SURROGATE MOTHERHOOD IN CALIFORNIA: LEGISLATIVE PROPOSALS

Surrogate motherhood is becoming an increasingly popular alternative for women unable to bear children. Nevertheless, certain California statutes not intended to deal with surrogate motherhood serve as potential barriers to the practice. This Comment examines the statutory obstacles created by the California Codes. The author recommends specific legislative amendments to the California Civil and Evidence Codes in order to facilitate the practice of surrogate motherhood but concludes that the Penal Code sections prohibiting payment for the transfer of custody and adoption should not be modified.

Recent newspaper articles,[1] magazine features,[2] and law review comments[3] attest to increasing interest in surrogate motherhood as an alternative for women unable to bear children. When a married couple's inability to have a child results from the wife's infertility, another woman may be artificially inseminated with the semen of the fertile husband. The resulting child, the biological product of the husband, is turned over at birth to the couple.

In recent years, surrogate motherhood has become increasingly attractive because of two advantages over routine adoption: speed and the biological nexus. As expanded birth control meth-

1. *E.g.*, Beyette, *Having a Child by a Surrogate Parent*, L.A. Times, Aug. 22, 1980, § V, at 1, col. 1; Castillo, *When Women Bear Children for Others*, N.Y. Times, Dec. 22, 1980, § B, at 6, col. 2; Krier, *Surrogate Motherhood: Looking at It as Business Proposition*, L.A. Times, Mar. 30, 1981, § V, at 1, col. 3; Marcus, *The Baby Maker*, Nat'l L.J., Aug. 25, 1980, at 1, col. 1; Quindlen, *Surrogate Mothers: A Controversial Solution to Infertility*, N.Y. Times, May 27, 1980, § B, at 12, col. 1; Thistle, *Surrogate Motherhood: Can the Many Perplexing Moral, Legal Issues Be Resolved?*, San Diego Union, Mar. 8, 1981, § C, at 1, col. 1; Truman, *"Babymaker" Will Deliver Finished Product to Couple*, Daily Californian (El Cajon, Cal.), Sept. 30, 1980, § B, at 1, col. 1.

2. *E.g.*, White, *Motherhood the "Surrogate" Way*, SCI. DIG., Mar. 1980, at 25; MACLEAN'S, Mar. 10, 1980, at 10; PEOPLE, Dec. 8, 1980, at 52; PEOPLE, Apr. 21, 1980, at 38.

3. *See, e.g.*, Kinney, *Legal Issues of the New Reproductive Technologies*, 52 CAL. ST. B.J. 514 (1977); Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611 (1978).

ods and liberalized abortion laws have checked the pace of procreation, and as single mothers have become more inclined to keep their babies, prospective adoptive couples face a shortage of adoptive children and a wait of up to seven years.[4] The use of a surrogate mother can shorten this waiting period to less than a year. Furthermore, because adoptive children are in demand, the adopting couple may not have a choice of age, race, or other physical characteristics. A child conceived with the aid of a surrogate, on the other hand, is the biological child of the husband.

Until 1981, no completed surrogate arrangements were known to exist in California. Several children had been born as a result of surrogate motherhood in other jurisdictions, however,[5] and California couples had expressed interest and sought legal assistance in establishing similar agreements.[6] The early part of 1981 saw a sudden increase in surrogate motherhood in California. The participation of California citizens in surrogate arrangements and completed births, and the breach of a surrogate agreement by a California woman in early 1981,[7] have underscored the need for legislative changes to deal with this growing practice. Recent legislation amending the conclusive presumption of paternity has eliminated a major legal obstacle to surrogate motherhood in California.[8] Nevertheless, a number of statutory impediments remain which create uncertainty and risk for the semen donor and

4. Interview of Dr. Richard M. Levin on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 20; Castillo, *When Women Bear Children for Others*, N.Y. Times, Dec. 22, 1980, § B, at 6, col. 2 (interview of California attorney William Handel).

5. As of March 1981, Michigan attorney Noel P. Keane reported ten births. Thistle, *Surrogate Motherhood: Can the Many Perplexing Moral, Legal Issues Be Resolved?*, San Diego Union, Mar. 8, 1981, § C, at 1, col. 1. The first reported surrogate birth in Kentucky, arranged by Surrogate Parenting Associates, Inc., of Louisville, occurred Nov. 9, 1980. PEOPLE, Dec. 8, 1980, at 52; Daily Californian (El Cajon, Cal.), Nov. 15, 1980, § A, at 2, col. 2.

6. *See* Beyette, *Having a Child by a Surrogate Parent*, L.A. Times, Aug. 22, 1980, § V, at 1, col. 1; White, *Motherhood the "Surrogate" Way*, SCI. DIG., Mar. 1980, at 25. A Sacramento attorney reported a client seeking a surrogate mother in 1980. Marcus, *The Baby Maker*, Nat'l L.J., Aug. 25, 1980, at 1, col. 1. In the fall of 1980 Mr. Keane found a Michigan woman willing to be a surrogate for a single California man. Daily Californian (El Cajon, Cal.), Oct. 15, 1980, § A, at 2, col. 1.

7. In January 1981 Los Angeles attorney William Handel arranged the insemination of a surrogate mother. Telephone interview with William Handel (Jan. 15, 1981). In the same month, another surrogate in Los Angeles was reportedly awaiting the birth of a donor's child. Daily Californian (El Cajon, Cal.), Jan. 16, 1981, § A, at 6, col. 1. In February 1981 a California couple brought home the baby borne for them by a Texas surrogate. Thistle, *Surrogate Motherhood: Can the Many Perplexing Moral, Legal Issues Be Resolved?*, San Diego Union, Mar. 8, 1981, § C, at 1, col. 1. A month later, a California surrogate about to deliver a baby for a New York couple changed her mind and notified the couple that she intended to keep the child. San Diego Union, Mar. 22, 1981, § A, at 3, col. 5.

8. CAL. EVID. CODE § 621 (West 1966 & Supp. 1981).

his wife. This Comment will analyze those remaining barriers and will suggest the extent to which California should further modify its legislation to allow for this childbearing option.[9]

CURRENT PROCEDURES

Surrogate motherhood arrangements in Michigan and Kentucky, which have received recent publicity, provide a background against which the situation in California can be examined.[10] A favorable pattern of paternity and adoption laws has enabled attorneys in Michigan to establish a legal procedure for effecting surrogate motherhood.[11] The surrogate is inseminated by a physician with semen of the husband of the adoptive couple.[12] After conception, but prior to birth, the donor-husband files a notice of intent to claim paternity with the county court.[13] The court transmits the notice to the vital records division of the department of health, which forwards a copy of the notice to the surrogate mother. If the surrogate does not deny the claim, the donor is

9. This Comment will not consider the arguments for and against surrogate motherhood in general. At one time courts expressed their distaste for artificial insemination whether by donor or by husband, but more recent decisions have acknowledged its social acceptance by holding that the resulting child is as legitimate as the one produced by sexual intercourse. *E.g.* People v. Sorensen, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968); *In re* Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (1973). Similarly, moral uncertainty as to surrogate motherhood is giving way to an understanding of the process as a valid childbearing option. This Comment will also not discuss in depth, situations in which single women, single men, or fertile women seek surrogates to bear children for them. The Comment's scope is limited to cases involving married couples unable to have children because of the wife's inability to carry a child. *But see* text accompanying notes 206-09 *infra*.

10. For agreements handled by Michigan attorney Noel P. Keane, see Marcus, *The Baby Maker*, Nat'l L.J., Aug. 25, 1980, at 1, col. 1; White, *Motherhood the "Surrogate" Way*, SCI. DIG., Mar. 1980, at 25; Daily Californian (El Cajon, Cal.), Nov. 15, 1980, § A, at 2, col. 2; MACLEAN'S, Mar. 10, 1980, at 10; Interview of Noel P. Keane on The Phil Donahue Show, Donahue Transcript No. 07290 (July 29, 1980). For those agreements arranged by Surrogate Parenting Associates of Louisville, Kentucky, see Beyette, *Having a Child by a Surrogate Parent*, L.A. Times, Aug. 22, 1980, § V, at 1, col. 1; Truman, *"Babymaker" Will Deliver Finished Product to Couple*, Daily Californian (El Cajon, Cal.), Sept. 30, 1980, § B, at 1, col. 1; PEOPLE, Dec. 8, 1980, at 52; PEOPLE, Apr. 21, 1980, at 38; Interview of Dr. Richard M. Levin and attorney Katie Brophy on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980).

11. Telephone interview with Noel P. Keane (Aug. 13, 1980).

12. MACLEAN'S, Mar. 10, 1980, at 10.

13. MICH. COMP. LAWS ANN. § 710.33 (West Supp. 1980).

presumed to be the father of the unborn child.[14] At the time of birth, the donor executes an acknowledgement of paternity, and his name is entered on the birth certificate as the natural and legal father of the child. The name of the surrogate mother is entered as the natural and legal mother.[15] When the surrogate relinquishes her rights to custody of the child, the court grants custody to the donor-father.[16]

The second step in this process requires the donor's wife to petition for adoption of the child under Michigan law, which permits private as well as agency adoptions.[17] Although the Michigan statute provides for a one-year waiting period after entry of the order terminating parental rights, the court may waive the one-year period, or any portion thereof, in the best interests of the adoptee.[18]

Attorneys and physicians in Kentucky have used a similar procedure.[19] Kentucky law permits the voluntary termination of parental rights five days after birth[20] and the administration of blood tests to ensure that the donor is actually the father of the child.[21] In a petition to relinquish her parental rights, the surro-

14. *Id.* The marital status of the surrogate has no bearing on the donor's right to claim paternity under this section. The presumption is rebuttable.

15. Telephone interview with Noel P. Keane (Aug. 13, 1980).

16. MICH. COMP. LAWS ANN. § 710.39(3) (West Supp. 1980).

17. *Id.* § 710.24.

18. *Id.* § 710.56.

19. Dr. Richard M. Levin and attorney Katie Brophy of Surrogate Parenting Associates, Inc., of Louisville, Kentucky, have used this type of procedure. They report from 500 to 1000 applicants and predict 100 deliveries by November 1981. Beyette, *Having a Child by a Surrogate Parent*, L.A. Times, Aug. 22, 1980, § V, at 1, col. 1; Truman, *"Babymaker" Will Deliver Finished Product to Couple*, Daily Californian (El Cajon, Cal.), Sept. 30, § B, at 1, col. 1.

The Attorney General of Kentucky has filed suit against Surrogate Parenting Associates, Inc., for a declaratory judgment that such contracts violate state laws as well as public policy. Kentucky v. Surrogate Parenting Assocs., Inc., No. 81-CI-0121 (Franklin Cir. Ct., filed Jan. 27, 1981). The state argues not only that payment to the surrogate is illegal and against public policy, *see* note 195 *infra*, but also that any contract in which a mother agrees before birth to surrender her parental rights violates the Kentucky statutes requiring a pre-adoption waiting period of five days after birth. KY. REV. STAT. 199.500(5) (1978). *Id.* § 208C.050(2) (1980) (replacing § 199.601(2) (1978) which is still referred to by the Kentucky Attorney General). *See* Kentucky v. Surrogate Parenting Assocs., Inc., No. 81-CI-0121, Exhibit D, (Franklin Cir. Ct., filed Jan. 27, 1981) (Letter from Attorney General Steven L. Beshear to Mr. Joe Ward (Jan. 26, 1981)); Thistle, *Surrogate Motherhood: Can the Many Perplexing Moral, Legal Issues Be Resolved?*, San Diego Union, Mar. 8, 1981, § C, at 1, col. 1.

20. KY. REV. STAT. § 199.500(5) (1978). *Id.* § 208C.050 (1980) (replacing *id.* § 199.601 (1978) which is still referred to by the Kentucky Attorney General).

21. *Id.* §§ 406.081, .091, .111 (1979). Surrogate Parenting Associates in Louisville requires the surrogate, the donor, the child, and the surrogate's husband to undergo blood and tissue typing (HLA) tests to confirm the donor's paternity. Because the HLA tests must be performed on the child, the paternity of the donor

gate names the donor as the person to whom parental rights are to be transferred[22] and gives her reasons for desiring the termination.[23] Kentucky statutes also establish various ways in which a putative father may acknowledge his paternity and thereby be made a party to an action for termination of parental rights.[24] As in Michigan, once the surrogate has terminated her parental rights and surrendered custody to the donor-father, the donor's wife can adopt the child from the surrogate.[25] The department for human resources issues a new birth certificate after entry of the adoption judgment.[26]

Although California's adoption laws permit the donor's wife to adopt the child, the state's paternity and artificial insemination statutes make it difficult for the donor to prove he is the father of the child. Like most states, California permits a parent to place a child for adoption.[27] Thus, the surrogate, as the natural mother of the child, can place the child for adoption with the donor's wife. A statutory provision for adoption by a stepparent (the donor's wife) where one natural parent (the donor) retains custody and control of the child also facilitates the adoption transaction.[28] In California, as well as in Michigan and Kentucky, once the donor is declared the natural and legal father of the child, his wife can pe-

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cannot be established until after delivery. Interview with Dr. Richard M. Levin on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 12.

22. KY. REV. STAT. § 208C.050(4)(e) (1980).

23. *Id.* § 208C.050(4)(d).

24. If the donor has voluntarily identified the mother by affidavit, acknowledged the child within sixty days of birth, caused his name to be affixed to the birth certificate of the child, commenced a judicial proceeding claiming parental rights, contributed financially to the birth or support of the child, or married the child's mother, or if he is openly living with her or the child, he will be made a party to the surrogate's action to terminate her parental rights. *Id.* § 208C.040(1)(a)-(f) (1980). The purpose of these statutes is not to enable a donor to establish his paternity, but to enable a mother to bring a paternity action against a putative father. Nevertheless, the legislation provides several methods by which a donor can establish his paternity.

25. *Id.* § 199.470 (1980). Subsection 199.470(4)(a) provides that when a child is sought to be adopted by a stepparent he need not be placed for adoption by a licensed institution. Nor is permission of the secretary of human resources required.

26. *Id.* § 199.570 (1980).

27. "Any person other than a parent or any organization, association, or corporation that, without holding a valid and unrevoked license or permit to place children for adoption issued by the State Department of Social Services, places any child for adoption is guilty of a misdemeanor." CAL. CIV. CODE § 224q (West Supp. 1980).

28. *Id.* § 226.9 (West Supp. 1980).

tition to adopt the child from the surrogate, who will already have relinquished her parental rights. The new birth certificate issued after the adoption will name the donor and his wife as the child's parents.[29]

This procedure requires that the law recognize the donor as the father of the child. Were he not the child's father, he would have to petition to adopt the child as a non-relative and would have to file with the court a full accounting of all disbursements made in connection with the birth of the child.[30] More importantly, were the surrogate to attempt to keep the child after birth, a man not considered the legal father of the child would have no standing to claim custody.[31] A donor not legally recognized as the child's father thus runs the risk of losing the child who is biologically his own, despite his acknowledged intention to the contrary.[32]

In Michigan, the donor can file a notice of intent to claim paternity even before the birth of the child.[33] In Kentucky, he can establish his paternity under one of the statutorily specified

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29. CAL. CIV. CODE § 7010(b) (West Supp. 1980); CAL. HEALTH & SAFETY CODE § 10450 (West Supp. 1980).

30. The petitioners in any proceeding seeking the adoption of a minor child shall file with the court a full accounting report of all disbursements of anything of value made or agreed to be made by them or on their behalf in connection with the birth of the child, the placement of the child with the petitioners, any medical or hospital care received by the natural mother of the child or by the child in connection with its birth, any other expenses of either natural parent of the child, or the adoption. . . .

The provisions of this section shall not apply to an adoption by a stepparent where one natural or adoptive parent retains his or her custody and control of the child.

CAL. CIV. CODE § 224r (West Supp. 1980). *See* text accompanying notes 147-54 *infra*.

31. The possible remedies in case of breach of agreement by either the surrogate or the adoptive couple are beyond the scope of this Comment. Breach is always a risk, however, and has already occurred in at least one case involving a California surrogate who announced her intention to keep the child. San Diego Union, Mar. 22, 1981, § A, at 3, col. 5. The possibility of breach must be considered when analyzing the need for legislation and when drafting a contract between an adoptive couple and a prospective surrogate mother. *See* note 183 *infra*.

32. Theoretically the transaction could be handled as an independent adoption, for which the donor need not establish his paternity. The surrogate and her husband, who is the presumed natural father, would relinquish their parental rights to the adoptive couple, the semen donor and his wife. To rely on the adoption procedure alone, however, assumes the cooperation of all parties throughout the pregnancy, birth, and adoption. Prospective parents involved in a routine adoption realize that the natural mother may decide during her pregnancy to keep her child. Since they have no biological connection with the child and will have lost only the waiting period, they may be willing to take that chance. The semen donor involved in surrogate motherhood, however, is the biological father of the surrogate's child and hence less willing to risk losing that child. Recognizing him as the child's legal father gives him an opportunity to challenge the surrogate who attempts to keep the child.

33. MICH. COMP. LAWS ANN. § 710.33 (West Supp. 1980). *See* text accompanying note 117 *infra*.

methods.[34] California laws, however, not only fail to provide a means by which the donor can acknowledge his paternity, but effectively preclude him from doing so, thus creating legal obstacles to surrogate motherhood itself. The remainder of this Comment analyzes those obstacles: the conclusive presumption of paternity, the rebuttable presumptions of paternity, the lack of a suitable method for the donor to establish his own paternity, and the artificial insemination statute. The final sections examine California's prohibition of payment for the transfer of custody or adoption and the extent to which the legislature should modify the law to facilitate surrogate motherhood in California.

THE CONCLUSIVE PRESUMPTION OF PATERNITY

Both the Evidence Code and the Civil Code of California contain presumptions of paternity.[35] Until September 30, 1980, Evidence Code section 621 established a conclusive presumption that a married woman's husband was the father of her child.[36] That law presented a major obstacle to surrogate motherhood in California. Although the conclusive presumption would not present an obstacle if the surrogate were single,[37] physicians and attorneys have preferred to use married surrogates who have already borne children. Presumably, these women have proven themselves physically capable of conception and childbearing and are less likely to keep the child than are single women without children.[38] Nevertheless, until the 1980 amendment the conclusive presumption of paternity effectively barred the use of married women as surrogates.

Prior to 1980, the conclusive presumption of paternity could be avoided only if the husband were impotent or sterile.[39] The 1980

34. KY. REV. STAT. § 208C.040 (1980). *See* text accompanying note 24 *supra*.

35. CAL. CIV. CODE § 7004 (West Supp. 1980); CAL. EVID. CODE § 621 (West 1966 & Supp. 1981) [hereinafter referred to in text as section 621].

36. "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." CAL. EVID. CODE § 621 (West 1966 & Supp. 1980). *See* note 41 *infra*.

37. *See* text accompanying notes 53-57 *infra*.

38. Quindlen, *Surrogate Mothers: A Controversial Solution to Infertility*, N.Y. Times, May 27, 1980, § B, at 12, col. 1; Interview of Dr. Richard M. Levin on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 3-4.

39. CAL. EVID. CODE § 621 (West 1966 & Supp. 1981).

legislation provided a third exception.[40] If blood test evidence excludes the surrogate's husband as a possible father of the child, the presumption is rebutted and the question of paternity is resolved accordingly.[41]

By admitting blood test results to rebut the presumption of paternity, the amended statute eliminates a significant barrier to surrogate motherhood and cures one constitutional flaw of the previously conclusive presumption. Prior to the 1980 amendment, even if the surrogate and her husband agreed that the donor was the natural father of the child, the law precluded the surrogate's husband from denying his own paternity. Under the amended statute, if the surrogate's husband supports his wife's agreement to relinquish parental rights, he may rebut the presumption of his paternity. The parties may then bring an action to establish the paternity of the donor under the appropriate provisions of the California Civil Code.[42] The amended statute also meets the requirements of procedural due process as applied to the surrogate's husband.[43] Until 1980, California's conclusive presumption of paternity denied the husband an opportunity to rebut the presumption that he was the father of his wife's child. As amended, the statute now permits him to rebut the presumption with appropriate blood test evidence.

Even as amended, however, section 621 still prevents the donor

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40. (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

The notice of motion for blood tests under this subdivision shall only be raised by the husband and shall be raised not later than two years from the date of birth of the child.

The notice of motion for the blood tests pursuant to this subdivision must be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on the effective date of the amendment to this section adopted at the 1979-80 Regular Session of the Legislature.

The provisions of this subdivision shall not apply to any case which has reached final judgment of paternity on the effective date of the amendment to this section adopted at the 1979-80 Regular Session of the Legislature.

Id. § 621 (West 1966 & Supp. 1981). The amending act was an urgency statute which went into immediate effect on Sept. 30, 1980.

41. *Id.*

42. CAL. CIV. CODE §§ 7004, 7006 (West Supp. 1980). *See* text accompanying notes 85-124 *infra*.

43. *See* text accompanying notes 46-48 *infra*.

from establishing his paternity in certain cases. Only the surrogate's husband may raise the notice of motion for blood tests.[44] Where the surrogate and her husband decide to keep the child, the donor cannot introduce blood test evidence himself. In such a circumstance, the donor is afforded no more protection than he was prior to the 1980 amendment.[45]

Furthermore, as applied to surrogate motherhood the statute arguably is unconstitutional on procedural due process grounds, under an irrebuttable presumption analysis, and as a denial of equal protection of the law. The presumption remains unconstitutional on procedural due process grounds because it denies the semen donor an opportunity to rebut it. The requirements of procedural due process apply to deprivations of liberty or property interests protected by the fourteenth amendment of the United States Constitution.[46] The United States Supreme Court has held that those fundamental, constitutionally protected interests include the individual's right to decide whether to procreate and rear children.[47] Since such fundamental interests are at stake in surrogate motherhood, procedural due process requires that the donor be given an opportunity to be heard.[48] Without such an opportunity, he is unable to rebut the presumption of the husband's paternity and therefore is unable to establish his own. By denying the donor the right to prove his paternity, the statute impairs

44. CAL. EVID. CODE § 621 (West 1966 & Supp. 1981).

45. The parties may agree in their contract that the surrogate's husband will raise the notice of motion for blood tests. (*See* text accompanying notes 197-205 *infra* for a discussion of other contract provisions.) A court will not necessarily grant specific performance of this provision, however. *See* text accompanying note 177 *infra*.

46. "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .", U.S. CONST. amend. XIV, § 1; Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

47. *See* Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

48. Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). These cases focused on the type of liberty or property interest whose deprivation would require the protection of procedural due process, and on the nature of the hearing required. Surrogate motherhood clearly affects the fundamental interests of the donor, as well as those of the surrogate's husband, now protected by the amended statute. The nature of the hearing which would be required to protect the donor's rights goes beyond the question of the constitutionality of the application of the statute. At the least, the donor must be afforded some opportunity to rebut the presumption of the surrogate's husband's paternity. Section 621 prevents him from doing so at any time and thus leaves his fundamental interests unprotected.

his fundamental right to decide to have a child when his wife is unable to bear children. The amended statute is also unconstitutional as applied to the surrogate who wishes to surrender her parental rights but whose husband wants to keep the child and refuses to order blood tests. Like the donor, she is denied the right to rebut the presumption that her husband is the father of the child.

Section 621, as applied to surrogate motherhood, also appears unconstitutional under an irrebuttable presumption analysis. The United States Supreme Court has held that where the state purports to be concerned with a particular status it may not deny one seeking that status the opportunity to show factors that clearly bear on the issue.[49] In enacting a presumption of paternity the state is avowedly concerned with the status of paternity, yet in making that presumption conclusive it denies the semen donor an opportunity to offer evidence of his paternity. Although the Court has been reluctant to extend this analysis when the status is not constitutionally protected, it has distinguished those cases dealing with protected rights.[50] Where fundamental interests are affected, such an approach is still appropriate. For example, the Court has held that an unwed father cannot be presumed to be unfit to have custody of his child without an opportunity to prove his fitness in a custody proceeding.[51] The same fundamental rights of childbearing and child rearing are affected in surrogate motherhood as are affected in custody disputes. The donor should not be presumed not to be the father of the surrogate's child without an opportunity to prove his paternity.[52]

The conclusive presumption of paternity denies the married surrogate the equal protection of the law because it does not also restrict the decision-making rights of single women who wish to serve as surrogates. The statute impairs a married woman's right

49. Vlandis v. Kline, 412 U.S. 441, 452 (1973) (state residency for purpose of tuition assessment).

50. Weinberger v. Salfi, 422 U.S. 749 (1975).

51. Stanley v. Illinois, 405 U.S. 645 (1972). *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (presumption that every woman who is more than four months pregnant cannot satisfactorily work violates due process). *See also In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975), *citing Stanley* and discussed in note 93 *infra*. *Stanley* can also be examined in equal protection terms. The state denied unwed fathers a hearing on parental fitness while granting such a hearing to all other parents whose custody was challenged. Weinberger v. Salfi, 422 U.S. at 771.

52. The court's concern over the difficulties of individual determinations, Weinberger v. Salfi, 422 U.S. at 777; United States Dep't of Agriculture v. Murry, 413 U.S. 508, 518 (1973), can be met by the adoption of pretrial hearing procedures which would reduce unnecessary litigation. *See* text accompanying notes 109-11 *infra*.

both directly and indirectly. Directly, the law subjects her decision to her husband's veto, while imposing no equivalent restriction on the decision of a single woman. If a married surrogate's husband refuses to introduce blood test evidence, she cannot rebut his paternity. His refusal to rebut the presumption of his own paternity vetoes the married surrogate's decision to bear a child for the donor and his wife.[53] Indirectly, the presumption of paternity encourages donors to use unmarried rather than married women and thereby limits the opportunities available to married women who wish to serve as surrogates. To the extent that they are passed over in favor of single women, they are indirectly restricted in the exercise of their right to be surrogates. The donor is similarly restricted. Although he may prefer to use a married woman, the statute creates a risk not present were he to use a single surrogate. Thus, the law deters the donor from using the preferred procedure.[54] The statute narrows the field of suitable surrogates and indirectly impairs the donor's right to beget a child through the use of a surrogate mother.

The effect of the presumption of paternity on surrogate motherhood is to classify surrogates on the basis of marital status.[55] Although a statute affecting surrogate motherhood might legitimately classify surrogates as distinct from other childbearing women, section 621 underinclusively classifies only married surrogates, not all surrogates. The classification is over inclusive as well because it includes married surrogates who intend to relinquish their children along with married women who intend to bear children for their own family. The state has no legitimate in-

53. This veto power itself is inconsistent with the decision in Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976), in which the United States Supreme Court held that a husband does not have a veto power over his wife's decision to have an abortion. Both the decision to have an abortion and the decision to serve as a surrogate are related to the fundamental right to decide whether or not to bear a child, which was established in Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973).

54. *See* text accompanying note 38 *supra*.

55. In some areas, the United States Supreme Court has required purposeful discrimination before declaring a statute unconstitutional on equal protection grounds. *E.g.*, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), Washington v. Davis, 426 U.S. 229 (1976) (disproportionate impact alone is not sufficient evidence of denial of equal protection on basis of race). Where a fundamental right explicitly or implicitly protected by the Constitution is involved, however, discriminatory effect alone justifies a presumption of unconstitutionality. Mobile v. Bolden, 446 U.S. 55 (1980); Skinner v. Oklahoma, 316 U.S. 535 (1942).

terest in classifying surrogates according to their marital status or in encouraging the use of single rather than married women as surrogates, especially when those involved in the procedure favor the use of married rather than single women.[56] This classification of married women who wish to be surrogates lacks a rational relation to a legitimate state interest and therefore denies those women the equal protection of the law.[57]

A further amendment of section 621 permitting the donor and the surrogate to rebut the presumption might make the statute constitutional on both due process and equal protection grounds as applied to surrogate motherhood. Such an amendment would eliminate a significant statutory barrier to surrogate motherhood. Because amendment would create yet another exception to a purportedly conclusive presumption, however, the better approach is to repeal the statute rather than continue the string of exceptions. The section has no continuing justification. In cases of surrogate motherhood, its original objectives do not apply; in traditional actions to determine paternity, its policies are met by the rebuttable presumptions of the Civil Code.[58]

The conclusive presumption of paternity does bear a reasonable relation to state interests in the integrity of the family, the protection of the child, and the financial concerns of the state.[59] The presumption has therefore traditionally excluded evidence tending to show non-spousal conception, lest such evidence impugn family integrity.[60] Another justification offered for the presump-

56. The state does have a legitimate interest in the presumption that the husband of a married woman is the father of her child, *see* text accompanying notes 59-65 *infra*, but this interest can be protected by a rebuttable presumption of paternity. *See* text accompanying notes 81-84 *infra*.

57. It can be argued that a strict scrutiny standard should be applied, because the right of procreation is among the rights of personal privacy protected by the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34 n.76 (1973); Skinner v. Oklahoma, 316 U.S. 535 (1942). Where fundamental rights are asserted under the equal protection clause, classifications which might restrain them may be closely scrutinized. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). Thus a classification of surrogates according to their marital status burdens a constitutionally protected right and can be justified only by a compelling state interest. Skinner v. Oklahoma, 316 U.S. 535 (1942). A statute which burdens such a fundamental right, however, may be characterized more accurately as a denial of due process than as a denial of equal protection. *See* Shapiro v. Thompson, 394 U.S. 618, 659-62 (1969) (Harlan, J., dissenting). If an equal protection approach is used, as noted in the text, even a rational relation test renders the classification unconstitutional.

58. *See* CAL. CIV. CODE § 7004 (West Supp. 1980). *See* note 81 *infra* for full text.

59. Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437, 465-67 (1962).

60. Kusior v. Silver, 54 Cal. 2d 603, 619, 354 P.2d 657, 668, 7 Cal. Rptr. 129, 140 (1960).

tion has been the protection of the innocent child from the social stigma of illegitimacy should his father disclaim paternity. At common law, the illegitimate child was *nullius filius* and had none of the legal rights of a child legitimately born.[61] Furthermore, the state has a valid interest in enforcing parental obligations in order to avoid a public burden of financial support for the abandoned child.

Valid though these concerns may have been at the time of enactment, and may still be today, they do not bear a rational relation to the presumption of paternity in the context of surrogate motherhood. The problems the presumption attempts to avoid are minimized when a father, other than the mother's husband, seeks to accept his parental responsibilities. Rather than weaken the family of the surrogate,[62] surrogate motherhood strengthens the family of the adoptive couple[63] by providing them with a child they otherwise might not have. Technically, the child is illegitimate because his parents (the surrogate and the donor) are not married to each other. Nevertheless, a child born through surrogate motherhood will have both a mother (the donor's wife) and a father (the donor) and will thereby avoid the stigma of illegitimacy.[64] The state need not fear that the child will become dependent on public funds because once the donor establishes his paternity he will be obligated to support the child.[65]

An additional justification for the conclusive presumption of paternity involved problems of proof. In the past, the difficulty of

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61. 1 W. BLACKSTONE, COMMENTARIES *459.

62. The reaction of the surrogate's family varies even during the procedure. The husband of Dr. Levin's pseudonymous surrogate, "Elizabeth Kane," was reluctant at first, but he now supports her decision. Her three children thought their mother's contribution to an infertile couple's family was "fantastic" but admit they were taunted by school friends. Interview with "Elizabeth Kane," The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 9; PEOPLE, Dec. 8, 1980, at 52.

63. Although only the wife actually adopts the child (the donor being the child's biological father), "adoptive couple" is used herein to refer to the semen donor and his wife together.

64. The Uniform Parentage Act eliminated the categorization of children as "legitimate" or "illegitimate" in its attempt to ensure the same rights to all children regardless of the marital status of their parents. UNIFORM PARENTAGE ACT § 2, Commissioners' Comment, 9A UNIFORM LAWS ANNOTATED 579 (1979). In adopting the Uniform Parentage Act, the California legislature also amended Evidence Code § 621 by substituting "presumed a child of the marriage" for "presumed legitimate." CAL. EVID. CODE § 621 (West 1966 & Supp. 1981).

65. CAL. PENAL CODE § 270 (West Supp. 1980).

proving paternity justified the exclusion of rebutting evidence. Until the recent development of human leococyte antigen (HLA) testing,[66] blood test results were not conclusive as to paternity and were only indicative of non-paternity in certain combinations of blood groups.[67] To admit such inconclusive results would have wasted time and tended to confuse a jury. Because the weighing of the possibilities would merely be guessing, where the husband was one of the possible fathers he "must bear the burden of his relation to the woman and be taken to be the father of her child."[68] The conclusive presumption of paternity, therefore, has rested on evidentiary grounds as well as on "overriding social policy."[69]

The procedural problems of proof which have traditionally arisen in paternity actions can now be met in cases of surrogate motherhood. HLA test results can establish paternity as well as non-paternity with a high degree of probability.[70] In addition, the physician's record of the surrogate's insemination and the written agreement between the surrogate and the donor can provide clear and convincing evidence to rebut the presumption of the surrogate's husband's paternity. The proposed provisions for informal, pretrial hearings also can eliminate much unnecessary litigation.[71]

The policy justifications for section 621 that remain in traditional cases of disputed paternity can be satisfied by the rebuttable presumptions of the Civil Code.[72] California's 1975 enactment of the Uniform Parentage Act (UPA) eliminated the need for the conclusive presumption of paternity even as amended in 1980.[73] Of those states enacting the UPA's rebuttable presumptions, only California has also incorporated a conclusive presumption of paternity.[74] Yet a conclusive presumption of paternity is inconsis-

66. *See* Hubbard, Goldstein, & Burger, *Probability of Paternity: What Do the Numbers Mean?*, OR. ST. B. BULL., June 1980, at 12.

67. *See* Huntingdon v. Crowley, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Rptr. 254 (1966).

68. *In re* Estate of McNamara, 181 Cal. 82, 96, 183 P. 552, 557 (1919).

69. Kusior v. Silver, 54 Cal. 2d at 619, 354 P.2d at 667-68, 7 Cal. Rptr. at 139-40 (1960). As amended in 1980, the statute permits the husband's interests to overcome those of the state when he can prove he is not the child's father. Even in traditional paternity cases, the state's social policies are not necessarily overriding.

70. *See* Hubbard, Goldstein, & Burger, *Probability of Paternity: What Do the Numbers Mean?*, OR. ST. B. BULL., June 1980, at 12.

71. *See* note 110 *infra*.

72. CAL. CIV. CODE § 7004 (West Supp. 1980). See note 81 *infra* for full text.

73. CAL. CIV. CODE §§ 7000-7018 (West Supp. 1980) (originally enacted as 1975 Cal. Stats. ch. 1244, effective Jan. 1, 1976).

74. "A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following

tent with the UPA's goal of ensuring equal rights for all children regardless of the marital status of their parents.[75] Not only did the Commissioners on Uniform Laws intend that "all presumptions of paternity [be] rebuttable in appropriate circumstances;"[76] the sponsors of California's version of the UPA also recognized the inappropriateness of a conclusive presumption of paternity where a rebuttable presumption fulfills the same goals. The sponsors' proposed repeal of Evidence Code section 621 was rejected by the Committee on the Judiciary, however, and the conclusive presumption was amended and retained.[77]

The 1980 amendment to section 621 creates a presumption which is rebuttable in certain circumstances by the mother's husband. As a limited rebuttable presumption, it duplicates part of Civil Code section 7004(a)(1).[78] To the extent that the presumption is still conclusive, in that neither the mother nor a third party may rebut it, it is unconstitutional.[79] As either a rebuttable or a conclusive presumption, it is unnecessary. Where family stability, illegitimacy, and obligations of financial support are still valid concerns, the rebuttable presumptions of paternity can fulfill these objectives and allay the fears underlying the conclusive presumption. Because limited standing and the requirement of clear and convincing evidence make even a rebuttable presumption of paternity difficult to rebut,[80] it is sufficiently strong to preserve family integrity and protect children. In amending section 621 in 1980 the legislature indicated its willingness to admit blood test results to prove non-paternity. Thus, it eliminated the procedural justification for retaining a conclusive presumption of paternity. Because both the policy and the procedural concerns supporting a conclusive presumption have been met, section 621 can be repealed.

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subdivisions. . . ." CAL. CIV. CODE § 7004(a) (West Supp. 1980). See note 81 *infra* for the full text of § 7004(a). Other jurisdictions which have adopted the Act are Colorado, COLO. REV. STAT. §§ 19-6-101 to -129 (1978); Hawaii, HAWAII REV. STAT. §§ 584-1 to -26 (1976); Montana, MONT. REV. CODES ANN. §§ 40-6-101 to -131 (1979); North Dakota, N.D. CENT. CODE §§ 14-17-01 to -26 (Supp. 1977); Washington, WASH. REV. CODE §§ 26.26.020 -.905 (1979); Wyoming, WYO. STAT. §§ 14-2-101 to -120 (1977).

75. UNIFORM PARENTAGE ACT § 2, Commissioners' Comment.

76. UNIFORM PARENTAGE ACT, Commissioners' Prefatory Note.

77. Cal. S. 347, Reg. Sess., 1975-76 J. SENATE 3774.

78. *See* note 81 *infra*.

79. *See* text accompanying notes 46-57 *supra*.

80. *See* text accompanying notes 91-97 *infra*.

The rebuttable presumptions of paternity codified in California's version of the Uniform Parentage Act operate to maintain family stability, protect the children of unwed mothers, and enforce paternal support obligations.[81] Because of California's unique version of the UPA, however, those same rebuttable presumptions of paternity and related sections of the Act potentially serve as additional barriers to surrogate motherhood. The UPA was drafted to conform to the standards enunciated in *Stanley v. Illinois*.[82] Its purpose was to recognize the right of all children, legitimate or not, to a legal relationship with both parents. The purpose of the UPA's presumption of paternity was to identify the father[83] against whom the child may assert that right.[84] Because

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81. (a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

CAL. CIV. CODE § 7004 (West Supp. 1980). The following discussion of the rebuttable presumptions and the other obstacles of the Uniform Parentage Act assumes that the conclusive presumption of paternity has been repealed.

82. UNIFORM PARENTAGE ACT, Commissioners' Prefatory Note; Stanley v. Illinois, 405 U.S. 645 (1972).

83. The Act also provides for the establishment of the mother and child relationship where it is in question. UNIFORM PARENTAGE ACT § 21.

84. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 9 (1974).

the drafters did not specifically provide for surrogate motherhood, portions of the UPA create legal obstacles to surrogate arrangements. California's version makes surrogate motherhood even more difficult because the legislature failed to adopt certain sections which would have enabled a donor to establish his paternity even where the surrogate is married.

Because he is not married to the surrogate and does not intend to be, the donor can establish his paternity by only one method.[85] Subsection 7004(a)(4) presumes him to be the natural father of the child if he receives the child into his home and openly holds out the child as his natural child.[86] This method involves two potential dangers for the donor seeking to claim paternity. First, the surrogate may refuse to relinquish custody at birth, so that the donor may not be able to receive the child and openly hold the child out as his own.[87] Second, despite the fact that the donor may be presumed to be the child's natural father if he receives the child into his home and openly holds the child out as his own, if the surrogate is married, or had been married within 300 days prior to the birth, her husband is also presumed to be the natural

85. CAL. CIV. CODE § 7004(a) (West Supp. 1980). Unless otherwise indicated, all references to sections 7004 and 7006 are to the Civil Code.

86. *Id.* § 7004(a)(4).

87. The court is empowered to determine parentage and custodial rights in the sequence it deems proper. CAL. CIV. CODE § 7017(d) (West Supp. 1980). Two California appellate courts have approved the award of custody to the natural father, in spite of the mother's refusal to give her consent, in order to allow him to complete the conduct necessary under § 7004(a)(4) to establish himself as the presumed father. *In re* Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (4th Dist. 1977), *cert. denied*, 435 U.S. 996 (1977); *In re* Reyna, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (5th Dist. 1976). The Court of Appeal for the Second District, however, held differently and expressed its disapproval of *Tricia*. W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (2d Dist. 1979); Adoption of Marie R., 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (2d Dist. 1978). In *Marie* the mother had married. The court said that regardless of which man was held to be the presumed father, whose consent to adoption was required, "the baby will end up with a father." *Id.* at 629, 145 Cal. Rptr. at 126 (2d Dist. 1978). In *W.E.J. v. Superior Court*, the court interpreted the legislative intent of § 7017(d) as the protection of the child's best interests, as opposed to the preferences of a "purely biological father," and refused to award custody to the natural father so that he could become a presumed father under § 7004(a)(4). W.E.J. v. Superior Court, 100 Cal. App. 3d at 312, 160 Cal. Rptr. at 868 (2d Dist. 1979). Although consent to adoption was the issue in these cases, the holdings point out the courts' conflicting interpretations of § 7017(d). If the surrogate refuses to let the donor take the child into his home, some courts may not award him custody under § 7017(d), thus preventing him from establishing his paternity under § 7004(a)(4).

father of the child under subsection 7004(a)(1).[88] Subsection 7004(b) provides that when two or more conflicting presumptions arise, "the presumption which on the facts is founded on the weightier considerations of policy and logic controls."[89] The related sections of California's Uniform Parentage Act dealing with standing[90] make it difficult for the donor to prove that the presumption of his paternity under subsection 7004(a)(4) is based on weightier considerations than the presumption of the surrogate's husband's paternity. The California UPA permits any interested party to bring an action to determine the existence or nonexistence of a father and child relationship presumed under subsection 7004(a)(4). However, only the child, his natural mother, or a man presumed to be the child's father under subsections 7004(a)(1), 7004(a)(2), or 7004(a)(3) may bring an action to determine the existence or nonexistence of the relationship presumed under one of those three subsections.[91] While the donor may

88. CAL. CIV. CODE § 7004(a)(1) (West Supp. 1980).

89. *Id.* § 7004(b).

90. *Id.* § 7006. *See* text accompanying notes 91-97 *infra*. Restricting standing is consistent with the policy underlying both the conclusive and the rebuttable presumptions of paternity, that family integrity should not be impugned by a third party. *But see* note 93 *infra*.

91. (a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or proposes to relinquish for or consent to, the adoption of the

bring an action to establish his own paternity once he receives the child into his home, he lacks standing to declare the nonexistence of the relationship between the child and the husband of a married surrogate. Although the married surrogate, her husband, or the child could bring an action to rebut the presumption of the paternity of the surrogate's husband and then to establish that of the donor, this would be awkward and inconvenient.[92] Furthermore, this procedure requires the cooperation of the surrogate and her husband. If they decided to keep the child, the donor would lack standing to rebut the presumption of the surrogate's husband's paternity.[93]

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child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of such child or the birth of the child, whichever is later. The commencement of such action shall suspend any pending proceeding in connection with the adoption of such child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby.

CAL. CIV. CODE § 7006 (West Supp. 1980).

92. *Id.* § 7006(a). Theoretically, the donor could prevail upon the district attorney to bring the action under § 7006(g). The original paternity action in Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979), was brought by the district attorney under CAL. CIV. CODE § 231 (replaced by § 7006). *See* text accompanying notes 105-08 *infra*.

By an even more circuitous route, the donor may have standing under § 7006(d), which permits a man not a presumed father to bring an action to declare he is the child's natural father, even where the child has a presumed father under § 7004(a), if the mother attempts to place the child for adoption. Since the surrogate proposes to relinquish the child for adoption by the donor's wife, the donor may bring an action under § 7006(d) to establish his paternity. This method is procedurally unsatisfactory. Not until the surrogate offers the child to the adoptive mother can the natural father even bring an action to determine his paternity. Furthermore, this provision does not afford the donor any protection if the surrogate attempts to keep the child. CAL. CIV. CODE § 7006(d) (West Supp. 1980).

93. A statute under which an unwed father lacks standing to prove his own paternity may be unconstitutional as a denial of due process, because the fundamental right of childbearing is affected. *See* text accompanying notes 46-52 *supra*. The question of standing in a paternity action was the focus of *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975). CAL. EVID. CODE § 661 (superseded by Civil Code §§ 7004 and 7006) limited the right to dispute the presumption of paternity to the woman, her husband, or their descendants, or to the state in a criminal action. CAL. EVID. CODE § 661 (repealed by 1975 Cal. Stats., ch. 1244). The California Supreme Court held that such a presumption, precluding the unwed father's right to offer evidence that he was the father of the child, denied him due process. *In re* Lisa R., 13 Cal. 3d at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485. The decision

An examination of the parallel sections in Washington's version of the Uniform Parentage Act suggests a statutory solution to the problem of standing.[94] Like California Civil Code section 7006(a), the comparable Washington section provides that the child, the natural mother, or a man presumed by statute to be the child's father may bring an action to declare the existence or nonexistence of paternity.[95] An additional provision permits any interested party, the department of social and health services, or the state to bring an action to determine the existence or nonexistence of paternity regardless of the source of the presumption of paternity.[96] Thus, under the Washington version of the UPA, the donor, as an interested party, could bring an action to rebut the presumption of paternity of the surrogate's husband and to establish himself as the father of the child.

Using the Washington statute as a guide, the California legislature should amend subsection 7006(b) to permit any interested party to bring an action to determine the existence or nonexistence of paternity without reference to the specific presumptions of section 7004(a). The state need not fear that hordes of litigious unmarried men will demand parental rights. Only those who in good faith believe they have fathered children, who have a genuine interest in their children, and who are willing to support those children are likely to bring actions to rebut the presumption of paternity of the mother's husband. Additionally, the provisions for informal hearings would serve as a safeguard against unjustified litigation in traditional cases of questioned paternity.[97] In cases of surrogate motherhood, under a modification of section 7006(b), the donor would have standing to rebut the presumption that the married surrogate's husband is the father of the child.

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was limited to the particular circumstances, however. In *Lisa* the unwed father had lived with the child's mother before and after birth, and, as in Stanley v. Illinois, 405 U.S. 645 (1972), both Lisa's presumed father and her natural mother had died. The court insisted that future decisions concerning an unwed father's right to offer evidence to rebut a presumption of paternity must depend "on circumstances prevailing in each particular case." *In re* Lisa R., 13 Cal. 3d at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485 n.17. It is not yet clear whether *Lisa* would apply to give a donor standing to rebut a presumption of paternity of the surrogate's husband where both the surrogate and her husband were still living. *See* Comment, *The Uniform Parentage Act: What It Will Mean for the Putative Father in California*, 28 HASTINGS L.J. 191 (1976).

94. WASH. REV. CODE §§ 26.26.040, .060 (1979).

95. *Id.* § 26.26.060(1).

96. *Id.* § 26.26.060(2) (1979). This represents a change from the original draft of the UPA, which permitted an interested party to bring an action only to determine the relationship presumed under the 4th condition (reception of the child into the man's home) or under the 5th, which California omitted completely, *see* text accompanying notes 112-24 *infra*. UNIFORM PARENTAGE ACT § 6(b).

97. *See* note 110 *infra*.

Even if the California donor had standing to bring an action to determine that a married surrogate's husband was not the child's father, he would then have the burden of proof in any such action to rebut the presumption of paternity by clear and convincing evidence[98] and to establish his own paternity. Section 895 of the California Evidence Code permits the donor to produce blood test results to prove the non-paternity of the married surrogate's husband.[99] This still leaves the donor with the burden of establishing his own paternity. That burden will be especially heavy if the surrogate attempts to keep the child and thus precludes the donor from establishing paternity under subsection 7004(a)(4).

California's versions of two Uniform Laws make it particularly difficult for the donor to introduce the affirmative evidence most likely to prove his paternity. First, the Uniform Act on Blood Tests to Determine Paternity provided that blood test results indicating *non-paternity* would be conclusive evidence that the alleged father was not the father of the child, while blood test results showing the possibility of *paternity* were admissible within the discretion of the court.[100] California's counterpart, however, permits blood test evidence only to indicate non-paternity. It omits the last sentence of the Uniform Act provision which would have permitted the court to admit blood test results showing paternity when warranted by the infrequency of blood type.[101] Second, in enacting the Uniform Parentage Act in 1975, the California legislature omitted section 12 of the draft UPA, once again rejecting the affirmative use of blood test results to show paternity.[102] Viewing these omissions as intentional, the

98. CAL. CIV. CODE § 7004(b) (West Supp. 1980).

99. If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.

CAL. EVID. CODE § 895 (West 1966). *See* Huntingdon v. Crowley, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Rptr. 254 (1966).

100. The current counterpart provision is UNIFORM ACT ON PATERNITY § 10, 9A UNIFORM LAWS ANNOTATED 635 (1979).

101. CAL. EVID. CODE § 895 (West 1966). The omitted portion reads: "If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type." UNIFORM ACT ON PATERNITY § 10. An amendment to CAL. EVID. CODE § 895 introduced in the 1979-80 Regular Session of the Legislature died in committee.

102. Evidence relating to paternity may include:

courts have admitted blood test evidence to prove non-paternity[103] but have excluded such evidence when it tends to prove paternity.[104] Under these judicial interpretations of current statutes, the donor may introduce blood test results only to prove that the surrogate's husband is not the father of the child, not to prove the donor's own paternity.

The recent California Court of Appeal decision in *Cramer v. Morrison* recognizes medical advances in blood test procedures and calls for a legislative modification of Evidence Code section 895.[105] In *Cramer* the court conceded that the omission of section 12 of the UPA may have indicated the California legislature's intent to exclude blood test evidence tending to prove paternity.[106] Nevertheless, the court concluded, the legislature meant the omission to refer only to the standard Landsteiner (red cell) blood grouping tests, not to the more precise human leucocyte antigen (HLA) or tissue typing tests, which were not standard practice in 1975.[107] According to the holding in *Cramer*, the donor could introduce HLA test results as evidence to prove that he is the father of the surrogate's child. Now that medical science has developed more reliable tests for paternity, the California legislature should join the *Cramer* court in recognizing the usefulness of such tests in actions to establish the father and child relationship. Amending California's Evidence Code section 895 to conform to the UPA would give the court discretion to admit red cell grouping or HLA test results where such results are highly probative of paternity.[108]

Adopting section 12 of the UPA would permit not only blood

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(1) evidence of sexual intercourse between the mother and alleged father at any possible time of conception;

(2) an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy;

(3) blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;

(4) medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon request of a party shall, require the child, the mother, and the man to submit to appropriate tests; and

(5) all other evidence relevant to the issue of paternity of the child.

UNIFORM PARENTAGE ACT § 12.

103. *E.g.*, Huntingdon v. Crowley, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Rptr. 254 (1966).

104. *E.g.*, Dodd v. Henkel, 84 Cal. App. 3d 604, 148 Cal. Rptr. 780 (1978).

105. Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979).

106. *Id.* at 881, 153 Cal. Rptr. at 869.

107. *Id.* at 883, 153 Cal. Rptr. at 871.

108. *See generally* Hubbard, Goldstein, & Burger, *Probability of Paternity: What Do the Numbers Mean?*, OR. ST. B. BULL., June 1980, at 12. Because of the recent development of HLA testing, the legislature should modify the last clause

test results, but "all other evidence relevant to the issue of paternity of the child."[109] Such evidence could include the physician's record of the surrogate's artificial insemination with the donor's semen and the written agreement between the donor and the surrogate. This would not lead to a flood of complicated litigation, since the admissibility of such evidence would rest on the sound discretion of the court, which could examine the blood test results, the physician's record, and the agreement in a pretrial hearing.[110] Section 12 of the UPA merely provides that "evidence relating to paternity *may include*" any evidence relevant to the paternity of the child.[111] It does not require the court to admit all evidence proposed by any man claiming to be a father. The court could, on the grounds of public policy, still exclude evidence which would defeat a socially desirable presumption of paternity. Some evidence would be deemed irrelevant. Furthermore, clear and convincing proof would still be necessary to rebut a presumption of paternity. Even with these safeguards, the enactment of section 12 of the UPA would at least give the California donor the opportunity to introduce the evidence necessary, not only to rebut the presumption of another man's paternity, but also to prove his own.

The donor's task of establishing himself as the father of the surrogate's child appears to be simplified when the surrogate is not and has not been married. Subsection 7006(c) of the California Civil Code permits a putative father to bring an action to determine his relationship to a child who has no presumed father

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of its version of § 10 of the Uniform Act on Paternity to include HLA as well as "blood group" tests.

109. UNIFORM PARENTAGE ACT § 12(5).

110. In adopting § 12 of the UPA, the legislature should also enact §§ 10, 11, and 13, which California's version also omitted. Section 10 provides for an informal hearing before a judge or referee from which the public is barred and at which the rules of evidence need not be observed. Section 11 permits the court to require the child, the mother, or the alleged father to submit to blood tests performed by experts. Under § 13, the judge or referee may recommend dismissal of the action, a compromise involving the alleged father's economic obligation, or the alleged father's acknowledgment of his paternity. If the parties accept the recommendation, judgment shall be entered accordingly. Otherwise, the action shall be set for trial. UNIFORM PARENTAGE ACT §§ 10, 11, 13. The drafters of the Act anticipated that these pretrial procedures would "greatly reduce the current high cost and inefficiency of paternity litigation." UNIFORM PARENTAGE ACT, Commissioners' Prefatory Note.

111. UNIFORM PARENTAGE ACT § 12 (emphasis added).

under section 7004(a).[112] However, California's UPA does not adequately provide the means by which a man bringing such a suit may introduce proof of his paternal relationship to the child. Section 7003 provides only two ways to establish paternity: one under the Uniform Parentage Act and the other by proof of adoption.[113] Presently, the only method by which a donor can establish paternity in Califonia is under subsection 7004(a)(4) by receiving the child into his home.[114] Thus, even though the donor may have standing to bring an action to determine his paternity when the surrogate is not married and the child has no presumed father, he has no practical means to establish his relationship with the child if the surrogate prevents him from taking the child into his home.

The most practical solution to this problem is the adoption of subsection 4(a)(5) of the draft UPA.[115] This subsection would serve as the general equivalent of the Michigan and Kentucky provisions, which permit a putative father to acknowledge his paternity of a child.[116] The legislature should not require the father to acknowledge his paternity before birth, as does Michigan, but should allow acknowledgment to be made either before or after the birth of the child.[117] This method would allow the putative father to wait for blood test results before acknowledging his paternity.

No obvious reason appears for the California legislature's failure to enact this subsection of the draft Act.[118] Arguably, the provision could "impugn family integrity"[119] where a man other than the husband has fathered a child. Such a family's integrity might

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112. CAL. CIV. CODE § 7006(c) (West Supp. 1980).

113. *Id.* § 7003.

114. *Id.* § 7004(a)(4).

115. (a) A man is presumed to be the natural father of a child if:

. . . .

(5) he acknowledges his paternity of the child in a writing filed with the (appropriate court or Vital Statistics Bureau), which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the (appropriate court or Vital Statistics Bureau). If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

UNIFORM PARENTAGE ACT § 4(a)(5).

116. *See* text accompanying notes 13-14 and 24 *supra*.

117. A similar Michigan statute replaced by MICH. COMP. LAWS ANN. § 710.33 (West 1980) has been criticized for providing for acknowledgment only before birth. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 13 (1974).

118. Except for California and Wyoming, the jurisdictions adopting the UPA have included this provision. *See* note 74 *supra*.

119. Kusior v. Silver, 54 Cal. 2d 603, 619, 354 P.2d 657, 688, 7 Cal. Rptr. 129, 140 (1960).

be considered already impugned, however, regardless of any legal relationships. Proposed subsection 7004(a)(5) would not create a rash of broken families, because the provision includes two safeguards. First, although acknowledged under this section, paternity will not be presumed if the mother disputes the acknowledgment within a reasonable time after receiving notice. Second, if another man (*e.g.*, her husband) is presumed under subsections 7004(a)(1), 7004(a)(2), 7004(a)(3), or 7004(a)(4) to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.[120] When another man claims paternity and the mother does not dispute his claim but her husband does, she would still be required to rebut the presumption of her husband's paternity in order to establish the other man as the father of the child.[121]

In any of three possible surrogate motherhood situations, the adoption of subsection 4(a)(5) of the UPA would greatly facilitate the establishment of the donor's paternity. If the surrogate were married and all parties agreed that the donor was the child's father, the donor could acknowledge his paternity; the surrogate would not dispute the acknowledgement; and her husband would give his consent in writing. No other presumptions would need apply. The donor would be the presumed father of the child under proposed subsection 7004(a)(5) of the California Civil Code. If the surrogate were single and fulfilled her agreement to surrender custody, the donor would be afforded an alternative, and considerably safer, method of establishing paternity than through subsection 7004(a)(4).[122] Under proposed subsection 7004(a)(5), a donor could acknowledge his paternity even before birth and thus be legally established as the child's father before taking the child into his home. If the surrogate, married or single, attempted to keep the child and a custody battle ensued, subsection 7004(a)(5) would provide the donor with the opportunity to offer at least some evidence of his paternity.[123] Absent a custody

120. UNIFORM PARENTAGE ACT § 4(a)(5).
121. *See* text accompanying notes 91-111 *supra*.
122. *See* text accompanying notes 85-88 *supra*.
123. *See* CAL. CIV. CODE § 4600 (West 1980). Under this section, the court may award custody to a non-parent, but only if it finds that an award of custody to a parent would be detrimental to the child. Unless an award of custody to the surrogate would be detrimental to the child, the court will probably not award custody to the donor if he has not established himself as a presumed parent.

struggle, the provision for establishing paternity by acknowledgment would enable the donor to become the child's presumed father whether the surrogate were married or unmarried. The enactment of the provision would also bring California's legislation into conformity with that of other states adopting the Uniform Parentage Act.[124]

This modification, together with the other amendments to sections 7004 and 7006 proposed herein, would eliminate major statutory obstacles to surrogate motherhood in California. Authorizing any interested party to rebut a presumption of paternity, allowing the admission of blood test results and other relevant evidence to rebut the presumption, and allowing a putative father to acknowledge his paternity in an appropriate writing would permit a donor to establish his paternity of a child born to a surrogate mother.

The Artificial Insemination Statute

The above proposals regarding the rebuttable presumptions of paternity assume that the conclusive presumption of paternity has been repealed and that no other legal obstacles to the procedures used in surrogate motherhood remain. Yet the UPA provides another legal barrier to the donor's attempt to establish paternity. California's artificial insemination statute denies parental rights to the donor of semen used in the artificial insemination of a woman not his wife.[125]

With some changes, the California legislature adopted the official text of the artificial insemination section of the UPA.[126] By providing for the use of donor semen without awarding any parental rights to the donor, the drafters intended to assure the

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124. *See* notes 74 and 118 *supra*.

125. (a) 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. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

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

Cal. Civ. Code § 7005 (West Supp. 1980). This discussion of the artificial insemination statute assumes that the other obstacles to surrogate motherhood have been eliminated.

126. *See* note 132 *infra*.

rights of children so conceived and to carry out the Act's general goal of family integrity.[127] When California enacted the UPA in 1975, artificial insemination by donor (AID) was used almost exclusively to impregnate the fertile wife of a sterile husband. The statute ensured that the sterile husband, rather than the donor, would be the child's legally recognized father. Since then, family planning has developed the reverse procedure, the insemination of a surrogate so that a fertile husband and his infertile wife may have a child. In surrogate motherhood, the couple wishes to ensure that the semen donor *is* the legal father of the child. Section 7005 precludes his parental rights.[128]

Subsection 7005(a) alone does not necessarily prevent the donor from becoming the legally recognized father of a child born to a surrogate, because in order for the wife's husband to be treated legally as the natural father of the child, he must give his written consent to the artificial insemination.[129] Under this subsection, if the husband of a married surrogate withheld his consent or, affirmatively, signed a statement denying that the child so con-

127. *See generally* Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1 (1974).

128. CAL. CIV. CODE § 7005 (West Supp. 1980). All references to § 7005 are to the Civil Code.

129. Presumably, the purpose of a consent requirement is to free the husband from support obligations incurred by a wife who independently seeks artificial insemination in order to have a child that her husband does not want. The underlying assumption is that the decision to procreate, even through artificial insemination, is a joint decision of the couple; a husband should not be required to support his wife's child if he did not consent to its conception. Likewise, in requiring a husband to support his child, Penal Code § 270 states in part: "The husband of a woman who bears a child as a result of artificial insemination shall be considered the father of that child for the purpose of this section, if he consented in writing to the artificial insemination." CAL. PENAL CODE § 270 (West Supp. 1980). Yet the presumptions of paternity, rebuttable or conclusive, hold otherwise: the husband, simply by virtue of his marital relationship to the woman, is presumed to be the father of her child. If § 7005(a) is to be interpreted as *requiring* the husband's consent before he will be legally recognized as the child's father, the law creates an interesting double standard. Where the wife conceives through artificial insemination, the husband, by withholding his consent, is not treated in law as the child's natural father. Where the wife conceives through sexual intercourse with another man, however, in which case the husband probably has not consented, the presumptions of paternity apply and the husband is presumed to be the natural father of the child in spite of his failure to consent. The non-consenting husband thus becomes responsible for children born to his wife through her sexual intercourse with other men but not for those she conceived through AID. Furthermore, since section 7005(b) precludes the donor from being legally treated as the natural father of the child, the ironic effect of § 7005 in a case in which the husband has not consented to AID is to deny the child the right to a legal relationship with either man.

ceived was his, the law might not treat the husband as the natural father of the surrogate's child. The donor then would be free to establish his paternity.[130] Subsection 7005(b), however, precludes the donor from being considered the child's natural father.[131] Because subsection 7005(b) applies whether the surrogate is married or unmarried, this statute is potentially a greater obstacle than the presumptions of paternity, which present a problem only when the surrogate is married.[132] Like subsection 7005(a), subsection 7005(b) serves a valid purpose: it protects (usually anonymous) donors from legal responsibility for children conceived through the use of their semen.[133] In the traditional case of AID, the donor wishes to avoid that legal responsibility; in the case of surrogate motherhood, he wishes to assume it. As presently enacted, subsection 7005(b) does not allow a donor to assume parental responsibility.[134]

One approach to this problem is to repeal subsection 7005(b), because subsection 7005(a) affords the donor the same protection. If a woman's husband is treated in law as if he were the natural father, the donor must be treated as if he were not. In fact, prior to the enactment of the UPA, California's artificial insemination statute did not mention the legal treatment of the donor in such a case.[135] In addition, most states that have enacted artificial insemination legislation have made no specific reference to the donor's rights.[136]

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130. *See* text accompanying notes 115-21 *supra*.

131. CAL. CIV. CODE § 7005(b) (West Supp. 1980).

132. Although the official text of the UPA specifies the artificial insemination "of a married woman other than the donor's wife," the California, Washington, Wyoming, and Colorado versions eliminated the word "married." UNIFORM PARENTAGE ACT § 5(b). Assuming the omission was intentional, § 7005(b) permits the artificial insemination of an unmarried woman. The reference in § 7005(a) to "a wife" appears to express merely the concern with the husband's responsibilities and rights in those cases in which the woman is married; it does not require that the woman be married.

133. Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 614 (1978).

134. The semen donor may be able to waive the right conferred by § 7005(b). If so, the statute need not be amended as proposed herein.

135. CAL. CIV. CODE § 216 (repealed by 1975 Cal. Stats., ch. 1244). The statute specified that a child born to a woman as a result of conception through artificial insemination, to which her husband had consented in writing, was legitimate if the birth occurred during the marriage or within 300 days after its dissolution.

136. ALASKA STAT. § 20.20.010 (1975); ARK. STAT. ANN. § 61-141(c) (1971); FLA. STAT. ANN. § 742.11 (West Supp. 1980); GA. CODE ANN. § 74.101.1 (1973); LA. CIV. CODE ANN. art. 188 (West Supp. 1981); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MICH. COMP. LAWS ANN. §§ 333.2824(6), 700.111(2) (West 1980); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10 § 551-53 (West Supp. 1980-81); VA. CODE § 64.1-7.1 (1980). The Connecticut, Oregon, and Texas counterparts to § 7005(b) provide that no donor of semen used in AID shall have any right in any resulting child. CONN. GEN. STAT. § 45-69j (West Supp. 1980); OR. REV. STAT. § 109.239 (1979-80); TEX. FAM. CODE ANN. § 12.03(b)

As adopted by the California legislature, however, subection 7005(b) does add a significant element not covered in subsection 7005(a), since subsection 7005(b) does not limit AID to married women.[137] Without this provision, the courts might interpret subsection 7005(a) as permitting the artificial insemination only of "wives." Although its protection of the donor's status seems redundant in light of subsection 7005(a), assuming the legislature's intent was to provide for the artificial insemination of unmarried as well as married women, subsection 7005(b) should be retained.

Rather than repeal subsection 7005(b), the legislature should amend the statute to permit the donor to claim paternity in certain cases. The Washington legislature made such a modification in enacting its version of the UPA's artificial insemination provisions.[138] The Washington statute implies that an agreement between the donor and the inseminated woman would conclusively establish the donor's paternity.[139] The amended California statute should provide instead that such an agreement be weighed along with other evidence. Pretrial hearings then could determine paternity according to the facts in each case.[140]

As enacted, the Washington statute could weaken the policy favoring family integrity which underlies the UPA and its presumptions of paternity. Where the woman inseminated is married, the statutory exception permits a man other than the mother's husband to establish paternity apparently without reference to the husband's consent.[141] Where she is unmarried, the

(Vernon 1975). Apparently only these three states and those which have adopted § 5 of the UPA (California, Colorado, Montana, Washington, and Wyoming) have expressly protected the donor's freedom from legal responsibility for a child conceived through AID. *See* note 74 *supra*.

137. *See* note 132 *supra*.

138. (2) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived unless the donor and the woman agree in writing that said donor shall be the father. The agreement must be in writing and signed by the donor and the woman. The physician shall certify their signatures and the date of the insemination and file the agreement with the registrar of vital statistics, where it shall be kept confidential and in a sealed file.

WASH. REV. CODE § 26.26.050(2) (1979).

139. Although the Washington statute does not state that such an agreement is conclusive, by providing that the donor is treated as if he were not the father "unless" he and the woman have agreed, it suggests that when they have made such an agreement, he will be so treated. *Id.*

140. *See* text accompanying notes 109-11 *supra*.

141. WASH. REV. CODE § 26.26.050(2) (1979); *see* note 129 *supra*.

clause recognizes parenthood without marriage.[142] While this may no longer constitute a social stigma, the California legislature may not be ready to condone the practice by statute. In addition, the drafters of the UPA realized that the section on artificial insemination would not cover all possible cases involving AID.[143] Although the Washington legislature may have had surrogate motherhood in mind when adopting its revised version of the UPA's artificial insemination statute,[144] the exception provided for in the Washington statute might also affect cases of AID not yet envisioned.[145]

Amending subsection 7005(b) to permit an agreement between the donor and the surrogate to be admitted along with other evidence would give the court discretion in meeting new situations in which policy considerations could demand—or preclude—the semen donor's paternity. If a married woman had been artificially inseminated without her husband's knowledge or consent while continuing sexual relations with him, a court might find the husband, rather than the donor, to be the legal father of the child, in spite of a written agreement between the woman and the donor. If an unmarried couple had agreed to have their own child through artificial insemination, the court could apply the exception clause and establish the paternity of the semen donor.[146] And if a surrogate mother, married or unmarried, had been artificially inseminated with the semen of the husband of an adoptive couple, with all parties agreeing in writing that the donor was the father of the child, the court could find that such an agreement re-

142. Even in this situation, the Washington statute does carry out the objective of the UPA, the establishment of the child's right to legitimacy regardless of the marital relationship of his parents.

143. *See* UNIFORM PARENTAGE ACT § 5, Commissioners' Comment. ("This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination.")

144. Letter from former Washington State Senator Peter D. Francis to the author (Oct. 8, 1980) (on file with the author).

145. For instance, the Washington statute appears to reflect the unusual situation of C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (1977). An unmarried woman contemplating marriage with a friend wished him to father her child but did not wish to have sexual intercourse before their marriage. He agreed to provide the semen for her artificial insemination and assumed he would be treated as the natural father of the child. The couple broke off their relationship during the pregnancy. The woman subsequently kept the baby and the man applied for visitation rights. In holding that the man was entitled to visitation rights as the natural father of the child, the court took notice of the couple's pre-conception agreement that the donor would assume the responsibilities of parenthood. In enacting Revised Code § 26.26.050(2) in 1975 it is unlikely that the Washington legislature envisioned the situation of C.M. and C.C. Nevertheless, a similar written agreement between a Washington couple would appear to be covered by the Washington statute. *See* Smith, *A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary*, 17 J. FAM. L. 41 (1978-79).

146. The situation described in note 145 *supra* would fall under this category.

butted any other presumptions of paternity and that the donor was the legal and natural father of the child. Amending subsection 7005(b) to permit the donor to be treated in law as if he were the natural father in certain circumstances would enable the donor to establish his paternity in a case involving surrogate motherhood yet would retain flexibility to deal with other situations involving artificial insemination.

PROHIBITIONS AGAINST PAYMENT TO SURROGATES

Although the statutory modifications discussed above would facilitate surrogate motherhood, California law should still prohibit payment to the surrogate.[147] While amending certain provisions of the Evidence and Civil Codes is necessary to allow for surrogate motherhood,[148] repealing or changing sections 273(a) or 181 of the Penal Code to permit payment of the surrogate is not recommended. These sections carry out strong social policies against the sale of children,[149] and their proscription of payment does not proscribe surrogate motherhood itself.[150] Furthermore, permitting the surrogate to be compensated would create a host of new problems.[151]

On its face, neither section 273(a) nor section 181 of the Penal

147. 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 child. 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 to the adoption, or cooperation in the completion of the adoption.

CAL. PENAL CODE § 273(a) (West 1970).

Every person who holds, or attempts to hold, any person in involuntary servitude, or assumes, or attempts to assume, rights of ownership over any person, or 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.

CAL. PENAL CODE § 181 (West Supp. 1980).

148. *See* text accompanying notes 58-80, 94-97, 105-12, 115-24, 138-46 *supra*.

149. *See* text accompanying notes 155-59 *infra*.

150. *See* text accompanying notes 184-87 *infra*.

151. *See* text accompanying notes 188-94 *infra*.

Code presents an unsurmountable obstacle to payment to a surrogate. Under section 273(a), it is a misdemeanor to pay or offer to pay anything of value to a parent for the placement for adoption, for consent to adoption, or for cooperation in the completion of adoption of a child.[152] Applied to surrogate motherhood, this section would prohibit payment to the surrogate for her cooperation in the eventual adoption of the child. The donor himself, however, is not involved in the adoption of the child; it is his wife who adopts the child from the surrogate. As long as the donor's payment to the surrogate is independent of his wife's subsequent adoption of the child, such payment may be permissible under section 273(a).[153] If the payment is in exchange for the surrogate's relinquishment of parental rights as a prerequisite for the eventual adoption by the donor's wife, however, the payment appears to violate the statute. If the fee is paid not for the surrogate's relinquishment of rights but for her consent to the donor's custody of the child, it violates section 181, prohibiting the delivery or receipt of anything of value in exchange for custody of a person.[154] Under section 273(a), the donor or his wife may not pay the surrogate for the surrogate's consent to the wife's adoption. Under section 181, the donor may not pay the surrogate for her consent to his custody. Together, these two statutes appear to preclude legal payment to the surrogate for the transfer of custody of the child or for her relinquishment of parental rights.

Both statutes reflect strong public policies in which the state has compelling interests. Section 273(a) militates specifically against black market baby sales[155] and rests on several policy considerations. Children should not be treated as chattels which can be bought and sold.[156] Financial gain should not be the primary motivating factor encouraging a natural parent to relinquish

152. CAL. PENAL CODE § 273(a) (West 1970). References to §§ 273(a) and 181 are to the Penal Code.

153. This is the procedure which has been used in Kentucky, where KY. REV. STAT. § 199.590(2) (1975) prohibits payment for adoption. It can be argued that the donor has conspired with his wife or is acting as her agent in the adoption transaction. *See* note 195 *infra*.

154. CAL. PENAL CODE § 181 (West Supp. 1980).

155. According to public hearings held in 1975 by the U.S. Senate Subcommittee on Children and Youth, a flourishing baby-selling business in New York, Pennsylvania, Florida, and Ohio involved payments of up to $25,000 for healthy, white infants. Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547, 548 (1975).

156. Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 613 (1978). In upholding the Michigan statute prohibiting payment of fees, in January 1980 Judge Roman Gribbs stated: "It is a fundamental principle that children should not and cannot be bought and sold." Castillo, *When Women Bear Children for Others*, N.Y. Times, Dec. 22, 1980, § B, at 6, col. 2.

parental rights.[157] Intermediaries should not be given an opportunity to profit from the adoption transaction.[158] Section 181 applies similar policies in expanding the scope of the proscription to include involuntary servitude and the infringement of personal liberty as well as paid transfers of custody. Repeal of Penal Code sections 273(a) and 181 would permit payment to the surrogate but would also leave the state without adequate safeguards against these socially condemned practices which reach far beyond cases of surrogate motherhood.[159]

Although theoretically, the legislature could amend sections 273(a) and 181 to allow for payment to surrogate mothers, such payment may not be in the best interests of the child or of surrogate motherhood in general. In spite of constitutional arguments, judicial precedent, and the general contractual requirement of consideration, such compensation, as shown below, may be neither desirable nor necessary.

The United States Supreme Court has recognized the right of a woman to decide whether to have children as a fundamental personal right protected by the Constitution.[160] "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 his decision

157. Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 613 (1978); Brief for Plaintiff at 15, Doe v. Kelley, No. 78-815531-CA (Cir. Ct. for the County of Wayne, Mich. 1979).

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

159. In contrast, modified in accordance with the suggestions presented above, the presumptions of paternity and the artificial insemination statute would still fulfill their original aims. If Evidence Code § 621 is eliminated, the purpose of the conclusive presumption of paternity will still be accomplished, because the rebuttable presumptions of paternity must be met with clear and convincing evidence. CAL. CIV. CODE § 7004(b) (West Supp. 1980). Giving interested parties standing to rebut those presumptions in preliminary hearings at which blood test results and contractual arrangments could be admitted as evidence will merely provide judicial flexibility to deal with uncommon situations such as surrogate motherhood. It will not set off a rash of unwarranted paternity suits which might impugn family integrity. Revising Civil Code § 7005(b) to permit semen donors' parental rights in certain cases continues to uphold the statute's policy of protecting the husband's rights in most cases, because only a written agreement between the donor and the mother will allow the donor to claim paternity. In the case of the Penal Code's prohibitions against payment for the transfer of custody or adoption of a child, however, the far-reaching policy considerations justify the retention of those statutes.

160. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

whether to bear or beget a child."[161] Denying surrogate mothers the right to be paid for their contribution to another family arguably deprives them of their right to bear a child for that purpose and indirectly deprives adoptive mothers of their right to choose this method of childbearing.[162] This argument, however, assumes that prohibiting payment to a surrogate mother deprives her of the right to *be* a surrogate mother. Penal Code sections 273(a) and 181 do not prevent a woman from bearing a child for another couple; they merely prevent her from being compensated. Women who cannot afford to be surrogate mothers without being paid a fee are no more denied their fundamental rights than are those who cannot afford abortions, contraceptives, or private schooling for their children.[163] The Constitution protects their rights, not their financial ability to exercise those rights.[164]

Nor is the right of a couple to have a child through a surrogate mother denied merely because the law prohibits their paying the surrogate. Although at present there are more adoptive couples seeking surrogate mothers than volunteer surrogates, the Constitution does not guarantee that all infertile couples desiring surrogate motherhood will find willing surrogates any more than it guarantees that all infertile couples desiring adoption will find available children to adopt. The wife's infertility, not the state's prohibition against payment to the surrogate, prevents the couple's exercise of their right to bear and beget children.[165]

Although some precedent exists for permitting payment for the transfer of custody between the child's natural parents, public policy still frowns on financial gain as the motivating factor on the part of the surrendering parent. In *Reimche v. First National Bank of Nevada,*[166] the United States Court of Appeals for the Ninth Circuit permitted a mother to prove an alleged agreement with the father of her illegitimate child whereby she had surrendered custody and consented to the father's adoption. The father, in return, had promised to include both the mother and the child in his will. He included the child but not the mother. The court

161. Eisenstadt v. Baird, 405 U.S. at 453 (1972) (emphasis original).

162. Brief for Plaintiff at 20, Doe v. Kelley, No. 78-815531-CZ (Cir. Ct. for the County of Wayne, Mich. 1979).

163. Harris v. McRae, 100 S. Ct. 2671 (1980).

164. "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 2688.

165. Brief for Defendant at 11, Doe v. Kelley, No. 78-815531-CZ (Cir. Ct. for the County of Wayne, Mich. 1979); *cf.* Harris v. McRae, 100 S. Ct. 2671 (1980) (woman's indigency, rather than governmental restraints, restricts her ability to enjoy full range of freedom of choice).

166. Reimche v. First Nat'l Bank of Nev., 512 F.2d 187 (9th Cir. 1975).

cited several decisions upholding similar agreements between natural parents. In those cases the consideration for promises to devise included the mother's forbearance from instituting filiation proceedings,[167] her consent to adoption,[168] and her surrender of the child.[169] The court concluded that the agreement between Reimche and her child's father was not against public policy.[170]

The *Reimche* court limited its decision to the circumstances of that case. There the agreement was between parents, the adoption and the consideration were in the best interests of the child, and pecuniary gain was not the mother's motivation.[171] The *Restatement (First) of Contracts* likewise emphasizes the best interests of the child in determining whether a bargain by one parent to transfer custody to the other is illegal.[172] *Reimche* would not apply to a case of surrogate motherhood. Although an agreement by the donor to pay the surrogate for her release of parental rights would be between the child's natural parents, the transfer of custody would not be in the child's best interests, while pecuniary gain might indeed be the motivating factor for the surrogate. *Reimche* and the *Restatement of Contracts* both presuppose the existence of a child whose best interests can be determined by the particular circumstances at the time of the agreement. At the time the donor agrees to pay the surrogate and she agrees to surrender her rights, the unborn child's interests, pecuniary or otherwise, cannot always be determined. The controlling consideration is not the welfare of the child but the desires of the adoptive

167. Schumm v. Berg, 37 Cal. 2d 174, 231 P.2d 39 (1951); Peterson v. Eritsland, 69 Wash. 2d 588, 419 P.2d 332 (1966).

168. Smith v. Wagers' Adm'rs, 238 Ky. 609, 38 S.W.2d 685 (1931); Redmon v. Roberts, 198 N.C. 161, 150 S.E. 881 (1929).

169. Doty's Adm'rs v. Doty's Guardian, 118 Ky. 204, 80 S.W. 803 (1904); Couch v. Couch, 35 Tenn. App. 464, 248 S.W.2d 327 (1951).

170. Reimche v. First Nat'l Bank of Nev., 512 F.2d at 189 (9th Cir. 1975).

171. *Id.*

172. (1) Except as stated in Subsection (2) a bargain by one entitled to the custody of a minor child to transfer the custody to another person, or not to reclaim custody already transferred of such a child, is illegal unless authorized by statute.

(2) A bargain by one parent to transfer the custody of a minor child to the other parent or not to reclaim such custody is not illegal if the performance of the bargain is for the welfare of the child.

Comment: a. Like marriage, the custody of young children is of importance to the State. It is not a property right of the parents. The court may, if it is for the welfare of the child, enforce the bargain, but will not do so otherwise. . . .

RESTATEMENT (FIRST) OF CONTRACTS § 583 (1932).

couple and the financial needs of the surrogate mother. If the surrogate has already been reimbursed for her medical and living expenses,[173] her agreement to surrender her parental rights in exchange for additional payment does indicate a pecuniary motiviation. *Reimche* was decided ad hoc; neither the dissent nor the majority urged enforcement of all such agreements between natural parents.[174]

If the donor is prohibited from paying the surrogate for her consent to his custody of their child, another argument suggests, their agreement lacks consideration and hence may be unenforceable.[175] Thus the donor runs the risk of losing his child if the surrogate changes her mind, because courts would not enforce an agreement without consideration. One approach to this problem recognizes that the surrogate does receive consideration. Consideration is a bargained-for performance or promise, not merely a measurable compensation or gain.[176] The surrogate who volunteers in order to experience the emotional satisfaction of helping an infertile couple has freely bargained for, and will receive, the couple's performance (her insemination with the husband's semen) and the bargained-for emotional satisfaction.

Realistically, however, even though there is sufficient consideration, the contract may not be enforced by the courts because of remedial difficulties or considerations of public policy. A court of equity will not specifically enforce a personal service contract; the remedy not only borders on involuntary servitude but is also impractical. If the services promised are not unique, an adequate legal remedy exists. If the services are indeed unique, problems of supervision and enforcement render an order of specific performance ineffectual.[177] Were the surrogate to decide to abort during her pregnancy, no court would order her to continue the pregnancy against her will, regardless of the existence of a contract in which she agreed to bear the child to term in exchange for consideration.[178] Public policy might also prevent a court from

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173. *See* note 187 *infra*.

174. The dissent cited several decisions refusing to enforce such agreements as to the parents, regardless of the benefits thereby awarded to the child. Reimche v. First Nat'l Bank of Nev., 512 F.2d at 196 (Koelsch, J., dissenting). *See* text accompanying notes 177-83 *infra* for further discussion of public policy arguments against the enforceability of agreements to transfer custody.

175. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19 (1972). *See also* Interview of Katie Brophy, attorney for Surrogate Parenting Associates, Inc., on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 15.

176. RESTATEMENT (SECOND) OF CONTRACTS §§ 75, 76 (1972).

177. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.5 (1973).

178. *Id.*; *cf.* Roe v. Wade, 410 U.S. 113, 165 (1973) (the abortion decision must be left to the woman's and her physician's judgment during the first trimester of pregnancy). *See also* note 204 *infra*.

enforcing a contract to transfer custody of a child.[179] Children are not chattels subject to barter,[180] nor is a parent's right of control or custody of a child a property right which may be bargained away.[181] Bargains to transfer custody of minor children are generally illegal.[182] Even an agreement without consideration would have significant evidentiary value as to the donor's paternity, but consideration would not add to its enforceability in court, where the best interests of the child and other policy objectives would prevail.[183]

Neither the Constitution nor judicial precedent calls for permitting payment to surrogate mothers, nor would such compensation necessarily render an agreement enforceable. Furthermore, compensation may not be required. Surrogates volunteer without offers of compensation,[184] and, in Kentucky, even those who have

179. Kentucky Attorney General Steven L. Beshear has stated: "We have a very strong public policy in Kentucky against baby buying, and one of the very strong concerns that we have is the monetary aspects [sic] of this practice." Castillo, *When Women Bear Children for Others*, N.Y. Times, Dec. 22, 1980, § B, at 6, col. 2 (interview with Mr. Beshear). *See also* note 195 *infra*. The Attorney General of Michigan also believes that payment of a surrogate mother for more than her maternity-related expenses would offend public policy as well as violate state law. Brief for Defendant at 21, Doe v. Kelley, No. 78-815531-CZ (Cir. Ct. for the County of Wayne, Mich. 1979). Gregory M. Luce, Assistant Attorney General of Virginia, has suggested that, even if legal under state laws, payment to a surrogate could be construed as a violation of the infant's civil rights under the thirteenth amendment of the United States Constitution. Letter from Gregory M. Luce to attorney Jeff Krause of Arlington, Va. (Dec. 10, 1980) (on file with the author). In a recent English case, a prostitute agreed to bear a child through AID for an unmarried couple in exchange for £ 500. She refused to surrender the child. The court held the agreement was for the sale and purchase of a child and hence void and unenforceable. Cusine, *"Womb-Leasing": Some Legal Implications*, 128 NEW L.J. 824 (1978).

180. 15 WILLISTON ON CONTRACTS § 1744 (3d ed. 1972).

181. 67A C.J.S. *Parent and Child* § 16 (1978).

182. RESTATEMENT (FIRST) OF CONTRACTS § 583 (1932).

183. Mr. Keane recognizes that the "statement of understanding" he prepares is not an enforceable contract. Marcus, *The Baby Maker*, Nat'l L.J., Aug. 25, 1980, at 1, col. 1; White, *Motherhood the "Surrogate" Way*, SCI. DIG., Mar. 1980, at 25. Ms. Brophy acknowledges that even giving consideration in a surrogate contract, which she believes is legally possible in Kentucky, would not ensure its enforceability in court were the surrogate to attempt to keep the baby. A court decision as to custody would be resolved in the best interests of the child, not merely by the terms of the contract. Interview with Katie Brophy on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 2.

184. The motivating factor of a surrogate is the desire to extend to a woman biologically incapable of bearing children the opportunity to raise a child biologically related to her spouse. Brief for Plaintiff at 21, Doe v. Kelley, No. 78-815531-CZ (Cir. Ct. for the County of Wayne, Mich. 1979). *See also* note 191 *infra*.

been paid have not been motivated primarily by financial gain.[185] Some surrogate mothers may be compensated sufficiently by maternity benefits from their own insurance.[186] Those who are not can be paid maternity-connected medical and hospital expenses as well as "necessary living expenses" for the period preceding and during confinement without violating Penal Code section 273(a), as long as the payments are not contingent upon the child's adoption.[187] Another possible method of compensating the surrogate without violating the statutory prohibitions would limit payment to a fee for her personal services, rather than as consideration for her surrender of parental rights. Such payment would not act as consideration for transfer of custody, but it would pay the surrogate for her conceiving, bearing, and delivering a child for the adoptive couple. Compensation for the surrogate's "necessary living expenses" or for her personal services may be possible even without altering Penal Code section 273(a) or 181.

Not only is a modification of those sections unnecessary; such a revision would also create other, new problems. An adopting stepparent is not required to report disbursements in connection with the adoption.[188] Without that information, the state would have no control over the fee paid to the surrogate for her release

185. *E.g.*, "Elizabeth Kane," Dr. Levin's surrogate in Louisville, "wanted to do it for nothing" and accepted payment to appease her husband. One of Dr. Levin's surrogate applicants, Janet Porter, has noted that she could work and earn as much as she would be paid as a surrogate, but that "this is something I need and I want to do." Interviews of Dr. Richard M. Levin and Janet Porter on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 5, 7.

186. *See, e.g.*, Brief for Defendant at 3, Doe v. Kelley, No. 78-815531-CZ (Cir. Ct. for the County of Wayne, Mich. 1979).

187. Since CAL. CIV. CODE § 224r (West Supp. 1980) (requiring a full accounting of all disbursements in connection with the birth or adoption of the child), does not apply to the adoption by a stepparent where one natural parent has retained custody of the child, *see* note 31 *supra*, the donor and his wife will not be required to account for their expenditures. No such exception exists in Michigan, where the court must approve all charges and fees in connection with adoption placements, releases, or consents. MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1980). Although a Michigan Juvenile Court Judge has stated that he would not permit payment of lost wages under § 710.54, Brief for Plaintiff, Exhibit A at 1, Letter of Judge James H. Lincoln to Margaret Pfeiffer, Doe v. Kelley, No. 78-815531-CZ (Cir. Ct. for the County of Wayne, Mich. 1979), the "necessary living expenses" clause of CAL. PENAL CODE § 273(a) seems to allow for flexibility. The $10,000 to be received by a woman artificially inseminated as a surrogate for a single California man is for "medical expenses," not as a fee. Walz, *Surrogate Mother Will Bear the Baby of a Single Man*, Daily Californian (El Cajon, Cal.), Oct. 15, 1980, § A, at 2, col. 1.

188. CAL. CIV. CODE § 224r (West Supp. 1980). This section does provide for judicial review of the sums expended in a routine adoption. Dr. Levin has indicated that he would match a surrogate who demanded $25,000 but that he might hesitate if the figure were $100,000. Beyette, *Having a Child by a Surrogate Parent*, L.A. Times, Aug. 22, 1980, § V, at 1, col. 1; Quindlen, *Surrogate Mothers: A Controversial Solution to Infertility*, N.Y. Times, May 27, 1980, § B, at 12, col. 1.

and consent to adoption. Permitting payment would be the practical equivalent of requiring payment, for once compensation is available, few surrogates, even those truly motivated by altruism, would reject it. The service then may be denied to those who cannot afford the fee, or less-than-wealthy couples may settle for a surrogate who does not meet their physical or psychological standards[189] but whose fee is reasonable.[190]

Amending sections 273(a) and 181 of the Penal Code to permit payment to the surrogate could also cast judicial and social disfavor upon surrogate motherhood itself. Presently, surrogates volunteer for a variety of non-financial reasons.[191] Where the surrogates' aim is altruistic rather than pecuniary, both society and the courts favor their participation. Legislation providing for their compensation, however, may encourage a host of women whose motivation is the compensation itself.[192] What now may be viewed as an alternative method of family planning for infertile couples might be seen instead as the hiring of a woman's reproductive system.[193] Courts that approve of agreements between natural parents in which financial gain is not the motivating factor

189. The couple matched with "Elizabeth Kane," for example, sought a tall surrogate of above average intelligence. Interview with Dr. Levin on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980), at 4. *See also* PEOPLE, Apr. 21, 1980, at 38. This type of matching is common in traditional adoptions.

190. This raises the question of state regulation of payments. If the state does not prescribe permissible fees, fluctuating prices may create a baby market, but the state might have to demonstrate a compelling interest in regulating payment to justify fee setting at all.

191. Most simply "want to help," Beyette, *Having a Child by a Surrogate Parent*, L.A. Times, Aug. 22, 1980, § V, at 1, col. 1; White, *Motherhood the "Surrogate" Way*, SCI. DIG., Mar. 1980, at 25 (help "another couple's dream to come true"). Some women like to be pregnant. White, *Motherhood the "Surrogate" Way*, SCI. DIG., Mar. 1980, at 25. Others "want people who can't have children to know that it can be done." MACLEAN'S, Mar. 10, 1980, at 10. One potential surrogate has declared, "It's my need to give. I also have a child and . . . I can understand someone who could not have the joy that I have. I would like to give that much." Interview with Janet Porter on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 5.

192. This does not imply that permitting payment will reduce all volunteer surrogates to greedy opportunists. Many women will still seek to be surrogates for altruistic reasons. Yet the availability of compensation could also attract a new breed of surrogates whose desire is primarily financial.

193. Arguably, a woman has a right to choose the means by which she will earn her living, even if that means involves the use of her sexual capacities. Just as the state denies her that right when she wishes to be employed as a prostitute, however, CAL. PENAL CODE § 647(b) (West Supp. 1980), it may also deny her that right when she wishes to earn her living as a surrogate mother.

would frown on those based primarily on compensation.[194] Indeed, such transactions come dangerously close to the baby-selling proscribed by the Penal Code. Although the object of those statutes is to prevent a natural mother from being influenced financially to give up her child irrespective of the child's best interests, they also ensure that a potential mother will not *create* a child primarily out of financial greed or need. If children are not chattels to be bargained away, neither are they products to be manufactured for gain.

A final consideration against amending the Penal Code sections is the fact that almost all jurisdictions prohibit payment for adoption and for the transfer of custody of a child. Even in Kentucky, where donors have paid surrogates for the relinquishment of parental rights, the legality of such payment is questionable.[195] To the extent that California takes guidance from its sister states, the legislature should think hard before altering these traditional prohibitions. Compensation beyond reasonable expenses is mandated by neither the Constitution nor judicial precedent. It will not make a contract with the surrogate enforceable. Surrogates volunteer even without payment, and those who require reimbursement may be paid at least necessary medical and living expenses, and perhaps an additional fee for their services. Statutorily permitting payment for surrogate motherhood would create new problems, including the possible development of a market in surrogates and their babies. The legislature should not except compensation for surrogate mothers from the sanctions of the Penal Code.

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194. *See* Reimche v. First Nat'l Bank of Nev., 512 F.2d 187 (9th Cir. 1975). *See* text accompanying notes 166-74 *supra*.

195. KY. REV. STAT. § 199.590(2) (1975) provides that no person, agency, or institution not licensed by the department of human resources may charge a fee for the procurement of a child for adoption purposes. Surrogate Parenting Associates, Inc., interprets this law as permitting payment for an agreement to terminate parental rights. To avoid violating the statute, the donor, not his wife, contracts with and pays the surrogate. Only after the donor has made the payment and gained custody of the child does the donor's wife adopt the child. Technically, the money has been exchanged, not for the purpose of adoption, but for the relinquishment of parental rights and the transfer of custody. Nevertheless, the Kentucky Attorney General has issued an advisory opinion that such paid surrogate motherhood arrangements violate both the Kentucky statute and the state's public policy against the buying and selling of children, and has filed suit against Surrogate Parenting Associates. Kentucky v. Surrogate Parenting Assocs., Inc., No. 81-CI-0121 (Franklin Cir. Ct., filed Jan. 27, 1981); Castillo, *Kentucky Attorney General Calls Surrogate Motherhood Illegal*, N.Y. Times, Jan. 28, 1981, § C, at 9, col. 1 (interview with Attorney General Steven L. Beshear). *See* note 19 *supra*. The Kentucky legislature is also aware of the publicity attached to surrogate motherhood as practiced in the state and may introduce specific proposals in its regular session beginning in January 1982. Letter from Edith Schwab, Reviser of Statutes, Kentucky Legislative Research Commission, to the author (Sept. 24, 1980) (on file with the author).

THE EXTENT OF LEGISLATION

The above proposals suggest a minimum of legislative change. Many aspects of surrogate motherhood are better left to private agreement than enacted in specific legislation. Regulation or a specific enabling act could neither forsee new developments nor solve all the problems presently connected with surrogate motherhood.[196] For these reasons, California's legislation should be altered as little as possible to permit rather than to provide specifically for surrogate motherhood.

Surrogate motherhood arrangements have been effected through a variety of agreements ranging from a non-binding memorandum between the parties[197] to a detailed contract specifying each party's obligations.[198] The fact that a state forbids compen-

196. *See* Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 621-22 (1978) (discussing proposed regulation).

197. This is the procedure Mr. Keane has followed in Michigan. MACLEAN'S, Mar. 10, 1980, at 10.

198. Under the contract drafted in 1980 by Surrogate Parenting Associates, Inc., of Louisville, Ky., the natural father (the donor) agrees: to pay the surrogate a specified consideration, which shall be deposited with the donor's attorney and paid to the surrogate upon completion of her obligations; to pay the surrogate's medical expenses which are not covered by her own insurance, excluding expenses for emotional problems related to the pregnancy and expenses occurring six weeks after birth; to pay for paternity testing and the surrogate's travel expenses; to undergo paternity testing; to purchase a term life insurance policy on the surrogate's life in a specified amount to remain in effect until six weeks after birth, payable to a named beneficiary; to provide in his will for support of the child should he die prior to the birth; to purchase a term life insurance policy on his life payable in trust to the unborn child; to pay for psychiatric and psychological testing of the surrogate and her husband; to accept all children born in a multiple birth; to compensate the surrogate at a reduced rate in the event of a miscarriage; to undergo a physical and genetic evaluation; not to seek the identity of the surrogate or her husband or to advise the child of their identity if known; to assume legal responsibility for an abnormal child.

The surrogate agrees to terminate all parental rights to the child, to undergo a physical and genetic evaluation and blood tests, and not to abort unless the inseminating physician determines it is necessary for her health or that the child is abnormal, in which case the surrogate agrees to have the abortion. Her husband agrees not to form a parent-child relationship but to do all necessary to rebut the presumption of his paternity. The surrogate and her husband further agree: to institute proceedings to terminate parental rights and permit the adoption of the child; to return all sums paid in the event the natural father is excluded by blood tests; to assume all risks, including that of death, incident to the pregnancy and delivery; to undergo psychological and psychiatric evaluations; to reimburse the natural father in the event custody is awarded to anyone other than the natural father; to reimburse the natural father or Dr. Levin for all monies expended if the surrogate or her husband violates any of the provisions of the agreement; to provide no interview without the consent of the adoptive parents' attorney; not to

sation beyond ordinary medical expenses should not preclude the drafting of a detailed agreement.[199] Most of the terms should be left to the free negotiation of the parties, rather than to the legislature, if only to add to the chances of the contract's enforceability.[200] Adoptive couples and surrogates will want to tailor their agreements to their own circumstances. One surrogate may already be adequately insured; another may wish to reveal her identity to the donor and his wife.[201] Most surrogates will agree to artificial insemination by a physician, yet others have requested that the donor's wife perform the insemination so that she can play an active role in the procedure.[202] Physical and psychological testing can be bargained for freely between the parties.[203] Farsighted participants may wish to include even more specific terms in their agreements. Who shall take custody of the child if the adoptive couple separates or one of the couple dies before birth? Is the surrogate required to undergo amniocentesis? If testing during pregnancy reveals a deformed fetus, may the surrogate abort? Alternatively, can the adoptive couple require her to abort?[204] In either case, or in case of a natural miscarriage, is

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seek to view the child or to meet with the natural father; to place the child in Dr. Levin's custody for adoption, in the event the natural father predeceases the child's birth; not to smoke, drink alcohol, or use illegal drugs, or medications without Dr. Levin's consent; to follow a specified pre-natal examination schedule. All parties agree to terminate the agreement if pregnancy has not occurred within a reasonable time and not to provide any information which could help identify the parties or the child. Kentucky v. Surrogate Parenting Assocs., Inc., No. 81-CI-0121, Exhibit C (Franklin Cir. Ct., filed Jan. 27, 1981).

199. Consideration will not necessarily make the contract enforceable. *See* text accompanying notes 177-83 *supra*.

200. If it appears that the surrogate agreed to undergo a particular procedure only because it was required by state legislation, the court might conclude that she did not enter freely into that part of the bargain.

201. Both parties may even wish to continue contact after the birth of the child. *See* Walz, *Surrogate Mother Will Bear the Baby of a Single Man*, Daily Californian (El Cajon, Cal.), Oct. 15, 1980, § A, at 2, col. 1. This is likely when sisters serve as surrogates for infertile siblings as occurred in Tennessee, N.Y. Times, Dec. 11, 1980, § A, at 25, col. 1, and in California, Daily Californian (El Cajon, Cal.), Jan. 16, 1981, § A, at 6, col. 1.

202. White, *Motherhood the "Surrogate" Way*, SCI. DIG., Mar. 1980, at 25. The agreement could still require that the insemination be performed under a physician's supervision.

203. Surrogate Parenting Associates, Inc., requires such testing. Interview with Dr. Richard M. Levin on The Phil Donahue Show, Donahue Transcript No. 04150 (Apr. 15, 1980) at 4.

204. The contract drafted by Surrogate Parenting Associates, Inc., specifies that the decision to abort is left to the physician, who will order an abortion only if the mother's health is endangered or the child will be abnormal. Marcus, *The Baby Maker*, Nat'l L.J., Aug. 25, 1980, at 1, col. 1. Mr. Handel's contract, used in California, provides that only the donor or the surrogate may decide to abort. Telephone interview with William Handel (Dec. 30, 1980).

The donor may be unable to prevent the surrogate from having an abortion. In Roe v. Wade, 410 U.S. 113 (1973), the United States Supreme Court held that the

the surrogate obligated to be re-inseminated? Is the surrogate subject to liability for her alleged negligence in causing a miscarriage? Is the adoptive couple subject to liability for the death of the surrogate resulting from pregnancy or childbirth?[205] If the surrogate dies in childbirth and the child survives her, can the child inherit from the surrogate? These questions reflect the variety of issues to be resolved in each case. An agreement between the surrogate and the adoptive couple, rather than specific legislation, should set out the obligations of each party.

Another issue that specific surrogate motherhood legislation would find difficult to resolve is whether the practice should be available to everyone. Presently most surrogate motherhood agreements involve married, infertile couples. Would the law permit single, infertile women to use surrogates?[206] Single men?[207] "Women" who were formerly men but who have undergone sex change operations?[208] Should the practice be restricted to infertile women, or should those who could bear their own children but do not choose to do so also be able to have a child through a surrogate mother? Is their reason for preferring surrogate motherhood relevant? Would the state allow women over thirty-five to use surrogates because their natural children would face an increased danger of birth defects, but deny surrogate motherhood to the belly dancer whose career cannot tolerate stretch marks?[209]

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woman and her physician may decide to terminate a pregnancy in the first trimester. In Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976), the Court held that a woman may have an abortion without her husband's consent. Since a husband's consent is not constitutionally mandated, neither would the donor's consent be required.

205. The insurance policy stipulated in the Surrogate Parenting Associates, Inc., contract in effect provides for this possibility.

206. Arguably, the state cannot restrict the use of surrogates to married women. Eisenstadt v. Baird, 405 U.S. 438 (1972) (regulating the distribution of contraceptives on the basis of marital status violates the equal protection clause).

207. Mr. Keane has matched a surrogate with a single California man. Walz, *Surrogate Mother Will Bear the Baby of a Single Man*, Daily Californian (El Cajon, Cal.), Oct. 15, 1980, § A, at 2, col. 1.

208. Mr. Keane is arranging for a surrogate for such an individual and her husband. Marcus, *The Baby Maker*, Nat'l L.J., Aug. 25, 1980, at 1, col. 1. The infertile sister in the Tennessee case reported in December 1980 was formerly a man. N.Y. Times, Dec. 11, 1980, § A, at 25, col. 1; *see* note 201 *supra*.

209. Dr. Levin has noted the difficulties of determining, even on a private scale, who shall have the right to bear a child through the use of a surrogate.

> A certain amount of information, anonymously, is given to the surrogate mother, and she has the right to say, "Wait. I don't like these people. They don't sound like the kind of people that I would want to have the child that I'm going to deliver." But morally, I don't have the right to say

The legislature is in no better position than the individual physician or attorney to determine who should be permitted to take advantage of this method of childbearing. Furthermore, surrogate motherhood may be only the first in a series of new alternatives to traditional childbearing.[210] To legislate specifically for surrogate motherhood as it is presently practiced would be only a stopgap measure.

The legislature need not pass an entirely new statute authorizing surrogate motherhood, but should make the following statutory modifications:

1. Repeal Evidence Code section 621.

2. Amend Civil Code section 7006(b) to read: "Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship."

3. Add to Evidence Code section 895: "If the experts conclude that the blood test and tissue typing results show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court."

4. Enact, as new section 7009 of the Civil Code, sections 10 through 13 of the draft Uniform Parentage Act.

5. Add new Civil Code subsection 7004(a)(5) to read: "He acknowledges his paternity of the child in a writing filed with the State Department of Social Services or an appropriate court, which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the State Department of Social Services or the court. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted."

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to couples coming into my office, "Yes, you can have a baby. And you cannot have a baby." This was tried in the Forties in Europe, and, you know, I don't have that moral capacity.

Interview with Dr. Richard M. Levin on The Phil Donahue Show, Donhue Transcript No. 04150 (Apr. 15, 1980) at 14-15. On another occasion Dr. Levin has indicated that he would not participate in the case of the belly dancer but that he is not sure about the case of the older woman. Beyette, *Having a Child by a Surrogate Parent*, L.A. Times, Aug. 22, 1980, § V, at 1, col. 1.

210. Physicians in England using *in vitro* fertilization have reimplanted the fertilized egg in the uterus of the woman who produced the egg. The egg could also be implanted in the uterus of a surrogate mother. *See generally* Oakley, *Test Tube Babies: Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development*, 8 FAM. L.Q. 385 (1974). It is not clear which woman would be considered the "natural" mother of a child so conceived.

6. Amend Civil Code subsection 7005(b) to read: "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived, unless the donor and the woman agree that said donor shall be the father. The agreement must be in writing and signed by the donor and the woman. The physician shall certify their signatures and the date of the insemination and shall retain the written agreement as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. Such written agreement between the donor and the woman may be admitted as evidence in a preliminary or full judicial hearing."

CONCLUSION

Although a number of legal obstacles presently discourage surrogate motherhood in California by hampering the semen donor's efforts to establish his paternity, minor legislative modifications would enable infertile couples to have children through the use of a surrogate. The repeal of Evidence Code section 621 would remove a major barrier to the donor's claim to paternity, while its policy objectives would be met by the rebuttable presumptions of Civil Code section 7004(a). The donor should be given standing to rebut those presumptions and the opportunity to introduce appropriate evidence to do so. Under a new section of the Uniform Parentage Act he could acknowledge his paternity before or after the child's birth. Under an amendment to the artificial insemination statute his written agreement with the surrogate would manifest their intent that in this case the semen donor be treated as the legal and natural father of the child. Modifying Penal Code sections 273(a) and 181 is neither necessary nor desirable. Because the current practice of surrogate motherhood suggests new, as yet unanswered questions, the legislature should leave the details of each transaction to the parties involved. The proposed amendments are sufficient to permit surrogate motherhood as a legal childbearing option.

ELLEN LASSNER VAN HOFTEN