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PROHIBITING PAYMENTS TO SURROGATE MOTHERS: LOVE'S LABOR LOST AND THE CONSTITUTIONAL RIGHT OF PRIVACY

INTRODUCTION

Recent scientific advances have removed some of the legal obstacles that have traditionally precluded surrogate motherhood as a means of procreation for most American families.[1] These developments have provided new hope of family life to the growing number of married couples who are unable to have children on their own,[2] and who are unwilling to suffer the long wait and uncertainties of adoption.[3] A major obstacle to surrogate motherhood, however, remains. Universally-enacted laws prohibiting baby selling arguably make it illegal to pay a surrogate mother for her services.[4] This comment argues that such laws, when applied in the context of surrogate motherhood, unconstitutionally infringe the right of privacy of any couple seeking to have a child with a surrogate mother. In part one, this comment analyzes the legal, scientific and social developments that have given rise to the recent increased demand for surrogate motherhood services. In part two, this comment discusses the constitutionality of payment prohibitions to surrogate mothers, and reaches the following conclusions. First, the right of privacy protects a married couple's decision to have children through surrogate motherhood.[5] Second, laws prohibiting payments to surrogate mothers infringe this right.[6] Third, the only state interests that are sufficiently compelling to justify this infringement are the protection of the parties to the relationship and to any child born from it.[7]

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1. For a discussion of some of these new technological developments, see *infra* text accompanying notes 41 to 61.

2. Included among these couples are those who are physically unable to have children, as well as those who, while physically able, encounter lifestyle obstacles to pregnancy. *See infra* text accompanying notes 36 to 37.

3. For a brief discussion of the obstacles facing couples who seek to adopt, see *infra* text accompanying notes 38 to 40.

4. For a brief discussion of the baby-selling argument, see *infra* text accompanying notes 63 to 65.

5. For a discussion of the proposition that a married couple's decision to have children through surrogate motherhood is protected from governmental interference by the constitutional right of privacy, see *infra* text accompanying notes 86 to 121.

6. For a discussion that laws prohibiting such payments effectively infringe the couple's right to decide to engage in surrogate motherhood, see *infra* text accompanying notes 121 to 134.

7. For a discussion of the possible state interests that would justify infringing the couple's right to engage in surrogate motherhood, see *infra* text accompanying

Fourth, the state can employ means of achieving these interests that are less restrictive of the married couple's right of privacy than a complete prohibition on payments.[8] Payment prohibitions are, therefore, unconstitutional as applied to surrogate mothers.

I. Surrogate Motherhood: Recent Scientific Legal and Social Developments

A. *A Laborious Task*

For surrogate motherhood to be successful, three conditions are necessary. First, the parties to the surrogate motherhood process must be able to arrange for the conception and birth of a child.[9] Second, before actually doing so, the parties must reach an agreement defining what their respective rights and duties will be both before and after the child is born.[10] Third, the parties must have some means by which to enforce these rights and duties so as to ensure performance.[11]

To begin this process, a married couple identifies and contacts a woman who is willing to act as a surrogate mother for their child. This may be as simple as convincing a family member, such as a wife's sister, to undertake the responsibility.[12] Increasingly, however, it is more common for a couple to hire a lawyer or private agency that specializes in locating and screening women willing to serve as surrogates.[13]

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notes 135 to 185.

8. For a discussion of whether the state is obliged to utilize a less restrictive means of achieving its interests and whether such means are available, see *infra* text accompanying notes 186 to 209.

9. Traditionally, this was achieved by the contracting husband engaging in intercourse with the surrogate, who would carry the child to term. *See, e.g.*, Genesis 16:1-15. Modern surrogate motherhood, however, is achieved without intercourse through either artificial insemination or *in vitro* fertilization. For an explanation of these scientific processes, see *infra* text accompanying notes 44-61.

10. These include what the surrogate's duties are regarding insemination, abortion, health care, and transferral of parental rights, and what the contracting couples' duties are regarding providing for the surrogate during the term of her pregnancy. For a sample of a surrogate motherhood contract setting forth such rights and duties, see Brophy, *A Surrogate Mother Contract To Bear A Child*, 20 J. Fam. L. 263 (1981-82); Comment, *Contract to Bear A Child*, 66 Calif. L. Rev. 611 (1978).

11. Under current law, these contracts are arguably unenforceable because they seek to do something that is illegal, *i.e.*, pay a surrogate money for her services. For a discussion that argues that such laws are unconstitutional as applied to surrogate motherhood, see *infra* text at notes 68 to 209.

12. For examples of women who have performed gratuitiously as surrogate mothers for close relatives and friends, see O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C.L. Rev. 127, 131 n.30 (1966).

13. One of the leading lawyers in the field is Noel Keane of Dearborn, Michigan, who has arranged 140 surrogate births since 1976. *Who Keeps "Baby M"?*, Newsweek, January 19, 1987, at 45 [hereinafter *Who Keeps "Baby M"*]. Keane typically charges $10,000 for arranging the surrogate motherhood relationship. *Id.* at 47. The

The parties next negotiate the terms of their relationship. It may be an informal verbal agreement in which the surrogate agrees to serve gratuitously.[14] More often, however, a lawyer drafts a written contract in which the couple agrees to pay for the surrogate's medical expenses during pregnancy.[15] Usually, though not always, the couple will also agree to pay the surrogate a fee for carrying the child.[16] For her part, the surrogate generally agrees to be inseminated, to not abort the child, to seek and accept adequate medical care, and, most importantly, to terminate her parental rights upon the birth of the child.[17]

If the parties are successful in conceiving a child and carrying it to term, the contracting husband will, upon birth, acknowledge his legal paternity of the child.[18] The surrogate then relinquishes all of her parental rights in the child, after which the couple pays her.[19] The contracting husband, as legal father, obtains custody of the

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contracting couple can expect to spend another $10,000 in hospital and other expenses, including a fee to the surrogate. *Id. See also* N. KEANE AND D. BREO, THE SURROGATE MOTHER 269 (1981) (providing a more detailed explanation of the process). For a partial list of the agencies providing surrogate mother services, see *Who Keeps "Baby M"?*, at 48; O'Brien, *supra* note 12, at n.38.

14. *See supra* note 12. Where the surrogate agrees to perform gratuitously, the contracting couple can expect to cut its total expenses to as low as $5,000. N. KEANE & D. BREO, *supra* note 13, at 269.

15. *See, e.g.*, Brophy, *supra* note 10, at 263.

16. *Id.* The surrogate can usually expect to receive approximately $10,000 for her services. The couple often puts the money into an escrow account until they obtain custody of the child. *Who Keeps Baby "M"? supra* note 13, at 47.

17. For a discussion of the enforceability of these obligations, see Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 83-94 (1982) (arguing that judicial reluctance to enforce personal service contracts and unwillingness to infringe the woman's right of privacy would preclude specific performance of these provisions).

18. In Illinois, for example, the contracting husband may bring an action to determine that he is the parent of the child. ILL. REV. STAT. ch. 40, ¶ 2507 (1985). This parent-child relationship may be established by the consent of the surrogate mother, her spouse if she is married, and the contracting husband. *Id.* ¶ 2506. For a discussion of how statutes recently enacted to enable couples to engage in artificial insemination may adversely affect this process, see *infra* text accompanying notes 52 to 54.

19. The mother relinquishes her rights to the child and surrenders custody and control of it to the state. For an example of the types of forms she must fill out and the conditions to which she must agree, see ILL. REV. STAT. ch. 40, ¶ 1512 (1985). The woman's surrender becomes irrevocable, but many states allow a waiting period immediately after birth to enable the mother to change her mind. In Illinois, for example, a woman cannot consent to relinquish her rights to her child until seventy-two hours after birth. *Id.* ¶ 1511. This creates a legal obstacle to enforcing the promise the surrogate makes some nine months earlier to relinquish her rights over the child at birth. A more important obstacle, however, are laws that prohibit the receipt of compensation for the "placing out" of children for adoption. *See, e.g., id.* ¶ 1701-05. These laws arguably make it illegal for surrogate mothers to receive payment for their services. For an argument that payments are allowed between close family members, see *infra* text accompanying notes 205 to 209. For an argument that the laws are inapplicable to surrogate motherhood, see *infra* note 120.

child,[20] and the wife, as stepmother, may initiate an adoption action to be declared the child's legal mother.[21]

B. *Traditional Legal Impediments to Surrogate Motherhood*

Married couples have used various versions of the surrogate motherhood process outlined above throughout history to bear children they otherwise could not have. The Bible documents how the eighty-seven year-old Abraham and his seventy-seven year-old wife Sarah engaged in a surrogate mother relationship with Sarah's maid, Hagar, to produce a son, Ishmael.[22] Other commentators have documented the use of the practice throughout the Roman period and the Middle Ages.[23]

Legal impediments, however, have traditionally precluded surrogate motherhood as an option for most American families. Longstanding proscriptions against fornication[24] and adultery[25] made it illegal for a couple to conceive a child with a surrogate mother. Furthermore, anti-baby-selling statutes criminalizing payments to a biological parent in connection with the adoption of a child prevented the commercialization of the surrogacy agreement.[26] As a result of these laws, any surrogate motherhood agreement was itself unenforceable under the well-accepted doctrine that any contract requir-

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20. Technically, the contracting husband must petition the state for custody of the child. *See, e.g.*, ILL. REV. STAT. ch. 40 ¶¶ 2101-26 (1985). The court however, usually approves uncontested custody actions between parties. For example, one commentator has observed that the average amount of time Connecticut courts spend on uncontested custody hearings is only four minutes. Developments, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 1094, 1127 (1976).

21. Where the contracting wife is not related to the child, as is the case in surrogate children born through artificial insemination, she has no parental rights as the wife of the contracting husband and must establish these rights through the adoption procedure. *See, e.g.*, ILL. REV. STAT. ch. 40, ¶ 2504 (1985).

22. GENESIS 16:1-15. One modern-day surrogate has argued that surrogate motherhood was practiced in the New Testament of the Bible as well, noting that Mary, the mother of Jesus, was a surrogate for God. *Who Keeps Baby "M"?*, *supra* note 13, at 46. For an account of Mary's pregnancy, see LUKE 1:25-80, 2:1-16. For a view that the Old Testament instructs that dormant in every surrogate motherhood arrangement is an explosive and tragic drama, see O'Brien, *supra* note 12, at 134.

23. O'Brien, *supra* note 12, at 134.

24. For example, ILL. REV. STAT. ch. 38, ¶ 11-8a (1985), provides that "any person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." *Id.*

25. For example, ILL. REV. STAT. CH. 38, ¶ 22-7 (1985) provides:

> (A) Any person who cohabits or has sexual intercourse with another not his spouse commits adultery, if the behavior is open and notorious and (1) the person is married and the other person involved in such intercourse is not his spouse; or (2) the person is not married and knows that the other person involved in such intercourse is married.

Id.

26. *See, e.g.*, ILL. REV. STAT. ch. 40, ¶ 1701-05 (1985).

ing the doing of an act that is illegal or otherwise opposed to public policy is void.[27]

C. *The Rebirth of Surrogate Motherhood*

Despite legal impediments, the use of surrogate motherhood is currently on the rise in the United States.[28] The factors that have contributed to this increase include: a rising demand among couples of childbearing age for alternative means of having a family;[29] a growing inability of adoption services to meet this growing demand;[30] and new technological developments enabling a couple to avoid some of the legal impediments that previously restricted surrogate motherhood.[31]

The rising demand for alternative means of procreation is due, in part, to the growing number of couples who are encountering physical barriers to having children through intercourse.[32] This is often due to the wife's age or physical condition.[33] In other cases, pregnancy poses an unusual health risk to the wife.[34] Still other couples fear transmitting genetically linked defects or disease to their children.[35]

Added to this list is the growing number of couples who are physically capable of having children. Although they wish to become parents they are unwilling to subject the wife to the physical constraints of a pregnancy.[36] Thus, the wife may have a career that the

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27. *See* 14 WILLISTON CONTRACTS §§ 1628-32 (b) (3d ed. 1972); 6A CORBIN, CONTRACTS §§ 1373-78, 1510-15 (1961 & Supp. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 178 (1986).

28. For example, Noel Keane reports that the number of surrogate births he has arranged have grown from five between 1976 and 1981 to 65 in 1986 alone. *A Chance to Clear the Foggy Issue of Surrogate Parents*, Chicago Tribune, January 18, 1987, § 4 (Perspective) at 1. In all, a total of approximately 500 children have been born in this country *via* surrogate motherhood. *Id.*

29. For a discussion of the factors that have given rise to this increased demand for alternative means of having a family among couples of childbearing age, see *infra* text accompanying notes 32 to 37.

30. For a brief exposition of the wide disparity between the supply of adoptable children and the demand therefore, see *infra* text accompanying notes 38 to 40.

31. For a discussion of these technological developments, see *infra* text accompanying notes 44 to 61.

32. Currently, between 15-20% of couples of childbearing age are incapable of having children. Handel and Sherwyn, *Surrogate Parenting*, TRIAL, April, 1982, at 57-58.

33. *Id.*

34. For example, a woman may be unable to carry the child to term because she suffers from diabetes. Note, *Surrogate Mothers: The Legal Issues*, 7 AM. J.S. & MED. 323, 324 (1981). Elizabeth Stern, the contracting mother in the highly publicized New Jersey case of Baby M, chose surrogate motherhood because she suffers from a mild form of multiple sclerosis and worried that pregnancy would aggravate the disease and leave her paralyzed. *Who Keeps Baby 'M'? supra* note 13, at 47.

35. P. REILLY, GENETICS LAW AND SOCIAL POLICY 190 (1977).

36. As one commentator succinctly explained, these include morning sickness, a

couple does not want to interrupt, or she may simply not want to endure the physical problems the pregnancy imposes.[37]

While the demand for alternative means of procreation is on the rise, the traditional means for fulfilling that demand—adoption placement—has not kept pace. For example, in 1984, more than two million couples contended for 56,000 babies placed in adoption.[38] Due to this disparity, most couples have to wait several years before adopting a child.[39] Many couples are unwilling to endure that wait; others want a biological link to their child.[40]

The impediments inherent in adoption have caused many couples to consider alternatives in order to fulfill their desire to have a family. Recent scientific advances in the fertilization of genetic materials have removed some of these traditional legal impediments to surrogate motherhood, making it become a more attractive alternative.[41] Specifically, a contracting couple may now conceive a child with a surrogate mother in either of two methods that arguably do not violate proscriptions against adultery or fornication: artificial insemination[42] or *in vitro* fertilization.[43]

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bulky torso, and the discomfort of childbirth. O'Brien, *supra* note 12, at 132.

37. The scope of this comment is limited to *married* couples who engage in surrogate motherhood. The surrogate motherhood process, however, opens up the opportunity of parenthood to those outside the marriage relationship. A single person thus may want a surrogate to have his child. *See, e.g.*, Wadlington, *Artificial Conception: The Challenge For Family Law* 69 VA. L. REV. 465, 493-94 (1983). So too, a homosexual couple may use surrogate motherhood to have a child. *See, e.g.*, Hanscombe, *The Right to Lesbian Parenthood*, 9 J. MED. ETHICS 133 (1983). The legal, ethical and moral issues these possibilities present are beyond the scope of this discussion.

38. Wilson, *Adoption: It's Not Impossible*, BUS. WK., July 8, 1985 at 112.

39. Comment, *Surrogate Motherhood in California: Legislative Proposals*, 18 SAN DIEGO L. REV. 341 (1981). Some commentators have wrongly attributed this shortage to increased use of contraceptives and abortions. *See, e.g.*, O'Brien, *supra* note 12; Coleman, *supra* note 7, at 72 n.5; Turano, *Black Market Adoptions* 22 CATH. LAW. 48 (1976). During the period in which contraceptives and abortions became more available, illegitimate births did not decrease but increased. Landes and Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 325 (1978). In light of this increase, the decreased availability of children for adoption is better explained by social factors, such as the diminished social and legal stigma accompanying illegitimacy; recognition of constitutional limits on legal discrimination predicated on illegitimate status; greater economic opportunity and child care services for single women; and changing male attitudes about child raising. *See* Wadlington, *supra* note 37, at 466-67.

40. *See* N. KEANE & D. BREO, *supra* note 13, at 15 (discussing the importance of the biological link).

41. For a discussion of how these advances enable modern surrogate motherhood to proceed without violating laws against adultery or fornication, see *infra* text accompanying notes 44 to 61.

42. For a discussion of artificial insemination, see *infra* text accompanying notes 44 to 55.

43. For a discussion of *in vitro* fertilization, see *infra* text accompanying notes 56 to 61.

D. *Removing the Legal Impediments: Artificial Insemination*

Artificial insemination involves the introduction of semen into the vagina of the surrogate through means other than intercourse.[44] Usually a doctor injects the semen into the surrogate through a syringe.[45] The process was originally developed to enable married couples, incapable of becoming pregnant because of male sterility, to have a child.[46] The doctor inseminates the wife with sperm that a fertile third party donor provides.[47] Several courts in the later 1950's and early 1960's held that this procedure, dubbed "AID" (artificial insemination donor), was adulterous[48] and that the children born from it were illegimate. [49] More recent decisions, however, have reversed that trend.[50] Modern courts have properly recognized adul-

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44. Guttmacher, *Artificial Insemination*, 18 DEPAUL L. REV. 566 (1969).

45. *Id.*

46. The husband may be capable of copulation but incapable of impregnating his wife due to azoopermia, which is an absence of sperm cells in his semen. W. FINEGOLD, ARTIFICIAL INSEMINATION 20 (1964); or he may be capable of impregnation, but fears transmitting a genetic defect. Guttmacher, *supra* note 44, at 570.

47. "Donor" is actually a euphemism, as 90% of the so-called donors are actually paid $20-$35 per ejaculation by a sperm bank which serves as a third party intermediary between the donor and the couple employing artificial insemination. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor* 14 FAM. L.Q. 1, 6 (1980).

AID should be distinguished from two other forms of artifical insemination, artificial insemination, homologous (AIH) and artificial insemination, confused (AIC). AIH employs the husband's semen to impregnate, and is used where normal copulation is impossible because of physical disorders such as penile deformity or vaginal scarring. AIC mixes the donor's sperm with that of the husband. Its main advantage is to alleviate the feelings of inadequacy that the husband may develop when only the donor's sperm is used. Dienes, *Artificial Donor Insemination: Perspectives on Legal and Social Change*, 54 IOWA L. REV. 253, 267-69 (1968).

48. Orford v. Orford 58 D.L.R. 251, 255 (Ont. 1921) (wife's submission to AID without husband's consent is adulterous); *See also* Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct. Cook County Ill. 1954), *appeal dismissed*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956) (wife's submission to AID with or without husband's consent is adultery).

49. Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Super. Ct. Cook County Ill. 1954), *appeal dismissed*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956) (child born with or without husband's consent via AID is illegitimate); *See also* Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963) (retains common law notion that a child begotten by a man who was not mother's husband was illegitimate).

50. For cases holding that the child born of AID is not illegitimate, see *In re* Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973) (child born of consensual AID during a valid marriage is a legitimate child and is entitled to the rights and privileges of a naturally conceived child of same marriage); *See also In re* Adoption of McFayden, 108 Ill.App. 3d 319, 438 N.E.2d 1362 (1982), *cert denied*, 460 U.S. 1015 (1983) (where wife is impregnated by AID, husband is entitled to presumption of paternity, which may be overcome by clear and convincing evidence); Happel v. Mecklenburger, 101 Ill.App. 3d 107, 427 N.E.2d 974, 979, n.1 (1981) (strongly criticizes early decisions).

For cases holding that the husband of a woman inseminated by AID has support obligations toward the child born from that process, see Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S. 2d 835 (Sup. Ct. 1962); Strand v. Strand, 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct. 1948).

tery to be a prohibition against illicit sexual intercourse, and have correctly found no such activity to be part of the artificial insemination process.[51] Applying the same reasoning, surrogate motherhood, which is AID with a third party, should not run afoul of adultery or fornication law.

In following the lead of the courts, many states have passed laws which, while promoting the use of AID, have also created new legal hurdles for surrogate motherhood.[52] These laws typically provide that a child born from AID is legitimate, that the mother who gives birth to the child and her husband are the child's natural parents, and, most importantly in the context of surrogate motherhood, that the sperm donor has no parental rights in the child.[53] These

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For a case holding that the husband has visitation rights in the case of a separation or divorce, see People v. Dennett, 15 Misc. 2d 260, 184 N.Y.S. 2d 178 (1958) (best interests of child and equity entitle former husband to visitation rights).

For authority holding that AID is not adultery, see Annotation, *Artifical Insemination*, 25 A.L.R. 3d 1103, 1107 54 (1969); Note, *The Legal Status of Artificial Insemination: A Need for Policy Formulation*, 19 DRAKE L. REV. 409, 418 (1970).

51. This is well expressed in Maclennan v. Maclennan, 1958 Sess. Cas. 105 (Scot. Outer House) (AID even without husband's consent is not adultery because it does not involve the physical conduct proscribed in adultery; adultery is concerned with means, AID is concerned with ends—impregnation). *Id.* at 114. *See also* CLARK, LAW OF DOMESTIC RELATION IN THE UNITED STATES 329 (1968) (AID not considered adultery because it does not involve physical contact, sexual gratification, or marital infidelity).

52. Legislatures in at least 26 states have addressed the legitimacy issue of AID children with statutes. *See* ALASKA STAT. § 25. 20.045 (1983); ARK. STAT. ANN. § 61-141 (1971); CAL. CIV. CODE § 7005 (West. 1983); COLO. REV. STAT. ANN. § 19-6-106 (1986); CONN. GEN. STAT.ANN. §§ 45-69f, 69n (West 1980); FLA. STAT. ANN. § 742.11 (West 1979); GA. CODE ANN. tit. 74 § 101.1 (1964); ILL. REV. STAT. ch. 40 ¶¶ 1451-53 (1985); KAN. STAT. ANN. § 23-128-30 (1974); LA. CIV. CODE ANN. art. 188 (West Supp. 1987); MD. EST. & TRUSTS CODE ANN. § 1-206(B) (1974); MICH. COMP. LAWS ANN. § 700.111 (1980); MINN. STAT. ANN § 257.56 (West. 1982); MONT. CODE ANN. § 40-6-106 (1985); NEV. REV. STAT.§ 126.061 (1979); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT.§ 494-1 (1976); OKLA. STAT. ANN. tit. 10 §§ 551-52 (West. Supp. 1980); OR. REV. STAT. 109, 239, 109.247, 677.355, 677.360, 677.365, 677.579 (1979); TENN. CODE ANN. §68-3-306 1983); TEX. FAM. CODE ANN. tit. 2, § 12.03 (Vernon 1975); VA. CODE ANN. § 64.2.-7.1 1980); WASH. REV. CODE 26.26050 (1986); WYO. STAT. § 14-2-103 (1978).

53. For example, Illinois law provides that children born of AID are to be treated as naturally conceived legitimate children:

> Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting to the use of such technique.

ILL. REV. STAT. ch. 40 ¶ 1452 (1985).

> Moreover, the husband or wife is to be treated as the natural parent.
> (A) If, under the supervision of a licensed physician and with the consent of the husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in the law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing executed and acknowledged by both the husband and the wife. The physician who is to perform the technique shall certify that signatures and the date of the insemination, and file the husband's consent in the medical record where it shall be kept confidential and held by the patient's physician. How-

laws are intended to provide parents of AID children protection from custody battles with anonymous sperm donors and to relieve both parent and child of the legal disabilities imposed through illegitimacy.

While beneficial to couples suffering from male infertility, these laws have created a new impediment to surrogate motherhood. When applied in the surrogate motherhood context, they arguably serve to prevent the contracting husband from establishing his legal paternity.[54] As a result, they require the contracting husband, who is the biological father, to adopt his own child in order to obtain custody. This incongruous result runs counter to all public policy goals concerning the promotion of families. If surrogate motherhood is to be viable, the courts and legislatures must distinguish between anonymous sperm donors in the AID context and the contracting husbands in the surrogate motherhood context. Accordingly, the courts should hold the aforementioned laws, passed to protect the parties in AID, inapplicable in the context of surrogate motherhood.

Artificial insemination also increases the number of married couples who can employ surrogate motherhood to have a family. Previously, only married couples that included a fertile male could procreate through surrogate motherhood. Artificial insemination provides couples with non-fertile males access to the surrogate motherhood process as well. In these cases, the contracting couple inseminates the surrogate mother with semen obtained from a third-party donor, often through a sperm bank.[55] This version of the surrogate motherhood process is particularly desirable where both the contracting husband and his wife suffer from infertility or run a high risk of passing on a genetically-related disease. The only difference between this type of surrogate motherhood and that previously discussed is that in this case neither contracting parent is biologically linked to the child. As a result, the couple must go through adoption procedures to obtain custody.

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ever, the physician's failure to do so shall not affect the legal relationship between father and child. All papers and records pertaining to the insemination, whether part of the permanent medical record held by the physician or not, are subject to inspection only upon an order of the court for good cause shown.

(B) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife shall be treated in law as if he were not the natural father of the child thereby conceived.

Id. ¶ 1453(a).

54. No court has yet applied these statutes to the surrogate motherhood context.

55. For an explanation of the likely legal relationships that this type of surrogate motherhood creates, see Wadlington *supra* note 37, at 494.

E. *In Vitro Fertilization*

Like artificial insemination, *in vitro* fertilization allows the parties to avoid some of the legal impediments traditionally imposed upon the surrogate motherhood process. In principle, it involves the surgical extraction of an ovum from a woman's body, subsequent fertilization of the ovum in a laboratory, and implantation of the fertilized ovum into the surrogate's body.[56] If all is successful, the surrogate gives birth to a child nine months later. Like artificial insemination, *in vitro* fertilization involves no sexual intercourse between the surrogate and any other party. Thus, while no court has yet decided a case challenging the legality of *in vitro* fertilization, the reasoning employed in the modern artificial insemination cases would likely apply, holding that the process does not violate adultery and fornication laws.[57]

In contrast to artificial insemination, *in vitro* fertilization offers the contracting wife an opportunity to have a biological link with her child. Moreover, she may do so without suffering the physical problems and changes in lifestyle associated with pregnancy.[58] This is particularly advantageous where the wife is fertile, but is either unwilling or incapable of carrying a child to term.[59] Thus, the couple may surgically remove an ovum from the contracting mother, fertilize it *in vitro* with her husband's sperm, or, if he is infertile, with sperm from a third-party donor, and implant it into the body of the surrogate for the nine-month gestation period. No court or legislature has yet grappled with the thorny issue of whether the ovum donor or the surrogate is the mother of the child.[60] To deny the contracting wife's claim of maternity as ovum donor, however, while recognizing the contracting husband's claim of paternity as sperm donor, would likely violate the fourteenth amendment's guarantee of equal protection under the law.[61] Thus, in addition to providing the contracting wife with a biological link to her child, *in vitro* fertiliza-

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56. The doctor extracts the ovum from the woman's body through laproscopy, and then places the egg in a petri dish already containing the donor sperm. Kolata, *How In Vitro Fertilization is Done*, 201 SCIENCE 698 (1978). If fertilization occurs, the fertilized egg is ready in 2-4 days for replacement into the body. *Id.* For pictures of the first baby born in America through this method, see Fadiman, *Small Miracles of Love and Science*, LIFE, November, 1982 at 44.

57. For a discussion of the reasoning the courts employ to hold that artificial insemination does not violate adultery and fornication laws, see *supra* text accompanying notes 49-51.

58. For a brief explanation of these lifestyle problems, see *supra* text at note 36-37.

59. This includes, for example, women who have a history of miscarriages.

60. For a discussion of the legal possibilities, see Wadlington, *supra* note 37, at 495-96.

61. "No state shall. . .deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

tion also offers her an opportunity to establish her legal maternity.

F. *Removing the Remaining Legal Impediments to Surrogate Motherhood*

The advent of new genetic technologies, and the removal of many legal impediments made possible as a result, have encouraged proponents of surrogate motherhood to argue that the state should heed the growing demand for alternative methods of procreation and legitimize surrogate motherhood relationships.[62] Opponents of surrogate motherhood contend, however, that these new technologies have failed to alter the major remaining legal impediments to surrogate motherhood: laws preventing the offer or receipt of payment in consideration for a mother's relinquishment of her parental rights.[63] The opponents argue that the surrogate receives a fee, in part, to compensate her for her relinquishment of her rights over the child in violation of these laws.[64] Viewed in this context, commercial surrogate motherhood is tantamount to baby selling, and as such the state is proper in prohibiting it.[65]

Proponents reply that the right to engage in surrogate motherhood is a fundamental right protected by the constitutional right of privacy,[66] and that complete prohibitions on commercial surrogacy infringe this right and are unnecessary to achieve a compelling state interest.[67] It is to a consideration of that constitutional argument and its ramifications that this comment now turns.

II. Surrogate Motherhood and the Constitutional Right of Privacy

A. *Constitutional Protection for Non-Textual Rights: Substantive Due Process Analysis*

The Constitution makes no specific mention of the right of married couples to employ surrogate motherhood as a means of becom-

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62. *See, e.g.*, Black, *Legal Problems of Surrogate Motherhood*, 16 New Eng. L. Rev. 373, 395 (1980). ("Surrogate motherhood, subject to reasonable regulation, deserves a place among the growing panoply of methods available to individuals for the ordering of their marital and reproductive lives.")

63. *See, e.g.*, O'Brien, *supra* note 12, at 143.

64. *Id.*

65. *Id.* For a view that the state ought to legalize baby selling, see generally Landes and Posner, *supra* note 39.

66. The Supreme Court has broadly defined the right of privacy as an individual interest in avoiding disclosure of personal matters and an interest in independence in making certain kinds of important decisions. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 599 (1977).

67. *See, e.g.*, Coleman, *supra* note 17, at 75-82 (surrogate motherhood protected by constitutional right of privacy). *But see* O'Brien, *supra* note 12, at 139-42 (arguing that surrogate motherhood not protected by right of privacy).

ing parents. The United States Supreme Court, however, has long held that the concept of liberty embodied in the due process clause of the fourteenth amendment[68] is broad enough to extend constitutional protection to certain rights not explicitly mentioned in the text of the document.[69] Under this substantive due process analysis, the Court determines whether a particular substantive right is included in the concept of liberty, and is thereby protected from unwarranted state infringement.[70]

Between 1897 to 1937, the Court regularly invoked substantive due process analysis to invalidate state laws seeking to regulate social and economic matters.[71] After the court-packing crisis of the 1930s,[72] however, the Court announced that it would defer to a state legislature's judgment in these matters, so long as the law in ques-

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68. "No state shall. . .deprive any person of life, liberty and property without due process of law." U.S. CONST. amend. XIV, § 1.

69. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (extending constitutional protection to a woman's decision to have an abortion as protected aspect of the right to privacy).

70. For an overview discussion of substantive due process analysis, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 421-55, 886-990 (1977); J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 331-416 (3d ed. 1986).

71. This is often referred to as the "*Lochner* era" after one of the more famous cases of the period, Lochner v. New York, 198 U.S. 45 (1905) (state statute limiting bakers to 60-hour work week unnecessarily infringed bakers' liberty of contract, which is one of the liberties protected from undue infringement by the 14th amendment). The so-called *Lochner* era actually began at least eight years before *Lochner* was handed down with the case of Allgeyer v. Louisiana, 165 U.S. 578 (1897) (state statute preventing any contracts with a company not licensed to perform marine business held to exceed the state's inherent police power by infringing liberty of contract and thereby violating the 14th amendment).

During the *Lochner* era, the Court invalidated statutes either on the basis that the statute did not further a legitimate goal of the government, as in *Allgeyer*, or for the lack of a plausible argument that the legislative means furthered the goal, as in *Lochner*. *See* G. GUNTHER, CONSTITUTIONAL LAW 527 (11th ed. 1985). In general, the Court sought to advance the popular belief that the state could only use its police power to advance the general welfare, and not to help certain parties gain an imporved bargaining position with those with whom they bargained to sell their services. TRIBE, *supra* note 70, at 427-34. The Court did allow the state to intervene to improve the bargaining position of certain groups whom it held to suffer from a vulnerable bargaining position. *See, e.g.*, Holden v. Hardy, 166 U.S. 366 (1897) (coal miners). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (women). For a view that the Court, in making these exceptions, sowed the seeds of destruction for substantive due process analysis, see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

72. After the *Lochner* Court rejected much of President Roosevelt's New Deal legislation, he introduced a bill into the Senate in 1937 that would have allowed him to appoint an additional justice to the Court for every sitting justice over 70 years of age. Six justices were over 70 in 1937. For an excerpt and a discussion of the proposed legislation, see G. GUNTHER, *supra* note 71, at 128-30.

The court-packing crisis is generally considered not to have been the actual cause of the Court's rejection of substantive due process analysis, but only to have affected the timing of the Court's change in thinking. For a discussion of the forces that precipitated the fall of the Lochner era, see TRIBE, *supra* note 70, at 442-55.

tion was rationally related to a legitimate state interest.[73] While the Court subsequently indicated that it would still strictly scrutinize laws that infringed upon the Bill of Rights, the political process, or insular minorities,[74] the practice of extending constitutional protection to rights for which the document itself offered no textual support became largely discredited.[75] Recently, however, the Court has revived the use of substantive due process analysis to extend constitutional protection to certain rights that are not mentioned in the text of the document, but which the Court nevertheless determines to be fundamental.[76] In such cases, the Court strictly scrutinizes the statute and requires the state to prove that the law is necessary to achieve a compelling state interest and is narrowly tailored to achieve that end.[77]

The process through which the Supreme Court determines which non-textual rights are so fundamental as to merit this higher level of due process scrutiny is decidedly unmechanical and largely undefined. The Court has articulated, however, two general approaches by which it makes this determination. First, the Court will declare a non-textual right to be fundamental if it determines it to be implicit in the concept of ordered liberty.[78] This is the familiar analysis Justice Cardozo set forth in *Palko v. Connecticut*.[79] Under this analysis, even though a right is not explicitly mentioned within the text of the document, the Court will extend constitutional pro-

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73. This standard was first articulated three years before the fall of the *Lochner* era in Nebbia v. New York, 291 U.S. 502 (1934) (if the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied). In 1936, however, the Court relied on *Lochner* era rationale to invalidate New York's minimum wage law for women. Moorhead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936). After Roosevelt announced his plan, the Court overruled *Moorehead* one year later, upholding a minimum wage law for women in West Coast Hotel Co. v. Parrish, 300 U.S. 579. (1937) (regulation that is reasonable to its subject and is adopted in the interests of the community affords due process).

74. This is Justice Stone's famous footnote four to United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (identifying what laws the court may still subject to strict scrutiny).

75. *See, e.g.*, Lincoln Fed. Labor Union v. Northwestern Iron & Metal, 335 U.S. 525, 535 (1949) (*Lochner* era constitutional doctrine unanimously and explicitly repudiated); *see also* Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (Court emphatically refused to use the due process clause to strike down state laws regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought).

76. *See, e.g., Roe*, 410 U.S. at 155 (extending constitutional protection to a woman's decision whether to bear a child).

77. *Id.*

78. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

79. *Id.* Although *Palko* concerned whether the Due Process clause protected a *textually-based* right from undue state infringement -- *i.e.* the Fifth Amendment's prohibition against double jeopardy -- the "ordered liberty" standard that *Palko* articulated has since become one criteria by which *non-textual* liberties are afforded Constitutional protection. *See, e.g., Roe*, 410 U.S. at 152.

tection to it if the failure to do so would undermine those basic values that the rights stated in the document were intended to preserve.[80] Determining which non-textual rights are, in this sense, indispensible to the continued preservation of these constitutional values is, of necessity, an abstract and speculative process.

To complement this approach, the Court has more recently declared that it will also rank as fundamental those liberties that are deeply rooted in the nation's history and traditions.[81] Justice Powell articulated this standard in *Moore v. East Cleveland.*[82] While some have argued that the *Moore* approach, with its emphasis on history, unduly broadens the scope of substantive due process analysis,[83] it is more proper to view *Moore* as restating the basic principles set forth in *Palko* in a manner that acknowledges traditional Supreme Court jurisprudence.[84] The *Palko* approach requires the Court to project into the future and determine what impact a denial of constitutional protection would have on basic constitutional values. The *Moore* approach requires the Court to reflect on the past and to determine whether the asserted right has traditionally been part of the basic values that underlie our society, and which the Constitution has sought to protect.

Although the methodologies differ, a unified logic emerges when the approaches are read together. The asserted right must take its place in relation to the basic traditions and decisions that have come before, while at the same time serving as an essential foundation for what is to come, in protecting those values that are the focus of the Constitution.[85]

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80. The appropriate source of these values remains a subject of ongoing debate. For a view that the Court is limited to those values derived from the text, history, and structure of the Constitution, see Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978). For a view that unwritten higher principles may also be constitutionally protected, see Grey, *Do We Have An Unwritten Constitution?* 27 STAN. L. REV. 703 (1975).

81. Moore v. East Cleveland, 431 U.S. 494, 503 (1976) (appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history and solid recognition of the basic values that underlie our society).

82. *Id.*

83. *Id.* at 549-50 (White, J., dissenting).

84. In *Palko*, Justice Cardozo noted that those principles that are at the very essence of a scheme of ordered liberty are those that are so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Palko*, 302 U.S. at 325.

85. Justice Harlan discussed substantive due process analysis in these terms in his oft-cited dissent:

> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restricted judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for

An application of these principles to the right of married couples to engage in surrogate motherhood reveals that it is a logical and natural extension of a long line of constitutional case law protecting an individual right to autonomy in decisions relating to procreation and family matters. This comment next examines those cases and their relation to surrogate motherhood.

B. *Surrogate Motherhood, Procreational Autonomy, and the Right to Privacy*

In considering which non-textual rights should be afforded a higher degree of constitutional protection from state action, the Court has consistently demonstrated a large measure of respect for those rights related to the basic responsibilities of family life. The Supreme Court first articulated these principles in the 1923 case of *Meyer v. Nebraska*,[86] where it struck down a Nebraska law prohibiting the teaching of foreign languages in public schools to young children.[87] In giving substantive content to the notion of liberty embodied in the fourteenth amendment, the Court held that liberty included not only freedom from bodily restraint, but also the right of the individual to marry, to establish a home, and to bring up children.[88] A unanimous Court further explained this right two years later in *Pierce v. Society of Sisters*[89] in striking down a law requiring children to attend public school.[90] The *Pierce* Court recognized that the state does not have sole dominion over children born into it.[91] It held, rather, that those who nurture a child and direct his destiny have rights and duties as well, the exercise of which the due process clause protects from undue state infringement.[92] This includes the right to prepare the child for the additional obligations he may encounter.[93]

In establishing constitutional protection for the non-textual rights to marry, to establish a home, to bring up children, and to prepare them for future obligations, *Pierce* and *Meyer* created a context for the Court's subsequent decisions that clearly establish a right of autonomy over procreational decisions. The Court first announced this right in 1942 in *Skinner v. Oklahoma*,[94] in which it

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what is to come."
Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).

86. 262 U.S. 390 (1923).
87. *Id.*
88. *Id.* at 399.
89. 268 U.S. 510 (1925).
90. *Id.*
91. *Id.* at 535.
92. *Id.*
93. *Id.*
94. 316 U.S. 535 (1942).

struck down an Oklahoma law providing for the sterilization of certain recidivist felons.[95] In invalidating the law on equal protection grounds,[96] the Court justified its application of strict scrutiny on the basis that procreation is among the basic civil rights of man, and is fundamental to the very existence of the human race.[97] In so doing, the Court implied that the right of procreation was so essential to the exercise of other fundamental rights that arbitrary state interference with it would infringe constitutionally-protected values.

Having protected the individual's right to procreate, the Court's next line of decisions protected the individual's right not to procreate. This obverse right was first articulated in *Griswold v. Connecticut*,[98] in which the Court struck down a state law prohibiting married couples from using contraceptives.[99] The Court, in a plurality opinion, held that the first, third, fourth, fifth, and ninth amendments to the Constitution emanate penumbras which create a right of privacy.[100] This encompasses the right of married couples to decide whether or not to use contraceptives without undue state interference.

Despite the Court's creative attempt to find textual support for the right of privacy and thereby avoid applying substantive due process analysis,[101] it nevertheless noted that the right to privacy was older than the Bill of Rights from which it purported to draw support.[102] In doing so, the *Griswold* Court echoed the reasoning set

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95. *Id.* Fifteen years earlier the Court had held that a law requiring the sterilization of so-called "imbeciles" did not violate due process or equal protection. Buck v. Bell, 274 U.S. 200 (1927). *Skinner* did not explicity overrule *Buck*. For a view that the Court would overturn *Buck* if it were presented with it today, see Burgdoff and Burgdoff, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1011, 1023 (1977).

96. *Skinner* came before the Court just five years after it had repudiated substantive due process analysis. *See supra* note 73.

97. *Skinner*, 316 U.S. at 541.

98. 381 U.S. 479 (1965).

99. *Id.*

100. *Id.* at 482-85. One of the Court's first implied references to a right of privacy was in Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891). There the court noted: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* As well said by Judge Cooly: "The right to one's person may be said to be a right of complete immunity: to be let alone." Justice Brandies subsequently described it as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

101. Justice Douglas noted: "Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. State of New York. . .should be our guide. But we decline that invitiation. . ." *Griswold*, 301 U.S. at 481-82. (citations omitted).

102. *Id.* at 486.

forth in *Skinner*[103] and implicit in the substantive due process analysis applied in *Meyer*[104] and *Pierce*.[105] In sum, the right to exercise autonomy over conception is one of a group of core rights basic to society and is therefore a value which the Constitution seeks to protect.

The Supreme Court, in *Roe v. Wade*,[106] recognized that the right of privacy was broad enough to protect an individual's decision, not only whether to conceive a child, but whether to give birth to a child already conceived.[107] In protecting this right, the Court declined to find implicit textual support for it as the *Griswold* penumbra analysis had purported to do.[108] Notably, the Court held that the liberty interest articulated by the due process clause of the fourteenth amendment protected the right of privacy.[109] In so doing, the Court resurrected substantive due process analysis as the appropriate means for extending constitutional protection to procreational matters.[110] The Court thereby reconciled its decisions in *Griswold*, *Roe*, and their progeny with those in *Meyer*, *Pierce*, and, by implication, *Skinner*. These cases thus stand for the right of the individual to be protected under the right of privacy from unwarranted governmental intrusion into decisions related to childbearing.[111] The rationale justifying this protection is that childbearing decisions are essential to all other rights and values that the Constitution seeks to protect.

For many infertile couples, surrogate motherhood is their only

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103. *See supra* text accompanying notes 94-97. (procreation among basic civil rights of man and fundamental to existence of human race).

104. *See supra* next accompanying notes 86-88 (liberty protected by the fourteenth amendment includes right of individual to marry, establish a home, and bring up children).

105. *See supra* text accompanying notes 89-93 (due process clause protects rights of those who nurture a child and direct his destiny).

106. 410 U.S. 113 (1973).

107. *Id.*

108. *Id.* at 153.

109. *Id.*

110. Even Justice Rehnquist, in his dissent, did not object to the application of due process analysis. *Id.* at 173 (Rehnquist, J., dissenting). He opposed, however, what he termed the "transplanting" of the compelling state interest test from equal protection analysis to due process analysis. *Id.* He argued that the traditional rational relation test should be applied instead. *Id.*

111. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Justice Brennan later clarified this point:

> The constitutional protection of individual autonomy in matters of childbearing is not dependent on [intrusion into marital bedrooms]. These decisions put *Griswold* in its proper perspective. *Griswold* may no longer be read as holding only that a state may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of child bearing from unjustified instructions by the state.

Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977).

means of bearing children. It is proper, therefore, to rank their decision to employ surrogate motherhood as a protected aspect of the right of privacy. For these couples, having the ability to decide *how* to have children is inextricably tied to their exercise of their constitutionally protected right to decide whether to conceive[112] and bear[113] children, whether to procreate at all,[114] and if so how to rear[115] their children. As such, the decision to engage in surrogate motherhood embodies other rights, which the Court has acknowledged predate the Bill of Rights[116], and which lie at the center of constitutionally protected values.[117] When a couple decides to engage in surrogate motherhood, it therefore exercises a right that is deeply rooted in our history and tradition, and in an indispensible aspect of an ordered liberty. It is thus appropriate to extend constitutional protection to the decision to engage in surrogate motherhood as an aspect of the constitutional right of privacy.

Recent state supreme court decisions support this view. The supreme courts of Oklahoma[118] and Florida,[119] while not having considered a constitutional right to surrogate motherhood per se, have nevertheless recognized a related right in the fundamental right to adopt. While the United States Supreme Court has never constitutionally recognized the right to adopt, the logic of these decisions suggests that if the right to adopt is fundamental, so too is the right to engage in surrogate motherhood for the purpose of bearing a child for adoption.[120]

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112. *See supra* text accompanying notes 98-105 (tracing development of constitutional protection for decision whether to conceive child).

113. *See supra* text accompanying notes 106-11 (tracing development of constitutional protection for decision whether to have child already conceived).

114. *See supra* text accompanying notes 94-97 (tracing constitutional protection for the basic responsibilities of family life).

115. *See supra* text accompanying notes 86-93.

116. *See supra* text accompanying note 102.

117. *Carey*, 431 U.S. at 678 (decision whether to beget a child is at the very heart of the cluster of constitutionally protected choices); *see also* Zablocki v. Redhall, 434 U.S. 374 (1978) (invalidates state law prohibiting the marriage of persons who have unpaid child support obligations on the grounds that the decision to marry is protected by the right of privacy and is placed on the same level of importance as decisions relating to procreation, childbearing, child rearing, and family relations).

118. *In re* Del Moral Rodriguez, 552 P.2d 397 (Okla. 1976) (Court finds no distinction between fundamental right to procreate and the right to adopt children).

119. Grissom v. Dade County, 293 So. 2d 59 (Fla. 1974) (fundamental right to have children either through procreation or adoption so basic as to be inseparable from the rights to enjoy and defend life and liberty to pursue happiness).

120. One state supreme court has upheld the right of an agency to arrange surrogate motherhood contracts, but not on constitutional grounds. The Kentucky Supreme Court in Surrogate Parenting Assoc. v. Kentucky *ex rel.* Armstrong, 704 S.W. 209 (Ky. 1986), held that the agency did not violate a state statute prohibiting the purchasing of children for purposes of adoption. *Id.* at 212-13. The court held that it was the role of the legislature to delineate public policy on scientific advancements, and absent a legislative pronouncement that surrogate motherhood was impermissi-

Fundamental rights, however, are not absolute. They may be infringed by a statute that is narrowly drawn to achieve a compelling state interest.[121] This comment next discusses whether prohibitions on payments to surrogates infringe this right.

C. *Prohibiting Payments to Surrogates: Infringing the Right to Privacy*

While the Constitution protects the decisions to engage in surrogate motherhood as a fundamental right, a prohibition against the payment or receipt of consideration in conjunction with the relinquishment of parental rights may infringe this right. Some argue it does not.[122] While such a law may make it more difficult for a couple to effect their decision to engage in surrogate motherhood, it arguably does not prevent the couple from making the decision to do so, nor from realizing it altogether. The couple may still engage in surrogate motherhood with a surrogate who will perform gratuitously.

The Supreme Court cases that arguably support this argument are those that hold that the government may choose not to fund abortions for financially needy pregnant women in structuring welfare programs.[123] The rationale of these cases is that while government may not place obstacles in the path of a woman's exercise of a decision protected under the right of privacy, it need not undertake affirmative steps to remove obstacles not of its own creation.[124] Thus, in the case of a poor pregnant woman, it is her indigency, not state action, that prevents her from obtaining an abortion.[125] Likewise, in surrogate motherhood, it is the couple's infertility, not any act by the state, that prevents them from having a child.

The flaw in this reasoning is that the plight of the indigent pregnant woman is not analogous to that of the couple seeking to procreate through surrogate motherhood. The barriers that the indigent pregnant woman faces are the abortion price levels that the marketplace imposes in order to achieve an efficient allocation of

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ble, the doctrine of separation of powers prevented the court from ruling it illegal. *But see* Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981) (court rejects argument that state law prohibiting exchange of money in connection with adoption services impermissible infringed would-be parents' rights in deciding how to beget or bear a child). *Cf.* Skyrowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985) (without overruling *Doe*, court allowed plaintiff to use state paternity act, designed to enforce child support obligations, to establish his paternity over child born by AID by married surrogate).

121. *Roe*, 410 U.S. at 154.

122. *See, e.g.*, Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

123. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464, 471-74 (1977).

124. *Harris*, 448 U.S. at 316; *Maher*, 432 U.S. at 474.

125. *Id.*

abortion services.[126] To the extent that this marketplace operates independently, reacting to forces that are largely beyond the control of the government, the woman cannot blame her inability to effectuate her decision to abort on any state action. The couple seeking to engage in surrogate motherhood, however, faces exactly the opposite problem. Unlike the indigent pregnant woman, an infertile couple can often meet the price level that the marketplace imposes to achieve an efficient allocation of surrogate motherhood services. The barrier such a couple faces is, thus, not forces beyond the control of government, but the government's own prohibition on payment. While there are recorded cases of women who have served gratuitously as surrogates,[127] the prohibition against payment so reduces the potential number of surrogates as to effectively deny most couples the opportunity to procreate in this manner.[128] In denying the couples' access to the surrogate motherhood process, the state thus infringes their fundamental right.

A line of post-*Roe* Supreme Court cases support this view, holding that statutes which substantially limit access to the means of effectuating a decision that is protected under the right of privacy are subject to the same scrutiny as statutes that prohibit the decision entirely.[129] The Supreme Court has applied this principle in striking down laws that burden a woman's decision to seek an abortion by requiring her to obtain spousal[130] or parental consent;[131] or by requiring her doctor to protect potentially viable fetuses,[132] to perform the abortion in a hospital,[133] or to provide the patient with anti-abortion information.[134] In light of these rulings, the Court

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126. *Id.*

127. *See supra* text accompanying note 14 (describing couples of women who serve gratuitously as surrogate mothers).

128. Black, *supra* note 62, at 389 (arguing that since the services of a surrogate mother are far too onerous to be provided gratuitously, a ban on payments to surrogate mothers effectively bans surrogate motherhood itself and therefore violates the couple's constitutional right of privacy).

129. *Carey*, 431 U.S. at 688-90.

130. Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976) (Court strikes down state provision barring married woman in most circumstances from obtaining abortion during first 12 weeks of pregnancy without her husband's written consent).

131. *Id.* (struck down provision requiring an unmarried woman under 18 to obtain consent of parent or guardian, before obtaining abortion. *See also* Bellotti v. Baird, 443 U.S. 622 (1979) (struck down law requiring unmarried minor to obtain consent of both parents before abortion). *Cf.* H.L. v. Matheson, 450 U.S. 398 (1981) (upholds state law requiring doctor to notify, if possible, parents or guardian of minor upon whom an abortion was to be performed).

132. Colautti v. Franklin, 439 U.S. 379 (1979) (state law subjecting doctors to criminal liability if they failed to follow statutory standard-of-care when fetus was viable struct down).

133. Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (strikes down state law requiring, *inter alia*, that second trimester abortions be performed only in hospital).

134. *Id.* (strikes down state regulation requiring doctor to inform patient of sta-

would undoubtedly find that a law that prevented a woman from *paying* a doctor to perform an abortion would unduly burden her decision whether to have a child. While there might be a few doctors still willing to perform abortions gratuitously under such a law, it would undoubtedly have the inevitable effect of substantially limiting a woman's access to the means of effectuating her decision to have an abortion. Such a law would, therefore, infringe a woman's right of privacy. Laws that prevent payments to surrogates also burden a married couple's decision whether to procreate by surrogate motherhood. While some women may still perform gratuitously as surrogates, such laws have the effect of dramatically limiting the couples' access to surrogate motherhood. For many couples, surrogate motherhood is their only means of effectuating their decision to engage in childbearing. Such laws, therefore, infringe these couples' fundamental rights.

D. *In Search of a Compelling State Interest*

Because a law that regulates payment to surrogate mothers infringes a couple's fundamental right to procreate in this manner, the state must demonstrate that the law is necessary and is narrowly drawn to achieve a compelling state interest in order to establish its constitutionality.[135] The following subsections analyze several possible interests that the state may assert in its efforts to justify infringing upon the couple's fundamental procreational rights. These interests include: promoting public morals;[136] protecting the institution of the family;[137] preventing injury to the parties of the relationship;[138] and providing for the best interests of any child born from the relationship.[139] Of these, only the last two are sufficiently compelling to justify regulating the surrogate motherhood relationship.

1. *Morality-Based Interests*

Surrogate motherhood involves procreation outside the traditional bounds of the marriage relationships, and as such arguably runs counter to traditional moral precepts. The state, however, can enact laws under its inherent police power to regulate public morals.[140] Thus, the state may arguably regulate surrogate mother-

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tus of pregnancy, development of fetus, date of possible viability, physical and emotional complications that may result from abortion, services of support agencies).

135. Roe v. Wade, 410 U.S. 113, 155 (1973).

136. *See infra* text accompanying notes 140 to 155.

137. *See infra* text accompanying notes 156 to 174.

138. *See infra* text accompanying notes 175 to 180.

139. *See infra* text accompanying notes 181 to 186.

140. Village of Euclid v. Amber Realty, 272 U.S. 365, 395 (1926) (state's police power includes the power to promote the "health, safety, morals, or general welfare"

hood as a means of promoting the morals of the community.

The Court has traditionally held, however, that the state's interest in promoting public morals is insufficient to justify the infringement of a fundamental right.[141] Two first amendment cases illustrate this point. The Court upheld the state's regulation of obscene materials in a movie theater in *Paris Adult Theatre I v. Slaton*,[142] as a means of protecting the state's interest in order and morality.[143] By contrast, the Court overturned the state's regulation of obscene materials in the privacy of a home in *Stanley v. Georgia*,[144] even though the law purported to promote similar interests as in *Paris*.[145] These conflicting results may be explained as follows. Because obscene materials are, by definition, beyond the protection of the first amendment,[146] the state's exercise of its police power in *Paris* in regulating such materials infringed no fundamental rights.[147] Its interest in promoting the public morals thus outweighed any individual interest in viewing obscenity, and was, therefore, justified.[148] In *Stanley v. Georgia*,[149] however, the state's efforts to promote public morals required an intrusion into a private citizen's home, infringing the defendant's fundamental right of privacy.[150] The state's interest in promoting public morals was, thus, insufficient to outweigh the individual's interest in exercising his fundamental right.[151]

This conclusion is supported by recent decisions in procreation-related cases. For example, in *Carey v. Population Services*.[152] the Supreme Court held that the state's interest in preventing teenagers from engaging in immoral sex acts was insufficient to outweigh their fundamental right to decide whether to have a child. Thus, the Court struck down a law restricting the distribution of contraceptives to pharmacists.[153] The Court offered similar reasoning in *Ei-*

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of citizens)

141. *But cf.* TRIBE, *supra* note 70, at 928 (all normative judgments are rooted in moral premises).

142. 413 U.S. 49 (1973).

143. *Id.* at 61 (citing Roth v. United States, 354 U.S. 476, 485 (1957)).

144. 394 U.S. 557 (1969).

145. *Id.* at 565-66.

146. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding "that obscenity is not within the area of constitutionally protected speech or press")

147. *Paris*, 413 U.S. at 69 (holding that commerce in obscene material is unprotected by any constitutional doctrine of privacy, and that "[s]tates have a legitimate interest. . .in regulating [the] exhibition of obscene material in places of public accommodation").

148. *Id.* at 69.

149. 394 U.S. 557 (1969).

150. The Court found that the invasion of privacy violated the defendant's first and fourteenth amendment rights. *Id.* at 565.

151. *Id.* at 568.

152. 431 U.S. 678 (1977).

153. *Id.* at 699.

senstadt v. Baird,[154] in which it implied that the only state interest that would be sufficient to outweigh the individual's interest in exercising autonomy in procreational decisions would be the state's interest in preventing health hazards.[155] Implicitly, the state's interest in promoting morals would be insufficient to outweigh the individual's interest in exercising a fundamental right. Applying this principle to surrogate motherhood, a law prohibiting payments to the surrogate mother is unconstitutional insofar as its purpose is to protect or promote public morals. This is because the state's interest in promoting morals is insufficient to justify infringing upon the contracting couple's interest in exercising its fundamental right of procreational autonomy.

2. *Preserving the Institution of the Family*

Surrogate motherhood, in bringing a third party into the procreation process, runs counter to society's traditional notion of the nuclear family. The state has an interest in preserving the institution of the family for two reasons. First, the family is the primary institution through which children become self-reliant participants in the political process.[156] Second, the family also provides children with the emotional and economic support they need to grow and engage in social discourse.[157] Thus, the state may, arguably, regulate surrogate motherhood as a means of preserving this valuable institution.

While surrogate motherhood may introduce variances to the nuclear family, the relationships it creates are not dissimilar, but actually similar to, those that the Court has traditionally protected from regulation. Notably, the Court has never restricted its concept of the family merely to that of the nuclear family.[158] On the contrary, the Court has stated that our tradition as a society and the accumulated wisdom of civilization as a whole support a larger conception of family.[159] While the Court has never delineated the limits to which it is prepared to extend the concept of family, an examination of the other types of relationships the Court has so far protected under it, and the common characteristics they share, indicate that surrogate

154. 405 U.S. 438 (1972).

155. *Id.* at 464 (White, J., concurring) ("to sanction a medical restriction upon distribution of a contraceptive not proved hazardous. . .would impair the exercise of the constitutional right.").

156. Bellotti v. Baird, 443 U.S. 622, 637-38 (1979).

157. Smith v. Organization of Foster Families for Equality & Reform ("OFFER"), 431 U.S. 816, 844 (1976).

158. Moore v. East Cleveland, 431 U.S. 494, 504 (1975).

159. *Id.* at 504, 508 (Brennan, J., concurring) ("the Constitution cannot be interpreted to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living").

motherhood falls within its ambit.

The Court extended constitutional protection to relationships outside the nuclear family in *Stanley v. Illinois*.[160] In *Stanley*, the Court invalidated a state law that deprived an unwed father of a hearing before his illegitimate child was put up for adoption.[161] The Court reasoned that an unwed father, no less than an unwed mother, has a right to the custody and companionship of a child he had sired and raised.[162] Significantly, even in a context outside that of the nuclear family, the Court acknowledged the right to raise one's children as an essential right.[163] Moreover, this right does not derive solely from the blood relationship between the father and child.[164] The unwed father must also actively participate in the upbringing of his child, or else he will lose this right.[165]

The Court further explained the nature of constitutionally protected family relationships in *Moore*, in which it invalidated a local zoning ordinance that prohibited a grandmother from residing with her two grandsons who were first cousins.[166] In affording constitutional protection to an extended family relationship, the Court explained that the Constitution prevented the state from imposing its narrowly defined notion of family to infringe the associational rights of close kin.[167]

The Court has implied that even the relationship between a foster parent and a foster child will also receive some measure of due process protection. In *Smith v. Organization of Foster Families for Equality and Reform ("OFFER")*, the Court assumed, *arguendo*, that the foster parent-child relationship was protected in upholding a system for removing children from foster homes,[168] an assumption disputed in concurring Court opinions.[169] Moreover, in defining the concept of family for substantive due process analysis, the Court stated that while family implies a biological relationship, such a relationship is not the exclusive determination of a family's existence.[170] The importance of familial relationships, both to the individual and to society, also stems from the emotional attachments

160. 405 U.S. 645 (1972).
161. *Id.*
162. *Id.* at 651.
163. *Id.*
164. *Accord OFFER*, at 843-44.
165. Quilloin v. Walcott, 434 U.S. 246 (1976) (state may deny natural father right to oppose adoption when father has never established home for the child or otherwise been substantially involved in its upbringing).
166. 431 U.S. 494 (1972).
167. 167. *Id.* at 505-06.
168. OFFER, at 841-42, 856.
169. *Id.* at 858 (Stewart, J., concurring) (interest asserted by foster parents not of a kind that the Due Process Clause protects).
170. *Id.* at 843.

that derive from the intimacy of daily association, as well as the role these relationships play in promoting a way of life.[171]

Applying these principles to the relationships formed between a contracting couple, the surrogate mother, and any child born of the relationship, it is clear that the ties they share include characteristics of relationships to which the Court has extended constitutional protection. The contracting couple usually shares a blood relationship with the child through the father's sperm.[172] Where the wife's egg is fertilized *in vitro* and then implanted in the surrogate, both parents share this blood relation.[173] Regardless of the degree of blood relation, however, the contracting couple provides, as much as possible, for the care and well being of the child during pregnancy through the terms of its agreement with the surrogate, and the resources it makes available to her during pregnancy.[174] Also, the contracting couple plans from before conception on having a baby that it will bring into its home to love and nurture, a promise that is fulfilled at birth. Their ties to the child are not, therefore, anathema to the institution of the family. On the contrary, they share many of the characteristics of the relationships extended some form of constitutional protection in *Moore*, *Stanley* and *OFFER*. Moreover, the presence of the third party in the person of the surrogate is not destructive of this relationship. Rather, her involvement is akin to that of a midwife or an adoption agency, enabling persons who want to form familial relationships to do so. Thus, because surrogate motherhood is itself supportive of the family relationships that the Constitution seeks to protect, the state cannot assert that it is necessary to regulate surrogate motherhood as a means of promoting those relationships.

3. *Injury to the Parties*

In promoting the general welfare, the state may exercise its police power to prevent some citizens from inflicting harm on others.[175] There is arguably a potential in the surrogate motherhood relationship for one of the parties to take advantage of the other. For example, a surrogate mother who, before conception, agreed to accept $10,000 for her services might, upon the birth of the child, raise her price in an effort to extort more money from the contracting

171. *Id.* at 844.

172. *See supra* text accompanying note 46 (describing injection of father's sperm into surrogate).

173. *See supra* text accompanying notes 56 to 61 (describing the *in vitro* fertilization process).

174. *See supra* text accompanying note 10.

175. 175. *See, e.g., Roe*, 410 U.S. at 162; Williamson v. Lee Optical, 348 U.S. 483 (1955).

couple.[176] As such, the state has an interest in regulating surrogate motherhood to prevent the parties to a relationship from inflicting harm upon one another.

Unlike the above-mentioned asserted state interests, the Court has recognized that the state's interest in preventing harm to one or more parties may be sufficient to justify infringing a fundamental right.[177] Thus, in *Roe v. Wade*, the Supreme Court held that the state may exercise its police power to regulate an abortion during the second trimester of pregnancy as a means of protecting a pregnant woman from the physical harm the procedure poses.[178] In such regulation, the state infringes the woman's fundamental right to decide whether to give birth to a child. Implicit in this ruling is a balancing of the interests involved, in which the Supreme Court has held that the state's interest in preventing physical harm to the woman during the second trimester outweighs her individual interest in exercising her fundamental right.[179] By analogy, insofar as the state can identify a similar harm to any of the parties to the surrogate motherhood relationship, the state's interest in preventing that harm would outweigh the couple's exercise of its fundamental right of procreational autonomy. The state would, therefore, be justified in regulating the surrogate motherhood relationship to prevent that harm. In so doing, however, the Constitution would require the state to employ a regulation that is narrowly drawn to achieve only this end,[180] and which does not otherwise burden the couple's exercise of its fundamental right.

4. *Best Interests of the Child*

By involving the transfer of custody from the surrogate mother to the contracting couple, surrogate motherhood affects the potential development of the child born from the relationship. The state, under its *parens patriae* power, may protect or promote the welfare of those, such as infants, who lack the capacity to act in their own best interests.[181] The state, therefore, has an interest in regulating the surrogate motherhood relationship to promote the best interests of any child born from that relationship.

The state may use its *parens patriae* power to interfere with the right of parents to rear their children where it is necessary to do so to protect the chld from physical or mental harm. Thus, the Su-

176. O'Brien, *supra* note 12, at 134 n.52.
177. *Roe*, 410 U.S. at 155.
178. *Id.* at 163.
179. *Id.*
180. *Id.* at 155.
181. *See, e.g.*, Adlington v. Texas, 441 U.S. 418, 426 (1979) (state may protect those who are incompetent to protect themselves).

preme Court upheld the right of the state to interfere as *parens patriae* to prevent a nine-year-old child from publicly distributing religious material under the direction of her mother in *Prince v. Massachusetts*.[182] The Court reasoned that such propagandizing posed potentially harmful emotional, psychological, or physical injury to the child, justifying the state's intervention.[183] By contrast, in *Wisconsin v. Yoder*,[184] the Court held it was improper for the state to intervene as *parens patriae* to require Amish children to attend high school against the religious wishes of their parents. The *Yoder* Court found that there was no proof that the decision of the Amish parents not to send their children to secondary schools caused any harm to the physical or mental health of their children, as had taken place in *Prince*.[185] Absent proof that the state is acting to prevent physical or mental harm, the Court held that the state's interest as *parens patriae* is not sufficient to outweigh the parent's fundamental right to direct the religious upbringing of his children.[186] By analogy, therefore, the state may use its *parens patriae* power to regulate the rights of the contracting parents to exercise their fundamental right of procreational autonomy, but only insofar as it is necessary to do so to prevent the child born of this relationship from suffering physical, emotional or psychological harm.

E. *Regulating Payments to Surrogates: Least Restrictive Means Analysis*

Only the state's interest in preventing harm to the parties,[187] or to the child born of the relationship,[188] will outweigh the contracting couples' interest in exercising their fundamental right to procreational autonomy, and thus justify state regulation of surrogate motherhood to achieve these ends. To pass constitutional muster, therefore, any regulation restricting the payment of funds to the surrogate mother must seek to alleviate or prevent harm to the parties or the child, and be narrowly tailored to achieve this goal. If a less restrictive means of infringing the parties' fundamental rights would achieve this end equally well, the regulation will be stricken on grounds that it is overly broad.[189]

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182. 321 U.S. 158 (1944).
183. *Id.* at 169-70.
184. 406 U.S. 205 (1972).
185. *Id.* at 229-30.
186. *Id.*
187. *See supra* text accompanying notes 174-179.
188. *See supra* text accompanying notes 180 to 185.
189. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (governmental interest cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved).

1. *Preventing Harm to the Surrogate: Least Restrictive Means*

The existing laws preventing the payment of consideration in conjunction with the relinquishment of parental rights are intended, in part, to protect parents and children from the harms typically associated with baby selling.[190] Surrogate motherhood, however, shares little in common with the baby selling experience. These laws are partially intended, for example, to prevent unscrupulous baby brokers, operating on the black market, from taking advantage of vulnerable mothers. Baby brokers typically prey upon young, unwed mothers after they become pregnant or have already had their child, and who, out of guilt, despair, or need, agree to give up their parental responsibilities over children they would otherwise have raised.[191] Baby selling thus destroys existing familial relationships in order to create others.

Surrogate motherhood, by contrast, does not involve these harms to the surrogate. Instead, the surrogate makes a rational decision before the child is even conceived to have a baby for a couple that is otherwise incapable of doing so.[192] Her decision is born not out of desperation, but out of a decision made at arms-length to provide a service that will enable others to enjoy the responsibilities and pleasures of being a parent.[193] Moreover, were it not for the surrogate motherhood relationship, the child the surrogate carries would never have otherwise been born. Thus, the surrogate sacrifices none of her own plans to raise, nurture, and love a child for the sake of the contracting couple.

One student commentator has argued that the commercialized surrogate mother suffers the same threat of harm as the person who donates an organ for pay.[194] This harm consists in the physical detriment, permanence of loss, and risk of exploitation. Just as the federal government has prohibited the interstate sale of human organs to prevent this harm,[195] so too, she argues, should the states prevent commercialized surrogate motherhood.[196] The flaw in this argument is that, while babies are unique, they are not analogous to non-re-

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190. For a discussion of the harms baby selling causes, see *Black Market Adoptions*, 22 CATH. LAW. 48 (1976) (welfare of mother and baby subordinated to profit nature of black market profiteer; promotes adoption system that favors rich; and creates moral problem). *But cf.* Landes and Posner, *supra* note 39 (advocating legalization of baby selling).

191. *See* Coleman, *supra* note 17, at 108-09 (arguing that while the black market for babies thrives on the shame, guilt or ignorance of unmarried mothers, and the frustration, impatience and haste of childless couples).

192. *See supra* text accompanying notes 10 to 16.

193. *See supra* text accompanying notes 10 to 16.

194. O'Brien, *supra* note 12, at 142-43.

195. 42 U.S.C.A. § 247(e) (West. Supp. 1986).

196. O'Brien, *supra* note 12, at 142-43.

generative body parts. After the surrogate mother leaves the delivery room she is, generally speaking, every bit as healthy as before the process began. The man who donates a functioning eyeball for transplantation is, by contrast, permanently scarred afterwards. Thus, the surrogate mother is not being compensated to undergo harm in the same way that an organ donor is.

Surrogate motherhood, however, does pose some risks for the surrogate. For example, she may be physically incapable of surviving a pregnancy,[197] the contracting couple may renege on its promised performance to her, or it may exert such influence over her as to engage in exploitation. While a complete ban on payments to the surrogate would greatly reduce the number of women willing to serve in that capacity[198] and, thereby, "solve" these problems, means less restrictive of the contracting couple's fundamental rights are available to address these harms. To minimize the potential physical harm to the surrogate, for example, the state could require her to obtain a license, for which she would have to secure medical certification of her physical and emotional fitness to bear a child.[199] To prevent the contracting couple from defrauding the surrogate, the state could likewise impose a licensing requirement on them, for which they would have to obtain a performance bond.[200] To prevent the couple from exercising undue influence over the surrogate, the state could regulate the amount of money they could offer.[201] Since these less restrictive means are available to promote the state's interest in preventing harm to the surrogate mother, a complete ban on payments to the surrogate is an overly broad means of achieving this end and, therefore, is unconstitutional as applied for this purpose.

2. *Protecting the Contracting Couple: Least Restrictive Means*

The contracting couple also runs a risk of suffering harms as well. These risks mainly derive from the possibility of non-performance on the part of the surrogate mother. She may refuse to accept insemination, fail to obtain medical care, renege on her promise not to abort the child, or refuse to relinquish parental rights to the child once it is born.[202] Refusing to perform in any of these manners can, depending on what stage of the surrogate motherhood process it oc-

197. *See supra* text accompanying notes 33-34.
198. *See supra* text accompanying note 128.
199. *Accord* Coleman, *supra* note 17, at 118.
200. The bond would assure that the surrogate mother would recoup her fee in the event that the contracting couple reneged.
201. An upper limit on the fee that the surrogate could receive would prevent post-birth extortion.
202. *See* Coleman, *supra* note 17.

curs, cause the contracting couple emotional and psychological harm, as well as the loss of the monies that they have expended to that point. These problems could be addressed through a state licensing scheme that would screen and counsel prospective surrogate mothers to ensure their stability and willingness to perform, and which would require each surrogate candidate to post a performance bond to compensate the contracting couple in the event of non-performance.[203] This scheme would promote the state's interest in protecting the contracting couple from harm in a manner that is less restrictive of the couple's constitutional rights than a complete prohibition on payments to the surrogate. Such a prohibition, thus, is unconstitutional as an overly broad means of promoting the state's interest in protecting the couple from harm.

3. *Promoting the Best Interests of the Child: Least Restrictive Means*

Under its *parens patriae* power, the state may intervene to protect children from abuse or neglect. Laws barring the receipt or offer of consideration in conjunction with the transfer of parental rights are intended to serve this end.[204] The state has no guarantee that the purchaser of parental rights is a fit parent, capable and willing of providing the economic and emotional support the child needs.[205] The state thus steps in and demands that the parties show that the transferral of rights is not exploitative and is in the best interests of the child.

Where parental fitness is established, however, the courts have traditionally had less problem with the introduction of compensation in conjunction with parental rights transfers. Thus, both the Ninth Circuit[206] and the Kansas Supreme Court[207] have upheld agreements between close family members to transfer parental rights in return for compensation where such transfers were in the best interests of the child.[208] In transferring parental rights from the

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203. *Cf. supra* note 199.

204. Surrogate Parenting Assocs. v. Armstrong, 704 S.W.2d 209 (Ky. 1986).

205. *See* Ford v. Ford, 371 U.S. 187, 193 (1962) (citing Virginia Supreme Court's statement that the custody and welfare of children are not the subject of barter).

206. Reimche v. First Nat'l Bank of Nevada, 512 F.2d 187 (9th Cir. 1975) (court enforced agreement in which natural mother provided pre-birth consent to adoption in return for natural father's promise to provide for natural mother in his will).

207. *In re* Shirk's Estate, 186 Kan. 311, 350 P.2d 1 (Kan. 1960) (court enforced agreement in which decedent agreed to devise one-third of her estate in return for her daughter's promise to consent to the adoption of her daughter)

208. The Restatement of Contracts states: "A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy *unless* the disposition as to custody is consistent with the best interests of the child." (emphasis added). RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981).

natural mother to the natural father, surrogate motherhood is arguably such an agreement between close family members.[209] Thus, the baby does not face the same threat of harm as he would in a typical baby-selling scenario involving strangers. Additionally, the state may use its existent adoption apparatus to further prequalify the fitness of contracting couples as part of an overall licensing procedure it may impose on them.[210] These actions achieve the state's interest in protecting the best interests of the child without infringing upon the couple's fundamental right to procreate. Thus, a complete prohibition on payments to the surrogate would be overly broad to achieve this end.

CONCLUSION

A married couple's decision to have a child through surrogate motherhood is constitutionally protected under the right of privacy from undue state infringement. Laws that prevent a married couple from paying a surrogate for her services infringe this decision, and thereby violate the married couple's right to privacy. The state's interest in protecting the parties to the surrogate motherhood relationship, and any child born from it, from harm, arguably justifies this infringement. The state can protect these interests, however, through means that do not infringe upon the married couple's fundamental rights. These include licensing, regulation, and bond requirements. A prohibition on payments to surrogates is, thus, unnecessary to achieve the state's compelling interests, and is therefore an unconstitutional restriction on the married couple's right of privacy.

Thomas S. Bradley

209. The contracting husband is usually the natural father of the child, and the contracting wife may also be related by blood to the child. *See supra* text accompanying notes 18-20, 56-60.

210. For a discussion of adoption procedures, see CLARK, LAW OF DOMESTIC REALATIONS (1968). *Cf.* ILL. REV. STAT. ch. 40, ¶ 1501 (1987).