Marquette Law Review

Volume 71
Issue 1 *Fall 1987*

Article 5

Surrogate Motherhood: Boon or Baby-Selling - The Unresolved Questions

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COMMENTS

SURROGATE MOTHERHOOD: BOON OR BABY-SELLING THE UNRESOLVED QUESTIONS

I. INTRODUCTION

Most children have one parental set;[1] an adopted child has two subsets (one is biological and the other is adoptive); but the child born from a surrogate arrangement has the unique possibility of having anywhere from two to five "parents."[2]

When the surrogate mother is also the egg donor the term "surrogate" becomes a euphemism. We are really dealing with a natural or biological mother who has agreed to conceive, carry a fetus to term, deliver the child and then terminate her parental rights in exchange for medical expenses and in most cases a sum of money, paid upon fulfillment of the contract. In short, she sells her child.[3]

Articles talk of the married infertile couple devastated by their inability to have a child.[4] Little mention is made of the

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1. The common parental set is a biological mother and father. This comment will not deal with stepparents nor an adoptive parent who adopts a child after either the death or divorce of a natural parent.

2. The combinations are as follows:

2 parents: Egg donor and birth mother are the same and a non-married biological father; 3 parents: Egg donor and birth mother are the same, biological father and biological father's wife; 4 parents: Egg donor, birth mother, biological father and biological father's wife; or 5 parents: Egg donor, sperm donor, birth mother, adoptive father and adoptive mother.

This comment will focus on the surrogate arrangement in which the woman who carries the fetus to term also donates her gamete (egg).

3. It is the presentation of the child which fulfills the contract.

4. *See generally* N. KEANE & D. BREO, THE SURROGATE MOTHER 12 (1981); Comment, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee*, 18 GONZ. L. REV. 539, 540-41 (1982-83); *No Other Hope for Having a Child*, NEWSWEEK, Jan. 19, 1987, at 50-51; Brochure, *Surrogate Parenting: An Alternative Method of Child Bearing* (Center for Surrogate Parenting, Inc., Beverly Hills, Calif. 1986). "Surrogate parenting is an alternative method of child bearing for an infertile couple when the wife is unable to bear a child." *Id.*

single person,[5] the homosexual,[6] the transsexual,[7] or the person who feels she is too busy to take the time out to have a child in the normal way.[8] Surrogate parenting institutions and individual attorneys are emerging nationwide, selling the picture of a family and white picket fence that often belies the truth of what is involved.[9] Using the argument that there are not enough babies available, they attempt to circumvent the statutory prohibition on child selling.[10]

This Comment will analyze the question of surrogacy in light of the constitutional rights of privacy and equal protection. Does the right to privacy protect the process and is equal protection an actual factor in the overall surrogate picture? It will examine the compelling state interest in the surrogate problem and look at how different courts have addressed the issue of compensation for the surrogate mother. Finally, this Comment will examine the Wisconsin statutes pertaining to adoption and artificial insemination and discuss

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5. Peterson, *Surrogates, Finding No Laws, Often Improvise Birth Pacts*, N.Y. Times, Feb. 25, 1987, at 1, col. 4.

6. *Id.* (When the lesbian couple split, all parties involved — the two lesbian lovers and the gay father — who provided the sperm — were all granted visitation rights).

7. N. KEANE & D. BREO, *supra* note 4, at 150.

8. The use of a surrogate enables the couple to have the husband's biological child without interrupting the wife's career. Comment, *Parenthood by Proxy: Legal Implications of Surrogate Birth*, 67 IOWA L. REV. 385, 387-88 (1982). With the advancement in medical technology today, the child could be the biological offspring of both parents — by the use of *in vitro* fertilization, the fertilized egg is then implanted into a host uterus. Handel, *Surrogate Parenting, In Vitro Insemination and Embryo Transplantation*, 6 WHITTIER L. REV. 783, 784 (1984).

9. Surrogate programs and attorneys handling surrogate arrangements include: Attorneys Noel Keane (who will handle a surrogate arrangement for anyone); William Handel (he only accepts infertile couples); Katie Brophy (initially started with a Kentucky surrogate program and then left to start her own); and Burton Stazberg (Philadelphia). The centers include Surrogate Parenting, Inc. (California), Surrogate Family Services, Inc. (Kentucky), Surrogate Parenting Associates, Inc. (Kentucky), National Center for Surrogate Parenting (Maryland), Miracle Program and Surrogate Mothering, Ltd. (Pennsylvania).

10. The argument is that legalized abortion and changing attitudes towards the unwed mother have reduced the number of "perfect" white babies available for adoption. *See generally* Comment, *supra* note 8, at 387. *But see* Galen, *Baby Brokers, How Far Can a Lawyer Go*, Nat'l L.J., Feb. 9, 1987, at 1, col. 1. According to adoption attorney L.S. Rosenstock, "[t]here's really a very large underground of people looking to adopt boys and girls who are looking to give their babies up for adoption. The emphasis on tight supply and big demand — it isn't true." *Id.* Attorney Rosenstock also claims that she can find a baby for every couple who comes to her and that it often takes less than nine months to do so. *Id.*

how they affect the ability to have a surrogate arrangement in Wisconsin.

II. CONSTITUTIONAL ISSUES

A. Right of Privacy

Proponents of surrogate motherhood argue, incorrectly, that the contract, payment of fees, and in fact, the entire transaction is protected by the Constitution under the auspices of the right of privacy. The constitutionally recognized right to privacy is relatively new in our history:

> When the Constitution and the Bill of Rights were ratified, neither statutes nor common law rules established a right of privacy as such. And certainly there was no constitutional provision which clearly provided a vehicle for its inclusion. The common law with regard to trespass, assault, slander and libel, and nuisance (as applied to offensive noises and odors, for example) could be said to have tangential reference to privacy, but this would offer a piecemeal approach rather than an argument based on a full-fledged right of privacy.[11]

Privacy is not one of the enumerated constitutional rights. It is an implied right, but it is not an absolute right. There are those who would argue that the right is not even a fundamental one.[12] By tracing the development of the right to privacy one can show that privacy does not shelter the surrogate arrangement.

In 1890, the Harvard Law Review published an article by Samuel D. Warren and Louis D. Brandeis referring to the tort of invasion of privacy.[13] This is later referred to as the beginning of the right to privacy by Roscoe Pound, Dean of the Harvard Law School.[14]

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11. M. G. ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 578 (4th ed. 1985).

12. Griswold v. Connecticut, 381 U.S. 479, 507-12 (1965) (Black, J., dissenting).

13. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Although the primary concern of the article is protection of the individual from slander, "[o]ut of a few fragments of the common law, the authors invented a brand new tort, the invasion of privacy." M. G. ABERNATHY, *supra* note 11, at 578.

14. M. G. ABERNATHY, *supra* note 11, at 578. "The article did nothing less than to add a chapter to the law." *Id.* Over the next sixty-five years, gradually a law of privacy evolved, using both common law and statutes. *Id.*

One of the earliest cases to mention a right of privacy is *Union Pacific Railway Co. v. Botsford*,[15] in which the Court discusses the importance of autonomy over one's own body — specifically that the government should not be allowed to force an inspection of one's person in a civil suit.[16]

Development of the right to privacy in matters pertaining to reproduction and sexual functions is often said to start with *Skinner v. Oklahoma*.[17] However, this is a misreading of the case. The Court does state that "procreation [is] fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects."[18] However, this opinion must be viewed in light of the issues presented by both the case and the times. *Skinner* is a 1942 decision, reached during a war period when the foreseen need was to increase our population.[19] When the Court speaks of the basic right "to have offspring"[20] what is meant is the biological ability to reproduce; but the actual right of reproduction is not protected.[21] That the right (to be able to reproduce) is not absolute is evidenced by the fact that the *Skinner* Court[22] does not overrule *Buck v. Bell*.[23] The *Buck* Court concludes that state-authorized sterilization of mental patients is not unconstitutional,[24] and does not violate the individual's constitutional rights under the fourteenth

15. 141 U.S. 250 (1891).

16. *Id. But see* DISCOVERY, 35 F.R.D. 39, 85-87 (1963) (modern application of FED. R. CIV. P. 35 (allowing physical and mental examination of persons when motion is made upon good cause)); Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (1960) (Rule 35 supplants earlier holdings about medical examinations).

17. 316 U.S. 535 (1942).

18. *Id.* at 541.

19. Today, when overpopulation of the planet is a threat, an opposite position might be taken by the Court. *See* Maher v. Roe, 432 U.S. 464 (1977). "[A] state may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth." *Id.* at 478 n.11.

20. *Skinner*, 316 U.S. at 536.

21. Smith & Iraola, *Sexuality, Privacy, and the New Biology*, 67 MARQ. L. REV. 263, 281 (1984).

22. *Skinner*, 316 U.S. at 542.

23. 274 U.S. 200 (1927).

24. *Id.* at 207.

amendment's due process and equal protection clauses.[25] Writing for the Court, Justice Holmes states:

> The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. . . . We have seen more than once that the public welfare may call upon the best citizens for their lives. . . . The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.[26]

In *Skinner*, the Court further states that Oklahoma's mandatory sterilization law for repeat criminal offenders is unconstitutional because under the fourteenth amendment's equal protection clause there is invidious discrimination in the way in which the statute was applied. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[27]

In *Griswold v. Connecticut*[28] the right of privacy within the confines of the marital relationship is recognized. Here Justice Douglas speaks of the

> relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. . . . The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[29]

What we are dealing with in this instance is the marital unit — the relationship between a husband and wife — who are viewed as a single fictitious unit. The freedom involved is the right to enjoy a sexual relationship, sanctioned by the state, and the right to choose *not* to bear a child as a result of that sexual union. Justice Goldberg's concurring opinion in *Griswold* also refers to the notion of protecting the privacy of the

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25. *Id.*
26. *Id.*
27. *Id.* at 541.
28. 381 U.S. 479 (1965).
29. *Id.* at 485-86 (emphasis in original).

family unit and of the right to marry and have children.[30] He states:

> Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.
>
> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy . . . are of similar order and magnitude as the fundamental rights specifically protected.[31]

"Although both *Skinner* and *Griswold* afford constitutional protection to the private decision of whether or not to bear children, the freedom they promote is not freedom for individuals, but freedom only for families."[32] A family in this instance is the husband and wife. Basic to these decisions is the right to use contraception — *the right to remain childless.*

After *Griswold* the next logical step for the Supreme Court was the extension of the right to use contraception to unmarried individuals. This is accomplished in the Court's decision in *Eisenstadt v. Baird*.[33] The right to have a sexual relationship without the fear of pregnancy is extended to the individual — not just the couple. The Court states "if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[34] Again the Court is striking down a statute prohibiting the use of contraception and reaffirming that an individual has the right to choose *not to have children*.

Control over one's body, a concept that was evidenced even in *Union Pacific Railway Co. v. Botsford*,[35] becomes paramount in the landmark case *Roe v. Wade*.[36] Citing to *Union Pacific*, Justice Blackmun writing for the court states: "The Constitution does not explicitly mention any right of privacy.

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30. *Id.* at 495 (Goldberg, J., concurring).

31. *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting)).

32. Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291, 310 (1982).

33. 405 U.S. 438 (1972).

34. *Id.* at 453 (emphasis in original).

35. 141 U.S. 250 (1891).

36. 410 U.S. 113 (1973).

In a line of decisions, . . . the Court has recognized that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution."[37] The Court continues that within this right to privacy is the right for a woman and her physician to choose to terminate a pregnancy.[38] Again the Court is dealing with the right *not* to have a child. The decision clearly states that the right to an abortion is not absolute: "The privacy right involved, therefore, cannot be said to be absolute."[39] The Court reiterates that the right of privacy does not extend to an *"unlimited right to do with one's body as one pleases."*[40]

The relationship between the marital unit and pregnancy or procreation involves different levels of protection and not all of these are entitled to privacy. The Court clearly states its position when it writes:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education. . . . The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.[41]

In *Carey v. Population Services International*[42] the Court addresses the right of privacy as it applies to non-prescription contraception and minors. Again we are dealing with the choice of remaining childless, and additionally with the rising number of teenage pregnancies. Perhaps in an attempt to stem the tide, the Court held that the New York statute was in violation of the first amendment and that the ban was not relevant to a state's interest in teenage promiscuity.[43]

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37. *Id.* at 152.

38. *Id.* at 153.

39. *Id.* at 154. Rights which are identified as being fundamental are not absolute and may be subject to state regulation when the state presents a compelling state interest. *Id.* at 155. *See also* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (state has the right to order vaccination).

40. *Roe*, 410 U.S. at 154 (emphasis added).

41. *Id.* at 159.

42. 431 U.S. 678 (1977).

43. *Id.* at 697-99. The Court notes that under New York law a girl of 14, with parental and court consent, could marry but would be prohibited from using birth control. *Id.* at 695 n.18 (again the Court is implying that the right upon which the New York statute infringed was the right to choose not to have a child).

Finally in *Bowers v. Hardwick*[44] the Supreme Court expressly states that not all actions in the bedroom are protected from intrusion by the state. Writing for the majority, Justice White states that the notion that the right of privacy protects any sexual act between two consenting adults as being "constitutionally insulated from state proscription is unsupportable."[45] Additionally, the Court notes that there is no textual support in the language of the Constitution for the privacy cases.[46]

In the surrogate situation the introduction of the third individual (who is not a family member) immediately takes the action outside of the protected "zone."[47] To complicate matters, the surrogate is often encumbered with a husband and children of her own.[48] With this enlarged cluster of individuals comes an even stronger reason for state intervention. At present there are no comprehensive studies available to assess the effects that a surrogate arrangement has on either the child born to a surrogate, her other children, or the woman herself.[49] It is imperative to ask what trauma exists in watching the growth of a brother or sister and then seeing the child sold.[50]

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44. 106 S. Ct. 2841 (1986).

45. *Id.* at 2844.

46. *Id.*

47. *See supra* note 37 and accompanying text.

48. The surrogate is usually a woman who has already had a child. There are two reasons for this: First, having a child is considered proof of her fertility; second, by having had a child it is thought that it will be easier for her to give up the new baby because the surrogate has firsthand knowledge of what a child brings to a family. *See, e.g.*, Handel, *supra* note 8, at 785; Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263, 265 (1981-82).

49. One child psychiatrist at Harvard Medical School recently stated that: "A child conceived and born for the purpose of providing a baby for the father would view itself as 'property.' . . . That child . . . would perceive itself as 'different from the vast majority of humanity.' " Hanley, *Baby M Witness Cites Risks to Child Taken from Mother*, N.Y. Times, Feb. 27, 1987, at 22, col. 5 (citations omitted).

50. Donna Regan, at age 23, has had four children, three of whom were sold to individuals who contracted for them. Ms. Regan's first child now has behavioral problems and is under a psychologist's care, but Ms. Regan sees no correlation between the child's problems and her having been a surrogate mother. Peterson, *Baby M Case Stirs Feelings of Surrogate Mothers*, N.Y. Times, Mar. 2, 1987, at 14, col. 1. Elizabeth Kane's (pseudonym) daughter (age 17) was 11 when Ms. Kane was a surrogate mother. Ms. Kane states: "'She is still having problems with what I did, and as a result she is still angry with me.' " *Id.* Does the child of a surrogate mother wonder - If I'm bad will I be sold, too? Does the child wonder what he/she is worth? The husband of Mary

B. Equal Protection

Another line of defense argued by those in favor of surrogate motherhood is that the procedure is constitutionally protected under the fourteenth amendment's equal protection clause.[51] To be within the scope of the equal protection clause a right must be deemed fundamental,[52] be "explicitly or implicitly guaranteed by the Constitution"[53] and involve a suspect class.[54] It should be noted that the Court has not accepted gender as a suspect classification,[55] although most decisions dealing with regulations relating to discrimination against women have been held to be in violation of the equal protection clause because they were not substantially related to important government objectives.[56]

What is at issue is the attempt to equate semen donation with the right to use a surrogate mother. The two major arguments are as follows: Most states allow a man to sell his sperm and "surrogate fatherhood" by artificial insemination by donor (AID) is allowed in all states.[57] Sperm banks have governmental sanction. Therefore, since a man can sell his bodily fluids, a woman should be able to sell her body for reproductive purposes.[58]

The second argument is that surrogacy is the counterpart of artificial insemination. If a man is infertile and his wife is fertile, the wife can be artificially inseminated with the sperm of usually an anonymous donor to produce a child. Therefore, it is argued, when the man is fertile and the woman infertile, the man should be able to use his sperm to impregnate another woman, who is usually not anonymous, to bear his child.

Beth Whitehead (surrogate for Baby M) has stated that he was troubled by "the thought of taking $10,000 for Ryan [their son] and Tuesday [their daughter] by selling their sister." *Who Keeps 'Baby M'*, NEWSWEEK, Jan. 19, 1987, at 49.

51. U.S. CONST. amend. XIV, § 1.

52. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

53. *Id.* at 33-34 (citations omitted).

54. Loving v. Virginia, 388 U.S. 1, 11 (1967).

55. Reed v. Reed, 404 U.S. 71 (1971).

56. Craig v. Boren, 429 U.S. 190 (1977).

57. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147, 153.

58. *See supra* note 40 and accompanying text.

The fallacy in the first argument is that the man sells semen while a woman sells far more than just some reproductive cells in fluid. If there is any equation to be drawn, it is that if a man can sell his sperm, then a woman, equivalently, should be able to sell her eggs, thereby entitling her to equal protection under the fourteenth amendment. Unfortunately, while the production of sperm can be done in private and has the potential of being an enjoyable experience for the male, eggs can only be harvested by either surgical or intrusive intervention,[59] and therefore the process carries with it the inherent pain and dangers of any invasive procedure.

The rebuttal to the second argument is that when the wife is fertile and undergoes AID we are assured of several crucial factors — namely, that the husband cannot father the child, the couple is married,[60] and that this is not being used as a way to have a child without the inconvenience of a pregnancy.[61] A positive aspect of AID is the fact that the father can begin the bonding process with the baby while the pregnancy progresses.[62] From the outset the family unit forms and grows naturally. Except in the rarest of instances, with surrogate procedures the fetus grows into a baby and bonds only with the surrogate (natural) mother and those with whom she interacts. If she is married and has children then

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59. There are two methods for the removal of eggs from the female. The most common method employs laparoscopy. This involves a hospital procedure performed under general anesthesia and requires a minimum of two incisions in the abdomen. *Methods for Removing Eggs*, 1 Women's Self Health 2 (Winter 1987) (newsletter from Good Samaritan Medical Center, Milw. Wis.). A newer, non-surgical, office procedure uses ultrasound "to locate the ova, which, instead of being collected through a surgical incision, are obtained by catheter through the uterus." *In Vitro Fertilization Procedure Leads to Birth of Quadruplets*, Am. Med. News, Feb. 20, 1987, at 30, col. 1.

60. This Comment is not addressing the issue of whether a single woman has the right to artificial insemination. For suggested reading on this subject, see Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 (1981). *But see* Smith & Iraola, Comment, *supra* note 21.

61. *See* Comment, *supra* note 8, at 387-88; Note, *Surrogate Mothers, The Legal Issues*, 7 AM. J. LAW & MED. 323, 324 (1981).

62. For the psychological bonding of the father to the baby see A. COLMAN & L. COLMAN, PREGNANCY, THE PSYCHOLOGICAL EXPERIENCE 97, 124-28 (1971). In most surrogate situations, neither the biological father nor his wife bond with the baby during the prenatal period. The adjustment for the adoptive mother, who also has the prime responsibility for child care, may be difficult or even insurmountable. L. ANDREWS, NEW CONCEPTIONS 199-201 (1984); *see also* N. KEANE & D. BREO, *supra* note 4, at 243 (problems of fathers whose wives have been artificially inseminated).

her family bonds with the baby. Furthermore, even the most ardent proponents of surrogacy admit that while there is no physical danger to the sperm donor and the time spent is only momentary, the surrogate mother does undergo physical danger and discomfort.[63] The duration of an average of thirty-eight to forty weeks of time are invested in the project.[64] This is full time work — twenty-four hours a day, seven days a week — without any time off: "Pregnancy and childbirth are hazardous, time-consuming, painful conditions."[65] Equal protection can only attach when equal rights are at stake. Here we have non-equivalent biological functions, but equal protection to donate the gamete cells exists (nothing stops a woman from donating eggs).

The Supreme Court holds that the equal protection clause of the Constitution requires that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[66] The Court allows the states broad power in creating their classifications and applies a rational basis test to determine if there has been invidious discrimination against a class.[67] These requirements have been reiterated in *Eisenstadt v. Baird*.[68] The Constitution does not guarantee the right to be a parent. The ability to be a parent is biological. Under these guidelines, until that time when a man can carry a baby to term, the roles of men and women in creating a child are too different to equate sperm donation with surrogate motherhood. It should, therefore, be obvious that the statement "[m]en and women who use their reproductive organs to provide services for infertile couples are *similarly situated* but not treated alike"[69] is inaccurate.[70]

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63. Keane, *supra* note 57, at 153.

64. J. PRITCHARD, P. MACDONALD & N. GANT, WILLIAMS OBSTETRICS 246 (17th ed. 1985) (normal duration of a pregnancy).

65. Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373, 380 (1981); *See also* R. BOLOGNESE, R. SCHWARZ & J. SCHNEIDER, PERINATAL MEDICINE (2d ed. 1982) (dangers associated with pregnancy).

66. Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

67. Levy v. Louisiana, 391 U.S. 68, 71 (1968).

68. 405 U.S. 438, 446-47 (1972).

69. Comment, *supra* note 4, at 558 (emphasis added).

in favor of payment to surrogates is that since the contract is entered into prior to conception there is no coercion and therefore the baby-selling statutes are not violated. How many women will enter into surrogacy simply to feed their children, repair a roof, or buy a new car? Not all women who relinquish parental rights are poor or unmarried.[82] There are numerous reasons for a woman choosing to place a child up for adoption. Regardless of the reasons involved, the baby-selling statutes are still applicable to these cases and therefore should also be applicable to the surrogate situation.[83]

Another attempt to distinguish surrogacy from baby-selling is that the child is being turned over to its natural father.[84] Neither the courts nor the legislatures should accept this argument. Just because the child is going to its natural father does not guarantee that the child will have a "good home."[85] Desire or biological ability to be a parent does not equate with parenting skills. Any child that is subject to the termination of parental rights deserves the protection of the state, and a full investigation into where the child is placed should be mandatory.

It is also important that the state protect the vulnerable woman from misuse by commercial surrogate parenting

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to legislate against child selling failed on the federal level but since then, all states have enacted statutes making the selling of a child a crime. *Id.*

Most states permit the adopting couple to pay medical costs while others allow "maintenance expenses during the latter part of the pregnancy." Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 328 (1978). The statutes are designed to prevent the sale of children and the coercion of a natural mother to place a child for adoption. *See* Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, 70 A.B.A. J. 50 (Aug. 1984).

82. Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. LAW & MED. 243, 250 (1984-85).

83. The surrogate situation is not free from all elements of coercion and therefore should fall under the baby-selling statutes. *Id.* at 250-51.

84. There may be a question as to who *is* the natural father. L. SPEROFF, R. GLASS, & N. KASE, CLINICAL GYNECOLOGIC ENDOCRINOLOGY & INFERTILITY 518 (3d ed. 1983). "A number of studies of selected [AID] newborn populations have indicated that over 10% of the infants could not be the offspring of the putative fathers on the basis of blood typing." *Id.*

85. "Studies show child abuse and neglect to transcend all socio-economic groups." CHILD ABUSE, INTERVENTION & TREATMENT xiii (N. Ebelery & D. Hill eds. 1975). Another study has shown that when adoption is used in an attempt to solve other marital problems, a higher rate of child abuse/neglect may actually result. THE BATTERED CHILD 70 (C. Kempe & R. Helfer 3d ed. 1980).

organizations. Indeed, reports of many of the women who have become surrogate mothers show them to be alcoholics, drug addicts, former abused children, and social outcasts.[86] One surrogate, Elizabeth Kane (a pseudonym) has now come forward to express her deep regret at ever having given up her child.[87] Ms. Kane now sees the surrogate process as only "transferring the pain from one woman to another, from a woman who is in pain from her infertility to a woman who has to give up her baby."[88] Additionally, these organizations often state that their purpose is to provide a "valuable medical service."[89] But it must be noted that the service is for the paying parties (the biological husband and his wife) and not for the potential surrogate mother, to whom they must then give a fee.[90] If nothing else, this at least should alert the state to a possible conflict of interest.

IV. THE COURTS

Two crucial questions are currently facing both the courts and the state legislatures. The first question concerns the surrogate contract. Is the contract void, and if not, is it enforceable or voidable? If voidable, at what point is it enforceable? The second question is usually dependent upon the first being resolved in favor of the existence of the contract. If the contract is valid, then one asks: May the surrogate mother be compensated for more than just routine medical expenses?[91]

A. Foreign

Victoria, Australia, by legislation, prohibits the use of commercial surrogate parenting.[92] Great Britain, on the other hand, like the United States, has no legislation concerning the

86. N. KEANE & D. BREO, *supra* note 4, at 60-63, 106-07.

87. The Baby "M" case in New Jersey prompted Ms. Kane to come forward and recant her earlier statements of how wonderful it was to be a surrogate mother. Mitchard, *The Surrogate Question*, Milw. J., Jan. 25, 1987, § G (Life/Style) at 1, col. 3.

88. *Who Keeps 'Baby M'*, *supra* note 50, at 46.

89. Recent Developments, *An Incomplete Picture: The Debate About Surrogate Motherhood*, 8 HARV. WOMEN'S L.J. 231, 237 (1985).

90. *Id.*

91. For an interesting discussion of the surrogate contract and whether the right to abort the fetus is an alienable right, see Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986).

92. Human Reproduction & L. Rep. (Legal-Medical Studies) 14 (Jan.- Feb. 1986).

surrogate process. England first addressed the problem of surrogacy in 1978.[93] The case involved a man (a professional) who paid a woman three thousand pounds to have a child for him through artificial insemination. After the baby was born the child was to be turned over to the man to be raised by him and his fiancee. The mother refused to give up the child and the father sued. The British Family Court held that the mother would receive custody and the natural father would have visitation rights.[94] A note to the case states that the mother appealed the visitation rights and a three judge panel terminated visitation for the natural father.[95]

B. Domestic

As of this writing, no legislation regulating surrogate motherhood exists in the United States. Attempts have been made to apply the termination of parental rights, paternity, and adoption statutes to the surrogate situation. However, this conflicts with many of the statutes governing artificial insemination by donor (AID).

Certain authorities hold that a contract to terminate the parental rights to a child is not one that can be entered into with informed consent.[96] A psychologist who works with mothers who give up children for adoption has said: "We cannot permit surrogate mothers to be used as machines to produce babies and then toss them out afterwards. . . . These women are incapable of understanding the impact that surrendering a child will have upon them until they have a living,

93. *A. v. C.*, 8 Fam. 170 (1978).

94. *Id.*

95. *Id.* at 171.

96. Hanley, *Expert Questions the Consent Granted by Mother of Baby M*, N.Y. Times, Mar. 7, 1987, at 29, col. 1. According to psychiatrist Dr. John J. Vetter "[a] woman cannot possibly know how she is going to feel until the baby is born." *Id.* A woman cannot "fully understand or anticipate all the implications and ramifications of the agreement." *Id.* Psychologists Phyliss Silverman adds that "[t]hese women are incapable of understanding the impact that surrendering a child will have upon them until they have a living breathing baby." Hornblower, *Fight Over Baby M Shows That Money Counts*, Milw. J., Feb. 20, 1987, at 8A, col. 1.

breathing baby."[97] In addition, in many situations one lawyer represents all parties. Thus, ethical problems are apparent.[98]

According to Law Professor Nadine Taub,[99] gender and class are at the base of this problem of surrogacy, the wealthy couples who purchase the babies versus the women who are financially burdened enough to go through with the sale.[100] Attorneys for the State of Michigan in *Doe v. Kelley*[101] argue that if paying a fee to a surrogate is allowed the court becomes a price-setter, "perhaps allowing higher compensation for a bright, beautiful surrogate as opposed to a less attractive, less intelligent one."[102] There is a real danger that a premium will develop for one type over another.

The attorneys conclude their argument saying, "the integrity of the court system and the statutory adoption process demands that the court be absolutely prohibited from deciding which individual has a Saks Fifth Avenue price tag and which individual has a K-Mart price tag."[103] Attorney General Frank J. Kelley[104] challenges the reference to the surrogate mother, appropriately noting that the surrogate is the natural mother and the adoptive mother (wife of the biological father) is actually the "substitute (or surrogate) mother if she were permitted to adopt the child."[105]

In an attempt to circumvent the statutes which forbid the payment of money in exchange for a child, most contracts are written as contracts to "bear a child."[106] It is felt that this phraseology will be less offensive. In Kentucky, one judge states that the language used in a surrogate mother contract avoids the use of the term adoption[107] and "[t]he purpose of

97. Hornblower, *supra* note 96, at 8A.

98. *Id.* An ethical issue is raised when one attorney represents both sides in this situation. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.7 - 1.9 (1983); *see also* Handel, *supra* note 8.

99. Hornblower, *supra* note 96, at 8A.

100. *Id.*

101. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

102. L. ANDREWS, *supra* note 62, at 230 (quoting from the Michigan State Attorneys' arguments).

103. *Id.*

104. *Id.* at 230.

105. *Id.* at 231.

106. Note, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 613 (1978).

107. Surrogate Parenting Assoc., Inc. v. Armstrong, 704 S.W.2d 209, 215 (Ky. 1986) (Wintersheimer, J., dissenting).

the language of the contract is merely to avoid KRS 199.590(2). It is merely a subterfuge."[108]

In *Doe v. Kelley*,[109] the issue is whether the Michigan statutes can prohibit the payment of a fee to the surrogate mother. The Michigan Court of Appeals responds by saying:

> The statute in question does not directly prohibit John Doe and Mary Roe from having the child as planned [by means of a surrogate mother]. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiffs' contractual agreement discloses a desire to use the adoption code to change the legal status of the child. . . . We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.[110]

Several jurisdictions also hold that the paternity statutes or termination of parental rights statutes of their respective states cannot be used to validate a surrogate arrangement. In *Syrkowski v. Appleyard*,[111] the circuit court states that:

> This Court, today, decides that the Paternity Act was not intended, and cannot be used, as a mechanism to establish the paternal rights of a semen donor in a "surrogate parent arrangement." Neither the laws nor public policy of the State of Michigan permit the direct or indirect judicial recognition and enforcement of "surrogate mother" contracts. The social wisdom and legal recognition of such agreements are matters of legislative concern and not for judicial pre-emption.[112]

In March of 1983, the circuit court for Jefferson County, Kentucky, relying on the legal presumption that a child born to a married woman was the child of her spouse, refused to accept a mere affidavit of AID and added that "[t]he Termination Act is not a paternity act and it contains no provision

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108. *Id.* KY. REV. STAT. ANN. § 199.590(2) (Baldwin 1986) as amended in 1984 reads: "No person, agency, institution or intermediary may sell or purchase or procure for sale or purchase any child for the purpose of adoption or any other purpose, including termination of parental rights." *Id.*

109. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

110. *Id.* at __, 307 N.W.2d at 441.

111. [May-June] Human Reproduction & L. Rep. (Legal-Medical Studies) 15 (Cir. Ct. Michigan 1981). Syrkowski v. Appleyard was remanded 420 Mich. 367, 362 N.W.2d 211, 1985 (the trial court has jurisdiction to decide *biological* paternity).

112. *Id.*

under which a court may adjudge paternity of a child . . . ."[113] Maryland, also relying on the presumption that a child's father is his mother's mate required more than just testimony of an artificial insemination procedure.[114] Petitioner, asking to adopt her husband's child, requested that the court forego normal investigative procedures of a custody case. The natural mother's whereabouts were unknown and apparently the natural mother was married and living with her husband at the time of the child's birth. In this instance the surrogate arrangement had been arranged by Miracle Program[115] at a total cost of $25,000 — $10,000 of which was paid to the surrogate mother. The court required further investigation.[116]

In Kentucky, the Attorney General brought suit against Surrogate Parenting Associates, Inc.,[117] (SPA) in an attempt to revoke its charter for baby-selling, claiming that three Kentucky statutes were being violated. These statutes deal with "sale, purchase or procurement for sale or purchase of any child for the purpose of adoption,"[118] prohibition against filing for termination of parental rights prior to five days after birth of a child,[119] and that consent for adoption given prior to five days after birth is invalid.[120] In *Surrogate Parenting Associates, Inc. v. Armstrong*,[121] the majority mistakenly fails to find that the legislature has ruled against surrogacy.[122] They say the contract is not illegal but voidable and refuse to call the process baby-selling.[123] Only the dissenting opinions are

113. *In re Baby Girl*, 9 Fam. L. Rep. (BNA) 2348 (Jefferson Co., Ky. Cir. Ct. Apr. 5, 1983).

114. *In re R.K.S.* [July - Aug.] Human Reproduction & L. Rep. (Legal-Medical Studies) 200 (Super. Ct. D.C. 1984).

115. Miracle Program is one of the centers that arranges for surrogate procedures. *See supra* note 9.

116. *In re R.K.S.*, [July-Aug.] Human Reproduction & L. Rep. 200. If the reader found it hard to distinguish the parties in this case, imagine the confusion for any children involved in the process.

117. Surrogate Parenting Assoc., Inc. v. Armstrong, 704 S.W.2d 209 (Ky. 1986).

118. KY. REV. STAT. ANN. § 199.590(2) (Baldwin 1986).

119. KY. REV. STAT. ANN. § 199.601(2) (Baldwin 1986) states: "No petition [for voluntary termination of parental rights] may be filed [by a parent] under this chapter prior to five (5) days after the birth of the child." *Id.*

120. KY. REV. STAT. ANN. § 199.500(5) (Baldwin 1986).

121. 704 S.W.2d 209 (Ky. 1986).

122. *Id.* at 212.

123. *Id.* at 213-14.

credible,[124] especially in light of the fact that in 1984 the Kentucky legislature amended KRS section 199.590(2) to prohibit the "purchase of any child for the purpose of adoption or any other purpose, *including termination of parental rights.*"[125] The majority attempts to show that since the baby is going to a natural parent this statute does not hold:[126] "[T]here are fundamental differences between the surrogate parenting procedure . . . and the buying and selling of children as prohibited by [the statute] which place this surrogate parenting procedure beyond the purview of present legislation."[127] The court claims that what is different is the time of entrance into the agreement. The fact that the woman is not trying to avoid conception, but entering into the agreement prior to the pregnancy, is paramount to the court.[128] Here the court falls prey to the false analogy of sperm donation being the counterpart of surrogacy.[129]

Both of the dissenting opinions are more attuned to the actual situation. Justice Vance, in his dissent, states:

> [T]he fact remains that [SPA's] primary purpose is to locate women who will readily, for a price, allow themselves to be used as human incubators and who are willing to sell, for a price, all of their parental rights in a child thus born . . . .
>
> It is stipulated that Surrogate Parenting Associates is an intermediary which offers to assist infertile couples in obtaining a child. . . . I view the subsequent delivery of the child together with an agreed judgment terminating the parental rights of the natural mother in exchange for a monetary consideration to be no less than the sale of a child.[130]

Justice Wintersheimer, in an even stronger argument, dissents and says:

> [T]he people of the Commonwealth of Kentucky have not abdicated their sovereignty to a self-appointed group of scientists-kings. The tolerance of the many can easily lead to the tyranny of a few. The attractiveness of assistance to

124. The dissenting Justices are Justice Vance and Justice Wintersheimer. *Id.* at 214.

125. *Id.* at 211 n.2 (emphasis added).

126. *Id.* at 211.

127. *Id.*

128. *Id.* at 211-12.

129. *See supra* notes 50-69 and accompanying text.

130. *Armstrong*, 704 S.W.2d at 214 (Vance, J., dissenting).

> childless couples should not be a cosmetic facade for unnecessary tampering with human procreation.
>
> Animals are reproduced; human beings are procreated . . . .
>
> [T]he consequences which could arise from the opening of the human uterus to commercial medical technology does not contribute to the emancipation of women . . . . [T]he safeguarding of marriage and the family is essential to the continuation of human society as we know it. The possibility of exploitation of women as surrogate mothers is totally undesirable . . . .
>
> Our consideration of public policy in this regard should include the possible exploitation of financially-needy women . . . . The price at which a woman will sell her reproductive capacity may depend on her financial status.[131]

The New York Surrogate Court in *Matter of Adoption of Baby Girl L.J.*,[132] analyzed both *Doe v. Kelley*[133] and *Surrogate Parenting Associates, Inc. v. Armstrong*.[134] They rejected the Michigan court's analysis preferring to adopt the majority position in *Armstrong*. The New York court states:

> However, this court, in spite of its strong reservations about these arrangements both on moral and ethical grounds, is inclined to follow the majority opinion by finding that biomedical science has advanced man into a new era of genetics which was not contemplated by either the Kentucky legislature nor by the New York legislature . . . .[135]

However the court does expand upon the Kentucky decision, and reserves for itself the right to refuse to place the child with the natural father.[136]

It must be noted that in the above cases the courts do not deal with the problem of a mother breaching her contract and refusing to surrender the child. That question is currently before the New Jersey court.[137]

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131. *Id.* at 214-16 (Wintersheimer, J., dissenting).

132. 132 Misc. 2d 972, 505 N.Y.S.2d 813 (N.Y. Sup. Ct. 1986).

133. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

134. 704 S.W.2d 209 (Ky. 1986).

135. *In re Baby Girl*, 132 Misc. 2d at __, 505 N.Y.S.2d at 817-18.

136. *Id.* at __, 505 N.Y.S.2d at 817.

137. While this Comment is being written the media abounds with daily reports of the first United States case in which a surrogate mother has decided she wants her baby back and the natural father has gone to court to sue for enforcement of the contract.

In all of the above cases, only the dissent in *Armstrong*[138] addresses what has the potential to become an important "woman's" issue. Will the courts' recognition of the validity of the surrogate contract create a class of "breeders?" Will all the advances for which women have worked now be lost due to a subset of women who spend their most productive years as breeders in the same way one might breed a race horse?

> Such questions will arise [to] the legal status of breeding as a profession, or the appropriate pecuniary value of boy babies over girls or light-skinned children over dark-skinned ones. Finally, the courts and legislatures will have to deal with the ultimate question of what dollar value can or cannot be placed on a human life.[139]

Perhaps the most important issue concerning the contract has not yet been addressed. A baby is not a saleable commodity. One cannot contract to sell another human being as this was outlawed by the thirteenth amendment.[140] "Whether payment was made before the woman is inseminated or after

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Mary Beth Whitehead agreed to be a surrogate for William and Elizabeth Stern. After the birth of a daughter (called Sarah by Mrs. Whitehead and Melissa by the Sterns), Mrs. Whitehead found that she could not part with the child. The Sterns have filed suit. In a bifurcated trial, the first phase dealt with the validity of the contract. Questions arose as to whether a surrogate is capable of giving informed consent (*see supra* note 97 and accompanying text), and whether the Sterns fraudulently represented themselves as an infertile couple. Dr. Elizabeth Stern claims to have a mild case of multiple sclerosis, which made her fear pregnancy. Peterson, *Doctors Split on Pregnancy's Risks to Women with Multiple Sclerosis*, N.Y. Times, Jan. 10, 1987, at 11, col. 4. The majority of neurologists hold that pregnancy is not barred by mild cases of multiple sclerosis. '*MS No Bar to Pregnancy*' MED. WORLD NEWS, Feb. 12, 1987, at 11, col. 1. The second phase of the trial is the custody hearing. *See, e.g.*, Hanley, *Baby M's Mother Seen as Caught in Dilemma*, N.Y. Times, Feb. 26, 1987, at 16, col. 1; *Who Keeps 'Baby M'?*, *supra* note 51. On March 31, 1987, Judge Harvey Sorkon of the Bergen County Family Court terminated Marybeth Whitehead's parental rights to Sarah. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (Super. Ct. 1987). Mrs. Whitehead is currently appealing the decision to the New Jersey Supreme Court.

138. *Armstrong*, 704 S.W.2d at 214-16 (Wintersheimer, J., dissenting).

139. R. DAVIES, WOMEN & THE LAW § 8.02[3] (Lefcourt ed. 1986).

140. "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. *See* Holder, *Surrogate Motherhood: Babies for Fun & Profit*, LAW, MED. & HEALTH CARE, *reprinted in* 90 CASE & COMMENT 3 (Mar.-Apr. 1985). "Children cannot be bought and sold. None of these surrogate mother decisions . . . have mentioned the thirteenth amendment . . . but its prohibition of slavery, sale of one person by another, seems relevant." *Id.* at 9. *See also This Week with David Brinkley*, (ABC television broadcast, Jan. 11, 1987) (transcript no. 272 at 12-14).

the baby is born seems irrelevant; the intention of the arrangement is to fulfill a contract for the payment of money in exchange for a human being."[141]

The sale of a person is against public policy.[142] Furthermore, courts have held that "an agreement by a parent to relinquish custody of his child is against public policy."[143] This is also supported by the *Restatement (Second) of Contracts* which states that promises regarding the custody of a child are unenforceable.[144] Even if there is no money involved the court is not bound to honor the placement wishes of the natural parent. In *Barwin v. Reidy*,[145] the court states that: "[A]lthough the natural parents may specify the person they wish to adopt their child, the court is not bound to so decree."[146]

By trying to differentiate between baby-selling and contracts to bear a child, courts such as New York and Kentucky have argued that the difference is that the contract is sealed prior to conception and that the woman wanted to conceive. What they do not understand is that when one contracts to "bear a baby" one is making a contract to sell a child. The money exchanged is consideration and there is now a contract to sell a human being.[147] In an adoption situation where a couple agrees to pay medical expenses, the agreement to adopt

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141. Holder, *supra* note 140, at 9, *reprinted in* 90 CASE & COMMENT 3 (Mar.- Apr. 1985).

142. *This Week with David Brinkley*, *supra* note 140, at 12-14; *See also* Handel, *supra* note 8, at 784 (there are felony statutes that prohibit payment in exchange for custody of another human being).

143. Fox v. Lasley, 212 Or. 80, __, 318 P.2d 933, 940 (1957) (en banc). *See also* Downs v. Wortman, 228 Ga. 315, __, 185 S.E.2d 387, 388 (1971) (contract giving custody of a child to another in exchange for value is void).

144. "A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 191 (1979); RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979) (when a term is unenforceable on grounds of public policy); RESTATEMENT (SECOND) OF CONTRACTS § 179(b)(ii) (1979) (basis of public policies against enforcement of a contract which causes impairment of family relations).

145. 62 N.M. 183, 307 P.2d 175 (1957).

146. *Id.* at __, 307 P.2d at 180.

147. *See* Surrogate Parenting Assoc., Inc. v. Armstrong, 704 S.W.2d 209, 214 (Ky. 1986) (Vance, J., dissenting).

> [A] portion of the payment is withheld and is not paid until [the surrogate's] living child is delivered unto the purchaser, along with the equivalent of a bill of sale, or quit-claim deed, to wit - the judgment terminating her parental rights. . . . I view the . . . exchange . . . to be no less than the sale of a child.

Id.

is entered into after the pregnancy has already begun. Now any money given is paid to insure the health of the baby and not for services rendered.[148] The argument that the surrogate contract also is for services rendered fails because final payment is not made until the mother terminates her parental rights and hands over the baby. Again it is the transaction of giving the child which makes this baby-selling. The child equals the goods received.

V. WISCONSIN

Adoption was unknown at common law.[149] Today adoption is created and regulated by statutes in all fifty states.[150] Most states allow for the payment of the expectant mother's medical expenses.[151] Some states will also allow the payment of reasonable expenses for rent, food, and clothing.[152] Twenty-four states prohibit payment in connection with adoption.[153] Wisconsin is among the states that disallow payment for other than medical expenses.[154]

Twenty-four states have statutes that dictate that if a married woman is artificially inseminated with her husband's consent, then the child is the legal offspring of her husband.[155] In

148. To ensure that there is no question as to the purpose of the money, it can be paid directly to the hospital and/or physician.

149. *See* Holder, *supra* note 140, at 3, *reprinted in* 90 CASE & COMMENT 3 (Mar.-Apr. 1985).

150. *Id.*

151. *Id.*

152. *Id.* at 3-4.

153. Andrews, *The Stork Market*, *supra* note 81, at 54-55.

154. WIS. STAT. § 946.716(1)(a) (1985-86). This statute makes it a class E felony ($10,000 fine and/or two years imprisonment) for anyone who "[p]laces or agrees to place his or her child for adoption for anything exceeding the actual cost of the hospital and medical expenses of the mother and the child incurred in connection with the child's birth, and of the legal and other services rendered in connection with the adoption." *Id.*

155. ALASKA STAT. § 25.20.045 (Supp. 1983); ARK. STAT. ANN. § 61-141(c) (1982); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1986); CONN. GEN. STAT. §§ 45-69f, 45-69n (1981); FLA. STAT. ANN. § 742.11 (West 1986); GA. CODE ANN. § 19-7-21 (1982); KAN. STAT. ANN. §§ 23-128, 23-129 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1987); MD. EST. & TRUST CODE ANN. § 1-206(b) (1974); MICH. COMP. LAWS ANN. §§ 333.2824(6), 700.111 (West Supp. 1987); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1985); NEV. REV. STAT. ANN. § 126.061 (Michie 1986); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10 §§ 551-553 (West 1987); OR. REV. STAT. ANN. § 109.239, .243, .247 (1984); TENN. CODE ANN. § 68-3-

Wisconsin the legislature has gone a step further and under Wisconsin Statute section 891.40 (2), the donor of sperm to a woman other than his wife is not the father of any subsequent pregnancy.[156] Section 767.47(a) also takes the position that "[w]here a child is conceived by artificial insemination, the husband of the mother of the child at the time of conception . . . is the natural father of the child, as provided in [section] 891.40."[157] Wisconsin Statute section 767.47(2m) prohibits the information regarding the artificial insemination from being used in a paternity action.[158]

Thus, it is evident that the sperm donor has no legal right to the child. A surrogate mother, in Wisconsin, could terminate her parental rights as agreed, but the court would be under no obligation to place the child with the sperm donor. The sperm donor would also be excluded from adopting the child under Wisconsin Statute section 48.835,[159] which allows a parent to place a child with a *relative* without going through the court.[160] However, the parties could arrange for a private adoption, which prohibits the payment of a fee, insures a proper investigation by the court of the adopting couple, and protects the innocent third party — i.e. the child.

Wisconsin should not change its present legislation concerning artificial insemination. As the statutes now stand, the state is protected from the rise of commercialism in surrogacy as has been evidenced in other states.[161]

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306 (Supp. 1983); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); VA. CODE ANN. § 64.1-7.1 (1984); WASH. REV. CODE ANN. § 26.26.050 (1986); WYO. STAT. § 14-2-103 (1977).

156. WIS. STAT. § 891.40(2) (1985-86). "The donor of semen . . . for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and *has no parental rights with regard to the child.*" *Id.* (emphasis added).

157. WIS. STAT. § 767.47(9) (1985-86).

158. WIS. STAT. § 767.47(2m) (1985-86) (medical and genetic information of the insemination is not admissible to prove paternity).

159. WIS. STAT. § 48.835(2) (1985-86) (allows a parent to place a child for adoption in the home of a relative without a court order).

160. Under WIS. STAT. § 891.40(2) (1985-86) the sperm donor is not the natural father and therefore, by law, is not a relative of the baby.

161. *See supra* note 9 and accompanying text.

VI. CONCLUSION

Legislatures are being asked to consider bills that would allow surrogacy and the payment of a fee. The form of legislation most often proposed allows that the surrogate will provide a baby for a married couple in which the wife is infertile. Such legislation may be in violation of the fourteenth amendment. This service cannot be limited to married infertile couples. In Wisconsin, by statute, anyone (single or married) may adopt.[162] There is no marital requirement in the artificial insemination statutes.[163] Noel Keane[164] has already worked with single men, one of whom never wanted to see the baby, but insisted that a gamete splitting process be employed because he wanted to have a male offspring.[165] He merely sends support money to the child. In another instance he arranged a surrogate procedure for a couple in which the wife was a transsexual.[166] He has also arranged a surrogate situation for a single female professional who couldn't allow a pregnancy to get in the way of tenure.[167] If the legislature is to give official sanction to the use of surrogate mothers they will be opening a Pandora's box of legal, ethical, and moral entanglements.

Several commentators cite the Bible as documenting the practice of surrogacy (not via AID) in an attempt to legitimize their position.[168] They quote Genesis and the story of Ishmael.[169] However this is not a case of surrogacy. Hagar was a legal concubine of Abram, as was the custom of the people at that time.[170] Never was Hagar asked to relinquish her paren-

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162. WIS. STAT. § 48.82(1)(b) (1985-86) (an unmarried adult may adopt).

163. *But see* Smith & Iraola, *supra* note 21.

164. Mr. Keane is one of the first advocates of surrogate motherhood and today his practice is devoted totally to surrogate arrangements. Pierce, *supra* note 81, at 3002.

165. N. KEANE & D. BREO, *supra* note 4, at 241.

166. *Id.* at 150. The baby was kept by the natural mother because the father was upset by the publicity surrounding the case. The father settled for his name on the birth certificate, but was denied visitation rights. L. ANDREWS, *supra* note 62 at 212-13.

167. *Id.* at 212.

168. *See, e.g.*, Note, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467 (1982); Note, *In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience*, 69 KY. L.J. 877, 880 (1980-81); Brochure, *supra* note 4.

169. *Genesis* 16:1 - 25:12 (According to the Masoretic text).

170. Abram and Sarah were from Babylon, where it was the legalized custom for the husband of a barren wife to take a concubine in order to have offspring. THE PENTATEUCH & HAFTORAHS 56 n.2 (J. Hertz 2d ed. 1961).

tal role. If this story is to be used for any purpose, then it must also be noted that Sarah was jealous of Hagar,[171] finally causing Hagar and her son to be expelled from the camp.[172] After leaving his father's camp, Ishmael matures and becomes the father of a nation[173] that has been at war with his father's people from that day until the present.[174] This story does not speak well of surrogate parenting.

When the desire to be a parent combines with the husband's insistance that parenthood only be achieved by having a biologically related offspring, we are perpetuating the myth that family is defined in terms of the man's genes. In a male- dominated society, the result may be that "[a] voice of law which is a predominantly male voice, articulating predominantly male concerns and values will produce a male model of the moral economy of women. Maternity and motherhood will be made and re-made male."[175]

The argument that there are not enough babies available should not cause the statutes to be changed. To allow surrogacy and especially surrogacy for a fee fosters the idea that anything can be purchased if one has money. We are degrading life when children are merely chattel, sold to the highest bidder.

NANCY W. MACHINTON*

171. *Genesis*, *supra* note 169, at 21:10-14.

172. *Id.*

173. *Id.* at 25:12-18.

174. THE PENTATEUCH & HAFTORAHS, *supra* note 170, at 56 n.6.

175. Morgan, *Making Motherhood Male: Surrogacy & the Moral Economy of Women*, 12 J. LAW & SOC'Y 219, 232 (1985).

* The author wishes to thank Stephen Machinton, M.D., for his guidance on the medical aspects of this comment.