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## PREVENTING THE BIRTH OF DRUG-ADDICTED BABIES THROUGH CONTRACT: AN EXAMINATION OF THE C.R.A.C.K. ORGANIZATION

Barbara Harris, a California homemaker, was angry at a system that failed to prevent children from being born with illegal drugs in their systems. In her own words:

I became a foster parent in 1990 and the first little girl that was placed with me was eight months old. [I] found out that she was the fifth baby born to the same drug-addicted mother. Four months after Destiny [the foster child] came to us, we got a phone call from the social worker who told us that Destiny had a baby brother. So [I] went ahead and took him too, so they could be together—the older four were in four different homes . . . . At this point, I was angry because the mother had given birth to six addicted babies and was allowed to just visit her local hospital, yearly, and drop off her damaged babies and nobody even gave her a slap on the hand. I just didn't get it.<sup>1</sup>

Harris not only got angry, she got involved. "I started calling district attorneys' offices and police departments, asking whether there was anything I could do as a concerned citizen, perhaps make a citizens' arrest. I got nowhere. I was told there was nothing I could do."<sup>2</sup>

Frustrated by these answers, and believing that the state, by continuing to allow the births of drug addicted children, was condoning child abuse,<sup>3</sup> Harris started a campaign to effect legal change.<sup>4</sup> Harris attracted the attention of Assemblyman Phil Hawkins, who agreed to sponsor legislation making it a crime to give birth to a drug-addicted child in California.<sup>5</sup>

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1. Interview by Jeff Stryker with Barbara Harris, Founder, Children Requiring a Caring Community (C.R.A.C.K.), *The Two Hundred Dollar Solution: Sterilizing Crack Moms*, CAL. HEALTHLINE FEATURES, at <http://www.chf.org/features/archive/980504.html> (posted May 4, 1998) [hereinafter *The Two Hundred Dollar Solution*] (copy on file with author). See generally Anne-Marie O'Neill & Kelly Carter, *Desperate Measure, Barbara Harris Offers \$200 to Stop Crack Addicts from Having More Babies*, PEOPLE, Sept. 27, 1999, at 145 (reporting on the controversy surrounding the C.R.A.C.K. program). Harris and her husband eventually adopted the fifth, sixth, seventh and eighth children of the same drug-addicted woman. *The Two Hundred Dollar Solution*, *supra*.

2. *The Two Hundred Dollar Solution*, *supra* note 1.

3. O'Neill & Carter, *supra* note 1, at 149.

4. *Id.*; *The Two Hundred Dollar Solution*, *supra* note 1.

5. *The Two Hundred Dollar Solution*, *supra* note 1.

The Prenatal Neglect Act proposed creating the crime of prenatal child neglect.<sup>6</sup> A person who "knowingly uses a specified controlled substance at a time when the person knows or reasonably should know that she is pregnant and the use of that controlled substance results in the child with whom the woman is pregnant being drug-exposed at birth"<sup>7</sup> is guilty of prenatal child neglect. Depending upon whether the exposure to drugs resulted in serious physical harm to the child, the proposed crime would be punishable either as a misdemeanor or felony.<sup>8</sup> The Prenatal Neglect Act was defeated on November 30, 1996.<sup>9</sup>

The California legislature's lack of support, however, did not stop Harris. After the demise of the Prenatal Neglect Act, she turned her attention from the public arena to the private sector. "I knew at that point that if there was anything I wanted to do as far as getting these women on birth control, I would have to do it on my own because the politicians and the government don't want anything to do with that kind of legislation."<sup>10</sup>

Harris shifted her focus from punishing drug-addicted mothers to preventing the births of drug-addicted babies.<sup>11</sup> To this end, she founded Children Requiring a Caring Kommunity (C.R.A.C.K.).<sup>12</sup>

6. H.B. AB 2614, 1995-96 Reg. Sess. (Cal. 1996), available at [http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab\\_2601-2650/ab\\_2614\\_bill\\_960221\\_introduced.html](http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2601-2650/ab_2614_bill_960221_introduced.html). During the same legislative session, Assemblyman Brett Granlund introduced a proposed revision to California's child neglect laws, which failed in committee. See also H.B. AB 3200, 1995-96 Reg. Sess. (Cal. 1996), available at [http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab\\_3200/ab\\_3200\\_bill\\_960223\\_introduced.html](http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_3200/ab_3200_bill_960223_introduced.html) (proposing legislation aimed at removing children from the custody of substance abusing parents by mandating that all hospitals screen and report drug-exposed infants to social services as a condition of licensing).

7. H.B. AB 2614.

8. *Id.* § 1. Interestingly, the defendant would be eligible for probation regardless of whether she was a first or repeat offender, subject to the following conditions:

(A) Participation in, and successful completion of, a drug treatment program and after-care program designated by the probation officer, including, but not limited to, any program consistent with the intent of this chapter . . . .

(B) Participation in a contraceptive program designated by the probation officer

. . . .

(C) Drug and alcohol testing . . . . [T]he defendant shall be required to provide her probation officer with a sample of her blood, breath, or urine whenever requested . . . except if the defendant becomes pregnant during the period of probation, in which case the defendant shall provide her probation officer with a sample of her blood, breath, or urine at least once a month while she remains pregnant.

*Id.*

9. H.B. AB 2614.

10. *The Two Hundred Dollar Solution*, *supra* note 1.

11. O'Neill & Carter, *supra* note 1, at 146.

12. Margot Hornblower, *Benevolent Bribery—Or Racism? A California Mom Stirs Debate by Paying Drug Users to Stop Having Kids*, *TIME*, Aug. 23, 1999, at 47.

C.R.A.C.K. is a non-profit organization that pays drug addicts for undergoing sterilization or receiving long-term birth control.<sup>13</sup>

C.R.A.C.K.'s objective is "to offer effective preventive measures to reduce the tragedy of numerous drug affected pregnancies."<sup>14</sup> Its mission statement is succinct: "C.R.A.C.K. offers \$200 to individuals who participate in long-term or permanent birth control."<sup>15</sup> This offer is open to anyone addicted to drugs.<sup>16</sup>

Critics dismiss the loftiness of C.R.A.C.K.'s mission statement, claiming that C.R.A.C.K. is merely bribing drug addicts with the money they need to feed their drug addiction.<sup>17</sup> Others fear that the program targets poor minorities<sup>18</sup> or is indicative of a return to eugenics.<sup>19</sup> Although the C.R.A.C.K. program is voluntary, many critics consider it a return to forced sterilization:

To critics, Harris' activities amount to eugenics: bribing befuddled women to give up their reproductive rights. "Two hundred dollars could lead these women to make a decision they

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13. *Id.*

14. *Objective*, C.R.A.C.K., at <http://www.cracksterilization.com/objectives/> (last modified Sept. 12, 2000) [hereinafter *Objective*].

15. *Homepage*, C.R.A.C.K., at <http://www.cracksterilization.com> (last modified Sept. 20, 2000) [hereinafter *Homepage*].

16. *Id.*

17. See Lisa Donovan & Sue Ellen Christian, *Program Hopes to Sell Addicts on Birth Control; \$200 for Proof of Sterilization*, CHI. TRIB., July 23, 1999, at 1, available at LEXIS, News Library, Major Newspapers File. "Coercing women into sterilization by exploiting the condition of their addiction is just plain wrong," said Steve Trombley, president and CEO of Planned Parenthood, Chicago Area. "You are essentially bribing women with what will be used to buy drugs. You are supporting their behavior." *Id.*

18. Robert Ourlian, *Woman Offers Payment if Addicts Get Sterilization*, L.A. TIMES, Oct. 24, 1997, at A3.

"The history of sterilization is so fraught with controversy and abuse that when you offer poor, drug-addicted people \$200, it looks like they're being bribed," said Arthur Caplan, director of the University of Pennsylvania Center for Bioethics. Caplan said the plan will be seen as "exploitative" and even "genocidal" because most of those eligible will be poor and minorities.

*Id.*; see Salim Muwakkil, *Cracked Logic*, THESE TIMES, Sept. 19, 1999, at 14, LEXIS, News Library, Major Newspapers File ("Critics also have noted that the acronym CRACK [sic] alludes to a drug publicly associated with minorities, and thus signals Harris' racist intent, hinting at limiting growth of those dreaded minorities."); see, e.g., Meredith May, *New Twist in Birth-Control Campaign*, S.F. CHRON., Oct. 21, 1999, at A19, available at LEXIS, News Library, Major Newspapers File ("I resent [Harris] coming here and putting [a billboard] up in a black neighborhood," said Terri Fuston . . . a cosmetologist at AJ's Grooming Room in the shadow of the Oakland [California] billboard. "There is just as much of a drug problem in other neighborhoods.").

19. See Hornblower, *supra* note 12, at 48; see also Michelle Cottle, *Say Yes to Crack*, NEW REPUBLIC, Aug. 23, 1999, at 16 ("When you dangle or give \$200 to somebody who's a drug addict, it seems coercive," says Priscilla Smith of the Center for Reproductive Law and Policy."). For a synopsis of eugenical sterilization, see generally *Sterilization and Mental Retardation*, 51 A.B.A. J. 1059 (1965).

would later regret," says Gloria Feldt, president of Planned Parenthood Federation of America. "It is unethical because they cannot give their informed consent."<sup>20</sup>

Although the array of issues surrounding Harris' program is intriguing, this Note applies contract law as an alternative to focusing on the social or constitutional aspects of C.R.A.C.K.'s incentive program.<sup>21</sup> The arrangement between C.R.A.C.K. and drug addicts is a contract. As such, this agreement must be accorded deference and enforced.

C.R.A.C.K. promises to pay drug addicts \$200 in exchange for their promise to be sterilized or receive long-term birth control. This exchange of promises can accurately be described as a contract. Whether this contract is enforceable is the subject of this Note.

This Note explores whether a transaction between a private organization, such as C.R.A.C.K., and a drug-addicted woman, where cash is exchanged for sterilization or long-term birth control, is indeed an enforceable contract. Specifically, it analyzes the validity and enforceability of the contract and discusses the terms and available remedies for a breach thereof. Finally, this Note concludes with a recommendation that state governments adopt a modified version of the C.R.A.C.K. program.

#### DEFINITION OF TERMS

The terms sterilization and long-term birth control are used throughout this Note; therefore, definitions are in order. Sterilization is the surgical, permanent, birth control method. Long-term birth control is the non-surgical alternative.

Sterilization may be achieved by either tubal ligation or vasectomy. Tubal ligation blocks the fallopian tubes so that sperm and an egg cannot unite.<sup>22</sup> Vasectomy blocks the *vas deferens* to prevent sperm from passing out of the testes.<sup>23</sup>

Long-term birth control may be achieved by contraceptive implants, hormone injections or an intrauterine device. Norplant

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20. Hornblower, *supra* note 12, at 48; see also Cottle, *supra* note 19, at 17 (citing critics who believe drug addicts are incapable of making this decision and giving informed consent).

21. While acknowledging the social and policy concerns raised by paying drug abusers to abrogate their procreative freedom, this Note focuses on the transaction as it relates to contract principles and does not address the constitutional or social issues.

22. ROBERT H. BLANK, *FERTILITY CONTROL: NEW TECHNIQUES, NEW POLICY ISSUES* 26 (1991).

23. *Id.* at 25.

is the most effective reversible contraceptive available.<sup>24</sup> It prevents conception for five years<sup>25</sup> and is effective within twenty-four hours of insertion.<sup>26</sup> Depo-Provera is the best known contraceptive injection. It inhibits ovulation for three months;<sup>27</sup> therefore, it must be repeated quarterly to maintain effectiveness.<sup>28</sup> The intrauterine device (IUD) is inserted into a woman's uterus. The IUD prevents contraception by inhibiting sperm capacitation and survival and preventing implantation of fertilized eggs.<sup>29</sup>

While C.R.A.C.K. specifies the methods of birth control it considers acceptable,<sup>30</sup> it does not provide sterilization or birth control to its clients.<sup>31</sup> Each of the foregoing contraception methods requires the services of a medical provider. Federal programs provide these services at no cost to indigent patients.<sup>32</sup> Before C.R.A.C.K. remunerates an applicant, he/she must demonstrate compliance with the program. This exchange of cash for demonstrated compliance with the program is a contract as discussed in the next section of this Note.

#### THE C.R.A.C.K. CONTRACT CONTAINS ALL NECESSARY ELEMENTS

##### *Offer*

C.R.A.C.K. advertises its offer via billboards in Los Angeles, Chicago, Florida and Minnesota.<sup>33</sup> Additionally, women in

24. Roberta J. Ogletree & Kathleen J. Welshimer, *Norplant: What Health Educators Need to Know*, J. HEALTH EDUC., July-Aug. 1994, at 231; see also Laura T. Hinkle, *Education and Counseling for Norplant Users*, J. OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING, June 1994, at 388 (discussing Norplant's effectiveness).

25. BLANK, *supra* note 22, at 35; Ogletree & Welshimer, *supra* note 24, at 230.

26. Hinkle, *supra* note 24, at 387; Ogletree & Welshimer, *supra* note 24, at 230.

27. Margaret Comerford Freda et al., *Women's Responses to Depo-Provera*, AM. J. MATERNAL/CHILD NURSING, July-Aug. 1996, at 183-84.

28. Warren E. Leary, *U.S. Approved Drug Used by Injection for Birth Control*, N.Y. TIMES, Oct. 30, 1992, at A1.

29. Carolyn L. Westhoff, M.D., *Current Assessment of the Use of Intrauterine Devices*, J. NURSE-MIDWIFERY, May-June 1996, at 218-19.

30. *Project Prevention*, C.R.A.C.K., at <http://www.cracksterilization.com/prevention/> (last modified Sept. 12, 2000) [hereinafter *Prevention*] (setting forth requirements for receiving \$200); see also Cottle, *supra* note 19, at 17 (listing the long-term birth control methods for which Harris' organization gives drug addicts \$200).

31. See *infra* notes 49-50 and accompanying text; see also Donovan & Christian, *supra* note 17, at 1 (noting that Illinois Public Aid covers the cost of tubal ligations, vasectomies and long-acting contraceptives); Ourlian, *supra* note 18 (maintaining that Medi-Cal, a state-run health system for the poor, would pay for most sterilization operations).

32. See *infra* note 50 and accompanying text.

33. Pam Belluck, *Addicts Offered \$200 to Get Sterilized*, PLAIN DEALER, July 25, 1999, at 19A, LEXIS, Nexis Library, Major Papers File; see also *Statistics*, C.R.A.C.K., at

Pennsylvania, New Hampshire and Michigan have received money from C.R.A.C.K. after following the program requirements outlined on the C.R.A.C.K. website.<sup>34</sup> "The billboards make an unusual offer. 'If you are addicted to drugs', they say, 'Get Birth Control – Get \$200 Cash.'"<sup>35</sup>

The Second Restatement of Contracts defines an offer as a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it."<sup>36</sup> Simply put, an offer communicates that the offeror is seeking acceptance of his/her bargain by the offeree.

C.R.A.C.K.'s billboards constitute a valid offer; the offer delineates the terms in a way that is easily understood as an invitation for the offeree to accept. Furthermore, it is clear, definite and leaves no room for negotiations.<sup>37</sup>

The language of the advertised offer communicates the offer in a manner that justifies another person in understanding that his/her assent to the bargain is invited. The words are concise and to the point.<sup>38</sup> The language succinctly identifies to whom the offer is made<sup>39</sup>—any drug-addicted person of childbearing age qualifies as an offeree<sup>40</sup>—so a qualified reader would conclude that his/her acceptance is invited.

The billboards also include the requirements for accepting the offer—obtaining long-term birth control—and how to accept the offer—by providing documentation of the completion of the requirements to C.R.A.C.K. personnel. All of the elements of an offer are met; therefore, the advertisements constitute a valid offer.<sup>41</sup>

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<http://www.cracksterilization.com/cfbc/statistics.html> (last visited Oct. 21, 1999) [hereinafter *Statistics*] (on file with author).

34. Belluck, *supra* note 33.

35. *Id.* For a discussion of the intention behind C.R.A.C.K.'s offer, see *Homepage*, *supra* note 15.

36. I RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981); see also Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 181 (1917) (stating that an offer is "an act whereby one person confers upon another the power to create contractual relations between them").

37. *Cf. Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689, 691 (Minn. 1957) (holding that an advertisement is an offer rather than an invitation to bid when the legal intentions of the parties is clear, definite and explicit).

38. See Belluck, *supra* note 33.

39. *Id.*

40. *Prevention*, *supra* note 30 ("The offer is open to any man or woman who is—or has been addicted to drugs or alcohol.").

41. The billboard advertisements are not an invitation to bid. There is no room for negotiation; if one is not a drug addict, one may not accept. If one does not receive long-term

Further, assuming *arguendo* that the offer was not adequately communicated via the billboard advertisements, C.R.A.C.K. restates its offer when the client contacts the organization for additional information and instruction.<sup>42</sup> Regardless of whether one agrees or disagrees with the assertion that the advertisement is sufficient to constitute an offer, a valid offer is nonetheless made at some point, either via billboard advertisement or oral communication.

### *Acceptance*

Acceptance of an offer is an assertion of the offeree's intention to enter into a contract with the offeror. An acceptance must be in response to an offer.<sup>43</sup> The offeree's acceptance must be communicated to the offeror.<sup>44</sup> Finally, an offeree must accept each term of the offer to exercise a valid acceptance.<sup>45</sup>

The Second Restatement of Contracts provides that: "[a]cceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise."<sup>46</sup> C.R.A.C.K.'s clients accept its offer by completing what the offer requests to be performed. As discussed above, C.R.A.C.K.'s offer is primarily communicated via billboard advertisements. An offeree must provide documentation of his/her drug addiction, such as an arrest report,<sup>47</sup> and demonstrate that he/she has been sterilized or received one of the approved long-term birth control methods to manifest his/her acceptance.<sup>48</sup>

Once C.R.A.C.K. personnel verify the requisite drug addiction status, they arrange for the client to sign a release form that will allow C.R.A.C.K. workers to verify that the individual has undergone a long-term birth-control or contraceptive procedure.<sup>49</sup>

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birth control, the offer is not open to him/her. See 1 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 27 (rev. ed. 1936). The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested." *Id.*

42. *Prevention*, *supra* note 30.

43. HUGH COLLINS, THE LAW OF CONTRACT 154-56 (Robert Stevens et al. eds., 2d ed. 1993) (detailing three required elements of a valid acceptance).

44. *Id.* at 155.

45. *Id.* at 154-55.

46. 1 RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981).

47. Belluck, *supra* note 33.

48. See *id.*

49. Donovan & Christian, *supra* note 17.



"After they get the birth control procedures, usually paid for with government assistance, they send in written proof."<sup>50</sup>

Fulfilling the dual requirements of (1) providing documentation of drug addiction and (2) signing a release form authorizing verification of the birth-control or sterilization procedure manifests assent to the terms of the offer in the manner dictated by the offer. As illustrated, C.R.A.C.K.'s billboards constitute a valid offer and providing the necessary documentation is manifestation of assent or acceptance. Thus, in determining whether contract law recognizes C.R.A.C.K. transactions, attention to consideration is necessary.

### *Consideration*

Offer and acceptance alone do not create a contract.<sup>51</sup> Consideration elevates a mere exchange of promises to the level of a legally recognized and enforceable bargain.<sup>52</sup> Consideration serves both an evidentiary and cautionary function in contract law. A bargained for exchange is sufficient to constitute consideration.<sup>53</sup>

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise

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50. Belluck, *supra* note 33; see also Title XIX, Social Security Act, 42 U.S.C. § 1396(a)(10)(A) (1994) (authorizing Federal Medicaid programs to reimburse states for a percentage of the healthcare costs associated with family planning services and supplies for low-income individuals); BLANK, *supra* note 22, at 62-65 (reporting on the federal government's involvement in sterilization with an emphasis on its historically involuntary nature).

51. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 28 (1981) ("It is a standard textbook proposition that in Anglo-American law a promise is not binding without consideration."); see also E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* 45-47 (5th ed. 1995) (reporting that by the end of the sixteenth century courts were imposing a requirement that the promisor must receive a benefit in exchange for a detriment incurred by the promisee; this doctrine was later expanded to include a promise in exchange for a promise as sufficient consideration). For a definition of consideration as a legal formality that serves two functions, see E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 45-46 (1998).

One is "evidentiary"—the function of providing trustworthy evidence of the existence and terms of the promise in case of controversy. The other is "cautionary"—the function of bringing home to the promisor the significance of promising by encouraging reflection on its consequences—preventing ill-considered decisions by prompting apprehension of future fears.

*Id.*

52. See FRIED, *supra* note 51, at 29.

53. 1 RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

and is given by the promisee in exchange for that promise.

- (3) The performance may consist of
  - (a) an act other than a promise, or
  - (b) a forbearance, or
  - (c) the creation, modification, or destruction of a legal relation.
- (4) The performance or return promise may be given to the promisor or to some other person.<sup>54</sup>

In *Hamer v. Sidway*<sup>55</sup> the New York Court of Appeals expanded the pre-Restatement definition of consideration. To summarize the facts of *Hamer*, an uncle made a promise to his nephew that he would pay the nephew \$5000 if the nephew refrained from both smoking and drinking alcoholic beverages until he reached his twenty-first birthday.<sup>56</sup> The nephew accepted his uncle's offer and then successfully complied with the request.<sup>57</sup> The uncle died without paying the nephew the contracted amount.<sup>58</sup> The executor of the uncle's estate refused to pay the nephew, claiming the promise had not been supported by adequate consideration.<sup>59</sup>

The New York Court of Appeals disagreed, overruling the lower court in favor of enforcing the contract.<sup>60</sup> The *Hamer* court stated that "[c]onsideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."<sup>61</sup> The *Hamer* court further noted that it was irrelevant whether the nephew even had a desire to drink alcoholic beverages or smoke prior to giving up their use.<sup>62</sup> The court focused on the sufficiency of the nephew's agreement to restrict his lawful freedom of action without examining the extent that the "deprivation" affected the nephew.<sup>63</sup>

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54. *Id.* § 71.

55. 27 N.E. 256 (N.Y. 1891).

56. *Id.* at 257.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Forbearance of a legal right is sufficient consideration to enforce a promise.<sup>64</sup> It follows that forbearance of one's constitutionally protected freedom to procreate is valid consideration for a contract.<sup>65</sup>

In the instant transaction, the consideration is payment and receipt of \$200 in exchange for forbearance, and proof thereof, of exercising one's reproductive rights. Forbearance of a legal right, here restricting one's freedom to procreate via long-term contraception or sterilization, is sufficient consideration to support a contract between C.R.A.C.K. and a drug-addicted individual.

It may appear at first glance that the consideration the contracting parties exchange is not of equal value. Indeed, payment of \$200 seems hardly adequate payment for one to forego one's right to procreate.<sup>66</sup> However, commensurate value of benefit and detriment is not a requirement of a bargained-for exchange.<sup>67</sup> "If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'"<sup>68</sup>

Notwithstanding the apparent validity of the contract under discussion, it is uncertain whether a court would enforce such a contract. Not every contract merits enforcement. An unenforceable contract appears valid on its face, but because of one party's actions or incapacity, the court acknowledges that enforcing the contract would be unjust.<sup>69</sup>

64. *Id.* at 257-258; WILLISTON & THOMPSON, *supra* note 41, § 135.

65. A person (whether male or female) has a right to reproductive freedom, guaranteed under the penumbra of the Bill of Rights of the Constitution. "The Constitution does not explicitly mention any right of privacy," however, the Supreme Court has recognized that the liberty protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy . . ." *Roe v. Wade*, 410 U.S. 113, 152 (1973). For additional Supreme Court decisions regarding the constitutionally protected zone of privacy, see *Planned Parenthood v. Casey*, 505 U.S. 833, 846-53 (1992) (plurality); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

66. The offer is not meant as payment for the value of one's procreative rights. "[The] plan was to offer a cash incentive to drug/alcohol addicts to spark the attention of those struggling with yearly pregnancies, numerous abortions, many abandoned children . . ." *Homepage*, *supra* note 15.

67. See *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 444 (N.Y. 1982) ("[M]utuality[] in the sense of requiring . . . reciprocity, is not necessary when a promisor receives other valid consideration.") (citation omitted).

68. I RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

69. II RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

## THE C.R.A.C.K. CONTRACT IS NOT AN UNFAIR CONTRACT

Some types of contracts are so inherently unfair or one-sided that, regardless of the fact that they have the requisite contract elements, courts will not enforce them.<sup>70</sup> These unfair contracts include adhesion contracts, contracts made under coercion or undue influence and contracts made without the informed consent of one of the contracting parties.<sup>71</sup>

*Adhesion Contract*

"The major characteristic in this new type of contract is that the will of one party exclusively dominates the whole transaction, not only with regard to one individual but for the entire unidentified group of people who will participate in such transactions."<sup>72</sup> One party generally has superior bargaining power. The contract is typically a "take it or leave it" type of transaction.<sup>73</sup>

Although adhesion contracts are generally found in the context of consumer transactions, critics of the contract between C.R.A.C.K. and drug addicts express the belief that it is one-sided and thus, an adhesion contract.<sup>74</sup> The argument that the contract under discussion is an adhesion contract is without merit. "[A]dhesion contracts are . . . contracts (or terms) that are imposed without bargaining. The only thing the weaker party is required to do is to 'sign on the dotted line.'"<sup>75</sup> In this situation, the offeree must complete certain conditions precedent before the contract is completed. In addition, and perhaps more importantly, although there is no per se "bargaining," the contract does not encompass a consumer relationship and the weaker party is not obliged to deal with the organization at all.<sup>76</sup>

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70. See generally FARNSWORTH & YOUNG, *supra* note 51, ch. 4, § 4 (discussing unconscionable contracts).

71. SINAI DEUTCH, *UNFAIR CONTRACTS: THE DOCTRINE OF UNCONSCIONABILITY* 1 (1977).

72. *Id.* at 2.

73. *Id.* at 126-27.

74. For a discussion of the criticisms of the C.R.A.C.K. program, see Ourlian, *supra* note 18 ("Birth control advocates and bioethical experts . . . questioned the plan, saying it may exploit poor women into giving up their right to procreate while missing the underlying cause of babies born to drug-addicted mothers.").

75. DEUTCH, *supra* note 71, at 4, 126-27 (identifying disparity of bargaining power as an essential element of every adhesion contract and clarifying that not every contract with such a disparity is an adhesion contract).

76. Adhesion contracts generally involve preprinted form contracts to which the consumer must agree to complete the transaction. See JOSEPH M. PERILLO, 1 CORBIN ON CONTRACTS § 1.4 (rev. ed. 1993); cf. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447-48 (D.C. Cir. 1965) (deciding that a contract for purchase of furniture on credit could be voided on basis

The weaker party, the drug addict, is interested in receiving the benefit of the bargain. He/she is required to do more than sign on the dotted line. Indeed, the steps required to accept the offer are difficult for many of C.R.A.C.K.'s clients to complete.<sup>77</sup> For these reasons, the contract cannot be invalidated as an adhesion contract.

### *Duress and Undue Influence*

Harris' critics brand the transaction between C.R.A.C.K. and drug addicts coercive and, therefore, invalid.<sup>78</sup> However, coercion may negate a party's consent to a contract only if it rises to the level of duress or undue influence.<sup>79</sup> The \$200 payment is certainly more appealing to people with few or no resources than it would be to wealthy individuals.<sup>80</sup> The person may be influenced to accept the contract because the value of the payment is higher to him/her than it would be to someone for whom money is not an issue.<sup>81</sup>

The contract is not improperly coercive merely because the bargain is attractive to one party due to his/her poverty. "It cannot be acknowledged, for instance, that poverty severely constrains choice, for this would render many common instances of contracting, such as employment, tenancies, and purchases of food, invalid."<sup>82</sup>

Neither is the contract wrongfully coercive because of the disparate values in the respective obligations of the parties. "[T]he goals to be achieved need not be common to both parties. Two persons might agree to coordinate their behavior so as to achieve one goal for one party and a very different goal for the other party."<sup>83</sup> The disparity in the objective between the contracting parties, in this case the drug addict's desire for monetary gain and the C.R.A.C.K. organization's goal of preventing the births of children with drug exposure, does not support a claim of wrongful coercion.<sup>84</sup> Offering to forego procreation in exchange for a cash

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of unconscionability at the time of formation).

77. See *Homepage*, *supra* note 15.

78. Cottle, *supra* note 19, at 17.

79. See I E. ALLAN FARNSWORTH, *CONTRACTS* §§ 4.16-4.20 (2d ed. 1998).

80. See Ourlian, *supra* note 18.

81. See Hornblower, *supra* note 12, at 48; see also Cottle, *supra* note 19, at 18 (discussing criticisms of C.R.A.C.K.'s \$200 incentive, including a disproportionate effect on the poor); cf. *Coca-Cola Bottling Co. v. Alexandria Coca-Cola Bottling Co.*, 769 F. Supp. 671, 739 (D. Del. 1991) (finding that, absent an improper act, driving a hard bargain did not constitute duress, even in light of the financial distress of one of the parties).

82. COLLINS, *supra* note 43, at 135.

83. HENRY MATHER, *CONTRACT LAW AND MORALITY: CONTRIBUTIONS IN LEGAL STUDIES* 5 (1999).

84. FRIED, *supra* note 51, at 97.

payment is a person's right. "A proposal is not coercive if it offers what the proponent has a right to offer or not as he chooses."<sup>85</sup>

The nephew in *Hamer v. Sidway*<sup>86</sup> chose not to exercise his lawful freedom to drink alcoholic beverage and smoke until his twenty-first birthday in response to the financial incentive of \$5000 offered to him by his uncle.<sup>87</sup> C.R.A.C.K.'s offer of \$200 is the same type of financial incentive offered in exchange for a drug-addict successfully foregoing procreation, one of his/her lawful actions. The *Hamer* court held that the agreement to restrict or forego activities to which one is lawfully entitled is adequate consideration to support an enforceable bargain.<sup>88</sup> Therefore, because of the similarities in circumstances, the C.R.A.C.K. contract would also be an enforceable bargain.

The parties are not threatened or coerced into compliance. In fact, the process is rife with information and disclosure.<sup>89</sup>

The process goes as follows: The participant contacts us and we send out our paperwork. Our offer is good for 60 days after receiving the paperwork. She or he then makes an appointment with a personal physician or family planning provider of choice (we are not involved in this process). In most cases, birth control services are available at no cost, and the provider offers informative counseling to assist their clients in choosing the appropriate family planning method. If a participant chooses tubal ligation, she is required by law to wait a period of 30 days before she may undergo the procedure. After she receives her services, she returns her completed paperwork to us. Once her paperwork is verified by our staff, the client receives \$200.<sup>90</sup>

The parties' contractual relationship is voluntary and, although it may be encouraged by the cash incentive, it is not unduly influenced by the promise of \$200. Robert Pugsley, a professor at Southwestern University School of Law in Los Angeles and an advisor to C.R.A.C.K., agrees. "To the extent a person may be wavering, that small amount of money may make the difference."<sup>91</sup>

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85. *Id.*

86. 27 N.E. 256 (N.Y. 1891).

87. *Id.* at 257.

88. *Id.*; see *supra* notes 55-64 and accompanying text.

89. See Donovan & Christian, *supra* note 17 ("Clients are instructed by volunteers on the phone and in writing that this is a serious decision that must be made individually."); see also *Prevention*, *supra* note 30 (describing in detail the process through which a person can qualify for the \$200, and supplying additional information on options and alternatives).

90. *Prevention*, *supra* note 30.

91. Ourlian, *supra* note 18.

This implies that not all drug addicts of child-bearing age are persuaded to accept C.R.A.C.K.'s offer because of the promised payment.

Even assuming *arguendo* that the \$200 payment is improperly coercive because it disproportionately appeals to drug addicts, a contract cannot be voided simply because a particular promise induced cooperation.<sup>92</sup> The influence of the monetary inducement does not rise to the level of wrongful coercion because it is not so inflated that it makes a rational decision impossible. In addition, C.R.A.C.K. provides information to prospective clients regarding the impact of the decision to be sterilized or get long-term birth control to ensure an informed decision.<sup>93</sup> Although the monetary incentive may influence the decision to accept C.R.A.C.K.'s offer, it does not rise to the level of improper influence.

Neither does the doctrine of duress void the C.R.A.C.K. contract. Duress requires "an illegitimate act performed by one party which causes the other to consent to the contract."<sup>94</sup> A drug addict's consent to C.R.A.C.K.'s offer is not achieved through threat or undue influence by a person in a position of trust.<sup>95</sup> Accepting the offer is an exercise of free will. Even if influenced or motivated by the cash reward, there is no illegitimate act that precludes the exercise of the drug-addict's free will.<sup>96</sup> Offering a cash incentive is not an illegitimate act, however distasteful it may appear to C.R.A.C.K.'s critics.<sup>97</sup> In the absence of a threat or other illegitimate act, C.R.A.C.K.'s contract is not voidable on the grounds of duress.

### *Capacity and Informed Consent*

C.R.A.C.K.'s clients are drug addicts, which raises the question of whether they have the capacity to contract. If the individual makes his/her decision while under the influence of drugs or if the

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92. MATHER, *supra* note 83, at 6. "Promises are sometimes made in situations where two or more persons are to coordinate their efforts in achieving something that cannot be obtained in the marketplace." *Id.* at 5.

93. See *supra* notes 33-42 and accompanying text.

94. COLLINS, *supra* note 43, at 138.

95. FARNSWORTH, *supra* note 79, § 4.19. Examples of special relationships in which one person may exercise improper influence based on his/her position of trust include: parent-child, clergy-congregant and doctor-patient. *Id.*

96. Illegitimate acts in this context include threatened or actual physical violence, threat of loss of employment made to employee by an at-will employer, threat of imprisonment or criminal prosecution. See *id.* §§ 4.16-4.17.

97. See Cottle, *supra* note 19, at 17 ("[I]t's the idea of giving money to drug users that really offends some folks' moral sensibilities. 'You're feeding their habit' is an oft-voiced objection.").

decision is galvanized by the desire for money with which to purchase drugs, it could be argued that he/she lacked the capacity to make an informed decision.<sup>98</sup>

Merely being addicted to drugs is insufficient to prove incapacity to contract.<sup>99</sup> A person must be so completely intoxicated or chronically influenced by his/her use of drugs as to be incapable of comprehending the nature of the contract.<sup>100</sup> In addition, the other party to the contract must have had reason to know that the intoxication or drug addiction rendered the first party wholly incapable of reasonably understanding the nature and consequences of the contract, in which case the contract would be voidable at the incapacitated party's option.<sup>101</sup>

Harris disagrees with critics who suggest that C.R.A.C.K.'s clients lack the capacity to give informed consent. "[A]ddicts can make informed decisions about whether to receive long-term birth control. 'They're not zombies 24 hours a day,' Harris said. 'They are capable of making decisions and there is a 30 day waiting period before they have the procedure. They are aware of the consequences.'<sup>102</sup>

While the initial decision to accept C.R.A.C.K.'s offer could be made while the client is under the influence of drugs, C.R.A.C.K.'s process encourages deliberation. As discussed above, C.R.A.C.K.'s clients have ample opportunity to consider the impact of their decision during the period between their initial contact with C.R.A.C.K. and their completion of the requirements for manifesting

98. See 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 10:10 (Lawyers Cooperative Publishing, 4th ed. 1993) (1936); see also FARNSWORTH, *supra* note 79, § 4.6 (including the use of drugs as a cause of mental incapacity); HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 2:16 (2d rev. ed. 1999) (defining incapacity as "an entire loss of understanding such that a party lacked the strength of mind to understand what he or she was doing").

99. See FARNSWORTH, *supra* note 79, § 4.6, at 435-36; WILLISTON & LORD, *supra* note 98, at § 10:11, 332.

100. See WILLISTON & LORD, *supra* note 98, § 10:11, at 335.

101. See I RESTATEMENT (SECOND) OF CONTRACTS § 16 (1981).

102. Susan Dodge, *Program Rewards Addicts for Taking Birth Control*, CHI. SUN TIMES, Sept. 13, 1999, at 14. C.R.A.C.K.'s clients have their own reasons for getting sterilized or long-term birth control. For their testimonials see Cottle, *supra* note 19, at 17 ("Sharon Adams had already given birth to 14 children by the time she contacted Harris. (Four died. Nine are in foster care. She's raising the youngest.)"); O'Neill & Carter, *supra* note 1, at 146-47.

Tracy McGruder, 34, felt . . . helpless before she received Norplant—and \$200 from Harris—in September 1998. "I was out there selling my body, doing whatever I had to do for the drug," recalls McGruder, who had five children, two of them drug-exposed . . . "I don't want to take the chance of hurting any more kids or bringing a baby into this world and having someone else raise it," she says. "It's just not worth it."

*Id.*



acceptance.<sup>103</sup> It is not reasonable to infer that C.R.A.C.K.'s clients lack the ability to understand the consequences of their agreed upon contractual obligations merely because they are addicted to drugs.<sup>104</sup> "The mere presence of such a disability . . . does not itself impair the capacity to contract."<sup>105</sup>

The contract would only be voidable if C.R.A.C.K. had reason to know that the offeree was so extremely intoxicated at the time of acceptance that he/she failed to understand the consequences of the contract. The party has already been sterilized or received long-term birth control as a condition precedent to accepting the offer. Therefore, he/she must necessarily have received information and counseling about the consequences of the transaction.<sup>106</sup>

Even if one accepts the argument that drug addiction indicates a lack of capacity to contract, affirmative action is required to avoid constructive ratification.<sup>107</sup> One has a reasonable amount of time after becoming sober to repudiate the contract; failure to do so is constructive ratification.<sup>108</sup>

Notwithstanding critics' doubts about the contract between C.R.A.C.K. and its clients, the contract is presumed to be valid. This presumption is rebuttable only if the client was so intoxicated that it would be unreasonable for a C.R.A.C.K. representative to have believed otherwise and the client disaffirms the contract within a reasonable amount of time.<sup>109</sup>

### *Unconscionability*

The official comment to the Uniform Commercial Code (U.C.C.) describes the doctrine of unconscionability as a means by which courts may refuse to enforce an otherwise valid contract.<sup>110</sup> The provisions of U.C.C. section 2-203 are expressly intended to prevent oppression and avoid unconscionable results. "If the court as a matter of law finds the contract or any clause of the contract to have

103. See *supra* notes 89-90 and accompanying text.

104. See FARNSWORTH, *supra* note 79, at § 4.6, 435. But see Cottle, *supra* note 19, at 16-18 (addressing reports of critics' opposition to C.R.A.C.K.'s offer); Donovan & Christian, *supra* note 17 (same); Hornblower, *supra* note 12, at 48 (same); May, *supra* note 18 (same); Ourlian, *supra* note 18 (same). Critics of C.R.A.C.K. uniformly believe that drug addicts are so influenced by their addiction that they cannot make an informed decision when money, with which they can purchase drugs, is involved.

105. FARNSWORTH, *supra* note 79, § 4.6, at 435.

106. See *infra* notes 114-17 and accompanying text.

107. See FARNSWORTH, *supra* note 79, § 4.7; WILLISTON & LORD, *supra* note 98, § 10:12.

108. See WILLISTON & LORD, *supra* note 98, § 10:12.

109. *Id.*

110. U.C.C. § 2-203 cmt. 1 (1978).

been unconscionable at the time it was made the court may refuse to enforce the contract . . . ."<sup>111</sup> Although the U.C.C. governs commercial transactions, it can be applied by analogy to other types of contracts.<sup>112</sup>

Whether the contract under discussion is unconscionable depends upon the factors involved in its formation.<sup>113</sup> In the C.R.A.C.K. agreement, the parties are informed as to their respective duties and obligations. Although critics disagree, there is little to indicate that the decision to become sterilized or receive long-term birth control is made without adequate information.<sup>114</sup> To the contrary, because a state medical assistance program likely covers the cost of the procedure, there are stringent controls to ensure C.R.A.C.K.'s clients have adequate information and make an informed decision with regard to the sterilization or birth control.<sup>115</sup>

Significantly, [under] the regulations on sterilization that became effective on February 6, 1979 . . . a waiting period of at least 30 days is required; informed consent cannot be obtained while the person is . . . under the influence of alcohol or drugs; and complete information concerning the risks, side effects, and irreversibility of sterilization as well as alternative methods of contraception must be given in the patient's own language both orally and in writing. The informed consent form must be signed by the person seeking sterilization, the person who obtains the consent, the physician performing the sterilization, and an interpreter if relevant. The regulations, therefore, provide strict guidelines for the use of federal funds and represent an effort to ensure that only mentally competent

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111. *Id.* § 2-203.

112. *See, e.g.,* *NASCO, Inc. v. Pub. Storage, Inc.*, No. 92-12731-RCI, 1995 U.S. Dist. LEXIS 7815, at \*12 (D. Mass. May 3, 1995) ("If the contract involves the sale of goods, the unconscionability provision of the Uniform Commercial Code . . . will apply directly; if it does not, the same provision will apply by analogy."). *See generally* Daniel E. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 *FORDHAM L. REV.* 447 (1971) (discussing the courts' acceptance of extending article 2 of the U.C.C. into non-sales areas and predicting an acceleration of its acceptance into all areas of contract law).

113. Courts consider a number of factors to determine if a contract is unconscionable, including whether the parties had a meaningful choice to enter into the contract, whether there was any deception or concealment of terms in the fine print, whether the contract was wholly one-sided and whether the inequality of the contract is so overwhelming that no reasonable person would accept its terms and no fair person would offer such terms. *See, e.g.,* *Children's Surgical Found., Inc. v. Nat'l Data Corp.*, 121 F. Supp. 2d 1221, 1225 (N.D. Ill. 2000); *Cain P'ship, Ltd. v. Fed. Deposit Ins. Corp.*, No. 91-5524, 1992 U.S. App. LEXIS 11377, at \*13 (6th Cir. May 11, 1992); *Svalina v. Split Rock Land & Cattle Co.*, 816 P.2d 878, 882 (Wyo. 1991).

114. *See* BLANK, *supra* note 22, at 62-64.

115. *Id.*

adults who have made an informed decision free from coercion may be sterilized under [Medicaid, the Public Health Service, or the Social Services Program].<sup>116</sup>

Critics imply that the C.R.A.C.K. contract is unconscionable because it does not include incentives for drug addicts to overcome their addiction.<sup>117</sup> In particular, they feel that the emphasis should be on drug treatment programs for pregnant women, rather than sterilization and long-term birth control.<sup>118</sup> "[T]he CRACK [sic] program doesn't solve the problem of poor women addicted to drugs, 'The focus should be on treating women while they're pregnant and addicted . . . .'"<sup>119</sup>

With respect to the criticism that the C.R.A.C.K. program does not address the root cause of the addicts' problem because it does not refer drug addicts to treatment or counseling programs, Georgann Turner, Volunteer Director of the Sacramento/Bay Area chapter of C.R.A.C.K. responds: "Our clients have all been in contact with social services and the criminal justice system numerous times. They have been offered substantial services (i.e. drug treatment, housing and parenting assistance) many times, and have still failed to change their lives."<sup>120</sup> Turner continued her defense of the C.R.A.C.K. program: "The motivation of getting their kids back (or the coercion of losing them) has not prompted a change . . . I doubt that the \$200 does much more than get their attention."<sup>121</sup>

Other critics have altered their initial perceptions of C.R.A.C.K. after learning more about its program. For example, Earl Ofari Hutchinson led a protest of African-Americans and Latinos in front of one of C.R.A.C.K.'s billboards in Los Angeles.<sup>122</sup> The next day, however, he issued a retraction of the protestors' angry words.<sup>123</sup> "[A]fter discussions with CRACK [sic] founder, Barbara Harris, and despite what many believe, we are satisfied that the program does

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116. *Id.* at 64.

117. See Ourlian, *supra* note 18.

118. Donovan & Christian, *supra* note 17.

119. Ourlian, *supra* note 18 (quoting Rebecca Jurado, an Assistant Professor at Western State College of Law in Fullerton, California).

120. E-mail from Georgann Turner, Volunteer Director, Sacramento/Bay Area Chapter of C.R.A.C.K., to Juli Horka-Ruiz (Oct. 29, 1999) (on file with author).

121. *Id.*

122. *What's New*, C.R.A.C.K., at <http://www.cracksterilization.com/cfbc/whatsnew.html> (last visited Oct. 21, 1999) [hereinafter *What's New*] (on file with author).

123. *Id.*

not target African American or Latino drug users for sterilization . . . ."<sup>124</sup>

The contract between C.R.A.C.K. and its clients does not rise to the level of unconscionability. The purpose of sterilization or birth control in this context is to prevent the birth of drug-exposed infants.<sup>125</sup> The lack of referral to drug treatment programs or counseling is not indicative of an unfair contract. C.R.A.C.K.'s program does not target minorities,<sup>126</sup> nor are the participants uninformed.<sup>127</sup> The parties mutually assent to a bargained-for exchange, creating a contract that is not outside of the spirit of contract law.

The contract between C.R.A.C.K. and drug addicts is not the result of duress or coercion.<sup>128</sup> The parties do not lack capacity to contract and have made an informed decision to forgo their procreative rights in exchange for a cash payment.<sup>129</sup> The contract cannot be labeled an adhesion contract, nor is it inherently unfair or unconscionable.<sup>130</sup> It is a valid, enforceable contract.

#### THE C.R.A.C.K. CONTRACT DOES NOT VIOLATE PUBLIC POLICY

Public policy dictates that the contract between C.R.A.C.K. and drug addicts be upheld in order to protect a woman's right to procreative freedom. The California Supreme Court considered a contract for gestational surrogacy in *Johnson v. Calvert*.<sup>131</sup> In *Johnson*, the surrogate received compensation for her gestational services and for undergoing labor in exchange for gestating an implanted fetus for the intended parents.<sup>132</sup>

Despite the surrogate's argument that the contract violated the public policy prohibiting payment for consent to adoption of a child because it was a pre-birth waiver of parental rights,<sup>133</sup> the California court upheld the contract. "The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures

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124. *Id.*

125. See *Objective*, *supra* note 14 (outlining the objectives and mission statement of C.R.A.C.K.).

126. See e.g., *Statistics*, *supra* note 33 (giving statistics of Caucasian as well as minority participants). But see sources cited *supra* note 18 and accompanying text.

127. See *Homepage*, *supra* note 15 (describing the process followed by C.R.A.C.K. and the role of the physician in informing patients of their choices).

128. See *supra* notes 78-92 and accompanying text.

129. See *supra* notes 98-109 and accompanying text.

130. See *supra* notes 71-73 and accompanying text.

131. 851 P.2d 776 (Cal. 1993).

132. *Id.* at 778.

133. *Id.* at 783-84.

before the child was conceived; at the time when Anna [the surrogate] entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring.<sup>134</sup>

Although a contract for surrogate gestation and a contract for forbearing one's procreative rights are not factually similar, they both concern a woman's reproductive freedom. The court in *Johnson* affirmed the parties' respective right to form contracts governing their procreative rights. By affirming the lower court's decision, the California Supreme Court recognized that gestation of a fetus does not automatically create parental rights for the surrogate.<sup>135</sup> Rather, a woman has freedom over her reproductive rights and can contract for what amounts to a gestational and labor/delivery service without violating public policy.

Similarly, a woman may contract with another party to forego her right to bear a child. Public policy supports enforcement of a woman's exercise of her reproductive freedom. To suggest otherwise is to advocate a return to a paternalistic time in which women lacked control over their bodies and were unable to make informed decisions with regard to their choice to procreate or forego procreation.<sup>136</sup>

The contract between C.R.A.C.K. and its clients does not violate public policy because the decision to forego reproduction is solely the individual's. If the contract were not upheld, it would be tantamount to a judge decreeing that a woman may not exercise her right to forego reproduction. Furthermore, an individual's decision to voluntarily forego his/her right to procreate, as consideration for a contract, does not violate public policy.

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134. *Id.* at 784.

135. *See id.* at 782 (concluding that the person who intended to procreate, bring about the birth of a child and permanently raise the child is the natural mother under California law, regardless of who gives birth).

136. *See id.* at 785.

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is to . . . foreclose a personal and economic choice on the part of the surrogate mother . . .

*Id.*; *see also* *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (holding that the right of privacy guaranteed by the Constitution encompasses a woman's choice of whether to terminate a pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right to use contraceptives to unmarried people); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding that procreation is a fundamental right).

## ADOPTION OF A MODIFIED PROGRAM BY THE STATES

States have the power to enact regulations designed to promote the health, safety and welfare of the community, provided the means employed have a real and substantial relation to their apparent purpose.<sup>137</sup> The protection of children's health is within the police power of state governments.<sup>138</sup> Adopting legislation authorizing a program similar to C.R.A.C.K.'s to protect children from prenatal drug exposure would be reasonably related to the objective of protecting children's health. Therefore, states could enact such legislation, providing it did not mandate sterilization or long-term birth control as a prerequisite to state benefits.

Welfare reform proposed by many states included provisions linking welfare benefits to family caps or mandatory birth control.<sup>139</sup> Other reforms proposed offering a cash incentive for welfare recipients to receive long-term birth control.<sup>140</sup> Regulation of the reproductive freedom of welfare recipients is fraught with dangers of abuse. A serious concern about mandating sterilization or birth control of any particular group of the population is that:

Compulsion under our present social structure must inevitably degenerate into discrimination. The politically powerful majority would quickly see to it that the fertility of the powerless minority—the poor and the nonwhite—is restricted while theirs is left alone. The rich would then go on doing just as they please . . . . The poor would be forced to have fewer children . . . .<sup>141</sup>

The proposed program would not link birth control or sterilization to welfare or public benefits. Its voluntary nature and limited application to drug addicts of child-bearing age would not lead to the

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137. See ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* §§ 3, 10-11 (Arno Press 1976) (1904); CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* §§ 1, 166 (Da Capo Press 1971) (1886); cf. *Paris Adult Theatre I v. Slaten*, 413 U.S. 49, 109 (1973) (Brennan, J., dissenting) (discussing limitations of the police power); *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 201 (1912) (describing the scope of the police power); *Munn v. Illinois*, 94 U.S. 113, 125 (1876) (describing the source of the police power).

138. See sources cited *supra* note 137.

139. See Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 894-95 (1994).

140. See *id.*

141. Richard Stiller, M.A., *Compulsory Birth Control: Yes or No?*, 36 SEXOLOGY No. 9, at 31 (Apr. 1970).

discrimination that could follow involuntary or mandated programs.<sup>142</sup>

The program endorsed by this Note could be adopted by state governments to curb the number of children born exposed to drugs. States could create programs whereby a representative of a state agency enters into a contract with drug addicts. This contract would offer an incentive or reward for the person's decision to prevent the birth of a child (or children) exposed prenatally to illegal substances.

The above program would be designed to protect the health and welfare of children; therefore, the State would have the authority to regulate its citizens in this manner.<sup>143</sup> The program would offer an incentive or reward for a voluntary decision to prevent conception; therefore, it does not violate a person's reproductive rights. The solution is not one of obligatory sterilization or mandatory long-term contraception for drug addicts. It would not require drug addicts to enter drug treatment programs or counseling, although that option should be available upon request. Nor is it designed to punish women for having given birth to drug exposed or drug addicted babies in the past. Its sole objective is to protect the health and safety of children by preventing the birth of drug-exposed infants.

The contract must be in writing and should include the express conditions of the agreement.<sup>144</sup> The contract must expressly state the obligation of each party in the event of breach and the remedies available to the non-breaching party.

The establishment of an oversight program is a foreseeable obstacle to implementing this program. A monitoring mechanism would ensure that the individuals choosing long-term birth control did not have their implants removed or fail to receive their quarterly injections prior to the expiration of the contract term. The cost of implementing and staffing the oversight mechanism might increase the costs of the program to an unworkable level.

Although not the focus of this Note, constitutional difficulties with court-ordered injunction or specific performance are also

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142. Furthermore, solutions to the underlying issues of poverty and/or drug addiction are beyond the scope of this Note.

143. See *Atl. Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548, 558-59 (1914) (holding that State enforcement of a public health or safety regulation is not an unconstitutional property taking).

144. The express conditions would include the condition precedent that the offeree must submit proof of drug addiction and documentation of the sterilization procedure or long-term birth control method he/she received. The performance of these express conditions is required before any money would be paid. Failure to comply with one of the provisions would excuse the offeror from its obligation to pay; performance of a duty is excused if the condition does not occur.

foreseeable.<sup>145</sup> Courts may be reluctant to order continuation of contraception if a woman changes her mind before the contract term expires.<sup>146</sup>

Despite a person's constitutional right to procreate, and regardless of the criticisms discussed throughout this Note, public policy favors protecting children from the harms associated with being exposed to illegal drugs in utero. Entering into a voluntary contract to forgo reproductive rights is an individual's right. Any validly constructed contract between the state and a drug addict should be upheld, and enforced with equitable remedies if necessary.<sup>147</sup>

### AVAILABLE EQUITABLE REMEDIES

Equitable remedies are available for breach of contract when monetary damages are unavailable or inappropriate.<sup>148</sup> Specific performance of a contract will only be ordered when damages afford an inadequate remedy.

Two types of specific enforcement of obligations are available. "The most direct form of equitable relief for breach of contract is specific performance. By ordering the promisor to render the promised performance, the court attempts to produce . . . the same effect as if the contract had been performed."<sup>149</sup> The second equitable remedy is injunctive relief. "Instead of ordering specific performance, a court may, by injunction, direct a party to refrain from doing a specific act. If the performance due under the contract consists simply of forbearance, the effect of an injunction is to order specific performance."<sup>150</sup>

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145. *Cf.* *People v. Dominguez*, 64 Cal. Rptr. 290, 294 (Cal. Ct. App. 1967) (refusing to enforce a term of probation that prohibited defendant from becoming pregnant while unmarried as beyond the scope of the court's discretionary power because the condition was not related to the crime).

146. *Cf.* *ABC v. Wolf*, 420 N.E.2d 363, 366 (N.Y. 1981) ("For practical, policy, and constitutional reasons, therefore, courts continue to decline to affirmatively enforce employment contracts.").

147. Notwithstanding the public policy arguments, however, specific enforcement that enjoins a woman from exercising her reproductive freedom could be classified as unconscionable by critics. *See* sources cited *supra* notes 74, 80, 97, 104. If so, although a clause in the contract provided specific performance as an agreed-upon remedy for breach, not every court would enforce it. *Cf.* *Wolf*, 420 N.E.2d 363, 366 (discussing practical and policy reasons courts decline to grant specific performance of employment contracts).

148. *See* COLLINS, *supra* note 43, at 365-94 (describing judicial remedies and reasons behind a judge's remedy selection).

149. III E. ALLAN FARNSWORTH, *CONTRACTS* § 12.5 (2d ed. 1998).

150. *Id.*



It is conceivable that a drug addicted woman, who has contracted to be on long-term birth control in exchange for financial reward, would decide to have the hormonal implant removed before the term of the contract expired. To prevent this breach of contract, an injunction enjoining the woman from having the implant removed prior to the expiration of the term would be appropriate, as money damages would be inadequate to restore the non-breaching party to his/her rightful position.

Specific enforcement in the form of an injunction is a viable remedy because it is not overly intrusive. The judge would not violate a woman's constitutional rights by ordering her to receive birth control because the Norplant device is already in place. In effect, a judge would be ordering specific performance in the form of enforcing the woman's promise to forbear procreation for a specific term.<sup>151</sup>

A more difficult situation is one wherein a woman breaches her contractual obligation to complete the Depo-Provera injections. In that situation, only a decree of specific performance with an order mandating that the woman comply with the terms of the contract by receiving the remaining series of injections would suffice. In the case of a drug-addicted person, however, ensuring that she is in compliance with such a court order is difficult at best. In the event that she did not follow the order, there are few options to compel her performance.<sup>152</sup>

A feasible alternative is to divide the incentive payment into quarterly increments, payable upon proof that the injection was administered. This would eliminate the need for specific enforcement because the terms of the contract would not be fulfilled unless the woman completed the entire course of contraceptive treatments.

### CONCLUSION

The state objective of protecting the health and safety of its children, both born and unborn, is a compelling state interest. Weighed against the constitutional right to procreate, the balance shifts in favor of protecting all children's right to be born healthy and free from exposure to illegal drugs. In addition, since the right to procreate is voluntarily forgone in the proposed contract, the

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151. *See id.*

152. *See supra* note 149 and accompanying text.

balance is more heavily tipped in the direction of upholding and enforcing the proposed contract.

Depending upon the success of private organizations, like C.R.A.C.K., future data may prove that contracting drug addicts do not attempt to discontinue long-term birth control. If the data reveals that some birth control methods are more likely to be discontinued than others, a modified list of birth control options may prevent or reduce the number of breaches of the proposed contract. For instance, if the data shows that women fail to get quarterly Depo-Provera injections, but do not take affirmative steps to have Norplant removed before the term expires, the program could be implemented with limited sterilization and birth control options. The reward or incentive could be offered strictly for tubal ligation, vasectomy or Norplant.

Without the specter of impending breach of contract, monitoring and oversight costs would be dramatically reduced. If limiting the terms of the contract to these three categories of sterilization and long-term birth control is sufficient to prevent numerous breaches of contract, the modified program would satisfy the states' interest in protecting children's health and promoting their safety and would be economically efficient. Thus, it should be implemented by state governments.

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