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essays by:

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Surrogate Parenting: The Michigan Legislation

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On September 1, 1988, the Michigan Surrogate Parenting Act took effect. It was not the first such law enacted, but it was the most comprehensive. The law enunciated the public policy of the State of Michigan with respect to surrogate contracts and established three legal principles addressing the critical issues raised by the practice.

(1) STATUS OF SURROGATE CONTRACTS.
Surrogate contracts are declared to be null, void and unenforceable in Michigan.

(2) STATUS OF COMPENSATED SURROGACY.
Parties who enter into or arrange surrogate contracts involving the exchange of anything of value are subject to criminal sanctions. The crime is a misdemeanor for parties to the contract and a felony for persons acting as arrangers, brokers or facilitators.

(3) STATUS OF THE CHILD
Disputes arising as to the custody of a child born pursuant to a surrogate contract, will be determined through a circuit court action based on statutory principles reflecting the
"best interest of the child," found in the Michigan Child Custody Act.

Legislative proposals to criminalize, declare void or legalize and regulate surrogate parenting contracts had been introduced in every session since 1983. The interest of a few legislators became the concern of many as the number of surrogate births began to increase dramatically and, though few in number, the drama of broken contracts grabbed national headlines. These events focused legislative, legal and popular attention on this novel and emotionally charged mechanism for establishing a family.

The technique of surrogate parenting has been known since the beginning of time. It involves no new or modern reproductive technology. An absorbing example, with all its attendant ramifications, is documented in the biblical narrative of Abraham, Sara and Hagar. However, in the mid 1970's a dramatic change occurred that forever altered the practice of surrogate parenting. The exchange of substantial sums of money entered the picture, giving a hitherto isolated occurrence exceptional commercial vitality in a demand saturated market. The money not only compensated the surrogate for conceiving, gestating and delivering the child; it had far more consequential objectives. It secured the natural mother's signed release of parental rights. It allowed the wife of the child's biological father to adopt the child. It enabled the biological father and the adoptive mother to form a family unit which thereafter legally excluded the natural mother from any future access, care, custody or enjoyment of that child.
These consequences were legitimatized on the basis of a comprehensive written contract, drawn up by an attorney--also for a substantial fee--signed and agreed to prior to conception. How does a surrogate parenting contract involving a modern-day "Bob & Carol, Ted & Alice" actually work? Does the government, through the courts, have a right to interfere in such contracts? Does the government, through the legislature, have a duty to intervene in such arrangements? What is the appropriate governmental response to contemporary, compensated surrogate parenting agreements? The balance of this article advances a response to those questions which reflects the public policy of Michigan toward surrogacy and which is contained in PA 199 of 1988, the Michigan Surrogate Parenting Act.

SURROGATE PARENTING CONTRACTS

Surrogate parenting can take a variety of forms. Due to considerations of time, space, and popular interest, this discussion of the practice, and the legislative response to it, will be limited to the type of arrangement which accounts for certainly 99% of the contracts and which arouses the greatest moral, legal and ethical concerns; that is, contracts involving compensation of a surrogate who is also the biological mother of the child.

The process typically begins when Carol (the surrogate) responds to a newspaper advertisement offering $10,000 to $15,000 to a woman who will conceive and bear a child for another couple--Ted and Alice. Carol is motivated by the fee as well as an altruistic desire to help another couple have a child.
The fee however, is the *sine qua non* of her participation. Surrogacy is normally limited to women who have had previous pregnancies, resulting in live births. In short, 'proven producers' who know what they are getting into.

Alice is infertile either from natural or voluntary causes. Ted and Alice must be persons of considerable financial means in order to pay the $25,000 to $30,000 total cost of the process. Usually a face to face meeting with the surrogate occurs, often including pictures of the surrogate's other children, which is the basis for tentative agreement on the part of both parties. After cursory physical and psychological screening of Carol (but not Ted) and an opportunity to have the documents reviewed by her lawyer, the contract is signed and the entire cost is paid to the attorney. Carol then begins the artificial insemination process, often being given fertility drugs to stimulate ovulation and speed conception. The contract deals extensively with matters relating to the pregnancy which, though very interesting, are not relevant to this discussion.

After the child is born the mother is expected, upon leaving the hospital, to surrender physical custody of the child to the biological father and his spouse--Ted and Alice. The surrogate's fee, which the contract recites she has earned exclusively for gestation and not for releasing her parental rights, is nonetheless held in escrow until the surrogate/mother also provides a signed release and consent for adoption.

But what about Bob and the obstacle presented by the long-standing legal presumption that a child born to a married woman during wedlock
is the legitimate child of her husband?9 Once the child is born, Ted will utilize Bob's handwritten statement indicating he did not consent Carol's artificial insemination,10 which is part of the contract documentation, as well as the Michigan Paternity Act11 to initiate a circuit court action for the purpose of setting aside these presumptions and establishing himself as the legal father of the child.

Once the release and consent is in hand, the baby is eligible for adoption by Alice, under the more lenient provision states usually apply to step-parent adoptions. Ted, of course need not adopt as he has established himself as the child's biological father. However, because Michigan adoption law prohibits (as does nearly every other state, in statutes generally labelled as prohibitions against baby-selling) the type of payment involved in a surrogate agreement and, in fact, imposes a criminal sanction for such fees,12 the final step in the process necessary to make Alice the child's mother and cut off Carol's right cannot occur in Michigan.13

This cursory exposition of the typical contract demonstrates how existing law, intended for the protection of children and the preservation of families, is either being debased or circumvented to effect the aims of these contracts.

An examination of a standard surrogate parenting contract discloses its commercial bases and biases. It was not surprising that the overwhelmingly adverse popular reaction to Marybeth Whitehead's effort to reclaim her child was met with statements like, "she's over 21" and "she signed the contract after all." People's early feelings about the rights of each party to the child
were guided by general rules appropriate to commercial transactions. It was only when people began to reflect on the nature of the contract and exactly what was being bought and sold, that attitudes began to change, and to change rapidly.

THE ROLE OF THE COURTS IN SURROGATE PARENTING CONTRACTS

Even where the parties comply with the terms of the contract, court action is necessary to establish paternity and finalize the step-parent adoption. An even more vital basis for court intervention occurs when a party decides not to comply with the terms of the contract. The most important issue about surrogate contracts, that is, whether they are valid and enforceable, was settled by the New Jersey Supreme Court Decision, In the matter of Baby M, 109 NJ 396; 537 A2d 1227 (1988). In addition to finding that the contract violated that state's adoption laws, which are similar to Michigan's with respect to compensation, it also determined the contracts themselves to be null, void and unenforceable for several public policy reasons. These included matters related to the rearing and custody of the child, parental rights in general and payments to the surrogate.

Because the contract was found to violate state statute, the Court did not reach constitutional issues raised by the parties and various amici questioning whether or not the practice of compensated surrogacy is a fundamentally protected right. Proponents argue that the United States Constitution implicitly protects compensated surrogacy as an extension of the right of privacy existing within the word "liberty" in the Due
Process Clause of the Fourteenth Amendment. Opponents argue that surrogacy is expressly prohibited by the Thirteenth Amendment's abolition of slavery and involuntary servitude.14

Michigan has two cases directly addressing compensated surrogate parenting contracts. In Yates v Keane, (Hearing on January 21, 1988, File Nos. 9758, 9722) the surrogate plaintiff changed her mind about surrendering custody of the children and brought an action in the Gratiot County Circuit Court challenging the validity of the contract. At a hearing on a motion for summary judgment, the court held that surrogate parenting contracts are against public policy and thus invalid and unenforceable based on the fact that such contracts do nothing to protect the fundamental rights of children or promote their welfare; and, the contracts belittle the human dignity of all the parties involved.15

Michigan courts had previously addressed the constitutional issue of a state statute prohibiting compensation in exchange for release of parental rights.16 In the case of Doe v Kelly, 106 Mich App 169; 307 NW2d 438 (1981),17 a surrogate was paid $5,000 in exchange for termination of her parental rights, enabling plaintiffs to adopt the child. Plaintiffs' argued that Michigan Adoption Law invaded their right to privacy established by the United States Supreme Court in the case of Carey v Population Services International, which held that a couple's decision to have or not have children is a constitutionally protected right. The Michigan Court of Appeals upheld the validity of the Adoption Code finding that the parties intended use of it to change the legal status of the child was not within the fundamental interests protected by the right to
THE ROLE OF THE LEGISLATURE IN SURROGATE PARENTING CONTRACTS

By 1987, the incentive for the Michigan legislature to deliberate the issue of surrogate parenting contracts was twofold. The nation's most well known promoter of compensated surrogate contracts, Noel Keane, had his primary business operation in Dearborn, Michigan. This resulted in a larger number of surrogate births than were occurring in other states. Not surprisingly, it also produced more situations in which disagreements over custody or repudiation of the contract became an issue for Michigan courts to resolve.\textsuperscript{18} Also, in the absence of express legislation, the prospect of non-uniform judicial outcomes loomed large, as did the opportunity for legislating on the part of the courts. As publicity about surrogate cases became more widespread, persons who were contemplating entering into such arrangements became uneasy about whether or not they were paying their money or producing a child with the result being nothing more than additional costly and controversial legal battles. In the face of such uncertainty, it is no longer the choice but the duty of the legislature to respond so that the "rules of the game" would be clearly known to everyone.

The public policy of the State of Michigan is unmistakable upon reviewing the contents of PA 199 of 1988.

* As to surrogate contracts where no compensation occurs other than payment of reasonable and necessary medical expenses of
pregnancy, all contracts are "void, and unenforceable as contrary to public policy."\textsuperscript{19} If any party does not comply with the provisions of the agreement, there is no access to any Michigan court to enforce the terms of the contract.

In most cases it seems the parties comply fully with the terms of the contract. Therefore, if parties are willing to assume the risks associated with noncompliance, compensated surrogacy would remain a viable and probably a statistically insurable option had the law gone no further.

* As to the contracts for which compensation of any kind is extended to the surrogate, the statute makes contracts illegal. A misdemeanor penalty of up to 1 year in jail and/or $10,000 fine is applicable to parties to the contract. A felony of up to 5 years imprisonment and/or $50,000 fine is applicable to others who "induce, arrange, procure or otherwise assist in the formation of the contract."\textsuperscript{20}

The state clearly has no interest in establishing a "surrogacy police" or in sending to jail couples who engage in this behavior out of a desperate desire to have a family. However, because most citizens are law-abiding, and this is no doubt especially true of the kind of individuals who heretofore entered into or considered surrogate parenting, the criminalizing of this conduct sends a clear and unequivocal message that compensated surrogacy will not be tolerated in Michigan.

These provisions alone are insufficient to resolve the surrogate contract issue. Despite their stringency, children already have been born as the
result of surrogate contracts and can still be, if the arrangement is not for compensation. If the mother decides not to release her parental rights, how is a court to decide the resulting controversy?

* As to custody disputes, the law provides that the party with physical custody shall retain it during pendency of the dispute and directs the circuit court to award legal custody based on a determination of the "best interest of the child."^21

This statute embodies a good deal of compromise, which is the essence of the legislative process, especially in the custody provision. Its primary focus remains the child who is the "product" of such a contract. It declares that the optimal societal goal is for a child to have the opportunity to be raised, influenced and cared for by each of its natural parents and that any choice to the contrary should in no wise be influenced or effected by money. This is particularly important because of the disparate financial standing of the parties to a surrogate parenting contract, the questionable impact surrogacy has on the status of women and the profound belief that in a just society not everything is for sale.

Neither this philosophy nor its espousal in the Surrogate Parenting Act is unique. Already cited are similar provisions in the Michigan Adoption Act. It is likewise contained in those provisions of the Public Health Code prohibiting the sale of human organs.^22

Objections to this prohibitory statute have been raised by women, in particular surrogates themselves or those who wish to be surrogates, who claim it deprives consenting adults of the
opportunity to make and live by their choices, which are not only valid and personal economic choices, but the retention of which are essential to the fundamental concepts of a democratic society.

In an ordered society there are numerous examples of so-called "protectionist" legislation through which the government deprives individuals of the ability to make choices for themselves because of a belief that the alternative is more beneficial to the society as a whole. Laws prohibiting prostitution, certain kinds of gambling and child labor laws, as well as minimum wage standards, are representative examples. None of these however involves an innocent third party as does a surrogate parenting contract.

**THE CHALLENGE TO THE STATUTE**

For a year Michigan's Surrogate Parenting Act has been in effect despite two challenges by the American Civil Liberties Union on behalf of various pseudonamed plaintiffs who are actual husbands, wives and surrogates.

The most obvious change occurred in the newspaper advertisements placed by Noel Keane soliciting surrogates. Even this was only effected after intervention by the Wayne County Prosecuting Attorney. Where once the $10,000 fee was prominently displayed, now the offer is to be a surrogate in exchange for payment of medical expenses. A fact of life is that this law applies only in Michigan; and, because Noel Keane operates in several other states, as do other attorney-brokers, it is difficult to tell whether the statute has actually stopped surrogacy or has only stopped the formation of contracts within the confines of the state.
The litigation has raised more interesting issues which this article will discuss only briefly as they pertain to the constitutionality and the legislative intent of the Act. The initial case, *Doe et al v Attorney General*,23 was filed on September 9, 1988, requesting application of the statute be enjoined and a declaratory judgment as to the constitutionality of the Act be rendered. These challenges were based on the Due Process and Equal Protection clauses in both the United States and Michigan Constitutions. As a close observer of this litigation because of significant participation in the formation of the statute, I found perplexing both the course of the litigation and the opinion of the judge.

Deflecting the constitutional challenge by suggesting an absurd construction of the statute—that the prohibition against compensated surrogacy did not encompass gestation service contracts,24—the Attorney General obtained a stipulation from the ACLU of the constitutionality of the Act, if so interpreted and applied. The matter was disposed of on a summary judgment motion in which Judge John Gillis determined that the constitutional question was mooted by the ACLU stipulation. Interpretation of the statute was limited to a restatement of the definition with "and" underlined and no comment made as to the validity of compensated gestation services contracts. In all fairness, the plaintiffs never raised this option. Their goal was to be able to continue traditional surrogacy, a critical element of which is securing the mother's release, through a ruling that the statutory prohibition of compensated contracts was unconstitutional. The case is currently on appeal to the Michigan Court of Appeals.
A second case, Coe et al v Attorney General, was filed on March 21, 1989. This case squarely puts before the court the question of whether or not the parties to a contract, by specifying that compensation to the surrogate is solely and exclusively for gestation services and not contingent on release of the child, can avert the prohibitions of the statute. This litigation is bogged down in deciding an issue raised by the Attorney General who argues that the very same issue was already decided for essentially the same plaintiffs, by the same court and is also the same issue that is on appeal to the Court of Appeals.

While the sponsors, drafters and legislators are confident that the statute as written is sufficient to withstand the use of legal fictions or contrivances created to circumvent it, a clear statement of its intent is expressed in subsequent legislation. Senate Bill 100 provides that even where the parties specify that payment is exclusively for gestation services, the law will presume it is also for release of parental rights. This bill passed the Senate on March 1, 1989 and awaits House action.

Any judge, lawyer or citizen who reads the statute cannot avoid the conclusion that its intent and effect was to absolutely ban compensated surrogacy and strongly discourage uncompensated surrogacy. There is an unresolved issue as to whether such a prohibition reinforces or contravenes existing constitutional provisions. That is an issue for honest debate and an appropriate legal challenge. The current litigation frankly is not. Passage of the Surrogate Parenting Act does not end the debate nor does it address the underlying desire of individuals to form families. It does state for the record that
within what the legislature of the State of Michigan considers a just society, only certain practices are allowed in pursuit of those goals.

2. Louisiana, in 1987, as well as Indiana, Kentucky, and Nebraska in 1988, have statutes either banning surrogate contracts or declaring them void.


5. This legislation received overwhelming support in the Michigan legislature, passing in the Senate with a vote of 33 to 3, and in the House of Representatives with a vote of 90 to 10.

6. Because no required reporting exists as to number of contracts, number of births, number of releases signed by mothers or number of babies mothers refused to release, the numeric references contained herein are based on the comments of Noel Keane, a Michigan attorney who has arranged the largest number of surrogate contracts. The data concerning contracts provisions is likewise from surrogate contracts issued by Mr. Keane.
7. In the most well publicized cases, the wife of the biological father was not infertile. Elizabeth Sterns of the Baby M case, is a physician, who did not want to become pregnant for career reasons or because of concerns about an incipient medical problem. In two of Michigan's most controversial surrogacy cases, the "infertile" women had children by prior marriages but, due to voluntary surgery, were no longer able to bear a child.

8. This accounts for the abnormally high incidence of fraternal twin births to surrogates.

9. See Stewart v. Stewart, 91 Mich App 602, (1979), apt. 604, "Lord Mansfield's Rule was judicially incorporated into Michigan law in Egbert v Greenwalt, 44 Mich 245; 6 NW 654 (1880). The rule was first uttered by Lord Mansfield in Goodright v Moss, 2 Cowp 591-594; 98 Eng Rep 1257-1258 (1777), which was a rule of evidence that parties to a marriage could not testify concerning nonaccess when the issue is paternity of a child born during their marriage. This rule was abolished in Michigan in Serafin v Serafin, 401 Mich 629; 258 NW2d 461 (1977), although the Supreme Court held that a child is guarded by the still viable and strong, though rebuttable, presumption of legitimacy."

10. MCL 333.2824 (6) A child born to a married woman as a result of artificial insemination, with consent of her husband (emphasis added) is considered to be the legitimate child of the husband. See also MCL 700.111 regarding legitimacy for purposes of intestate
succession.

11. P.A. 1956, No. 205, as amended, being sections 722.711 et seq. of the Michigan Compiled Laws. See especially MCL 722.711 (a) "Child born out of wedlock" means a child...or a child which the court has determined to be a child born or conceived during a marriage but not the issue of that marriage (added by P.A. 1980, No. 54).

12. See MCL 710.54 (1) Except for charges and fees approved by the court, a person shall not offer, give, or receive any money or other consideration or thing of value in connection with any of the following:
   (a) The placing of a child for adoption. ...
   (b) A release.
   (c) A consent. ...

and MCL 710.69 A person who violates any of the provisions of Sections 41 and 54 of this chapter shall, upon conviction, be guilty of a misdemeanor, and upon subsequent conviction shall be guilty of a felony.

13. Florida was the forum of choice for all surrogate adoptions. A recently enacted six month jurisdictional residency requirement has undoubtedly affected this choice somewhat.

14. See also 1963 Michigan Constitution, Article I, §9 which states: "Neither slavery, nor involuntary servitude unless for the punishment of a crime shall ever be tolerated in this state." For a comprehensive discussion of the applicability of the XIII Amendment to surrogate contracts see Means, *Surrogacy v. The Thirteenth Amendment*, Vol.IV

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16. MCL 710.54 *supra*.


18. Though few in number, Michigan courts have had to resolve surrogate cases presenting all of the "imaginary horribles" that could arise from such an arrangement. These include a child born with severe handicaps where the contracting couple were divorcing. A birth involving fraternal twins, a girl and a boy, where the contracting couple already had three boys and wanted only the girl, not the boy. A case where the surrogate wished to have the contract set aside prior to the birth and have herself declared the custodial parent of the subsequently born twins. A case where a surrogate, deeply regretting her decision, is attempting to regain parental rights to her son by challenging the Florida adoption.

19. MCL 722.855.

20. MCL 722.859.


22. See MCL 333.9121.

24. The essence of the contention is the consequence (legislative intent) of the word and in the statute's definition of a Surrogate Parentage Contract as "a contract, agreement or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation and to voluntarily relinquish her parental rights to the child" (MCL 722.853 (i)).

25. Full case name: Carol Coe, Carl Coe, Jane Doe, John Doe, Tom Toe, Terri Toe and Hannah Hoe v. Attorney General of Michigan. Plaintiffs are again represented by the American Civil Liberties Union Fund of Michigan. The action was again filed in the Wayne County Circuit Court, Docket No. 89-908112-cz. This time the case was assigned to Judge Kaye Tertzag.
Introduction

As of September 1, 1988, Michigan became the first state to criminalize surrogate motherhood contracts involving gestational services.¹

In late Summer 1988, the ACLU Fund of Michigan, through staff and cooperating counsel, filed a lawsuit challenging the Michigan statute on constitutional grounds. That litigation is pending in the Michigan Court of Appeals.²

While the legal issues move slowly through the courts, both sides of the issue claim their position as the one which most protects civil liberties. As with other reproductive freedom issues, one's position on surrogacy usually depends upon one's focus: the consenting adults or the child.

Careful analysis, however, leads to the conclusion that the interests of all the parties can be recognized and protected, without conflict. Reasonable state regulation will ensure protections, and provide mechanisms to fairly resolve the inevitable occasional dispute; state prohibition, and particularly criminalization, achieves no tangible benefits, instead forcing Michigan infertile couples
who desire children to take steps to avoid the law.

I. A FRAMEWORK FOR SURROGACY

After a review of all the interests involved in surrogate parenting arrangements, the most rational conclusion is that infertile couples and surrogate mothers have fundamental rights to enter into such arrangements. The couple has the right, without interference by the state, to make the most private decisions about reproduction, family planning, and intimate association. The surrogate has the freedom to provide an egg, and/or her gestational services, and to be reasonably compensated for her services. To prohibit compensation is to abolish surrogacy for all practical purposes.

The surrogate must, however, retain the right to change her mind from when she originally enters into the arrangement, and can choose to not relinquish her parental rights. So long as she has provided the service, she is entitled to the compensation even where she does choose to retain her parental rights. The payment is for her services, not the child. That somewhat anomalous situation will not arise frequently, as the clear intent of the surrogate when entering into the arrangement is to relinquish parental rights. If she should choose to retain her parental rights, the custody dispute is between the two natural parents, to be resolved in the same fashion that hundreds of custody disputes are resolved every day in Michigan—under a "best interests of the child" standard.

The state's interest in protecting the parties, including the child, can be accomplished through reasonable, narrowly tailored regulations. Those regulations could include medical screening;
minimums for compensation to the surrogate; adopting a "best interests of the child" standard for custody disputes; and disallowing judicially-enforceable relinquishment of parental rights by the surrogate. For the state to do as Michigan has done, prohibiting and even criminalizing surrogate arrangements for compensation, is for the state to improperly infringe upon the fundamental rights of Michigan citizens. The Michigan law not only deprives infertile couples and surrogates of their rights, it also threatens the privacy rights of all Michigan citizens.

II THE INTERESTS INVOLVED

There are four interests involved that must be reviewed and balanced in determining the proper regulations, if any, to be instituted by the state: those of the infertile couple; the surrogate; the child; and the state. As fundamental freedoms are unquestionably implicated, the state must show a compelling interest to justify interference.

A. The Infertile Couple

Typically, a surrogate parenting arrangement is initiated by an infertile couple. The most common situation is where the woman is infertile, though the man is able to fertilize an egg. Faced with an agonizing inability to adopt, an infertile couple who desires a family has no options except surrogacy. Surrogacy takes several forms: the most common are the male's donation of semen to artificially inseminate a surrogate; and in vitro fertilization, involving fertilization of an egg (either from the male's partner, or from a surrogate) outside of the egg donor's body, and
placement inside a surrogate's womb for gestation. In either form, the conceived child is in part the product of the genetic matter of one of the ultimate parents.

The Supreme Court has recognized a fundamental right "whether to bear or beget a child." The Court has recognized that right both within, and outside of marriage. The Court's line of privacy cases, starting with the rights surrounding contraception, explicitly recognizes the freedom of choice regarding future offspring.

Moreover, the Court has held several times that there is a "fundamental liberty interest" of natural parents in the care, custody and management of the child.

Thus, the rights of the childless couple regarding private and intimate decisions involving family planning and reproduction, and intimate association with their child, are fundamental.

B. The Surrogate

Surrogacy arrangements also affect the fundamental privacy rights and reproductive freedom of the surrogate mother. A woman who chooses to be a surrogate by providing an egg, and/or her body for gestational services, or both, has a right to do so. As with any provider, she also has a right to be reasonably compensated for her services.

Michigan law permits men to sell their portion of the reproduction partnership to sperm banks; to forbid women the same opportunity is to deprive women of equal protection of the law. To prevent undue economic coercion of surrogates, the state should place minimums on the amount of
compensation to be paid in much the same fashion as the state creates minimum wages for other providers.

The gestating surrogate must also retain the rights of personal lifestyle choices during the pregnancy, and to choose to terminate the pregnancy. A surrogate's constitutionally protected reproductive freedoms cannot validly be waived. A couple's screening of surrogates through personal interviews will best ensure a comfortable "fit" between the parties.

Similarly, a surrogate cannot validly waive her retention of parental rights. The state should simply disallow judicially enforceable agreements to relinquish parental rights.

C. The Child

A child has the right not to be treated as a commodity or chattel. To allow a child to be sold may well violate the 13th Amendment's prohibition of slavery and involuntary servitude.  

Moreover, a child's interest in receiving care and nurture should not depend on its health, sex, or the number of other children with which the child was born.

The state should ensure that the natural parents that have retained parental rights carry out their parental responsibilities. As with other family law issues, the state has already instituted judicial mechanisms to decide custody, support and visitation.

D. The State

The state has a legitimate interest in protecting the rights of the parties, including the
child. The state must do so in a fashion that does not improperly infringe upon the rights of the adult parties to a surrogacy arrangement. Reasonable regulations of such arrangements (such as those suggested in this article), narrowly tailored, can ensure that all interests are adequately protected.

III. PROBLEMS WITH THE MICHIGAN SURROGACY LAW

The Michigan statute is a classic example of government overreach. The law provides for misdemeanor penalties (up to one year in prison and/or a fine of up to $10,000) for "participating parties" to a surrogate parenting contract for compensation. Persons other than "participating parties" who induce, arrange, procure or otherwise assist in the formation of a surrogacy contract for compensation are subject to felony penalties (up to five years in prison and/or a fine of up to $50,000). By criminalizing surrogate parenting arrangements, and providing for severe criminal penalties, Michigan has simply exceeded constitutional limitations on the state's authority. Moreover, as long as the Michigan law remains valid, Michigan citizens who choose to enter into surrogacy arrangements will simply take steps to avoid the law.

The original Senate Bill was tie-barred to the South African Divestiture Bill; thus, the bill never received a full hearing on the floors of the Legislative Houses. That may explain the serious language problems in the law. "Surrogate parentage contract" is ambiguously defined; the language suggests that it is only those agreements where the surrogate's compensation is contingent upon her relinquishment of parental rights that are
prohibited. The bill's sponsor, however, insists that she intended for all arrangements to be outlawed, including those that provide compensation for gestational services only. The Attorney General of Michigan has subsequently joined in that rather skewed interpretation. It is a dispute over that interpretation that is the basis of the ACLU Fund of Michigan's litigation.

Thus, instead of instituting reasonable regulations of surrogacy arrangements, Michigan has acted precipitously and extremely. In doing so, the state has violated the constitutional rights of both infertile couples and surrogates, and threatened the rights of all Michigan citizens.

A. Due Process Problems

Because it effectively eliminates surrogate parenting arrangements, Michigan's law restricts the exercise of several rights which are fundamental under the Constitution, rights involving marriage, family, reproduction, children, and intimate association. Under the 14th Amendment, and its state constitutional counterpart, the government must demonstrate a "compelling state interest" to justify regulation in these areas. Furthermore, such regulation must be "narrowly drawn to express only the legitimate state interests at stake."¹⁰

Michigan fails to recognize the dual nature of surrogate motherhood arrangements, which provide for both relinquishment of parental rights, and gestational services. The state has overlooked the possibility of permitting compensation for gestational services alone, and disallowing judicially-enforced agreements providing for relinquishment of parental rights. It is possible to leave surrogate
motherhood intact as a reproductive option by forbidding pre-birth waiver of parental rights and by forbidding compensation for post-birth waiver.

Problems with custody of the child when the surrogate mother changes her mind are already covered by section 11 of P.A. 199 of Acts of 1988--legal custody is awarded based on the child's best interests. The physical and mental fitness of parties to surrogacy contracts can be regulated by provisions for health examinations, and personal interviews. Instead Michigan has chosen to completely eliminate one reproductive option for its citizens.

While Michigan has a compelling interest in regulating surrogate parenting arrangements, the state has pushed its regulation beyond the permissible boundary of its interest.

B. Equal Protection

Because the law outlaws only compensated surrogate motherhood, and retains compensated surrogate fatherhood through semen donation, Michigan's law denies women the equal protection guaranteed under the 14th Amendment and its state constitutional counterpart. To be permissible, sex-based classifications must be substantially related to the advancement of an important government interest. Surrogate motherhood obviously involves a greater degree of physical and emotional involvement with the child than does surrogate fatherhood. However, the government interest in regulating parenting arrangements does not justify a degree of differentiation between the two which completely forecloses one method of surrogacy.
IV CONCLUSION

Surrogate parenting came to the public's attention when Mary Beth Whitehead initiated the infamous "Baby M" case. Whitehead had entered into a surrogacy arrangement, but changed her mind after the birth, and refused to relinquish her parental rights. The ensuing court battle, resulting in a decision by the New Jersey Supreme Court, received enormous media attention, and was ultimately the subject of the original American docudrama, the "TV Movie."

Shrill cries of "babyselling" were heard throughout the country. Articles appeared on Noel Keane, the "babybroker" attorney in Dearborn, Michigan. The Catholic Church condemned surrogacy. State legislators began to initiate legislation prohibiting, and as in Michigan even criminalizing, surrogacy arrangements.

The facts, however, simply do not support the extremist and emotional criticisms leveled at surrogacy. At the time of the Michigan ACLU's lawsuit, only 5 of the nearly 300 documented surrogacy arrangements had resulted in litigation. The vast majority of the arrangements had worked, allowing infertile couples to form a family, and surrogates to perform a valuable service for reasonable compensation. The media did not, and still has not, focused on the parents and surrogates involved in these successful arrangements, who describe the "joy" and "miracle" of the results.

Neither infertile couples nor surrogates have organized to the point of wielding political power; thus, it is opponents of surrogacy that have been heard, and that have been able to push through restrictive legislation. Governor Blanchard, in signing Michigan's law, called the legislation...
"imperfect," and troubling, yet there was no political reason for him to veto the bill. Fortunately, infertile couples and surrogates are gathering political strength. In the meantime, the fight is out of the political arena and in the courts.

In a world filled with unwanted children, who end up the victims of abuse and abject poverty, it is hard to imagine what is wrong with couples that badly want a child taking steps to form a family. Opponents of surrogacy tell these couples to accept God's cruel gift of infertility, or if they must, adopt. Yet these opponents do not answer how to deal with a 7-year wait for adoption, or why adoption is any more sensible than a process that results in a child that is actually biologically related to one of the parents.

Opponents of surrogacy say that the child must be protected from the trauma of being born to a surrogate, or an ensuing custody battle, yet they do not explain why that is any more traumatic than divorce and custody fights that occur every day, or the abuse and molestation that happens to unwanted children.

Opponents of surrogacy claim that it just isn't "natural," that it is meddling in God's master plan. Yet most of them do not reject the other miracles of medicine that have alleviated other forms of human suffering. And these opponents certainly do not respect the rights of others to have different religious convictions than their own.

Surrogate parenting is a legitimate option to infertility. It has successfully worked for hundreds of proud parents now blessed with children and families. In America people have certain fundamental rights concerning reproduction, and family planning, and basic privacy. When a few
vocal advocates (or even more than a few) attempt to impose their religious or moral values on the rest of us, the courts must exercise judicial review to protect all of our rights, and remind government of its limitations.

The fight over the right to enter into surrogate parenting arrangements will not end until the courts reaffirm these most basic American values.

2. Doe v. Attorney General of Michigan, Civil Action No. 88-819032 CZ (Wayne Circuit Court); No. 113775 (Michigan Court of Appeals)
   A second suit has been filed by the ACLU Fund of Michigan. See Coe v. Attorney General of Michigan, Civil Action No. 89-908112 CZ (Wayne Circuit Court)

3. There is typically a 5 to 7 year wait for adoption of healthy newborns for most couples.


8. See MCLA 333.2824; MCLA 700.111.

9. Senate Fiscal Agency analysis of Senate Bill 228.


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ETHICS EDUCATION AND CITIZEN PARTICIPATION IN TECHNOLOGY DOMINATED ISSUES
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Friday, 10:00 a.m., 3020 Friedmann
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Shirley Bach, Philosophy, WMU
Virginia Jones, SSJ, Borgess Medical Center
Gloria Mejeur, Borgess Medical Center
Friday, 3:00 p.m., Faculty Lounge, Bernhard Center

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