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SEXUALITY, PRIVACY AND THE NEW BIOLOGY

GEORGE P. SMITH II*
ROBERTO IRAOLA**

Man's "mischievous animal magnetism"¹ has begun to give way to alternative methods of human conception, such as artificial insemination² and *in vitro* fertilization.³ Within the foreseeable future, the "new biology's" perfection of techniques such as cloning⁴ and parthenogenesis⁵ may lead

* B.S., Indiana University, 1961; J.D. Indiana University, 1964; Professor of Law, The Catholic University of America.

** B.A., The Catholic University of America, 1979; J.D. The Catholic University of America, 1983; Judicial Clerk, District of Columbia Court of Appeals.

1. Turano, *Paternity by Proxy*, AM. MERCURY, Apr. 1938, at 418, 419 (predicting artificial insemination would become accepted in pathological cases, and be resorted to by a few feminists and "Lucy Stoners").

2. Artificial insemination is defined as "the introduction of the male semen into the vagina for the sake of procreation by any means other than the act of copulation . . ." Guttmacher, *Artificial Insemination*, 18 DE PAUL L. REV. 566, 566 (1969). It is by no means an innovative or untested practice. See W. FINEGOLD, *ARTIFICIAL INSEMINATION 5-7* (2d ed. 1976); H. ROHLER, *TEST TUBE BABIES 30-44* (1934).

The first successful human artificial inseminations were performed in England by Dr. John Hunter in 1799 and in the United States by Dr. J. Marion Sims in 1866. H. DAVIS, *ARTIFICIAL HUMAN FECUNDATION 8* (1951); G. VALENSIN, *THE QUESTION OF FERTILITY 11-12* (1960).

3. *In vitro* fertilization is the fertilization of an ovum in the laboratory and its subsequent implantation in the uterus, where it will develop into a fetus and grow until it is born. Smith, *Manipulating the Genetic Code: Jurisprudential Conundrums*, 64 GEO. L.J. 697, 708 (1976). The first baby to be fertilized *in vitro* was born in England on July 25, 1978. Comment, *Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby*, 28 EMORY L.J. 1045, 1048 n.19 (1979). In December, 1981, the United States joined England and Australia and produced its first test tube baby. *America's First Test-Tube Baby*, SCI. NEWS, Jan. 2, 1982, at 7.

For a discussion of the use of an artificial uterus to develop embryonic life, otherwise known as ectogenesis, see D. RORVIK, *BRAVE NEW BABY 78-84* (1971). See also Grobstein, *The Moral Uses of 'Spare' Embryos*, HASTINGS CENTER REP., June 1982, at 5; Branigin, *Frozen Embryos Trigger Debate by Australians*, Wash. Post, May 17, 1983, at A1, col. 6; *Doctors Say Frozen Egg Produces Pregnancy*, Wash. Post, May 3, 1983, at A14, col. 2; *Amazing Birth*, TIME, Jan. 23, 1984, at 30 (discussing the birth of the world's first donor egg baby fertilized in a Petri dish by the husband's sperm and subsequently implanted in his wife's uterus).

4. Several steps would be required to clone a human. First, the nucleus of a donor's egg cell would be destroyed. A nucleus from any convenient cell of the person to be cloned would be inserted into the enucleated egg by microsurgical techniques not yet fully developed. The new cell, placed in a

to an asexual mode of human reproduction. While not enough is known about the latter techniques "to allow dogmatizing concerning whether [they] should or should not be undertaken,"⁶ the emergence and practical implementation of the former modes of human reproduction leave no doubt that they may be viewed not as a mere component of a Huxleian view of the future, but rather as a major scientific force for tomorrow.⁷

A number of commentators have observed that either the liberalization of state adoption laws, coupled with the liberation of women, or the fundamental constitutional rights of privacy and procreation⁸ may establish the right of unmarried women to be artificially inseminated⁹ or to participate in the process of surrogation and become surrogate

nutrient medium, would begin to divide and embryo implantation would follow in approximately four to six days. The cloned individual would be the identical twin of the person who contributed the body cell.

Smith, *supra* note 3, at 711-12 (footnotes omitted). See also Note, *Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning*, 47 S. CAL. L. REV. 476, 481-87 (1974).

5. In this form of asexual reproduction, "[t]he male sperm is supplanted by a chemical or electrical stimulus which causes the female cell to begin reproducing. All offspring born of this procedure would, therefore, necessarily be female." Comment, *supra* note 3, at 1046 n.5 (citing Kindregan, *State Power Over Human Fertility and Individual Liberty*, 23 HASTINGS L.J. 1401, 1418-19 (1972)). See also Host—Mothers TIME, Apr. 6, 1936, at 49 (discussing experiments on rabbits performed by Dr. Gregory G. Pincus, a physiologist at Harvard, who soaked some rabbit ova in brine, and heated other ova to 113 degrees Fahrenheit, about 10 degrees above normal, and, after placing all the ova in the fallopian tubes of different rabbits, discovered they became pregnant).

6. Smith, *supra* note 3, at 713.

7. See Smith, *The Medicolegal Challenge of Preparing For a Brave, Yet Somewhat Frightening New World*, J. LEGAL MED., Apr. 1977, at 9-10. See generally Friedmann, *Interference with Human Life: Some Jurisprudential Reflections*, 70 COLUM. L. REV. 1058 (1970); Lederberg, *The Freedoms and the Control of Science: Notes from the Ivory Tower*, 45 S. CAL. L. REV. 596 (1972).

8. See *infra* text accompanying notes 86-131.

9. See generally Annas, *Fathers Anonymous: Beyond the Best Interest of the Sperm Donor*, 14 FAM. L.Q. 1 (1980); Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 26-39 (1981); Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 344-46 (1979); Comment, *Artificial Insemination and Surrogate Motherhood — A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L.J. 913, 935 (1981). See also Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 405-36 (1983).

mothers.¹⁰

This article will present an argumentative analysis showing that unmarried women have no fundamental right to artificial insemination and that statutes limiting artificial insemination to married women¹¹ are reasonable and reflect sound public policy considerations. Furthermore, statutes which might seek to legitimize the status of surrogate mothers could undermine fundamental policies which recognize the family as the very essence of societal strength and well-being. The purpose of this article, then, is not to explore the complex legal and ethical dimensions of the new reproductive biology. Rather, only one aspect of this process is to be examined: the process of artificially inseminating unmarried women for either their own personal purposes of pregnancy without marriage or as surrogates for infertile women. Surrogation will be evaluated only as an analytic complement to the sexual privacy¹² of women who are expressing their sexual freedom through unconventional (artificial) means to become pregnant.

I. ARTIFICIAL INSEMINATION

A. Overview

There are three kinds of artificial insemination (AI): (1) artificial insemination with the husband's sperm, referred to as homologous artificial insemination (AIH);¹³ (2) artificial insemination by a donor, referred to as heterologous artifi-

10. See Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1981-1982); Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611 (1978); Comment, *Surrogate Motherhood in California: Legislative Proposals*, 18 SAN DIEGO L. REV. 341 (1981).

11. See *infra* note 36 (listing insemination statutes by state).

12. See Eichbaum, *Lovisi v. Slayton: Constitutional Privacy and Sexual Expression*, 10 COLUM. HUM. RTS. L. REV. 525 (1978-79); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977).

13. A number of physical difficulties may impede a couple from conceiving by normal sexual intercourse. The husband, for example, may suffer from retrograde ejaculation, physical impotence, malformation of the penis, obesity or low fertility. Likewise, impediments to conception in the wife may include vaginal tumors or scarring, an abnormal position of the uterus, a very small cervical opening, or obesity.

cial insemination (AID);¹⁴ and (3) artificial insemination through a combination of the donor's and the husband's sperm (AIC).¹⁵ Although the reasons which lead to this form of reproduction may vary from case to case, AI remains a simple medical procedure in which a syringe is inserted into a woman's vagina and semen is released toward the opening of the uterus.¹⁶

Traditionally considered an alternative to adoption¹⁷ and permissible only within the marital relationship,¹⁸ AI has

See Guttmacher, *supra* note 2, at 569. See also Comment, *supra* note 9, at 916-17 n.19.

Most commentators agree that homologous insemination poses few legal problems. See, e.g., Smith, *Through A Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 128 (1968); Tucker, *Legal Problems of Artificial Insemination*, 33 WOMEN LAW. J. 57, 58 (1947); Comment, *supra* note 9, at 916-17; Note, *Legal and Social Implications of Artificial Insemination*, 34 IOWA L. REV. 658, 661 (1949); Note, *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 YALE L.J. 457, 459 (1949).

14. Artificial insemination by an unrelated and usually unidentified donor is an alternative to childlessness when the husband is absolutely or severely sterile. This may also be a preferred practice when the husband is the carrier of genetic defects or when an abnormal pregnancy is likely because of incompatible Rh blood factors. Comment, *supra* note 9, at 918. See also W. FINEGOLD, *supra* note 2, at 18; Smith, *Great Expectations or Convoluted Realities: Artificial Insemination in Flux*, 3 FAM. L. REV. 37, 38 (1980).

15. Some doctors disapprove of this practice. See, e.g., Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A. J. 1089, 1155-56 (1957). However, it is often used to give the husband some hope that he is fact the natural father of the child. Shaman, *supra* note 9, at 332. For example, if the husband suffers from poor sperm mobility (oligozoospermia), the combination of his sperm with that of a donor may result in his sperm fertilizing the egg. See Comment, *Therapeutic Impregnation: Prognosis of a Lawyer — Diagnosis of a Legislature*, 39 CIN. L. REV. 291, 297 (1970).

16. Shaman, *supra* note 9, at 333.

17. See W. FINEGOLD, *supra* note 2, at 23-26. But see Note, *Artificial Insemination versus Adoption*, 34 VA. L. REV. 822 (1948).

18. See generally Smith, *supra* note 13, at 130; Comment, *supra* note 3, at 1050; Note, *supra* note 17, at 828-29.

The Catholic Church opposes artificial insemination of any kind. See Address by Pope Pius XII, Fourth International Convention of Catholic Doctors, Rome (Sept. 29, 1949) (cited in G. KELLY, *MEDICO-MORAL PROBLEMS*, 223-30 (1958)). See also W. FINEGOLD, *supra* note 2, at 79-86 (discussing the Catholic, Jewish, and Protestant views on AI); Lombard, *Artificial Insemination—Civil Law and Ecclesiastical Views*, 2 SUFFOLK U.L. REV. 137, 145-47 (1968); Ryan, Noble & Friedman, *Symposium on Artificial Insemination - The Religious Viewpoints*, 7 SYRACUSE L. REV. 96, 99-106 (1955); Smith, *Intrusions of a Parvenu: Science, Religion and the New Biology*, 3 PACE U.L. REV. 63 (1982).

In 1948 the Church of England held, consistent with the followers of the Lutheran, Jewish Orthodox and the Roman Catholic faiths, that artificial insemination was not

shed its social shackles as unmarried heterosexual and lesbian women have sought to become AI mothers.¹⁹ As a result, one commentator recently observed: "The use of A.I. by unmarried women for the first time allows reproduction to be separated from sexual activity and traditional family life and forces the law, itself rooted in traditional values, to face the clash between 'the power of science of human reproduction and traditional family values.'"²⁰ The judicial response to this question has been limited, but the legislatures of twenty-two states²¹ have limited the practice of AI to married women.

B. The Judicial Response

Only one reported case,²² *C.M. v. C.C.*,²³ concerns the artificial insemination of an unmarried woman.²⁴ This New

only wrong in principle but contrary to Christian beliefs. Today, because of widespread use of AID, the Church of England, as represented by its clergy, is no longer so rigid nor dogmatic in its condemnation of this process. R. SCOTT, *THE BODY AS PROPERTY* 202 (1981).

See generally *Biomedical Ethics in Perspective of Jewish Teaching and Tradition*, PROCEEDINGS OF AN ACADEMIC CONFERENCE, November 13, 1977 (1980).

19. Kritchevsky, *supra* note 9, at 3. The realization that unmarried women might be desirous of AI is by no means a new occurrence. On May 12, 1934, *Newsweek Magazine* published a story discussing the success Dr. Frances I. Seymour of New York had in artificially inseminating Mrs. Lillian Lauricella of Long Island, who had been childless for eight years. The article also noted that in 1932 and 1933, Dr. Seymour had helped to artificially impregnate thirteen women, including two professional women who wanted children but did not want to marry. *Children Provided to the Childless*, NEWSWEEK, May 12, 1934, at 16. See also *Substitute Fathers*, NEWSWEEK, Sept. 13, 1943, at 87 (discussing the AI of wealthy single women who desired to leave an heir). For a reference to recent articles in the press concerning this subject as well as past legal literature addressing it, see Kritchevsky, *supra* note 9, at 3 n.10; Comment, *supra* note 9, at 915 n.11.

20. Kritchevsky, *supra* note 9, at 1 (citation omitted).

21. See *infra* note 36.

22. There has, however, been a recent suit by an unmarried woman regarding the precise issue of an unmarried woman's right to AI. See Kritchevsky, *supra* note 9, at 6 n.24. See also Wadlington, *Artificial Conception: The Challenge of Family Law*, 69 VA. L. REV. 465, 493 n.11 (1983).

23. 152 N.J. Super. 160, 377 A.2d 821 (1977).

24. Initially, AID, even within marriage, was not greeted with much enthusiasm by the judiciary. One court held that AID amounted to adultery, irrespective of the husband's consent. See *Orford v. Orford*, 58 D.L.R. 251 (Can. 1921). Another court found that a child so conceived was illegitimate. *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

The modern trend contradicts these earlier positions. The legal status of the AID child has been legitimized by the courts. See, e.g., *People v. Sorensen*, 68 Cal. 2d 280,

Jersey case presents an unusual set of facts. C.C., an unmarried woman, desired to have a child but did not want to engage in premarital sex. She considered artificial conception with friends, but C.M., whom she had dated for two years, suggested that she use his sperm since they had often spoken of an eventual marriage. The couple visited a local sperm bank but were denied the use of its facilities.²⁵ While consulting with the doctor, however, C.C. familiarized herself with a procedure for artificial insemination using a glass syringe and a glass jar. For the next several months, C.C. made regular visits to C.M.'s apartment for this purpose. C.M. would stay in one room, obtain sperm, and then give it to C.C., who would artificially inseminate herself in another room.²⁶ Conception was eventually achieved, and sometime during the third month of her pregnancy, the pseudo-platonic relationship ended.

After C.C. gave birth, C.M. brought an action for visitation rights with the child,²⁷ asserting he was the natural father and expressing his desire to fulfill that role. Consequently, the parties asked the New Jersey Superior Court to decide whether C.M. was the natural father of the child "or whether he should be considered not to be such because the sperm used to conceive was transferred to C.C. by other than natural means."²⁸

The court refused to take a position on the propriety of unmarried persons using artificial insemination.²⁹ Nonetheless, it recognized public policy considerations which dictated that, whenever possible, it was in the child's best interest to have two parents.³⁰ Accordingly, C.M.'s petition was granted, with an attendant responsibility for the support and maintenance of the child.³¹

437 P.2d 495, 66 Cal. Rptr. 7 (1968); *In re Adoption of Anonymous*, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973). Moreover, most jurisdictions do not consider AID adultery since it does not encompass actual sexual intercourse. Shaman, *supra* note 9, at 334.

25. 152 N.J. Super. at ___, 377 A.2d at 821.

26. *Id.* at ___, 377 A.2d at 821-22.

27. *Id.* at ___, 377 A.2d at 822.

28. *Id.*

29. *Id.* at ___, 377 A.2d at 825.

30. *Id.*

31. *Id.*

C.M. v. C.C. cannot be said to provide precedent supporting an unmarried woman's right to AI. The court could have, but did not, justify its decision on any one of a number of legal theories recognizing the rights and efforts of C.M. in the insemination process such as implied contract, quasi-contract, or estoppel.³² Given the magnitude of the interest at stake, the court properly shied away from basing its decision on a property or contract theory, and unequivocally recognized that the "contraband stork"³³ was no match for the nuclear family. However, the court saw a *child's interest* in having a father and mother as paramount, no matter how the child was conceived.³⁴

C. Legislative Responses

With a larger number of children being born each year as a result of AID,³⁵ the need to clarify their legal status has become a growing concern of state legislatures. Twenty-three states have enacted statutes³⁶ defining the rights of

32. See Kritchevsky, *supra* note 9, at 15 (arguing court could have employed an estoppel theory).

33. Turano, *supra* note 1, at 422.

34. 152 N.J. Super. at ___, 377 A.2d at 825.

35. Six to ten thousand children are born each year in the United States as a result of AID. Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979). Moreover, it is estimated that 250,000 people in the United States have been conceived by artificial insemination. Kritchevsky, *supra* note 9, at 1 n.3 (citing F. MIMS & M. SWENSON, *SEXUALITY: A NURSING PERSPECTIVE* 192 (1980)).

The *New England Journal of Medicine* article raised the real and serious concern regarding potential for incest. It was found that sperm from one donor had been used to produce fifty children! Obviously a possibility of accidental incest exists among offspring who unknowingly have the same father. This article also revealed a surprising degree of sloppiness in record keeping by the participating physicians.

36. ALASKA STAT. § 25.20.045 (Supp. 1982); ARK. STAT. ANN. § 61-141(c) (1971); CAL. CIV. CODE § 7005 (West 1983); CAL. PENAL CODE § 270 (West Supp. 1983); COLO. REV. STAT. § 19-6-106 (1973); CONN. GEN. STAT. ANN. §§ 45-69f-n, 45-152 (West 1981); FLA. STAT. ANN. § 742.11 (West Supp. 1983); GA. CODE ANN. § 19-7-21 (1982); KAN. STAT. ANN. §§ 23-128-130 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1983); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MICH. COMP. LAWS ANN. §§ 333.2824(6), 700.111(2) (1980); MONT. CODE ANN. § 40-6-106 (1981); NEV. REV. STAT. § 126.061 (1979); N.Y. DOM. REL. LAW § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West Supp. 1982-1983); TENN. CODE ANN. § 53-446 (Supp. 1982); TEX. FAM. CODE ANN. § 12.03(a) (Vernon 1975); VA. CODE § 64.1-7.1 (1980); WASH. REV. CODE ANN. § 26.26.050 (Supp. 1983); WIS. STAT. § 767.47(9), 891.40(a) (1981-82); WYO. STAT. § 14-2-103 (1983).

children born through this procedure.³⁷ All of the statutes, except Oregon's, limit the practice of AID to married women. The Oregon statute implicitly authorizes AID for unmarried women, since it provides in part: "Artificial insemination shall not be performed upon a woman without her prior written request and consent, and *if she is married*, the prior written request and consent of her husband."³⁸ Nonetheless, when the statute is viewed as a whole and when one considers that it has yet to receive any judicial construction, its legislative meaning remains uncertain.³⁹

The equal protection clause of the fourteenth amendment prohibits the states from denying equal protection of the laws to any person.⁴⁰ Since a state statute represents state action for equal protection analysis, a statute limiting AID to married women must conform with constitutional strictures or it will violate the equal protection clause. As the analysis in part III will demonstrate, these restrictive statutes are not amenable to constitutional attack.

II. SURROGATION

A. Definition

Simply defined, a surrogate mother is a woman (single or married) who conceives artificially from a married man who is not her husband. The surrogate carries a pregnancy for the man's wife because of the wife's infertility. Upon delivery, the surrogate relinquishes all control over the child and surrenders him or her to the contracting couple — normally for adoption. Thus, maternal surrogation is, in reality, a log-

37. For an analysis of the common elements found in the majority of these statutes, see Comment, *supra* note 3, at 1065-71. See also Schuyler, *The New Biology and the Rule Against Perpetuities*, 15 U.C.L.A. L. REV. 420, 424-28 (1968); Smith, *For Unto Us a Child is Born — Legally*, 56 A.B.A. J. 143 (1970).

38. OR. REV. STAT. § 677.365(1) (1981) (emphasis added). One commentator has recently suggested that the statutes of California, Colorado, Washington and Wyoming, which follow the language of the UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592 (1979), but omit the word "married" from one of its provisions, may arguably legitimize the practice for unmarried women. See Kritchevsky, *supra* note 9, at 18.

39. One commentator seems to have interpreted the statute as limiting the practice to married women. See Shaman, *supra* note 9, at 344-45.

40. U.S. CONST. amend. XIV, § 1.

ical counterpart to AID.⁴¹

The surrogate mother and donor father do not participate in sexual intercourse. If a wife gives her consent to a surrogate mother arrangement, and if a husband consents to his wife's participation in donor insemination (AID), there is no basis for considering adulterous the fertilization techniques used to effect a pregnancy.⁴²

None of the states have passed laws specifically regulating surrogate motherhood. Yet, a number of state statutes make the payment to a parent for his or her consent to adopt or obtain custody of a child unlawful;⁴³ many impose heavy penalties or imprisonment for violations.⁴⁴ Consequently, there is some deterrent to extensive "black market" operations in adoptions.⁴⁵ Since the legality of a contract is tested by, and depends upon, the place where it is made,⁴⁶ a jurisdiction which prohibits payment for consent to adopt or for custody of a child would hold illegal, and thus invalid, a contract entered into between a married couple and a surrogate mother to relinquish the surrogate's parental rights to an infant born for subsequent adoption by the natural father and putative mother. Thus, the bargain is viewed in terms of an *adoption* contract. If this same contractual relation is viewed as a contract *to bear* a child, less objection and greater acceptance of the contract should be recognized simply because the purchaser is the natural father of the child.

41. R. BLANK, THE POLITICAL IMPLICATIONS OF HUMAN GENETIC TECHNOLOGY 68 (1981); G. SMITH, GENETICS, ETHICS AND THE LAW 124-25 (1981).

42. Keane, *Legal Problems of Surrogate Motherhood*, 5 ILL. U.L.J. 147, 151-52 (1980). The theological response to this phenomenon is, as with artificial insemination, to regard it as an essentially adulterous act since it is considered to be an "intrusion of a third party into the psycho-physical union of husband and wife." Kavanagh, *Theologians Hit "Surrogate Mother" Business*, CATH. STANDARD, Apr. 8, 1982, at 33, col. 2.

43. See, e.g., KY. REV. STAT. § 199.590(2) (1980); MICH. COMP. LAWS ANN. § 710.54 (Supp. 1983); N.J. STAT. ANN. § 9:3-54(a) (West Supp. 1983).

44. See, e.g., CAL. PENAL CODE § 181 (West 1970 & Supp. 1983) (two-, three- or four-year imprisonment); MICH. COMP. LAWS ANN. § 710.69 (Supp. 1983) (misdemeanor); N.J. STAT. ANN. § 9:3-54(c) (West Supp. 1983) (high misdemeanor).

45. See, e.g., *Adoption Hot Line, Inc. v. State of Florida*, Dept. of Health and Rehabilitative Servs., 385 So. 2d 682 (Fla. Dist. Ct. App. 1980); Comment, *Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy over Gray-Market Adoptions?*, 18 DUQ. L. REV. 629 (1980); Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715 (1950).

46. A. CORBIN, ON CONTRACTS § 1374 (1962).

Under the second view, fears of commercialization soften and more attention is paid to the interests of the child and the biological mother.⁴⁷ Interestingly, an unmarried man would encounter even less legal entanglement in dealing with a surrogate. Since no wife would be involved, it would be unnecessary for a man to adopt his own child. He would simply pay the surrogate without risk and, as natural father of the child, take custody of him or her upon birth without the necessity of formal adoption proceedings.⁴⁸

B. Presumptions of Paternity

The Uniform Parentage Act⁴⁹ presents an initial obstacle to establishing paternity in surrogate contract situations. Section Five of the Act controls the use of artificial insemination and provides: "The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."⁵⁰ It is obvious that this provision was drafted in order to protect anonymous AID donors from all legal responsibility for those children fathered through their semen. If the provision is adopted *in toto*, this language could present difficulty for the biological father under, for example, a surrogate contract to either establish paternity or assert parental rights of visitation.

Children born of a valid marriage are presumed to be legitimate issue of that union. All states, regardless of whether they adopted the Uniform Parentage Act, recognize this presumption.⁵¹ Thus, if a surrogate is married, her child is presumed to be the legitimate child of her husband, not the child of the sperm donor. However, the donor-biological father could bring a custody suit and prove he was in fact the

47. Comment, *Contracts to Bear a Child*, *supra* note 10, at 613.

48. Krucoff, *Private Lives: The New Surrogate*, Wash. Post, Sept. 24, 1980, at B5, col. 2.

49. UNIF. PARENTAGE ACT § 5(b), 9A U.L.A. 593 (1973). The Act has been adopted in California, Colorado, Hawaii, Minnesota, Montana, North Dakota, Washington and Wyoming. 9A U.L.A. 171 (West Supp. 1983).

50. UNIF. PARENTAGE ACT § 5(b), 9A U.L.A. 593 (1973).

51. Annas, *Contracts to Bear a Child: Compassion or Commercialism?*, 11 HASTINGS CENTER REP., Apr. 1981, at 24.

biological father. The court would then have to determine which parent or set of parents could better serve the long-term needs of the child.⁵²

C. *Additional Policy Issues*

Presumably, there is a parallel relationship between AID and contracts to bear children. Yet, while the donor is generally assured confidentiality in heterologous insemination, the surrogate mother's identity is generally known by the contract couple. Her physical appearance, in fact, together with her medical history, education level, environmental and cultural background is often a major consideration in making a judgment of a surrogate's suitability.⁵³ Thirty-five years of age is usually the cut-off point for surrogate candidacy because of the increased potential for genetic anomalies in children born to women over thirty-five. Furthermore, candidacy is normally limited to women who are presently married or have been divorced.⁵⁴ Single women, especially those who have never had children, are often regarded as unsuitable simply because their involvement would not only be regarded as promoting immorality (and perhaps adultery), but also because their unproven record of birth successes creates uncertainty for the contracting parties. However, the right of a single, unmarried woman to control her own physical autonomy is an evolving concept which must be balanced against the state interest in preserving the public welfare and morals. The extent to which a married woman can act or conduct her marital affairs *without* the informed consent of her husband, or more specifically, her right to become a surrogate mother, also remains an open-ended legal question.

An even more unsettled issue is the degree of control the surrogate has over her own activities during the pregnancy. What if, for example, after agreeing to abstain from the use of alcoholic beverages during the pregnancy, the surrogate

52. *Id.* See generally Karst, *supra* note 12.

53. See, e.g., Harris, *Stand-In Mother — Maryland Woman to Bear Child for Couple*, Wash. Post, Feb. 11, 1980, at 1, col. 3 (recounting how a single, unmarried twenty-year old acted in her role as a surrogate).

54. See generally Smith, *A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary*, 17 J. FAM. L. 41 (1978).

does drink on a regular basis? Could a court order be obtained to stop such consumption?⁵⁵ If so, how could it be enforced? By total restraint, such as hospital confinement? Suppose the surrogate did not reveal her propensity to consume alcohol (or drugs) and the child is born with a genetic defect determined to be the direct consequence of the surrogate's action. Could the surrogate be sued for negligence? Suppose further, neither the husband nor his wife wishes to take the defective child as his or her own and the surrogate does not want the child. Should a penalty be assessed against all parties because of this "misdeed"? In this situation, the infant becomes a ward of the state and, thus, a responsibility of the taxpayers if and until an adoption can be arranged.

If a physician is negligent in screening a prospective surrogate mother and the infant is born with a genetic deficiency, would a cause of action for malpractice exist against the attending physician?⁵⁶ Or, suppose a surrogate decides to keep the contract baby. Could she in turn sue the biological father for child support?⁵⁷ As a practical matter, financial support by the biological father would be in the best interest of both the child and the state. One trial court has decreed that the biological surrogate mother, who had insufficient funds to support herself and the child, had a right to keep the child.⁵⁸

55. See generally Comment, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051 (1981).

56. See also *supra* note 14.

57. The only recorded "change of mind" case covered the surrogate's desire to keep her biological child. No support issue was raised. *Search for a Surrogate*, TIME, June 22, 1981, at 71. For further discussion of this case see *infra* note 58. See generally Curtis, *The Psychological Parent Doctrine in Custody Disputes Between Foster Parents and Biological Parents*, 16 COLUM. J.L. & SOC. PROBS. 149 (1980).

58. The first known incident of a surrogate mother attempting to rescind her contract was decided recently by a superior court judge in Los Angeles, California. The plaintiff and his wife were unable to have a family and contracted with a California widow, mother of three children, to be artificially inseminated by plaintiff. Although not paid for her services, the surrogate's medical expenses were covered. During the pregnancy, the surrogate changed her mind and expressed her intent to keep the fetus when born. Plaintiff then sued for custody, but before trial, he requested the presiding judge to withdraw the suit. Claiming the "extraordinary publicity" concerning the fact that his wife was a transsexual would make it difficult for his son to "lead a normal life," the plaintiff capitulated. The infant was given his birth mother's surname, but despite being listed on the birth certificate as the father, the plaintiff was

D. Emerging Case Law

In *Doe v. Kelley*,⁵⁹ a Michigan couple brought suit to declare unconstitutional a state statute⁶⁰ prohibiting the exchange of money or other consideration for independently placing a child for adoption. The couple, John and Jane Doe, entered into a contract with John's secretary, Mary Roe, in which she would be artificially inseminated with John's sperm for \$5,000 plus medical expenses.⁶¹ Jane Doe was incapable of bearing children. John and Jane argued that the statute impermissibly infringed upon their constitutional right to privacy.⁶²

In rejecting the plaintiff's claim, the Michigan Court of Appeals first acknowledged that under *Maher v. Roe*,⁶³ "the decision to bear or beget a child has . . . been found to be a

granted no visitation rights. The plaintiff's attorney opined that plaintiff might wish to re-open the case on the issue of visitation rights. The presiding judge of the court stated his belief that surrogates should always be allowed to reconsider and change their minds regarding such contracts. *Search for a Surrogate*, TIME, June 22, 1981, at 71. See also *Surrogate Mother Wins Custody of Baby*, Wash. Post, June 5, 1981, at A6, col. 1; *Reluctant Surrogate Mother*, Wash. Post, Apr. 7, 1981, at A7, cols. 1-2; Mathews, *Adoptive Parents Fight Surrogate Mother for Baby*, Wash. Post, Mar. 23, 1981, at 7A, col. 6.

59. 106 Mich. App. 169, 307 N.W.2d 438 (1981).

60. MICH. COMP. LAWS ANN. § 710.54(1)(a) (1983) is identical to the statute attacked in *Kelley* and provides in relevant part: "Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following: (a) the placing of a child for adoption."

61. The agreement provided:

(a) That JANE DOE and JOHN DOE will pay MARY ROE a sum of money in consideration for her promise to bear and deliver JOHN DOE's child by means of artificial insemination.

(b) That a licensed physician will conduct the artificial insemination process.

(c) That prior to the delivery of said child, JOHN DOE will file a notice of intent to claim paternity.

(d) That at the time the child is born, JOHN DOE will formally acknowledge the paternity of said child.

(e) That MARY ROE will acknowledge that JOHN DOE is the father of said child.

(f) That MARY ROE will consent to the adoption of said child by JOHN DOE and JANE DOE.

Kelley, 106 Mich. App. at ___, 307 N.W.2d at 440.

62. *Id.*

63. 432 U.S. 464 (1977).

fundamental interest protected by the right of privacy."⁶⁴ However, the court did not see that right as a bar to state interference in the plaintiffs' contract.⁶⁵ The court reasoned that the disputed statute did not directly prohibit John Doe and Mary Roe from having the child as planned.⁶⁶ Instead, it viewed the statute as precluding "plaintiffs from paying consideration in conjunction with their use of the state's adoption process."⁶⁷ This was, the court said, an attempt to use the adoption code in order to change the legal status of the child, particularly the child's right to support and intestate succession.⁶⁸ The court did not see "this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation."⁶⁹

On November 9, 1980, in the Louisville, Kentucky area, the birth of a baby born to a surrogate mother *under contract* was first recorded.⁷⁰ The following April, the infant was legally adopted by the biological father and his wife. While the identity of the new parents was not disclosed, the facts show that an Illinois housewife had been paid to carry the child of her artificial insemination from a married man's semen. Ninety days after birth, as required by Kentucky law,⁷¹ the biological father's wife had petitioned to adopt the infant. Her attorney argued that the adoption order, which had been obtained on the petition, was final and that a lawsuit maintained by the Attorney General of Kentucky challenging the legality of the surrogate contract should have no effect.⁷² Presumably, the attorney general based his action on a statutory provision prohibiting advertising or soliciting children for adoption and accepting remuneration for the

64. *Kelley*, 106 Mich. App. at ___, 307 N.W.2d at 441.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Wash. Post, Apr. 24, 1981 at A12, col. 1. The first recorded incident of surrogate motherhood birth took place in San Francisco, California, on September 6, 1976. N. KEANE & D. BREO, *THE SURROGATE MOTHER* 33 (1981).

71. KY. REV. STAT. § 199.470(3) (1980).

72. Wash. Post, Apr. 24, 1981 at A12, col. 1.

procurement of any child for adoptive purposes.⁷³ A penalty is specified for violation of this provision.⁷⁴

III. EQUAL PROTECTION FOR WHOM?

A. *Traditional Equal Protection Analysis*

When a statute creates a classification resulting in disparate treatment of similarly situated people, the equal protection clause compels courts to examine the justification for the classification.⁷⁵ The level of scrutiny to be employed, however, will depend on the interest at stake.⁷⁶ Traditionally, the legislative classification will be upheld if it is "reasonable, not arbitrary,"⁷⁷ and if it rests "upon some ground of difference having a fair and substantial relation to the object of the legislation"⁷⁸ However, if a fundamental right is involved, a more critical examination of the classification is required.⁷⁹ A higher level of scrutiny then demands that "the statutory classification . . . be not merely *rationaly related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest."⁸⁰

The AID statutes make an express classification between married and unmarried women. Accordingly, the next step

73. See KY. REV. STAT. § 199.590 (1980). In addition, the attorney general maintained an action to enjoin Surrogate Planning Associates, Inc., (SPA) from making any further surrogate mother arrangements in the state. Annas, *supra* note 51, at 23, 25. See also Note, *In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience*, 69 KY. L.J. 877 (1980-1981).

The surrogate received less than \$10,000 for her services. The issue born of this arrangement thus became the first born through the work of SPA. SPA was founded in January, 1980, in Louisville, Kentucky, and it operates as a match-maker, matching infertile couples with fertile women willing to bear babies. SPA estimates the average cost involved in a total surrogate program to be anywhere from \$13,000 to \$20,000. This covers medical and hospital expenses and the fees of SPA. Krucoff, *supra* note 48. See also Note, *In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience*, 69 KY. L.J. 877 (1980-81).

74. See KY. REV. STAT. § 199.990(2) (1980).

75. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 587 (2d ed. 1983).

76. See generally *id.* at 590-94.

77. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

78. *Id.* at 415; *accord* *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

79. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

80. *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972) (emphasis in original). See also *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

in the analysis is determining whether the right affected by the classification is fundamental. If the right is "explicitly or implicitly guaranteed by the Constitution,"⁸¹ it will be deemed fundamental,⁸² and the strict scrutiny standard will apply. Or the strict scrutiny standard will apply if the classification involves a suspect class.⁸³

But equal protection arguments are an inappropriate basis for those seeking to protect informal, illicit relationships.⁸⁴ Legal distinctions between married and unmarried persons are justified when the state seeks to protect and regulate marriage as a social institution, as well as to maintain and validate legitimate individual interests, such as property, taxation, contracts and torts, which are inherent in every marital relationship.⁸⁵

Recently, a number of commentators have suggested that an unmarried woman's right to AID may derive from a liberal reading of Supreme Court decisions establishing fundamental rights to procreation and privacy.⁸⁶ The following discussion summarizes the points of view presented in those cases.

As society evolves and changes, so do many of its values.⁸⁷ Autonomy, self-representation, personhood, identity, intimacy and dignity are all essential to privacy.⁸⁸ The extent to which these essentials play a role in shaping sexual, procreational autonomy must surely remain flexible; attempting to define them with precision would challenge and erode any efficacy they might enjoy.⁸⁹ The right of the state to control and to shape the behavior of both individuals and groups regarding the birth of children is always an area of high emotion and concern.

81. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (citations omitted).

82. *Id.* at 33.

83. *See, e.g., Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272-73 (1979). *See also Craig v. Boren*, 429 U.S. 190 (1976).

84. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 541 (1983).

85. *Califano v. Jobst*, 434 U.S. 47, 53 (1977).

86. *See supra* note 9.

87. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 892 (1978).

88. *Id.* at 889.

89. *Id.* at 892.

The majority view on privacy holds that private conduct between consenting adults or, for that matter, personal conduct of any nature, should be regulated only to the extent necessary to prevent harm to others.⁹⁰ Thus, conformity is not a priority and is certainly not a value worth pursuing.⁹¹ The opposing view argues that the business of the law is to suppress vice and immorality.⁹² Advocates of this view reason that if violations of society's moral structure are indulged and promoted, the whole basis of society would be undermined.⁹³

Arguably, under the majority view, the state would be justified in acting to control personal decision making in the areas of artificial insemination and surrogation for unmarried women. The requirement of harm to others is met because society could suffer economic harm by incurring expenses associated with the maintenance and education of a fatherless child born of artificial insemination. Similarly, the prevention of harm theory could be invoked in surrogation where the state, by attempting to prevent such acts, seeks to maintain the dignity and continuity of the traditional family.⁹⁴

B. *A Basic Right to Procreate?*

*Buck v. Bell*⁹⁵ was the first case to address what has now come to be regarded as a fundamental right to procreate. In *Bell* the Supreme Court upheld a Virginia statute that permitted the sterilization of state institution inmates who suffered from hereditary forms of insanity or imbecility.⁹⁶ The opinion, authored by Justice Holmes, was written before the fundamental right-compelling state interest standard was de-

90. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 57 (1963).

91. *Id.*

92. P. DEVLIN, *THE ENFORCEMENT OF MORALS* 7 (1965).

93. *Id.* at 24, 25. See also Dworkin, *Lord Devlin and The Enforcement of Morals*, 75 *YALE L.J.* 986 (1966).

94. Using this former view of openness in matters of private conduct, a New York court recently held that unmarried, consenting adults in private settings should not be subjected to criminal sanctions for acts of sodomy since these actions were of no societal concern and promoted no social damage. *People v. Onofre*, 51 *N.Y.2d* 476, 415 *N.E.2d* 936, 434 *N.Y.S.2d* 947 (1980), *cert. denied*, 451 *U.S.* 987 (1981).

95. 274 *U.S.* 200 (1927).

96. *Id.* at 207.

veloped.⁹⁷ Thus, it must be determined whether the Court's opinion implicitly recognized the existence of a compelling state interest, or whether the Court refused to classify procreation as a fundamental right.⁹⁸ The latter appears to be the case; it has been suggested that the Court's emphasis on the state's right to promote the general good or welfare approximates a rational basis standard of judicial review.⁹⁹

In *Skinner v. Oklahoma*¹⁰⁰ the Supreme Court again considered the validity of compulsory sterilization laws. Unlike the *Bell* Court, which did not find an equal protection violation,¹⁰¹ the *Skinner* Court struck down an Oklahoma sterilization statute on equal protection grounds. The statute provided for the sterilization of habitual criminals, that is, persons convicted of three or more felonies. However, the statute did not consider felonies which arose from the violation of prohibitory laws, revenue acts, embezzlement, or political offenses.¹⁰² In its opinion, the Court first recognized that marriage and procreation are fundamental to both the existence and survival of mankind.¹⁰³ It then observed, however, that for purposes of criminal sterilization, a classification distinguishing larcenists from embezzlers represented a

97. Comment, *supra* note 3, at 1054.

98. *Id.*

99. Note, *Legislative Naivete in Involuntary Sterilization Laws*, 12 WAKE FOREST L. REV. 1064, 1071 (1976). Writing for the *Bell* Court, Justice Holmes observed:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

274 U.S. at 207.

100. 316 U.S. 535 (1942).

101. The *Bell* Court used a revolving door rationale in rejecting the equal protection claim:

[T]he law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

274 U.S. at 208.

102. *Skinner*, 316 U.S. at 537.

103. *Id.* at 541.

form of invidious discrimination.¹⁰⁴ Consequently, the Court subjected the classification to strict scrutiny and found it violative of the equal protection clause.

Although a number of subsequent Supreme Court decisions have cited the *Skinner* case as validating, if not in fact creating, a constitutional right to procreate,¹⁰⁵ it is important to recognize the precise contours of that right. In both *Bell* and *Skinner*, the Court confronted sterilization statutes. Sterilization, unlike other methods of control over human reproduction, is irreversible.¹⁰⁶ Thus, in discussing the procreative "right" affected by Oklahoma's Habitual Criminal Sterilization Act, the *Skinner* Court aptly observed that this "right [is] basic to the perpetuation of a race"¹⁰⁷ Given this background, it is apparent that the procreative right recognized in *Skinner* was simply a right to remain fertile, and not an uninhibited right to engage in potentially procreative conduct.

C. Searching for a Fundamental Right to Sexual Privacy

Neither the rationale of *Buck v. Bell*¹⁰⁸ nor *Skinner v. Oklahoma*¹⁰⁹ applies to the insemination issue, creating a new right in the area. Nowhere does the Constitution mention a right to privacy. Nor is any right of sexual freedom to be found within the gambit of procreative rights recognized by the Supreme Court. Nor, for that matter, has the Court

104. *Id.*

105. Comment, *supra* note 3, at 1056. Indeed, this commentator suggested that *Skinner* has been incorrectly interpreted since "the *Skinner* Court neither denied the state's right to sterilize nor established a constitutional right to procreate. Rather, the Court expressly declared that the scope of the state's policy power was unaffected by its holding." *Id.* (footnote omitted). See also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of . . . constitutionally protected choices."); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (stating that *Skinner* makes it clear that the right to privacy has some extension to activities related to procreation).

106. See *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.C. 1974).

107. *Skinner*, 316 U.S. at 536. Writing for the Court, Justice Douglas stated: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches." *Id.* at 541.

108. 274 U.S. 200 (1927).

109. 316 U.S. 535 (1942).

fashioned a general right of personal privacy which is sufficiently broad to permit sex outside marriage.¹¹⁰ However, in *Griswold v. Connecticut*¹¹¹ the Supreme Court recognized a constitutionally protected zone of privacy and invalidated part of a Connecticut statute forbidding the use of contraceptives by married persons.¹¹² The protection of this aspect of procreative autonomy "was largely subsumed within a broad right of marital privacy"¹¹³ which "stressed the unity and independence of the married couple and forbade undue inquiry into conjugal acts."¹¹⁴ But it cannot be argued from this that there must exist a corresponding fundamental right to reproduce or to use artificial reproductive technology.¹¹⁵ As Justice Goldberg made emphatically clear in his concurring opinion, *Griswold* "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."¹¹⁶ Thus, the constitutionality of Connecticut's statutes prohibiting adultery and fornication remained beyond dispute.

In *Eisenstadt v. Baird*¹¹⁷ the Court was confronted with a Massachusetts statute which prohibited the distribution of contraceptives to unmarried persons. In holding that the statute violated the equal protection clause of the fourteenth amendment, the Court observed that, "[if] the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹¹⁸ Accordingly,

110. Hafen, *supra* note 84, at 538.

111. 381 U.S. 479 (1965).

112. *Id.* at 485. The Court observed that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484 (citation omitted). Thus, it is those "[v]arious guarantees [which] create [the] zones of privacy." *Id.*

113. Note, *Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 HARV. L. REV. 1850,1867 (1981).

114. *Developments in the Law - The Constitution and the Family*, 93 HARV. L. REV. 1156, 1183 (1980).

115. Comment, *supra* note 3, at 1058.

116. *Griswold*, 381 U.S. at 498-99 (Goldberg, J., concurring). But Professor Tribe states that since *Griswold* recognized as valid individual decisions not to bear a child, read as such and considered with *Skinner*, it forces the conclusion that whether or not one's body is to be the source of new life, "must be left to that person and that person alone to decide." L. TRIBE, *supra* note 87, at 923.

117. 405 U.S. 438 (1972).

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

the *Eisenstadt* Court fleshed out the procreative skeleton of *Griswold* at a time when *Griswold* appeared confined to the so-called "sacred" precincts of the matrimonial bedroom chambers.¹¹⁹ However, this decision did no more than refine a qualified right to procreative autonomy blurred by the *Griswold* Court's emphasis on the marital relation.¹²⁰

In *Roe v. Wade*¹²¹ the Court squarely addressed an integral part of the individual's right to procreative autonomy. In *Roe* an unmarried woman challenged the constitutionality of the Texas criminal abortion laws. The Court articulated a new source of privacy derived from the fourteenth amendment's standard of personal liberty and inherent restrictions upon state action. It held that this right was sufficiently broad to embrace a decision made by a woman to terminate her pregnancy.¹²² The Court went on to state,

119. *Id.* at 454.

120. "It has been suggested that the Court's opinion was lacking in candor, for it stated in broad dictum a major extension of the 'privacy' right which could have justified its decision, while purporting to rest on a strained conclusion that the statute involved failed even the minimal rationality test." *Developments in the Law, supra* note 114, at 1184 (footnotes omitted).

Under an expansive liberal interpretation, *Eisenstadt* has been seen as extending the right of privacy to all sexual activities of whatever nature. See *Wilkinson & White, supra* note 12, at 589. See, e.g., *Miller v. Rumsfeld*, 647 F.2d 80, 85 (9th Cir. 1981) (Norris, J., dissenting), *cert. denied*, 454 U.S. 855 (1981); *Lovisi v. Slayton*, 363 F. Supp. 620, 625 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 977 (1976); *Neville v. State*, 290 Md. 364, 390, 430 A.2d 570, 583 (1981) (Davidson, J., dissenting).

A more conservative and narrow construction views *Eisenstadt* as merely recognizing a freedom to decide issues related to the birth of a child. See, e.g., *Neville v. State*, 290 Md. 364, 374, 430 A.2d 570, 575 (1981); *People v. Onofre*, 51 N.Y.2d 476, 498, 415 N.E.2d 936, 946, 434 N.Y.S.2d 947, 957 (1980) (Gabielli, J., dissenting); *State v. Santos*, 413 A.2d 58, 68 (R.I. 1980).

121. 410 U.S. 113 (1973).

122. *Id.* at 153. This right, however, is not absolute and the degree of involvement allowed is contingent upon the length of the pregnancy. "[P]rior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. After this stage, the state may "regulate the abortion procedure in ways that are reasonably related to maternal health." *Id.* Finally, after viability, the state may protect fetal life and "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-64. See also Comment, *Technological Advances and Roe v. Wade: The Need To Rethink Abortion Law*, 29 U.C.L.A. L. REV. 1194 (1982); Comment, *Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion*, 27 U.C.L.A. L. REV. 1340 (1980) (suggesting that technological advances in artificial life support systems will undercut a woman's right to abortion since they will push viability closer

however, that it was not recognizing "an unlimited right to do with one's body as one pleases" ¹²³

The final case of interest is *Carey v. Population Services International*.¹²⁴ In *Carey*, the Court invalidated a New York statute regulating the sale and distribution of contraceptives to minors and stated that "at the very heart of [the] cluster of constitutionally protected choices" recognized in the previous privacy cases¹²⁵ is "the decision whether or not to beget or bear a child" ¹²⁶ As the following discussion illustrates, this decision is particularly instructive on the question of the unmarried woman's right to artificial insemination because it examines the previous privacy cases and delineates the extent of the individual's right to procreative autonomy.

Although it has been suggested by some commentators that since a woman has a right to terminate her pregnancy and to use contraceptives, *a posteriori*, the conduct required to bring about those procreative choices must also be protected,¹²⁷ the Court's opinion in *Carey* indicates that this is simply not the case. First, with regard to contraception and abortion, the Court made it clear that it is the "individual's right to decide to *prevent conception* or *terminate pregnancy*"¹²⁸ that is protected. Such unequivocal language lends little or no support to the argument that a concomitant right to conceive is also protected. Second, the Court emphasized that its decision did not encompass any constitu-

to the time of conception). In a trilogy of recent cases, *Simopoulos v. Virginia*, 103 S. Ct. 2532 (1983), *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517 (1983), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983), the Supreme Court analyzed in light of *Roe* two state statutes and one city ordinance regulating the performance of abortions.

123. *Roe*, 410 U.S. at 154. In support of this proposition the Court cited *Buck v. Bell*, 274 U.S. 200 (1927), which led one commentator to observe: "As it is difficult to imagine a more substantial interference with procreation than compulsory sterilization, the limited stature of the recognized procreative 'right' is apparent." Note, *supra* note 113, at 1868.

124. 431 U.S. 678 (1977) (plurality opinion).

125. In addition to the privacy cases already discussed in this article, the Court cited *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974); *Loving v. Virginia*, 388 U.S. 1 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

126. *Carey*, 431 U.S. at 685.

127. Kritchevsky, *supra* note 9, at 27-28.

128. *Carey*, 431 U.S. at 688 (emphasis added).

tional questions raised by state statutes regulating either sexual freedom or adult sexual relations.¹²⁹ This reading of *Carey* is supported by a later decision of the Court in which it stated that if the "right to procreate means anything at all, it must imply some right to enter the only relationship in which the state . . . allows sexual relations legally to take place."¹³⁰ The lesson from the Court's decisions in *Skinner*, *Griswold*, *Eisenstadt*, *Roe* and *Carey* is plain: "procreative autonomy includes both the right to remain fertile and the right to avoid conception,"¹³¹ but nothing more.

D. The Level of Scrutiny and the State's Justification for Action

Since the unmarried woman's decision to be artificially inseminated does not fall within the gambit of any recognized fundamental right, state statutes limiting this procreative technology to married women may "be sustained under the less demanding test of rationality"¹³² Under this test, the distinction drawn must merely be "rationally related" to a "constitutionally permissible" objective.¹³³ In employing this rather relaxed standard, courts must be sensitive to the fact "that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."¹³⁴

129. *Id.* at 688 n.5. See generally *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973), Annot., 20 A.L.R. 4TH 1009 (1983) (implication that state fornication statutes do not violate the federal constitution). But see *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (holding that fornication statute affects by its very nature personal choice and that it infringes upon the right of privacy).

130. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Cf. *Doe v. Commonwealth's Attorney For Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (summary affirmance of three-judge district court decision holding that the state of Virginia could constitutionally apply its sodomy statute to private sexual conduct between consenting male adults). See also *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting). A noted constitutional law scholar, however, has suggested that the precedential value of the court's summary affirmance in *Doe* may "stand for relatively little." L. TRIBE, *supra* note 87, at 943.

131. *Developments in the Law, supra* note 114, at 1185. See also *Wilkinson & White, supra* note 12, at 591-94.

132. *Maher v. Roe*, 432 U.S. 464, 478 (1977).

133. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

134. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

Absent a suspect classification or the infringement of a fundamental right, the Supreme Court has recognized that legislation "protecting legitimate family relationships," as well as both the regulation and protection of the family unit, are "venerable" concerns of the state.¹³⁵ Statutes limiting the availability of artificial insemination to married women fall squarely within this classification.

As early as 1888, the Court recognized marriage as "the foundation of the family and society, without which there would be neither civilization nor progress."¹³⁶ Recently, the Court observed that "a decision to marry and raise the child in a traditional family setting must receive . . . protection."¹³⁷ Thus, although certain aspects of an individual's right to procreative autonomy have been lawfully separated from the familial and marital relationship, the Court has also implicitly recognized that, whenever possible, childrearing should take place within the traditional family unit.¹³⁸ An unmarried woman's decision to seek artificial insemination goes against the tide of these pronouncements.

Adoption laws offer an instructive analogy. Like statutes regulating artificial insemination, adoption statutes are rooted in state law.¹³⁹ Although all states currently allow adoption by unmarried adults,¹⁴⁰ it occurs only in rare cases. In *Adoption of H.*¹⁴¹ both an unmarried middle-aged woman and a young couple sought to adopt a thirteen-month-old child. In rejecting the unmarried woman's application, the court observed:

Adoption by a single person has generally and in this Court's experience been sought and approved only in exceptional circumstances, and in particular for the hard-to-place child for whom no desirable parental couple is avail-

135. *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 173 (1972) (citation omitted).

136. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

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

138. *See generally* *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

139. *See, e.g.*, *Ferguson v. Finch*, 310 F. Supp. 1251 (D.S.C. 1970); *In re Jarboe's Estate*, 235 F. Supp. 505 (D.D.C. 1964).

140. *Kritchevsky, supra* note 9, at 31.

141. 69 Misc. 2d 304, 330 N.Y.S.2d 235 (1972).

able. In the universal view of both experts and laymen, while one parent may be better than none for the hard-to-place child, joint responsibility by a father and a mother contributes to the child's physical, financial, and psychic security as well as his emotional growth. This view is more than a matter of present convention, anthropologists pointing out that the institution of marriage, which is a method of signifying commitment to such joint responsibility, evolved in response to the need for two-parent care of children.¹⁴²

This observation applies with equal force to the artificial insemination of unmarried women.¹⁴³ Indeed, if a state may reasonably regulate unmarried adults in their quest to adopt children, it may be contradictory to suggest that the state could not regulate an unmarried individual's use of a procreative technology designed to bring children into the world.

More importantly, however, the unmarried woman's access to artificial insemination and, thus, surrogation, directly undermines "[t]he basic foundation of the family in our society, the marriage relationship"¹⁴⁴ The desirability of having a child reared within a traditional family unit has been repeatedly recognized by the courts.¹⁴⁵ Moreover, it is clear that "[w]ithin the traditional model, marriage serves as

142. *Id.* at 314, 330 N.Y.S.2d at 245 (footnotes omitted). *Cf.* *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977). In upholding the statutory and regulatory procedures for the removal of foster children from foster homes, the Court observed in *Smith*: "Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." *Id.* at 846-47.

143. One commentator has argued that the AI process in fact makes it less likely that the parent will be indigent or emotionally unfit to care for the child First, because the procedure of AI itself is expensive, its use would tend to be limited to the nonindigent. Second, prospective AI mothers . . . receive screening and counseling to ensure that they are fit to become parents Third . . . use of AI guarantees that the child be born into a home that sincerely wants it, and there is no reason to believe that this is less true in the single parent than the dual parent home [F]inally, since a woman refused AI remains free to choose to conceive through sexual intercourse, any state rationale arguing that eliminating AI will protect it financially or will protect children is irrational.

Kritchevsky, *supra* note 9, at 29.

144. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 843 (1977).

145. *See supra* note 138 and accompanying text.

the genesis of the family"¹⁴⁶ Accordingly, both the inherent procreative potential of this union¹⁴⁷ and the stability to the social fabric it provides¹⁴⁸ would be dealt a fatal blow by either permitting unmarried women to be artificially inseminated or permitting them to act as surrogate mothers.¹⁴⁹ Equally unpersuasive is an argument that a state is painting with too broad a brush when it limits AI to married couples. Although the Supreme Court has failed to formulate a concrete definition of the family, *Moore v. City of East Cleveland*¹⁵⁰ "represents the only clear extension of protection [routinely afforded the nuclear family] to a quasi-familial group."¹⁵¹ In *Moore* a zoning ordinance which limited an area to single family dwellings was challenged by a woman who shared her home with her two grandsons. The Court recognized that the extended family occupies a place in American tradition similar to that of the nuclear family and, thus, is to be guaranteed protection by the Constitution.¹⁵² As the procreation and privacy cases illustrate by analogy, although a mother and her offspring may find protection within the nuclear family structure, this does not imply a right to freely bring about that condition, nor does it demonstrate that the limitations placed on AI with respect to un-

146. *Developments in the Law, supra* note 114, at 1270.

147. Along these lines it has been suggested that artificial insemination, if approved and encouraged by the state, tends to upset the traditional, totally private, monogamous method of human reproduction. By sanctioning the intervention of a third party (the donor) into the process, the state is approving a trend toward treating reproduction as a social as opposed to a private act. Artificial insemination also creates a potential for direct state intervention into the reproductive process.

Kindregan, *supra* note 5, at 1409.

148. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

149. One commentator recently suggested that a clearer understanding of the family-marriage-procreation cases can be attained by focusing on the right to freedom of intimate association underlying those decisions. Karst, *supra* note 12, at 625. According to Professor Karst, procreation is considered fundamental because it "strongly implicates the values of intimate association, particularly the values of caring and commitment, intimacy, and self-identification." *Id.* at 640. See also Note, *supra* note 113, at 1869. None of these values is present in the unmarried woman's desire to AI, thus lending further support to a state's legitimate interest in limiting AI to married women.

150. 431 U.S. 494 (1977).

151. *Developments in the Law, supra* note 114, at 1272.

152. *Moore*, 431 U.S. at 504.

married women are in any way irrational. Thus, an expanded definition of family is required in order to contend that statutes limiting AI to married women are not rationally related to a constitutionally permissible objective. The line of demarcation may be drawn imprecisely, but the Constitution is not offended "simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"¹⁵³

IV. CONCLUSION

The legal system, by protecting relationships such as kinship and formal marriage, promotes not only the interests of the parties involved, but the interests of society in social and political structures which ensure a long-term individual view of liberty.¹⁵⁴ As one legal commentator remarked:

[T]he structure of marriage and kinship responds to that social interest by maximizing the interest of children and society in a stable family environment; by ensuring a socialization process and an attitude toward personal obligation that maximizes democracy's interest in the voluntary "public virtue" of its citizens; by maintaining marriage and kinship as legally recognizable structures that mediate between the individual and the State, thereby limiting governmental power; and by maintaining sources of objective jurisprudence that will ensure stable personal expectations and encourage generality of laws, thereby minimizing the arbitrary power of the state. In these ways, the structure of formal family life emphasizes that sense of "ordered liberty" necessary to achieve individual liberty as a long range objective.¹⁵⁵

In judicial decisions affording familial and marriage relationships a higher degree of constitutional protection, tradition has played a pivotal role. In the procreative field, the Supreme Court has carved out a limited degree of autonomy for the individual. As this article has demonstrated, a woman's fundamental right to privacy or procreation does not encompass a right to AI or to surrogation. Accordingly, stat-

153. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

154. Hafen, *supra* note 84, at 559.

155. *Id.*

utes limiting the use of this reproductive technology need only be rationally related to a constitutionally permissible state interest. The state's desire to raise children in the *traditional* family setting and, at the same time, promote the institution of marriage and the family is an unquestionably permissible, if not laudable, objective. Thirty years ago, Justice Frankfurter cautioned: "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred" ¹⁵⁶ State legislatures, in limiting the practice of artificial insemination to married women, have taken this advice to heart. The extended use and application of this procedure through surrogation must be strictly controlled by legislative design. Surrogation should be limited to married women who have gained their husband's consent, and then, only under proper medically supervised conditions. As a medical aid to infertility, surrogation should be allowed only as an adjunct to medical treatment of the impediment and not as a popular or novel experiment.

A legislative program designed to validate, and thereby license, the procedure of surrogation for married women, as well as the married surrogates participating therein, should seek to not only protect the health and well-being of the issue born, but also to assure the safety of the surrogate. Ideally, such a legislative program should include provisions shaping the rights and determining the extent of the contracting parents' liabilities in the surrogate contract *vis-a-vis* the infant. Due consideration should be given to shaping the sphere of responsibility for various types of error which intermediaries, such as doctors and lawyers, might commit in facilitating the process. In addition, the specific policy matters coincident with the administration of a structured surrogation program should be implemented by an administrative body or licensing board. The Surrogate Parenting Associates, Inc., of Kentucky could serve as a model for legislative reform in other states. Their policies and standards for evaluating and processing requests for surrogate mothering are both comprehensive and equitable in their design and

156. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

utilization.¹⁵⁷

The new reproductive biological techniques are of enormous significance for humanity and demand a comprehensive inquiry into the parameters of future development.¹⁵⁸ The legislative branch of government is far better equipped to deal with this inquiry than the executive or judicial branches. Thoughtful study and cautious planning are needed now before the growing complexities overwhelm, confuse and confound the role of the rule of law in meeting the challenges of the brave new world of tomorrow.

157. See *supra* note 73. See also Brophy, *supra* note 10; Comment, *Contracts to Bear a Child*, *supra* note 10.

158. R. SCOTT, *supra* note 18, at 221.

