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SURROGATE MOTHER AGREEMENTS: CONTEMPORARY LEGAL ASPECTS OF A BIBLICAL NOTION

Behold now, the Lord prevented me from bearing children: Go into my maid; it may be that I shall obtain children by her. And Abram harkened to the voice of Sarah.¹

After centuries of silence, modern man again harkens the voice of Sarah. With the decline in the number of children available for adoption² and the apparent rise in infertility in this country over the past three decades,³ individuals unable to bear children are seeking alternative methods for becoming parents.⁴ Surrogate motherhood is one solution to the age old problem of childless families. A surrogate mother is a woman, married or unmarried,⁵ who agrees to have a child for a person who is incapable of giving birth. While the more common utilization of a surrogate occurs in situations where the wife in a married couple is unable to have a child, it may also occur where an unmarried male seeks to become a father.⁶ The surrogate contracts to conceive the child of the husband or

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¹. Genesis 16:2 (Modern Bible).
². Passage of liberal abortion laws coupled with greater reliance on birth control methods has resulted in fewer children being born. Increased social tolerance of illegitimate children has also encouraged more unmarried females to keep their infants. Bodenheimer, New Trends and Requirements in Adoption Law and Proposals for Legislative Change, 49 S. CAL. L. Rev. 10, 13 (1975).
³. Over 10 million men and women between 18 and 40 years old experience procreative difficulty. Three decades ago one out of ten couples was unable to have children. Today this figure has increased to one out of six couples. Several reasons for this decline in fertility have been suggested. Changing lifestyles have caused many couples to postpone child-bearing to a time beyond their peak years of fertility. Also, the increased incidence of venereal disease has left more people sterile. Finally, certain commonly used methods of birth control are suspected of contributing to infertility. Kleiman, Anguished Seek Cure for Infertility, N.Y. Times, Dec. 16, 1979, § 9, at 38, col. 1.
⁴. While artificial insemination and in vitro fertilization are the substitutes now available for human conception, techniques such as cloning, parthenogenesis, and embryo transfer may be perfected in the foreseeable future. See generally Green, Genetic Technology: Law and Policy For the Brave New World, 48 Ind. L. J. 559 (1973); Kindregan, State Power Over Human Fertility and Individual Liberty, 23 HASTINGS L.J. 1401 (1972); Kinney, Legal Issues of the New Reproductive Technologies, 52 CAL. ST. B.J. 514 (1977); Oakley, Test Tube Babies: Proposals for Legal Regulation of New Methods of Human Conception and Prenatal Development, 8 Fam. L.Q. 385 (1974); Smith, Manipulating the Genetic Code: Jurisprudential Conundrums, 64 GEO. L.J. 697 (1976); Note, Asexual Reproduction and Genetic Engineering: A Constitutional Assessment of the Technology of Cloning, 47 S. CAL. L. Rev. 476 (1974).
⁵. To minimize the likelihood that a surrogate will elect to keep the child, the ideal surrogate will already have children. Quindlen, Surrogate Mothers: A Controversial Solution to Infertility, N.Y. Times, May 27, 1980, § 2, at 6, col. 1.
⁶. This article will not address the instances in which unmarried couples, homosexual
single male by means of artificial insemination in return for expenses and, usually, a fee. The surrogate also agrees that at the child's birth she will terminate her rights to the child and give custody to the biological father. If the contract involves a couple, the wife then adopts her husband's child.

Although a surrogate mother arrangement may offer advantages over adoption, it is an area fraught with legal questions. With only limited case law and no statutory guidance available on surrogate transactions, the perimeters of the legal questions involved and the validity of any proposed answers remain unclear. Until appropriate legislation is adopted or case precedent is established, direction must be sought from existing laws governing such areas as contracts, artificial insemination, and adoption. Due consideration must also be given to relevant constitutional limitations. Unfortunately, the task is similar to the proverbial placing of square pegs in round holes. Contract law is more at home in the business world than in the nursery; artificial insemination statutes were designed to legitimize, not bastardize, a child; and adoption procedures were established to facilitate giving up an unwanted child rather than to orchestrate its conception. The law in these substantive areas is simply not designed to meet the needs of surrogate agreements. In an attempt to clarify the issues resulting from such incongruities, this comment will examine the impact of existing laws and constitutional principles on the validity and enforceability of surrogate transactions. It will also discuss relevant provisions of Virginia law.

7. Among the advantages offered by surrogate mothers is that the infant is the husband's biological child. Also, the prospective couple does not have to meet the adoption agency criteria or wait three to seven years for a child. See Comment, Contracts to Bear a Child, 66 Calif. L. Rev. 611 (1978).

8. To date only three cases involving surrogate mother agreements have been filed in the United States. Doe v. Kelley, Mich. App. —, 307 N.W.2d 438 (1981) (declaratory judgment finding state adoption statute limiting payment of fees was applicable to surrogate agreements). See also Silberg, Circuit Judge Hears Surrogate Mother Case, 105 N.J.L.J. 24, col. 4, (Feb. 14, 1980); Court Bars Surrogate Adoptions, N.Y. Times, May 9, 1981, § 1, at 20, col. 6. A paternity-custody suit, In the Matter of James Noyes, was brought in the California Superior Court by a biological father against a surrogate who refused to give up the child. The case was eventually settled out of court with the father's name being placed on the birth certificate of the child. Visitation rights were denied. See Granelli, Surrogate Mother Sued Over Custody Agreement, 3 Nat'l L.J., Apr. 6, 1981 at 4, col. 3; Baby's Father Agrees to Withdraw His Suit Over Surrogate Birth, N.Y. Times, June 5, 1981, § 1, at 12, col. 1. The Attorney General of Kentucky has filed a declaratory judgment suit against Surrogate Parenting Associates, Inc., a medical clinic that matches couples and surrogates, for alleged violations of state adoption statutes forbidding the payment of fees for procurement of a child for the purpose of adoption. Castillo, Kentucky Attorney General Calls Surrogate Motherhood Illegal, N.Y. Times, Jan. 28, 1981, § 3, at 9, col. 1.
I. Basic Contract Principles and Surrogate Agreements

Once a surrogate has been located, a contract is signed by all parties. If each individual honors the agreement, then the law remains silent and aloof. However, in surrogate contracts, more than in other types of contracts, there is a substantial likelihood that disputes between the parties will occur. One reason is that surrogate agreements require making personal choices and commitments months in advance of performance. The time lapse itself is conducive to participants changing their minds. Changed circumstances, such as divorce, illness, death, or even marriage, may cause either party to attempt a modification or termination of the contract. Further, a child before being conceived is an unknown entity. It may be born with physical or mental defects and the prospective parents accordingly might refuse to take custody of the child. Even more realistic is the possibility that once the child is born, the mother may be unwilling to relinquish custody to the biological father.

If any such breach of the agreement occurs the first legal question raised would be the validity and enforceability of the surrogate contract. Under traditional contract law, there is an adequate basis for finding the agreement void and unenforceable. An agreement is illegal and, therefore, unenforceable “if either its formations or performance is criminal, tortious or otherwise opposed to public policy.” Thus, surrogate agreements theoretically could be challenged on the grounds that they involve the crime of adultery, violate adoption laws, circumvent artificial insemination statutes, or offend the thirteenth amendment. Such contracts could also be found to violate public policy, which “can be enunciated by the Constitution, the legislature or the courts at any time. Whether there is a prior expression or not, the courts can refuse to enforce any contract which they deem to be contrary to the best interests of citizens as a matter of public policy.” Because the courts have broad

9. Some surrogate contracts are twelve-line “statements of understanding” that simply outline the arrangement and provide for relinquishment of legal custody of the child to the biological father. Others are twenty-page contracts which address a multitude of issues, including what will occur if the surrogate decides to keep the child, the father dies, or an abortion is sought. Marcus, The Baby Maker, Nat’l L.J., Aug. 25, 1980, at 17, col. 3.

10. Comment, supra note 7, at 619.

11. See Granelli, supra note 8.

12. There appears to be general accord that surrogate agreements would be unenforceable. Noel Keane, an attorney who handles surrogate agreements, has expressed such a belief. Marcus, supra note 9. Sanford Katz, Chairman of the ABA Family Law Section agrees. Quindlen, supra note 5, at 6, col. 2.

13. RESTATEMENT OF CONTRACTS § 512 (1932).

14. See notes 45-50 infra and accompanying text.

15. See notes 81-97 infra and accompanying text.

16. See notes 36-63 infra and accompanying text.

17. See notes 73-80 infra and accompanying text.

discretion to interpret public policy, it seems clear that surrogate contracts may be held unenforceable whenever a court finds that such agreements do not serve the best interests of the citizenry.

The question then becomes what remedies may be pursued if the contract is declared void by the court or is breached by one of the parties.19 If a contract is found void, neither party can sue for breach or recover losses.20 In a surrogate case, the two biological parents would be left to battle over custody, support, and visitation rights in a separate court proceeding.21 If the contract were valid, but breached, the nonbreaching party might seek specific performance. However, in surrogate contracts, as in all personal service contracts, courts would not grant specific performance, based on several policy considerations.22 First, actual performance of a personal service contract would be difficult for a court to supervise. Second, to force individuals to perform personal services might violate the thirteenth amendment by imposing involuntary servitude. Finally, courts are reluctant to force individuals into unwanted personal association.23 The very personal nature of the agreements in question make these considerations particularly applicable to surrogate cases.

As both a practical and a legal matter, it is even more unlikely that a court would order a reluctant surrogate to undergo artificial insemination, submit to an abortion, bear a child, or give up an infant merely because the terms of a contract require it. If neither a husband24 nor the state25 has an interest sufficient to compel an individual to make particular choices relating to conception and abortion, it is unlikely that mere parties to a contract would have the right to affect such choices. In addition, a court, ever mindful of the best interests of the child,26 would not force a reluctant person to take the infant into his life solely because a clause of

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(1971). See also Restatement of Contracts § 369 (1932).


21. See Granelli, supra note 8; Baby's Father Agrees to Withdraw His Suit Over Surrogate Breach, N.Y. Times, June 5, 1981, § 1, at 12, col. 1.


24. See Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (woman's decision to terminate her pregnancy not subject to parental or spousal consent).

25. See Roe v. Wade, 410 U.S. 113 (1973) (state has sufficient interest to regulate abortion procedures only after third trimester of pregnancy).

a contract so stipulated.

The only real remedy for breach of the surrogate contract would be damages. If the surrogate failed to comply with the agreement, the biological father could seek to recover expenses and fees already paid.\(^{27}\) Any greater recovery would require a showing of additional economic loss.\(^ {28}\) If the couple breached, the surrogate could sue on the contract for her expenses and promised fee.\(^ {29}\) If she could show that the breach was willful and wanton, and that the promisor had reason to know that any breach would cause her mental suffering, for reasons other than the pecuniary loss, recovery for emotional distress might be allowed.\(^ {30}\)

There may also be remedies available under non-contract theories. An action for damages based on intentional infliction of emotional distress could perhaps be brought in tort law.\(^ {31}\) The mother might elect to put the child up for general adoption. In a California case where the surrogate refused to surrender custody of the child, an out of court settlement required that the biological father's name be placed on the birth certificate.\(^ {32}\) Assuming that the paternity of the child could be established, potential suits exist for custody, support, and visitation rights.\(^ {33}\) In this regard surrogate cases may be analogous to the New Jersey case of \(C.M. v. C.C.\)^\(^ {34}\) where the male friend of an unmarried woman assisted in the planning of a child and even provided the sperm used for artificial insemination. After the child was born, the mother refused to allow the biological father to establish a relationship with the infant. Citing the sperm donor's participation in the planning of the child, the reasonableness of his belief that he would be a part of the infant's life, and the thought that a child should have two parents, the court allowed the father visitation rights. It also provided that he should contribute to the support and maintenance of the child.\(^ {35}\)

II. Issues Presented by Artificial Insemination and Illegitimacy

Equally unresolved issues are raised by the use of artificial insemina- 

\(^{27}\) See Restatement of Contracts § 333 (1932); J. Calamari & J. Perillo, supra note 20, at §§ 15-3, -4.


\(^{29}\) Restatement of Contracts § 332 (1932); J. Calamari & J. Perillo, supra note 20, at § 14-4.

\(^{30}\) Restatement of Contracts § 341 (1932). Types of contracts where this has been applied are engagements to marry, contracts for the carriage or proper disposition of dead bodies, and contracts for delivery of death messages. Surrogate cases may be analogous to these situations.

\(^{31}\) See Restatement (Second) of Torts §§ 312-313 (1965).

\(^{32}\) See N.Y. Times, supra note 21.

\(^{33}\) Id. See also C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (1977).


\(^{35}\) Id. at 164, 377 A.2d at 825.
tion as the method for achieving conception in surrogate transactions. Legal aspects of this procedure have only recently been addressed. To date, nineteen states have passed statutes regulating artificial insemination. The primary purpose of these enactments has been to legitimate children born as a result of the procedure. However, it is unclear whether the statutes were intended to regulate all uses of the method. If total regulation is intended, surrogate agreements must be careful to comply with statutory requirements in this area. In Virginia, this would mean that a surrogate must be married and have the consent of her husband before artificial insemination could be performed by a licensed physician. Of the states with applicable statutes, only one would allow the procedure to be performed on an unmarried woman. As a practical matter, physicians in most states would probably not inseminate a single female on the ground that such action would be contrary to the best interest of the child. Since artificial insemination is a relatively simple procedure, the parties to a surrogate agreement might be tempted to proceed without the aid of a physician. Self-insemination would violate the statutes of Virginia and ten other states.

36. Although the first artificial insemination of humans occurred in 1799, it was not until the twentieth century that the procedure began to gain acceptance. Today it is estimated that 250,000 persons alive in the United States were conceived by this method. Comment, Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby, 28 EMORY L.J. 1045, 1047 (1979) [hereinafter Artificial Human Reproduction]. See also 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, 132 (1968); Comment, Artificial Insemination: Problems, Policies, and Proposals, 26 ALA. L. REV. 120 (1973) [hereinafter Artificial Insemination]; Note, Social and Legal Aspects of Human Artificial Insemination, 1965 WIS. L. REV. 859.


40. OR. REV. STAT. § 677.385 (1979) (states "if she is married, then need prior written request and consent of her husband" (emphasis added)).

41. Shaman, supra note 36, at 345.

42. The technique basically consists of inserting a syringe into the vagina and squirting semen toward the uterine opening. See Shaman, supra note 36, at 333. Self-insemination was used in the case of C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (1977).

43. ALASKA STAT. § 20.20.010 (1979); CAL. CIV. CODE § 7005 (West Supp. 1980); COLO. REV. STAT. § 19-6-106 (1977); CONN. GEN. STAT. ANN. § 545-69g(b) (West Supp. 1980); GA. CODE § 74-101.1 (1973); MONT. REV. CODES ANN. § 40-6-106 (1979); N.Y. DOM. REL. LAW § 73 (McKinney 1977); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West Supp. 1979); VA. CODE ANN.
such action practicing medicine without a license.  

Another legal question raised by the use of artificial insemination is whether it constitutes sexual intercourse sufficient to sustain a criminal charge of adultery or fornication. The general consensus is that adultery requires some penetration of the female by the male sex organ. Yet, where artificial insemination is involved a more imaginative interpretation has been accepted by several courts. The Canadian decision of Orford v. Orford is most illustrative. In that case artificial insemination was found to constitute adultery because reproductive powers and facilities had voluntarily been surrendered to another. A more realistic view was expressed by the California Supreme Court in People v. Sorenson. The court observed that at the time of artificial insemination, the donor may be miles away or even dead. Therefore, to suggest that artificial insemination involved an illicit affair or sexual intercourse associated with adultery was "patently absurd."

A more serious problem with surrogate agreements arises from the fact that the statutes and case law which have evolved to regulate artificial insemination were designed to meet needs entirely different from those involved in surrogate transactions. Artificial insemination originally was developed to allow a wife to have her biological child when her husband was unable to father an infant. The sperm for insemination was furnished by an anonymous donor who had no actual or potential contact with the couple or child. Because of a mantle of secrecy and, often, medical fiction, the infant was accepted as the biological child of the couple with-
out the necessity of formal adoption by the husband. True paternity was only brought to light when the husband, in an effort to circumvent an obligation for support of the child, disclaimed paternity based on conception by artificial insemination. Occasionally, paternity would be raised by the wife to foreclose visitation of the child by the husband or to dispense with the necessity of his approval for the infant's adoption by her subsequent husband.

In an effort to end such disputes, statutes have been passed in nineteen states which legitimate children conceived by artificial insemination and establish paternity in the husband, rather than in the unknown donor. In Virginia the law declares that if the procedural aspects of the statute are followed, any resulting child "shall be presumed, for all purposes, the legitimate natural child of such woman and such husband the same as a natural child not conceived by means of artificial insemination." Some states have taken the additional step of severing all potential obligations and ties between the donor and the child. In these states, the donor is treated in law as if he were not the natural father of the child. As a result of such statutory provisions and accompanying case law, the parties to a surrogate agreement may encounter difficult problems in establishing paternity.

Application of a statute such as Virginia's to a surrogate case would indicate that the husband of a married surrogate, not the sperm donor, would be recognized as the child's father. In a state with the additional provisions noted above, the donor would have no legal rights to the child, regardless of actual paternity. If the surrogate refused to relinquish custody of the child at birth, the biological father might be precluded from challenging paternity since he would lack standing. Even if he were allowed to assert his claim, the court might apply estoppel to protect the child from being bastardized. If, on the other hand, the biological father breached the agreement and refused to take custody of the child upon

52. Id. See also Oakley, supra note 4, at 390, n.47.
56. See note 37 supra.
birth, the child would be presumed to be the child of the surrogate and her husband. The statutory provisions noted above probably would bar the couple from asserting any rights against the biological father.

The obstacles are not entirely removed by the absence of artificial insemination statutes. Many states still recognize Lord Mansfield's presumption that a child born during a marriage is presumed to be that of the husband. In addition, while the case law involving artificial insemination deals primarily with support obligations by the husband, it is clear that the courts view him as the child's legal father. As the California court reasoned in People v. Sorenson, the husband is the legal father because a child conceived by artificial insemination does not have a natural father. A similar view was echoed in In Re Adoption of Anonymous. In that case a New York court found that a husband could not adopt his wife's child conceived by artificial insemination during her former marriage without the former husband's consent.

The next legal question is presented when the mother, in accordance with the agreement, places the biological father's name on the birth certificate. Assuming, arguendo, that this is sufficient to counteract the artificial insemination statutes, the child is then born out of wedlock and, thus, illegitimate. Aside from the stigma of such a label, the greatest consequences would be in the area of inheritance. While Blackstone would find that such a child could inherit from no one, more modern laws allow the infant to inherit from both his mother and his putative father if certain requirements are met. In Virginia, public recognition of the child by the father or his consent to the placement of his name on the birth certificate would be sufficient to allow the child to inherit from him.

An even greater problem involves determining when the child's right to

62. 68 Cal. 2d at 282, 437 P.2d at 498, 66 Cal. Rptr. at 8.
65. "The incapacity of a bastard consists principally in this, that he cannot be heir to anyone, neither can he have heirs, but of his own body; for being nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived." 1 W. BLACKSTONE, Commentaries* 459.
66. See UNIFORM PROBATE CODE § 2-109(2); KRAUSE, The Uniform Parentage Act, 8 Fam. L.Q. 1, 7-8 (1974); Schwartz, Rights of a Father with Regard to His Illegitimate Child, 36 Ohio St. L.J. 1, 15 n.73 (1975).
inherit from the surrogate mother would be terminated. As long as the child is not adopted, inheritance through the surrogate would be possible. In addition, both the Uniform Probate Code and the Code of Virginia provide that "adoption of a child by the spouse of a biological parent has no effect on the relationship between the child and either biological parent." As a result, the child would be able to inherit from the biological father, the surrogate, and the adoptive mother. The child could also inherit from the surrogate's family line. Of course, by having a will, the surrogate could negate the effect of such provisions for intestate succession.

III. ISSUES PRESENTED BY THE PAYMENT OF CONSIDERATION

Further legal problems may be generated by the payment of expenses and fees to a surrogate mother. Monetary transactions relating to the procurement of a child must conform to the requirements of the thirteenth amendment of the United States Constitution and of public policy. If adoption is involved, one must also be alert to restrictions posed by adoption statutes.

The thirteenth amendment assures that "neither slavery nor involuntary servitude... shall exist within the United States..." Despite the origins of this amendment as a response to slavery after the Civil War, it has been suggested that the provision has a potential application to surrogate mother agreements. However, surrogate transactions probably could not be construed as violating the express language of the amendment. It has long been recognized that involuntary servitude does not apply to the rights of parents to the custody of their minor children. Therefore, the placement of an infant with its biological father would not appear to constitute involuntary servitude. While money changes hands in both situations, the welcoming of an infant into the father's "family fold" lacks the evil connotations normally associated with any form of

68. UNIFORM PROBATE CODE § 2-109(1).
72. Some surrogates accept only medical expenses while others collect fees for their services. Total expenditures generally range from $5000 to $10,000 but may be as high as $20,000. See Granelli, supra note 8, at 4, col. 2.
73. U.S. CONST. amend. XIII.
74. For a discussion of the origins of the amendment, see Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).
75. Letter from Gregory M. Luce, Assistant Virginia Attorney General, to Jeff Krause, Esq. (Dec. 10, 1980). While stating that Virginia law did not forbid payment of consideration to a surrogate, the letter suggested that the thirteenth amendment and the Civil Rights Act might apply.
slavery.

While the letter of the thirteenth amendment is not violated by surrogate agreements, its spirit may be compromised. This spirit has been articulated as the belief that "the sovereign has an interest in a minor child superior even to that of the parents; hence, there is a public policy against the custody of such child becoming the subject of barter."77 Courts have applied this public policy in recognizing as "fundamental that parents may not barter and sell their children."78 While a strict application of this policy could foreclose payment to a surrogate, the policy does not appear to be etched in stone. Exceptions have been noted when the consideration accompanies a change of custody from one relative to another. When the motivating factor is not pecuniary gain but the best interest of the child, courts have found such agreements to be "family compacts" that do not violate public policy.79 In surrogate agreements payments could also be viewed as the biological father's attempt to protect the welfare of his child by insuring that the mother is provided with proper care. Further indications that the ban against payment is not absolute exist in statutory acknowledgement that in adoption proceedings expenses during confinement may be made out of a sense of charity.80

Although the law varies from state to state, it is widely held that adoption statutes authorize payment for expenses relating to the adoption process.81 Virginia merely requires notification to the court having jurisdiction in the matter of payments made to the person or agency assisting in obtaining a child.82 However, most states require approval by the court of all expenses.83 Generally, payment of medical and legal expenses is deemed proper.84 A number of states also have a restriction which limits payment of additional consideration by providing that "except charges and fees approved by the court, a person shall not offer, give or receive any money or other consideration or thing of value in connection with . . . placing a child for adoption . . . a release . . . [or] a consent. . . ."85

77. 6 S. Williston, Contracts § 1744A (rev. ed. 1936).
79. Id. at 324, 340 P.2d at 12; Reimche v. First Nat'l Bank, 512 F.2d 187, 189 (9th Cir. 1975).
81. H. Clark, supra note 50, § 18.6 at 651.
Taken literally, such statutes would preclude payment to the surrogate of any extra fees, including the value of wages lost during disability due to pregnancy and child-birth.\(^8\) Despite indications that such statutes should not be applied outside the context of normal adoption procedures,\(^7\) both the Kentucky Attorney General\(^8\) and a Michigan Court of Appeals\(^8\) have found similar statutory restrictions applicable to surrogate agreements.

Such a broad construction of these restrictions may be questionable in view of the original purpose of laws limiting the payment of consideration in adoptions. When such legislation was enacted, surrogate mothers were unknown. The object of the provisions was to protect both mother and child from unscrupulous persons engaged in the booming black market baby business.\(^9\) The prey of such practices was usually an unplanned, unwanted, and often illegitimate child. Unable to perceive any better alternative and acting under the duress of the situation, the mother was induced to give up her baby for money.\(^9\) Without concern for the welfare of either the mother or infant, the child then became available to the highest bidder.

Surrogate agreements do not fit into the black market profile. In theory, there is no unwanted pregnancy, no duress, no hurried decision and no rival bidding. Before a child is conceived, each party makes an independent decision to enter an agreement to have a child. Since the agreement is made prior to artificial insemination, any payment might be physical consequences are regularly paid. Such payment ranges from $20 to $35 per donor. Curie-Cohen, Luttress & Shapiro, *Current Practices of Artificial Insemination by Donor in the United States*, 300 New Eng. J. Med. 585, 587 (1979).

\(^86\). Judge Lincoln of Michigan explicitly stated that he would not allow the payment of lost wages in a surrogate adoption case. See note 84 supra.

\(^87\). The prevailing view in many jurisdictions is that adoption statutes should be given a construction that is reasonable and carries out the intent of the legislature. Since surrogate agreements were not within the contemplation of the legislature at the time the statutes were adopted, they should not be applied to these agreements. 2 Am. Jr. 2d Adoption § 5 (1981).

\(^88\). In response to a request by two Louisville newspapers, Kentucky Attorney General Steven L. Beshear wrote a seven-page advisory opinion in which he concluded that state laws regulating the payment "for the procurement of a child for adoption," make surrogate agreements illegal. He has filed a suit for declaratory judgment to clarify this issue. Castillo, supra note 8.

\(^89\). Doe v. Kelly, 106 Mich. App. 169, 307 N.W.2d 438 (1981). The court found that statutes precluding the payment of consideration in adoption cases were applicable to surrogate cases. The court further noted that this did not mean surrogate agreements were illegal, but only that one could not pay fees or expenses over those normally allowed in other adoption proceedings.


\(^91\). See Bodenheimer, supra note 2, at 14-16.
viewed merely as consideration to the mother for the inconvenience of pregnancy and childbirth, rather than as purchase of a child. It may also be argued that compensation for lost wages is not payment to procure a child, but rather is a means of allowing the surrogate to maintain her financial status quo. In addition, the interests of the child arguably are protected in that he will enter the home of the biological father.

Adoption statutes place other legal obstacles in the path of surrogate arrangements. For instance, in Virginia "the consent of a parent for the adoption of his or her child shall not be valid unless the child be at least ten days old at the time the consent is signed." Since a surrogate agreement is signed prior to conception, it would not be a valid consent to adoption. Statutes in other states forbid the use of advertising to seek children available for adoption. Women willing to act as surrogate mothers are often found through advertisements. If such laws are applicable to surrogate transactions, they are likely to impede the location of surrogates. Another problem is created by the participation of doctors, lawyers, and other persons not licensed to place children for adoption in arranging surrogate adoptions. In Virginia, as in other states, "the utilization of an attorney or physician in locating and effecting the move of a child from the surrogate mother to the natural father and his lawful spouse would be the type of activity which requires licensure." Strict compliance with this requirement would mean that doctors or lawyers could not actively assist in arranging surrogate agreements. However, the policy behind the licensure requirement arose without reference to children born of surrogate mothers. In addition, the intermediary's efforts are aimed primarily at locating and overseeing the use of a surrogate rather than placing a child for adoption.

IV. CONSTITUTIONAL ISSUES RAISED BY SURROGATE TRANSACTIONS

Most of the legal impediments to surrogate transactions are products of state law. Although regulation of domestic relations and family matters is

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97. Letter, supra note 75.
generally left to the states, due consideration must always be given to relevant constitutional guarantees. If the Constitution offers no special protection, a state can regulate or even ban surrogate mother agreements as long as it has a rational basis for such action. However, it seems arguable that surrogate transactions would be encompassed by the broad right of privacy which the Supreme Court has found in relation to the family and procreation. The Court has specifically recognized fundamental rights to marry, procreate, not procreate, raise children, and establish family living arrangements.

The Supreme Court first protected the right to procreate in *Skinner v. Oklahoma*, where it found: "[W]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." In *Griswold v. Connecticut*, the right to procreate was addressed in terms of freedom from governmental intrusion. The makers of the Constitution were found to have "conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Justice Goldberg, in a concurring opinion, not only

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98. Sosna v. Iowa, 419 U.S. 393, 404 (1975); H. Clark, supra note 50, § 15.3.
100. Although unable to identify a constitutional provision which expressly creates such privacy rights, the Supreme Court has found protection for certain "fundamental rights" in the penumbra of the Bill of Rights. See Griswold v. Connecticut, 381 U.S. 479 (1965). See generally notes 101-25 infra and accompanying text.
101. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry is fundamental; therefore, state may not condition it upon meeting conditions of child support obligations); Loving v. Virginia, 388 U.S. 1 (1967) (Virginia's miscegenation statute struck as violative of equal protection and due process).
104. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (combined rights of parental control in child-rearing and free exercise of religion outweigh state's interest in educating children beyond eighth grade); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents have basic right to direct upbringing and education of child, and state cannot compel children to attend public school).
105. See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion) (municipal zoning ordinance prohibiting extended family from occupying same dwelling is unconstitutional).
107. Id. at 541.
109. Id. at 494 (Goldberg, J., concurring) (quoting Olmstead v. United States, 277 U.S.
found that "the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected" but also recognized the existence of a "private realm of family life which the state cannot enter."

Later cases acknowledge that the right to procreate is not limited to married persons or "sacred precincts." As was stated in Eisenstadt v. Baird: "[I]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." In Roe v. Wade, which overturned a state statute prohibiting abortions, the Supreme Court cited these earlier cases as having established that the privacy right "has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, and child rearing and education. . . ." Finally, in Carey v. Population Services International, the Court spoke of "individual autonomy in matters of childbearing," and stated that "the teaching of Griswold is that the Constitution protects individuals' decisions in matters of child bearing from unjustified intrusion of the state."

It is unclear whether the Supreme Court's recognition of procreative autonomy and the attendant restriction on state regulation of such matters is an umbrella broad enough to encompass surrogate mother agreements. Any pronouncement on this subject would be mere speculation. The cases addressing procreative rights have dealt primarily with the election not to have a child. Contraceptives and abortions were the topics discussed. In contrast, surrogate agreements deal with the decision to have a child. Different protection might be accorded to this right. Furthermore, "privacy is a broad, abstract, and ambiguous concept which can easily be shrunken in meaning but also be interpreted as a Constitutional bar to many things." Thus, the constitutional aspects of surrogate agreements must await consideration by the Supreme Court.

Of course, even if surrogate transactions were held to be constitutionally protected, that would not preclude state regulation of surrogate mother agreements. Aspects of fundamental rights such as marriage and

438, 478 (1928) (Brandeis, J., dissenting)).
110. Id. at 495 (Goldberg, J., concurring).
111. Id. at 495 (Goldberg, J., concurring).
115. Id. at 687.
116. Id.
117. Brief, supra note 93, at 11.
118. 381 U.S. at 509 (Black, J., dissenting).
procreation are the subject of laws. The state "makes rules to establish, protect, and strengthen family life" when it is in the public interest. Likewise the state possesses broad powers in the area of public health. As stated, there is no "unlimited right to do with one's body as one pleases." However, when a fundamental right is involved, the state can burden that right only when a compelling interest can be shown. Any regulation must be reasonable and must be drawn in a manner that does not significantly interfere with the protected right.

The states undoubtedly would have an interest sufficient to justify reasonable regulations protecting the health of the surrogate and child. For example, procedures for the documentation and administration of artificial insemination would be proper areas for state supervision. Adoption statutes that are designed to protect the welfare and interest of the child would also be applicable to surrogate agreements. Finally, a state could also elect to pass new legislation that would allow the payment of fees to surrogates. However, the state could place restrictions on the payment by limiting the amount of the fee or requiring approval of sums paid.

V. Conclusion

Whether Sarah and Abram faced any legal repercussions from the initial surrogate mother arrangement is unrecorded. Even centuries later, the legal consequences of such agreements are still questionable. Contract, artificial insemination, illegitimacy, and adoption laws could be applied to surrogate mother agreements. In their respective areas, these laws provide proper regulations and remedies for the problems they were designed to address. Yet, when these laws are applied to surrogate mother

119. All states set age limits and prevent parties from entering into more than one marriage. "A State may not only 'significantly interfere with decisions to enter into the marital relationship' but may in many circumstances absolutely prohibit it." Zablocki v. Redhair, 434 U.S. 374, 392 (1978) (Stewart, J., concurring). In Buck v. Bell, 274 U.S. 200 (1927), the Court upheld statutes for sterilization of inmates of state institutions afflicted with hereditary mental defects or diseases.

120. Labine v. Vincent, 401 U.S. 532, 538 (1971) (intestate succession statute upheld which subordinated rights of acknowledged illegitimate children to those of other relatives of deceased parent).

121. See, e.g., Whalen v. Roe, 429 U.S. 589, 598 (1977) (patient identification as user of dangerous drugs is reasonable exercise of state police power); Roe v. Wade, 410 U.S. 113, 154 (1973) (even though constitutional right of privacy includes right to have abortion, "the right is not unqualified and must be considered against important state interests"); Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) (compulsory vaccination within state's police power, as is any other law safeguarding public health and safety "unless palpably in conflict with the Constitution").

122. 410 U.S. at 154.

123. Id. at 155.

124. Id.

125. Id.
agreements, they prove to be an impediment rather than a beneficial remedy. Active recognition of this problem by an enlightened judiciary is the immediate solution. The long term solution is legislation carefully drafted with an awareness of the impact which future medical technology may have on the concept of surrogate motherhood.

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