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Articles

CAN SURROGATE PARENTING BE STOPPED? AN INSPECTION OF THE CONSTITUTIONAL AND PRAGMATIC ASPECTS OF OUTLAWING SURROGATE MOTHER ARRANGEMENTS

HERBERT T. KRIMMEL*

In two previous Articles¹ about surrogate parenting I have discussed the ethics of that practice and its likely adverse social consequences. Most particularly, my previous Papers were concerned with the potentially devastating effects that surrogate parenting will have on the children born under those arrangements. The purpose of this Paper, however, is to address questions of a quite different nature that continually are presenting themselves in the debate over surrogate parenting, and which I do not believe have been as fully explored as they ought to be. The matters that I will address in this Paper are primarily structural concerns, by which I mean they relate not to the ethics or social desirability of the practice of surrogate parenting *per se*, but rather to the prudence and mechanics of its prohibition. The questions I seek to answer here assume that we are already in some way convinced that the practice of surrogate parenting is unethical or socially deleterious, but ask what can be done about it.

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1. Herbert T. Krimmel, *The Case Against Surrogate Parenting*, 13 HASTINGS CTR. REP., Oct. 1983, at 35 [hereinafter cited as Krimmel (1983)]; Herbert T. Krimmel, *Surrogate Mother Arrangements From The Perspective Of The Child*, 9 LOGOS 97 (1988) [hereinafter cited as Krimmel (1988)]; see also Herbert T. Krimmel, Correspondence, 14 HASTINGS CTR. REP., June 1984, at 42-44.

Can surrogate parenting be stopped as a practical matter? Would it be prudent to try to do so? Or, is this an area of private immorality beyond the effective regulation of the state?² Can surrogate parenting be stopped as a legal matter without doing violence to the warp and woof of the fabric of constitutional rights? My answer to all of these questions will be that surrogate parenting, at least to the extent that it is being practiced as a commercial venture, can, and should be, legally prohibited, and that to do so would be permissible as a matter of constitutional law.

I. CAN SURROGATE PARENTING BE STOPPED?

The proponents of surrogate parenting, in arguing in support of permissive legislation, assure us that the practice cannot be effectively prevented.³ They admonish us to remember the lesson of Prohibition: that to outlaw practices that are popular, albeit immoral or socially dysfunctional, would be futile, would be a waste of social resources, and would breed disobedience and disrespect for the law.⁴ They argue that prohibitory legislation would not stop surrogate parenting, but would merely drive up the price, send the practice underground, and set up a black market.⁵ They further argue that such prohibitory legislation would be circumvented by infertile couples--and others seeking the services of a surrogate mother--who would merely go to another state or to a foreign country where the practice was legal in order to avail themselves of it.⁶

What answer can be made to these arguments? I will advance two: first, I take issue with the assumption that criminal or other legal sanctions would be impotent to significantly deter the practice of surrogate parenting. Second, even if this assumption were to prove true, it is largely irrelevant; for, although a high degree of efficacy is a very desirable element for a law to have, it is not

2. See generally THOMAS AQUINAS, *SUMMA THEOLOGICA*, q. 96, a. 2.

3. See, e.g., Leo Wolinsky & Jerry Gillam, *Bill Passed to Bar Surrogate Parent Facts*, L. A. TIMES, May 25, 1988, at I-1, I-14 (quoting remarks of California assemblyman Byron Sher); Mark Rust, *Whose Baby Is It?* A.B.A. J., June 1, 1987, at 52, 54 (quoting Gary Skoloff, the attorney in the *Baby M* case for William and Elizabeth Stern); Michele Galen, *Surrogate Law*, THE NAT'L L.J., Sept. 29, 1986, at 1, 10 (quoting Noel Keane); Malcolm Gladwell, *Surrogate Parenting Industry Goes into Legal Labor Pains*, INSIGHT, Sept. 22, 1986, at 20, 21 (quoting Michigan State Representative Richard Fitzpatrick).

4. See, e.g., Joan H. Hollinger, *From Coitus To Commerce: Legal And Social Consequences Of NonCoital Reproduction*, 18 J.L. REFORM 865, 881 (1985).

5. See, e.g., Galen, *supra* note 3, at 10; Hollinger, *supra* note 4, at 881; Patricia Avery, *Surrogate Mothers: Center of a New Storm*, U.S. NEWS & WORLD RPT., June 6, 1983, at 76; Avi Katz, Note, *Surrogate Motherhood and the Baby Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 43 (1986).

6. See, e.g., Rust, *supra* note 3, at 54; Gladwell, *supra* note 3, at 21.

an essential characteristic of a law.⁷

With regard to the first question, would legal sanctions be capable of deterring the practice of surrogate parenting? I believe that this can be readily demonstrated, and I will proceed to do so momentarily. However, before discussing the merits of this question, I want to point out an inconsistency in the argumentation of this issue by some members of the pro-surrogacy camp which I think is quite telling. Some of those persons who, when arguing for permissive regulatory legislation from state legislatures, have most vociferously maintained that surrogacy cannot be stopped⁸ have been the same people to make contradictory utterances before the courts that surrogacy will be brought to a crashing halt if the courts fail to fully enforce such contracts.⁹ So, which is it? My strong suspicion is that the people who argue that surrogacy cannot be suppressed, and that therefore the most that society can hope for is to regulate the process, make this contention not because they believe that surrogacy cannot be stopped, but rather because they do not want it stopped, and in fact fear that it might be. In other words, it is precisely because they do fear that surrogacy can be stopped that they are trying so hard to get legislation passed "regulating" (read: permitting) the practice. As Clausewitz said about war, victory is achieved when you destroy your enemy's will to resist.¹⁰ If legislators can be convinced that laws against surrogacy are futile, then the proponents of surrogacy will indeed have won.

This brings us back to the question at hand: Can surrogacy be stopped? Now, I do not want to be peevish about this matter, but although I have often heard it contended by the proponents of surrogacy that the practice cannot be stopped, I have not seen any real analysis of the point. Most typically the maker of this argument advances the contention as something that is self evident, tosses in an analogy to Prohibition, and--apparently believing the matter to be settled--moves on to other matters. But, not so fast, please. If we truly want to outlaw surrogacy, and our only concern is with whether or not this can be done, is not the more logical course to try to do so and see if it works? Or, at a minimum, do not those who make this contention bear some responsibility for

7. See *infra* notes 25-34 and accompanying text; and see generally EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 169-70 (1953).

8. See, e.g., Rust, *supra* note 3, at 54 (quoting Gary Skoloff as saying that whatever the outcome of the *Baby M* case, he is convinced that "[t]here's no stopping surrogate parenting. It's only a question of regulating and licensing . . .").

9. See, e.g., Galen, *supra* note 3, at 8 (reporting Gary Skoloff as saying "that if the contract [in the *Baby M* case] is invalidated, couples no longer will seek out surrogate mother arrangements . . ." because of the risks involved).

10. CARL VON CLAUSEWITZ, VOM KRIEGE [ON WAR] 90-94, 259, 596 (Michael Howard & Peter Paret, trans., 1976); see [MARSHALL] FERDINAND FOCH, DES PRINCIPES DE LA GUERRE [THE PRINCIPLES OF WAR] 286-87 (Hilaire Belloc, trans., 1920).

persuading us that what are otherwise normally effective sanctions for deterring conduct would prove ineffectual in this instance? But, in as much as they have not done so, let me make the case for the contrary proposition. For, I believe it can be established that surrogate parenting would be a comparatively easy phenomenon to stop, especially so when compared with other types of conduct that society seeks to prohibit or regulate through its laws.

II. HOW TO STOP SURROGATE MOTHER ARRANGEMENTS (IF WE REALLY WANT TO)

In this portion of the Paper, I will outline what methods might be used to deter surrogate mother arrangements and explain why I believe each step would be an effective and appropriate technique.

Begin by enforcing the existing baby bartering statutes. All states outlaw the sale of children by their parents.¹¹ Most states also have statutes on the books that prohibit the payment of money in consideration for the placement of a child in adoption.¹² These statutes, if not already applicable to surrogacy,¹³ could be easily expanded to include it. California Penal Code section 273 is typical of the baby brokering statutes. It provides:

(a) It is a misdemeanor for any person or agency to offer to pay money or anything of value, or to pay money or anything of value, to a parent for the placement for adoption, for the consent to an adoption, or for cooperation in the completion of an adoption of his or her child.

(b) This section does not make it unlawful to pay the maternity-connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, as long as the payment is not contingent upon placement of the child for adoption, consent

11. See William L. Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. 3001 (1985).

12. See Angela R. Holder, *Surrogate Motherhood: Babies for Fun and Profit*, 12 LAW, MED. & HEALTH CARE 115 (1984); John J. Mandler, Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L. J. 1283, 1290 (1985); Katz, *supra* note 5, at 8-9 n.34 (collecting statutes); Lori B. Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, A.B.A. J., Aug. 1984, at 50, 54-55 (collecting statutes).

13. For a discussion of the possible impediments to applying these statutes to surrogacy without modification, see Sharon L. Tiller, Note, *Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415, 422-27 (1987).

to the adoption, or cooperation in the completion of the adoption.¹⁴

Commercial surrogacy falls within the clear language of statutes such as this one; moreover, applying statutes such as this to surrogacy would be perfectly consistent with their central purpose: to prevent children from being treated as items of commerce.¹⁵ This step would have several effects. First, the criminal penalty would itself be a strong deterrent to the contracting couple and the surrogate mother.¹⁶ Now, although such statutes would not reach non-commercial surrogate mother arrangements, in point of fact these are quite rare.¹⁷ Ninety percent of the surrogate mothers say they would not be one unless compensated.¹⁸ By making it illegal to pay the surrogate, you have only the remaining ten percent who purportedly would do it for free, plus those who would be willing to enter into black market transactions. Of course the latter group would demand a higher fee since they are taking a greater risk, and this would be an additional economic disincentive to the couples who might be disposed to contract with them.

Second, recognizing commercial surrogacy as a crime would have the effect of making it much harder for willing surrogates and the couples who desire their services to find each other. Attorneys and newspapers would not be able to perform the function of providing a market. Indeed, it is important to note that

14. CAL. PENAL CODE § 273(a-b) (West 1992). State anti-slavery statutes may also conceivably have some application here. See Holder, *supra* note 12, at 117; see, e.g., CAL. PENAL CODE § 181 (West 1992):

Every person . . . who sells, or attempts to sell, any person to another, or receives money or anything of value, in consideration of placing any person in the custody, or under the power or control of another, or who buys, or attempts to buy, any person, or pays money, or delivers anything of value, to another, in consideration of having any person placed in his custody, or under his power or control, or who knowingly aids or assists in any manner any one thus offending, is punishable by imprisonment in the state prison for two, three or four years.

15. See *In re Baby M*, 537 A.2d 1227, 1240-42 (N.J. 1988); *Doe v. Kelley*, 307 N.W.2d 438 (Mich. App. 1981), *cert. denied*, 459 U.S. 1183 (1983).

16. In certain states, such as California, an additional step might be necessary to prevent the circumvention of these statutes as a practical matter. Because of a loophole in some adoption statutes, the parties to a step-parent adoption are excused from making the normal disclosure to the court concerning whether any money has passed hands between the parties. See, e.g., CAL. CIV. CODE § 221.50 (West 1992); see Andrews, *supra* note 12, at 52; Mandler, *supra* note 12, at 1290 n.53. It must be stressed that these statutes do not allow one parent to sell his custody rights in the child to the other parent; they merely dispense with the need to provide the court with a statement.

17. Surrogate practitioner Noel Keane has himself argued that to prohibit compensation from being paid to the surrogate mother would be the functional equivalent of prohibiting the practice. See Noel P. Keane, *Legal Problems of Surrogate Motherhood*, S. ILL. U. L.J. 147, 164 (1980).

18. See Philip J. Parker, *Motivations of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117-18 (Jan. 1983); Krimmel (1988), *supra* note 1, at 107-08 nn. 11-15 (collecting sources).

although--as the proponents of surrogacy love to point out--the do-it-yourself form of surrogacy probably has been around for a long time, surrogacy only became popular and accessible once attorneys started providing a place for surrogate mothers and adopting couples to meet and "cut a deal." Modern surrogate mother arrangements make extensive use of professionals: physicians, psychologists, and attorneys. This in turn makes commercial surrogacy a relatively easy matter to control. Few doctors or lawyers are going to be willing to risk their licenses to aid and abet a crime. With their participation largely precluded, we are left with only the most adamant of surrogate mothers and contracting couples who first have to find each other, and then resort to self insemination,¹⁹ all with the knowledge that either party could blackmail the other.

Given the above effects of applying the baby-bartering statutes to surrogate mother arrangements, there is not much question but that this sanction alone would largely suppress the practice. But our purpose here is not meant to be Draconian. In light of the objection by the proponents of surrogacy that the practice cannot be stopped, it is necessary to demonstrate rather firmly that they are wrong about this contention, but it is also important to indicate why a given sanction is appropriate. In this case our task is a relatively simple one: We simply do not want people selling babies, whether in the context of black market adoptions or in made-to-order surrogacy. If surrogate mother arrangements are a form of baby selling, then they should be treated as such.

Next, custody of any child born under a surrogate mother arrangement should be determined without regard to any contractual agreements, and solely on the basis of what is in the best interest of the child.²⁰ This may well be a decision to give custody to the biological father and his wife; to the surrogate mother and her husband, if married; or to decree some form of shared custody among them. The court could even decide that neither biological parent is fit and terminate the parental rights of both biological parents and place the child for adoption.²¹ The inability of the parties to determine the outcome of the

19. See, e.g., *C.M. v. C.C.*, 377 A.2d 821 (N.J. Super. 1977). For the controversial suggestion that self-insemination might constitute the unlicensed practice of medicine, see Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 796 (1970); Margaret D. Townsend, Note, *Surrogate Mother Agreements: Contemporary Legal Aspects of the Biblical Notion*, 16 U. RICH. L. REV. 467, 472-73 (1982).

20. See, e.g., *In re Baby M*, 537 A.2d 1227, 1246-50, 1256 (N.J. 1988); see also *Ford v. Ford*, 371 U.S. 187, 193 (1962)(*dicta*); see generally 15 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1744A (3d ed. 1972); RESTATEMENT (SECOND) ON CONTRACTS § 191 (1981).

21. A basis for terminating parental rights might possibly include the treating of the child as a commodity by entering into a surrogate mother arrangement. See Barbara Cohen, *Surrogate Mothers: Whose Baby Is It?* 10 AM. J.L. & MED. 243, 275, 280-81 (1984). Hopefully, a court

custody decision in advance would be one of the strongest disincentives to the practice of surrogate parenting because neither the surrogate mother nor the contracting couple could ever be assured that their expectations would be met. Again, the design and purpose of this step is not primarily to create a harsh deterrent to surrogacy, although it certainly will do that. Rather, the uncertainty that results from deciding the custody of the child exclusively on the basis of his own best interests, rather than on the basis of the contract, is a necessary side effect of making the child's welfare--instead of the parents' contractual autonomy--the center of our concerns.

Finally, regardless of what parties are granted custody of the child, both biological parents should remain financially responsible for the support of the child. This is in accordance with the well established principle that agreements between parents cannot be allowed to compromise the child's interest.²² We might also want to extend financial responsibility to the husband of the surrogate mother if he has consented to her insemination,²³ and to the wife of the biological father as complicitous. This would further discourage surrogate mother arrangements since it would be very possible for the contracting couple to end up without the baby, yet bear the financial responsibility for it. Again, although this sanction should provide a strong deterrent against entering into a surrogate mother arrangement, that is not our primary objective. The sanction is apt because the child born of a surrogate mother arrangement faces greater insecurity as a result of the confusion over parental responsibility that is engendered by the practice.²⁴ It only seems fitting that he should be allowed

would only do this in a very egregious case; for, the child's best interests should not be sacrificed merely for the sake of deterrence. See *In re Baby M*, 537 A.2d 1227, 1257 (N.J. 1988).

22. See, e.g., *Elkind v. Byck*, 68 Cal. 2d 453, 457 (1968); *In re Marriage of Ayo*, 190 Cal. App. 3d 442, 448-52 (1987); *Ackerman v. Super. Ct.*, 221 Cal. App. 2d 94, 97 (1963); see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-55 (1979).

23. See, e.g., CAL. CIV. CODE § 7005(a) (West 1992):

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

For a discussion of the possible impediments to applying statutes such as these to surrogacy without modification, see Cohen, *supra* note 21, at 264-66. See also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Syrkowski v. Appleyard*, 362 N.W.2d 211 (Mich. 1983)(case decided on narrow grounds).

24. See Krimmel (1983), *supra* note 1, at 36-37; THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY* 120 (1988)[hereinafter *New York State Task Force*]; Leon R. Kass, "Making Babies" Revisited, 54 PUB. INTEREST 32, 47 (1979); Leon R. Kass, *Making Babies--The New Biology and the Old Morality*, 26 PUB. INTEREST 18, 36, 49-51 (1972).

The most notorious illustration of this problem probably remains the Stiver-Malahoff case. Following the birth of a microcephalic baby to surrogate mother Judy Stiver, both she and Alexander Malahoff, the man who had engaged her services, attempted to disclaim responsibility for the child.

to hold accountable those who were responsible for his being born into this more precarious situation.

III. WHAT IF LEGAL SANCTIONS PROVE TO BE INEFFECTIVE AT SUPPRESSING COMMERCIAL SURROGACY?

For the sake of argument, let us assume that I am wrong in the conclusions I have made in the previous section of this paper. What if the sanctions I have just outlined turn out to be ineffective in completely suppressing commercial surrogacy? Further, what if the proscription of surrogacy in one state can be easily avoided by merely going to another state or foreign country that allows the practice? Would these be compelling reasons for a legislature to abstain from outlawing surrogacy?

It is not to be denied that the expected efficacy of a law is a legitimate concern when deciding whether to proscribe certain behavior, but the point cannot be pressed too far. For no law has ever yet succeeded in eliminating any crime. Murder, theft, and rape have been illegal, *and* severely punished, since the mind of man runneth not to the contrary; yet they still are with us. Beginning law students are often confronted on their first day of criminal law class with the following riddle: How do you eliminate all crime? Answer:

"For weeks the baby was tossed back and forth like a football—with no one having responsibility The state had to step in and become the guardian for the child." The matter was not finally resolved until it was shown that the father of the baby was actually Mrs. Stiver's husband. They apparently did not realize that they needed to abstain from intercourse during the period that Mrs. Stiver was being inseminated. See Andrews, *supra* note 12, at 56 (quoting Michigan legislator Richard Fitzpatrick).

Two other cases are equally appalling, but less well known. In 1986, a thirty-two year old woman who was acting as a surrogate mother for her sister and brother-in-law gave birth to a baby who tested positive for HIV. The surrogate mother was an intravenous drug user, a fact which was unknown to her family prior to the birth of the baby. The surrogate mother, her sister, and the baby's father all refused to care for the baby, and he has been shuttled between foster homes and state hospitals since the time of his birth. See Winston R. Frederick, *et al.*, Correspondence, *HIV Testing of Surrogate Mothers*, 317 NEW ENG. J. MED. 1351 (Nov. 19, 1987); Diane Burch, *Surrogacy Spawns a New Wave of Litigation*, LEGAL TIMES, Jan. 29, 1990, at 5, 6.

In April 1988, surrogate mother Patty Nowakowski gave birth to fraternal twins, a boy and a girl. The couple which had contracted for Mrs. Nowakowski's services as a surrogate mother refused to accept the baby boy, giving as a reason that they already had three male children and they did not want another. They were willing, however, to accept, and did take custody of, the baby girl. Mrs. Nowakowski sent the rejected baby boy to a foster home, but she later changed her mind and reclaimed him, deciding that she would raise him herself. About six weeks later Mrs. Nowakowski also reclaimed the baby girl by refusing to consent to her adoption by the contracting couple. See *Rejected Boy's Twin Also With Mother*, L.A. TIMES, May 29, 1988, at I-8.

repeal all the laws.²⁵ A truth buried in this somewhat cynical riddle is that the law's ability to limit and condition human behavior is limited. One does not need to pass laws against evils that people do not want to do, and those evils which have strong appeal for some can only be imperfectly deterred by legal prohibitions and punishments. The strong disincentive provided by legal sanctions does not eliminate a given crime; the most that can ever be hoped for is to make its occurrence less frequent.

Moreover, the criminal law serves other useful and important purposes apart from mere deterrence; namely, it is used to express society's moral condemnation of the proscribed behavior. I have no doubt that with regard to commercialized surrogate parenting the law can do the former (deter),²⁶ and should do the latter (express social opprobrium).

There is also a basic logical objection to the argument that there is no point in prohibiting surrogate parenting arrangements in a given jurisdiction because those seeking to avail themselves of that service will simply go elsewhere. If this type of argument were valid then we should also feel compelled to legalize prostitution, child pornography, snuff movies, and heroin. All of these are reputed to be quite freely available elsewhere, for example, in Amsterdam.²⁷ I am surprised anyone would be impressed by such a "But, Timmy's mother lets him do it" type of argument. A state legislature is not responsible for the practices of other states or nations, only for its own.²⁸

25. The answer presupposes a Positivist view of jurisprudence. See also WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, Act II, Sc. I, ll. 227-30 (G. Blakemore Evans, ed., Houghton Mifflin Co. 1974)

Escalus: How would you live, Pompey? by being a bawd? What do you think of the trade, Pompey? Is it a lawful trade?

Pompey: If the law would allow it, sir.

26. Comparatively speaking, because of the nature of the practice, surrogate parenting should be quite easy to effectively eliminate when contrasted with say, drunk driving. See *supra* notes 11-24 and accompanying text. See *infra* notes 29-34 and accompanying text.

27. See Frederick Painton, *The Netherlands: Tolerance Finally Finds Its Limits*, TIME, Aug. 31, 1987, at 29.

28. See New York State Task Force, *supra* note 24, at 126-27:

The regulatory approach has been justified and supported as the only way to protect the children born of surrogate parenting. The practice is seen as a trend that cannot be inhibited given the existence of the underlying technologies and the intense desire of infertile couples to have children, a desire that now fuels a growing black market in the sale of children. According to this view, regulation does not facilitate surrogacy, but merely accepts and guides its inevitable proliferation.

The Task Force found this justification for regulating and upholding the practice unpersuasive. The difficulty of discouraging a practice does not dictate social acceptance and assistance. Society has not legalized the purchase and sale of babies to establish a better marketplace for that

The proponents of surrogacy have occasionally called forth the specter of Prohibition in support of their position that to outlaw surrogacy would be futile.²⁹ But, what exactly were the lessons of Prohibition? Certainly not that the use of alcohol does not pose tremendous costs on society. The amount of money spent on alcohol recovery programs and the damage inflicted by drunk drivers alone would dispel such arguments without even getting into the finer points of the costs of lost productivity, and of alcohol related illnesses, accidents, and crimes.³⁰ Nor was it apparent that Prohibition was repealed because its costs outweighed its benefits, for I am aware of no formal studies that were done, or even attempted, on that score.³¹ No, the lesson of Prohibition was primarily that laws prohibiting popular evils are untenable to maintain as a political matter. Perhaps an analogy to Prohibition could be drawn with regard to some drug laws. But, does surrogacy fall within this same category? Hardly. With surrogacy you do not have, relatively speaking, a terribly large constituency: some infertile couples, some single men who want children but do not want to be burdened with a wife, and some women who consider surrogacy a dandy way to make money and feel good about themselves, or who simply like being pregnant.³² Contrary to the assertion that laws prohibiting surrogacy would, like Prohibition, be ineffective, the one thing legal history should have taught us is that surrogacy is precisely the type of situation in which society is most emphatically willing and able to enforce its laws. The smaller the constituency, and the less able we are to imagine ourselves wanting to do a certain behavior,³³ the more righteously indignant a state we can work

activity, despite the fact that both the children and intended parents might be better protected. The laws against baby selling embody fundamental societal values and doubtlessly minimize the practice even if they do not eliminate it.

Public policy on surrogate parenting should also reflect basic social and moral values about the interests of children, the role of the family, women and reproduction. A commitment by society to uphold the contracts removes the single greatest barrier to those considering the practice. In contrast, voiding the contracts, banning fees, and prohibiting brokering activity will drastically reduce the number of persons who seek a commercial surrogate arrangement. Given the potential risks to the children born of surrogacy, children are best served by policies designed to discourage the practice.

29. See, e.g., Hollinger, *supra* note 4, at 881.

30. See, e.g., *People v. Rocha*, 3 Cal. 3d 893, 896-97 (1971); *People v. Hood*, 1 Cal. 3d 444, 458 (1969).

31. Besides, I must ask my utilitarian friends, when performing the "felicific calculus," what value does one allocate to a good buzz anyway?

32. See Krimmel (1988), *supra* note 1, at 98-99 (collecting sources).

33. It is interesting to note that a very typical reaction to surrogacy is incredulity as to why any woman would be willing to be a surrogate mother. This view is often expressed even by the infertile couple who are to be the beneficiary of the arrangement. See, e.g., David Gelman & Daniel Shapiro, *Infertility: Babies by Contract*, NEWSWEEK, Nov. 4, 1985, at 74, 75, 77; Rita

ourselves into in prohibiting others from doing it.³⁴ Unlike users of alcohol, surrogacy is unlikely ever to have a large constituency. Therefore, rather than posing a difficult case, it seems like an ideal example of the type of behavior that society should be able to effectively suppress. In fact, it is hard to imagine what could be a better example than surrogacy.

IV. IS THERE A CONSTITUTIONAL RIGHT TO PROCREATE BY NON-NATURAL MEANS?

Even if commercial surrogacy could be largely suppressed as a practical matter, would it be constitutional for a state to try to do so? More particularly, does there exist a fundamental right to procreate by non-natural means, which would be offended by a state either enacting an outright ban on the practice of commercial surrogacy, or using more limited means at its disposal to discourage the practice? The simple and direct answer is no. The Supreme Court of the United States has never so held. This much is admitted by even the most ardent advocates of surrogacy.³⁵ The reason that this issue comes up at all in the

Robinson, *Is California Prepared for Surrogate Parenting?* SAN GABRIEL VALLEY TRIB., Nov. 12, 1981, at A21.

34. The interesting history of California Penal Code § 598(b) is illustrative of this phenomenon. Before its passage in 1989 it was not illegal to capture stray cats and dogs and eat them. Presumably no one wanted to, or at least if they did, they did so quietly and kept it to themselves. Of course, cruelty to animals has been forbidden for a long time, but in this society we have rarely considered the mere act of killing for food to be cruel, although anyone who has ever witnessed a game animal's dying moments or visited a slaughterhouse might find himself tempted to rethink this conclusion. Nevertheless, all of a sudden when there was an influx of refugees under whose cultural rubrics dogs were a perfectly legitimate item of food, the dominant culture was horrified at the prospect of their stray pets becoming mu shu puppy. The reaction was purely a visceral, and not an intellectual, one. And, one might add, a rather culturally arrogant reaction at that. No discussion was entertained about why cows and lambs are legally edible but dogs are not. That this statute was not just about protecting someone's lost pet is evident from the scope of its prohibitions; for, by failing to exempt any but the usual animals which are raised for food, it apparently outlaws the commercial raising of dogs or cats for food as well (How much per pound is that doggie in the window?). *Quaere* for the California Legislature: Are pot-bellied pigs legally edible? *See, e.g.*, Kathleen A. Hughes, *Just How Big Can Miniature Pigs Get?* WALL ST. J., July 21, 1992, at 1.

And *see* HERODOTUS, BK. II, 38, *quoted in* GEORGE C. CHRISTIE, JURISPRUDENCE 172 (1973): Darius called into his presence certain Greeks of his empire and asked them how much they would take to eat their parents then they had died—a custom of certain inhabitants of India. They replied that they could not be induced to do so at any price. He then asked some Indians what they would take to burn their parents upon death, as the Greeks did, but not to eat them afterwards. They exclaimed aloud and bade him forbear such language.

35. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 420 (1983) [hereinafter Robertson (VLR-1983)]:

Although recognition of a right to procreate should extend to any means or technique of reproduction, the right has not yet been extended in this manner, and it is not inevitable that it will be. Defining and articulating the scope of the right to procreate

debate over surrogate parenting is that several advocates of surrogacy, most notably Professor John Robertson of the University of Texas, have argued that a general right to procreate by non-natural means can, and should, be found within, or inferred from, certain of the Supreme Court's past holdings on marriage,³⁶ marital privacy,³⁷ parental custody,³⁸ child rearing,³⁹ abortion,⁴⁰ sterilization of criminals,⁴¹ and access to contraceptives.⁴² Professor Robertson's arguments in support of this thesis are primarily set forth in three law review articles.⁴³ He is in favor of recognizing a broad based fundamental right to procreate, which he defines expansively to include control over all

will set the Supreme Court adrift in the largely uncharted waters of substantive due process. In light of the differences of opinion that surface when the Court embarks on that voyage . . . the passage here will likely be stormy and difficult. *Id.*

36. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

37. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

38. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Little v. Streater*, 452 U.S. 1 (1981); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Smith v. Foster Families*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972).

Lehr v. Robertson, 463 U.S. 248 (1983), was decided after the publication of Professor Robertson's 1983 article in the *Virginia Law Review*. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), was decided after the publication of all three of the articles of Professor Robertson which are discussed here.

39. *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

40. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

The Court's two most significant recent opinions on abortion: *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); and *Planned Parenthood v. Casey* 112 S.Ct. 2791 (1992); were decided after the publication of all three of the articles of Professor Robertson that are made the focus of our analysis.

41. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

42. *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

43. Robertson (VLR-1983), *supra* note 35; John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986) (hereinafter cited as Robertson (1986)); John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285 (1988) (hereinafter cited as Robertson (JJ-1988)); and see John A. Robertson, *Resolving Disputes Over Frozen Embryos*, 19 HASTINGS CTR. REP., Nov.-Dec. 1989, at 7 (hereinafter cited as Robertson (1989)); John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Non-Coital Reproduction*, 16 LAW, MED. & HEALTH CARE 18 (1988) (hereinafter cited as Robertson (LM&HC-1988)); John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 CASE W. RES. L. REV. 1 (1988) (hereinafter cited as Robertson (CWR-1988)); John A. Robertson, *Surrogate Mothers: Not So Novel After All*, 13 HASTINGS CTR. REP., Oct. 1983, at 28 (hereinafter cited as Robertson (HCR-1983)).

aspects of the conception, gestation, and rearing of children.⁴⁴ He believes that this right to procreate should encompass within it the right to procreate by non-natural (collaborative) means, and he would not limit such a right to only infertile married couples,⁴⁵ but argues that fertile couples who wish to use collaborative means of reproduction in order to choose the genetic traits or gender of their child,⁴⁶ as well as single persons,⁴⁷ should have the right to do this.

By raising this alleged right to procreate by non-natural means to the level of a fundamental constitutional right, Professor Robertson would only permit it to be infringed if the state could demonstrate a compelling interest for the limitation that could not be accomplished by less intrusive alternatives.⁴⁸ In general, he is not convinced that such a compelling state interest could be shown, and he argues either that as a matter of fact the objections put forth in opposition to surrogate mother arrangements and other forms of collaborative reproduction do not pose a serious risk of any substantial harm, or as a legal matter that the alleged harms are not of a character that they could constitute compelling state interests.⁴⁹ Most particularly, he does not believe that what he terms "merely symbolic harms"—a category in which he would include, among others, concerns about such matters as the commercialization of reproduction,⁵⁰ "family image,"⁵¹ and female roles⁵²—can constitute a compelling state interest.⁵³

In responding to Professor Robertson's arguments I will, for the most part, confine myself to discussing only the most difficult of the cases he poses: that of the infertile married couple who are only able to reproduce by collaborative means. For, even in that context, I do not believe his argument—that there either does or should exist a fundamental right to procreate by non-natural means—to be a tenable one. I will leave to another day most of my even

44. Robertson (VLR-1983), *supra* note 35: "Full procreative freedom would include both the freedom *not* to reproduce and the freedom to reproduce when, with whom, and by what means one chooses." *Id.* at 406 (emphasis in original). "Claims of procreative freedom logically extend to every aspect of reproduction: conception, gestation and labor, and childrearing." *Id.* at 408. "Procreative freedom includes the right to separate the genetic, gestational, or social components of reproduction and to recombine them in collaboration with others." *Id.* at 410.

45. Robertson (VLR-1983), *supra* note 35, at 428-29; Robertson (1986), *supra* note 43, at 960-62.

46. Robertson (VLR-1983), *supra* note 35, at 429-32.

47. Robertson (1986), *supra* note 43, at 962-63.

48. Robertson (JJ-1988), *supra* note 43, at 290-92.

49. Robertson (VLR-1983), *supra* note 35, at 433-36; Robertson (1986), *supra* note 43, at 965-66; Robertson (JJ-1988), *supra* note 43, at 293.

50. Robertson (JJ-1988), *supra* note 43, at 298.

51. Robertson (VLR-1983), *supra* note 35, at 435-36.

52. Robertson (1986), *supra* note 43, at 966.

53. Robertson (1986), *supra* note 43, at 966-67; Robertson (JJ-1988), *supra* note 43, at 293.

stronger objections to his conclusions that such a right should be extended to either fertile couples or single persons, and I will not concern myself with my disagreement with him on those points at this time.

At this juncture I want to examine Professor Robertson's argument in greater detail, taking the points I have outlined above one at a time, and proposing my answer to each.

A. *Can a Fundamental Right to Procreate Be Inferred from the Supreme Court's Past Holdings?*

Professor Robertson argues thus:

Although the Supreme Court has rarely considered the legality of a direct limitation on the right to procreate, its opinions have for many years contained statements suggesting that the Constitution protects a right to procreate. Some commentators have suggested that the Court's broad statements support the proposition that any actions related to obtaining and raising children are constitutionally protected. Yet a closer look reveals that except for *Skinner v. Oklahoma*, which examines involuntary sterilization in an equal protection context, none of the Court's cases asserting a right to procreate directly address restrictions on reproduction or questions of genetic transfer and gestation. Instead, they assume the children's existence and assert the parents' right to autonomy in rearing them. When the opinions mention procreation, they usually presuppose procreation within a marriage or a traditional family and assume that the conception and bearing of children will occur in a natural way.

Despite the limited nature of the Court's inquiry, one can still conclude that the principles and doctrines espoused in two kinds of cases necessarily protect some measure of autonomy in bringing children into the world. One kind is the case involving contraception or abortion, in which the Court recognizes the rights of all persons, married and single, adult and minor, to avoid conceiving a child or to avoid bearing a child already conceived. The right *not* to procreate, at least as it involves activities that take place before the fetus reaches the stage of viability, is well established.

This well-established right implies the freedom not to exercise it and, hence, the freedom to procreate.⁵⁴

54. Robertson (VLR-1983), *supra* note 35, at 414-16 (emphasis in original).

I have several difficulties with the argument that Professor Robertson makes in the concluding part of this quotation, but before proceeding with my response to it, let me first sharpen the emphasis on several of the points he makes in the first paragraph. The case dealing with sterilization of criminals, *Skinner v. Oklahoma*,⁵⁵ concerns the right of an individual to preserve procreative capacity. That one convicted of stealing chickens should have a fundamental right in preserving his capacity to reproduce does not equate with a right to procreate by non-coital means,⁵⁶ or, even for that matter, with a right to fornicate or to donate sperm. Were it otherwise, would not the state need to make greater accommodation for conjugal visits for its prisoners?⁵⁷

Professor Robertson is correct in saying that the Court has spoken in broad language of a "right to procreate"⁵⁸ and a "right to decide whether to bear or beget a child"⁵⁹ as being fundamental. But one must view that language in context. As Professor Robertson himself points out in the quotation above, for the most part the cases assume that reproduction is taking place within the marital union by coital means. The Court in *Meyer* speaks of the "right of the individual . . . to marry, establish a home and bring up children . . ." ⁶⁰ (interesting order, that). Justice Douglas in *Skinner* links procreation with marriage.⁶¹ And Justice Marshall in *Zablocki* explains:

[I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations to legally take place.¹¹

11. Wisconsin punishes fornication as a criminal offense.⁶²

55. 316 U.S. 535 (1942).

56. See George P. Smith II & Roberto Iraola, *Sexuality, Privacy and the New Biology*, 67 MARQ. L. REV. 263, 281 (1984).

57. See, e.g., Michael Checchio, *The Man in the Sperm Suit*, CAL. LAW., April 1992, at 20; Paul Feldman, *Death Row Inmates File Suit to Father Children*, L.A. TIMES, Dec. 31, 1991, at A3 (reporting on *Anderson v. State* (C-914501), a case filed in the Federal District Court for Northern California, in which fourteen death row inmates at San Quentin prison are suing for the right to impregnate their wives and girlfriends through conjugal visits and/or to freeze their sperm for future insemination).

58. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and see *Stanley v. Illinois*, 405 U.S. 645 (1972) ("The rights to conceive and to raise one's children . . ." *Id.* at 651).

59. *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

60. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

61. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

62. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

As revealed in the passage just quoted, the other context within which we must reconcile the Court's broad language on the right to procreate is the Court's continuing recognition that a state may outlaw fornication and adultery,⁶³ if it wishes.⁶⁴ Because fornication and adultery complete the sphere of the traditional methods for procreating outside of marriage, if a state can constitutionally outlaw these, then it seems difficult to resist the conclusion that it is permissible for a state to limit procreation to that which takes place within the marital union.⁶⁵ Of course, in this technological era, procreation and sexual union are not necessarily connected. Conception can occur by artificial means without coitus. But would anyone seriously want to contend that artificial means of procreation should be accorded greater protection than sexual union?

63. See *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 486, 498-99 (1965) (Goldberg J., concurring); see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973).

Any doubts concerning whether this was still an open question that might have been raised by *Carey v. Population Services Int'l*, 431 U.S. 678 (1977)—compare the majority opinion at 688 n.5 and the plurality opinion at 694 n.17 with Justice White's concurring opinion at 702 and Justice Powell's concurring opinion at 703, 705, and Justice Steven's concurring opinion at 713 and Justice Rehnquist's dissenting opinion at 718 n. 2—concerning whether the Court's summary affirmance of *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), was "definitive," appears to have been largely put to rest by *Bowers v. Hardwick*, 478 U.S. 186, 191, 195-96 (1986). For a more detailed discussion of this issue, see Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

64. Although, as a prudential matter, I doubt the wisdom of fornication statutes (see also note 2, *supra*), they have been repeatedly upheld against constitutional challenge. See Robert A. Brazener, Annotation, *Validity of Statute Making Adultery and Fornication Criminal Offense*, 41 A.L.R.3d 1338 (1972); but see *State v. Saunders*, 381 A.2d 333 (N.J. 1977). See also WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, Act II, Sc. I, ll. 229-43 (G. Blakemore Evans, ed., Houghton Mifflin Co. 1974).

Escalus: But the law will not allow [fornication], Pompey

Pompey: Does your worship mean to geld and spay all the youth of the city?

Escalus: No, Pompey.

Pompey: Truly, sir, in my poor opinion, they will to't then If you head and hang all that offend that way but for ten year together, you'll be glad to give out a commission for more heads: if this law hold in Vienna ten year, I'll rent the fairest house in it after three-pence a bay: if you live to see this come to pass, say Pompey told you so.

65. Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 522 (1961), makes a very strong statement of this principle:

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Id. at 546, (Harlan J., dissenting).

The language of the Court in *Eisenstadt* and *Carey* is indeed broad:

If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁶⁶

The decision whether or not to beget or bear a child is at the very heart of . . . constitutionally protected choices [T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.⁶⁷

But, taken in the context of the Court's other holdings on marriage⁶⁸ and sexual behavior,⁶⁹ the broad language of *Eisenstadt* and *Carey* is revealed as *dicta* in the truest sense. *Eisenstadt* and *Carey* were about *not* procreating. In deciding that all individuals married or single have a right to have access to contraceptives, the Court did not need to consider the outer perimeters of such right *to* procreate as does exist.

In sum, we can harmonize the above propositions in two rules: 1) individuals, married or single, have a right not to procreate,⁷⁰ and 2) such right to procreate as has been recognized by the Court exists within the marital union, marriage and family being defined here in a traditional manner.⁷¹

That said, I will now proceed to my objections to Professor Robertson's argument that we can infer a right to procreate from the Court's past holdings on contraception and abortion. It must be remembered that when Professor Robertson speaks about procreation he is including in that phrase not only a right to conceive, but also rights to design, engineer, gestate and rear children.⁷² Such a right just cannot be sustained based on any fair reading of the abortion and contraception cases. The rights established by those cases are far more limited ones. Narrowly speaking, the abortion cases establish the right of

66. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (plurality opinion) (emphasis in original).

67. *Carey v. Population Services Int'l*, 431 U.S. 678, 685, 687 (1977).

68. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

69. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

70. *But see* note 76, *infra*.

71. *See Moore v. City of East Cleveland*, 431 U.S. 494, 503-05 (1977); *see also* Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion); *see generally* Hafén, *supra* note 63.

72. *See* note 44, *supra*.

a woman to abort a non-viable fetus⁷³ (with some procedural restrictions).⁷⁴ And, the contraception cases establish the right to use approved methods⁷⁵ of birth control. The abortion and contraception cases can be taken together, generalized, and read as establishing a right *not to procreate*,⁷⁶ viewed in the

73. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992); *Planned Parenthood v. Danforth*, 428 U.S. 52, 63-65 (1976); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973). Concerning viability testing, compare *Webster v. Reproductive Health Services*, 492 U.S. 490, 513-21 (1989) (plurality opinion) with *Colautti v. Franklin*, 439 U.S. 379 (1979).

74. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2821-26 (1992) (joint opinion) (holding that informed consent and twenty-four hour waiting period requirements are not an undue burden); *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (state may require use of licensed facilities for performance of second trimester abortions); see *Roe v. Wade*, 410 U.S. 113, 150, 153-55 (1973).

75. The right to use contraceptives must also be viewed in the context of extensive government regulation of the means of contraception (see *Carey v. Population Services Int'l*, 431 U.S. 678, 685-86 (1977)) as is amply demonstrated by: 1) the recent controversy over the government's refusal to license RU 486—the so-called french morning after pill—(see *Class-Action Suit Challenges Import Ban on Abortion Drug*, L.A. TIMES, July 8, 1992, at A4; David G. Savage, *Supreme Court Blocks Abortion Pill's Return*, L.A. TIMES, July 18, 1992, at A1); and 2) the long battle with the FDA over the licensing of Depo-Provera (see Melinda Beck & Mary Hager, *A New Birth-Control Option?* NEWSWEEK, June 29, 1992, at 70).

76. Even the ability to extract from the abortion and contraception cases and generalize this limited right not to procreate is not altogether unproblematical. For, properly speaking, only women have a right to control their fecundity by means of abortion. Men cannot protect their interest in preventing the birth of unwanted children by requiring their sexual partners to have abortions, nor presumably even to require them to use a relatively less invasive means of preventing birth such as ingesting a morning after pill.

Similarly, the right to use contraceptives is the right to use approved means to control one's capacity for reproduction, and not strictly speaking a right not to reproduce. In other words, results are not being guaranteed, only the ability to make efforts. Contraception, after all, can fail. The distinction, although fine, is important. I have the right to try not to conceive, but not necessarily the right to prevent the birth of an unwanted child. A right to use contraceptives without a right to abort cannot properly be said to be a right not to procreate, at least not as Professor Robertson uses that term. Yet, this was precisely the state of affairs for women after *Griswold* (1965) and before *Roe* (1973), and still is the state of affairs for men, who may use contraception but cannot force their sexual partners to abort an unwanted child, such as one produced in spite of precautions taken. Now it may be said in response that the reason that men cannot require women to have an abortion or to use a morning after pill is not because they do not have a right not to procreate, but because of the invasion of the woman's interest in her bodily integrity that the exercise of that right would entail. In other words, if one posits this as a clash between two fundamental rights, one of them obviously must give way. Granted, the conflict can be resolved in this manner, but if that premise is indeed the only reason why a male's posited right not to procreate is being overridden, then we would expect his interest to be vindicated in a case where there was no danger of invading the bodily integrity of the female participant in procreation. Exactly such a situation can arise—and, indeed, already has arisen—from the use of *in vitro* fertilization (IVF). Suppose, for instance, that a couple decides to have a child by IVF, but that after the woman's ova have been fertilized by the man's sperm with the design of creating a child by those means, the man changes his mind about wanting a child, and does so before the embryos have been implanted in the woman. Would the postulated right not to procreate allow either participant to mandate the destruction of the embryos?

Interestingly enough, when confronted with facts very similar to the ones in the above

limited sense as a right to prevent the birth of a non-viable unwanted offspring. But, contrary to what Professor Robertson argues, the recognition of a right *not to procreate* would not necessarily entail the existence of a right *to procreate*.⁷⁷ A right not to do something does not logically, or necessarily, imply its converse. The example Professor Robertson uses is based on a trick of language. When he argues that the contraception cases entail both the right to use or not to use it, he is correct, but not because the negative infers the positive, but because he misstates the right. The right conferred by the contraception cases is the right to make a choice. By definition, such a right entails both the power to use or not to use it. But not all rights are of this kind. The right to liberty does not allow a person to sell himself into slavery; one's right to life does not allow one to commit suicide; and a right of marital privacy does not allow a married couple to copulate in the town square. The right to choose whether or not to have an abortion certainly allows one the right not to have an abortion, and the same can be said with respect to one's right to choose whether or not to use contraceptives. But the same cannot be said for the generalized right not to procreate that Professor Robertson attempts to draw from those precedents. Otherwise, by Professor Robertson's logic, if a minor

hypothetical, the Tennessee Supreme Court in *Davis v. Davis*, 1992 Tenn. LEXIS 400 (June 1, 1992), stops short of embracing this position. (See *Davis* at *35). The court in *Davis* opines that with regard to IVF at least, the rights of procreational autonomy are waivable and could be governed by an advance agreement of the parties (see *id.* at *31, *56). The Tennessee Supreme Court is clearly troubled, though, by the analogous situation of enforcing the agreement of a woman who contracts with her husband not to abort their child. Its attempt to distinguish between the two situations, however, leaves much to be desired. See *id.* at *32 n.18; and compare Robertson (1986), *supra* note 43, at 1015 n.254 (suggesting a surrogate mother might be able to waive her right to abort) with Robertson (1989), *supra* note 43, at 10-12 (distinguishing advance agreements concerning IVF from those concerning abortion based on the differing degree of bodily intrusion entailed). Furthermore, when faced with an absolute conflict between the mother's right to procreate and the father's right not to procreate, the court's opinion gets vague. The court indicates that in the absence of a prior agreement it would hold in favor of the father's right not to procreate in those instances where the mother had other procreational options open to her. But when it was postulated that the mother would not be able to procreate if this opportunity were denied her, the *Davis* court resorted to this rather fuzzy circumlocution: "If no other reasonable alternatives [for the mother to procreate] exist, then the argument in favor of using (i.e. implanting) the pre-embryos to achieve pregnancy should be considered." *Davis* at *56. Precisely *how* we should "consider" it, the court leaves to our imagination.

To what extent and how broadly the United States Supreme Court would be willing to generalize from the abortion and contraception cases a right not to procreate, how it would view the dimensions and contours of such a right, and how it would resolve a conflict between it and another person's interest in procreating if confronted with a case like *Davis*, remain open questions.

See also *Del Zio v. Presbyterian Hospital*, 74 Civ. 3588 (S.D.N.Y. 1978) (memorandum decision) (decided on other grounds) reprinted in MICHAEL H. SHAPIRO & ROY G. SPECE JR., *BIOETHICS AND LAW* 522 (1981).

77. See Shari O'Brien, *The Itinerant Embryo and the Neo-Nativity Scene: Bifurcating Biological Maternity*, 1987 UTAH L. REV. 1, 17-20 (1987).

female has both the right to use contraceptives⁷⁸ and to have an abortion,⁷⁹ she would also have to be said to have a fundamental right to procreate, or even, I suppose, to be a surrogate mother.⁸⁰ That would be a proposition I doubt that Professor Robertson would be willing to embrace.⁸¹

The other argument that Professor Robertson uses to derive a general broad based right to procreate fails no better. From two lines of Supreme Court precedents he generalizes a right of parents to rear their children. He then infers that if one has a right to rear someone, one must necessarily have the right to bring into existence someone to rear. In his words:

One can also infer a right to bring children into the world from a second kind of case in which courts ask who has the right to rear a child and what the scope of that right should be. Cases involving assignment of rearing rights arise when the child is illegitimate, when it has been placed in foster care, or when its parents' rights are being terminated.⁸² Cases concerning the scope of rearing rights arise when the right of the parties to rear a child is clearly established, but the government attempts to prevent the exercise of parental autonomy that is arguably not in the child's best interest.⁸³

The right to rear cannot, at least in the case of married persons, be easily divorced from the acts and decisions leading to the existence of the person to be reared. Rearing is a protected right in part because it is a natural or inherent part of the reproductive process. Some measure of freedom in putting oneself into a position to rear must be protected if rearing is to occur. The inference is close enough to conclude that the Court has recognized a right of married persons

78. See *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (plurality opinion).

79. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (joint opinion); *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976). Concerning parental notification, in addition to the above, see *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *H.L. v. Matheson*, 450 U.S. 398 (1981).

80. See Hollinger, *supra* note 4, at 878 n.57.

81. Apparently Professor Robertson has withdrawn somewhat from the position he took in his 1983 article in the *Virginia Law Review*. It now appears that he concedes this point. See Robertson (1986), *supra* note 43, at 963.

82. Robertson (VLR-1983), *supra* note 35, at 416-17 n.33, citing *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Little v. Streater*, 452 U.S. 1 (1981); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Smith v. Foster Families*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972).

83. Robertson (VLR-1983), *supra* note 35, at 417 n.34, citing *Bellotti v. Baird*, 443 U.S. 622 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

to conceive and bear for the purpose of rearing.⁸⁴

First, it is perhaps a little shocking to imply that it is reproduction that gives meaning to child rearing; I would have thought it the other way around. Be that as it may, I largely do not dispute the ultimate conclusion that married couples have a fundamental right in reproduction, but I would find a much more limited right than would Professor Robertson, who seeks to extend its scope to include collaborative means of reproduction. Second, and directly to the point, I do not believe that the cases he cites support such an extension.

The child custody cases have made it clear that it is the social relationship that a child develops with his parent--and not simply biology--that gives rise to constitutional protection.⁸⁵ In the Court's view, a biological relationship entitles a parent to a protected window of opportunity during which he may form a social relationship with his child.⁸⁶ But, it is the formation in fact of the latter that causes the biological parent's interest in his child to ripen into a constitutionally protected right of custody. By placing relatively little weight on the fact of the biological relationship by which the child was brought into being, and primary emphasis on the social relationship which develops only after the child's birth, the Court seems to cut the legs out from under Professor Robertson's reasoning.⁸⁷ *Lehr v. Robertson* makes explicit what was implicit in its prior holdings when the Court opines:

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. . . . The difference between the developed parent-child relationship that was implicated in Stanley and Caban, and the potential relationship involved in Quilloin and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children" But the mere existence of a biological link does not merit equivalent constitutional protection The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with

84. Robertson (VLR-1983), *supra* note 35, at 416-17.

85. See Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313 (1984).

86. *Lehr v. Robertson*, 463 U.S. 248, 262-63 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 128-29 (1989) (plurality opinion).

87. See Hollinger, *supra* note 4, at 878-80.

his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.⁸⁸

If Professor Robertson hopes to find a right to procreate by non-natural means he will have to seek it elsewhere, because it certainly cannot be found in this line of cases.⁸⁹

The other line of cases that Professor Robertson cites,⁹⁰ those concerning the extent of a parent's autonomy in making child rearing decisions, does not support his proposition that there is a fundamental right to procreate by non-natural means, either. These cases stand for no more than the right to rear such children as one has. They grant parents considerable autonomy in the rearing of their children regardless of the means by which they acquired them, but there

88. *Lehr v. Robertson*, 463 U.S. 248, 260-62 (1983) (quoting Justice Stewart's dissenting opinion in *Caban v. Mohammed*, 441 U.S. 380 (1979) (emphasis added)).

89. The Court's most recent decision on the question of a biological father's custody rights, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), is even more restrictive in conferring constitutional protection. A plurality of the Court held:

Michael reads the landmark case of *Stanley v. Illinois* . . . and the subsequent cases of *Quilloin v. Walcott*, *Caban v. Mohammed*, and *Lehr v. Robertson*, as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael [the father] and Victoria [the child] has been treated as a protected family unit under the historic practices of our society

Id. at 123-24 (citations and footnotes omitted). Justice Brennan's dissenting opinion in *Michael H.*, which garnered three votes, rejects this language, but adopts principles equally incompatible with Professor Robertson's thesis:

[T]hese cases (*Stanley*, *Quillion*, *Caban*, and *Lehr*) have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause." . . . This commitment is why Mr. Stanley and Mr. Caban won; why Mr. Quillion and Mr. Lehr lost; and why Michael H. should prevail today.

Id. at 142-43, (Brennan J., dissenting) (footnotes omitted). Of course because *Michael H.* was decided after the publication of Professor Robertson's articles, one cannot fault him for anything more serious than lacking a gift of prophesy.

90. See *supra* note 83.

is no reason to believe that they extend any further than that. They certainly do not support the proposition that one has a fundamental right to use collaborative means of reproduction to manufacture a child according to one's desired specifications.

The more fundamental problem with Professor Robertson's argument that one can infer a right to procreate from a right to rear is that it is based on a faulty premise. His argument assumes that the two rights are correlative. In fact the two are quite different types of rights and not necessarily related at all. This can best be demonstrated by illustrating the absurd consequences which would follow from Professor Robertson's premise were it to be true. For example, while the father of an illegitimate child may have, under certain circumstances, a right to rear his child,⁹¹ it could not be said that, therefore, he has a fundamental right to have an illegitimate child. A foster parent may also have a fundamental right to rear the child placed in his custody,⁹² but it cannot be said that a person has a fundamental right to adopt a child or to become a foster parent. Even an orphanage, perhaps, has a right to rear the children placed in its custody,⁹³ yet if it did, would it follow that it had a right to manufacture orphans (perhaps by collaborative means)⁹⁴ to provide it with the wherewithal to fulfill this right?

A married couple certainly may have some right to procreate, but if so, it is an independent right, and one that is in no way merely dependent upon, or derivative from some other right, such as the rights to maintain custody of and to rear such children as one has. Furthermore, in order to determine the proper contours and dimensions of such marital right to reproduce as does exist, one must inspect that right directly; it cannot be simply inferred from some other right as Professor Robertson has attempted to do. Determining the proper scope of the marital right to reproduce will be one of our considerations in the next Section of this Article.

B. Do Married Couples Have a Fundamental Right to Procreate by Non-Natural Means?

The prior discussion dealt with the question of whether persons, *qua*

91. See *Stanley v. Illinois*, 405 U.S. 645 (1972); see also *Caban v. Mohammed*, 441 U.S. 380 (1978) (equal protection).

92. Cf. *Smith v. Foster Families*, 431 U.S. 816 (1977) (decided on narrower grounds, *Id.* at 847).

93. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (case decided on parents' rights).

94. See also Robertson (1986), *supra* note 43, at 995-97 (proposing posthumous conception); Krimmel (1988), *supra* note 1, at 111 n.54 (responding to Robertson).

individuals, have a fundamental right to procreate. The purpose of this Section of the Paper is to inspect Professor Robertson's narrower argument that married couples have a fundamental right to procreate by non-natural means.

Professor Robertson argues:

The starting point of analysis is the recognition that married persons . . . have a right to reproduce by sexual intercourse. Although laws regulating fornication, cohabitation, and adultery have limited the freedom of unmarried persons to reproduce, laws limiting coital reproduction by a married couple have been notably absent. As a result, there are no cases that directly involve a married couple's right to coital reproduction.

In dicta, however, the Supreme Court on numerous occasions has recognized a married couple's right to procreate in language broad enough to encompass coital, and most noncoital, forms of reproduction⁹⁵

The Court's statements have not distinguished carefully between conceiving and rearing a child, analyzed the interests behind this protection, nor taken account of new reproductive technologies. Moreover, these statements arise in a context where government control over entrance to, and exit from, marriage is not in question, and where public policy may mandate government interference with the reproduction of mentally incompetent persons. Yet it seems indisputable that even a conservative Supreme Court would find that married couples have a fundamental constitutional right to reproduce by coitus.

One need only imagine the result if a state passed a law that limited a married couple's freedom to reproduce by sexual intercourse. Involuntary sterilization, mandatory contraception and abortion laws, laws limiting the number of children, or other laws restricting coital reproduction doubtlessly would be subjected to the same strict scrutiny that laws restricting abortion and contraception now receive. Such laws would be struck down unless some compelling ground for such a drastic restriction of marital freedom could be shown.

If the Supreme Court would recognize a married couple's right

95. In the portion omitted, Professor Robertson cites, and quotes from, the Court's holdings in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and *Meyer v. Nebraska*, 262 U.S. 390 (1923). Robertson (1986), *supra* note 43, at 958-59.

to coital reproduction, it should recognize a couple's right to reproduce noncoitally as well. The couple's interest in reproducing is the same, no matter how conception occurs, for the values and interests underlying coital reproduction are equally present. . . .

Unpacking the meaning of procreation by sexual intercourse, as . . . noncoital conception require[s] us to do, we see that the reasons and values that support a right to reproduce coitally apply equally to noncoital activities involving external conception and collaborators.⁹⁶

Now let me say immediately that I do not contest that married couples have a fundamental right to reproduce coitally. Nor am I disposed to object to Professor Robertson's conclusion that the Supreme Court would explicitly recognize a married couple's right to procreate by coital means as a fundamental right if that right ever were to be seriously questioned or challenged. Where I take issue with him is his conclusion that this right in any way extends to noncoital procreation. To the contrary, I would argue that the Court's holdings in the area of marriage and marital privacy are largely hostile to any inference that the right to procreate extends to, or encompasses, using non-coital or collaborative means of reproduction.

The principle of marital privacy⁹⁷ certainly does not support such an extension. As has been most cogently argued by Shari O'Brien:

[W]hen the initiation, continuation, and consummation of the pregnancy necessitate the acute involvement of third parties, the right of privacy acquires a bloated, oddly communal silhouette.

As previously construed and applied, the constitutional right of procreative privacy has guaranteed, on a rudimentary level, the right of *self-government* in forming decisions on intimate matters. For this reason the right of privacy is perhaps inapposite to shared pregnancies. Arrangements like SET [surrogate embryo transfer] and surrogate gestation contemplate one person's or couple's commissioning and supervising of another's impregnation and pregnancy. Arguably, medical procedures enlisting the procreative powers of third parties represents the antithesis of reproductive privacy. At least in the colloquial sense of the word, procreative "privacy" wanes as the individual or couple moves away from the intimacy of a bedroom into the concourse of a clinic.⁹⁸

96. Robertson (1986), *supra* note 43, at 958-61.

97. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

98. O'Brien, *supra* note 77, at 20 (emphasis in original).

Nor does the right to marry⁹⁹ harbor a fundamental right to reproduce non-coitally. Regrettably, Professor Robertson's argument sidesteps the implications for his thesis, which are raised by the extensive powers that a state is permitted to exercise concerning marriage. In the long passage quoted above, he acknowledges that the fundamental right to marry exists in the context of the state's power to control the entry into and exit from marriage, and to place limitations on marriage based on age, gender, mental capacity, relationship,¹⁰⁰ and number.¹⁰¹ But the point that Professor Robertson largely ignores is that many of these marriage restrictions are themselves de facto limitations on procreation.¹⁰² Control of marriage generally is control of procreation (especially in the broad sense in which he defines that term). Typically, intentional reproduction occurs within the confines of marriage. Although people can and do reproduce outside of marriage, most people in this society will not do so intentionally if a marriage relationship is denied to them. Therefore, to limit one's right to marry is to limit one's right to reproduce as a practical matter. The correlation need not be perfect. For example, a poll tax may inhibit my right to vote though it technically does not make it impossible

99. See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

100. The laws forbidding incestuous marriage are generally designed to serve two quite different purposes. First, to protect the integrity of the family, and second, to protect the vitality of the gene pool. See Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?* 18 FAM. L. Q. 257, 267, 289 (1984). Although in popular attitude it is the second purpose which is most commonly thought of in present times; this purpose is actually of modern vintage. Incest was prohibited long before anything was known of recessive genes, or the dangers of inbreeding. See, e.g., *Leviticus* 18:6-18. Historically, the main purpose of the incest laws—at least the main non-religious purpose—has been to protect the integrity of the family. This purpose is most sharply revealed in those instances where the incest statute operates to prohibit marriages between persons who have no close common genetic heritage but who are members of the same family group. See Bratt, *supra*, at 290-91.

Now, if society can prevent persons from entering into incestuous marriages (and cohabitations) for the purpose of protecting the integrity of the family, it would surely seem that they would be able to limit a couple's ability to enter into collaborative schemes of reproduction for the same reason, especially, because the nature of the threat to the family (i.e. confusion of roles and relationships) in both these situations is so similar. The recently reported case of a woman who served as a gestational surrogate for her own daughter, for example, epitomizes the potential for family confusion that this and other forms of collaborative reproduction possess. See *Surrogate Mother Gives Birth to Her Own Grandchild*, L.A. TIMES, Oct. 2, 1987, at 19.

101. Robertson (1986), *supra* note 43, at 959 n.62.

102. See Robertson (1986), *supra* note 43, at 955. Perhaps the reason Professor Robertson sees no difficulties with the states' presently existing restrictions on marriage is because he believes them all to be based on what he would consider to be compelling state interests and therefore capable of meeting strict scrutiny. Although he does not expressly address this point in so many words, it seems a logical assumption. If this assumption is correct, it would be interesting to see how Professor Robertson would apply the distinction he makes between "real" and "symbolic" harms in evaluating the ability of the presently existing restrictions that the states place upon marriage to pass constitutional muster. See *supra* notes 125-47 and accompanying text.

for me to do so.¹⁰³

The relevance of the observation that control of marriage involves a limitation on procreation--and the point to which all of this is eventually leading --is this: if a certain reason, or reasons, have been found by the Court to be sufficient for limiting marriage, and thus, as a practical matter, procreation, then we would expect that it would be permissible for a state for the same reason, or reasons, to restrict or bar the use of non-coital methods of procreation. The prime illustration that I will use to elucidate these points is the restriction that the states place on plural marriages. Again, it would be very short-sighted to merely airily dismiss the laws against polygamy (bigamy) as just being restrictions on marriage, and not also to see them as *de facto* limitations on the right to procreate. For, although the reasons that people have had for entering into polygamous marriages are undoubtedly as numerous as the times of its occurrence, foremost among them has been the desire to have greater progeny than that which could be produced by a single wife.¹⁰⁴ Candidly speaking, is that not pretty much what is going on with surrogate parenting, too?¹⁰⁵

That the prohibition against polygamy is not just about marriage is evident from the history of these laws in this country. The prohibition against polygamy, even that practiced for religious reasons, was upheld by the United States Supreme Court in the case of *Reynolds v. United States*.¹⁰⁶ The reasons the Court advanced for upholding this prohibition of plural marriages against even so precious and protected a right as the free exercise of religion was the interest the state had in protecting the integrity of the family, preventing the exploitation of women, protecting the children born from those marriages, as

103. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

104. See, e.g., GUSTIVE O. LARSON, *THE "AMERICANIZATION" OF UTAH FOR STATEHOOD* 38-39 (1971); Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 310 (1964); KIMBALL YOUNG, *ISN'T ONE WIFE ENOUGH?* 30-33, 42-43, 71-72, 103, 176, 189 (1954) (this author was a Mormon, a sociologist, and a grandson of Brigham Young) [hereinafter KIMBALL YOUNG]; MRS. THOMAS B. H. (FANNY) STENHOUSE, *TELL IT ALL [:] THE TYRANNY OF MORMONISM OR AN ENGLISHWOMAN IN UTAH* 67-75, 87, 160, 181-82, 225-26, 286, 302 (1971 reprint) (autobiography of Fanny Stenhouse, an important early Mormon missionary, who left the Mormon church in 1869, and who, along with Ann Eliza Young and Harriet Beecher Stowe, was at the forefront of the movement to outlaw polygamy); IRVING WALLACE, *THE TWENTY-SEVENTH WIFE* 13, 80, 214 (1961) (biography of Ann Eliza Young, who, according to the records of the Mormon church, was the fiftieth of Brigham Young's fifty-two wives. *Id.* at 356.); ANN ELIZA (WEBB) YOUNG, *WIFE NO. 19*, 307, 400 (photo. 1972 reprint) [hereinafter ANN ELIZA YOUNG].

105. Surrogate *mothers*, indeed, as others have pointedly demonstrated the more accurate and descriptive term would be surrogate *wife*. See Katha Pollitt, *Contracts and Apple Pie, The Strange Case of Baby M*, 244 THE NATION 667, 682-84 (1987).

106. 98 U.S. 145 (1878); *accord* *Cleveland v. United States*, 329 U.S. 14 (1946); *The Late Corp. of the Church of Jesus Christ, etc. v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890).

well as protecting the public morals.¹⁰⁷ These reasons sound very much like those advanced today against the practice of surrogacy.

The aftermath of the *Reynolds* decision also demonstrates that the prohibition of polygamy was intended to be a restriction on procreation and not just on marriage. For, one of the responses made by some Mormons to the *Reynolds* decision was to attempt to avoid a bigamy charge by the expedient of not getting married.¹⁰⁸ This loophole was closed by Congress in 1882 by the passage of the Edmunds Act,¹⁰⁹ which banned polygamous cohabitation. Whether the cohabiting parties were legally married or not was clearly understood to be a technicality. The central purpose of the polygamy statutes was to protect the integrity of the family, and perhaps more pointedly, the social mores of what constituted a proper family structure.¹¹⁰ Those purposes could only be accomplished by looking at the reality of the parties' behavior and relationships rather than just the legal formalisms in which they were usually packaged.¹¹¹ What then were, and are, the realities, as distinct from the formalism, of marriage? They are the relationships one has with one's spouse and children. Polygamy, ceremonialized or *de facto*, was considered to seriously compromise these relationships and to constitute a danger to the parties involved in it, especially the women (who might be exploited or degraded in

107. *Davis v. Beason*, 133 U.S. 333, 341 (1890); *Reynolds v. United States*, 98 U.S. 145, 164-69 (1878); see *Cleveland v. United States*, 329 U.S. 14, 18-19 (1946) (The Court, per Justice Douglas, held that the Mann Act was applicable to a Mormon who transported a woman across state lines for the purpose of making her his plural wife).

108. See *United States v. Cannon*, 7 P. 369, 374 (Utah), *affirmed*, 116 U.S. 55 (1885), *judgment vacated for want of jurisdiction*, 118 U.S. 355 (1886); cf. *Miles v. United States*, 103 U.S. 304, 307, 315 (1880) (discussing secret marriages); LARSON, *supra* note 104, at 62, 83-85 (same); KIMBALL YOUNG, *supra* note 104, at 370, 420-22 (discussing secret marriages in the decade after the Mormon Church repudiated polygamy in the "Manifesto" of 1890). Concerning the use of these techniques by modern polygamists see G. Keith Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, 11 MEMPHIS ST. U. L. REV. 303, 320 (1981); HAROLD W. BLACKMORE, ALL ABOUT POLYGAMY--WHY AND HOW TO LIVE IT! 54-55, 58, backcover (1978).

109. Act of Mar. 22, 1882, ch. 47, 22 Stat. 30 (1882).

110. See, e.g., Grover Cleveland, *First Annual Message [to Congress]*, Dec. 8, 1885, reprinted in JAMES D. RICHARDSON, 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4909, 4946-47 (1897); *Polygamy in the Territories of the United States*, H. R. Rep. No. 83, 36th Cong. 1st Sess. pp. 1-2 (Mar. 14, 1860); see generally WALLACE, *supra* note 104, at 326-332, 385-90; KIMBALL YOUNG, *supra* note 104, at 301.

111. See, e.g., *State v. Barlow*, 153 P.2d 647, 652 (Utah 1944), *appeal dismissed*, 324 U.S. 829, *reh'g denied*, at 891 (1945); *United States v. Peay*, 14 P. 342, 343-44 (Utah 1887); *United States v. Snow*, 9 P. 686, 686-92 (Utah), *appeal dismissed*, 118 U.S. 346 (1886), *rev'd*, 120 U.S. 274 (1887) (reversed on other grounds); *Cannon v. United States*, 7 P. 369, 374 (Utah), *aff'd*, 116 U.S. 55, 59-75 (1885), *judgment vacated for want of jurisdiction*, 118 U.S. 355 (1886); *United States v. Musser*, 7 P. 389, 391 (Utah 1885).

their role)¹¹² and the children (who might be neglected or objectified as components of family wealth).¹¹³ It is interesting to note that each of these fears of social harm attributed to the practice of polygamy has its precise analog in the catalog of harms that many commentators believe will be caused by surrogacy and other forms of collaborative reproduction.

The implications of this apparent congruence will be addressed more fully at a later point in this Paper.¹¹⁴ For now, however, we need only to conclude this section by observing that while the Supreme Court's precedents do support the existence of a fundamental right of married couples to procreate by coital means within the marital union, considering the context in which these cases have arisen, the restrictions that a state may place on marriage, and the state's ability to criminalize adultery and fornication,¹¹⁵ this fundamental right to procreate cannot fairly be said to extend outside the legally recognized marital union.

C. *Does the Infertility of the Married Couple Change this Result?*

Professor Robertson argues that it does:

112. See *Davis v. Beason*, 133 U.S. 333, 341 (1890); *Reynolds v. United States*, 98 U.S. 145, 168 (1878); *United States v. Snow*, 9 P. 686, 687-88 (Utah), *appeal dismissed for want of jurisdiction*, 118 U.S. 346 (1886), *rev'd*, 120 U.S. 274 (1887) (reversed on other grounds); *STENHOUSE*, *supra* note 104; *WALLACE*, *supra* note 104, at 90, 356, 386-87; *KIMBALL YOUNG*, *supra* note 104, at 11, 13-14, 113, 190, 206-08; *ANN ELIZA YOUNG*, *supra* note 104, throughout entire work but especially at 292, 400.

For more recent examples, see, e.g., Ellis E. Conklin, *Isolated Arizona Town Defies Church, State Authority by Encouraging Polygamy*, L.A. DAILY J., May 20, 1986, at 22 ("[W]ives . . . are expected to reproduce at least once every two years." *Id.*); *State v. Musser*, 175 P.2d 724, 735 (Utah 1946), *judgment vacated and case remanded to consider questions of state law*, 333 U.S. 95 (1948) ("LeBaron with . . . arrangements made by Zitting, induced a 13 year old girl to agree to be his polygamous wife. Zitting told her all she would have to do is bear children." *Id.*).

In considering who should be finalists in the contest for the most caddish public statement about marriage, we must give serious consideration to the candidacy of Brigham Young's chief aide, Heber C. Kimball, who remarked: "I think no more of taking another wife than I do of buying a cow." *WALLACE*, *supra* note 104, at 101.

113. See *Reynolds v. United States*, 98 U.S. 145, 168 (1878); *Linford*, *supra* note 104, at 311; *STENHOUSE*, *supra* note 104, at 162, 300, 304, 325-27, 330; *WALLACE*, *supra* note 104, at 200, 280, 291; *KIMBALL YOUNG*, *supra* note 104, at 47, 114-15, 176, 362-63, 451; *ANN ELIZA YOUNG*, *supra* note 104, at 150-51, 154-55, 406, 590.

For reports of current examples of these phenomena, see, e.g., Conklin, *supra* note 112, at 22 ("One town elder is believed to have fathered more than 80 children. Some men have so many offspring that they lose count . . ." *Id.*); Janice Perry, *Polygamy And The State [-] Despite Laws Against It, The Practice Seems To Be Gaining*, L.A. DAILY J., April 24, 1985, at 4.

114. See *infra* note 138 and accompanying text.

115. See *supra* notes 58-71, 99-113, and accompanying text.

In the United States the right to avoid reproduction by contraception and abortion is now firmly established. . . .¹¹⁶

The right to procreate--to bear, beget and rear children--has received less explicit legal recognition. Because the state has never tried to prevent married couples from reproducing by coital means, no cases (with the possible exception of *Skinner v. Oklahoma*) turn on the recognition of such a right. However, dicta in cases ranging from *Meyer v. Nebraska* to *Eisenstadt v. Baird* clearly show a strong presumption in favor of marital decisions to found a family. One may reasonably conclude that a married couple's decision to have children coitally would have fundamental right status as part of marital liberty or privacy. Thus, only extreme circumstances of great harm to others--compelling state interests not achievable by less restrictive means--would permit state limitation on the formation of families coitally.

What then about married couples who cannot reproduce coitally? Their need and interest in forming a family may be as strong as fertile couples The values and interests that undergird the right of coital reproduction clearly exist with the coitally infertile. Their interest in bearing, begetting or parenting offspring is as worthy of respect as that of the coitally fertile.

It follows that restrictions on noncoital reproduction by an infertile married couple should be subject to the same rigorous scrutiny to which restrictions on coital reproduction would be subject

Thus if bearing, begetting or parenting children is protected as part of marital privacy or liberty, those experiences are no less important when they are achieved noncoitally with the assistance of physicians, donors of gametes and embryos, or even surrogates. Reproduction matters not because of the coitus (though that has its own independent importance) but because of what the coitus makes possible. The use of noncoital techniques, including the assistance of willing collaborators, should thus be constitutionally protected.¹¹⁷

116. The right to an abortion undoubtedly felt far more firmly established in 1988, when Professor Robertson wrote these words, than it does today in 1992 when, due to the changing composition of the Court, *Roe v. Wade* may be tottering on the brink of being overruled. See *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2855 (1992) (Rehnquist, C.J., dissenting) (in which Justices White, Scalia and Thomas joined).

117. Robertson (JJ-1988), *supra* note 43, at 290-91.

I have several problems with Professor Robertson's argumentation here. First, let me point out where I agree with him in order to isolate our points of disagreement. I in no way denigrate the importance of reproduction for any person, married or single. Nor do I value the interests that a couple has in their privacy concerning the intimate matter of sex and reproduction one iota less than him. Furthermore, I believe, as he apparently does, that it is a great tragedy for a couple if they are infertile and cannot reproduce coitally, and I agree that they have just as much of an interest in having children as do fertile married couples. Where I disagree with him is that all of this somehow adds up to a fundamental right of infertile married couples to use non-coital and collaborative means of reproduction to achieve their desired ends. More specifically, I take issue with him over the following points.

First, Professor Robertson misapprehends the basic nature of the constitutional right here in question. As he acknowledges,¹¹⁸ most constitutional rights are negative in nature.¹¹⁹ They usually consist of the right to be left alone concerning a certain matter. They do not, however, assure the right to attain a certain objective. This has been most pointedly illustrated in the fight over abortion. I have a right to be left alone if I choose to have an abortion, but I do not have a right to require others to pay for my abortion if I cannot afford it.¹²⁰ However, it could be said in response that all infertile couples are asking for is the right to be left alone so that they can contract with others for collaborative services in reproduction. This might be true if the right were as Professor Robertson defines it: A right to reproduce by any and all means. However, the basic error with this is that there is no such right. The right being protected is the right of marital privacy. And, as the quotation from Shari O'Brien's Article¹²¹ earlier in this Paper eloquently points out, collaborative reproduction is far from being a private experience; in fact, it is its antithesis.

Second, the mere fact one possesses an interest in attaining a certain end does not mean that all means of attaining that end are permissible. Infertility, for example, would not justify resort to bigamy or adultery for the infertile (or insufficiently fertile) person. And it should be pointed out that the social interests being protected by these limitations are broader than just the protection of the other spouse, although that is certainly a very important purpose of these

118. Robertson (VLR-1983), *supra* note 35, at 405 n.3; Robertson (1986), *supra* note 43, at 966 n.83; Robertson (JJ-1988), *supra* note 43, at 289 n.11.

119. See *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); see generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

120. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); see also *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding that there is no obligation to make public facilities available for non-therapeutic abortions).

121. See *supra* note 98 and accompanying text.

laws. Were it otherwise we would expect that a spousal consent or waiver would vitiate the criminality of these offenses. But, in point of fact, this is not the case. Spousal consent is irrelevant in these prosecutions.¹²²

D. Assuming That There Did Exist a Fundamental Right (at Least for Infertile Couples) to Reproduce by Non-Natural Means, Would There Nevertheless Be a Compelling State Interest to Prohibit the Practice?

Professor Robertson argues against the existence of any such compelling state interest as follows:

Restrictions on noncoital means of reproduction should meet the strict standards for limiting coital reproduction, not a looser standard. Only serious harm to the interests of others, not avoidable by less restrictive means, should justify interference with such a fundamental choice. Restrictions on noncoital techniques involving embryos, donors and surrogates must therefore meet the compelling state interest standard to be valid. . . . [C]oitally infertile married couples (and others accorded a right of coital reproduction) should have the same liberty to choose noncoital means of reproduction that they would have to reproduce coitally if they were fertile. Moral condemnation of the separation of sex and reproduction or speculative fears of a slippery slope¹²³ would not suffice to restrict such techniques, anymore than such views would suffice to restrict coital reproduction, to ban abortion or to suppress books. Only serious harm to the interests of others, not avoidable by less restrictive means, should justify interference with such a fundamental reproductive choice Constitutional rights, though fundamental, are not absolute. As *Buck v. Bell* reminds us, even coital reproduction can be limited for sufficient cause. The case for limiting noncoital reproduction depends on showing that some substantial harm to persons will result from the noncoital . . . technique at issue. Yet the concerns that have been raised . . . do not appear to be sufficient¹²⁴

In his writings on this question, Professor Robertson consistently rejects the notion that the state might have a compelling interest in limiting non-coital

122. See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1069 (10th Cir.), cert. denied, 474 U.S. 849 (1985) (bigamy); *State v. Ayles*, 145 P. 19, 20-21 (Or. 1914) (adultery).

123. Well, slopes can be slippery. To identify a slippery slope is not to provide footholds (nor does it absolve one from answering the objections raised). Tell me, rather, what trees or shrubs there are that we will be able to grab hold of to arrest our descent.

124. Robertson (JJ-1988), *supra* note 43, at 290-93.

reproduction.¹²⁵ His reasoning is premised on first dividing the types of harms a state might seek to avoid into two categories: 1) what he terms "real" harms, and 2) what he terms "symbolic" harms.¹²⁶ His response to the arguments that I and other writers have made--that surrogacy and other forms of collaborative reproduction pose a serious risk of harm to the children born under those arrangements, to the participants, and to society--is to dismiss them as either factually doubtful (i.e. speculative)¹²⁷ or legally inadequate. In other words, he rejects the idea that any of them pose a substantial danger of presenting a "real" harm to others; and, to the extent that the harm posed is "symbolic," he categorically rejects its legal ability to serve as a compelling state interest.¹²⁸

I have two disagreements with Professor Robertson on this issue. First, I believe he is gravely in error in what he takes to be a real harm. And, second, I believe he is profoundly mistaken in his legal conclusion that symbolic harms cannot be compelling.

The potpourri of harms that Professor Robertson has considered under these rubrics, and rejected for one or the other reason, include, among others: 1) emotional harm done to the children conceived by these arrangements (dismissed as being speculative, not harmful enough, and that the benefits outweigh the risks);¹²⁹ 2) commodification of children (dismissed as being symbolic and speculative);¹³⁰ 3) family confusion, i.e. damage to the family structure caused by confusion in relationship (dismissed as being symbolic);¹³¹ and 4) exploitation of women or their objectification as reproductive machines (dismissed as being symbolic, and with the vague conclusion that the benefits to women outweigh the risks).¹³² In two previous Articles,¹³³ I have attempted to outline why I believe that the practice of surrogate parenting will pose serious risks of harm to the children born through those arrangements and the dangers

125. Robertson (1986), *supra* note 43, at 965-66; Robertson (CWR-1988), *supra* note 43, at 8-11.

126. Robertson (JJ-1988), *supra* note 43, at 293 ("symbolic" versus "real" (*Id.*) or "serious" (*Id.* at 290, 292) or "substantial" (*Id.* at 293) harm); Robertson (1986), *supra* note 43, at 966 (comparing "symbolic" with "direct tangible harm").

127. See Krimmel (1988), *supra* note 1, at 106 n.1 (responding to a similar argument by Robertson).

128. Robertson (1986), *supra* note 43, at 965-66.

129. Robertson (VLR-1983), *supra* note 35, at 434; Robertson (1986), *supra* note 43, at 995-1000; Robertson (JJ-1988), *supra* note 43, at 293-94.

130. Robertson (1986), *supra* note 43, at 1021-23, 1025; Robertson (JJ-1988), *supra* note 43, at 298-99.

131. Robertson (VLR-1983), *supra* note 35, at 435-36; Robertson (1986), *supra* note 43, at 966.

132. Robertson (1986), *supra* note 43, at 966, 1026-33.

133. See note 1, *supra*.

I believe the practice holds for the participants and their families. Others have argued that the practice of surrogate parenting presents a very real danger for exploiting women and of objectifying them in their reproductive role.¹³⁴ I think that after any fair reading of those sources one would be hard put to characterize the concerns there addressed as being about anything but genuine risks of “real,” “substantial,” and “serious” harms being inflicted on real people. The emotional pain of knowing that your mother did not want you, but rather created and sold you for money;¹³⁵ the fear, distrust, and insecurity that a sibling might experience in seeing his little brother being “given” away;¹³⁶ or, the emotional ambivalence a destitute mother might feel at accepting the temptation to sell her next child in order to provide a better life for her existing children are hardly symbolic harms to the person experiencing them. Therefore, even if Professor Robertson were able to distinguish in theory between what he calls “symbolic” and “real” harms, I would have difficulty seeing how he would be able to classify the abovementioned harms as being merely “symbolic.”

Even if I were disposed—which I am not—to accept his argument that a distinction exists between these two allegedly different types of harms,¹³⁷ I would be at a loss to see how he would be able to explain how the same types of harms that were deemed adequate to prevent a polygamist’s exercise of his religious liberty would be inadequate to curb an infertile couple’s resort to collaborative means of reproduction. If Professor Robertson is right that the interests that a state has in protecting the image and structure of the family,¹³⁸

134. See, e.g., GENA COREA, *THE MOTHER MACHINE* 213-249, 272-77 (1985); Pollitt, *supra* note 105, at 683-86; O’Brien, *supra* note 77, at 29-33.

135. See Krimmel (1988), *supra* note 1, at 97-102.

136. Pollitt, *supra* note 105, at 688:

Even if the business could be managed so that all the adults involved were invariably pleased with the outcome, it would still be wrong, because they are not the only people involved. There are, for instance, the mother’s other children. Prospective contract mothers . . . do not seem to consider for two seconds the message they are sending to their kids. But how can it not damage a child to watch Mom cheerfully produce and sell its half-sibling while Dad stands idly by? I’d love to be a fly on the wall as a mother reassures her kids that of course she loves them no matter what they do; it’s just their baby sister who had a price tag.

Id.

137. In point of fact, most behaviors we label immoral, unethical, or sinful have to do with harm being inflicted on other persons. Even in religious based legal systems (e.g. The Torah) most of the prohibitions have to do with matters of social justice. Comparatively few can be said to be concerned exclusively with offenses against God. Blasphemy, idolatry, and other forms of sacrilege being the most likely candidates for inclusion in the latter group.

138. While a state may not legitimately require all families to conform themselves to “some state-designated ideal” of family life (see *Hodgson v. Minnesota*, 497 U.S. 417 (1990)), this does not mean that it is impermissible for a state to protect the family from morally pernicious practices, for example: incest, adultery, and polygamy. By analogy, there is a big difference between a state assigning its citizens a required reading list for their moral edification and its outlawing obscene

preventing the objectification of women in their reproductive role, and protecting children from being viewed as components of family wealth are merely "symbolic," and therefore, are an inadequate basis for circumscribing a fundamental right, then *a fortiori* the Supreme Court must have been wrong in deciding the *Reynolds* case as it did. But until *Reynolds* and its progeny are overruled it is hard to see how Professor Robertson can maintain his position.

Professor Robertson's thesis that "symbolic" harms cannot delimit fundamental rights is also questionable considering other Supreme Court precedents. It is generally maintained that the police power encompasses within it the ability to regulate public morals.¹³⁹ If moral concerns cannot circumscribe fundamental rights it becomes rather difficult to explain how it is possible for a state to outlaw obscenity.¹⁴⁰

Most fundamentally, however, I think Professor Robertson's thesis is wrong because it fails to give due deference to the importance and power of symbols. Rather than view symbolic harms as substandard, I would think them to be among the very most important matters of social concern. One example of this should suffice. When the Supreme Court decided *Brown v. Board of Education*,¹⁴¹ it held that "separate but equal" schools for black and white children were inherently unequal. Now, the Court's decision is predicated upon a lengthy factual record which details the past abuses of the segregated system, and concludes that the separate schools were far from being equal in fact.¹⁴² But to read *Brown* in this light alone misses the true importance of the case. To illustrate: what if a state, determined to maintain a segregated system, were to provide schools for its black children which, although segregated, were by all known measures of educational effect superior to the schools made available to white children; would the principles of *Brown* be offended? I would hope that we would answer yes, for the following reason: the statement that segregated

literature in order to protect public morals.

139. See *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2462 (1991); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Poe v. Ullman*, 367 U.S. 497, 522, 545-46 (1961) (Harlan J., dissenting).

140. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); cf. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461-62 (1991) (holding that nude dancing is not protected expression).

In response, some might quibble that the reason that a state can inhibit obscenity is only because there is no fundamental right involved, obscenity being defined as outside the protections of the First Amendment. But this seems largely a semantic matter. Whether morality is used to define the outer perimeters of a fundamental right or to limit its exercise, the ultimate conclusion is the same: moral concerns can be given preference. But, if any will derive comfort from it, I would be just as happy with the alternate conclusion: that because of the moral and social concerns raised by surrogacy, it is determined not to be within the fundamental right to procreate.

141. 347 U.S. 483 (1954).

142. *Id.* at 494-95 n.11.

schools are "inherently" unequal is not the answer to a factual question, it is the assertion of a moral principle.¹⁴³ The very motive of segregation, the government enunciated premise that certain persons solely by virtue of their race should be treated differently, is *in itself* a serious harm.¹⁴⁴ Being consigned to the symbolic equivalent of slave quarters is hurtful to them even so nicely furnished.¹⁴⁵

In point of fact, symbols are highly important to us. As the Court has said on numerous occasions,¹⁴⁶ marriage and family are part of the cohesive glue that holds any society together. If a society has a right to preserve itself, then it surely has the right to protect those institutions, whether moral, cultural or political, that are necessary for its survival.¹⁴⁷

143. See Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 446-47 (1973).

144. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

145. The Thirteenth Amendment to the United States Constitution authorized Congress to pass legislation rooting out the last vestiges of slavery and eliminating those practices which were badges of servitude. See *Runyon v. McCrary*, 427 U.S. 160, 170 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968). As Justice Douglas' concurring opinion in *Mayer* illustrates, perhaps the most durable badge of servitude has not been any physical one, but rather the emotional and moral effects of slavery (*Id.* at 444-49). Tremendous harm is caused by the emotional realization that you were once thought of and treated as a chattel, an item of commerce, the subject of rights, but not the holder of them; that you were valued merely as a means to another's pleasure and not respected as an end; that you were treated as a thing and not as a person. For the reasons outlined in one of my previous articles on surrogacy (Krimmel (1988), *supra* note 1), I think there is more than just superficial resemblance behind Professor Holder's intuition that surrogacy and slavery have something in common. See Holder, *supra* note 12, at 117.

146. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-05 (1977) (plurality opinion); *Davis v. Beason*, 133 U.S. 333, 345 (1890); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888); *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

147. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (including polygamy among activities that constitute a "substantial threat to public safety, peace or order."); see also *Prince v. Massachusetts*, 321 U.S. 158 (1944):

A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impending restraints and dangers within a broad range of selection . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against parent's claim to control of the child or one that religious scruples dictate contrary action.

Id. at 168-69.

A very extreme illustration of this point is provided by the case: *In re Black*, 283 P.2d 887 (Utah), *cert. denied*, 350 U.S. 923 (1955) which arose out of the famous raid on the polygamists of Short Creek, Arizona in 1953. The Utah Supreme Court—part of the town is in Utah—held that polygamist parents, by continuing to live that lifestyle, had neglected the moral education of their children, and that their home was an immoral environment for the rearing of children, and notwithstanding that the children were not otherwise neglected, this constituted grounds to terminate parental custody. See generally PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

E. Even If One Were to Recognize a Fundamental Right of Infertile Couples to Procreate by Non-Coital Means, Would This Preclude Prohibiting the Commercialization of the Practice?

How far may a state go in seeking to discourage surrogate mother arrangements without violating the right Professor Robertson postulates to exist? The state has at its disposal a panoply of responses to surrogacy, ranging from its outright prohibition by means of criminal law, to lesser restraints such as prohibiting payment of money for surrogacy or refusing to enforce such contracts in the event that they are litigated. Would a state's active discouragement of collaborative reproductive arrangements by such means be permissible?

Professor Robertson argues that it likely would not:

Banning surrogacy for a fee or outlawing surrogacy brokers would dry up the supply of surrogates nearly as effectively as a total ban or a refusal to enforce such contracts. Failing to enforce agreements among gamete providers and surrogates would also interfere with their freedom of reproductive choice almost as much as an outright prohibition.¹⁴⁸

Now this may be true as a matter of fact, but I disagree that even if we were to postulate the existence of a fundamental right of married couples to utilize non-coital means of reproduction, that this would debar the state from discouraging, or even banning, its commercial exploitation. The existence of a fundamental right does not necessarily imply the right to use commercial means to attain it. My right to rear a child that I had adopted does not imply that the state cannot forbid the exchange of money for placing children for adoption, i.e. baby bartering. Even if it could be said that my right of privacy protected engaging in sexual activities with another consenting adult, this still would not necessarily imply that I had the right to hire a prostitute. And, as Professor Robertson has himself pointed out,¹⁴⁹ my right of privacy may entitle me to read obscene literature in the privacy of my own home, but it does not protect the makers or distributors of such materials.¹⁵⁰

Nor should the Court imply that any such postulated right to procreate by collaborative means encompasses within its scope the commercialization of the

148. Robertson (JJ-1988), *supra* note 43, at 293; *see* Robertson (VLR-1983), *supra* note 35, at 433-34; Robertson (1986), *supra* note 43, at 961-62, 1021-23.

149. Robertson (VLR-1983), *supra* note 35, at 418 n.35; Robertson (1986), *supra* note 43, at 963-64 n.75.

150. *Compare* Stanley v. Georgia, 394 U.S. 557 (1969) with *United States v. Reidel*, 402 U.S. 351 (1971) and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

practice.¹⁵¹ For, as the Warnock Commission and others have concluded,¹⁵² it is primarily in its commercial aspects that collaborative reproduction poses the gravest dangers to society, the children born from those arrangements, and the other participants in the process.

V. CONCLUSION

Following the birth of a baby girl in April 1986, twenty-three year old Shannon Boff of Redford Township, Michigan, having twice been a surrogate mother, announced her retirement with these words: "Any more babies coming from me are going to be keepers."¹⁵³ It is tragic that any child should have to grow up with the realization that his natural mother created him, not because she wanted him, but because he could be useful to her.¹⁵⁴ It is a shame that any child should have to learn that he was not a "keeper."

As has been outlined in this Paper, the states possess the means to effectively suppress surrogate mother arrangements, and there is no constitutional impediment to their doing so. It would be a very good thing for the states to act now and outlaw surrogacy before even more are hurt by it.

151. See *Doe v. Kelley*, 307 N.W.2d 438, 441 (Mich. App. 1981), *cert. denied*, 459 U.S. 1183 (1983).

152. [WARNOCK COMMITTEE], DEPT. OF HEALTH & SOC. SECURITY (GREAT BRITAIN), REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY 46-47 (HMSO 1984); New York State Task Force, *supra* note 24, at 125-26; JOINT LEGISLATIVE COMMITTEE ON SURROGATE PARENTING, REPORT TO THE CALIFORNIA LEGISLATURE, COMMERCIAL AND NONCOMMERCIAL SURROGATE PARENTING 22 (Joint Publication No. 204-J, Nov. 1990).

153. Nancy Blodgett, *Who is Mother?* A.B.A. J., June 1, 1986, at 18.

154. See Krimmel (1988), *supra* note 1, at 98-99.