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Drawing the Line in Surrogate Parenthood Arrangements: How the Intended Parent Definition of New York Senate Bill 1429 Denies Equal Protection to Non-Married Persons

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DRAWING THE LINE IN SURROGATE PARENTHOOD ARRANGEMENTS: HOW THE INTENDED PARENT DEFINITION OF NEW YORK SENATE BILL 1429 DENIES EQUAL PROTECTION TO NON-MARRIED PERSONS

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Preface: The current status of New York Senate Bill 1429-A is uncertain. As of publication date, the bill had not yet been reintroduced into the 1989 legislative session. In 1988, the bill became dormant in the Child Care Committee. Gregory Serio, Special Counsel to the bill's author, Senator John Dunne, stated in a phone conversation with this author on March 1, 1989, that the future of S1429-A is dependent on the Legislature's reaction to the newly introduced Governor's Program Bill, A3558, which would prohibit surrogate parenthood contracts. A "wait-and-see" attitude has thus been adopted regarding the disposition of S1429-A.

I. INTRODUCTION

Surrogate parenthood arrangements are receiving increased attention as controversy about their use grows. The recent Baby M case, in which the surrogate's refusal to terminate her parental rights ignited a major custody controversy with the intended parents, is one example of this.[1] In a surrogate parenthood arrangement, a fertile woman agrees, for a fee, to become a surrogate[2], conceiving a child by insemination[3], and carrying that child to term. At birth, the child is given to its intended parent(s)[4], and the surrogate terminates her parental rights.[5] If an intended parent is not biologically related to the child, that person must adopt the child to accomplish legal parenthood.

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Surrogate parenthood arrangements are becoming more common. Estimates of the last decade place the number of babies born to a surrogate at approximately 500.[6] Legal and ethical concerns about the practice abound. Parentage, legitimacy, adoption, and contract issues are currently being debated in the legal arena.[7] The ethical issues are concerned with concepts of humanity and personal autonomy.[8] Legislative proposals addressing these issues exist in twenty-six states[9] and in Congress[10], but only three states, Arkansas, Louisiana and Nevada, have enacted such legislation.[11]

The New York State Legislature is attempting to respond to surrogate parenthood arrangements. In 1988, six proposals were introduced. Senate bill 1429-A would legalize payment for surrogate services, designating the responsibilities of the parties involved.[12] This proposal was also separately introduced in the Assembly (A4748).[13] Assembly bill 9857 provides for certain requirements imposed upon all parties to surrogate arrangements.[14] Senate bill 6891 (A8852) would prohibit surrogate parenthood, paid or voluntary.[15] Assembly bill 9882 declares surrogate parenting to be against public policy and voids any such contracts.[16] Assembly bill 10851 (S9134) also prohibits surrogate parenting contracts.[17]

The constitutionality of the definition of intended parent in Senate bill 1429-A is the focus of this article. The bill defines the intended parents as "an infertile woman and her husband"[18], thus limiting the use of surrogate arrangements to heterosexual married persons. If 1429-A is enacted, this limitation would deny equal protection to non-married persons[19] and, thus, would be unconstitutional.[20]

Equal protection analysis is triggered when similarly situated persons are treated differently by legislative classifications.[21] Section II of this article compares the situa-

tion of married and non-married persons in relation to surrogate parenthood arrangements. Key to understanding the situation of these persons is a recognition of the notions of family inherent in 1429-A and that used by this author.

In Section III, the nature of the right involved and the appropriate standard of review are defined. Here, the right to procreate is established as fundamental. The standard of review to be applied is one of strict scrutiny. Therefore, the state's definition of intended parent in 1429-A must be shown necessary to achieve a compelling government interest.

Section IV analyzes the relationship of the intended parent definition to the state's interests. Senate bill 1429-A's main purposes are to create a stable home for the child of a surrogate arrangement, and to prevent abuse of these arrangements.[22] However, no evidence supports the state to establish that these interests are compelling. Nor is there evidence to show that the intended parent definition is necessary to achieve the purposes of the proposed legislation. In the context of differing ideas of family and relationships in our society, the state's intended parent definition must be justified with more than unexamined expectations of social norms.

This article concludes that non-married persons are unjustifiably excluded from Senate bill 1429-A's intended parent definition. Because the state has not established that its definition is necessary to achieve the bill's purposes and because these purposes are not compelling, the fundamental right of non-married persons to procreate is unconstitutionally limited. Thus, equal protection is denied by the exclusion of non-married persons from 1429-A's intended parent definition.

II. The Similar Situation of Married and Non-Married Persons in Relation to Surrogate Parenthood Arrangements

Whether non-married and married persons are seen as similarly situated depends on the use of the term "family". The state uses the term in Senate bill 1429-A to mean a unit consisting of two married heterosexual parents - a mother and a father - and their children, or what is termed the "nuclear" family.[23] This definition is too limited in the context of surrogate parenthood arrangements.

This author defines family as a cohabitative unit of two or more persons, with a primary focus on the care of its members.[24] With this latter definition in mind, non-married and married persons are similarly situated with respect to surrogate parenthood arrangements, because both groups are similarly confronted with the types of problems which motivate use of these arrangements, i.e. infertility and inability or unwillingness to adopt.

Surrogate parenthood arrangements offer viable solutions for persons who desire to create a family of their own, but lack either the biological ability to do so or the ability or willingness to adopt. Infertility among women and men has increased dramatically in the past generation. It is estimated that one out of every six women, and one of every six men, suffers some type of fertility problem.[25] Adoption is not always readily chosen by the childless because, although there are a number of adoptable children, the type of child desired by some, i.e. white infants, is not as numerous at present.[26] As a reproductive alternative, surrogate arrangements offer a prospective parent the ability to beget a child, in a social and/or genetic sense. This is a major motive for utilizing these arrangements.[27]

Parenting is not inherently limited to married persons. Single parenthood is on the rise.[28] The decreasing marriage rate and the increasing divorce rate which began in the last decade sustain this trend.[29] Potential parents are not only married persons. Non-married persons may procreate if they have the biological ability, and in lieu of such, non-married persons may adopt.[30] Consequently, there is no reason why surrogate arrangements should not be available to non-married persons.

III. The Appropriate Standard of Review for the Right Involved

A. Equal Protection Standards of Review

The standard of review to be applied to legislation in an equal protection analysis depends on the nature of the right involved. To be fundamental, a right must be either explicitly or implicitly guaranteed by the Constitution.[31] Governments employ classifications to include those who may exercise a right and to exclude others from that exercise. If a fundamental right is at issue, the applicable standard is one of strict scrutiny. The inquiry made is whether the legislation is necessitated by a compelling government interest, sufficient to limit the exercise of the right by the individual.[32]

If something other than a fundamental right is involved, one of two standards might be applied. At the very least, a rational basis test will be used to determine whether the classification is reasonably related to a legitimate government end.[33] The second standard is the intermediate test, used when greater protection is required than is afforded by a rational basis analysis.[34] This intermediate test requires a fair and substantial relationship between the classification and an important, legitimate, and articulated government interest.[35] For the classification to remain sound, the state must show that the relationship between the legislative classification and purpose is constitutionally permissible.

B. Fundamental Right to Procreate

The exercise of the right to procreate is limited by Senate bill 1429-A. Because the right to procreate is fundamental, strict scrutiny requirements must be met by the state. This section traces the development of this fundamental right.

The right to procreate arises out of the constitutionally constructed right to privacy.[36] In a line of cases since

1927-37, the Supreme Court has attempted to define the right of privacy in relation to procreative matters. These cases address three particular areas - sterilization, contraception and abortion.[39]

Beginning with *Buck v. Bell,*[39] the Court addressed the issue of a state's power to sterilize people afflicted with hereditary imbecility or insanity, committed to its mental institutional system. Although Buck is no longer deemed authoritative, it nevertheless provides important guidance regarding the standards to be met by the state in its attempts to limit procreative ability.[40] The procedure was upheld on the basis of the state's overwhelming interest in societal welfare.[41] Of note in *Buck* is that the plaintiff, Carrie Buck, was economically dependent on the state, and had already given birth to a child, who would also be dependent on the state. This case suggests that a state's power to sterilize is not unlimited, and that some type of extraordinary conditions must justify the state's exercise of the power to sterilize.

Skinner v. Oklahoma[42] supports the assertion that a state's power to sterilize is limited. In *Skinner,* the Court struck down a state statute permitting sterilization as a form of punishment for certain criminal offenses. Procreation was therein given status as a fundamental right.[43] The statute did not withstand the strict scrutiny analysis because its classification, which included larcenists but not embezzlers, was not justified by a compelling government interest.[44] The state's inability to demonstrate a connection between the designated offenses and sterilization upholds the view that the state can not exercise its power over its charges on the basis of unsubstantiated assertions. Thus, in the context of sterilization, *Skinner* asserts the existence of the fundamental right to retain procreative potential.

The Supreme Court was confronted next with the contraception issue in *Griswold v. Connecticut.*[45] Here, the Court overturned on privacy grounds a statute prohibiting contraceptive use by married persons.[46] The state's proferred justification that the statute would deter extra-marital relations was deemed insufficient to compel the limitation of the fundamental personal liberty interest at stake.[47] The ruling thus established that the right to use contraceptives (and thus avoid procreation) was included within the fundamental right of marital privacy.[48]

Following *Griswold,* questions arose whether the right to avoid procreation extended beyond the marital domain. The Court's subsequent decision in *Eisenstadt v. Baird*[49] clarified the confusion *Griswold* created regarding the scope of the fundamental right to procreate. The Court stated this right as that of "the *individual,* married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[50]

In *Eisenstadt,* the Court invalidated a state statute that denied non-married persons access to contraceptives, on equal protection grounds. The compelling interests sought to be established by the state were the protection of public morality and the protection of public health. The state argued that one purpose of the statute was "to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women."[51] Denied access to contraceptives would, ostensibly, discourage sexual relations between non-married persons, and, thus, accomplish the ends of the statute. The Court discounted this public morality purpose because contraceptives were available to married persons regardless of their intended use, and, as such, could be used for purposes contrary to the statute, i.e. extramarital sex. The Court concluded that the "statute is . . . so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim."[52]

The state's interest in protecting public health was, according to the Court, an invalid purpose; if contraceptives posed a health danger, then it was discriminatory to deny non-married persons the medical supervision afforded married persons in contraceptive use. *Eisenstadt* is thus far the only Supreme Court decision to address the relationship between equal protection and the procreative rights of non-married and married persons.

The Supreme Court next examined the contraception issue in *Carey v. Population Services International.*[53] In this case, a statute prohibiting contraceptive sales to minors was held unconstitutional because it was unjustified by a compelling state interest.[54] The state's assertion that its public policy to prevent teenage extramarital sex justified the statute was rejected by the court because this premise was not demonstrated in fact.[55] The decision is significant because it established that mere articulation of a state's public policy is insufficient to limit the exercise of a fundamental right. The state must show that the condition sought to be corrected exists, before limiting a fundamental right.[56]

The third area of procreative privacy, abortion, was addressed by the Court in *Roe v. Wade.*[57] Roe overturned a statute that prohibited abortion in all but a few "medically necessary" [58] instances. This statute unconstitutionally infringed on a woman's right to procreative privacy.[59] The right to terminate pregnancy was thus established.[60] Although states retained some power to regulate use of abortion procedures, any regulation would have to be compellingly justified before a woman's fundamental right to abortion could be curtailed.[61]

This line of cases establishes the fundamental nature of the individual's right to decisional autonomy in procreative matters. Only a compelling government interest can transfer this decision making power from the individual to the state. An important aspect of the contraception and abortion decisions is the concept that an individual is empowered to utilize medical assistance or other alternative means to effectuate her or his procreative rights. If a woman wants to avoid pregnancy, she does not have to avoid sex;

she has the right to use contraceptives to avoid that pregnancy. If pregnant, a miscarriage is not the only way to end the pregnancy; a woman has the right to obtain an abortion. The use of alternatives, in the form of contraceptives and medically-assisted abortion, is permissible. The right to avoid procreation is not limited to the individual's biological ability to do so.

A second aspect of these cases is that an individual's right to avoid procreation can not be thwarted by denial of the means to achieve that right. The right to avoid procreation is in some sense inextricably connected with access to medical assistance or other alternatives. Subsequent decisions of the Supreme Court have given greater meaning to this concept. Because the right to avoid procreation inheres in the individual, statutes that have required the consent of a husband to the wife's abortion[62], or the consent of a minor's parents to her abortion[63] have been held unconstitutional. Statutes requiring that abortions be performed only in a hospital have also been overturned based on the unconstitutional interference with the right to avoid procreation.[64] An area that remains unprotected, however, is denial of access because of indigency. In at least one case to date, the Court has held that obstacles to the exercise of procreative rights not created by the government, are not necessarily unconstitutional.[65]

If an individual has the right not to procreate, then it follows that an individual has the freedom not to exercise that right - in other words, the right to procreate.[66] This right is, almost without exception, absolute for individuals who have the biological and economic ability to bear and beget children. Once public assistance, economic or otherwise, is needed by the individual, the absolute nature of the right is diminished, and the state begins to regulate the right. Although the initial decision of whether to bear or beget a child is constitutionally protected,[67] it is problematic whether the protection extends to decisions about the method of procreation. As John Robertson has pointed out, "choices about who may conceive, bear, or rear a child are distinct from choices about the conduct that occurs in the process of conceiving, bearing, and rearing. In other words, the freedom to procreate is distinct from freedom *in* procreation."[68]

The Supreme Court has yet to consider whether an individual, married or non-married, has a right to utilize reproductive alternatives, such as surrogate parenthood, to achieve procreation.[69] The lower courts are, however, moving toward a willingness to protect affirmative procreative choice. Their decisions, as Andrea Stumpf has noted, encourage "recognition of a fundamental interest in procuring assistance to overcome a personal inability to procreate. . . . (For) the right to procreate . . . to be fully protected . . . certain derivative rights (must be assured)."[70]

The right of married persons to exercise affirmative procreative choice is easier to assert given the decisions that protect various rights within a marital setting.[71] According to John Robertson, use of reproductive alternatives, such as surrogate parenthood, by married persons would be allowable as "an extension of the rights of familial autonomy and natural conception that the courts have already recognized."[72] This does not mean, however, that non-married persons are automatically excluded from exercising the same procreative choice. *Eisenstadt* made clear that procreative decisions inhere not in the marital or familial relationship, but in the *individual*. The individual right to use alternative means to achieve procreation can be inferred from the Supreme Court decisions allowing the use of alternative means to prevent procreation.[73] More importantly, just as state denial of access to abortion and contraception frustrates the right to avoid procreation, state denial of access to surrogate parenthood would render the right to procreate meaningless for individuals who are unable to do so with their own biological abilities, in the same way that never affording the right in the first place would do.[74] A right which can not be exercised is not a right. Therefore, the use of reproductive alternatives to effectuate procreation is an interest as fundamental in character as the right to procreate.

IV. The State's Intended Parent Definition Is Not Justified By Compelling State Interests.

Senate bill 1429-A would make the use of surrogate parenthood by infertile married persons a fundamental right, thus settling the question of the status of procreative choice for that particular group.[75] However, the limitation of eligibility to heterosexual, married persons subjects the bill to constitutional scrutiny. To remain constitutional, the bill must be justified by the state showing that limiting the use of surrogate parenthood to these persons is necessary to accomplish a compelling government interest.

The first major justification proferred by the state is that its limitations will work toward the creation of a permanent home and settled rights of inheritance for the child of a surrogate arrangement.[76] The notion of the stable home is generated by the ideology of the American nuclear family fostered by the state. It is presumed that heterosexual married persons provide stability, and, further, that such stability is necessary to raise a child. According to Barbara Kritchevsky, "[t]raditional American legal and social values support this unit and urge its protection and encouragement as the foundation of society."[77]

A second related justification is based on the state's role as *parens patriae* and as the protector of morality. The state would argue that it has an affirmative duty to prevent abuse of surrogate parenthood, thus protecting the morality of its citizens.[78] Protection of morality translates into public policy. The ideology of the nuclear family is integral to this public policy. The abuse of surrogate arrangements would occur when persons not in a nuclear family, i.e. non-married, non-heterosexual persons, utilize these arrangements. To allow such use would weaken the ideology of the nuclear family. Perceived threats to the nuclear family are prohibited by the state based on public

policy,[79] or, rather on the ideology of the nuclear family. In the absence of evidence of the effects of surrogate parenthood, the limitation of surrrogate parenthood to nuclear families is seen by the state as the only method of ensuring a stable home for the child and preventing abuse of the practice.[80] In other words, it is a way to protect the nuclear family.

The state may rely on legal precedent for its view that the nuclear family is the only appropriate context for surrogate parenthood. Marriage is given protection as a fundamental right.[81] The marital relationship is presently afforded greater protections than similar non-marital relationships; acts which occur within a marital context are subject to less state interference on that basis.[82] Same-sex marriages are prohibited, thus perpetuating the view that procreation is a proper function of a heterosexual nuclear family.[83] Marriage is viewed as an appropriate cornerstone upon which to build a family.[84] Ostensibly, the public act of marriage demonstrates the necessary commitment on the part of the family to create and maintain a family.[85]

A third justification for the state's intended parent definition is that by allowing non-married persons to use surrogate parenthood, complex issues of parental fitness would need to be resolved. This, it is argued, would place an administrative burden on an already overburdened judicial and social services establishment. The use of the marriage requirement is a method of determining the intended parent's level of commitment. Presumably, the fact that two persons have signified their commitment to each other by marriage, and that they are willing to go to great lengths to bring a child into their family, indicates a serious level of commitment toward the perpetuation of the ideal of the (nuclear) family. Conversely, persons who are not married are presumably not as committed to that ideal.[86]

There is growing evidence to rebut the premise that a nuclear family will create a stable home. The nuclear unit is losing its justification for existence as several factors erode its societal base.[87] One such factor is divorce. The nuclear unit is being split by a 50% divorce rate, and the corresponding rise of single-parent families and those of remarried divorced parents, i.e. blended families.[88] Furthermore, the nuclear unit is not the dominant, timeless unit that the state suggests it to be. The blended family structure and that of the single parent are equally pervasive in society.[89] In addition, approximately 25-35% of children in today's society are currently being raised by persons other than their biological parents.[90]

To posit that one particular family structure creates a better individual than any other ignores the countless factors which shape both the individual and the family structure.[91] If the nuclear family were the best environment in which to raise a child, one might expect that such individuals would not be plagued with life's troubles in the same way as other persons. However, the physical, emotional and psychological development of a child is dependent more on the character of the individual(s) who raises her or him, than on the family unit in which she or he is raised.[92]

While legal precedent affords protection to certain decisions made within a marital context, no one particular family form has yet received judicial sanction to the exclusion of all others. Of particular interest is *Moore v. East Cleveland.*[93] In Moore, the Supreme Court invalidated a zoning ordinance which was structured according to a narrowly defined family pattern.[94] In New York State, judicial recognition of family structures other than the nuclear one has been accorded in cases regarding adult adoption,[95] custody of children,[96] and leasehold situations.[97]

The state's concern for settled inheritance rights as a justification for the nuclear family is also misplaced. The marriage of intended parents does no more to settle the child's inheritance rights than if the parents were not married. Given the legal presumption regarding parentage,[98] the child's inheritance status does not become certain until the intended parent achieves legal custody.[99] The adoption procedure must necessarily be completed by the non-biological intended parent.[100] Settled inheritance rights are contingent on the resolution of legal parentage, which is independent of the marital status of an intended parent.[101]

The interests posited by the state as justification for its denial to non-married persons of access to surrogate arrangements fail because these interests have not been given a basis in fact by the state. If the state presented empirical evidence to support its view that the nuclear family is the only appropriate context for surrogate arrangements, then the state could better demonstrate a compelling interest which would justify its classifications. However, to base limitations on vague notions of how things should be or to prevent imagined abuses is, at the least, an abuse of classificatory powers, and, at best, a lazy manner in which to legislate. The state attempts to limit the use of surrogate parenthood to a segment of society which it favors. If it is the role of legislators to represent their constituents, then to only represent those persons who currently practice or believe in the ideology of the nuclear family is to ignore the others who are not encompassed by this narrow category.

In formulating an appropriate legislative response to the surrogate parenthood question, the state would benefit from the wisdom of Oliver Wendell Holmes:

> It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past.[113]

It must be remembered that other family structures exist in addition to that of the nuclear family. Furthermore, the nuclear family is no longer as prevalent as it may once have been, and will probably never be so again.

As Senate bill 1429-A presently exists, it would not survive a constitutional challenge based on equal protection grounds. To survive such a challenge, the proposed legislation must include non-married persons in its intended parent definition. This would recognize those persons who remain single by choice or are legally unable to marry, but nevertheless desire to become parents.

The state's nuclear family preference is being challenged by current decisions regarding custody.[102] Persons who are not part of a nuclear family are increasingly being granted custody. These decisions utilize a "child's best interests" standard, of which parental fitness is a key component.[103] Factors which, in the past, have been held as per se indicators of parental unfitness are now being reevaluated. These include the sexual preference of the parent and her/his chosen lifestyle.[104] A 1982 review of 23 factors used by appellate courts in making custody decisions revealed a marked preference for stability of environment, that is, the type of environment provided by the parent - physical, emotional and psychological.[105]

The validity of the state's purpose to prevent abuse of surrogate parenthood must be questioned. The state perceives that abuse of the practice will lead to the disintegration of the nuclear family. To allow non-married persons to use surrogate parenthood would, in the state's view, work toward this disintegration. This concern about surrogate parenthood is, however, contradicted by the legal availability of adoption to non-married persons.[106] Since the welfare of a child is a prime concern in adoption, it might be expected that the state's preference for the nuclear family would mandate that a potential adoptive parent be married. Yet no such requirement exists. The changes in the legal status of adoption and custody arrangements indicate that assumptions which formerly made it difficult for non-married persons to be parents are being reevaluated in their favor, and are therefore more likely to benefit non-married persons who seek to use surrogate arrangements.

A significant factor to examine is the non-married person's intent to create a family. That a person is willing to utilize surrogate parenthood - to expend the considerable amount of time, money and energy necessary for its success - is an unambiguous indicator of parental intent.[107] This intent should be ascertainable in bill 1429-A's proposed judicial screening which would precede participation in surrogate arrangements.[108]

While the limitation to married persons may facilitate administrative efficiency, this does not constitute a state interest sufficient to compel the limitation of a fundamental right. As stated by the Supreme Court, "although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency'. . . . [W]hen we enter the realm of 'strict judicial scrutiny', there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."[109]

V. CONCLUSION

The state interests outlined above are not sufficiently compelling to necessitate the state's restrictive intended parent definition in Senate bill 1429-A. Thus, the requirements of strict scrutiny would not be met if constitutionally challenged. Although the intended parent definition may work toward the creation of a stable home and prevent abuse of surrogate arrangements, these purposes do not constitute compelling government interests absent supporting evidence. There is no evidence presented by the state to suggest that the nuclear family is the only appropriate structure in which to use surrogate arrangements. Nor is there evidence which supports the assertion that expanding the intended parent definition will subject the practice to abuse. More than unexamined expectations of social norms are needed to justify limiting the exercise of a fundamental right. As stated in *Carey*, "[w]hen a State . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some state policy requires more than the unsupported assertion . . . that the burden is connected to such a policy."[110] It must be noted that the structure of the proposed bill undermines its stated legislative intent.[111] It is posited that it is the individual's right to utilize surrogate arrangements, but then a classification is created prohibiting such use by a large number of individuals - all those who are non-married.[112] The initial procreative right is thus made meaningless.

ENDNOTES

1 Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

2 Surrogate is used instead of surrogate mother for greater precision. Thus, a surrogate can be either a surrogate in order to conceive a child, or in order to gestate a child, or both. In Senate bill 1429-A, surrogate means the woman who both conceives and gestates a child. N.Y. S. 1429-A, Sec. 119, 210th Leg., Reg. Sess. (1987-1988).

3 Insemination is generally defined as the introduction of semen into the vagina by means other than intercourse. *See* **Dorland's Illustrated Medical Dictionary** 785 (25th ed. 1974).

4 Intended parent is the person who will ultimately raise the child. Although surrogate parenthood arrangements are primarily used by married couples who are childless because of the woman's infertility, their use is not limited to these situations. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies,* 96 **Yale L.J.** 187, 188 n.5 (1986); Martin, *Surrogate Motherhood: Contractual Issues and Remedies under Legislative Proposals,* 23 **Washburn L.J.** 601, 602 (1984). Other possibilities include single men who want children but not marriage; single women who want children but not childbirth; single women who want childbirth but are unable to conceive; and, gay or lesbian couples.

5 An affirmative act of termination is necessary to overcome the presumptions which vest maternity in the woman who gives birth to the child, and, if the surrogate is married, vest paternity in the surrogate's spouse. Stumpf, *supra* note 4, at 187 n.1; **J. Long, A Treatise on the Law of Domestic Relations** Sec. 252 (1923).

6 108 **Newsweek** 66 (1986). Newspaper advertisements for surrogates also attest to the existence and growing popularity of this practice. Martin, *supra* note 4, at 601 & n.1.

7 Numerous articles address these issues. *See, e.g., Andrews, The Stork Market: Legal Regulation of the New Reproductive Technologies* 6 **Whittier L. Rev.** 789 (1984); Barnett, *In Vitro Fertilization: Third Party Parenthood and the Changing Definition of Legal Parent,* 17 **Pac. L.J.** 231 (1985); Black, *Legal Problems of Surrogate Motherhood,* 16 **New Eng. L. Rev.** 373 (1981); Martin, *supra* note 4; Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth,* 69 **Va. L. Rev.** 405 (1983); Stumpf, *supra* note 4; Wadlington, *Artificial Conception: The Challenge for Family Law,* 69 **Va. L. Rev.** 465 (1983).

8 For a discussion of these issues from a variety of perspectives, *see, e.g.,* **P. Ramsay,** *Fabricated Man: The Ethics of Genetic Control* (1970); Kass, *Making Babies Revisited,* 54 Pub. Interest (1979); Kass, *Making Babies - The New Biology and the 'Old Morality,* 26 **Publ. Interest** (1972); Watson, *Moving Toward the Clonal Man,* 226 **The Atlantic** 50 (May 1971); Wikler, *Society's Response To The New Reproductive Technologies: The Feminist Perspective,* 59 S. **Cal. L. Rev.** 1043 (1986).

Interestingly, a radical feminist perspective on reproductive alternatives argues for the suppression of their use, based on its aversion to the present male-dominated technologies. *See* **A. Dworkin,** *Right Wing Woman* (1983); Corea, *How The New Reproductive Technologies Could Be Used To Apply The Brothel Model of Social Control Over Women,* 8 **Women's Stud. Int'l F.** 299 (1985); Hanmer & Allen, *Reproductive Engineering: The Final Solution?,* 1982 **Feminist Issues** 53; Mies, *"Why Do We Need All This?" A Call Against Genetic Engineering and Reproductive Technology,* 8 **Women's Stud. Int'l F.** 553 (1985); Rowland, *A Child At Any Price?,* 8 **Women's Stud. Int'l F.** 539 (1985). For an insightful analysis and critique of this feminist perspective, see Wikler, *supra.*

9 *Surrogate Parenthood: A Legislative Update,* 13 **Fam. L. Rep. (BNA)** 1442 (July 14, 1987).

10 Dunne & Serio, *Surrogate Parenting After Baby M: The Ball Moves to the Legislature's Court,* 4 **Touro L. Rev.** 161 (1988), *citing* **H.R.** 2433, 100th Cong., 1st Sess. (1987).

11 Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood,* **Hastings Center Rep.** 31 (Oct.-Nov. 1987). The Arkansas law, **Ark. Code Ann.** Sec. 9-10-201(c)(1)(1987), solves the parentage problem by designating the intended parents as the legal parents of a child born to a surrogate. The Louisiana law, **La. Rev. State. Ann.** Sec. 9:2713(A) (West Supp. 1988), prohibits surrogate parenthood contracts on the basis of public policy. The Nevada Law, **Nev. Rev. Stat. Ann.** Sec. 127.303(5) (Michie Supp. 1987), allows surrogate parenthood arrangements notwithstanding the prohibition against adoption commercialization. Andrews, *supra.*

12 N.Y. S. 1429-A, 210th Leg., Reg. Sess. (1987-1988). For an in-depth discussion of this proposal by its authors, *see* Dunne & Serio, *supra* note 10.

13 N.Y. A. 4748, 211th Leg., Reg. Sess. (1988).

14 N.Y. A. 9857, 211th Leg., Reg. Sess. (1988).

15 N.Y. S. 6891, 211th Leg., Reg. Sess. (1988); N.Y. A. 8852, 211th Leg., Reg. Sess. (1988).

16 N.Y. A. 9882, 211th Leg., Reg. Sess. (1988). This has been reintroduced into the 1989 legislative session. *See* N.Y. A. 3467, 212th Leg., Reg. Sess. (1989).

17 N.Y. A. 10851, 211th Leg., Reg. Sess. (1988); N.Y. S. 9134, 211th Leg., Reg. Sess.(1988). This has been reintroduced into the 1989 legislative session. *See* N.Y. A. 3558, 212th Leg., Reg. Sess. (1989).

18 N.Y. S. 1429-A, Sec. 119(2). Although infertility is also required for use of surrogate arrangements, it is beyond the scope of this article to examine the constitutionality of this infertility requirement.

19 Non-married encompasses single persons, and non-legally recognized couples, such as gay and lesbian unions. Because of their legal status, these couples are not yet allowed legal recognition of their unions. Thus, they, too, would be denied the use of surrogate arrangements by Senate bill 1429-A. For a discussion of the prohibition against same-sex marriage, see Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185, *app. dismd.* 409 U.S. 810 (1971).

20 *See* **U.S. Const.** amend. XIV, Sec. 1; **NYS Const.,** Art. I, Sec. 11 (1976).

21 Cohen, *Equal Protection for Unmarried Persons,* 65 **Iowa L. Rev.** 679, 683 (1980).

As defined in Reed v. Reed: "The Equal Protection Clause of the 14th amendment does . . . deny to States the power to legislate that different treatment be accorded persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed,* 404 U.S. 71, 75-76 (1971).

22 In full, these purposes are:

> [T]o ensure that the child born in fulfillment of a surrogate parenting agreement has a permanent home and settled rights to inheritance; to define and delineate the rights and responsibilities of the intended parents, the surrogate mother, and her husband, if any; to facilitate private reproductive choices by effectuating the parties' intentions; to minimize the risk to the parties; to prevent the use of surrogate parenting for other than medically necessary reasons; to reduce the risk of exploitation and coercion which may arise from the commercialization of surrogate parenting; and to ensure informed and voluntary decision making.

N.Y. S. 1429-A, Sec. 1.

23 *See* **The Future of the Family** (L. Howe ed. 1972).

> What is invariably in mind when we consider 'the family', we will find, is a white, middle-class, monogamous, father-at-work, mother-and-children-at-home family living in a suburban one-family house. This is a definition that now *effectively excludes more than half the population.*

Id. (Emphasis added).

24 Some of the general attributes of families are: "union and individuation, the care of the young, the cultivation of a bond of affection and identity, reciprocal need satisfaction, training for the tasks of social participation . . . and the development and creative fulfillment of its members." **N. Ackerman, Treating the Troubled Family** 62 (1966).

25 Andrews, *supra* note 7, at 790.

> Pollution, workplace toxins, stress and infections have lowered men's sperm counts dramatically. . . . (Women are infertile due to) an increase in pelvic inflammmatory disease, the (increased) use of certain contraceptives, and environmental chemicals. The social trend of postponing childbearing also takes its toll since fertility for both men and women decreases after age 25.

Id. See also The New Origins of Life, **Time,** Sep. 10, 1984, at 46; **Nat'l Law J.,** 22 Dec. 1986, at 29, col.1.

26 Several reasons explain this: "[L]egal availability of abortion and contraceptives; diminished social and legal stigma accompanying illegitimacy; recognition of constitutional limits on legal discrimination predicated on illegitimate status; greater economic opportunity and child care services for single women; and changing male attitudes about child raising roles." Robertson, *supra* note 7, at 466-67.

In New York State, between 1972 and 1982, the adoption rate decreased 32.4%, although the number of live births and children born to non-married persons increased (13% and 77.4%) over the same period. N.Y. S. 1429-A, Memo in Support, at 5. Adoption can now take as long as seven years to accomplish. Barnett, *supra* note 7, at 321; N.Y. S. 1429-A, Memo in Support, at 5.

27 Robertson, *supra* note 7, at 708-09. According to Robertson, "[i]t is meaningful to say that one has reproduced when one has merely passed on genes and neither gestated nor reared the resulting child. A gene contributor may find genetic transfer a vital source of feelings connecting him or her with nature and future generations." *Id.*

28 **U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States** 42-46 (10th ed. 1986).

29 *Id.,* at 37.

30 Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family,* 4 **Harv. Women's L.J.** 1, 31 (1981); *see, e.g.,* **N.Y. Dom. Rel. Law** *Sec. 110 (McKinney 1977).*

31 San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

32 See Roe v. Wade, 410 U.S. 113, 155 (1973); Graham v. Richardson, 403 U.S. 365, 375 (1971); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).

33 *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972); Mcdonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 425 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

34 *See* Parnham v. Hughes, 441 U.S. 347, 352-53 (1979) (plurality opinion); Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring); Reed v. Reed, 404 U.S. 71, 76 (1971).

35 Cohen, *supra* note 21, at 685.

36 Several commentators have also characterized the right to procreate as fundamental. *See* Kritchevsky, *supra* note 30; Note, *Reproductive Technology and the Procreation Rights of the Unmarried,* 96 **Harv. L. Rev.** 669 (1985); Robertson, *supra* note 7. *But see* Smith & Iraola, *Sexuality, Privacy and the New Biology,* 67 **Marq. L. Rev.** 263 (1984).

37 Buck v. Bell, 274 U.S. 200 (1927); Skinner v. Oklahoma, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 678 (1973); Carey v. Population Services International, 431 U.S. 678 (1977).

38 The litigation dealt with the relatively recent emergence of the particular forms of, or the new practices related to, sterilization, contraception or abortion involved in the respective cases. For example, the type of sterilization involved in Buck had been developed into a safe and acceptable method only 25 years earlier. Murdock, *Sterilization of the Retarded: A Problem or a Solution,* 62 **Calif. L. Rev.** 917, 920 (1974).

39 274 U.S. 200 (1927).

40 The *Buck* decision of 1927 is now viewed as 'an aberration, largely the product of a misguided, pseudoscientific eugenics fad." Note, *supra* note 36, at 675. There is also evidence suggesting that Carrie Buck was not the "imbecile" the Court portrayed her as, but, rather, a woman unfortunate enough to bear an illegitimate child at a time when society was incredibly intolerant toward that. *See* Gould, *Carrie Buck's Daughter,* **Natural History** 14 (1984).

41 274 U.S. at 207.

42 316 U.S. 535 (1942).

43 The Court stated: "We are dealing here with legislation which involves one of the basic civil rights of man. . . . [P]rocreation (is) fundamental to the very existence and survival of the race. . . ." *Id.,* at 541.

44 *Id.*

45 381 U.S. 479 (1965).

46 *Id.,* at 485-86.

47 *Id.,* at 497-98 (Goldberg, J., concurring).

48 *Id.,* at 495-99 (Goldberg, J., concurring).

49 405 U.S. 438 (1978).

50 *Id.,* at 453 (emphasis in original).

51 *Id.,* at 447-48, *citing* Commonwealth v. Allison, 227 Mass. 57, 62, 116 N.E. 265, 266 (1917).

52 *Id.,* at 449.

53 431 U.S. 678 (1977).

54 *Id.,* at 684-88.

55 *Id.,* at 694-96.

56 *Id.,* at 695.

57 410 U.S. 113 (1973).

58 Medically necessary meant situations in which the pregnant woman's life was endangered. *Id.*

59 *Id.,* at 129, 164-64.

60 *Id.,* at 164.

61 Impliedly, the earlier the state intervention, the more compelling the interest must be: "The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests." *Id.,* at 165-66.

62 *See* Bellotti v. Baird, 443 U.S. 622 (1979).

63 *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

64 *See* City of Akron v. Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983).

65 *See* Harris v. McRae, 448 U.S. 297 (1980). The Court's assertion must be questioned, since the connection between indigency and government policies has been demonstrated on numerous occasions. One example of this is the plight of the homeless in America, persons whom the system has failed to accomodate.

66 Robertson, *supra* note 7, at 416.

67 Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services International, 431 U.S. 678 (1977).

68 Robertson, *supra* note 7, at 410 (emphasis in original).

69 It is unclear whether the Supreme Court will consider this matter in the near future, since only a few cases have reached even the appellate level. *See* Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988); Syrkowski v. Appleyard, 122 Mich. App. 506, 333 N.W.2d 90 (1983); Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

70 Stumpf, *supra* note 4, at 199.

71 *See Griswold, 381 U.S. 479 (1965) (contraception); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923) (child upbringing and education).*

72 Robertson, supra note 7, at 432.

73 *Griswold,* 381 U.S. 479 (1965); *Eisenstadt,* 405 U.S. 438 (1972); *Roe,* 410 U.S. 113 (1973); Carey, 431 U.S. 678 (1977); Barnett, *supra* note 7, at 236.

74 An instructive analogy is provided by First Amendment questions. *Griswold* discussed the First Amendment as follows:

> The right of 'association', like the right of belief . . . is more than the right to attend a meeting; it includes the right to

express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Id., at 483 (citations omitted).

75 The stated legislative intent of 1429 is:

> The legislature further determines that an individual's decision regarding whether or not to bear or beget a child should fall within the protected rights of privacy, and, therefore, the state may not prohibit the practice of surrogate parenting or enact regulations that would have the effect of prohibiting the practice.

N.Y. S. 1429-A, Sec. 1.

76 *Id.*

77 Kritchevsky, *supra* note 30, at 1, n.1.

78 The Supreme Court has allowed that a state has a legitimate interest in maintaining and strengthening the moral fiber of society. Included in this is a valid concern for the quality of family life. *See* Kritchevsky, *supra* note 30, at 37.

79 *See id.* at 1, n.1.

80 *New York State Senate Judiciary Committee, Surrogate Parenting in New York: A Proposal for Legislative Reform* 7 (1987) (hereinafter Jud. Comm. Rpt.).

81 *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Meyer v. Nebraska, 262 U.S. 390 (1923).

82 *See* Cherry v. Koch, 129 Misc.2d 346, 491 N.Y.S.2d 934 (1985); People v. Onofre, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980).

83 *See* B. v. B., 78 Misc.2d 112, 355 N.Y.S.2d 712 (1974); Anonymous v. Anonymous, 67 Misc.2d 982, 325 N.Y.S.2d 499 (1971).

84 *See* People v. Destefano, 121 Misc.2d 113, 467 N.Y.S.2d 506 (1983).

85 Jud. Comm. Rpt., *supra* note 81, at 7.

86 *Id.*, at 49.

87 Adams, *The Single Woman in Today's Society: A Reappraisal,* in **Intimacy, Family, and Society** (A. Skolnick & J. Skolnick ed. 1974). The idea of marriage is itself suffering erosion:

> The threat of overpopulation and diminishing food supply has already begun to rob marriage of its vital rationale - i.e., the procreation of children and maintenance of a stable family setting for their nurturance - and as more attention is focused on the importance of restricting population growth, marriage will come to be seen as a societal liability perpetuating an outmoded dysfunctional social system.

Id..

88 Robertson, *supra* note 7, at 419, n.36.

89 For a discussion of these family structures, *see, e.g.,* **C. Smart, The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations** (1982); **M. Poster, A Critical Theory of the Family** (1978).

90 **V. Satir, Peoplemaking** 170, 195 (1972), *cited in* Robertson, *supra* note 7, at 419, n.36.

91 **V. Satir,** *supra* note 90, at 195.

> [T]he form of the family is not the basic determinant for what happens in the family. Form presents different kinds of challenges that have to be met, but the process that goes on among the family members is what, in the end, determines how well the family gets along together, how well the adults grow separately and with one another and how well the children develop into creative healthy human beings. For this, the (person's self-esteem), the commune, the rules and the system are the chief means of making it work.
>
> *Id.*

92 *See id.* A family form which differs from the perceived norm may, in fact, better provide children with the skills necessary for survival in today's world. *See* M.P. v. S.P., 169 N.J. Super. 425, 404 S.2d 1256 (1979), where the court contemplated awarding custody to a lesbian mother:

> If defendant retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgements, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

Id., at 436-39, 404 S.2d at 1262-63.

93 431 U.S. 494 (1977).

94 *Id.*, at 506. According to the Court, "[O]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents has roots equally venerable and equally deserving of constitutional recognition." *Id.*, at 504.

95 *See* Adoption of Elizabeth P.S. by Eileen C., 134 Misc. 2d 144, 509 N.Y.S.2d 746 (1986); Adoption of Adult Anonymous, 106 Misc.2d 792, 435 N.Y.S.2d 527 (1981). *But see* Adoption of Adult Anonymous II, 111 Misc.2d 320, 443 N.Y.S.2d 1008 (1981).

96 *See* M.A.B. v. R.B., 134 Misc.2d 317, 510 N.Y.S.2d 960 (1986); Karin T. v. Michael T., 127 Misc.2d 14, 484 N.Y.S.2d 780 (1985).

97 *See* Yorkshire Towers Co. v. Harpster, 134 Misc.2d 384, 510 N.Y.S.2d 976 (1986).

98 *See supra* note 5.

99 N.Y. S. 1429-A, Sec. 73.

100 *Id.*

101 *See id.*, Sec. 127.

102 *See* M.A.B. v. R.B., 134 Misc. 2d 317, 510 N.Y.S.2d 960 (1986); DiStefano v. DiStefano, 60 A.D.2d 976, 401 N.Y.S.2d 636 (1978).

103 Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts,* 18 **Fam. L.Q.** 1, 4 (1984).

104 *See* Basile, *Lesbian Mothers I,* 2 **Women's Rts. L. Rep.** 3 (1974); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy,* 25 **Buffalo L. Rev.** 691 (1976); Wilson, *Homosexuality and Child Custody: A Judicial Paradox,* 10 **T. Marshall L. Rev.** 222 (1985).

105 Atkinson, *supra* note 103, at 9-10.

106 Kritchevsky, *supra* note 30, at 31.

107 Stumpf, *supra* note , at 196.

108 N.Y. S. 1429-A, Secs. 123, 124, 125.

109 Frontiero v. Richardson, 411 U.S. 677 (1973), *citing* Stanley v. Illinois, 405 U.S. 645, 656 (1972).

110 431 U.S. at 695.

111 *See supra* note 75 and accompanying text.

112 *Id.*

113 Holmes, *The Path of the Law,* **10 Harv. L. Rev.** 457 (1897).