ARTICLES

The Right of Abortion in Surrogate Motherhood Arrangements

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I. INTRODUCTION

Infertility is a disorder that affects couples throughout the United States. It is an increasing problem due to the current prevalence of sexually transmitted diseases which are causing infertility in females. In addition, fewer babies are available for adoption. As an alternative to remaining childless or waiting years to adopt a healthy baby, couples

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1. "Infertility is defined as failure to conceive after 1 year of regular coitus without contraception." R. Benson, Current Obstetrics and Gynecologic Diagnosis, 992 (5th ed. 1986).

2. Id.


4. R. Benson, supra note 1, at 992.

5. It takes approximately three to seven years to adopt a child in the United States. Preferences as to race, religion and sex increase the delay in adoption. The reasons for the low supply of adoptable babies are as follows:
   (1) liberalized views toward contraceptive use,
   (2) greater availability of legal abortions,
   (3) single mothers keeping their babies,
   (4) successful counseling of troubled families, and
   (5) "fading social stigma associated with illegitimacy."


6. This article will not discuss the rights of the single woman and lesbian to reproduce via the new technologies. See generally Strong & Schinfield, The Single Woman and Artificial Insemination by Donor, 29 J. Reproductive Med. 293 (1984); Smith & Iraola, Sexuality, Privacy and The New Biology, 67 Marq. L. Rev. 263 (1984).
are turning to reproductive technologies. These include surrogate motherhood, either by artificial insemination or by in vitro fertilization. A third form of reproductive technology, artificial gestation, does not require a surrogate mother. There are legal obstacles to both methods of surrogate motherhood. For example, surrogate arrangements involving a fee are viewed as baby selling and, therefore, are void as against public policy. Many commentators have proposed legislation so that surrogate arrangements can have a secure legal status in society. These commentators, however, have failed to consider the major barrier to wide use of surrogate mothers, that is, the surrogate mother’s right to abort the child which she is carrying. This article examines the exercise and non-exercise of the right of abortion in the surrogate motherhood and artificial womb context. It argues that, under Roe v. Wade, the surrogate has the sole right to decide whether or not to terminate the pregnancy. No party to a surrogate contract or any person involved in the arrangement can veto the surrogate’s constitutional right. After considering legislative alternative to vetoing the surrogate’s right to abort, the article concludes that artificial gestation is the legally preferable

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7. Generally, this article will address the reproductive technologies that are used when a wife is unable to conceive or bear a fetus. Female infertility is not the only reason a couple will hire a surrogate. The wife may not want to bear the child because it would interrupt her career. Sappideen, The Surrogate Mother—A Growing Problem, 6 U. New S. Wales L.J. 79, 81 (1983).

8. The first known surrogate was Elizabeth Kane (a pseudonym). She delivered a baby on November 9, 1980. Smith, The Razor’s Edge of Human Bonding: Artificial Fathers and Surrogate Mothers, 5 W. New Eng. L. Rev. 639, 659 (1983).


form of reproduction technology for the couple when the female partner
is unable to carry the fetus.

In general, surrogate motherhood refers to an arrangement be-
tween a married couple and a woman who agrees to be artificially
inseminated or implanted with an embryo, carry the child to term
and surrender the child to the couple at birth. The typical arrange-
ment involves the surrogate, her husband and the couple who seek
the surrogate’s services. Usually a contract is signed, and the surro-
gate receives a fee. The contract provisions typically stipulate that
the surrogate must have already given birth to a child of her own. She
will also be required to undergo psychological and medical testing

15. Usually the surrogate is inseminated with the sperm of the male partner of
the couple who want the child. The surrogate also could be inseminated by a donor

16. As soon after the birth as possible, the surrogate terminates her parental
rights. The child is then adopted by the wife of the couple. If the wife is the genetic
mother, she must rebut the presumption that the gestational female is the natural
mother. Andrews, The Stork Market: Legal Regulation of New Reproductive Tech-

See Smith v. Jones, No. 85 532014 DZ, Slip op. (Wayne County Cir. Ct.,
Mich. March 14, 1986), where the court issued an interim order directing the name
of the ovum donor to be listed as the natural mother on the birth certificate of the
first baby expected to be born as a result of surrogacy by in vitro fertilization. The
court limited its ruling to the circumstances where (1) the parties contracted to engage
in the surrogate process; (2) the parties underwent certain surgical procedures for the
process to take place; (3) in vitro fertilization occurred; and (4) paternity-maternity
tests confirm that “the implanted ovum is, in fact, the child that resulted from the
in vitro fertilization.” Id. at 10. The court further ruled that a final declaratory
judgment would be entered after verification of the interim findings of the court by
HLA blood testing of the parties upon birth of the child. The baby was born, and a
final declaratory judgment was wanted on May 30, 1986. See supra note 9; telephone
interview with Noel Keane, Attorney (Dec. 8, 1986).

17. It is advised that the adopting wife of the couple not sign the contract. Not
being a party to the contract, she can say she has not paid for a baby and, therefore,
is not in violation of the adoption statutes. Brophy, A Surrogate Mother Contract
to Bear a Child, 20 J. Fam. L. 263, 266-267 (1982). But “most courts should reject
this obvious subterfuge on the grounds that the husband (donor) will have paid on
behalf of the wife.” Wadlington, supra note 15, at 476.

18. The fee can range from $5,000 to $25,000. L.B. Andrews, New Concep-

19. This is to insure the couple that the surrogate is capable of bearing a
healthy child. See Brophy, supra note 17, at 265.
to ensure that she is healthy and will not transmit any genetic defects to the fetus she will be carrying. Terms of the agreement also provide that, during the pregnancy, the surrogate must not smoke, drink alcoholic beverages, or take any drugs without the consent of a physician approved by the couple. The surrogate and her husband also "assume all risks including the risk of death which are incident to conception, pregnancy, childbirth and postpartum complications." Amniocentesis may also be stipulated so that, if the child is found to be defective, the surrogate must abort the fetus. Furthermore, there is typically a contract clause that restricts the choice of abortion for the surrogate. The provision may read as follows:

The Surrogate agrees that she will not abort the child once conceived except, if in the opinion of the inseminating physician, such action is necessary for the physical health of the Surrogate or the child has been determined by said physician to be physiologically abnormal. In the event of either of these two (2) contingencies, the surrogate desires and agrees to have said abortion.

Through an attorney, agency, or private solicitation, a woman who wishes to be a surrogate can be located. The reasons a woman would want to carry a child for another may vary. These reasons may be categorized into five groups: (1) "[possession of] either a sentimental or a maternal instinct, or fascination with having
a child’’; (2) a sense of altruism; (3) financial need; 28 (4) the opportunity to undergo a ‘body experience’; or (5) atonement for a previous abortion. 29

A. SURROGATE MOTHERHOOD VIA ARTIFICIAL INSEMINATION AND SURROGATE MOTHERHOOD VIA IN VITRO FERTILIZATION: THE DIFFERENT PROCEDURES

Surrogate 30 motherhood via artificial insemination 31 entails the impregnation of a surrogate with sperm from the husband 32 of an infertile woman. The procedure, requiring only a syringe, is rather simple and can easily be conducted without the aid of a physician. 33 Surrogate motherhood by way of in vitro fertilization is a more complicated procedure. It requires the harvesting of an egg 34 from the wife of the couple. 35 The egg is retrieved in an operation under general anesthesia. This operation involves the insertion of a laparoscope, 36 a long silvery tube, in which the doctor can view the

28. Smith, supra note 8, at 649-650.
29. Id. at 650 n.51 (citing Harris, Stand-In Mother - Maryland Woman to Bear Child for Couple, Wash. Post, Feb. 11, 1980, at 1, col. 3).
30. The term ‘‘surrogate’’ which means ‘‘substitute’’ is actually a misnomer. ‘‘The natural mother, who contributes egg and uterus, is not so much a substitute mother as a substitute spouse who carries a child for a man whose wife is infertile. Indeed, it is the adoptive mother who is the surrogate mother, since she parents a child borne by another.’’ Robertson, Surrogate Mothers: Not so Novel After All, 13 Hastings Cen. Rep., Oct. 1983, at 28.
32. See, supra note 15.
33. A friend wanted to bear a child for a couple. ‘‘They read up on artificial insemination in . . . the Reader’s Digest Family Health Guide and decided they could do it themselves.’’ P. Singer, supra note 10, at 25.
34. Drugs such as Clomid and Pergonal are injected in the female so that, not only one, but many eggs can be retrieved. ‘‘Howard Jones ‘harvests’ an average of 5.8 eggs per patient; it is possible to obtain as many as 17.’’ The retrieval of a number of eggs prevents repeat operations. Willis, The New Origins of Life, Time, Sept. 10, 1984, at 46, 48. For a discussion of the use of Comid and Pergonal for the induction of ovulation see Quigley, The Use of Ovulation-Inducing Agents in In-Vitro Fertilization, 27 Clinical Obstetrics and Gynecology 983 (1984).
35. There is also the possibility that the egg must be retrieved from a female other than from the wife of the couple who wanted the child. This is beyond the scope of this paper. Id. at 49.
36. Some clinics are now using ultrasound instead of a laparoscope. The procedure, conducted in a doctor’s office under local anesthesia, is less expensive but also may be less reliable. Id. But see Lewin, Comparative Study of Ultrasonically
target—a small, bluish pocket inside the ovary where the egg is produced. Once the target is viewed, the doctor inserts a long, hollow needle through a second incision. Through this needle, the eggs and surrounding fluid are removed by suction. The fluid is then examined under a microscope to determine whether it contains an egg. If an egg is found, it is carefully washed and placed in a petri dish containing a solution of nutrients. The petri dish is placed in an incubator for four to eight hours. Meanwhile, the husband is requested to produce a sperm sample. After a sperm sample is produced, the sperm is prepared in a solution and added to the petri dish that contains the egg. For the next twenty-four hours, the incubator is set at body heat. The egg, hopefully, will fertilize and start to divide so that the resulting embryo can be placed within the surrogate.

The procedure utilized, therefore, determines who the baby’s genetic mother will be. If the surrogate is artificially inseminated, the surrogate is the genetic mother whereas, if the surrogate is implanted with an embryo, the wife of the couple is the genetic mother. Under either method, the husband of the couple providing the sperm is the genetic father and, of course, in each situation, the surrogate is the gestational mother. Moreover, the couple is expected to rear the child.

B. ARTIFICIAL WOMB

Theoretically, the embryo that results from fertilization in a petri dish also could be implanted in an artificial womb. Under this format, a human body would not be necessary for gestation. All aspects of conception and pregnancy would take place outside

Guided Percutaneous Aspiration with Local Anesthesia and Laparoscopic Aspiration Follicles in an In Vitro Fertilization Program, 151 AM. J. OBSTETRICS AND GYNECOLOGY 621 (1985), in which the results of a study comparing the use of ultrasound and a laparoscope indicated no significant difference in the number of eggs retrieved.

37. "It is hardly a romantic moment recalls [a] Cleveland Businessman. . . . 'You have to take the jar and walk past a group of people as you go into the designated room, where there's an old brass bed and a couple of Playboy magazines. They all know what you're doing and they're watching the clock, because there are several people behind you waiting their turn." Id.

38. Id. For a more detailed description of the operation and in vitro fertilization in general, see R.G. EDWARDS, TEST TUBE BABIES (1981).

39. An embryo has not survived implantation more than three days in vitro. While unsuccessfully implanted, embryos have been kept alive for periods as long as nine days. Mouse and rat embryos have sustained the equivalency of four weeks of human embryonic life. P. SINGER, supra note 10, at 132-33.
of the body. This procedure, known as ectogenesis, has not yet been perfected.40

II. THE DECISION TO ABORT

The decision whether or not to terminate the pregnancy of a surrogate dictates analysis under Roe v. Wade.41 In Roe, the Supreme Court held that a woman has the constitutional right to decide whether or not to terminate her pregnancy. Justice Blackmun, writing for the majority, stated:

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.42

This fundamental right,43 however, is not absolute.44 During the first trimester, the abortion decision is a decision to be made between the pregnant woman and her physician.45 At the end of the first trimester, the state has a compelling interest in protecting the health of the mother and “may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.”46 The state’s compelling interest, at the end of the second trimester, is in the potential life of the fetus and the state “may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of life or health of the mother.”47

40. Published research was extensive in 1979. See generally Morris, Growing Embryos in Vitro, 278 Nature 402 (1979). The latest discovery is the simplification of culture chambers for rat embryos. See generally Priscott, The Culture of 12- and 13-day Rat Embryos Using Continuous and Non-Continuous Gassing of Rotating Bottles, 230 J. Exper. Zoology 247 (1984). At this time, research with embryos may be limited because ectogenesis is being studied through another method: the prolongation of the lives of premature babies.
41. 410 U.S. 113 (1973).
42. Id. at 153.
43. Id. at 155.
44. See id. at 154. This statement should not be read out of context to enable a couple’s claim to reproduce to override the surrogate’s right to abort. This statement is pertinent in discussing the second and third trimesters of a female’s pregnancy.
45. Id. at 164.
46. Id.
47. Id. at 165.
In recognizing this right, the Court, in dicta, stressed the circumstances of the pregnant female. Justice Blackmun wrote:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise to care for it.48

Justice Douglas, in his concurring opinion,49 stated:

Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future.

48. Id. at 153. The Court's concern for the aftermath of pregnancy has been lessened by later cases dealing with public funding of nontherapeutic abortions. See the following cases which were similarly decided by 6 to 3 votes: Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1973). In these cases, the Court held that neither the Constitution, nor federal legislation requires the states to provide funding of nontherapeutic abortions for indigent women. Justice Marshall in his dissenting opinion in Beal states "I am appalled at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children." Beal, 432 U.S. at 456-57. In a separate dissent Blackmun, J. joined by Brennan and Marshall, JJ. reiterated the view that the majority's approach to the indigent women's problems is "disingenuous and alarming, almost reminiscent of 'let them eat cake'." Id. at 462. But see Harris v. McRae, 449 U.S. 297 (1980) (rejection of constitutional attacks on versions of Hyde Amendment that limited public funding for most medically necessary abortions). However, Harris, a 5 to 4 decision as opposed to the 6 to 3 decisions in the cases dealing with nontherapeutic abortion, indicates that medical aspects still weigh heavier than lifestyle aspects. See also the "lifestyle" cases, Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) (summary affirmance of federal court's dismissal of a challenge by homosexuals to Virginia's sodomy statute); Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (Constitution does not confer a fundamental right upon homosexuals to engage in sodomy); and Hollenbaugh v. Carnegie Free Library, 578 F.2d 1374 (3d Cir. 1978) (upholding discharge of two public employees who were "living together in a state of 'open adultery.'"), aff'd 436 F. Supp. 1328 (W.D. Pa. 1977), cert. denied, 439 U.S. 1052 (1978). The Court's approach in each of these cases signifies its lack of great concern for protecting one's lifestyle.

For example, [a pregnant female is] required to endure the discomforts of pregnancy; to incur pain; higher mortality rate, and after effects of childbirth; to abandon education plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to hear the life long stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.\footnote{Roe, 410 U.S. at 214-15 (Douglas, J., concurring).}

In both \textit{Roe} and its companion opinion, \textit{Doe v. Bolton},\footnote{410 U.S. 179 (1973).} it was not necessary for the Court to distinguish between the gestational mother and the childrearing mother since neither Jane Roe\footnote{Jane Roe is a pseudonym. Roe, 410 U.S. at 120, n.4.} nor Mary Doe,\footnote{Mary Doe is a pseudonym. Roe, 410 U.S. at 184, n.6.} the challengers of the abortion statutes,\footnote{In \textit{Roe}, the Texas statute made it "a crime to ‘procure an abortion’ . . . or to attempt one, except with respect to ‘an abortion procured or attempted by medical advice for the purpose of saving the life of the mother’." 410 U.S. at 117-18. The Georgia statute in \textit{Doe} was patterned upon the American Law Institute's Model Penal Code, sec. 230.3. This statute contained a number of requirements which had to be met before one could obtain an abortion. Moreover, there were limited circumstances as to when an abortion could be procured. 410 U.S. at 182-84.} were surrogates. The type of problems listed by the Justice's in \textit{Roe}'s dicta, are those experienced during the actual pregnancy and the aftermath of giving birth to an unwanted child. Despite the lack of distinction between the difficulties encountered by a gestational mother and those difficulties encountered by a childrearing mother, \textit{Roe}'s constitutional principles are applicable to the surrogate situation, providing the surrogate with the constitutional basis upon which she can claim sole right to decide whether or not to abort the child which she is carrying for another.

The reason \textit{Roe}'s constitutional principles are applicable, despite this lack of distinction, is that the opinion is primarily concerned with the bodily integrity of the female. That is, the gestational aspect of pregnancy and its effects on the female's health are the focal points of the opinion. For example, the Court considers the state's interest in the health of the mother during the first trimester but finds that, through modern medical technology, "mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates of normal child-birth."\footnote{Roe, 410 U.S. at 149.} The health of the mother is also important when determin-
ing whether the State has a compelling interest in regulating the abortion decision during the second trimester.\textsuperscript{56} Furthermore, the health of the mother is recognized by the Court as taking precedence over the State's interest in the fetus during the third trimester of the pregnancy.\textsuperscript{57}

Throughout \textit{Roe} and \textit{Doe}, the Supreme Court refers to the abortion decision as a "medical decision." In \textit{Roe}, the Court said that the "... abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."\textsuperscript{58} This medical decision is, not only one that encompasses the physical aspects of pregnancy, but also the emotional and psychological factors attributed to pregnancy. By looking at these factors, the physician can assess the health of the pregnant woman.\textsuperscript{59} Moreover, Douglas recognizes specific rights that reinforce the view that the abortion decision should be exercised by the gestational mother. These rights are "the freedom to care for one's health and person"\textsuperscript{60} and "freedom from bodily restraint or compulsion."\textsuperscript{61} The first is an affirmative right, and the second protects the pregnant female from intrusion.\textsuperscript{62}

The dicta that was referred to earlier in this section also attests to the Court's recognition of the effect of gestation on the woman's body. This recognition is not without support in female literature\textsuperscript{63} and medical texts.\textsuperscript{64} Throughout the pregnancy, ovarian hormones (estrogen and progesterone) are produced within the female's body.\textsuperscript{65} Morning sickness, a condition that is experienced by seventy-five to eighty-eight percent of all pregnant women, seems to be related to

\textsuperscript{56} Id. at 164.
\textsuperscript{57} Id. at 164-65.
\textsuperscript{58} Id. at 166.
\textsuperscript{59} \textit{Doe}, 410 U.S. at 215.
\textsuperscript{60} Id. at 213.
\textsuperscript{61} Id.
\textsuperscript{62} These rights are in contrast to Mill's "harm principle." The principle is "that the government can only exercise power over an individual against his or her will if necessary to prevent harm to others." Ehrlich, \textit{Freedom of Choice: Personal Autonomy and the Right to Privacy}, 14 \textit{Idaho L. Rev.} 447, 469 (1978).
\textsuperscript{65} M.J. Wallace Paxton, \textit{The Female Body in Control} 97 (1981).
higher levels of estrogen during pregnancy. Of course, body changes take place as the fetus grows. For example, when sex differentiation begins, the breasts of the pregnant woman change in that the nipples have more pigment. When the finger and toes of the fetus appear, the female's uterus is above the pelvic bones. When the sex differences are eventually clear, the abdomen of the gestational mother protrudes. As the pregnancy progresses, the woman's bodily systems become more involved in the gestation of the child. The circulatory system of the gestational mother, by the fourth week of pregnancy, exchanges products with the circulatory system of the embryo. By the sixteenth week, the placenta is formed within the woman. The fetus, connected with the placenta of the gestational mother by two blood vessels (the umbilical artery and the umbilical vein), is completely dependent upon the food and oxygen that are brought to it via the mother's circulatory system. Carbon dioxide and other waste products of the fetal metabolism are returned by way of the umbilical vein to the maternal circulation. They are then excreted by the mother's lungs and kidneys, respectively. It is therefore expected that, because she is carrying the baby, the gestational mother will modify her choices of the commonplace activities in which she may engage. For example, the pregnancy may inhibit the gestational mother's usual consumption of alcohol, change her

66. M.L. Margolis, supra note 63, at 249. But see Masson, Serum Chorionic Gonadotrophin (HCG), Schwangerschafts protein 1 (SPI), Progesterone and Oestraadiol Levels in Patients with Nausea and Vomiting in Early Pregnancy, 92 BRITISH J. OF OBSTETRICS AND GYNAECOLOGY; 211 (1985), in which the results of a study indicated levels of human chorionic gonadotrophin (HCG), a placental protein, to be significantly higher in pregnant females with nausea and/or vomiting than those pregnant females who were symptom free. The 116 females tested were between their nine and sixteen gestation period.

67. M.J. Wallace Paxton, supra note 65, at 98.

68. The placenta is the organ of metabolic interchange between fetus and mother. The human placenta at term averages about 1/6 to 1/7 the weight of the fetus. It is disk-shaped, about an inch in thickness and 7 inches in diameter. Its fetal face is smooth . . . The umbilical cord is attached, normally near the center of the fetal face. The maternal face of a detached placenta is rough . . . After the delivery of the fetus the extruded placenta with the torn membranes adherent to its margins and the attached umbilical cord is called the 'afterbirth.'


69. M.J. Wallace Paxton, supra note 65, at 100.

70. "From the [scientific] evidence available the best advice to the woman pregnant or about to become pregnant would seem to be 'Don't consume alcohol.'" J. Pritchard, supra note 64, at 259.
eating habits and affect her sexual relations with her husband. In addition to the physical effects of the pregnancy on the gestational mother during the nine months of pregnancy, the female must undergo labor, a process characterized as painful.

The above discussion has described the normal events of pregnancy and their effect on the gestational mother's body. The topic now turns to the possible advisor effects of the pregnancy on the health of the gestational mother who, before the pregnancy, was diagnosed as in good health. One of the major dangers for the gestational female is toxemias of pregnancy. Toxemia is a term used to designate a number of conditions characterized by high blood pressure. It occurs in about six out of one hundred pregnant women, and is the leading cause of maternal and fetal deaths. Half of the toxemias are labeled as "preeclampsia." A female diagnosed with preeclampsia suffers from a combination of symptoms, including hypertension, edema and proteinuria (protein in the urine). In a more serious stage (eclampsia), the pregnant female undergoes convulsions and coma. Unless controlled, toxemia results in maternal death.

Another ailment that may affect women during pregnancy is hyperemesis gravidarum, characterized by severe nausea and vomiting, as distinguished from the normal experience of morning sickness during pregnancy. During this ailment, the pregnant woman loses weight and becomes dehydrated, disrupting her body's balance of fluids, electrolytes and acids. The pregnant woman also may suffer

71. "A daily caloric increase throughout pregnancy of 300 kcal has been recommended by the Food and Nutrition Board." Id. at 251. Books on nutrition for the pregnant woman have been written to help her to adjust her eating habits during this period of her life. See generally I. CRONIN & G. BREWER, EATING FOR TWO: THE COMPLETE PREGNANCY NUTRITION COOKBOOK (1983); J. BROWN, NUTRITION FOR YOUR PREGNANCY (1983).

72. "It has long been the custom of many obstetricians to recommend abstinence from intercourse during the last 4 weeks of pregnancy..." J. PRITCHARD, supra note 64, at 257.

73. M.J. WALLACE PAXTON, supra note 65, at 104.

74. Pregnancy also increases the health problems of women who already have medical conditions such as diabetes or heart disease. R.K. FREEMAN & S.C. PESCAR, SAFE DELIVERY: PROTECTING YOUR BABY DURING HIGH RISK PREGNANCY 17, 23 (1982).

75. E. SLOANE, BIOLOGY OF WOMEN 275 (1980).

76. Id.

77. Id.

from gallbladder disease, and thus require the removal of gallstones. In addition, cholestasis of pregnancy, referred to as pregnancy jaundice, may develop. This sickness consists of itching and/or jaundice that is caused by pregnancy-induced changes that prevent the normal flow of bile in the liver. The symptoms, itching and yellow-colored skin, disappear after delivery. Finally, a female during pregnancy may be vulnerable to urinary tract infection. Almost ten percent of pregnant women suffer from this ailment. An additional five percent develop the infection after delivery. Recurrent acute urinary tract infections during successive pregnancies often result in chronic pyelonephritis, a major cause of death in older females.

In addition to ailments during pregnancy that may affect the female’s physical well-being, there are abnormal labor complications that may be life-threatening to the mother. Furthermore, in certain types of abnormal delivery methods, the gestational mother may suffer more than discomfort, but actual physical injury to herself. For example, when an obstetrician utilizes forceps to aid the fetus in its travels through the gestational mother’s birth canal, the female may suffer lacerations of the vagina.

Not only are there physical aspects of gestation, but gestation and labor also entail psychological factors. As one author states:

Pregnancy may exacerbate or reactivate a preexisting mental illness; moreover, it may be stressful even for women who function quite normally and who appear to be in very good emotional health prior to conception. Thus all pregnancies, probably without exception, are associated with some emotional upheaval.

Emotions during pregnancy can be viewed in light of the trimesters. Depressive feelings are not uncommon during the first trimester. There also may be a sense of disappointment that accompanies early nausea, vomiting and fatigue during the first trimester. This sense

79. Although there is no evidence that pregnancy is one of the causes of gallstones, normal physiological changes during pregnancy affect the gallbladder in such a way that it becomes sluggish. This sluggishness could lead to the incomplete removal of bile from the gallbladder, creating a greater risk of gallstones. Id. at 133.
80. Id. at 134.
81. R. Benson, supra note 1, at 908.
82. E. Sloane, supra note 75, at 309.
83. D. Hales, supra note 78, at 180.
of disappointment is due to the absence of an expected sense of excitement and well-being.85 Late in the second trimester, women may undergo an increased desire to be let alone. These feelings reach their peak in the third trimester and do not leave until the postpartum period. As she reaches term, she may become anxious due to her concern about the process of labor and the possible difficulties that may arise.86 Women, after giving birth, experience the 'baby blues', "characterized by mild depression, anxiety and minimal clouding of consciousness."87

In many ways, these factors are more pronounced for a surrogate. As stated above, there usually is a contract provision that requires the surrogate to refrain from consumption of alcohol.88 Moreover, the surrogate and her husband are required to abstain from sex after insemination.89 The surrogate also is not allowed to view the child after birth90 which may increase her postpartum depression. There may be the possibility that the surrogate, later in her years, may regret having given up the child and undergo depression as a result. Furthermore, the surrogate, during the pregnancy, may be subjected to anxiety that the couple may refuse the child at birth. The surrogate, trying to earn extra income for her family,91 would then have the burden of raising another child. This fear would be analogous to the concerns of the aftermath of pregnancy expressed Roe v. Wade and Doe v. Bolton.92 The anxiety may be greater for the surrogate because she may feel that a third party has control over this aspect of her life.

In general, the surrogate, in carrying the child, is the person who undergoes the physical and psychological aspects of pregnancy recognized in Roe v. Wade to support a woman's constitutional right to abortion. These matters, in certain instances, may cause

85. Id. at 77.
86. Id.
88. See supra note 21, and accompanying text.
91. A surrogate states 'The money could help pay for my children’s education,' ... 'or just generally to make their lives better.' Willis, supra note 34, at 53.
92. See supra notes 47 and 49, and accompanying text.
greater discomfort and unhappy consequences for the surrogate than for a woman who carries a baby for herself. Thus the gestational mother, whether artificially inseminated or implanted with an embryo, is the person who is constitutionally entitled to exercise the abortion right. Under *Roe v. Wade* it is the process of gestation which dictates who may exercise the right of abortion.

III. **No Party to the Contract or Arrangement can Veto the Surrogate’s Right to Abort the Fetus She is Carrying**

As discussed in the previous section, the surrogate undergoes the physical and psychological aspects of pregnancy that serve the basis of the constitutional right articulated in *Roe v. Wade*. Under *Planned Parenthood of Central Missouri v. Danforth*, this right cannot be vetoed by anyone involved in the surrogate arrangement. *Planned Parenthood* addressed the issue of whether the State had authority to require a pregnant woman to obtain the consent of her husband before she could abort a fetus. The Supreme Court held that the spouse’s consent could not be required by the State. The State “cannot delegate to a spouse a veto power which the State itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.”

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94. Another issue concerned the constitutionality of a provision requiring a single woman under eighteen years of age to obtain the consent of a parent or a person in loco parentis before she would be able to abort the child she was carrying “unless the abortion [was] certified by a licensed physician as necessary in order to preserve the life of the mother.” *Id.* at 58. The majority held that this provision was unconstitutional. The majority also invalidated a provision prohibiting abortions by the saline amniocentesis method. The Court, however, sustained the following provisions: (1) a record-keeping requirement for physicians and hospitals; (2) a provision defining viability; (3) a provision requiring written consent from the pregnant mother before the abortion can be performed. All of these provisions of the challenged statute (except the provision prohibiting saline amniocentesis) concerned the first twelve weeks of pregnancy.

95. The pertinent provision reads as follows: sec. 3(3), requiring [from the woman, prior to submitting to abortion during the twelve weeks of pregnancy,] ‘the written consent of the woman’s spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.’

*Id.* at 58.
authority to any particular person, even the spouse, to prevent abortion during that same period." (emphasis added). 96 The language of the opinion explicitly disallows the husband of the surrogate or the genetic father from prohibiting or regulating the surrogate’s abortion decision. 97

The argument can be made, as in the dissent, that the natural father has an interest in having a child. Rehnquist, J., concurring with White, J., wrote:

A father’s interest in having a child—perhaps his only child—may be unmatched by any other interest in his life. See Stanley v. Illinois, 405 U.S. 645, 651 (1972), and other cases there cited. 98 This sentiment is shared by others like John T. Noonan99 who wrote that it 'could reasonably be argued that if a father could not lose his rights to one of his children without a hearing, even if the child was in the mother’s control, he could not lose his child within the mother’s womb without at least an opportunity to object.” 100 Both Rehnquist and Noonan fail to recognize that the bodily integrity of the mother must take precedence over the father’s desire for children.

The Court in Planned Parenthood acknowledged this balance:

The obvious fact is that when the wife and husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. Cf. Roe v. Wade, 410 U.S., at 153. 101

96. Id. at 69.

97. In a surrogate arrangement, judicial enforcement of a contract provision regulating the surrogate's abortion decision constitutes state action. In Shelley v. Kraemer, 334 U.S. 1 (1948), the Supreme Court held that judicial enforcement of a racially restrictive covenant constitutes state action and, therefore, violates the Fourteenth Amendment. The Court stated: “But for the active intervention of the state courts, supported by the full panoply of state power, [defendants] would have been free to occupy the properties in question.” 334 U.S. at 19. Likewise, in a surrogate arrangement, the state judicial machinery is necessary to deny the surrogate the exercise of her constitutional right.

98. Planned Parenthood, 428 U.S. at 93 (Rehnquist and White, JJ., dissenting).


As in *Roe v. Wade*, *Planned Parenthood* does not distinguish between the roles of motherhood. Yet is relevant in discussing whether the wife has a voice in the surrogate’s abortion decision. The following analysis first considers the situation where the wife is the genetic mother of the fetus and then examines the situation where the surrogate is both the gestational and genetic mother.

In *Planned Parenthood*, a difficult balance was struck between the female’s right to abortion and the male’s right to father children. The Court recognized that the mother’s gestational involvement in the pregnancy was a factor that outweighed the genetic contribution of parenthood. Thus, under *Planned Parenthood*, the genetic mother, like the genetic father, cannot override the gestational mother’s decision. An argument, however, can be made on behalf of the genetic mother that her physical involvement in the reproduction process dictates that she, along with the surrogate, should decide whether or not to terminate the pregnancy. That is, the genetic mother, in undergoing an operation for retrieval of her eggs, must withstand bodily discomforts and pain,\(^\text{102}\) making her circumstances more closely analogous to the role of the gestational mother than to the role played by the genetic father or surrogate’s husband. Although the genetic mother may be required to undergo several operations to retrieve eggs,\(^\text{103}\) one operation or several operations cannot compare to the nine month involvement of the gestational mother. Furthermore, the reasons underlying the abortion decision are totally unrelated to the operation and physical state of the genetic mother. The genetic mother does not undergo the risks of pregnancy. Hence the gestational mother’s right cannot be shared with the genetic mother nor vetoed by her. It follows *a fortiori* that, if a genetic bond cannot be the basis of regulating the abortion decision of the surrogate, then a wife of a sperm donor, having no genetic (let alone gestational bond with the fetus) cannot veto the surrogate’s right.

If, under *Planned Parenthood*, no one can veto the right of the surrogate to abort the fetus, the question becomes whether a contract provision can negate the surrogate’s right. Typically, the contract will contain a provision stating,

\(^{102}\) A female, the next day after the operation, “felt a lot of discomfort. Her navel was battered, her abdomen felt bruised, and she had severe gas pains from the carbon dioxide that had been pumped into her abdomen, like blowing up a balloon, to give doctors more room to work.” Woodall, *Born of Faith and Science*, Phila. Inquirer, (magazine) March 3, 1985, at 16, 19.

\(^{103}\) See id.
Each party acknowledges that he or she fully understands the agreement and its legal effect and that he or she is signing the same fully and voluntarily and that neither party has any reason to believe that the other(s) did not freely and voluntarily execute said agreement.104

A constitutional right can be waived if it is voluntarily, knowingly and intelligently waived.105 A factual issue, however, may arise as to the voluntariness of the waiver. There are women who become surrogates because of monetary gain.106 Thus, one may wonder whether the surrogate was coerced into accepting the contract provision as a result of the financial condition in which she finds herself. She also may not be represented by counsel107 so that the waiver may not be intelligently made. Another consideration is that a constitutional right, once waived, need not be waived forever.108 For example, in criminal law, a suspect does not waive his right to remain silent when he speaks.109

The surrogate should not be able to waive her constitutional right forever. Indeed, the surrogate, like the criminally accused, is in a situation where personal liberty and bodily freedom may be lost. Due to the coercive nature of custodial interrogations,110 incriminating statements by the accused can be acquired by police officers in order to deprive the accused of his personal liberty. Similarly, a surrogate's signature to a contract may be used to take away the surrogate's bodily autonomy. She, too, is part of a coercive atmosphere. The emotional nature of the topic of negotiations may engender this atmosphere. The couple's right to have a child will be stressed by the couple's attorney111 and, at that moment, the surrogate may feel compelled to aid the couple while forgetting the

104. Brophy, supra note 17, at 283.
107. Usually the couple has a lawyer and this lawyer ends up advising the surrogate. "Although he has recruited the surrogate, he is paid by and represents the couple. By disclosing his conflicting interest, he has satisfied legal ethics, but he may not serve the interests of the surrogate. . . ." Robertson, supra note 30, at 30.
109. Id.
110. Miranda, 384 U.S. at 441.
111. Noel Keane "would like to see [specific performance] applied to surrogacy contracts." P. Singer, supra note 10, at 121-22.
physical and emotional consequences to herself. No one, including
the surrogate, may be able to envision or fully realize the conse-
quences that may fall on the surrogate. Moreover, if the surrogate
is being paid, her financial conditions may increase the pressure to
sign the contract.

An argument could be made by the natural father, however,
that he prejudicially relied on the contract provision by paying all
medical and testing expenses and, therefore, the surrogate is estopped
from rescinding the waiver of a constitutional right. The response
is that the contract provision, if enforced in this situation, would
result in injustice and, therefore, would be void as against public
policy. The societal interest in protecting bodily autonomy and
human dignity of its members would be destroyed if economic rights
were able to override these values.

Assuming that under the contract clause the surrogate waived
her constitutional right on a permanent basis, there is the practical
problem of enforcing the contract provision. If a court enjoined the
surrogate from aborting the fetus, she could not be placed in jail
for contempt of the order. In addition, courts also are reluctant to
enforce a service contract, especially when the enforcement requires
court supervision. Damages based on breach of contract would
not provide an adequate remedy for the couple, since the couple
wants a child, not money. The couple, however, could probably

112. An attorney’s description of the meeting between the surrogate and the
couple suggests this emotional coercive atmosphere that can be created:

The couples and the surrogates then meet. It is very important to ‘meet,’
face to face, because this program, in our opinion, is about 2 percent
medical, about 1 percent psychological and legal, and about 97 percent a
surrogate. The surrogate looks at a couple and tells them, ‘I’ll carry your
baby,’ and them looking back at her and saying, ‘We trust you to carry the
most precious thing in our life, and that’s our child, a family that we’re
going to raise.’

Handel, Legal Aspects of New Reproductive Technologies—A Panel Discussion,

113. “The pregnancy and birth may entail more pain, unpleasant side effects,
and disruption than she expected. The couple may be more intrusive or more aloof
than she wishes.” “Relinquishing the baby after birth may be considerably more
disheartening and disappointing than she anticipated.” Robertson, supra note 30, at
30.

114. Brophy, supra note 17, at 281.

115. D. DOBBS, REMEDIES 63 (1973); see also Coleman, Surrogate Motherhood:
Analysis of the Problems and Suggestions for Solutions, 50 TENN. L. REV. 71, 85-
86 (1982).

116. See D. DOBBS, REMEDIES 57-58 (1973) for general guidelines in determining
whether a legal remedy is inadequate.
recover on the theory of unjust enrichment if the surrogate was paid in installments rather than being promised payment at birth of the child. 117 Again, the damages are inadequate in that the couple wants a child. Moreover, damages for emotional distress are usually not granted unless there is physical injury involved. 118 An argument similar to the one advanced in Del Zio v. Presbyterian Hospital 119 might succeed, but only where the surrogate is implanted with an embryo. In Del Zio, a couple sued a doctor and a hospital for destruction of an embryo. The embryo was to be implanted in the genetic mother. Damages were awarded on the basis that the couple had a property interest in the embryo. Del Zio, however, can be distinguished from the surrogate mother procedure in that the embryo was not implanted in a human body when it was destroyed. Thus, Del Zio may be held inapplicable where a gestational mother is exercising her constitutional right of abortion.

A. COUPLE'S CONSTITUTIONAL RIGHTS VS. SURROGATE MOTHER'S RIGHT

Section III of this article argued that an individual cannot negate the surrogate's right of abortion. This section considers whether the natural father and his wife, as a couple, can assert any constitutionally-based rights, and whether their rights may override the surrogate's abortion right.

The right asserted by many advocates of reproductive technologies in favor of the couple is the right to procreate. This right is deemed to be established by Skinner v. Oklahoma.120 In Skinner, a statute that provided for sterilization of "habitual criminals" was challenged as unconstitutional under the Fourteenth Amendment. An habitual criminal was defined as a person "convicted two or more times for crimes 'amounting to felonies involving moral turpitude'."121 The statute, however, expressly excluded "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses."122 This distinction between the

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117. "The restitution claim . . . is not aimed at compensating the [couple], but at forcing the [surrogate] to disgorge benefits that it would be unjust for [her] to keep." See id. at 224.

118. W.P. Keeton, Prosser and Keeton on Torts 364 (5th ed. 1984). There are only a handful of courts that have permitted general negligence actions for infliction of emotional distress without requiring physical injury.


120. 316 U.S. 535 (1942).

121. Id. at 536.

122. Id. at 537 (citing Okla. Stat. Ann. tit. 57, § 195 (West 1935)).
excepted crimes and crimes within the definition of 'habitual criminal' was held to be invidiously discriminatory, denying equal protection of the laws. In reviewing the classification, the Court applied a strict scrutiny test. The Court wrote:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters . . . in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.\(^\text{123}\)

Analysis of the holding and language of *Skinner* reveals that it does not support an affirmative right to procreate nor an affirmative right to actively pursue procreation using reproductive technologies. "The procreative right recognized in *Skinner* was simply a right to remain fertile, and not an uninhibited right to engage in potentially procreative conduct."\(^\text{124}\)

Nor does *Griswold v. Connecticut*\(^\text{125}\) supply the basis for a couple's constitutional right to procreate via the new reproductive technologies. In *Griswold*, a statute\(^\text{126}\) that prohibited the use of contraceptives to married persons was held unconstitutional. The married couple's right to use contraceptives was held to be within a protected zone of privacy.\(^\text{127}\) Justice Douglas stated:

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125. 381 U.S. 479 (1965).
126. The section of the statute reads as follows: ANY PERSON WHO USES ANY DRUG, MEDICINAL ARTICLE OR INSTRUMENT FOR THE PURPOSE OF PREVENTING CONCEPTION SHALL BE FINED NOT LESS THAN FIFTY DOLLARS OR IMPRISONED NOT LESS THAN SIXTY DAYS NOR MORE THAN ONE YEAR OR BE BOTH FINED AND IMPRISONED. *Id.* at 480.
127. The right of privacy is not explicitly stated in the Constitution. Justice Douglas, in his majority opinion in *Griswold*, held that the constitutional basis of
We deal with a right of privacy older than the Bill of Rights—
older than our political parties, older than our school system.
Marriage is a coming together for better or for worse, hope-
fully enduring, and intimate to the degree of being sacred. It
is an association that promotes a way of life, not causes; a
harmony in living, not political faiths; a bilateral loyalty, not
commercial or social projects. Yet it is an association for as
noble a purpose as any involved in our prior decisions.
(emphasis added).\textsuperscript{128}

In describing the statute being struck down, Justice Douglas further
stated:

The law . . . operates directly on an intimate relation of
husband and wife and their physician's role in one aspect of
that relation. (emphasis added).\textsuperscript{129}

The married couple's right is not a right to reproduce, but a
right to use contraceptives to prevent reproduction. Griswold
does not establish an affirmative right of reproduction. "Freedom to have
sex without reproduction does not" serve as the basis for a claim
that a couple is free "to have reproduction without sex."\textsuperscript{130} In
addition, this right that is recited in \textit{Griswold} is rooted in intimacy.\textsuperscript{131}
The language in \textit{Griswold} focuses on the intimacy of the sexual
relations between a man and a woman. This focus is further illus-
trated by Justice Douglas' comment: "Would we allow the police to
search sacred precincts of marital bedrooms for telltale signs of the
use of contraceptives?"\textsuperscript{132} Hence the couple's right to decide to
prevent conception is "'largely subsumed within a broad right of
marital privacy' which 'stress(es) the unity and independence of the
married couple and forbids undue inquiry into conjugal acts.”

Even if *Griswold* is read to establish a right to procreate,134 Justice Douglas' emphasis on the intimacy of marital relations135 distinguishes *Griswold* from a couple's arrangement with a surrogate for the purposes of reproduction. *Griswold* does not encompass the circumstances where a third party must be secured for purposes of reproduction. The involvement of a third party, by definition, negates the intimacy that two people share in their relations. The methods used, such as artificially inseminating the surrogate or fertilizing an egg in a petri dish, are totally distinct from the intimate relations encompassed by *Griswold*.

The rationale of the Court of Appeals for the Fourth Circuit in *Lovisi v. Slayton*,136 however, is applicable to surrogate arrangements. Lovisi involved a married woman who was convicted under a state sodomy statute137 for acts of fellatio she performed on both

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133. Smith & Iraola, supra note 124, at 282.

134. There are commentators and attorneys who argue that Supreme Court decisions can be read to establish a constitutional right to procreate. See P. Reilly, Genetics, Law and Social Policy 213 (1977); Handel, supra note 112, at 788; Robertson, supra note 130.

135. The right asserted in *Griswold* can be expressed in terms of “the freedom of intimate association.” See Karst, The Freedom of Intimate Association, 89 Yale L.J. 642 (1980).

136. 539 F.2d 349 (4th Cir. 1976) (en banc), cert. denied, 429 U.S. 977 (1976). This case has been criticized by commentators. See Note, Constitutional Law—Right to Privacy—Husband and Wife Who Permit Third Party to Observe Their Sexual Activities Waive Right to Marital Privacy. Lovisi v. Slayton, 539 F.2d 349 (4th Cir.) (en banc), cert. denied, 97 S. Ct. 485 (1976), 8 Rut.-Cam. L.J. 707 (1976-1977) and Note, Constitutional Law—Right of Privacy—Married Couple Relinquished Right of Privacy by Engaging in Oral-Genital Contact in the Presence of Another—Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976), cert. denied, 45 U.S.L.W. 3395 (U.S. Nov. 29, 1976), 25 Emory L.J. 959 (1976). It is asserted that the Lovisi majority erred in applying fourth amendment principles in a case involving marital intimacies. The right of privacy in *Griswold*, under certain circumstances, is distinct from the right of privacy based upon the fourth amendment, but common sense dictates that the *Griswold* relation entails a reasonable expectation of privacy. The fourteenth amendment's right of privacy may be broader than the fourth amendment, but that does not negate the fact that the fourteenth amendment's right of privacy contains aspects of the fourth amendment. That is, *Griswold* may not require that a couple's sexual relations take place per se in the bedroom or house, but as a practical matter, it does require that it not take place in public streets. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973).

137. The Virginia Statute reads as follows:

**CRIMES AGAINST NATURE. — IF ANY PERSON SHALL CARNALLY KNOW IN ANY MANNER ANY BRUTE ANIMAL, OR CARNALLY KNOW ANY MALE OR FEMALE PERSON BY THE ANUS**
her husband and a third party. These consensual acts of fellatio were performed in the couple’s bedroom. The Lovisi court stated that the right of privacy exists only in circumstances in which it may be reasonably expected. Once a third party is accepted as a viewer or participant in the marital bedroom, there is no longer any constitutional protection. As a result, the court held that the married couple had waived their right of privacy. Like the couple in Lovisi, the couple hiring a surrogate waives their right of privacy under the fourteenth amendment. If the married couple does not have a reasonable expectation of privacy when there is an onlooker or participant in the marital chambers, it follows that a married couple should not have a reasonable expectation of privacy when they take the reproduction process outside the marital chambers. Reproduction by its nature entails intimacy that is lacking when a third party is involved in the process and/or is taken outside the bedroom. The Constitution protects the intimacy of private marital sexual relations.

Furthermore, other cases such as Eisenstadt v. Baird and Carey v. Population Services International do not support a procreation right or, more specifically, a right to conceive. In Eisenstadt, the Supreme Court held that a statute that prohibited the distribution of contraceptives to unmarried persons was unconstitutional. The case was purportedly decided on the basis of a minimum

OR BY OR WITH THE MOUTH, OR VOLUNTARILY SUBMIT TO SUCH CARNAL KNOWLEDGE, HE OR SHE SHALL BE GUILTY OF A FELONY AND SHALL BE CONFINED IN THE PENITENTIARY NOT LESS Than ONE YEAR NOR MORE THAN THREE YEARS.

Lovisi, 539 F.2d at 350 N.1 (CITING VA. CODE ANN. § 18.1-212 (1950) (repealed 1975)).

138. Photographs were taken of the Lovisis' sexual acts. Lovisi, 539 F.2d at 350.
139. Id. at 351.
140. Id. at 351. Constitutional protection has not been extended to the intimacy of private homosexual relations. See Doe v. Commonwealth’s Attorney and Bowens v. Hardwick, supra note 48.
141. 405 U.S. 438 (1972).
143. The statute provides a “maximum five-year term of imprisonment for whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception, except as authorized in Sec. 21A.” Under Sec. 21A, [a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish drugs or articles to any married person presenting a prescription from a registered physician.’ Eisenstadt, 405 U.S. at 440-441.
rationality-equal protection ground. There is, however, language in Eisenstadt that speaks of fundamental rights doctrine:

If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (emphasis added except "individual")

A divided court in Carey invalidated restrictions on the distribution of nonprescription contraceptives. The challenged provision, inter alia prohibited the distribution of contraceptives to persons over sixteen years of age by anyone other than a licensed pharmacist. Justice Brennan insisted that the "compelling state interest" test apply. He stated:

The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. . . . where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests. Justice Brennan also looked at post-Roe decisions to assert "that the same test must be applied to state regulations that burden the individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means effectuating that decision as is applied to state statutes that prohibit the decision entirely." (emphasis added).

144. Eisenstadt, 405 U.S. at 447. "The question . . . is whether there is some ground of difference that rationally explains the different treatments accorded married and unmarried persons under Massachusetts [statute]." (emphasis added). G. GUNThER, CONSTITUTIONAL LAW CASES AND MATERIALS 588 (10th ed. 1980).

145. Eisenstadt, 405 U.S. at 453.

146. Under New York Educ. Law § 6811(8) (McKinney 1972), it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.

Carey, 431 U.S. at 681.

147. Id. at 686.


149. Carey, 431 U.S. at 688.
In these cases, the Supreme Court did not recognize a right to procreate nor a more limited right to conceive. Rather, the emphasis was placed on the prevention of conception and government's intrusion on that right. The language "whether to bear or beget a child" cannot be read out of context. That is, the language cannot be read independently of the factual situation. Each case dealt with contraceptives and the prevention of conception, not an affirmative right to conceive.

Assuming that the couple does have a constitutional right to conceive via the reproductive technologies, this fundamental right cannot be absolute. The government can assert a compelling state interest to justify interference with the exercise of the couple's right. Moreover, the couple's right may be less than fundamental if the wife is capable of bearing a child, but does not want to undergo the inconvenience of pregnancy. The government would then have to show only a rational basis for restricting the exercise of that right.

One of the few cases dealing directly with reproduction by the hiring of a surrogate is Doe v. Kelly. In Doe, a couple filed a complaint in a Michigan circuit court for a declaratory judgment, declaring adoption statutes unconstitutional. Their challenge was based on the claim that the surrogate arrangement was within their constitutional "right of privacy," the government did not have a compelling state interest to invade that area of privacy, and the

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151. Id.
   (1) Except for changes and fees approved by the court, a person shall not offer, give or receive any money for other consideration (sic) or thing of value in connection with any of the following:
   (a) The placing of a child for adoption
   A person who violates any of the provisions of section 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon any subsequent conviction shall be guilty of a felony.
M.H. Shapiro, supra note 153 at 537-38.
statute was not sufficiently narrow. The court dismissed this claim and ruled on a more limited issue:

It is this Court's opinion that a contract to use statutory authority of the Probate Court to effect the adoption of a child wherein such contract provides for valuable compensation, is not deserving of, nor is it within the constitutional protection of the right of privacy as defined by the many cases of the United States Supreme Court.\textsuperscript{156}

The court, however, in dictum, assumed the constitutional right of privacy applied to the couple's arrangement with the surrogate, and considered whether the state had a compelling interest. The Court found that the state had a compelling interest in preventing commercialism from affecting a mother's decision to execute a consent to the adoption of her child.\textsuperscript{157} The court stated:

\textsuperscript{156} M.H. Shapiro, supra note 153 at 539. Two recent rulings, however, have not followed Doe in determining the applicability of similar state adoption statutes to surrogate motherhood arrangements in which the surrogate is artificially inseminated. In Surrogate Parenting Assoc. Inc. v. Commonwealth ex rel. Armstrong, Attorney Gen., 704 S.W.2d 209 (Ky. 1986), the Kentucky Supreme Court held that Surrogate Parenting Associates' (SPA) involvement in the surrogate parenting procedures did not violate Kentucky's adoption statute which prohibits the buying and selling of babies. The court reasoned that there are significant differences between the surrogate parenting procedures in which SPA takes part and the buying and selling of babies as contemplated by the Kentucky statute. The Court stated:

There is no doubt that [the statute] is intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child. But the contral fact in the surrogate parenting procedure is that the agreement . . . is entered into before conception. The essential considerations for the surrogate mother when she agrees to the surrogate parenting procedure are not avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing [but in assisting a couple who is unable to conceive a child in the customary manner.]

\textit{Id.} at 211. These differences placed the surrogate parenting procedure beyond the scope of the adoption statute. The court, however, noted that according to state law, the contractual arrangement regarding the surrendering of custody by the surrogate and termination of the surrogate's parental rights is voidable for five days following the birth of the child.

In another case, Matter of Baby Girl, N.Y.L.J., Aug. 8, 1986, at 15, col. 1. (Nassau County Surrogate Ct.), the Surrogate Parenting Associates, Inc. ruling was followed. In upholding a $10,000.00 payment to a surrogate mother, the court ruled that the payment was not foreclosed by New York's adoption statute, and requested that the legislature review the legality of surrogate arrangements.

\textsuperscript{157} Id. at 539.
Mercenary considerations used to create a parent-child relationship and its impact upon the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community.\textsuperscript{158}

Hence, in view of the Court, the adverse impact on society and the child clearly outweighed any interest of the contracting parties. \textit{Doe v. Kelly} illustrates the strong public policy against baby selling that can be asserted to void an agreement that provides for compensation to a surrogate. The next question is whether there is a compelling state interest to restrict the couple’s right when no compensation is involved. The following interests that may be asserted by the state will be discussed consecutively:

(1) the protection of familial values\textsuperscript{159}
(2) prevention of harm to the child\textsuperscript{160}
(3) protection of the female with low economic status\textsuperscript{161}
(4) the protection of societal values of personal autonomy and bodily integrity.

It will be argued that state interests (1) and (2) would not withstand strict scrutiny, but would pass muster under the rational basis test. State interests (3) and (4) could not be asserted to entirely prohibit surrogate motherhood. State interest (3), however, would prohibit payment for surrogate motherhood and state interest (4) would prohibit contract provisions regulating the surrogate’s abortion right. In that way, state interests (3) and (4) would satisfy the requirements that the state interest be “compelling” and that the statute be narrowly drawn to further a state interest.

At first glance, the protection of familial values seems to be a compelling state interest. “Collaborative reproduction confuses the lineage of children and destroys the meaning of family as we know it.”\textsuperscript{162} The same argument, however, can be asserted against the adoption system. Yet adoption has not been found to be detrimental to familial values.\textsuperscript{163} This interest would not withstand strict scrutiny, but would serve as a rational basis for denying women access to the use of surrogates for reproduction purposes if the women simply

\textsuperscript{158} Id. at 539-40.
\textsuperscript{159} Robertson, \textit{supra} note 30, at 29.
\textsuperscript{160} Id. at 30.
\textsuperscript{162} Robertson, \textit{supra} note 30, at 30.
\textsuperscript{163} Id.
felt inconvenienced by pregnancy. A woman should not be able to establish different familial lines because she is inconvenienced by adhering to traditional family patterns.

Preventing harm to the child may also be asserted as a state interest. Although surrogacy is analogous to adoption in that the child may have intense desires to know his biological mother or where he came from, the child may be more prone to psychological problems when he learns that his biological mother not only gave him up for adoption, but never had any intention of mothering him.\(^{164}\) This argument also would fail under the compelling state interest test because there is no direct evidence that a child would suffer greater harm from being born of a surrogate arrangement where adoption is decided before conception than with traditional adoption patterns.\(^{165}\) "The fact that adoption through surrogate mother contracts is planned before conception does not increase the chance of identity confusion, lowered self-esteem, or the blurring of lineage that occurs with adoption."\(^{166}\) Moreover, it is not unusual for a surrogate to see the child on a regular basis.\(^{167}\) By seeing the child, the surrogate contact may erase the child’s feeling of rootlessness, as well as feelings of rejection.

The state may also assert an interest in protecting economically-disadvantaged women who may be coerced into accepting surrogate motherhood by financial pressures.\(^{168}\) This interest is compelling in that public policy opposes the renting of a body. This interest, however, could not be used to argue against surrogate motherhood except where a fee is rendered. As stated earlier, there are women who want to be a surrogate for reasons other than monetary gain.\(^{169}\)

The promotion of the societal values of personal autonomy and bodily integrity would serve as a compelling state interest that would override the right to procreate via surrogate motherhood when the surrogate arrangement entails regulation of the surrogate’s right to abortion. This state interest represents an indirect assertion of the surrogate’s right to bodily integrity. The female body cannot be used by others as a baby machine. Otherwise, the value that society

\(^{164}\) Annas, *Contract to Bear a Child: Compassion or Commercialism?*, 11 HASTINGS CENT. REP. Aug. 1979 at 23, 32.

\(^{165}\) Id.

\(^{166}\) Robertson, *supra* note 30, at 30.

\(^{167}\) A surrogate remained close to the couple, and was referred to as “Auntie Sue.” P. SINGER, *supra* note 10, at 125.

\(^{168}\) See *supra* note 28, and accompanying text.

\(^{169}\) Id.
attaches to the integrity of the individual would be destroyed. In order to protect the dignity of the individual in society, the state must not allow the couple to dictate what the surrogate can and cannot do with her body. The person who owns that body thinks and has feelings. The surrogate may initially decide to use her body to bear a child for a couple, but that does not mean that she cannot change her mind. As emphasized in Roe v. Wade, she has sole control of her body, and this value takes precedence over procreation.

B. ALTERNATIVES TO VETOING THE SURROGATE'S DECISION WHETHER OR NOT TO ABORT.

As discussed above, the surrogate's right to decide whether or not to abort the child cannot be vetoed by anyone, including the couple who participate in a surrogate arrangement. Moreover, the couple does not have an overriding right to reproduce via surrogate motherhood. Yet this has not deterred couples from seeking surrogates for the birth of a child. Surrogate motherhood is a current reality. The question is whether there are alternatives that, instead of vetoing the surrogate's right, would accommodate both the surrogate's abortion right and the couple's wishes. Also, when the surrogate does exercise her right contrary to the couple's wishes, there is a question of what remedies are available to rectify the situation or alleviate any negative impact on society.

Whether the surrogate is artificially inseminated or implanted with an embryo, the objective of the couple is to secure a healthy baby. The societal interest is to protect the child from entering an environment detrimental to its well-being. Society's concern cannot justify an absolute veto of the surrogate's right to abort, but accommodations can be made so that society's objective can be attained. Accommodations, however, cannot guarantee that the couple will be satisfied with the resulting circumstances. Moreover, from the couple's perspective, remedies may be inadequate when these accommodations fail.

170. Of course, there are limitations during the second and third trimesters. See supra notes 43-46, and accompanying text.

171. The extensive physical involvement of the surrogate dictates this hierarchy of values. See supra notes 65-86 and accompanying text; cf. L.H. Tribe, American Constitutional Law 924 (1978).


173. The couple, however, may change their mind or circumstances such as divorce may arise where the couple's goal is prevention of the child's birth.
Whatever alternatives may be available, they should be set forth in legislation rather than settled by private arrangements. Legislation would provide notice and uniformity lacking in case-by-case adjudications of private contracts in a new field of law. Parties would be aware of their rights and liabilities prior to any arrangement so that later tragedies may be avoided. Moreover, each party would be aware of any risk in engaging in the activity and would be able to assess the pros and cons of entering into a surrogate arrangement. By legislation, the stability of familial relations and responsibilities of parenthood on an uniform basis also would be established.

Legislation should be separated into four categories: (1) preventive measures; (2) dispute resolution; (3) remedial measures; and (4) liability of the surrogate. In turn, each category should focus on the situations where, a normal child is born against a couple’s wishes; a defective child is born; and no child is born. For example, as to preventive measures, the incorporation of contractual provisions and practice in private arrangements such as the screening of potential surrogates may ensure the birth of a healthy baby

174. One of the characteristics of adjudication is that a specific factual dispute where rights are affected must occur first before guidance on the matter is given. See generally Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1977-78).

175. Malahoff v. Stivers is representative of the terrible circumstances that may arise if surrogate arrangements are not governed by statute. In this case, Mr. Malahoff contracted with Judy Stivers to give birth to a child for him. Mrs. Stivers was inseminated with Mr. Malahoff’s sperm; however, paternity tests revealed that Mr. Malahoff was not the natural father of the child carried by Mrs. Stivers. Mrs. Stivers had engaged in sexual intercourse with her husband immediately prior to being artificially inseminated. The child, born with microcephaly (a disorder indicating possible mental retardation), was unwanted by Mr. Malahoff and, at the same time, the surrogate felt no bond with the child. The state finally intervened and became the guardian of the child. The case is now in federal district court in Detroit, Michigan. Andrews, The Stork Market: The Law of the New Reproductive Technologies, A.B.A.J., August 1984, at 50, 56. (It is at the discovery stage. Telephone interview with law clerk, U.S. Dist. Ct., Detroit, Michigan (January 31, 1985)). A Michigan legislator, Richard Fitzpatrick, has unsuccessfully tried to pass three different versions of surrogate motherhood bills. L.B. Andrews, supra note 18, at 237-41.

176. One commentator writes:

Private contracts working in tandem with the court system are inadequate to deal with the multiplicity of issues presented. The issues are too numerous to be dealt with in the courts on a case by case basis; private contracts alone are often too myopic and vague to deal with the complexities of the issue. Mady, Surrogate Mothers: The Legal Issues, 7 Am. J.L.M. 323 at 345 (1981). However, this should not prevent legislators from borrowing these provisions when they are found to be clear regulatory devices.
without the need to request a surrogate to exercise her abortion right in agreement with the couple’s wishes.

Two contractual provisions that could be mandated by the legislature as standard in a surrogate contract are the clause that requires the surrogate, during pregnancy, to abstain from alcohol, smoking and drugs unprescribed by a physician, and the clause that requires the surrogate to undergo amniocentesis. The first provision would be enforced by requiring the surrogate, during the pregnancy, to undergo toxicological testing at each visit with her doctor. The female would be required to consent to this type of testing even before she would be accepted as a surrogate. She would have to undergo toxicological testing during the screening process to determine whether she already practices these unhealthy habits. If she does not consent, she cannot be considered a candidate for surrogacy.177 In addition, it would be essential that the surrogate consent to amniocentesis before she would be considered. The combination of these two provisions would enable the surrogate’s doctor to monitor the course of the pregnancy. These provisions, however, are not fool-proof in securing a healthy baby. For example, amniocentesis does not identify all possible defects.178 In addition, a scheduled toxicological test will not reveal the use of drugs that can easily escape the body.179 It would be impractical, however, for a court of law to conduct and enforce “surprise” examinations.

The screening of a potential surrogate would necessitate toxicological testing, a physical examination, genetic testing and psycho-

177. This is not an unusual method in insuring applicants who are drug-free. Firms and corporations are now requiring job applicants to undergo urine tests to determine whether an applicant engages in drug use. If the applicant does not take the test, he cannot be considered for the employment position. Whether this is an invasion of privacy in this context is yet to be seen as the suits are now being brought into court. Collins, Drugs tests are the newest hurdle for many job applicants, Phila. Inquirer, Apr. 7, 1985, at 1-A, 14-A. In the surrogate context, the State can claim that the protection of unborn children is compelling.

178. Amnicentesis, fetoscopy, and ultrasound techniques have dramatically increased our ability to detect fetal disorders antenatally. It is now possible to diagnose virtually all chromosome abnormalities, over 100 inborn errors of metabolism, biochemical and monogenic disorders, and an increasing number of structural abnormalities.

D.N. DANFORTH, supra note 64, at 43.

179. Traces of marijuana may be detected as many as 80 to 90 days after the drug has been used whereas cocaine disappears from the urine in several days to one week. Collins, supra note 177, at 14-A, col. 6. See also R. BUSELT, DISPOSITION OF TOXIC DRUGS AND CHEMICALS IN MAN (2d ed. 1982).
logical studies. An investigation of the couple also should be conducted.\textsuperscript{180} The couple's physical, emotional and mental capabilities to engage in this reproductive arrangement and to rear a child resulting from this process should be assessed. Both the surrogate and the couple must be informed of the surrogate's absolute right of abortion and circumstances that may follow.\textsuperscript{181} The surrogate, on the other hand, should be made aware of the couple's plight.\textsuperscript{182}

Once the screening process is completed, the surrogate should attend a specific number of mandatory prenatal care sessions. Furthermore, once she is pregnant, the surrogate should be required to undergo periodic medical examinations by a doctor\textsuperscript{183} selected by the surrogate with the approval of the couple. In addition, the State may find it beneficial to require the surrogate to attend surrogate group meetings for emotional support during the pregnancy. These meetings might enable the surrogate to feel secure in her decision to carry the baby to term and enable her to deal with any feelings of attachment to the fetus that may develop. The State also may allow the surrogate to know the identity of the couple so that the couple and surrogate can develop a trusting relationship. This relationship may secure the surrogate's cooperation in matters concerning abortion. The problem, from the couples perspective, would be that the surrogate may want to continue relations with the couple and the child after the child is born.

Record-keeping provisions may also be a part of surrogate legislation. The State would maintain records of results of each surrogate arrangement. That is, the record would contain the following information: whether a child was born; whether the child was born with a defect; if so, what was determined to be the cause of the defect; and whether the surrogate exercised her abortion right


\textsuperscript{181} "Before undertaking one of these procedures, couples should discuss freely their feelings about the technique and about the various potential outcomes." "They should discuss all possible scenarios that might occur even if at the moment they seem inconceivable." L.B. Andrews, \textit{supra} note 18, at 262.

\textsuperscript{182} The surrogate should understand that the couple has become involved in a surrogate arrangement because it was a last resort to have a family. W. Handel, \textit{supra} note 112, at 786. Yet every effort should be made so that the surrogate does not feel coerced. See \textit{supra} notes 111-113 and accompanying text.

\textsuperscript{183} The doctor also would be responsible for monitoring the surrogate's intake of alcohol and drugs. Since the doctor initially would be chosen by the surrogate, the doctor would be viewed as less of an intruder or adversary by the surrogate when he monitors her.
contrary to the wishes of the couple. This file would be kept confidential except in assessing a returning applicant for surrogacy. The couple, thus, would be provided with a method of notification.

Once a surrogate seeks readmission to the screening process, her file would be opened to assess her potential cooperation with the couple. For example, a surrogate who has capriciously aborted a child would not be hired again. This, however, may be construed as a measure to punish the surrogate for exercising her constitutional right. Indeed, surrogates may be deterred from exercising their right in fear of not being hired again. Moreover, the utility of this procedure may be of limited use for the couple because it only provides the couple with notification of a previous exercise by a surrogate. It is yet to be known whether surrogacy will attract “career” surrogates, and whether any surrogate who was uncooperative in a specific arrangement would try to be a surrogate again.

The major obstacle to this record-keeping provision is the constitutional claim of invasion of privacy. Since Planned Parenthood cases have invalidated record-keeping requirements where the names of women who have undergone abortions are not kept confidential. An alternative approach would be to use recordkeeping provisions for statistical information. The couple could then make an informed decision as to whether they want to reproduce via surrogacy, yet the name of a surrogate would not be disclosed. The utility of this procedure is more limited than the previous suggested approach to record-keeping because the couple will not know if a career surrogate has been uncooperative in the past.

A form of notification of the couple that may be beneficial falls under the second category of legislation, dispute resolution. The surrogate would be required to notify the State that she intends to exercise her right to abort. At this point, the surrogate would be requested to submit to counseling sessions before the surrogate could exercise her right. If a court after counseling found that the surrogate

184. One author writes:
The state may decide that a uterine mother who capriciously aborts a fetus should be barred from further third-party pregnancies and should be subject to other sanctions.
P. Reilly, Genetics, Law and Social Policy 221.
187. The couple would not be notified until after the counseling process is completed. Otherwise, the notification may be viewed as a restraint on the surrogate’s right to abortion. See Scheinberg v. Smith, 550 F. Supp. 1112 (1982).
was resolute concerning her decision, the court would allow the abortion right to be exercised. If, however, the court found the surrogate was insecure, the court would order further counseling\textsuperscript{188} without hindering her ability to eventually exercise her right.\textsuperscript{189} This requirement of counseling would most likely withstand constitutional challenge in that it would probably be viewed as a confirmation of the surrogate’s independent decision. The couple may have used coercion, and the counseling sessions assure the State that the surrogate is exercising her free will.\textsuperscript{190}

Despite any notice provisions, counseling, and various precautions, a surrogate may be chosen who will carry a defective child\textsuperscript{191} who ultimately may not be aborted by the surrogate when the couple requests otherwise. Also, the surrogate, despite precautions, may abort a healthy child against the couple’s wishes. Thus, remedial measures, the third category of legislation, must be pursued. Remedial measures should be implemented to ensure the child’s well being, and to ensure that the surrogate will not be deterred from exercising her abortion right. Adherence to these guidelines dictates that the couple should be required to keep the child, regardless of whether the child is born normal or defective, and irrespective of the cause of the defect. If the couple dies, the surrogate could be given the option of keeping the child or placing the child for adoption. The surrogate should not be required per se to keep the child. If that were the case, the rearing of the child could be viewed as a punitive measure against the surrogate for exercising her abortion right.\textsuperscript{192} The surrogate would be placed in the detrimental position that the Supreme Court recognized in \textit{Roe v. Wade} and \textit{Doe v. Bolton}. Moreover, the return of the child to the surrogate would undermine the dignity of the child as a human individual. Whether or not the surrogate is compensated, the child, if returned

\textsuperscript{188} \textit{This is similar to the counseling requirements in the Pennsylvania Divorce Code for no-fault divorces. PA. STAT. ANN. tit. 23 § 202 (Purdon 1984).}

\textsuperscript{189} \textit{The court must exercise its discretion in light of \textit{Roe v. Wade}. See supra notes 44-46 and accompanying text.}

\textsuperscript{190} \textit{The counseling requirement would be analogous to the written consent required by the pregnant woman in \textit{Planned Parenthood of Missouri v. Danforth}. See supra note 94. The written confirmation was unconstitutional since it assured the doctor of the female’s decision.}

\textsuperscript{191} \textit{See supra notes 178-79 and accompanying text.}

\textsuperscript{192} \textit{Child care work entails 4,000-5,000 wet, dirty diapers per child, “months or years of disturbed nights, loss of personal freedom, [and] many extra hours of domestic work per week per child.” A. \textsc{oakley}, \textsc{women confined: towards a sociology of child birth} 61-62 (1980).}
to the surrogate, would be treated by the couple as an unwanted item or product. The child should not be valued as an item on the market, but should be valued as an unique human being, incapable of replication or improvement.193

The couple should be held responsible for the resulting child, not only on a financial basis, but also on an emotional, physical and mental basis. This responsibility cannot be delegated to another adopting couple or an institution. In the typical family arrangement, a couple has the option of rearing a defective child, placing it in an institution, or placing the child for adoption. The couple who engages a surrogate for reproduction purposes should not have these options. This distinction is justified by the nature of the couple’s decision. In the typical surrogate arrangement, the couple has already considered all avenues of reproduction194 and surrogacy is the last resort. It is a more calculated approach to pregnancy as opposed to the pregnancy that was unexpected or the pregnancy that was planned without the use of a third party.195 Moreover, involvement of a third party requires the couple to give more consideration to the aftermath of the pregnancy. There is an opportunity to discuss matters. Because of this opportunity, the couple should be required, before the pregnancy, to assure society that it can provide a beneficial environment for the child. That is, a determination must be made that the couple, without feelings of resentment, will be capable of rearing a child, defective or not defective. If the couple refuses the child after the birth or intentionally provides the child with an unhappy, abusive home life, the couple will not be allowed to engage in surrogacy again. Moreover, the couple will remain responsible for the child’s financial support. These measures should prove successful because the couple who seeks surrogacy desperately wants a child, and would not risk non-access to the only reproductive means available.196

193. See generally Keniston, 'Good Children' (Our Own), 'Bad Children' (Other People's), and the Horrible Work Ethic, 37 Yale Alumni Mag. 6 (1974).
195. Lori B. Andrews stresses that 'surrogate motherhood' should not be rushed into. "There is time to carefully consider whether it is right for [the couple] and, if it is, at what time." For example, "since the wife does not physically take part in the reproductive process, she does not have to speed the process for fear that her reproductive clock will run out. She does not have to hurry into childbearing like the woman who gets married in her mid-thirties and feels she must begin having children immediately before she goes into menopause." L.B. Andrews, supra note 18, at 201.
196. The argument can be made that these proposals would deny the couple's
couple also could be held liable for damages for emotional injury to the abandoned child. As to additional financial security for the child, the couple should be required to post bond should also be required to purchase a life insurance policy for the child.

Although the couple would be required to take custody of the child, the surrogate should not escape responsibility for any actions detrimental to the child’s well-being. For example, if the surrogate lied or failed to disclose pertinent information (i.e., use of drugs) she should be denied compensation and be denied the opportunity to be a surrogate for future couples. In addition, the couple who selected the surrogate should be awarded punitive damages. Punitive sanctions should be imposed so that this type of conduct will be deterred. The problem is that the surrogate may be judgment-proof. If it is discovered that the surrogate violated the contractual provision concerning consumption of unnatural substances, she should not be compensated for the remaining months of the pregnancy. This remedy is only available if the surrogate is paid in installments. Also, both the couple and child should be able to seek recovery for any resulting injury that can be proved to be the result of the surrogate’s negligence and/or breach of contract. Again, the remedy may be meaningless if the surrogate is judgment-proof. The plaintiffs also must overcome a proof problem as to proximate cause. It is difficult in certain circumstances to determine the cause of a resulting child’s defect. If no child is born, the couple is left with no adequate remedy.

right to reproduce. It, however, has been established that the couple has no right to reproduce via reproductive technologies. See supra text accompanying notes 120-49. Assuming the couple does have this right, this right is not absolute. The protection of a child would be a compelling state interest.


202. See supra note 200.

203. Mady, supra note 176, at 335.

204. See supra text accompanying notes 114-19.
As the above discussion demonstrates, there are presently a number of inadequacies for the couple in securing a healthy child through a surrogate arrangement. Of course, no legal remedy provides an aggrieved party a perfect solution. Yet the couple who desperately seeks a healthy child probably feels these inadequacies more than, for example, the person who contracts to buy a car and receives damages instead. No damages or denial of payment to the surrogate will ever replace a healthy child nor will damages for prenatal injuries ever rectify the defects of a child. Furthermore, the couple involved in a surrogate arrangement resulting in a defective child or no child may undergo greater feelings of disappointment than a couple that has control of the abortion right. A more ideal solution for the couple lies in the use of an artificial womb. With an artificial womb, no surrogate can claim an absolute right of abortion. Since there is literally no body involved in carrying the embryo, the genetic parents of the embryo would be able to decide for themselves whether they wished to terminate the pregnancy.205

IV. Conclusion

In general, the right of abortion in the surrogate motherhood arrangement can be exercised only by the gestational mother, the surrogate, since her physical autonomy is most affected by the pregnancy. This conclusion is dictated by Roe v. Wade. Planned Parenthood v. Danforth further provides that no one, including the genetic mother, can veto this right, for the gestational effects of pregnancy determine who can exercise the right. Furthermore, the couple cannot claim a constitutional right to procreate. Assuming there is a constitutional right to procreate, this right cannot override the surrogate's right to abort. Society's interest in maintaining

205. With the use of an artificial womb, the concerns of physical autonomy expressed in Roe v. Wade are not present so that the rights of the fetus may take precedence. Thus, the State may proscribe terminations of pregnancies, but not 'womb emptying.' That is, the couple would not be able to destroy the fetus. See Goldstein, Choice Rights and Abortion: The Begetting Choice Right and State Obstacles to Choice in Light of Artificial Womb Technology, 51 S. CAL. L. REV. 877 (1978). Yet, unlike the surrogate motherhood arrangement, the State should be responsible for the resulting child if the couple changed their minds. With physical autonomy not present, the detrimental effects of child rearing recognized in Roe v. Wade may be asserted. Moreover, if the fetus is found to be defective, the couple may assert a right to eugenic abortion. See Rush, Genetic Screening, Eugenic Abortion and "Roe v. Wade": How Viable is "Roe's" Viability Standard?, 50 BROOKLYN L. REV. 113 (1983). The couple's wishes, therefore, would be in accord with the State's interest in preventing genetic defects.
personal autonomy must take precedence over a couple's wish to procreate.

Although there is an absolute prohibition against the regulation of the surrogate's right of abortion, legislation may be passed to provide the couple with alternatives to vetoing the surrogate's right. These alternatives, however, may prove ineffective in securing the couple's objective of obtaining a healthy child. That is, remedies, although in accordance with societal values, may be inadequate from the couple's viewpoint. The ultimate solution lies in the development of artificial womb technology.