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## SURROGATE MOTHERING: MEDICAL REALITY IN A LEGAL VACUUM

"And this," said the Director opening the door, "is the fertilizing room."<sup>1</sup>

Mankind is on the brink of biological revolution. Research in the area of human reproduction is expanding man's knowledge and presents a new found ability to control, manipulate, and direct mankind's reproductive processes. The exploding technology surrounding human reproduction brings man to a critical threshold in his history. Although reproductive technology can be used to correct infirmities in man's reproductive system, it may also threaten society by disrupting natural human relationships. Surrogate mothering is an example of a technological development which offers this choice. Stated simply, surrogate mothering is a procedure by which a woman produces a child for a couple or a single person by becoming impregnated without engaging in sexual intercourse, carrying the fetus to term, and then surrendering the child for adoption.<sup>2</sup>

Our present legal system has not adequately addressed the problems presented by surrogate mothering. Legislation which regulates the practice is nonexistent. Although there have been few court cases concerning surrogate mothering,<sup>3</sup> as the practice becomes more prevalent, litigation is certain to increase. The interrelated and complex problems demand both scholarly and legislative attention. Some examples include the surrogate relationship under adultery laws, the illegitimacy of offspring, and the enforceability of the surrogate contract. In addition, the parameters of the relationship between surrogate mother, adopting mother, and child must be defined.

Legislators must confront the legal and social issues that such novel biomedical procedures as surrogate mothering create. Unless legislators familiarize themselves with the potential consequences of surrogate mothering and draft specific legislation outlining the rights and obligations of all involved parties, a chaotic patchwork of judicial decisions will result.

The purpose of this note is to highlight concerns which legislators must confront in proposing legislation for the regulation of surrogate mothering. This note discusses child support, adultery, illegitimacy,

1. A. HUXLEY, BRAVE NEW WORLD 1 (1932). Authors dealing with science fiction and social-political themes have long recognized the implications of scientifically controlled reproduction.
2. See notes 6-16 *infra* and accompanying text.
3. Doe v. Kelley, [1979-1981] REP. HUMAN REPRO. L. (Legal-Med. Studies) II-B-15 (Wayne County, Mich. Cir. Ct. Jan. 28, 1980).

freedom of contract, and rights of privacy as they relate to surrogate mothering. Also considered are the social and psychological effects of surrogate mothering. It is imperative that legislators understand these problems in order to formulate legislative policy regarding surrogate mothering.

## I. SURROGATE MOTHERING UNDER CURRENT LAW

The historically low number of children available for adoption has been attributed to liberalized abortion laws and the fading social stigma attached to illegitimacy.<sup>4</sup> A couple often waits three to seven years for an infant to become available for adoption.<sup>5</sup> One alternative recently made available is surrogate mothering. Surrogate mothering requires the child-seeking couple to locate a woman who is willing to become impregnated, carry the fetus to term, and surrender the child to the couple after delivery. A surrogate may be located by a variety of means, including a surrogate parenting institution,<sup>6</sup> an attorney,<sup>7</sup> or private solicitation.<sup>8</sup> Generally, the child-seeking couple will formalize the relationship with the surrogate in a contract<sup>9</sup> and adopt the child in legal proceedings.<sup>10</sup>

Surrogate mothering is classified into two distinct types. The first

4. Podulski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547 (1975); see U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, at 358 (100 ed. 1979); see also Turano, *Black-Market Adoptions*, 22 CATH. LAW. 48 (1976), in which the author attributes the reduced number of adoptable infants to the widespread use of contraceptives in addition to liberalized abortion laws.
5. *Adoption and Foster Care 1975: Hearings on Baby Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 6 (1975).
6. Dr. Richard Levin and attorney Katie Brophy "institutionalized" the first surrogate mother matchmaking agency in Louisville, Kentucky. Surrogate Parenting Associates, Inc., evaluates hundreds of surrogate mother applications and matches each qualified surrogate according to the blood type and physical characteristics of the adopting mother. The institute expects to be responsible for 100 births in 1981. Krucoff, *Private Lives: The New Surrogates*, Wash. Post, Sept. 24, 1980, at B5, col. 2; Quindlen, *Surrogate Mothers: A Controversial Solution to Infertility*, N.Y. Times, May 27, 1980, at B12, col.1.
7. A Michigan attorney, Noel Keene, finds a surrogate for a couple, usually through a classified ad, and arranges the adoption for a \$3000.00 fee. Since Michigan law prohibits a payment in connection with an adoption, Keene's surrogates are not paid consideration in excess of expenses. See note 31 *infra*. An exception is a surrogate who agrees to bear a child for a bachelor. Since the bachelor is the biological father an adoption is not necessary. See articles cited note 6 *supra*; White, *Motherhood the 'Surrogate' Way: Practice has Pitfalls, Joys*, SCI. DIG., March 1980, at 24.
8. In some situations a friend or a relative has volunteered to serve as a surrogate mother. See articles cited notes 6 & 7 *supra*.
9. See articles cited notes 6 & 7 *supra*; Seligmann & Curry, *Pregnancy by Proxy*, NEWSWEEK, July 7, 1980, at 72; see Note, *Contracts to Bear a Child*, 66 CAL. L. R. 611 (1978).
10. The wife of the biological father will need to adopt the child in formal proceedings in order to acquire legal rights as mother. *But see* text accompanying notes 75-80 *supra*.

Adoption is not necessary for the husband, however, since he is the biological father. In many states there are statutes which confer the same rights as legitimate children enjoy once the father acknowledges his paternity. *E.g.*, ALA. CODE § 26-11-2 (1977); CAL. PROB. CODE § 255 (West Supp. 1979); WISC. STAT. ANN. § 237.06 (1957). Problems may arise, however, if the biological father is required to prove paternity. See Note, *supra* note 9, at 614-616.

A perplexing situation may arise if ovum transplantation, *see* note 15 *infra*, were used to impregnate the surrogate mother. In this case the surrogate mother-is-not the biological mother. Therefore, absent specific legislation, the courts may presume the surrogate mother

type uses an ovum, or egg, of the surrogate mother, which is artificially inseminated<sup>11</sup> with sperm from the husband of the adopting couple.<sup>12</sup> As a result, the child's genetic or biological parents are the surrogate and the husband of the adopting couple.<sup>13</sup> The second type employs an ovum of the adopting mother.<sup>14</sup> By the procedure of ovum transplantation, the surrogate mother is impregnated with the fertilized ovum.<sup>15</sup> In the latter type of surrogate mothering, the adopting couple is also the child's biological parents.<sup>16</sup>

Surrogate mothering may be examined in three time periods: (1) the period prior to and during the surrogate mother's pregnancy; (2) the period after birth but prior to adoption; and (3) the period after formal adoption. Legal issues may arise during any of the three periods. For example, in the first period the actions of the parties to the surrogate mother relationship may be considered adulterous under state law. In addition, if the surrogate mother's actions are restricted by contract, enforcement of these restrictions may require legal action. A contractual problem which may arise in the second period concerns the enforcement of the surrogate mother's and adopting couple's rights and obligations under contract. Also during this period, the legitimacy of the child may be a subject of challenge. Finally, issues may arise dur-

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to be the biological mother thus requiring the adopting mother to prove that she is the biological mother.

11. The introduction of semen (male fertilizing fluid) into the vagina or uterus by means of a syringe or other instrument. If the semen is obtained from the husband, it is *homologous* artificial insemination; if from another male, it is *heterologous* artificial insemination. 1 SCHMIDT'S ATTORNEYS DICTIONARY OF MEDICINE A-306 (1968).
12. To provide a focused discussion of surrogate mothering, it is assumed that the adopting couple is a heterologous married couple. It should be noted, however, that surrogate mothering has been used to produce a child for a bachelor. Walz, *Woman will be Surrogate Mother for Single California Man*, Mobile Press, Oct. 15, 1980, at 10-F, col. 1.
13. This type of surrogate mothering is usually used when a woman has some reproductive incapacity which prevents her from bearing children.
14. This type may be used either by a woman whose reproductive faculties are only partially impaired or by women whose reproductive faculties are perfectly normal. An example of a partial impairment would be damaged fallopian tubes, a history of miscarriages, incapability of normal delivery, and women who have had hysterectomies but who still have functional ovaries.
15. The ovum may be fertilized during normal sexual intercourse or by artificial insemination and then transplanted to the surrogate mother, if the adopting mother's reproductive faculties are not impaired. Otherwise, the ovum must be fertilized *in vitro* and then transplanted to the surrogate mother.

There are five basic steps in ovum transplantation. First, the woman is either assayed for urinary levels of luteinizing hormone every three hours around the time of ovulation to determine her exact time of ovulation or a hormone, gonadotrophine, is injected to cause super-ovulation. Second, the egg which has been ovulated into the fallopian tube is removed and placed into a culture medium. Next, the ovum is incubated for 12 to 18 hours with sperm. Then, after the egg has been fertilized, it is transferred to another culture medium for cleavage, and after it has reached the blastocyst stage, it is finally implanted into another woman's uterus. See *Test-tube Babies and the Law*, 115 SCI. NEWS 358 (1979).

16. Since surrogate mothering through ovum transplantation is not currently being applied, this note will focus on the first type of surrogate mothering, that is, surrogate mothering through artificial insemination. The procedures of *in vitro* fertilization and ovum transplantation, however, have already been successfully performed. See note 15 *supra*; Kinney, *Legal Issues of the New Reproductive Technologies*, 52 CAL. ST. B. J. 514, 519 (1977); *Human Embryo Research: Science and Ethics*, 114 SCI. NEWS 212 (1978).

ing the second and third periods regarding the surrogate mother's responsibility toward the child. The question of legitimacy and the surrogate mother's responsibility toward that child become particularly acute, if for any reason adoption proceedings are not completed. Clearly, the legal status of surrogate mothering is questionable throughout all three periods.

#### A. Liability of Parties—Adultery

Although most common law definitions of adultery contemplate the actual act of sexual intercourse,<sup>17</sup> several focus on the surrendering of the reproductive function.<sup>18</sup> In jurisdictions that adopt this rule, parties to the surrogate mother agreement may be civilly or criminally liable.

The first North American<sup>19</sup> case to hold that parties to artificial insemination commit adultery adopted the second definition. The Ontario Supreme Court emphasized that the essence of adultery is the voluntary surrender to another person of the reproductive functions of a married person.<sup>20</sup> Using this definition, the court reasoned that an act other than sexual intercourse would constitute adultery, if it invaded a married person's reproductive faculties; the court noted that adultery does not require the moral turpitude inherent in the act of sexual intercourse.<sup>21</sup> This interpretation of the common law would include not only all acts held adulterous under the alternative definition of adultery but also non-sexual acts, such as surrogate mothering.<sup>22</sup>

An Illinois court adopted the Ontario Supreme Court's interpretation of adultery in 1954.<sup>23</sup> The court declared that heterologous arti-

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17. At common law adultery was defined in terms of acts such as "the unfaithfulness of a married person to the marriage bed," *Copeland v. State*, 108 Tex. Crim. 228, 300 S.W. 86, 91 (1927), or "a transgression against the marriage resolution," *State v. Brooks*, 215 Wis. 134, 254 N.W. 374, 375 (1934), rather than as a word with specific legal content. Later cases interpreted these phrases to mean that the physical act of sexual intercourse is implicit. *Commonwealth v. Moon*, 151 Pa. Super. Ct. 555, 30 A.2d 704 (1943); *Beckwith v. Beckwith*, 379 A.2d 955 (D.C. App. 1977).

*People v. Sorenson*, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968), was the first artificial insemination case to apply a definition of adultery based upon sexual intercourse. The court held that absent legislation prohibiting artificial insemination, a child conceived through artificial insemination is not the product of an illicit or adulterous relation. In dicta the court noted that it is absurd to hold the doctor liable for adultery since the doctor may be a woman, or the husband may administer the insemination by a syringe. At least one court has adopted the *Sorenson* court's reasoning. *In re Adoption of Anonymous*, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973).

18. This interpretation would include some non-sexual acts as well as sexual intercourse. *Orford v. Orford*, 58 D.L.R. 251 (1921). The Court had to resolve whether a woman who had agreed to heterologous artificial insemination without her husband's consent had committed adultery. The woman's claim of artificial insemination was rejected by the court, but in lengthy dictum, the court discussed the issue of artificial insemination as adultery.

19. *Orford v. Orford*, 58 D.L.R. 251 (1921).

20. *Id.* at 258.

21. *Id.*

22. Since the court considered heterologous artificial insemination, an integral part of surrogate mothering, an act of adultery, it is logical to conclude that under this court's definition surrogate mothering would be adulterous.

23. *Doombos v. Doombos*, 23 U.S.L.W. 2308 (Cook County, Ill. Super. Ct. Dec. 13, 1954), *appeal dismissed* 12 Ill. App. 2d 473 (1956).

cial insemination, with or without the consent of the husband, is contrary to public policy and good morals, and as such constitutes adultery.<sup>24</sup> This interpretation of adultery, however, has not escaped criticism.<sup>25</sup>

## B. The Surrogate Mother Contract

Advocates of surrogate mothering argue that careful contract construction will alleviate foreseeable problems, such as injury to the surrogate mother, undesirable actions of the surrogate mother, and questions of custody.<sup>26</sup> Nevertheless, many limitations on the surrogate mother contract remain, including the permissible scope of the contract, remedies for breach of contract, and statutory and public policy limitations on the power to contract. These issues arise when the validity of the contract is challenged. For example, the adopting couple may elect to terminate the agreement and thereby refuse to accept the child or to honor such terms of the contract as payment for the surrogate mother's medical expenses. Alternatively, the surrogate mother may decide to keep the child. Problems may also arise at a later time, if the state determines that the surrogate mother has parental responsibilities<sup>27</sup> and she claims to have assigned these responsibilities by contract to the adopting couple.

1. *Limitations on the Power to Contract.* Surrogate mothering contracts may be found void under one of two theories. The contract may violate state adoption laws if it involves a payment to the surrogate mother.<sup>28</sup> Alternatively, it may violate public policy.<sup>29</sup>

24. *Id.* Homologous artificial insemination, however, was not included in the court's condemnation.

The reasoning of the Canadian court was also applied in 1963 to determine whether a child conceived through heterologous artificial insemination was a child born in wedlock. The court found that the child was not. *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).

25. Dr. Wilfred Finegold suggests that under this definition a hysterectomy would preclude a woman from committing adultery. W. FINEGOLD, *ARTIFICIAL INSEMINATION* 72 (2d ed. 1976). Dr. Finegold, however, has missed the *Orford* court's distinction between reproductive powers and reproductive faculties. 58 D.L.R. 258.

Through its use of the terms reproductive powers and reproductive faculties, the court was distinguishing between the ability to reproduce and the sexual organs of reproduction. Although a hysterectomy eliminates the *power* to reproduce, not all of a woman's sexual organs, reproductive *faculties*, are removed during surgery. 1 SCHMIDT'S *ATTORNEYS DICTIONARY OF MEDICINE* 311.71 (1968); *ATTORNEY'S TEXTBOOK OF MEDICINE* 311.10 (3d ed. 1949).

A married woman who has sexual intercourse outside her marriage, therefore, would be surrendering her reproductive *faculties* to someone other than her spouse and under the *Orford* court's definition would be committing adultery. Since the *Orford* court's definition of adultery proscribes the surrendering of one's reproductive *powers or faculties*, 58 D.L.R. 258, it would therefore include both sexual acts such as sexual intercourse and non-sexual acts such as artificial insemination in its definition.

26. Note, *supra* note 9; Quindlen, *supra* note 6.

27. See text accompanying notes 68-80 *infra*.

28. See note 31 *infra* for an example of a statute; see also, e.g., CAL. PENAL CODE § 273 (West 1967); ILL. ANN. STAT. ch. 4 § 9.1-21 (Smith-Hurd 1959); MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1967). Katie Brophy, attorney for Surrogate Parenting Associates, Inc., believes

All United States jurisdictions ban the sale of children.<sup>30</sup> In fact, many states have enacted statutes that expressly prohibit a person from offering, giving, or receiving any money or other consideration in connection with the placing of a child for adoption.<sup>31</sup> Babies are not the property of their parents and cannot be made the subject of barter.<sup>32</sup> Violation of these statutes is a misdemeanor initially or a felony for subsequent violations.<sup>33</sup>

It has been held that payment beyond expenses pursuant to a surrogate mother contract violates at least one state's statute prohibiting the sale of adoption rights.<sup>34</sup> The policy underlying this rule is to prevent the commercialization of adoption and the problems that emerge from such a trend.<sup>35</sup>

Although draftsmen of state adoption laws probably did not contemplate surrogate mothering, the policy considerations are very similar. Each state must amend its adoption laws in order to clarify its position with respect to surrogate mothering.

Absent statutory limitations, a court may hold that a surrogate mother contract is against public policy and therefore void.<sup>36</sup> The rule applied in both state and federal courts is that agreements which tend

- that Kentucky is the only state in the country that allows a fee to be paid to a surrogate mother. Castillo, *When Women Bear Children for Others*, N.Y. Times, Dec. 22, 1980, at B6, col. 2. Kentucky Attorney General, Steven L. BeShear has issued an advisory opinion that declares surrogate mother contracts illegal and unenforceable. 7 FAM. L. REP. (Bureau Nat. Affairs) 2246 (Feb. 17, 1981). Although the attorney general declared a surrogate mother contract void under KY. REV. STAT. §§ 199.500(5) & 199.601(2) (1970), he also stated that "the strongest legal prohibition against surrogate parenting in Kentucky is found in the strong public policy against the buying and selling of children. *Id.* at 2247.
29. See 17 C.J.S. *Contracts* §§ 211, 260, 265 (1963); 17 AM. JUR. 2d *Contracts* § 174-180 (1964); 15 S. WILLISTON, *CONTRACTS* § 1744A (3d ed. 1972); A. CORBIN, *CONTRACTS* §§ 1374, 1375, 1447 to 1516; *Downs v. Wortman*, 228 Ga. 315, 315, 185 S.E.2d 387, 388 (1971). A contract wherein a mother agrees to the adoption of her child by another in consideration of a monetary payment to herself is void as against public policy. *Doe v. Kelley*, [1979-1981] REP. HUMAN REPRO. L. (Legal-Med. Studies) at II-B-20.
30. *Doe v. Kelley*, [1979-1981] REP. HUMAN REPRO. L. (Legal-Med. Studies) II-B-15 (Wayne County, Mich. Cir. Ct. Jan. 28, 1980).
31. MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1980).
- (1) 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
- (b) the registration recording or communication of the existence of a child available for adoption or the existence of a person interested in adopting a child.
- (c) a release
- (d) a consent
- (e) a petition.
32. *In re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1 (1960); *Parks v. Parks*, 209 Ky. 127, 132, 272 S.W. 419, 422 (1928); *Hooks v. Bridgewater*, 111 Tex. 122, 131, 299 S.W. 1114, 1118 (1921); 67A C.J.S. *Parent & Child* § 16 (1978). See A. HOLDER, *LEGAL ISSUES IN PEDIATRICS & ADOLESCENT MEDICINE* 7-8 (1977).
33. *E.g.*, MICH. COMP. LAWS ANN. § 710.69 (West Supp. 1980); see also CAL. PENAL CODE § 181 (West 1980).
34. *Doe v. Kelley*, [1979-1981] REP. HUMAN REPRO. L. (Legal-Med. Studies) at II-B-22.
35. Expansion of the current adoption black market is one foreseeable problem. Personal profit rather than social gain characterizes the goal of adoption Black marketeers. Turano, *supra* note 4; see Podulski, *supra* note 4.
36. See note 29 *supra*.

to be injurious to the public are illegal and void, although actual injury from the agreement has not occurred.<sup>37</sup> The issue, then, is whether surrogate mothering is potentially injurious and thus violative of public policy.<sup>38</sup>

Of the many factors that play a role in determining whether surrogate mothering violates public policy, three are most important. The first consideration is the biological mother's strong affection for her child. A court is unlikely to overlook this bond when deciding whether surrogate mothering is sound public policy. The law recognizes the mother's claim to her child as a compelling natural right which derives from the deepest instincts of motherhood.<sup>39</sup> Although the natural father has a right of affection, the courts stress that when all factors are equal, a mother's right is the more compelling.<sup>40</sup> In fact, a parent's right of custody in a child, particularly the mother's, has been likened to the inalienable rights of the Constitution.<sup>41</sup>

A second policy consideration is that surrogate mothering may lead to exploitation of financially needy women.<sup>42</sup> There will be some altruistic women who will volunteer as surrogates,<sup>43</sup> but as this supply is depleted, remuneration will have to be paid to satisfy the demand for surrogates. This fact is illustrated by the efforts of one attorney who, after being informed by a juvenile court that surrogate mothers could not be paid, experienced great difficulty in finding women willing to

37. 17 C.J.S. *Contracts* § 211 (1963); *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619, 628 (1956).

38. The facts a court considers in determining whether adoptions violate public policy are illustrated in several cases. For example, in *In re Adoption of P.J.K.*, 359 S.W.2d 360, 365 (Mo. 1962), a parent's agreement to evade moral or legal responsibility to his child was held to be against public policy. A Minnesota court held that an agreement which, in effect, transfers from the natural mother to total strangers the right to keep, return or otherwise dispose of her unborn child without further consent is void as contrary to public policy. *State v. Whaley*, 246 Minn. 535, 75 N.W.2d 786 (1956).

It is not enough that the natural mother and the adopting parents are willing to consummate an exchange. *Willey v. Lawton*, 8 Ill. App. 2d 344, 132 N.E.2d 34 (1956).

39. *State v. Whaley*, 246 Minn. 535, 75 N.W.2d 786 (1956); *Kingsbury v. Kingsbury*, 75 N.Y.S.2d 699, 700 (Sup. Ct. 1947).

40. *Miller v. Miller*, 371 So. 2d 565 (Fla. Dist. Ct. App. 1979); *Gravel v. Gravel*, 355 So. 2d 1057 (La. Ct. App. 1978); "Maternal preference" should be expressed in limited instances where it would be impossible to decide custody upon evidentiary facts. *Cooke v. Cooke*, 21 Md. App. 376, 319 A.2d 841 (Ct. Spec. App. 1974); *Annot.*, A.L.R.3d 255.

41. *State v. Whaley*, 246 Minn. 535, 75 N.W.2d 786 (1956).

42. During hearings on *in vitro* fertilization before the Ethics Advisory Board of the Department of Health, Education and Welfare, one witness testified that there was an "immediate possibility of the exploitation of women surrogate mothers with wombs-for-hire, and [an] immediate [possibility] that we are going to begin to 'design' our descendants up to the limit that is scientifically possible." Statement by Paul Ramsey, Professor, Princeton University, *printed in ETHICS ADVISORY BOARD, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, APPENDIX: H.E.W. SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSPLANT § 7*, at 21 (May 4, 1979).

It should be noted, however, that poorly educated women and women on welfare or public assistance are currently being rejected as surrogate mother candidates by Surrogate Parenting Associates, Inc. OB/GYN NEWS, May 1, 1980.

43. See notes 6-8 *supra*.



become surrogates.<sup>44</sup> The offer of remuneration will persuade financially needy women to sell their reproductive faculties for the benefit of others.

The price at which a woman will sell her reproductive faculties may depend on her financial status.<sup>45</sup> If the remuneration increases to staggering amounts,<sup>46</sup> a woman's choice to become a surrogate mother may lose its voluntary nature.<sup>47</sup> This situation has great potential for use of disproportionate bargaining power and, for this reason, it may be held unconscionable and violative of public policy.

A final policy factor related to surrogate mothering is society's interest in the preservation of the traditional family. The family unit has been identified as the backbone of our society.<sup>48</sup> As a result, any practice which threatens the stability of the family unit also threatens society's stability. The issue, then, is whether the introduction of a third party, the surrogate mother, substantially deviates from and threatens the traditional family unit. If the courts view surrogate mothering as a significant threat to the stability of the family unit,<sup>49</sup> then they may hold that surrogate mothering violates public policy and that any related contract is necessarily void.<sup>50</sup>

2. *Scope of the Surrogate Contract.* Many foreseeable problems attendant to surrogate mothering can be alleviated by proper drafting of surrogate mother contracts. If courts recognize the surrogate mother contract as valid, the freedom of contract principle would grant a wide latitude in contract terms. Unless a court finds fraud, duress, or illegality, it will not interfere with the contracting parties' power to create rights and duties.<sup>51</sup> This laissez-faire attitude has permitted a contract whereby one party promised not to drink or use tobacco.<sup>52</sup> Similarly, the adopting parents could contract to restrict the surrogate mother's consumption of such commodities. Nonetheless, a contract must not

44. [1976-1978] REP. HUMAN REPRO. L. (Legal-Med. Studies) II-A-1; *Hiring Mothers*. TIME, June 5, 1978, at 59.

45. A career woman would require much greater remuneration than an unemployed woman since the former is giving up more to become a surrogate mother.

46. Fees to surrogate mothers have ranged from \$5,000.00 to \$13,000.00. Also from, *Physician sees no problem in Surrogate Mother Business*, AM. MED. NEWS, June 20, 1980, at 17. But some couples have stated that they are willing to pay from \$40,000.00 to \$50,000.00. McCann, *Surrogate Child-Bearing now Clinical Reality*, MED. TRIBUNE, May 14, 1980, at 1.

47. It has been suggested that as the amount of payment increases, a surrogate mother's choice may actually become involuntary. *Doe v. Kelley*, [1979-1981] REP. HUMAN REPRO. L. (Legal-Med. Studies) II-B-15 (Wayne County, Mich. Cir. Ct. Jan. 28, 1980).

48. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Maynard v. Hill*, 125 U.S. 190, 211 (1887).

49. See note 105 *infra*.

50. Legislatures and courts in this country have continually expressed a desire to protect and promote the nuclear family. See note 105 *supra*; *Willey v. Lawton*, 8 Ill. App. 2d 344, 132 N.E.2d 34 (1956).

51. Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598 (1969).

52. *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891). The issue on appeal, however, was whether a promise to refrain from the consumption of alcohol and tobacco was sufficient consideration. The court held that it was.

become a contract for involuntary servitude<sup>53</sup> or violate the surrogate mother's constitutional right of privacy.<sup>54</sup>

To protect the surrogate mother and child, state legislators may require insurance coverage as a condition of the contract. This contractual condition would merely codify current practice.<sup>55</sup> By requiring the adopting parents to insure all of the parties, both the surrogate mother and the child would be secure against calamity. The surrogate mother's life and health could be insured during pregnancy, childbirth, and the stages following childbirth. Health insurance could be obtained to insure support and maintenance of the child in the event that he is born handicapped or retarded and the adopting parents refuse to accept him.<sup>56</sup> Finally, the adopting parents' lives could be insured with the child as beneficiary. In this manner, the child would have support, if the adopting parents die during the surrogate mother's pregnancy.

3. *Remedies for Breach of Contract.* Breach of the surrogate mother contract may be viewed from two perspectives. Remedies for breach of contract against the adopting couple are easily fashioned. If the adopting couple refuses to pay, the surrogate may sue the adopting couple for the amount due pursuant to the contract. If the adopting couple refuses to accept the child, the child can be placed in another home through regular adoption procedures.

When the surrogate mother breaches the contract, however, fashioning a remedy is more difficult. If the surrogate mother breaches the contract by refusing to surrender the child, for example, it is unlikely that a court will require specific performance.<sup>57</sup> Although this issue remains unresolved in the United States, a court in England held that in such a custody dispute the biological mother should prevail.<sup>58</sup>

53. U.S. CONST. amend. XIII.

54. See text accompanying notes 117-120 *infra*. Possible examples include whether a surrogate mother can be compelled to undergo amniocentesis, a prenatal test for fetal abnormalities. The test is conducted on a sampling of amniotic fluid which is removed from the mother by inserting a hollow needle into the womb. A more extreme situation of a possible invasion of privacy arises when the test result indicates a deformed child. It is highly questionable whether the adopting couple could compel the surrogate mother to undergo an abortion.

55. Life and health insurance is currently included in many surrogate-mother contracts. Note, *supra* note 9; Alsofrom, *supra* note 44, at 3.

56. Under some surrogate mother contracts, however, a refusal of acceptance by the adopting couple would be a breach of contract. See Krucoff, *supra* note 6.

57. See Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970). While principles of contract prevent the arbitrary revocation of an adoption agreement entered into by a natural parent, *In re Adoption of D—*, 122 Utah 525, 252 P.2d 223 (1953), in proper circumstances the court will permit the natural parent to withdraw from, or repudiate the agreement. *Allen v. Morgan*, 75 Ga. App. 738, 44 S.E.2d 500 (1947).

58. An unmarried couple employed a prostitute as a surrogate mother. The woman was artificially inseminated with the male's semen, but after birth the surrogate mother refused to surrender the baby. The couple offered the surrogate £3000.00 and the extra inducements of an £850.00 second-hand car and, in desperation, their house. The judge described the parties' agreement as a pernicious contract for the sale and purchase of a child. It was held void, and the surrogate mother was granted custody. *Cusine, "Womb-Leasing": Some Legal Implications*, NEW L. J. 824 (1978); *The Times* (London) June 21, 1978, at 1, col. 8.

It should be noted that at press time, suit on a surrogate mother contract was pending in

Creative contracting may avoid many of the problems associated with surrogate mothering. The courts, however, may find the surrogate mother contract in violation of state adoption laws or public policy and therefore void. Surrogate mothering is a delicate issue whose results are not easily reversed. For this reason, state legislatures must take immediate action in order to eliminate confusion concerning surrogate mothering contract rights and responsibilities.

### C. Illegitimacy

The legitimacy of a child delivered of a surrogate mother has not been resolved. Illegitimacy may stigmatize the child socially and hinder his right of inheritance.<sup>59</sup> Case law surrounding heterologous artificial insemination may be analogized to the surrogate mother situation. Absent a statute specifically addressing the legitimacy issue, a court may resort to one of three alternatives.<sup>60</sup> First, the surrogate's offspring may be presumed legitimate,<sup>61</sup> if the surrogate mother was married at the time of delivery.<sup>62</sup> A majority of states have adopted this rule.<sup>63</sup> Second, if the surrogate mother was single at the time of delivery and the court views her as the legal mother, then the surrogate's offspring is clearly illegitimate.<sup>64</sup> Finally, the court may find that the child is legitimate regardless of the surrogate's marital status. This situation may arise when the father is married and the court views his

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the California courts. James Noyes of Rochester, New York filed suit against Denise Lucy Thrane of Los Angeles, California to obtain custody of a child he fathered through artificial insemination. *Noyes v. Thrane*, No. CF 7614 (L.A. County, Cal. Super. Ct., filed Feb. 20, 1981). Mrs. Thrane contracted to become a surrogate mother for the childless Noyes couple and agreed to surrender the baby in exchange for payment of her medical bills. After contracting, however, Mrs. Thrane changed her mind and now wants to keep the child. Mrs. Thrane gave birth to a baby boy on April 4, 1981.

59. Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WIS. L. REV. 859; Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127 (1969).

Recent United States Supreme Court holdings, however, have reduced the impact of the harsh treatment rendered illegitimate children by the common law. *Gomez v. Perez*, 409 U.S. 535 (1973); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Giona v. America Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968); see Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

60. Several states have enacted statutes legitimizing children conceived through heterologous artificial insemination with the husband's consent. *E.g.*, CAL. CIV. CODE § 7005 (West Supp. 1980); N.Y. DOM. REL. LAW § 73 (McKinney 1977); OKLA. STAT. ANN. 10 § 55a (Supp. 1977).
61. A child born in wedlock is presumed to be the child of the husband and is, therefore, legitimate. *London v. London*, 78 Misc. 2d 535, 356 N.Y.S.2d 1000 (1974); *Lewis v. LoChirco*, 350 Ill. App. 394, 112 N.E.2d 917 (1953). *E.g.*, CAL. EVID. CODE § 621 (West Supp. 1977).
62. This alternative illustrates the status of children conceived through heterologous artificial insemination and retained by the mother. Surrogate mothering only changes this situation in that the child is not retained by the mother. If the surrogate mother is married, therefore, her offspring should be characterized as legitimate even though she intends to give it up.
63. See *Ray v. Bryant*, 411 F.2d 1204, 1205 (5th Cir. 1969). At least 28 states have adopted this presumption. *E.g.*, *Butler v. Butler*, 254 Ala. 375, 48 So. 2d 318 (1950); *People v. Russell*, 22 Cal. App. 3d 330, 99 Cal. Rptr. 277 (1971); *People v. Peters*, 226 Ill. App. 512, 62 N.E.2d 139 (1945); *London v. London*, 78 Misc. 2d 535, 356 N.Y.S.2d 1000 (1974).
64. In this alternative the child is not the product of legally married parents. A similar situation was addressed in *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977).

wife as the legal mother, although she is not the biological mother.<sup>65</sup>

The conflict between surrogate mothering and current legitimacy law may also be resolved in states that provide for the legitimation of illegitimate children through acknowledgement of paternity by the father.<sup>66</sup> This reasoning revolves around a judicial determination that the legislature intended to include a surrogate mother's pregnancy within the statute's scope. Finally, the problem of legitimacy may be cured by formal adoption in most states.<sup>67</sup> State legislators must evaluate surrogate mothering in light of the policy behind legitimacy laws and amend their state's statutes accordingly.

#### D. Legal Identity of Mother

The identity and marital status of a baby's legal mother determines whether the child is legitimate. Legal responsibility for the child's support also depends on the identity of the legal mother. Consideration, therefore, must be given to the legal status of the surrogate mother. Under certain conditions the surrogate mother may be held to be both the biological mother and the legal mother. If an adopting mother should die prior to formal adoption, the surrogate mother may replace the adopting mother as the legal mother.<sup>68</sup> Similarly, if the natural father's wife refuses to adopt the child formally and has not actively participated in or consented to the child's birth, then the surrogate mother, by virtue of her active participation, may satisfy the test of legal motherhood.<sup>69</sup> Finally, when the natural father is single, it is likely the

65. Under this alternative, the child is born into a couple who are its legal parents and who are legally married. The requirements of legitimacy are thus satisfied. Generally, illegitimacy is defined as the status of a child born of parents not legally married at the time of the child's birth. *People v. Sorenson*, 68 Cal. 2d 280 (1968).

It is the policy of the law to favor the legitimacy of children and to declare them legitimate if it can fairly support such a declaration. *Arcand v. Flemming*, 185 F. Supp. 22 (D. Conn. 1960); *People v. Sorenson*, 68 Cal. 2d 280 (1968); Annot., 25 A.L.R.3d 1093 (1969).

66. *E.g.*, ALA. CODE § 26-11-2 (1977); CAL. PROB. CODE § 255 (West Supp. 1979); WISC. STAT. ANN. § 237.06 (1957).

In states which do not have these statutes, a surrogate's offspring can receive all the rights of a legitimate child through formal adoption.

67. "Unless specific exceptions are provided by law, the effect of adoption is to establish as between the adoptive parents and the child all the rights and duties as normally exist between the child and its natural parents." M. LEAVY & R. WEINBERG, *LAW OF ADOPTION* 64 (4th ed. 1979).

68. This could arise if the courts elect to follow the reasoning of *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977). *C.C.*, an unmarried woman, wanted a child and wanted *C.M.*, *C.C.*'s paramour, to be the father. Since *C.C.*, did not want to have intercourse before marriage, and she was not ready to marry *C.M.*, *C.M.* agreed to donate his semen. *C.C.* artificially inseminated herself, and as a result a child was conceived. After approximately the third month of pregnancy, however, their relationship terminated and *C.M.* brought suit for visitation rights.

The court held that a "known donor" of reproductive faculties is the legal parent, as well as the natural parent, when the donee is without a consenting spouse. Consequently, as legal parent *C.M.* was liable for support and, therefore, was granted visitation rights. *Id.* at 167-168. If this reasoning is applied to surrogate mothering law, the surrogate mother would be the legal mother when one of the conditions outlined in the text was satisfied and if the surrogate's identity was known.

69. *Id.* The test for legal parenthood is discussed in the text accompanying notes 76-80 *infra*.

courts will hold the surrogate mother liable as the legal mother.<sup>70</sup>

A surrogate mother does not contract with the intention of assuming any duty or responsibility as the child's legal mother. In general, a parent has an absolute obligation to support the child until the child reaches majority age,<sup>71</sup> but this obligation can be terminated by formal adoption proceedings.<sup>72</sup> The surrogate mother's obligation to support the child, therefore, is terminated when the child is formally adopted. In one state, however, the ultimate liability for child support would remain with the surrogate mother after adoption by another, if the surrogate mother is also the biological mother.<sup>73</sup> Moreover, as biological mother, the surrogate is subject to the child's claims to inheritance in at least ten states.<sup>74</sup> Thus, the surrogate mother may have to assume legal liability for the child whose life she created.

Liability of the surrogate mother for child support turns upon the distinction under heterologous artificial insemination<sup>75</sup> law between a biological parent and a legal parent. The developing legal concepts relating to heterologous artificial insemination are relevant to the question of the legal mother's identity, since that procedure is the male-oriented counterpart of surrogate mothering. In this area the courts

70. This situation is the same as when any two people cause a child to be born. A parent has a duty of support which cannot be terminated by contract. *Culpepper v. Brewer*, 242 Ga. 210, 248 S.E.2d 619 (1978). If the parent is "known," he will be held responsible even though the child was conceived through artificial means. *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977).

71. *Prenzler v. Prenzler*, 55 Ill. App. 3d 244, 370 N.E.2d 642 (1977). This obligation is "well nigh absolute." *Commonwealth ex rel. Kaplan v. Kaplan*, 236 Pa. Super. 26, 344 A.2d 578 (1975). See *In re Marriage of O'Connell*, 80 Cal. App. 3d 849, 146 Cal. Rptr. 26 (1978).

A parent is not released from this obligation by giving the child away. *Hamm v. Hamm*, 207 Kan. 431, 485 P.2d 221 (1971). Moreover, a parent's duty of support is not terminated because he does not have custody or because the child is illegitimate. *Gomez v. Perez*, 409 U.S. 535, 536 & 538 (1973). A parent may not enter into an irrevocable contract which relieves him of the duty to support. *Culpepper v. Brewer*, 242 Ga. 210, 248 S.E.2d 619 (1978). Although these cases concern support payments by fathers, both father and mother are equally responsible for support. *Carter v. Carter*, 58 A.D.2d 438, 397 N.Y.S.2d 88 (1977).

72. *Gessner v. Powell*, 238 So. 2d 101 (Fla. 1970); *In re Quantius' Will*, 58 N.M. 807, 277 P.2d 306 (1954); *Betz v. Horr*, 276 N.Y. 83, 11 N.E.2d 548 (1937); *Annot.*, 114 A.L.R. 491 (1938).

73. The Illinois Supreme Court stated that "[a]n adoption of a child does not work a complete severance of the relationship between the child and its natural parents. The duty of a parent to support his minor child arises out of the natural relationship, and while that duty may also be imposed upon the adoptive parents by statutory enactment, the natural parent may, if necessity arises, be required to perform that duty." *Dwyer v. Dwyer*, 336 Ill. 630, 634, 10 N.E.2d 344, 346 (1937). This holding has been repeatedly upheld. *People ex rel. Bachleda v. Dean*, 48 Ill. 2d 16, 268 N.E.2d 11 (1971); *Anderson v. Anderson*, 320 Ill. App. 140, 49 N.E.2d 841 (1943). See also *Huckaby v. Huckaby*, 75 Ill. App. 3d 195, 393 N.E.2d 1256 (1979); *Cessna v. Montgomery*, 28 Ill. App. 3d 887, 329 N.E.2d 861 (1975).

74. Since adoption terminates all legal relationships between biological parent and child, the general rule is that, in the absence of specific statutory provision, the child does not have a right of inheritance against this biological parents. A number of states, however, have specific provisions in their statutes giving the adopted child such a right of inheritance. States with such provisions are Alabama, Arkansas, Florida, Maine, Massachusetts, Michigan, Texas, Vermont, and West Virginia. *LEAVEY & WEINBERG*, at 65 *supra* note 65.

In Iowa the courts have held that, absent specific statutes, the child may inherit from its biological parents under common law. *Snook v. Herrmann*, 161 N.W.2d 185, 190 (Iowa Sup. Ct. 1968).

75. See note 11 *supra*.

have held that a husband of a woman artificially inseminated, though not the biological father, can make himself the legal father by his acts and representations.<sup>76</sup> A biologically noncontributing husband may be considered the legal father, if he "actively participated and consented"<sup>77</sup> to his wife's conception of a child by means of artificial insemination.<sup>78</sup> Under this theory, if the husband is found to be the legal father, he is then liable for the child's support.<sup>79</sup>

A similar distinction between biological mother and legal mother may be made as law regarding surrogate mothering develops. By analogy, it is reasonable to conclude that the biological father's wife will be held accountable as the legal mother, if she "actively participates and consents" to the conception of a child by means of surrogate mothering. The designation of the biological father's wife as the legal mother provides a second source of support and maintenance, if something should happen to the father. Additionally, it may remove the stigma of illegitimacy from the surrogate's offspring if the court views the child's birth as a product of a couple who are the baby's legal parents and who are lawfully married.<sup>80</sup>

## II. PSYCHOLOGICAL AND SOCIAL IMPLICATIONS

The psychological and social effects of surrogate mothering must be considered when formulating legislation. Since surrogate mothering is on the cutting edges of both science and law, there have been very few empirical studies of its consequences. Psychological and sociological studies have focused on two important aspects of surrogate mothering: heterologous artificial insemination and adoption.<sup>81</sup>

### A. Psychological Impact on the Child

The complex psychological impact of surrogate mothering is best understood when viewed from the separate perspectives of the child,

76. The first case to draw a distinction between the biological father and the legal father was *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963). Being unable to consummate the marriage, the husband agreed that his wife should be artificially inseminated with the semen of a third-party donor. Although the husband was not the child's biological father, by applying theories of equitable estoppel and implied contract, the court held that the husband was the legal father. *Id.* at 1089.

77. *People v. Sorenson*, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968), expanded the concept of a legal father. Like *Gursky*, *supra* note 76, the husband in *Sorenson* consented to the artificial insemination of his wife with semen from a third-party donor. The court held that the husband was the legal father since he actively participated and consented to his wife's artificial insemination. 68 Cal. 2d at 285.

78. The policy underlying these holdings is that one who actively participates and consents to one's wife's artificial insemination cannot create a temporary relation to be assumed and disclaimed at will. Instead, the arrangement must be of a long term character which imposes an obligation of supporting those for whose existence one is directly responsible. 68 Cal. 2d at 285.

79. 68 Cal. 2d 280; *Gursky v. Gursky*, 39 Misc. 2d at 1089.

80. Legitimacy is defined and discussed in the previous section. For the common law definition of legitimacy see note 65 *supra*.

81. See notes 10 & 11 *supra*.

the surrogate mother, and the adopting parents. A primary consideration, of course, is the psychological welfare of the child. According to several experts, discovery of his status as a surrogate mother's offspring before the child is mature enough to accept such a realization may cause severe psychological damage.<sup>82</sup> A less dramatic but more probable result is that the child will have doubts about his parentage.<sup>83</sup> The child's belief that the woman acting as his mother shared his genetic and psychological make-up would be shattered, possibly causing feelings of insecurity.<sup>84</sup> Furthermore, if surrogate mothering has any adverse effect upon the adopting couple's relationship, the child may detect that familial disharmony is caused by his presence and may suffer emotionally. These considerations, however, are counterbalanced by the accepted principle of adoption which has similar characteristics and has suffered many of the same criticisms.<sup>85</sup> In addition, when confronting psychological turmoil, offspring of a surrogate mother will have the advantage, unlike many other children, of being wanted.

### B. Psychological Impact on the Surrogate Mother

To understand the psychological impact on the surrogate mother, one must understand why someone becomes a surrogate mother. Reasons for wanting to become a surrogate may vary from an altruistic desire to share the gift of life to pure economic motivation.<sup>86</sup> In the words of Dr. Philip Parker, an instructor in the Department of Psychiatry at Wayne State University:

Many women like to be pregnant because it gives them a feeling of power. They are creating a new life, something no man can do. For others, pregnancy is the last word in femininity. Another group responds to a symbiotic, nurturing relationship with the fetus. And a small percentage look upon pregnancy as a punishment.<sup>87</sup>

A surrogate mother's psychological stability depends upon her motive

82. With regard to heterologous artificial insemination, most doctors feel that the identity of the biological father should be kept as a secret between the couple and their doctor. Atallah, *Report From a Test-Tube Baby*, N.Y. Times, April 18, 1976, § 6 (Magazine), at 16; Curie-Cohen et al., *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENGLAND J. MED. 589 (1979). One doctor has stated that if the child should discover any irregularity in his parentage, psychological damage could be disastrous, and an inferiority complex could result that psychoanalysis could not cure. Atallah, *supra* at 17.

Surrogate Parenting Associates, Inc. refuses to disclose the identity of the surrogate mother to the adopting couple. Krucoff, *supra* note 6; Quindlen, *supra* note 6. On the other hand, an attorney in Michigan encourages the surrogate mother and the adopting couple to become acquainted. See Seligmann & Curry, *Pregnancy by Proxy*, NEWSWEEK, July 7, 1980, at 72.

83. See C. DALY, *MORALS, LAW AND LIFE* 168 (1966).

84. At least one situation, however, indicates that such a discovery would not be disastrous. A child who was the product of heterologous artificial insemination stated that knowing about her origin did nothing to alter her feelings for her family. Atallah, *supra* note 81, at 48.

85. One difference, however, is that the adopted child has already been born, while the surrogate mothering offspring is purposely being created.

86. White, *Motherhood the 'Surrogate' Way: Practice has Pitfalls, Joys*, SCI. DIG., March 1980, at 26.

87. *Id.*

for becoming a surrogate.<sup>88</sup> A woman who volunteers as a surrogate mother for purely altruistic reasons may adjust easily and even experience joy when she surrenders her offspring to the adopting couple. A woman who becomes a surrogate mother to achieve a feeling of power or for the other reasons which Dr. Parker suggests, however, could suffer a profound sense of loss when the child is relinquished.<sup>89</sup> Regardless of the surrogate mother's reason for volunteering, payment beyond expenses may exacerbate any negative psychological effects.<sup>90</sup>

### C. The Adopting Couple

Possible adverse psychological effects of surrogate mothering on the adopting mother revolve around her nonparticipatory role in the child's creation.<sup>91</sup> An impairment of one's sexual or procreative ability, alone, is likely to have a dramatic psychological effect;<sup>92</sup> this insecurity may be intensified when the unimpaired spouse creates and brings a new life into the relationship without her biological participation.<sup>93</sup> This possibility, however, must be balanced against the thrill of having a family that is genetically related to one of the spouses.<sup>94</sup>

The infertile wife may experience doubt because her husband's child develops in another woman's body.<sup>95</sup> She may, consequently, develop feelings of jealousy and animosity for the surrogate mother.<sup>96</sup> Moreover, the child's discovery of the facts surrounding his birth may result in the isolation of the wife in the familial relationship. This situation clearly differs from traditional adoption. In traditional adoption neither spouse contributes to the biological character of the child, and therefore, each parent has an equal position with the child.

The father's psychological well-being may also be threatened by surrogate mothering. If the identity of the surrogate is kept anonymous, the father may develop a covert attraction for her and expend energy fictionalizing her character.<sup>97</sup> In addition, the father may concentrate his love on the child, thereby excluding the wife from the familial relationship.<sup>98</sup> Alternatively, as the child matures the father may resent the child or develop guilt feelings with the realization that his

88. See Krucoff *supra* note 6; Quindlen *supra* note 6. For this reason, Dr. Levin of Surrogate Parenting Associates, Inc. subjects his surrogate mother candidates to a thorough psychological examination.

89. White, *supra* note 86. Surrendering the child she has carried for nine months and sacrificed for, the surrogate mother's psychological upheaval will be nothing short of traumatic. *Id.*

90. See notes 45-47 *supra*.

91. The discussion in this paragraph assumes that the reproductive capabilities of the adopting mother are impaired so that she cannot contribute biologically to the creation of the child.

92. Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WIS. L. REV. 859 nn.38, 868 nn. 41 & 879 nn. 100.

93. See Rubenstein, *Little-Known Hazards of AID: Disease, Inbreeding, Guilt*, PSYCH. TODAY, May 1980, at 23.

94. See text accompanying notes 11-13 *supra*.

95. See note 86 *supra*.

96. These feelings may ultimately affect her relationship with her child.

97. See C. DALY, *supra* note 83.

98. The reverse situation has been proposed in the heterologous artificial insemination proce-



satisfaction in the child might not be shared by his spouse. These feelings may be intensified by the presence of the child, especially if the surrogate mother was not selected with attention to the physical characteristics of the adopting mother. The father's psychological welfare must, once again, be balanced against the unique excitement of sharing in the creation of life where none was previously possible.

#### D. Sociological Effects

The psychological implications are but a single component of the total sociological impact of surrogate mothering. Legislatures, as guardians of the public health, safety, morals, and general welfare, legitimately may consider the effects of surrogate mothering on society. Surrogate mothering, to the extent that it affects the social structure by its impact on family structure, is within the legislative prerogative.

There are people who view the divorce of reproduction from the marital union as the single greatest threat to the family's continued existence, and oppose surrogate mothering for this reason.<sup>99</sup> Although surrogate mothering is desirable on the grounds that it provides adoptable infants where they were previously unavailable or only available after a wait of three to seven years,<sup>100</sup> it may also lay the foundation for the dissolution of the family.

The principle underlying surrogate mothering is that a womb external from the marital union may be permissibly employed for human reproduction. By analogizing to this principle, later generations may justify the use of a separate and independent artificial womb which will be perfected and will permit all women to forego natural pregnancy, if they chose to do so.<sup>101</sup> If, as a result of changing social values concerning motherhood versus career aspirations, surrogate mothering becomes widespread,<sup>102</sup> personal involvement will be severed from reproduction.<sup>103</sup> It has been suggested that this may mark the end of

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dure. Dienes, *Artificial Donor Insemination: Perspectives on Legal and Social Change*, 54 IOWA L. REV. 253 (1968).

99. P. Riga, *Humane Vitae and the New Sexuality*, TRIUMPH, 18 (Oct. 1973); C. DALY, *supra* note 83, at 164-165; See generally D. CALLAHAN, *THE TYRANNY OF SURVIVAL* (1975); P. REILY, *GENETICS, LAW AND SOCIAL POLICY* (1977).

100. It has been noted, however, that "undiscriminating attempts to give children to the childless can in many cases produce results detrimental to the welfare of society." Commentary, *Artificial Insemination: Problems, Policies, and Proposals*, 26 ALA. L. REV. 120, 126 n.31 (1973). See also note 5 *supra*.

101. The E.M.D. (extracorporeal membrane oxygenator or in other words, artificial womb) has supported life in three dozen lambs for up to two and a half days. R. FRANCOEUR, *UTOPIAN MOTHERHOOD* (1970). Dr. Daniele Petrucci fertilized a human egg *in vitro* and kept the resulting embryo alive in an artificial environment for twenty-nine days. *Id.* at 57. The development of the 'perfect' artificial placenta and womb appears to be merely a matter of time. *Id.* at 56.

102. Dr. Herman J. Muller states: "Foster pregnancy, which is already possible, will become socially acceptable and even socially obligatory. It will seem wrong to breed children who mirror parents' peculiarities and weaknesses. In the future, children will be produced by the union of ovum and sperm, both derived from persons of proved worth, possible long deceased, and who exemplify the ideals of the foster-parents. C. DALY, *supra* note 83, at 164.

103. See C. DALY, *supra* note 83, at 165.

the traditional family.<sup>104</sup> The bleakness of such a possibility, of course, must be contrasted with the idea that a family can still exist and perform its vital function in society even though a wife does not perform her traditional role as child-bearer.

The essential contribution of the family lies in teaching role behavior through socialization.<sup>105</sup> By passing the cultural traditions of one generation on to the next, family members gain an understanding of their identity in society.<sup>106</sup> If society accepts a practice which threatens the stability of the familial institution, society must then replace the family with a new means of socialization. Failure to employ a new means of socialization could cause the loss of social identity and the eventual collapse of that society.

Legislators must determine whether surrogate mothering presents a threat to the family and its socializing functions, and based upon their conclusion, draft correlative legislation. Unless legislators draft legislation which protects society from any destructive effects of surrogate mothering, they should be prepared to replace the family with an alternative socializing force.

### III. CONSTITUTIONAL LIMITATIONS ON LEGISLATIVE POWER

This note recommends enactment of legislation clarifying the status, rights, and liabilities of all parties affected by surrogate mothering. When drafting this legislation, however, a legislature must be aware of the constitutional limitations on its power. Individual rights that supercede legislative power include the recently created right to privacy. A constitutionally based right of privacy was first recognized by the United States Supreme Court in *Griswold v. Connecticut*.<sup>107</sup> The Court recognized a privacy zone created by several fundamental constitutional guarantees.<sup>108</sup> Although the parameters of this zone were not defined, it was held to extend at least to the intimate decisions regarding child-bearing.<sup>109</sup> In a later case the Court decided that if the right of privacy means anything, it is the right of the individual to decide, free from unwarranted governmental intrusion, whether to bear a child.<sup>110</sup> Although the concept of privacy is instinctively appealing, the boundaries of the right of privacy remain uncertain more than a decade

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104. See note 99 *supra*.

105. See Dienes, *supra* note 98; *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975); Noonan, *The Family and the Supreme Court*, 23 CATH. UNIV. L. REV. 255 (1973).

106. *Id.*

107. 381 U.S. 479 (1965). The United States Supreme Court reversed a conviction under a Connecticut statute which made the use of contraceptives a criminal offense. The Court held that the statute was invalid as invading a couple's constitutional right of privacy. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

108. 381 U.S. at 485.

109. *Id.*

110. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The United States Supreme Court held that a Massachusetts statute which made it a felony for anyone to give away a drug, medicine, instrument, or other article for the prevention of conception except a registered physician or pharmacist was unconstitutional.

after *Griswold*.<sup>111</sup>

The constitutionality of surrogate mothering legislation will be tested by one of two standards. If it is determined that surrogate mothering legislation encroaches upon a fundamental right, the state will then be required to satisfy the "compelling state interest test."<sup>112</sup> This test requires the state to overcome two hurdles: the legislation must be both *necessary* and directed towards achieving a *compelling state interest*.<sup>113</sup> If a fundamental right is not implicated, the state then will have only to satisfy the "rationally related test."<sup>114</sup> Under this test the contemplated legislation need only be *rationally related* to the achievement of a permissible state interest.<sup>115</sup> Traditionally, states prevail under the rationally related test but rarely prevail under the compelling state interest test.<sup>116</sup>

The issue, then, is whether surrogate mothering involves a fundamental right. Fundamental rights are rooted in the express guarantees of the Constitution and in the implied guarantees that flow from these guarantees.<sup>117</sup> The latter guarantees are not to be found in any Supreme Court decision. Instead, the Supreme Court enumerates rights previously upheld as fundamental and then decides whether the claimed right is sufficiently similar to warrant protection.<sup>118</sup>

Although a surrogate mother's decision to become pregnant parallels the fundamental right of reproductive privacy, the adopting couple's claimed right of reproductive privacy does not appear to be

111. The Court's most comprehensive attempt, thus far, to define this right came in *Whalen v. Roe*, 429 U.S. 589 (1977). The Court stated that the right of privacy encompassed something beyond the lease common denominator of the Court's prior decisions with respect to marital choice, procreation, contraception, and child rearing. The right embraces both a general "individual interest in avoiding disclosure of personal matters" and a similarly general, but nonetheless distinct "interest in independence in making certain kinds of important decisions." *Id.* at 599-600. See generally Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Note, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976); Note, *Roe and Paris: Does Privacy have a Principle?*, 26 STAN. L. REV. 1161 (1974).

112. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). This test was applied previously in equal protection cases involving either suspect classifications or fundamental interests. See Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1973).

113. See Comment, *Roe v. Wade and Doe v. Boelton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628, 639-42 (1973).

114. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

115. The state is permissibly concerned with the health and welfare of the child. The necessity of state's interest is exemplified by one surrogate mother's statement that she did not consider the child as hers. Quindlen, *It's the Father's Child—I am Simply Growing it for Him*, N.Y. Times, May 27, 1980, at B12, Col. 2. Because of such attitudes, the state may rightly require a minimum standard of care for the child.

The state also has a permissible interest in the mother. Without state regulation, surrogate mothers may be exploited through coercion and duress. See notes 44-47 *supra*. Finally, the state has a permissible interest as *parens patriae*. See *Wynn v. Carey*, 582 F.2d 1375, 1386 (7th Cir. 1978); *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975).

116. See Gunther, note 112 *supra*.

117. *Griswold v. Connecticut*, 381 U.S. at 484.

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

sufficiently similar. The emphasis in reproductive privacy is on the right of the individual to control his or her own reproductive faculties.<sup>119</sup> To give a second party the right to control another person's reproductive faculties, therefore, would be contradictory. Under this theory, although a surrogate mother's decision to become pregnant is a fundamental right, another party would not have the right to contract for control of the pregnancy. The only case to date that addresses surrogate mothering, *Doe v. Kelley*, adopted this conclusion.<sup>120</sup>

In summary, a showing of both a compelling state interest and necessity would be required in order to legislate with respect to the surrogate mother's decision; however, there does not appear to be a fundamental right to employ a surrogate mother.<sup>121</sup> If this conclusion is accepted by the courts, legislators may constitutionally regulate those activities of the adopting couple that rationally relate to a state interest.

#### IV. CONCLUSION

The practical result of legislative inattention to the emerging area of scientifically controlled reproduction is that the determination of social policy shifts to the biological researcher. As a democratic society, however, we have entrusted our legislatures with the task of determining which social goals should be pursued. This task can only be accomplished by direct confrontation with questions of social concern.

State legislators face three alternatives concerning surrogate mothering: surrogate mothering can be legislatively forbidden; fully sanctioned; or tolerated with an intermediate level of regulation. Constitutional guarantees and practical considerations preclude extreme reactions—selection of either of the first two alternatives. The right of privacy protects an individual's decision to become pregnant. As a result, legislation which forbids certain women from becoming pregnant in anticipation that they will become surrogate mothers is constitutionally unsound.<sup>122</sup> Similarly, both the constitutional ban on the sale of children and common law principles of public policy seem to preclude the sanctioning of surrogate mothering for profit. Legislators should pursue the third alternative. Surrogate mothering should be regulated within constitutional bounds.

The legislation which is adopted may either stimulate or discourage

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119. *Id.*; *United States v. Caesar*, 368 F. Supp. 328, 334 (D. Wis. 1973); Eichbaum, *Towards an Autonomy—Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361 (1979); see Noonan, *supra* note 105.

120. [1979-1981] REP. HUMAN REPRO. L. (Legal-Med. Studies) II-B-15, II-B-18 (Wayne County, Mich. Cir. Ct. 1980).

121. This does not address the separate and distinct issue of whether a mother has a right to determine who may adopt her children. Even if the courts hold that there is such a right, surrogate mothering legislation would not be unconstitutional unless it attempts to totally eliminate transfer of custody. Laws prohibiting the payment of money to the surrogate would not be unconstitutional.

122. Aside from violating a woman's right to privacy, an equal protection problem also surfaces since legislation of this type involves invidious discrimination.

surrogate mothering. For example, a legislature may decide that payment of expenses, including hospital costs, doctor fees, attorney fees, lost wages,<sup>123</sup> and other reasonable costs, is permissible. On the other hand, a legislature may deny any payment to the surrogate mother, including expenses. The latter response would merely give a mother the right to control the placement of her adoptable child. On the spectrum of regulated surrogate mothering, this restrictive stance is most desirable since it accomplishes the beneficial ends of surrogate mothering and avoids the detrimental ends. Restrictive legislation, legislation denying *any* payment to the surrogate mother, permits altruistic women to become surrogate mothers and provide children to otherwise childless couples while preventing the degradation of child-bearing into a mercenary profession which exploits financially needy women.<sup>124</sup> Regardless of the posture selected, the legislature should clarify its adultery and illegitimacy laws, as they apply to surrogate mothering. All parties involved in surrogate mothering are entitled to know the legal consequences of their actions.

*Perry J. Vieth\**

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123. At least one case has implied that a mother may be able to recover lost wages as an expense. *Las Vegas Sun v. Franklin*, 74 Nev. 282, 292, 329 P.2d 867, 872 (1958). This practice, however, is very close to paying the surrogate mother a "profit" for her services.

124. See notes 42-47 *supra* and accompanying text.

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