parents. However, here, I think he misses the point of those who oppose surrogacy contracts. Few commentators would debate the legitimacy of a childless couple's desire for a child. In most cases, the intended parents are profoundly sympathetic people. However sympathetic the intended parents may be, their plight is the status quo. It seems to me that in order to endorse an affirmative practice that involves forcibly removing a child from a woman who carried the child in her body for nine months requires more than heartfelt sympathy.

B. Richard Posner and Elisabeth Landes

Richard Posner has argued for free market adoptions in his controversial article with Elisabeth Landes, *The Economics of the Baby Shortage,*[105] and in his follow-up piece, *The Regulation of the Market in Adoptions.*[106] In Posner's hypothetical world, under a free-market regime, a pregnant woman who might otherwise terminate a pregnancy would be "induced" to continue the pregnancy and to give the child up for adoption by proving economic incentives.[107] Posner describes the exchange of monetary compensation for a baby as efficient, since "the parties would not make it if they did not think it would make both of them better off."[108] This is another example of reliance on the classic economic model of the rational actor. Nowhere does this argument account for the optimistic bias, which has been demonstrated to reduce the likelihood that people will accurately judge future risks.[109]

Because Posner describes a situation in which the bargain would necessarily have to be made *before* the decision to carry the fetus to term or to terminate the pregnancy was made, the situation is analogous to a contract adoption or a surrogacy arrangement in which the woman must pre-commit—bind herself to giving up a child before she has gotten to know the child. As discussed above, a lack of knowledge about the future severely compromises a potential surrogate's ability to bargain. Any agreement made at an early point in a pregnancy would not account for the risk that the gestational mother might feel very differently about giving up the child once the pregnancy progressed to the point where the fetus could be felt and a bond established. Finally, the

104. *Id.*

105. Elisabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage,* 7 J. LEGAL STUD. 323 (June 1978).

106. Posner, *supra* note 72.

107. *Id.* at 63.

108. *Id.* at 60.

109. *See* discussion *supra* Part IV A.

problem of market manipulation might be particularly acute in situations in which the woman being induced to give up rights in the child was unintentionally pregnant at the time that the contract was formed. Women who find themselves facing an unwanted pregnancy are typically lacking in resources, as well as education and social support.[110] A paucity of resources might induce the woman to commit to giving up rights in the child for the right price before she has a good sense of what she is giving up.

One of the objections to "babyselling" has been that under such a regime, the price of babies would be driven up, and those who could afford to pay, rather than those most deserving, would end up gaining access to the babies. Accompanying this fear is the concern that those with the most wealth would also be able to apply the most pressure to pregnant women in order to gain their compliance. Hence, the argument goes, babyselling hurts everyone but the very wealthy. Posner argues that increasing the number of babies "on the market" would increase the ability of those who were not wealthy enough to gain access to babies. However, Posner himself admits that even under his regime, there would be natural limits on the number of children who would be up for sale.[111] Therefore, there would still be a relatively thin market. In the context of this thin market, placing fewer constraints on the exchange of babies would only serve to drive up the cost of babies, by making it easier for the relatively few babies to go to the highest bidder.[112] The result would be to increase the chances that the intended parents involved in surrogacy and contract or free-market adoptions would be in particularly good positions to manipulate the market, as discussed above.

However objectionable Posner's proposal for free-market adoption may be on other grounds, his notion about the remedy for breach of contract marks a substantial break with Epstein's approach, and as such, reduces the chances of surrogate exploitation in the hypothetical world he has created. Posner maintains that should the natural mother change her mind, she should be permitted to keep the baby.[113] Providing the woman with a loophole would alleviate many of the problems caused by asking a woman to

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110. *See* Martha Cole McGrew & William B. Shore, *The Problem of Teenage Pregnancy*, J. FAM. PRACTICE (1991), found on-line at http://www.findarticles.com/p/articles/mi_m0689/is_n1_v32/ai_10380944 (last visited Mar. 30, 2005) (pointing out the high incidence of unwanted teenage pregnancy and the lack of resources available to pregnant teenagers. "Children of teenage parents frequently live in homes that are near or below poverty level. They often require public assistance for the basics of life: food, clothing, and shelter. There is an increased incidence of school failure and dropout in teenage parents and subsequently in their children." *Id.*) The fact that women who give their babies up for adoption lack education, support, and resources makes sense, as these factors influence one's ability to care adequately for a child.

111. *Id.* According to the 1988 National Survey of Family Growth, there are roughly three adoption seekers for every child placed up for adoption. This statistic does not account for adoption preferences that might limit the pool of "acceptable" children. For example, adoption seekers of a particular ethnic or religious background might only consider adoption if a child matching their own background were available.

112. Posner addresses this argument, saying that it is unlikely that "allowing people to bid for babies with dollars would drive up the price of babies." Posner, *supra* note 72, at 65. His argument rests upon the notion of the gray market many allege exist under the current adoption scheme. This "blended" market consists of a combination of the low "lawful market price" of adoption and the high costs and fees that are associated with the process. The cost of adoption is certainly high, and probably prohibitively so for many. However, given that a lawful free market adoption would still involve doctors bills, hospital costs, plane fares, *and* as Posner suggests, screening fees and payment for the surrogate's missed work opportunities, *in addition to* the premium that the intended parents would have to pay in order to outbid other interested couples, it is difficult to imagine how such a regime would not drive up the costs of obtaining a child. *Id.*

113. *Id.* at 67.

commit to surrendering a child under uncertain circumstances. This approach would also level the playing field in cases where the surrogate was particularly vulnerable.

Posner focuses specifically of adoption. It is important to note that there are critical differences between traditional adoption and contract adoption or surrogacy arrangements. The critical difference between traditional adoption and surrogacy is that a surrogate may or may not be biologically related to the child she carries. Even where the surrogate is the biological mother of the child she carries, the male of the intended couple is typically the biological father. Furthermore, in both surrogacy and contract adoption, unlike in a traditional adoption situation, the intended parents have not caused the child to come into being—the child would have existed regardless of their desire to be parents. Nevertheless, when considering the implications of pre-commitment in all three situations, traditional adoption, contract adoption, and surrogacy, psychological evidence provides reason to believe that the woman who agrees to carry the child does not have all of the information necessary to make an informed decision to unequivocally commit herself.[114]

C. Surrogacy Proponents' Failure to Address Behavioral Research

Epstein, Landes and Posner, and others who espouse enforcement of surrogacy contracts[115] have interesting and cogent responses to several areas where opponents have raised concerns. However, these advocates of surrogacy have failed to adequately address the relevant questions raised in light of information about heuristics and biases and market manipulation demonstrated by empirical research in the behavioral sciences. Almost all advocates of surrogacy assume that potential surrogates fully comprehend and take advantage of information about the potential pitfalls of surrogacy and are able to thoroughly assess the situation prior to entering a contract. In fact, some have gone as far as to suggest that if a surrogate cannot "assess what her emotions would be at the end of the pregnancy" then we cannot hold any person to any contract "when their emotions may change over time."[116] However, as discussed in this Article, the decision to become a surrogate is unlike the decision to sell widgets for many, many reasons. Commentators who blithely assert that people only enter into contracts that are in their own best interests ignore evidence that in certain situations individuals make systematic errors in the process of decision making. The known existence of these errors creates a mandate that courts and the legislature take these errors into account when determining whether to strictly enforce certain types of contracts.

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114. The position argued in this Article is one taken by courts, which have held that a natural mother's irrevocable agreement, prior to birth, even prior to conception, to surrender a child to an adoptive couple, is unenforceable in private placement adoption. *In re* Baby M, 109 N.J. 396 (N.J. 1988); *see also e.g.*, N.J. STAT. ANN. § 9:3-41(e) (West 1993) (explaining that "[a] surrender of a child shall not be valid if taken prior to the birth of the child . . . [or] . . . if taken within 72 hours of the birth of the child").

115. *See e.g.*, Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995); Elise Bruhl, *Motherhood and Contract: Always Crashing in the Same Car*, 9 BUFF. WOMEN'S L.J. 191 (2000–2001); Amanda Mechell Holliday, *Who's Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH. L. REV. 1101 (2003); Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 742 (2003).

116. Munyon, *supra* note 115, at 717.

VI. MORE SUPPORT FOR NON-ENFORCEMENT OF SURROGACY CONTRACTS

This Article focuses on behavioral research indicating that potential surrogates are incapable of knowing what is in their own best interest when they enter a surrogacy arrangement. However, a number of legal scholars have made this argument without relying on social science research to bolster their case. As Vicki Jackson puts it,

> [b]ecoming and being a parent is one of the most fundamental aspects of adult human identity, and thus should be parted with only in the most voluntary of settings. *Given the changes in feeling that we know frequently occur, and that we generally want to occur, during pregnancy and at birth, the informed voluntariness of the choice to give up the child is at its peak when made with full awareness of the pain entailed—after the child comes into being. This is so for any surrogate: it may be quite difficult, even impossible, accurately to evaluate, prior to birth, the ability to surrender the child* . . . the pain of the surrogate mother who cannot voluntarily give up her child can be very great—it is a pain I am not eager to quantify, and that I do not think society should encourage women to quantify in monetary or exchange terms. It is, therefore, a pain that I do not believe can or should be permitted to be the subject of binding, prebirth [sic] contracts.[117]

Katharine Bartlett has made the point that among those who deal with child custody issues, there is a tacit understanding that the connection between a woman and the child she carries is profound, and may grow beyond that which was anticipated by the woman.[118] This idea has been used to argue (as this Article does) that this bond is such that no surrogacy agreement should be specifically enforced.[119]

The argument is sometimes made that women who have already had children are psychologically prepared and aware of what giving up a child involves. However, if a potential surrogate has never irrevocably signed away her rights to a child, it is difficult to see how she could fully comprehend the consequences.[120] At the time of birth, the surrogate has not only been physically attached to the child for nine months, but she has developed an emotional attachment to the child as well.[121] A woman forms a bond with each child,[122] and each of these bonds is unique.[123]

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117. Jackson, *supra* note 31, at 1818–20 (emphasis added).

118. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 333 (1988) ("Within custody law, there is a strong ideology that through pregnancy and childbirth an enduring bond develops between mother and child which cannot easily be broken. This mystical bond is perceived of as inevitable and more powerful than any woman can realize in advance.").

119. Maurice M. Suh, *Surrogate Motherhood: An Argument for Denial of Specific Performance*, 22 COLUM. J.L. & SOC. PROBS. 357, 362–69 (1989) (arguing that the bonding interests of the birth mother, which have been demonstrated by research, should prevent specific performance unless consent is given after the child's birth).

120. See Macklin, *supra* note 9, at 60 ("[I]t has been argued that no one is capable of granting truly informed consent to be a surrogate mother. This argument contends that even if a woman has already borne children, she cannot know what it is like to have to give them up after birth.").

121. According to the results of studies of pregnant women by doctors Klaus and Kennel, a woman usually experiences feelings of attachment toward her unborn child. *See* M. KLAUS & J. KENNELL, MATERNAL-INFANT BONDING 42 (1976); *see also* M. KLAUS & J. KENNELL, PARENT-INFANT BONDING 263 (1982).

122. *See* Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in American Society*,

As I have argued in this Article, legal commentators have pointed out that enforcing surrogacy agreements is also likely to make victims of women who are economically and otherwise disadvantaged.[124] Economic strain makes it more likely that potential surrogates will enter into agreements that are ultimately devastating. As Jackson points out,

> to the extent that surrogate mothers are in pressed financial circumstances, they may be even more likely to make an agreement that does not reflect the true cost to them of the undertaking they are embarking on, because immediate economic pressures result in an inability to value correctly the future 'costs' of being pregnant and of giving up a baby.[125]

Ultimately, women with few options may end up becoming surrogates without truly understanding the consequences down the road.[126] This is not to belittle or condescend to women of limited financial means. As I point out elsewhere in this Article, research demonstrating phenomena such as the optimism bias and endowment effect has been demonstrated with college-level and graduate students.[127] Moreover, research finding that human beings are terrible at knowing themselves and their own attitudes has been illustrated using these same, highly educated, resource-rich groups.[128] Given the data, it would seem incumbent upon society to protect all members of society, and *especially* those who might be particularly vulnerable. As Gerald Dworkin has argued, paternalism in the form of governmental restrictions on individual freedoms when these restrictions are intended to protect the individual is justified. In such instances, paternalistic intervention safeguards a broader freedom for the individual.[129]

VII. CONCLUSION

In recent years, there has been an increasing amount of scholarship discussing surrogacy and from those in the field of law and human behavior. Although the two areas have flirted with each other occasionally, very little psychological research has been directly applied to the question of whether surrogacy contracts should be enforced. This Article has examined several biases in how human beings make decisions and has

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in BEYOND BABY M: ETHICAL ISSUES IN NEW REPRODUCTIVE TECHNIQUES 9 (Dianne M. Bartels et al. eds., 1990) (discussing how the fetus interacts and develops a relationship with its mother during gestation).

123. *See* Suh, *supra* note 119, at 379 (arguing that the bonding interests of the birth mother, which have been demonstrated by research, should prevent specific performance unless consent is given after the child's birth).

124. *See, e.g.*, Jackson, *supra* note 31, at 1819 ("Moreover, the likelihood that most paid surrogate mothers will be women who are economically (and educationally) disadvantaged vis-a-vis the other contracting parties is another exploitive feature of the real world impact.").

125. *Id.*

126. Becker, *supra* note 20, at 309. ("Women without much money will be tempted, because they have so few other options, to sign contracts that might ultimately be extremely painful for them to go through with.").

127. *See supra* Part IV A.

128. Timothy D. Wilson & Julie I. Stone, *Limitations of Self-Knowledge: More on Telling More Than We Can Know* in REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY vol. 6 (P. Shaver ed., 1985).

129. Gerald Dworkin, *Paternalism*, in MORALITY AND THE LAW 107, 118 (R. Wasserstrom ed., 1983).

argued that they are relevant to determining whether potential surrogates are in a position to make an informed decision about whether to enter a binding agreement to conceive, bear, and give up a child. Specifically, I have argued that the optimism bias and the endowment effect (or status quo bias) increase the likelihood that many surrogates will overestimate their own willingness to part with the child by the end of the pregnancy. In addition to having her decision influenced by biases, I have asserted that a surrogate is likely to experience cognitive dissonance in the course of the pregnancy. Because surrogacy is still somewhat "experimental" and lacks broad support, any decision to become a surrogate is likely to generate some level of criticism, disapproval, or misunderstanding, resulting in dissonance in the surrogate. As a result of this dissonance, surrogates will often seek to change the dissonance-causing behavior and will end up wishing to terminate the surrogacy arrangement.

Strong empirical evidence of the potential for biases and dissonance-reduction strategies to drive human behavior belie the notion that individual potential surrogates can accurately predict prior to a pregnancy what their attitudes will be toward the end of that pregnancy. This is not in any way to suggest that potential surrogates are less in tune with their own preferences or less responsible or trustworthy than other members of society. The data supporting the optimism bias, the endowment effect, and cognitive dissonance were primarily conducted on men and women from undergraduate and graduate educational institutions. These subjects are likely to have the resources and level of sophistication at least comparable to the average member of society in the United States (and possibly greater). Importantly, although currently only women can be surrogates, there is no reason to think that men (were they able to carry a fetus) would fare any better in being able to predict their own willingness to abandon all rights to the child at the conclusion of the pregnancy. The bottom line is that all human beings are subject to the psychological phenomena discussed in this Article. The very robustness of the results of the studies discussed suggests that there is little that can be done to counteract these tendencies.

Although some surrogates certainly might make an informed decision and never look back, there is ample evidence of the potential for many surrogates to come to regret their decision to give up the child they carry. Armed with this information, it behooves courts and legislatures to assure that surrogacy contracts are not strictly enforced. While surrogacy may be the best option for some infertile couples, these couples should enter agreements with the understanding that the risk of the surrogate changing her mind is ever-present. Undoubtedly, the turmoil caused by a surrogate changing her mind is great—particularly where the child is biologically tied to the intended father, mother, or both. The potential for such a situation should lead legislatures to discourage surrogacy in the first place. However, given that surrogacy arrangements may be entered without the blessings of the state, state legislatures should be prepared to deal with such eventualities by crafting laws that make clear the responsibilities of the adults involved in the decision and by mandating joint custody arrangements where necessary.