Commercial Conceptions: A Breeding Ground for Surrogacy

Shari O'Brien

COMMERCIAL CONCEPTIONS: A BREEDING GROUND FOR SURROGACY

SHARI O'BRIEN†

He who is not childless goes down to his grave in peace.[1]

And surely a Man shall see, the Noblest workes, and Foundations, have proceeded from Childlesse men; which have sought to expresse the Images of their Minds; where those of their Bodies have failed.[2]

For many couples the decision to become parents is frustrated by an inability to conceive a child. These couples suffer considerable emotional anguish, and in some cases the inability to conceive leads to marital conflict. Couples who cannot have children are presented with a variety of options: come to terms with childlessness; pursue the adoption of a child; or employ an alternative reproductive method such as artificial insemination. In recent years surrogacy has gained considerable popularity as an alternative reproductive method. In a surrogate transaction a couple arranges for a third-party female to bear their child. Although surrogate transactions are not a recent phenomenon, they take place amid much controversy and confusion. Dr. O'Brien discusses the evolution of surrogate transactions and spotlights the debate and uncertainty surrounding commercial surrogacy transactions. She considers various arguments in support of ratifying surrogacy transactions, and examines the enforceability of surrogate parenting contracts. Dr. O'Brien concludes that commercial surrogacy fosters a perception of children as commodities, contributes to exploitation of and by surrogate mothers, and should not be ratified.

I. INTRODUCTION

The animal side of our nature is to me too dreadful.[3]

Despite the fact our Victorian forbears generally had large families, in the typical nineteenth century home sex "was the skeleton in the parental chamber. . . . Any untoward questions [about sex] were answered with a white lie . . . ."[4] Today, gamete donors and surrogate mothers rattle around in more and more family closets and white lies are told not about engaging in sex, but about circumventing it. The Victorians contrived a myth—that infants were dropped

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1. G. SANTAYANA, REASON IN SOCIETY 43 (1924).

2. F. BACON, *Of Parents and Children*, in THE ESSAYS OR COUNSELS, CIVILL AND MORALL (M. Kiernam ed. 1985) (1st ed. 1625).

3. Queen Victoria. *Quoted in* D. CROW, THE VICTORIAN WOMAN 52 (1972).

4. W. HOUGHTON, THE VICTORIAN FRAME OF MIND, 1830-1870 353 (1957).

into nurseries by long-legged, long-billed birds[5]—to obfuscate that having babies was inextricably linked to sex and pregnancy. Today, the stork is less a myth than a metaphor for the actual dissociation of conception, gestation, and rearing that medical science has made possible.[6]

This Article spotlights the controversy surrounding the ratification of surrogacy, an increasingly popular[7] reproductive method by which biological and nurturing maternal roles are segregated.[8] It examines the origins and modern configurations of the practice, canvasses recent judicial and legislative developments, probes and rejects the arguments that state prohibitions of breeding-for-hire transactions violate the parties' constitutional right of privacy, and considers the enforceability of surrogate parenting contracts allocating responsibilites and placement. The Article concludes that commercial surrogacy fosters a perception of children as commodities and contributes to exploitation of and by host mothers. A marketplace for babies should not be countenanced.[9]

II. DOING WHAT DOESN'T COME NATURALLY: THE CAUSES AND CONTOURS OF SURROGACY

I could be content that we might procreate like trees, without conjunction, or that there were any way to perpetuate the World without this trivial and vulgar way of union: it is the foolishest act a wise man commits in all his life.[10]

Avoiding pregnancy and childbearing are commonplace practices.[11] The

5. "[O]ne suspects that some [Victorian] women, at any rate, would have been happy if the stork had been a reality." *Id.* Queen Victoria, in fact, wrote to her daughter of feeling like a cow or a dog during childbirth—"at such moments . . . our poor nature becomes so very animal and unecstatic . . ."—and obliquely referred to conjugal relations as the "dark side of married life." F. BASCH, RELATIVE CREATURES 36 (1974). She advised a daughter who married on the continent to "think of England" when the occasion for performing marital duties arose. D. CROW, *supra* note 3, at 52.

6. It is now conceivable that a child could be born with three distinct mothers (a genetic mother, a gestational mother, and a rearing mother) and two fathers (a genetic father and a rearing father), lending a whole new dimension to the celebration of Mothers' Day, Fathers' Day, and Grandparents' Day.

7. It probably is impossible to gauge the exact number of people obtaining a child by surrogacy. Recent estimates of the number of babies born to surrogate mothers in this country are fixed at 600, "but their ranks are multiplying." Gelman & Shapiro, *Infertility: Babies by Contract*, NEWSWEEK, Nov. 4, 1985, at 74.

8. *See infra* text accompanying notes 27-40. Commentators, courts, and legislators have assigned to the practice an assortment of terms, none of which are distinguished by precision. A surrogate, after all, is a substitute, yet the so-called surrogate mother is the actual, not a substitute, mother. The author pleads guilty to the charge of employing some of the same slipshod expressions. Her defense is an unwillingness to add further to the rogue's gallery.

A recent New Jersey case, *In re* Baby M., FM-25314-86E (Superior Court of New Jersey, Chancery Division, Family Part filed May 6, 1986), has focussed national attention on the controversy and confusion surrounding this area of the law. For a discussion of *In re* Baby M. and an overview of the problems associated with surrogate parenting, see Galen, *Surrogate Law*, Nat'l Law J., Sept. 29, 1986, at 1, col. 1. *See also infra* note 193 (discussing the facts of the New Jersey case).

9. An intriguing proposal for a free market in babies is presented in Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

10. II T. BROWNE, RELIGIO MEDICI, § IX, at 110-11 (W. Greenhill ed. 1881) (1st ed. 1643). Browne was a seventeenth century British physician.

11. *See generally* Dryfoos, *Contraceptive Use, Pregnancy Intentions and Pregnancy Outcomes*

law poses few obstacles to those who wish to engage in sexual intercourse but avoid pregnancies.[12] At the same time, however, conception eludes a significant number of involuntarily childless couples, for whom legal uncertainty surrounds several contingent modes of conceiving children without engaging in sexual intercourse.[13]

Many couples whose parental aspirations have been thwarted by infertility suffer enormous personal anguish and even marital conflict.[14] A generation ago adoption presented an alternative to a childless future. However, the widespread use of contraceptives, the availability of abortions, and the destigmatization of unwed motherhood have created a short supply of adoptable, healthy infants.[15] In 1984 two million couples contended for the 58,000 children placed for adoption. The ratio of adopters to adoptees stood at thirty-five to one.[16]

Some couples who want but cannot have children will accept one of several conventional compromises available to them: come to terms with childlessness; tolerate a very long period of waiting for an adoption placement; or pursue the adoption of a special needs child.[17] Other couples, frustrated and desperate, will buy babies from black market brokers, who apparently do a brisk business in today's society.[18]

Of course, if the fecundity of the male rather than the female partner is impaired, the inveterate alternative reproductive method, artificial insemination by donor (AID),[19] the use of which today barely raises an eyebrow in most legal,

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Among U.S. Women, 14 FAM. PLAN. PERSP. 81 (1982) (statistical survey of contraceptive use and contraceptive failure). By 1982 the annual number of abortions performed in the United States had exceeded one and one-half million. *See* NAT'L COMM. FOR ADOPTION, ADOPTION FACTBOOK 18 (1985) [hereinafter ADOPTION FACTBOOK].

12. *See* Colautti v. Franklin, 439 U.S. 379 (1979) (expanding the scope of a woman's right to seek an abortion by invalidating a Pennsylvania regulation requiring a doctor to determine viability prior to performing an abortion); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (invalidating statute requiring spousal and parental consent to an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating state ban on use of contraceptives by married persons).

13. In addition to surrogacy, other legally uncertain alternative reproductive methods include embryo transfer and ova donation. *See* Krause, *Artificial Conception: Legislative Approaches*, 19 FAM. L.Q. 185, 190 (1985). For a discussion of these methods, see *infra* notes 19-40 and accompanying text.

14. *See* Robertson, *Surrogate Mothers: Not so Novel After All*, HASTINGS CENTER REP., Oct. 1983, at 28, 29. The author recently had the opportunity to interview a couple enrolled in attorney Noel Keane's surrogate parenting program in Dearborn, Michigan. The infertile wife, a sophisticated, gracious-mannered lawyer, described in moving terms the heartache the couple has experienced during a ten-year childless marriage. The objective of this Article is neither to depreciate the suffering of individual infertile couples nor to portray them as the unscrupulous predators of indigent surrogates.

15. *See* R. LASNIK, A PARENT'S GUIDE TO ADOPTION 56 (1979); Wilson, *Adoption: It's Not Impossible*, BUS. WK., July 8, 1985, at 112.

16. *See* Wilson, *supra* note 15, at 112.

17. *See* R. LASNIK, *supra* note 15, at 56; ADOPTION FACTBOOK, *supra* note 11, at 41-42.

18. *See generally* Note, *Black-Market Adoption*, 22 CATH. LAW. 48 (1976) (discussing problems in regulating black market sales of children and "gray market" placement of children by private adoption agencies); *see also* Louenheim, *Innocence, Inc.*, STUDENT LAW., Dec. 1977, at 23 (reporting increased black market activity characterized by steep prices for infants); Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547 (1975) (discussing means of avoiding a black market in children).

19. Artificial insemination is the introduction of sperm into a woman vaginally to achieve pregnancy without sexual intercourse. *See* W. FINEGOLD, ARTIFICIAL INSEMINATION 5-7 (2d ed. 1976).

medical, and social circles,[20] is readily available.[21] However, if the woman is sterile or is afflicted with a childbearing impairment,[22] the use of donated ova,[23] which is the closest female counterpart to AID, is less accessible, both medically and practically.[24] Moreover, use of a donated egg does not provide a viable solution unless ova nonproduction or tubal damage are the sole or primary impediments to conception. Women without wombs simply cannot benefit from *in vitro* fertilization,[25] as there is no uterus into which an egg can be implanted and nurtured. Thus, those women who are incapable of carrying a child either because they have undergone hysterectomies or because a medical condition like diabetes makes pregnancy or childbirth dangerous, form, in large measure, the pool of candidates who might consider procreation through proxy.[26]

Surrogacy, the phoenix of alternative reproductive methods, is the oldest[27] and technologically the simplest[28] means of procuring a child who is genetically

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A nonexperimental, medically sophisticated technique that was first performed successfully in the eighteenth century, H. DAVIS, ARTIFICIAL HUMAN FECUNDATION 8 (1951), artificial insemination is the method by which an estimated 250,000 people alive in the United States in 1980 were conceived. Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 n.3 (1981). Heterologous artificial insemination, or artificial insemination by donor, is the use of semen not that of the recipient's husband. Homologous artificial insemination (H.A.I.), in contrast, is the use of the sperm of the recipient's own husband; fewer legal issues—paternity and its attendant obligations and rights—are raised in this situation. *See* Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331 (1979-80); Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 128 (1967). By 1984 twenty-five states had enacted statutes governing the artificial insemination of married women. *See* Andrews, *The Stork Market: The Law of the New Reproductive Technologies*, A.B.A. J., Aug. 1984, at 54-55.

20. The Catholic Church opposes artificial insemination, however. *See* Smith, *Intrusions of a Parvenu: Science, Religion and the New Technology*, 3 PACE L. REV. 63, 74 (1982).

21. *See supra* note 19.

22. Approximately 14% of currently married women of childbearing age are infertile. Mosher & Pratt, *National Center for Health Statistics: Fecundity and Infertility in the United States, 1965-82*, VITAL AND HEALTH STATISTICS No. 104, at 5 (Feb. 11, 1985). The percent infertile excludes the surgically sterile. A couple is classified as infertile if, for a period of at least one year, they were sexually active, had not used contraception, and had not conceived. *Id.* at 4.

23. Some commentators have asserted that surrogacy is the female equivalent of AID. *See* Robertson, *supra* note 14, at 30; Smith & Iraola, *Sexual Privacy and the New Biology*, 67 MARQ. L. REV. 263, 270-71 (1984). A sperm donor and an egg donor are logical counterparts, however, as both contribute genetic material only and do not have even minimal involvement with the fetus that results. The surrogate mother's involvement, on the other hand, is intensely personal. *See* AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, ETHICAL ISSUES IN SURROGATE MOTHERHOOD, STATEMENT OF POLICY (May, 1983).

24. In contrast to sperm, which is readily collected, ova can be obtained only through laparoscopy, a surgical procedure performed under anesthesia. *See* P. SINGER & D. WELLS, MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION 59-60 (1985). In addition, the cycles of the egg donor and donee must be synchronized by the use of hormones. *Id. See generally* Gold, *The Baby Makers*, SCIENCE, April 1985, at 26 (discussing the difficulties involved in ova transfers); Mettler, Seki, Baukloh, & Semm, *Human Ova Recovery Via Operative Laparoscopy and In Vitro Fertilization*, 38 FERTILITY & STERILITY 30 (1982) (discussing the problems, success rates, and failure rates in the use of laparoscopy and in vitro fertilization).

25. In vitro fertilization is a medical procedure whereby egg and sperm are joined outside the womb. *See* C. GROBSTEIN, FROM CHANCE TO PURPOSE: AN APPRAISAL OF EXTERNAL HUMAN FERTILIZATION 1 n.1, 14-16 (1981).

26. P. SINGER & D. WELLS, *supra* note 24, at 98.

27. *See infra* text accompanying notes 42-54.

28. A homespun account of the success of do-it-themselves inseminators is found in N. KEANE & D. BREO, THE SURROGATE MOTHER 39-56 (1981).

related to at least one of his or her parents. Broadly stated, in a surrogate transaction a couple arranges for a third-party female to bear their child.[29] The transaction can assume various forms. For example, the carrier may receive payment or she may perform gratuitously;[30] pregnancy may occur through artificial insemination or through intercourse; the surrogacy may be full or partial;[31] a written contract may have been prepared, or an informal verbal agreement may govern;[32] and the rearing couple may be homosexual or heterosexual.[33] Pursuit of a proxy breeder may be the product of necessity due to the

29. Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373, 373-74 (1981). For an article presenting a similar discussion, see Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147.

30. *See* N. KEANE & D. BREO, *supra* note 28, at 57-74 (narrating the experience of a woman whose closest friend offered to have a baby for her); P. SINGER & D. WELLS, *supra* note 24, at 109 (recounting the altruistic surrogacy carried out by one woman for her twin sister). In November 1985 Sherry King of Tamarac, Florida delivered, nine months after being artificially impregnated with her brother-in-law's sperm, a baby for her sister. This gratuitous arrangement gained national attention. Toledo Blade, Feb. 20, 1986, at 14, col. 1; *cf.* P. SINGER & D. WELLS, *supra* note 24, at 99-100 (relating instances of payment for the surrogate).

31. The surrogate in a full surrogate pregnancy contributes nothing but the use of her womb; her body is merely the incubator in which another woman's egg, fertilized in vitro, grows. The popular media properly has dubbed this arrangement "renting a womb." In contrast, the surrogate in a partial surrogate pregnancy contributes both the egg, which is fertilized either by artificial insemination or sexual intercourse, and the gestational environment. P. SINGER & D. WELLS, *supra* note 24, at 96. In August 1985 the first "true" or "full" surrogate pregnancy was confirmed. It was achieved by "ovum implantation," a technique involving surgical removal of an egg from the intended rearing mother, followed by external fertilization of the ovum with the semen of her husband and then by implantation of the fertilized egg into the surrogate's uterus. Dr. Wulf Utian of Sinai Medical Center of Cleveland performed the procedure. The genetic father and mother (sperm and egg donors respectively) were granted a declaratory judgment on March 14, 1986, establishing biological parentage of the child, expected in late April. Under Michigan law no precise definition of "mother" is available. In the absence of a court order directing otherwise, the state department of public health requires the name of the woman who delivers the child to be recorded as its mother on a certificate of live birth. *See* John Smith and Mary Smith v. Mike Jones and Jane Jones, No. 85-532014-DZ, slip op. at 11, (Mich., Wayne County Cir. Ct., Mar. 14, 1986).

Embryo transfer ("prenatal adoption") is a reproductive technique best conceptualized as a biological mirror image of ovum implantation. In this procedure, performed successfully for the first time in California in 1983, a donated ovum undergoes initial cleavage inside the donor; the fertilized ovum, or conceptus, is then transferred to the womb of the gestational mother, who is the intended rearing mother. *See* J. AREEN, P. KING, S. GOLDBERG & A. CAPRON, LAW, SCIENCE AND MEDICINE 1323-24 (1984). Embryo transfer poses different legal and ethical issues from those posed by surrogacy. For example, in a contest between the embryo donor and the embryo recipient, who has the greater claim to the resulting child? *See* P. SINGER & D. WELLS, *supra* note 24, at 64.

32. For a description of various surrogate contracts, see N. KEANE & D. BREO, *supra* note 28, at 306 app.; Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1981-82); Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611 (1978).

33. Lesbian couples have availed themselves of AID to form families. A sperm bank in northern California reported that one-third of its unmarried female clients are lesbian. *See Fertility Rights: Medical Efforts to Help Childless Couples Pose Host of Difficult Issues*, Wall St. J., Aug. 7, 1984, at 1, col. 1. (quoted in P. SINGER & D. WELLS, *supra* note 24, at 54, 223-24); *see also* Hanscombe, *The Right to Lesbian Parenthood*, 9 J. MED. ETHICS 133 (1983) (arguing that the homosexual minority should not be excluded from parenthood). Although homosexual women have used AID to obtain children, no case of a lesbian couple using the surrogate parenting technique has been reported. However, it is not far-fetched to imagine that a lesbian who finds pregnancy unpalatable might contract with a surrogate to carry a child for her by using sperm from an anonymous donor and an egg donated by one of the females involved. Another possibility is that a lesbian couple may wish to share maternity. One could contribute the gestational environment and the other the maternal genetic material. Fertilization could be achieved in vitro by joining donor sperm and the ovum of one of the women. In this way, both rearing parents would be biologically linked to the child. However bizarre the procedure may strike some readers, it obviously is available technologically,

would-be mother's reproductive incapacity, or it may stem from a desire of the would-be mother to avoid inconvenience, morning sickness, a bulky torso, a career interruption, or the discomfort of childbirth.[34] In the typical surrogate parenting arrangement of the 1980s, however, a woman[35] contracts with a married couple, the wife of whom is unable to conceive or carry a child, to be artificially inseminated with the husband's semen. An attorney, who often also has recruited and screened the surrogate, prepares a surrogacy contract.[36] A substantial fee, generally 10,000 dollars or more, is paid to the surrogate and a fee of similar dimensions is paid to the attorney-broker.[37] Increasingly, organizations have supplanted individuals as the brokers who match infertile couples with surrogates and oversee the entire transaction.[38] In the vast majority of cases the surrogate supplies both genetic (the egg) and gestational (the womb) materials.[39] Often, the rules of the organizations or individual brokers who orchestrate surrogacy transactions preclude single people and unmarried couples from participating in surrogate parenting transactions.[40] The contours of modern surrogacy

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now that full surrogacy is an accomplished fact. *See supra* note 31. The California Alternative Reproduction Act, A.B. 1707, Cal. Legis., 1985-86 Session if enacted, would have specifically authorized single men and women to obtain a child via surrogacy, with or without the use of donated sperm or egg. *See infra* text accompanying note 104.

34. *See* P. SINGER & D. WELLS, *supra* note 24, at 98-99; Pritchard, *A Market for Babies*, 34 U. TORONTO L.J. 341, 345 (1984). For the ingenious theory that circumscribing the power of women to engage third parties to undertake the toil of birthing is tantamount to "reproductive slavery," see Morgan, *Making Motherhood Male: Surrogacy and the Moral Economy of Women*, 12 J.L. & SOC'Y 219, 229 (1985). *But cf.* Surrogate Parenting Assocs. v. Kentucky *ex rel.* Armstrong, 704 S.W.2d 209, 215-16 (Ky. 1986) (Wintersheimer, J., dissenting) ("In my view the consequences which could arise from the opening of the human uterus to commercial medical technology does not contribute to the emancipation of women.").

35. The woman who conceives and carries the baby is often herself married. In fact many surrogate brokers limit candidacy to women who have been or are married and who have already borne children of their own. A perception exists that participation of childless single women is undesirable not only because of an adulterous undercurrent, but also because of the absence of a track record of successful childbirths. *See* Smith & Iraola, *supra* note 23, at 273; *see also* Brophy, *supra* note 32, at 263, 265 (describing one organization's acceptance of potential surrogate mothers only if they are over twenty-one years of age and have had at least one live, healthy child); Handel, *Surrogate Parenting, In Vitro Insemination and Embryo Transplantation*, 6 WHITTIER L. REV. 783, 785 (1984) (describing screening procedures and mandatory group counseling for surrogate candidates required by one organization).

36. *See* Robertson, *supra* note 14, at 28-29.

37. *See* Robertson, *supra* note 14, at 28-29; *see also* Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 475 (1983) (estimating "a total cost of about $20,000 for the procedure"); *Wrong mothers, wrong babies*, THE ECONOMIST, April 20-26, 1985, at 63 ("A commissioning parent can expect to pay some $20,000 for a baby, including medical and legal fees.") (quoted in *Krause*, *supra* note 13, at 202 n.87).

38. A few of the "surrogate mother" services include Surrogate Parenting Associates, Inc. in Louisville, Kentucky; Surrogate Family Services, Inc. in Dearborn, Michigan; The Hagar Institute in Topeka, Kansas; Surrogate Mothering, Ltd. in Philadelphia, Pennsylvania; and the National Center for Surrogate Parenting in Maryland. Of the two dozen or so services in the United States, a nonprofit agency in Louisiana has become the first to gain government approval. *Wrong mothers, wrong babies*, THE ECONOMIST, April 20-26, 1985, at 63 (quoted in Krause, *supra* note 13, at 202 n.87).

39. For an explanation of full and partial surrogate pregnancies see *supra* note 31.

40. *See* Note, *In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience*, 69 KY. L.J. 877, 881 (1980-81) [hereinafter Note, *In Defense of Surrogate Parenting*]. State statutes introduced to date, however, are sufficiently ambiguous to allow for the transfer of the child of a surrogate to a single parent of either sex. *See Survey of State Activity Regarding Surrogate Motherhood*, 11 Fam. L. Rep. (BNA) 3001, 3003 (Jan. 29, 1985). Some bills have expressly author-

transactions diverge radically from surrogate arrangements as they existed before the advent of the "high tech" stork age. Earlier prototypes bear but a remote resemblance to late twentieth century surrogacy; parallels nevertheless exist, and the similarities are as instructive as the differences.

III. SURROGACY AMONG THE ANCIENTS

What has been is what will be, and what has been done is what will be done; and there is nothing new under the sun.[41]

Proponents of surrogacy steadfastly cite its venerable biblical origins.[42] The Hagar Institute in Topeka, Kansas, one of several burgeoning surrogate parenting brokerages in the United States,[43] has even derived its name from the key player in the first recorded surrogate deal struck in history.[44] No lawyers or doctors participated in the Old Testament precedent. Rather, the eighty-six year old Abraham heeded the advice of his barren wife Sarah, ten years his junior and apparently well past menopause, to "go in to my maid"[45] Hagar. The maid conceived and a baby was born nine months later. Advocates of surrogacy, however, usually fail to chronicle the turmoil that transpired between conception and birth.[46] Soon after Hagar became preganant, she began to despise Sarah, Sarah blamed Abraham, and Abraham insisted that Sarah handle Hagar. Sarah in turn harshly rebuked Hagar, who consequently left town.[47] Like modern day couples confronting an uncooperative pregnant surrogate, Abraham and Sarah might have been left with an empty nest and no effective remedy. God intervened, however, urging Hagar to return, but at the same time acknowledging her anguish.[48] At Sarah's insistence Abraham eventually cast out Hagar and their son Ishamel,[49] who would become "a wild ass of a man, his hand against every man and every man's hand against him."[50] Later in Genesis the story of Jacob, his two wives, and their proxies is imbued with equal measures of

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ized that an unmarried couple may become the rearing family. *See, e.g.*, Alternative Reproduction Act, A.B. 1707, Cal. Legis., 1985-86 Session. It has been argued that preventing unmarried persons from procreating by means of reproductive technology violates the due process clauses of the fifth and fourteenth amendments to the United States Constitution. *See* Comment, *Surrogate Motherhood in California: Legislative Proposals*, 18 SAN DIEGO L. REV. 341, 383 (1981); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 675 (1985). *But see* Smith & Iraola, *supra* note 23, at 284-85 (arguing that recent Supreme Court decisions on abortion and contraception do not protect a right to conceive).

41. *Ecclesiastes* 1:9 (Revised Standard Version).

42. *See, e.g.*, Comment, *Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion*, 16 U. RICH. L. REV. 467 (1982); Note, *In Defense of Surrogate Parenting*, *supra* note 40, at 880.

43. *See supra* note 38.

44. *Genesis* 16:1-15.

45. *Id.* 16:2 (Revised Standard Version).

46. *See, e.g.*, Note, *In Defense of Surrogate Parenting*, *supra* note 40 (citing the biblical account but omitting discussion of the problems the surrogate arrangement created).

47. *Genesis* 16:4-7.

48. *Id.* 16:9-11.

49. *Id.* 21:9-14.

50. *Id.* 16:12 (Revised Standard Version).

bitterness, jealousy, and spite.[51]

It is not surprising that the ancient Hebrews encountered difficulties in situations that are almost parodies of today's surrogate arrangements. But it is ironic that surrogacy today is justified, in part, by way of allusion to these ill-fated biblical anecdotes. If anything, history instructs that dormant in every surrogate parenting arrangement is an explosive and tragic human drama. Furthermore, the exchange of money and access to abortion that accompany modern surrogacy were missing in the biblical surrogacies. Today's commercial surrogate holds the trump card of abortion. Thus, extortion now supplements the perennial possibilities of change of heart, envy, and suspicion.[52]

Surrogacy in a rudimentary form— the adulterous method to which the biological father's spouse acquiesced—no doubt was practiced in the millenia bridging Hagar's day and ours. Certainly most civilizations throughout history have regarded the production of heirs, especially male heirs, as woman's major social and religious responsibility.[53] Men were thus permitted, not only in ancient Hebrew society, but also in Roman, Arabic, European, Medieval, and Renaissance cultures, to displace barren wives with plural consecutive marriage and concubinage.[54] It is beyond the scope of this Article to probe the status of alternative reproduction techniques through the ages. Accordingly, it is necessary to take a quantum leap from an ancient to a contemporary setting.

IV. THE LEGAL STATUS OF SURROGACY IN THE EIGHTIES

Finality is not the language of politics.[55]

Commercial surrogacy in the late twentieth century is practiced in a climate of legal suspense. Participating lawyers, physicians, biological parents, and spouses "may be committing a felony"[56] by transgressing statutes providing that a person cannot pay for the custody of a human being. Theoretically, those conspiring to commit the crime of buying or selling a baby could face twenty-six years in jail.[57] Commentators on both sides of the controversy surrounding commercial surrogacy probably agree on at least one point: unequivocal legal guideposts desperately are needed in this area.

A. *Judicial Activity*

Lawsuits brought by and against participants in surrogate parenting transactions have occupied but a few court dockets in a handful of states. *Doe v.*

51. *Id.* 30:1-24.

52. For an eye-popping initiation into the darker side of surrogate arrangements, *see* N. KEANE & D. BREO, *supra* note 28, at 99-114, 197-209 (1981). Keane, a Michigan attorney who is perhaps the nation's foremost surrogacy entrepreneur and advocate, recounts, *inter alia*, the nightmarish experiences of one couple who contracted with a lesbian addicted to drugs and alcohol who extracted more and more money from them during and after her pregnancy.

53. A. IDE, WOMAN: A SYNOPSIS 104 (1983).

54. *Id.*

55. Disraeli, *Representation of the People*, 152 PARL. DEB. (3d Ser.) 966, 969 (1859).

56. Handel, *supra* note 35, at 784.

57. Handel, *supra* note 35, at 784.

Kelley [58] was the first and is still a leading American case. The pseudonymous John and Jane Doe had contracted with Mr. Doe's secretary to conceive, by means of artificial insemination, and bear Mr. Doe's child for a sum of 5000 dollars plus medical expenses. The contract further stipulated that Mr. Doe would formally acknowledge the paternity of the child at birth and that the surrogate would consent to the child's adoption by the Does.[59] The Michigan Court of Appeals rejected plaintiffs' claim that sections of the state adoption code prohibiting the exchange of money in connection with adoption and child placement proceedings impermissibly infringed on their constitutional right to privacy.[60] The court concluded that the disputed statutory provisions did not interfere with plaintiffs' right to automony in deciding to bear or beget a child, but rather "[precluded] plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures."[61]

More recently surrogacy advocates registered an uncertain victory in *Syrkowski v. Appleyard*.[62] The Michigan Supreme Court in *Syrkowski* permitted a sperm donor to use the state Paternity Act,[63] designed as a procedural device for determining paternity and enforcing the resulting support obligation, as a vehicle for effectuating a surrogate parenting arrangement. Corinne Appleyard, a married woman, gave birth to Teresa, her third child. All of the parties admitted that the child was fathered through artificial insemination using George Syrkowski's semen, pursuant to a surrogate parenting contract.[64] Syrkowski and his wife took custody of the child and paid Appleyard 10,000 dollars plus expenses.[65] Five months before Teresa's birth, Syrkowski had filed a complaint for filiation, relying on the Michigan Paternity Act. Nonadversarial defendant Appleyard answered by admitting plaintiff's allegations and joining his request for an order declaring his paternity.[66] Rejecting the intervening Michigan Attorney General's argument that the relief requested disserved the purpose of the Paternity Act, the supreme court sanctioned using the state's legislative and judicial apparatus to facilitate bringing a child born of a surrogate parenting contract into its biological father's home.[67] At the same time the court neither overruled *Doe v. Kelly* nor expressed an opinion on the entitlement of Syrkowski to other forms of judicial relief beyond a determination of biological paternity.[68]

In other jurisdictions, the District of Columbia Superior Court in 1984 ordered a detailed factual inquiry into the ramifications of what it styled a surrogate mother adoption case.[69] The issues raised in the opinion indicate a cautious

58. 106 Mich. App. 169, 307 N.W.2d 438 (1981).
59. *Id.* at 172, 307 N.W.2d at 440.
60. *Id.* at 172-74, 307 N.W.2d at 440-41.
61. *Id.* at 174, 307 N.W.2d at 441.
62. 420 Mich. 367, 362 N.W.2d 211 (1985).
63. MICH. COMP. LAWS § 722.714 (1979) (MICH. STAT. ANN. § 25.494 (Callaghan 1984)).
64. *Syrkowski*, 420 Mich. at 369, 362 N.W.2d at 212.
65. *Id.*
66. *Id.* at 370, 362 N.W.2d at 212.
67. *Id.* at 375, 362 N.W.2d at 214.
68. *Id.* at 373, 362 N.W.2d at 213.
69. *In re* R.K.S., 10 Fam. L. Rep. (BNA) 1383 (1984).

approach to approving an adoption resulting from the natural mother's "abandonment" of her child to its biological father.[70] In late 1985 a California appellate court ruled that attorneys who represent parties to surrogate parenting arrangements lack standing to attack the constitutionality of a state statute governing paternity in cases of artificial insemination.[71] The statute provides that the sperm donor should not be regarded as the natural father of a child born to a woman who is artificially inseminated.[72] Although the court expressed "grave doubts" about the applicability of the statute to participants in a surrogate parenting arrangement, it held that the parties' attorneys themselves possessed no cause of action.[73]

The Kentucky courts also have considered the legality of surrogate parenting arrangements.[74] Two years after the State Attorney General issued an opinion that surrogate parenting is unlawful in Kentucky,[75] a state circuit court in 1983 refused to permit a surrogate mother to use the machinery of the court to terminate her parental rights.[76] More recently, in the culmination of a series of proceedings spanning several years, the high court of Kentucky in 1986 became the first state supreme court to confront squarely the issue of the legality of commercial surrogacy. *Surrogate Parenting Associates v. Kentucky ex rel. Armstrong*[77] commenced when the Attorney General sought to revoke the corporate charter of a medical clinic functioning as an intermediary between surrogates it recruited and infertile couples.[78] Reversing the Kentucky Court of Appeals, the supreme court held that the participants in a surrogate parenting procedure do not violate the state statute prohibiting the sale or purchase of children.[79] Commercial surrogacy does not, the court concluded, differ biologically from "the reverse situation where the husband is infertile and the wife conceives by artificial insemination."[80] The majority, without elaboration, predicated its refusal to proscribe surrogate parenting arrangements on a constitutional right of reproductive privacy.[81] The court devoted a substantial portion of its opinion to a separation of powers treatise[82] insisting that the social and ethical questions raised in the solutions to infertility offered by biomedical science must be resolved "in the legislative domain, not the judicial. . . . [T]he threshold question

70. *See id.* Subsequent records of this adoption proceeding are sealed. The D.C. Corporation counsel, however, appointed *amicus curiae*, revealed that the adoption petition was approved. Telephone interview with the office of the District of Columbia Corporation (Nov. 21, 1985).

71. Sherwyn & Handel v. Department of Social Servs., 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985).

72. CAL. CIV. CODE § 7005(b) (West 1983).

73. *Sherwyn*, 173 Cal. App. 3d at 59, 218 Cal. Rptr. at 783.

74. For a discussion of other jurisdictions in which surrogate parenting disputes have arisen, see *infra* note 193.

75. 1980-81 Ky. Op. Att'y Gen. 81-18, 2-588 (Jan. 26, 1981).

76. *In re* Baby Girl, 9 Fam. L. Rep. (BNA) 2348 (1983).

77. 704 S.W.2d 209 (Ky. 1986).

78. *Id.* at 210.

79. *Id.* at 214. The court of appeals had concluded that its decision to prohibit the surrogate parenting technique comported with legislative intent. *Id.* at 211.

80. *Id.* at 212. It is arguable that the process is distinguishable from AID. *See supra* note 23.

81. *Surrogate Parenting Assocs.*, 704 S.W.2d at 212-13.

82. *Id.* at 213-14.

is whether the legislation on the books declares the procedure impermissible. Short of such legislation it is not for the courts to cut off solutions offered by science."[83]

Notwithstanding two vigorous dissents,[84] *Surrogate Parenting Associates* has far-reaching precedential significance, if only because it is the first state supreme court decision that braves, on a substantive level, the turbulent waters of surrogate parenting. As that court recognized, however, the ultimate determination of whether women will be allowed to use themselves "as human incubators and . . . sell, for a price, all their parental rights in a child thus born"[85] awaits the legislatures of Kentucky[86] and of forty-nine other states.[87]

B. *Legislative Activity*

Legislative response to procreative technology has been lethargic generally,[88] but in the case of surrogate parenting lawmakers across the nation have reacted catatonically. Although by 1985 every state had enacted legislation criminalizing trafficking in children, no state has yet passed legislation either expressly authorizing or proscribing surrogacy.[89] A string of bills, some sanctioning and some prohibiting the practice, have gyrated through the legislatures of at least twenty-one states,[90] but legislators unwilling to act have kept the legal status of surrogate parenting in a state of suspended animation. An exhaustive survey of the proposals that in all instances have encountered stalemate or defeat is beyond the scope of this discussion. However, a laconic overview of two recent bills will illustrate the general legislative orientation.

The Legislative Council of the District of Columbia has deliberated the merits of a surrogate parenting regulatory act. As drafted the District of Columbia proposal[91] mandates psychological counseling for both the surrogate and her husband and the natural father and his wife.[92] The natural father and the host mother must submit to medical tests to detect genetic disorders or sexually transmitted diseases. Under the bill the presence of sexually transmitted diseases disqualifies an individual from participation in the procedure.[93] Within twenty-four hours after the birth of the child, blood or tissue typing tests tending to establish paternity are to be performed on the surrogate, her spouse, and the infant. The results of these tests are to be made available immediately to all parties.[94] The proposed legislation requires the surrogate and her husband,

83. *Id.* at 213.
84. *Id.* at 214 (Vance, J., dissenting), 214 (Wintersheimer, J., dissenting separately).
85. *Id.* at 214 (Vance, J., dissenting).
86. *Id.* at 213.
87. *See Survey of State Activity Regarding Surrogate Motherhood*, *supra* note 40, at 3001.
88. *See* Krause, *supra* note 13, at 190-91; Wadlington, *supra* note 37, at 482-86.
89. *Survey of State Activity Regarding Surrogate Motherhood*, *supra* note 40, at 3003.
90. *Survey of State Activity Regarding Surrogate Motherhood*, *supra* note 40, at 3003.
91. Council of the District of Columbia Bill 6-152 (1985). The bill was introduced by Councilman John Ray in 1985. No action has been reported.
92. *Id.* § 3(b)(3), (5).
93. *Id.* § 5(a)(1).
94. *Id.* § 6(a).

prior to insemination, to consent in writing to relinquish their parental rights and responsibilities permanently, effective upon the birth of the child.[95] Notably, the bill makes it unlawful to provide consideration to the surrogate or her spouse except for reimbursement of medical and legal expenses, loss of income, and costs incurred as a direct result of the pregnancy.[96] This not-for-profit provision, inconspicuously fused into an act that otherwise appears to champion surrogate parenting, would actually serve more to hinder than to effectuate the practice in the District of Columbia.[97]

In contrast to the District of Columbia proposal, California's Alternative Reproduction Act, if enacted, would have authorized commercial surrogacy.[98] Breathtakingly detailed, the California proposal[99] aspired to anticipate most contingencies. The surrogate mother's consent to termination of her parental rights would have been voidable at her option twenty days after the child's birth in the event that both the biological father and the intended mother died.[100] The contracting couple would have nominated a guardian to take responsibility for the child had the couple failed to survive and the surrogate opted not to revoke her consent.[101] The death of the biological father before completion of the adoption would not have prejudiced the intended (rearing) mother's custodial rights or her right to adopt the child.[102] The proposal mandated a provision for term life insurance on the lives of the surrogate and the infertile couple, as well as adequate health insurance for the surrogate.[103] The California bill not only expressly permitted a single person of either sex to obtain a child by hiring a surrogate, but also permitted him or her to procure donor ova or sperm for that purpose.[104] The resulting child would, by design, have had no biological relationship to the single parent who contracted for his or her creation.[105] This scheme approached the outer limits of deliberate splicing of the biological and nurturing roles. The California proposal palpably distended the ostensible purpose of surrogacy—to furnish a means of procreation for infertile couples.

In at least fourteen other states, prosurrogacy legislation has been offered,

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95. *Id.* § 4(c).

96. *Id.* § 5(d).

97. One commentator has noted that "since the services of a surrogate mother are far too onerous to be provided gratuitously . . . a prohibition on compensation for surrogate motherhood [would] be equivalent to a prohibition of the practice." Black, *supra* note 29, at 389.

98. Alternative Reproduction Act, A.B. 1707, at 9, Cal. Legis., 1985-86 Session ("reasonable monetary compensation shall be paid to the surrogate by the infertile couple").

99. Introduced March 7, 1985, the proposed Alternative Reproduction Act, A.B. 1707, Cal. Legis., 1985-86 Session, had remained active and was in the Senate Committee on the Judiciary as of Feb. 24, 1986. On August 20, 1986, however, the bill was defeated in the Senate. Telephone interview with Ray Lenau, California Legislature Bill Room (Oct. 22, 1986).

100. *Id.* at 5-6.

101. *Id.* at 6.

102. *Id.* at 5.

103. *Id.* at 8-9.

104. *Id.* at 3.

105. A perspective on some of the drawbacks of segregating "the genetic, gestational, and rearing dimensions of parenthood (except through rescue), as in adoption" is offered in McCormick, *Therapy or Tampering? The Ethics of Reproductive Technology*, AMERICA, Dec. 7, 1985, at 396, 401-02.

but, as indicated, always has been jettisoned.[106] One state, however, has taken a small but unequivocal step in the direction of authorizing surrogacy. The Kansas legislature in 1984 amended its adoption code to provide that the prohibition against advertising by any individual or nonlicensed child placement agency to procure a child for the purposes of adoption shall *not* extend to a prospective surrogate mother or person seeking one.[107] Coupled with the recent decision of the Kentucky Supreme Court legalizing surrogacy,[108] the Kansas amendment may be a harbinger of the forbearance in the United States of commissioning for the birth of children.

V. COMMERCIAL CONCEPTION: A FUNDAMENTAL RIGHT?

Motherhood is neither a duty nor a privilege, but simply the way that humanity can satisfy the desire for physical immortality . . . .[109]

Proponents of surrogacy have contended that entering into a surrogate pregnancy arrangement is a fundamental right protected by the United States Constitution.[110] The basis for this contention is a series of Supreme Court cases holding that the due process clauses of the fifth[111] and fourteenth[112] amendments to the Constitution, together with the penumbral rights emanating from specific guarantees in the Bill of Rights,[113] confer on individuals a right of privacy.[114] In precise terms, a right of privacy entails a right of autonomy in making decisions touching on highly personal or family matters, such as bearing or begetting a child.[115] Of far-reaching importance, in the landmark case of *Roe v. Wade*[116] the Court found the right of privacy to be broad enough to encompass a woman's decision to obtain an abortion. Those favoring commercial surrogacy maintain that because the choice *not* to procreate is constitutionally protected,

106. *Survey of State Activity Regarding Surrogate Motherhood, supra* note 40, at 3003.

107. KAN. STAT. ANN. § 65-509 (1984).

108. *See supra* text accompanying notes 75-83.

109. G. SELDES, THE GREAT THOUGHTS 444 (1985) (quoting Rebecca West).

110. *See* Brief for Appellant at 18-19, *Surrogate Parenting Assocs.*; Black, *supra* note 29, at 387-92; Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 408, 422 (1979).

111. The fifth amendment provides, in part, "nor [shall any person] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

112. The fourteenth amendment provides, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

113. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

114. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (invalidating several state regulations of abortion procedures as hindering a woman's fundamental right to choose to have an abortion); Roe v. Wade, 410 U.S. 113 (1973) (striking down a Texas statute banning abortion except when necessary to save the mother's life); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating, on equal protection grounds, statute prohibiting the distribution of contraceptives to single persons); Griswold v. Connecticut, 381 U.S. 479 (1965) (overturning state statute criminalizing the use of contraceptives, or counselling, or aiding others in their use); Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating state statute providing for the compulsory sterilization of felons convicted of crimes of moral turpitude).

115. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977) ("[T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").

116. 410 U.S. 113 (1973).

the corresponding choice to procreate—and to employ any procreative method available—should be symmetrically protected.[117] Significantly, however, the right to decide not to procreate, that is, the right to choose to terminate a pregnancy, is not absolute. Governments can justify the abridgement of the fundamental right to choose by demonstrating that a countervailing compelling state interest is thereby promoted and that the means of promotion are closely tailored to the end sought to be achieved.[118] Accordingly, after the second trimester of the pregnancy the state's interest in the potentiality of human life becomes sufficiently weighty to justify checking the pregnant woman's interest in maintaining "bodily integrity and life plans."[119] The state thus may proscribe abortion at the beginning of the third trimester, when the fetus is thought to be viable, except in the rare instances in which abortion is essential to preserve the mother's life or health.[120]

The constitutional protection that society should accord to surrogate parenting bargains is susceptible to parallel analysis. Although individuals have a right to choose to conceive and bear children, that right should be no more absolute than the right to decide *not* to conceive and bear children. The impairment of the choice to procreate can be justified by establishing a countervailing compelling state interest, the achievement of which is attainable through no less drastic means than impairing that choice. Thus, for example, the state arguably has a sufficiently ponderous interest in preserving the dignity of mankind to warrant prohibiting trans-species fertilization despite the fact a mentally ill person might express a desire to breed and bear the world's first centaur or mermaid.[121] Less facetiously, the state similarly may demonstrate a compelling interest in preventing the commodification of children,[122] averting human exploitation,[123] or perhaps in deterring the making of contracts that for all practical purposes are unenforceable.[124]

The meager case law on the constitutionality of legislation barring, by implication, commercial surrogacy[125] is marked by disparity and sometimes obscu-

117. *See* Black, *supra* note 29, at 387-92; Robertson, *supra* note 110, at 408; *see also Surrogate Parenting Assocs.*, 704 S.W.2d at 211-12 (equating the decision to avoid bearing children with the decision to have children through artifical modes of conception).

118. *See Roe*, 410 U.S. at 155; Eisenstadt v. Baird, 405 U.S. 438, 463-64 (White, J., concurring).

119. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 931-32 (1978); *see also* Planned Parenthood v. Danforth, 428 U.S. 52, 63-65 (1976) (determination of viability is a matter for the attending physician, not the legislature or the courts). The trimester framework adopted in *Roe* and its progeny has been attacked vehemently by some scholars. *See, e.g.*, Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1641 (1979); *see also* Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 458-61 (1983) (O'Connor, J., dissenting) ("the trimester framework . . . is clearly on a collision course with itself" and "*potential* life is not less potential in the first weeks of pregnancy than it is at viability or afterwards").

120. *Roe*, 410 U.S. at 164-65.

121. *See* R. SCOTT, THE BODY AS PROPERTY 41 (1981) (citing aborted experiments two decades ago in Chinese laboratories inseminating a female chimpanzee with human sperm); *see also* Krause, *supra* note 13, at 187 n.11 (quoting conclusions reached on interspecies fertilization by the Warnock Committee of Inquiry into Human Fertilization and Embryology in Great Britain).

122. *See infra* text accompanying notes 144-50.

123. *See infra* text accompanying notes 137-43.

124. *See infra* text accompanying notes 175-209.

125. In Michigan, for example, provisions of the state adoption code prohibit exchanging money

rity.[126] It remains an open question whether statutes forbidding commercial surrogacy interfere with the personal freedom to have a child or to select a preferred mode of reproduction,[127] or merely forbid prospective parties to an adoption to confer or collect profit in tandem with their use of a state's adoption process or termination of parental rights procedures.[128] It is of course true that the incidental effect of such legislation is to eliminate *commercial* surrogacy as a potential means of procuring a child. The primary purpose and effect of such statutes, however, is to forestall any and all forms of trading in children, rather than to meddle with sexual conduct in the environs of a couple's bedroom,[129] to manipulate personal decisions on family size,[130] or to check gratuitous surrogacy.[131] An unsavory and clumsy, but nevertheless serviceable analogue is found in the context of anti-prostititution statutes.[132] These laws criminalize not mere sexual activity but meretricious sexual activity. People choosing to gain and grant sexual access for payment will not succeed in persuading judges, legislators, and citizens in most jurisdictions that their right of privacy—a personal liberty bestowed by the Constitution—is abridged by laws proscribing prostitution. Those laws of course have the secondary effect of intruding into a zone of privacy, but the private zone becomes a public precinct to the extent that the sexual activity is for hire and harms society.[133]

The highly intimate decision to bear and beget a child has long been recognized as a fundamental right, the effectuation of which is well-insulated from casual limitation by the state.[134] However, like pregnant women who seek abortions, would-be commercial surrogates and couples who contemplate relying on them to procure children are not "isolated in [their] privacy."[135] When the state meets its burden of demonstrating that another interest is significantly and negatively implicated by the exercise of the right of autonomy in procreative matters,

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or valuable consideration in connection with adoption proceedings. MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1986) (MICH. STAT. ANN. § 27.3178(555.54) (Callaghan 1984)). Kentucky has enacted a similar statute that also prohibits selling or purchasing "termination of parental rights." KY. REV. STAT. ANN. § 199.590(2) (Michie/Bobbs-Merrill Supp. 1986).

126. *See supra* text accompanying notes 58-87; *infra* note 193.

127. *See Surrogate Parenting Assocs.*, 704 S.W.2d at 213.

128. *See* Doe v. Kelley, 106 Mich. App. 169, 176, 307 N.W.2d 438, 441 (1981).

129. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (asking rhetorically: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?").

130. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977) (access to contraceptives is essential to exercise the right of decision-making in childbearing matters).

131. Some commentators have stressed that by precluding payment to a surrogate, states would essentially be extirpating this mode of reproduction, as few women will conceive and carry a child for an infertile couple out of the goodness of their hearts. *See* Black, *supra* note 29, at 388-89.

132. All states but Nevada have legislation proscribing prostitution. *See* J. DECKER, PROSTITUTION: REGULATION AND CONTROL 81-92 (1979) (discussing prostitution-related controls and their implementation in the United States).

133. *Id.* Perspectives on the causes and effects of prostitution are found in G. SCOTT, LADIES OF VICE: A HISTORY OF PROSTITUTION FROM ANTIQUITY TO THE PRESENT DAY (1936); C. WINICK & P. KINSIE, THE LIVELY COMMERCE (1971).

134. *See supra* notes 110-16 and accompanying text.

135. *See Roe*, 410 U.S. at 159.

it may abridge that right. The sections that follow consider several of the consequences of surrogacy that the state may assert as warranting prohibition.

VI. COMMODIFICATION AND OPPRESSION: THE INCIDENTS OF COMMERCIAL SURROGACY

Money is indeed the most important thing in the world; and all sound and successful personal and national morality should have this fact for its basis.[136]

A student commentator has urged that paying the surrogate mother for the use of her reproductive system and the product that results from its use is logically indistinguishable from paying a sperm donor for his services and wares.[137] Other commentators argue that because compensation to a sperm donor is permitted, *a fortiori* compensation to a surrogate mother should be permitted, as pregnancy and childbirth are much more hazardous, painful, and time consuming than donating semen.[138] The short answer to this argument is that semen *is* distinguishable from a baby, even from a fetus,[139] and it is as much a product as a service that is being bought in both instances. A more refined response emanates from examination of other forms of human anatomical trafficking. A modest fee is legitimately and customarily paid to those who donate blood.[140] Federal law, however, prohibits giving or receiving valuable consideration for a human organ.[141] Applying the nimble syllogism of commercial surrogacy proponents, it is ironic that the law tolerates remuneration to blood donors but not to organ donors on the ground that a person who gives blood is endangered and inconvenienced to a lesser extent than one who gives an eye or a kidney. However, it is precisely *because* donating an organ is so risky, as well as so permanent, that the law deters people from relinquishing nonregenerative parts of themselves for mere money. When money animates the transfer of a human substance, the issue of exploitation arises. The danger is that the transferor is exploiting the desperate need of the transferee and that the transferee is exploiting the financial need of the transferor. The potential for exploitation is minimized when there is a marketing of blood or sperm. The seller is not imperilled, the buyer pays a nominal fee,[142] and the commodity sold is fungible and regen-

136. G. SHAW, PREFACE, THE IRRATIONAL KNOT xiv (1905) (the remark was, of course, characteristically satirical).

137. Note, *In Defense of Surrogate Parenting*, *supra* note 40, at 915-16.

138. *See* Black, *supra* note 29, at 380; Comment, *supra* note 42, at 477-78 n.85.

139. *Roe*, 410 U.S. at 163-65, established that the state has a compelling interest in protecting a viable (third trimester) fetus. But during the first trimester of pregnancy, the state may not proscribe or even closely regulate abortions, as embryos at this stage are not viable. *See id.* Obviously, the moral status of sperm or unfertilized ova (the gametes) does not forbid their waste. *See* P. SINGER & D. WELLS, *supra* note 24, at 71. If sperm were placed on the same footing, legally and morally, as a fetus or a newborn infant, nocturnal emissions could be regulated by society.

140. The debate on the relative merits of commercial versus gratuitous blood banks is presented in R. TITMUSS, THE GIFT RELATIONSHIP (1971).

141. 42 U.S.C.A. § 274e (West Supp. 1986) prohibits the purchasing, acquiring, or transferring of organs for valuable consideration.

142. Sperm donors generally are paid between $20 and $35 per deposit. Nearly two-thirds of the physicians in a 1977 study who performed artificial insemination relied on medical students or resi-

erative. On the other hand, when an organ or an infant is being marketed the seller experiences pain and substantial risks, the buyer may pay a hefty or even an extortionate fee, and the commodity sold is unique and irreplaceable.

In addition, the sophism advanced by commercial surrogacy proponents that a seller is merely recouping what he or she has expended in *services*[143] has no more merit in the context of procurement of another's baby than it does in the context of procurement of another's organ. The services component cannot be isolated from the goods component, especially when the idiosyncratic goods are being supplied from the very body of the seller, and must be proffered if the deal is to be consummated. For some of the same reasons that organ vending is prohibited, commercial surrogacy should be prohibited. Lines can and should be drawn between blood and organs, and between sperm and infants.

The apprehension of exploitation is heightened in the case of commercial surrogacy by the presence of an exploitable third party: the child. Blood, sperm, and even kidneys are not, as things without personality, capable of being exploited. In contrast, a baby is not only an object through which adult parties can exploit each other, but also can itself be abused. Sober commentators already have discussed the feasibility of cloning human beings who would serve as spare parts reservoirs for organ transplant recipients.[144] Moreover, families might conceive a second child for the purpose of using it as a bone marrow, eye, or kidney donor for an existing sick child.[145] Of course, parents conceiving a child by the mundane method might also contemplate using or abusing their offspring. Commercial surrogacy, however, encourages conceptualizing babies as commodities. The surrogate, at least, usually does not create a child merely because she wants it for its own sake,[146] but because she wants to earn a fee from its production.[147] As commercial surrogate transactions multiply, the notion that children can be conceived for profit, or parental rights can be terminated for

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dents for donations. *See* Curie-Cohen, Luttrell, & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 586-87 (1979).

143. *See, e.g.*, N.Y. Times, Feb. 27, 1984, at C12, col. 2 (cited in Krause, *supra* note 13, at 200, n.80).

144. *See* Peters, *The Brave New World: Can the Law Bring Order Within Traditional Concepts of Due Process?*, 4 SUFFOLK U.L. REV. 894, 901-02 (1970); *see also* P. SINGER & D. WELLS, *supra* note 24, at 140 (suggesting that removing organs from clonal embryos at an early stage and growing them in cultures would save the lives of many dying patients by decreasing the chances of organ rejection). For several years researchers have produced frog clones successfully. *See* Watson, *Moving Toward the Clonal Man*, ATLANTIC, May 1971, at 50. In 1981 scientists claimed to have created the first clonal mouse. *See* J. AREEN, P. KING, S. GOLDBERG & A. CARRON, LAW, SCIENCE AND MEDICINE 1329 (1984).

145. One set of California parents reportedly decided to produce a bone marrow donor-sibling for their ailing child. *See* Krimmel, *The Case against Surrogate Parenting*, HASTINGS CENTER REP., Oct. 1983, at 35, 36 (1983).

146. *Id.* at 36.

147. Recent demographic and motivational data on 125 women who applied to be surrogate mothers reveal that the vast majority require a fee for their participation, although surrogacy candidates often have secondary motives for their participation. *See* Parker, *Motivation of Surrogate Mothers: Initial Findings*, AM. J. PSYCHIATRY, Jan. 1983, at 117. During interviews with several prospective surrogates at Noel Keane's Dearborn office on Feb. 22, 1986, the author discovered that all the women were either unemployed or worked at low-paying positions. A variety of secondary motives was articulated by this small cross section. These included the need to assuage guilt over an abortion, the desire to "help" someone else, and the gratification obtained from being pregnant.

a price, will become less shocking. These ideas might become especially accepted if states enact statutes authorizing commercial surrogate transactions. Making this form of trade routine would alter social perceptions of children;[148] babies, like automobiles, stock, and pedigreed dogs, will be viewed quantitatively, as merchandise that can be acquired, at market or discount rates. Once society accepts dollars and infants as reciprocal, people will be less averse to bearing children as a means to an end,[149] such as obtaining a bone marrow donor. The closest historical antecedent to the commodification of humanity—slavery in this nation only one hundred and twenty-five years ago—should present some resistance to returning to a practice of legally sanctioned trafficking in lives.[150]

The impact on the surrogate's own children of her participation in a childbearing-for-profit venture also should be considered. Presumably a youngster whose mother markets her genes and womb must be told something when the newborn infant is never brought home from the hospital. A child who is told half or all of the truth—that the baby is being "given" away, or that another family is paying mother to have a child for them—might wonder if he or she, too, or perhaps one of his or her siblings, is equally expendable.[151] The surrogate's own nurtured child is not, of course, the only child who may suffer psychological damage as a result of the transaction. At some point during childhood, adolescence, or adulthood, a person who is the product of a commercial surrogate parenting arrangement may well learn the facts surrounding his or her conception, gestation, and adoption. Surrogacy enthusiasts might deny that the revelation that one owes his or her existence to a commercial surrogate is any more unsettling than is receiving the information that one is adopted. Admittedly, many conventional adoptees experience difficulties coping with their adopted status.[152] However, the imposition of potential emotional burdens on the traditional adoptee is assuaged by the practical imperatives of an existing situation. Adoption for him or her is, even with its attendant risks of feelings of rejection and rootlessness, the best option available. This is true only because the alternatives of institutionalization, foster care,[153] or retention by a parent

148. *See* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 687-88 (1979).

149. Krimmel, *supra* note 145, at 36. Permitting commercial conceptions might also provoke a "trade-in phenomenon." That is, "people would be tempted to 'trade in' unsatisfactory children and 'trade up' by purchasing a newborn." Pritchard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 349 (1984) (asserting that this concern would be realized only if the state did not regulate and enforce child support obligations).

150. It has been suggested that the slavery prohibition of U.S. CONST. amend. XIII poses an obstacle to commercial surrogacy arrangements. *See* Comment, *supra* note 42, at 476 n.75.

151. The concern that siblings may experience confusion is not entirely speculative. Several years ago the nine-year-old daughter of an expectant host observed, in response to the news that the baby would be given away, "Oh good. If it's a girl we can keep it and give [my younger brother] away." *Womb for Rent*, Los Angeles Herald Examiner, Sept. 21, 1981, at A3 (quoted in Krimmel, *supra* note 145, at 39 n.15).

152. *See generally* J. SHAWYER, DEATH BY ADOPTION (1979) (advocating single parent families from a feminist perspective); J. TRISELIOTIS, IN SEARCH OF ORIGINS: THE EXPERIENCES OF ADOPTED PEOPLE (1973) (describing experiences of adoptees who search for their biological parents).

153. The devastating effects of both institutionalization and successive foster care placements are

who lacks the ability or desire to raise a child are decidedly less attractive. Traditional adoptions are child rescue operations, not palliatives for disappointed parents. The current adoption system allocates lives in being; the child is already in a crisis. In short, adoption poses the least detrimental alternative for the child.[154] In marked contrast, the host mother in a surrogate parenting contract conceives the child intentionally for the very purpose of exchanging the child for money. Rather than centering on the needs of a child,[155] the surrogate model exists primarily to satiate the psychic and financial needs of adult parties. Rather than providing a postconception solution to a fortuitous pregnancy, the surrogate model inaugurates a birth that will culminate in separating a child from its gestational and genetic mother. The resulting child may experience not only the sense of rejection and isolation that are the occasional unavoidable by-products of an orthodox adoption, but also a sense of worthlessness as a human being because its natural mother calculated his or her worth in dollars.[156]

Those espousing the surrogate alternative have responded that the child conceived for the very purpose of being adopted benefits by the contract. One author maintains that, but for the commercial surrogate arrangement, that boy or girl would never have been born.[157] If this species of logic were to prevail, society would be hard pressed to justify any form of birth control because the ontologists would convince us that, for an ovum, never being fertilized is a fate worse than death. Significantly, in the context of wrongful life actions the courts have generally rejected a metaphysical approach that attempts to weigh the relative benefits and burdens of nonexistence against impaired existence.[158] In *Curlender v. Bio-Science Laboratories*[159] a California court stressed that the suffering of the child plaintiff who was afflicted with a hereditary disease could not be justified by "[retreating] into meditation on the mysteries of life. We need not be concerned with the fact that had defendants [a medical laboratory] not been negligent [in performing pre-conception blood tests on the parents], the plaintiff might not have come into existence at all."[160]

This "but for" logic, however, is cogent only when summoned retroactively, *after* a fetus already has been conceived or a person already has been born

well-documented. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-34 (1973); Goldfarb, *Psychological Privation in Infancy and Subsequent Adjustment*, 15 AM. J. ORTHOPSYCHIATRY 247 (1945); Mnookin, *Foster Care—In Whose Best Interests?*, 43 HARV. EDUC. REV. 599 (1973).

154. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 153, at 53-64.

155. Waller, *Borne for Another*, 10 MONASH U.L. REV. 113, 114-15 (1984).

156. Denials that financial reward motivates women to have babies for another family can hardly be given credence. Even proponents of surrogacy admit that "[i]t seems clear that unless surrogate mothers can be offered meaningful compensation for their services, there will be very few children brought into the world in this way . . . ." Black, *supra* note 29, at 380; *see supra* notes 131, 147.

157. Robertson, *supra* note 14, at 29.

158. *See, e.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

159. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). The holdings in *Curlender* and Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982), are not congruous. *See* Scheid, *Benefits vs. Burdens: The Limitation of Damages in Wrongful Birth*, 23 J. FAM. L. 57, 63 (1984-85).

160. *Curlender*, 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.

as a result of a surrogate transaction. An analysis of the advisability of institutionalizing commercial surrogacy in the United States should not be based on such retroactive reasoning. Rather, such analysis should focus on avoiding the problems created by commercial surrogacy arrangements. Thus, the argument that without commercial surrogacy, some people who might otherwise have been conceived will not be is unpersuasive.

A similarly flawed *post factum* analysis animates the assertion that the "best interests" of the surrogate offspring are served by facilitating its adoption by the biological father and his wife, who obviously want a child in a desperate way.[161] To initiate a situation that is inherently fraught with difficulty for the child, and then to defend it as in the best interests of the child by resolving it in the least harmful way is illogical. By a parallel sophistry, slavetraders and owners in the eighteenth and nineteenth centuries justified the retention of slavery. The very forces responsible for kidnapping and enslaving black men, women, and children defended the perpetuation of the institution by underscoring the "benevolent" sanctuary it furnished to its prostrate, uneducated, resourceless victims. Obviously, the problems created by slavery differ tremendously from those created by commercial surrogacy arrangements. However, the ingenious casuistry offered to condone slavery illustrates how readily an exploitive institution can be defended by characterizing its victims as beneficiaries.

Another serious objection to commercial surrogacy is that a market mechanism for acquiring a child fosters an expectation, perhaps a demand, for product quality. Purchasers who are disbursing 25,000 dollars to obtain an infant from a third party may be reluctant to accept an imperfect child.[162] Because the baby is not entirely "theirs" but half "hers," the couple may attribute the defect to the host mother's faulty genes, or perhaps to inadequate prenatal care.[163] If the contract parents reject the child, it is likely that the biological mother will also refuse to keep the child because she did not bargain for raising even a healthy infant.[164] Admittedly, if a state enacted legislation sanctioning surrogacy, the statute could allocate custody in the event of the birth of a mentally or physically impaired newborn.[165] Foisting parental duties on the contract parents, who would be viewed as assuming the risk of faulty "merchandise," makes perfectly good sense as a matter of contract law. The essential problem, however, is not resolved by an assignment of custody. The subject matter of the contract,

161. Black, *supra* note 29, at 386.

162. Krimmel, *supra* note 145, at 37.

163. Krimmel, *supra* note 145, at 37.

164. In perhaps the most well-publicized birth in the United States, the baby was born with microcephaly, a condition of abnormal smallness of the head, usually linked to mental retardation. The contracting father, Mr. Malahoff, separated from his wife, rejected the child. On national television, the results of blood and tissue tests confirming that Malahoff was not the natural father were disclosed. *See* Waller, *supra* note 155, at 120.

165. California's proposed surrogacy bill, for example, provides that "[t]he infertile couple shall take custody of and parental responsibility for, any child conceived pursuant to a surrogate contract . . . regardless of whether the child suffers from any . . . defect, unless the . . . defect is the result of some act or failure to act by the surrogate . . . ." Alternative Reproduction Act, A.B. 1707, at 7, Cal. Legis., 1985-86 Session.

burdened with a disability or an illness, could easily sustain tremendous emotional damage.

Commercial surrogacy and its latent potential for devaluing perceptions of human worth is assailable on still another ground. Price differentials inevitably develop in any market. Because there exists a glut of nonwhite infants[166] who are available for adoption through the usual nonprofit channels,[167] minority host mothers would not be in high demand. White, Anglo-Saxon surrogates and their babies would fetch higher prices than Black or Hispanic ones.[168] Similarly, the supply of physically, mentally, or emotionally disadvantaged homeless children, adoptable through nonprofit agencies, exceeds the demand of interested adopters.[169] With no "market" for these special needs children, commercial surrogacy would foster the view that sick children are "worth less" than healthy children.[170] Furthermore, tall, fair surrogates with classic profiles and straight teeth might command higher prices for their goods than might short, swarthy surrogates with crooked noses and overbites. Of course, human beings already are assessed by race, size, and physical appearance, and discriminatory treatment results. The reality of this scheme of evaluation must be acknowledged, but it need not be buttressed. The market mechanism engendered by surrogacy would animate overt calculation of the pecuniary value of persons, indirectly undermining the battered but cherished notion that all men and women are created equal.[171]

The dangers of exploitation and commodification inherent in commercial surrogacy, then, arguably constitute ponderous countervailing interests that states may identify as outweighing the right of privacy asserted by prospective surrogate parents.

One final objection to commercial surrogacy warrants further examination: the inculcation, in the parties to a surrogacy, of the illusion that making a contract shelters them from injury. Surrogate parenting contracts are indigenously "ambulatory" instruments.[172] It is not an overstatement to delineate them as "[resting] on sand dunes supporting pillars of rubber and floors of turf."[173]

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166. *See* ADOPTION FACTBOOK, *supra* note 11, at 35; *see also* O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485 (1986) (arguing against the use of race as a factor in adoption proceedings).

167. Conventional adoption is not without expenses, but the average cost of $6,000 is not much higher than costs incurred in a typical pregnancy and delivery. *See* ADOPTION FACTBOOK, *supra* note 11, at 23.

168. *See* Pritchard, *supra* note 149, at 351-52.

169. *See* ADOPTION FACTBOOK, *supra* note 11, at 41.

170. *See* Pritchard, *supra* note 149, at 351.

171. Pritchard, *supra* note 149, at 351.

172. Ambulatory means "not yet fixed legally or settled past alteration." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1971). Frequently used to describe wills, the term ambulatory provides an apt characterization of surrogate parenting contracts.

173. C.I.T. Corp. v. Jonnet, 419 Pa. 435, 438, 214 A.2d 620, 622 (1965) (Justice Musmanno's baroque metaphor was offered in the context of modification of contracts by subsequent oral agreement).

VII. CREATING BABIES BY CONTRACT

[C]ontract rights are [not] absolute; for government cannot exist if the citizen may at will . . . exercise his freedom of contract to work . . . harm.[174]

Surrogate pregnancy contracts arguably can be viewed as illegal, and hence, as void. A contract is illegal "if either its formation or its performance is criminal . . . or otherwise opposed to public policy."[175] Generally, an illegal contract is void, a nullity; that is, it is treated as though it had never been formed.[176]

Surrogacy proponents urge that an inspection of the many state statutes criminalizing the purchasing of children compels the conclusion that the literal terms of the law are not violated by a skillfully prepared contract to conceive and bear a child.[177] If this conclusion were endorsed, a court could find contracts illegal only on the grounds of public policy; an "unruly horse"[178] with blurred features that many courts are reluctant to mount. Therefore, interpretation of the pertinent provisions of state adoption codes is pivotal.

State statutes typically provide that money may not be offered, given, or received in connection with the placing of a child for adoption.[179] In addition, a prohibition against exchanging money for the termination of parental rights appears in many statutes.[180] Attorneys representing parties to a surrogate pregnancy arrangement have attempted to circumvent the letter of such statutes by drafting contracts that vigilantly exclude any reference to the infertile wife who is the only adoptive parent implicated; the written instrument focuses exclusively on the legal relationship between the biological father and the infant, a relationship that defies characterization as an adoption.[181]

Despite this clever drafting device, it is clear that the infertile wife is the "*sine qua non*" of the transaction;[182] the studied omission in the contract of her intended role is, as one commentator has noted, "an obvious subterfuge" that most courts should discern and repudiate.[183]

Surprisingly, the Kentucky Supreme Court, in its recent validation of surrogacy in that state, has elevated form over substance by articulating its willingness to overlook what the agreement contemplates in fact, but camouflages on its

174. Nebbia v. New York, 291 U.S. 502, 523 (1934).

175. RESTATEMENT OF CONTRACTS § 512 (1932).

176. *See* J. CALAMARI & J. PERILLO, CONTRACTS 18 (2d ed. 1977) [hereinafter CALAMARI & PERILLO].

177. *See generally* N. KEANE & D. BREO, *supra* note 28, at 275-305 (reproducing model contracts); Brophy, *supra* note 32, (annotating a model contract).

178. Richardson v. Mellish, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824).

179. *E.g.*, S.C. CODE ANN. § 16-3-1060 (Law. Co-op. 1985) (providing that "[n]o person may request or accept any fee, compensation, or any other thing of value as consideration for relinquishing the custody of a child for adoption"). For similar statutes, see COLO. REV. STAT. § 2A:96-7 (1977); MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1986); N.C. GEN. STAT. § 48-37 (1984).

180. *See, e.g.*, KY. REV. STAT. ANN. § 199.590(2) (Michie/Bobbs-Merrill Supp. 1986).

181. *See* Brophy, *supra* note 32, at 264, 268.

182. *Surrogate Parenting Assocs.*, 704 S.W.2d at 211.

183. Wadlington, *supra* note 37, at 476.

face: adoption of the child by the spouse of the biological father.[184] One could even view the fact an adoption is anticipated by the parties to the contract as an irrelevancy in assessing the legality of the contract. Some state statutes provide that no child may be bought, sold, or procured for purchase or sale *for any purpose*.[185] On a broader scale, the thirteenth amendment to the United States Constitution tacitly forbids making chattels of people.[186] The common thread is the sale of human beings, which dehumanizes people by demoting them to the status of chattels.

Surrogate pregnancy contracts may violate another category of statutes in force in many states. These laws preclude prenatal consent to adoption, typically requiring a lapse of a minimum number of days after childbirth before voluntary termination of parental rights.[187] Surrogate advocates offer the specious argument that the host mother's preconception commitment to terminate her parental rights is nothing more than a voidable expression of intention.[188] Because it is voidable—that is because the promise can be avoided by the mother at her election[189]—it does not violate a mandatory waiting period imposed by law.[190] However, a contract that violates the law is not rendered legal by bestowing the power to escape its terms on one of the parties. If the courts accepted this argument, the application of the bromide of voidability would, *ipso facto*, insulate every illegal contract from judicial nullification.[191]

Even if state statutes were amended to exclude surrogacy specifically from the ambit of the laws prohibiting the purchase and sale of children for adoption purposes, parties to an agreement and the courts to which they would resort would flounder in their attempts to find viable remedies to disputes. Either party may breach the contract in numerous ways and at diverse points during its execution.[192] Of all the possible scenarios the imagination can devise, that of the host mother refusing to relinquish the child after it is born is one of the likeliest types of breach and the one having the most dramatic effects.[193] It serves as

184. *Surrogate Parenting Assocs.*, 704 S.W.2d at 212-13.

185. *See, e.g.*, KY. REV. STAT. ANN. § 199.590(2) (Michie/Bobbs-Merrill 1986); *see also Surrogate Parenting Assocs.*, 704 S.W.2d at 214 (Vance, J., dissenting) (concluding that the surrogate parenting transaction involves a sale of a child in contravention of state law).

186. Section one of the thirteenth amendment provides: "Neither slavery nor involuntary servitude, except as a punishment . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

187. *See, e.g.*, OHIO REV. CODE ANN. § 3107.08 (Page 1976).

188. *See Surrogate Parenting Assocs.*, 704 S.W.2d at 212; Note, *In Defense of Surrogate Parenting*, *supra* note 40, at 888-91, 900-02.

189. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

190. *See Surrogate Parenting Assocs.*, 704 S.W.2d at 213.

191. For a discussion of the distinctions between void (illegal) and voidable contracts and the effects of illegality, see CALAMARI & PERILLO, *supra* note 176, at 18-19, 780-92.

192. *See* Comment, *Surrogate Motherhood: Contractual Issues and Remedies Under Legislative Proposals*, 23 WASHBURN L.J. 601, 609-17 (1984).

193. The New Jersey case of *In re* Baby M., FM-25314-86E (Superior Court of New Jersey, Chancery Division, Family Part filed May 6, 1986), illustrates the problems caused by such a breach. In *Baby M.* William Stern provided his sperm and promised to pay Mary Beth Whitehead $10,000 for her services as a surrogate mother. Three days after the child's birth Whitehead relinquished the baby to the Sterns. One day later, however, she changed her mind and begged for the baby's return. The Sterns complied, but later—armed with a court order and five police officers—went to retrieve

well as any other kind of breach to illustrate that even if a surrogacy contract were legal, its enforcement would pose considerable difficulties. If the host mother makes a postnatal decision to retain the baby, the contracting couple could sue either for money damages or specific performance.[194] The measure of damages in contract actions usually is limited to compensation for pecuniary loss sustained by the breach.[195] Money damages, however, would inadequately redress the grievance of an infertile couple within the framework of a surrogate parenting transaction. First, the biological father and his spouse would suffer profound personal loss that could not be assuaged by an award of damages.[196] Second, even if an award of money damages somehow could restore the infertile couple to the position they would have been in had the contract been performed, in all likelihood the judgment could not be successfully levied against the breaching natural mother. Even proponents of surrogacy concede that well-to-do women generally do not seek employment as surrogates.[197]

When damages at law do not afford adequate relief, a court may, in its discretion, decree specific performance.[198] A traditional prerequisite to a decree of specific performance is that the subject matter of the contract be unique, as opposed to fungible.[199] That requirement clearly is met in the surrogate parenting context. A court will decline, however, to direct specific performance when an order to perform—to deliver over the child to the contracting couple—would introduce compulsion into close personal relationships.[200] A decree to deliver over the child to the contracting couple indeed would constitute compulsion and intrusion into close personal relationships. Other equitable factors a court may

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the child. Whitehead and her husband somehow were able to elude the Sterns and fled to Florida with the child. The Sterns located the Whiteheads in Florida and brought the child back to New Jersey. In May 1986 the Sterns were awarded temporary custody of the baby, and Whitehead was granted limited visitation rights. The case probably will go to trial and the decision could have a far-reaching impact on surrogate parenting law in this country. *See* Galen, *supra* note 8, at 1, 8, 10; Lacayo, *Is the Womb a Rentable Space?*, TIME, Sept. 22, 1986, at 36; *The Case of the Breach of a Contract Baby*, NEWSWEEK, Sept. 1, 1986, at 66. If a court finds that a surrogate parenting contract is unenforceable the dispute becomes a custody fight. *See* Galen, *supra* note 8, at 8. A recent Illinois decision offers a potential solution to such disputes. In Wagner v. Erber, 85 D 6382, a Cook County circuit judge awarded joint custody of a five-year-old girl to the girl's mother, the mother's ex-husband, *and* the girl's biological father. For a brief discussion of *Wagner* and its potential relevance to surrogate parenting disputes, see Middleton, *Judge Awards 3-Way Custody*, Nat'l Law J., Oct. 13, 1986, at 3, col. 1.

At least three other cases involving a surrogate mother's breach of contract have been settled out of court. *See* 7 Fam. L. Rep. (BNA) 2351 (1981) (discussing a California case in which the surrogate mother was granted custody under the settlement); *Galen*, *supra* note 8, at 10 (discussing the California case and two other cases, one from Michigan and one from Ohio, in which the surrogate mothers were granted custody under the out-of-court settlements). In a fourth case the surrogate mother lost a custody fight that ultimately was resolved by the Idaho Supreme Court. In *In re* the Petition of Steve B. D. and Linda Sue D., No. 15998, slip. op. (Idaho June 17, 1986), the surrogate lost her custody fight that began three weeks after terminating her parental rights in an adoption proceeding. *See* Galen, *supra* note 8, at 10.

194. Comment, *supra* note 32, at 620.

195. L. SIMPSON, CONTRACTS 394 (2d ed. 1965).

196. Black, *supra* note 29, at 393.

197. Black, *supra* note 29, at 393.

198. *See* CALAMARI & PERILLO, *supra* note 176, at 581.

199. *See* U.C.C. § 2-716 (1977); J. MURRAY, MURRAY ON CONTRACTS 500-01 (1974).

200. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1150-52 (1970).

examine in determining whether to compel specific performance are the adequacy of the consideration and the harshness of enforcement,[201] either of which could, in this context, prompt a court to eschew specific relief. Finally, one cannot overstress the discretionary nature of equitable relief.[202] In adjudicating the demand that the host mother surrender the child to the contracting couple, a court would be exercising its "sound discretion."[203] Compelling a woman to give up her newborn pursuant to the terms of a mere contract may impress a court as disturbingly incongruous with the line of cases[204] holding that a woman cannot be compelled to carry to term a previable fetus.[205] On this basis specific relief may be witheld. A court refusing to divest a parent of custody by virtue of a contractual obligation[206] would then resolve the dispute by considering the relative ability of the two biological parents to raise the child.[207]

Surrogate pregnancy contracts, then, are not only of doubtful validity under the law of most states, but also entail intractable enforcement problems and great risks to all parties. Notably, the retainer agreement used by one Los Angeles law firm that limits its practice to surrogate parenting warns, "[t]he possible adverse consequences to the Adopting Couple are too numerous and complex to state, but it is possible . . . that the Surrogate might clearly breach the agreement and yet the Adopting Couple may be ordered to pay . . . child support for a child they do not get."[208] Creating a child in the framework of a contract is "like trying to fit a square peg into a round hole."[209]

VIII. CONCLUSION

Thou art thy mother's glass, and she in thee calls back the lovely April of her prime . . . .[210]

To possess the end and yet not be responsible for the means, . . . this is . . . the chief hypocrisy of our time.[211]

Commercial surrogacy has been hailed as a salutary means of fulfilling the parental aspirations of infertile couples.[212] Furthermore, the choice to engage in

201. CALAMARI & PERILLO, *supra* note 176, at 594-95.

202. CALAMARI & PERRILO, *supra* note 176, at 588-89.

203. CALAMARI & PERILLO, *supra* note 176, at 588.

204. *See generally* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (a woman's decision to obtain an abortion is not subject to spousal consent); Roe v. Wade, 410 U.S. 113 (1973) (state may not compel a woman to persevere in a pregnancy until the onset of the third trimester).

205. *See* Comment, *supra* note 42, at 470.

206. *See In re* Rhea, 207 Kan. 610, 612, 485 P.2d 1382, 1384 (1971) (a child is not a chattel and cannot be made the subject of a contract or a gift).

207. *See* Comment, *supra* note 192.

208. *See* Andrews, *The Stork Market: Legal Regulation of the New Reproductive Technologies*, 6 WHITTIER L. REV. 789, 797 (1984).

209. *Id.* at 796 (*quoting* a Jefferson County Kentucky Circuit Court judge).

210. W. Shakespeare, *Look in Thy Glass* in IMMORTAL POEMS OF THE ENGLISH LANGUAGE 56 (O. Williams ed. 1966).

211. *Drug Experiments and the Public Conscience* in CONFRONTING INJUSTICE: THE EDMOND CAHN READER 368, 372 (L. Cahn ed. 1962) (quoted in Waller, *supra* note 155, at 129).

212. *See* N. KEANE & D. BREO, *supra* note 28; Black, *supra* note 29; Note, *In Defense of Surrogate Parenting*, *supra* note 40. *But see* Robertson, *supra* note 14, at 34 (concluding that surrogacy is

a commercial surrogate parenting arrangement has been exalted to the level of a constitutionally protected right of reproductive privacy.[213] However, the right of privacy is inappropriately summoned to insulate participation in commercial surrogacy. The fundamental right of privacy in childbearing matters is intended to guarantee the right of an individual to control his or her own reproductive faculties,[214] not to commission and monitor[215] the pregnancy of a third party. Arrangements that induce an often financially needy woman[216] to assume for money the burdens of childbearing, and auxiliary contracts forbidding her from seeking an abortion or keeping her baby should she have a change of heart, stand the right of privacy on its head. Perhaps it is for this reason that the problem of childlessness among the infertile has not been solved by tendering to women contemplating abortions financial incentives to bear and then surrender their children.[217] Arguably, holding out fiscal carrots to women[218] to forego abortions would collide with Supreme Court decisions establishing that a woman's choice to terminate a pregnancy cannot be burdened, directly or indirectly.[219]

Even if the decision to commission a birth were found to fall within constitutional parameters, the right of privacy has never been defined as absolute.[220] Encumbrance of the right is justified by the presence of weighty countervailing interests. In the context of surrogacy, there are a number of discernible counterbalancing interests. These include the dangers of commodification and oppression, and massive roadblocks to enforcing surrogacy contracts—even if they are found to be legal.

In contrast, meager risks attend altruistic surrogacy. The potential for commodification is avoided, and the potential for exploitation is minimized. Because gratuitous surrogacy arrangements usually occur among friends or rela-

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"neither the evil nor the panacea that many have thought" and that surrogacy may be feasible if carefully regulated).

213. *See supra* text accompanying notes 110-17.

214. *See Surrogate Parenting Assocs.*, 704 S.W.2d at 216 (Wintersheimer, J., dissenting).

215. Surrogate parenting contracts typically contain pregnancy policing clauses stipulating that the surrogate is not permitted to smoke, use alcohol or illegal drugs, or even take an aspirin without the written consent of the overseeing obstetrician. In addition, she must submit to medical examinations at prescribed intervals during her pregnancy. *See* Brophy, *supra* note 32, at 283.

216. *See supra* text accompanying notes 146-47; *see also Surrogate Parenting Assocs.*, 704 S.W.2d at 216 (Wintersheimer, J., dissenting) ("The offer of financial payment will undoubtedly persuade financially needy women to sell their reproductive faculties for the benefit of those who can pay.").

217. If the dwindling supply of adoptable infants comes to be viewed as a tragedy of national dimensions triggered by the prevalence of abortion, then the right to choose to terminate a pregnancy might be fettered more properly through straightforward rather than circuitous governmental responses.

218. The more impoverished the woman, the more tempted she might be to grab the carrot. In effect, fetuses of well-to-do women who could afford to pass up the carrots would be at a disadvantage. On the other hand, many minority women (and their fetuses) might not be offered the financial incentive, because there is no foreseeable dearth of minority children available for adoption. *See* ADOPTION FACTBOOK, *supra* note 11, at 35.

219. *See* Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 427-31 (1983) (abortion regulations designed to influence a woman's informed choice between abortion and childbirth do not withstand strict scrutiny); *cf.* Harris v. McRae, 448 U.S. 297, 314 (1980) (governmental spending statute encouraging women to prefer childbirth over abortion permissible only because "no restriction on access to abortions that was not already there" was added) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

220. *See supra* notes 118-20 and accompanying text.

tives,[221] the likelihood of breaches is greatly reduced. Accordingly, enforcement problems rarely occur. In fact, an understanding between sisters or intimate friends probably is not cast in the matrix of a contract at all. "Philanthropic" surrogacy, then, is virtually benign and its suppression advances no weighty state interest.

Society should not discount the suffering of the infertile couple whose attempts at creating a family have failed.[222] Their pain is real. Accordingly, funds and talent should be committed to the vigorous pursuit of means of rectifying and preventing childbearing impairments.[223] The current adoption system should be revamped to eliminate unnecessary red tape and other obstructions to expeditious placement.[224] Adoption of foreign and special needs children should be promoted and facilitated.[225] Before dashing blithely toward the ratification of commercial surrogacy as an alternative reproductive method, however, this brave new society should reconsider the grave implication of transmuting the fairytale stork into a flesh and blood purveyor of babies.

221. *See supra* note 30.

222. *See supra* note 14 and accompanying text.

223. For a discussion of the underallocation of research and technological resources to identifying and redressing infertility, see Morgan, *supra* note 34, at 225-26.

224. The proposed Model Adoption Act, which would seek to ameliorate the imbalance between childless infertile couples and unwanted, displaced children, is discussed in Leavitt, *The Model Adoption Act: Return to a Balanced View of Adoption*, 19 FAM. L.Q. 141 (1985). *But cf.* Schur, *The ABA Model State Adoption Act: Observations from an Agency Perspective*, 19 FAM. L.Q. 131 (1985) (discussing the possible problems that might arise under the Model Act).

225. *See generally* R. LASNIK, *supra* note 15 (describing the proposed MODEL STATE SUBSIDIZED ADOPTION ACT); ADOPTION FACTBOOK, *supra* note 11, at 41-42 (discussing the availability of special needs children and the difficulties associated with placing such children).