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SURROGATE MOTHERHOOD

New Hope for Infertile Couples

by Renee L. Menasche

The concept of surrogate motherhood evolved approximately four years ago in answer to the needs of some of the infertile couples in America. The surrogate mothering process is not currently regulated by law. Consequently, the viability of these programs as well as the rights of those individuals participating in the process are questionable. This article explores surrogate mothering arrangements, identifies the myths surrounding them and addresses the public policy issues that will allow for their continued viability. The author recommends that legislation be promulgated which could sanction surrogate mothering and would protect the interests of all parties to the process.

Overview

Studies indicate that there are approximately 2.5 million infertile married couples in America.¹ For various reasons, many of these couples are desirous of becoming parents.² Despite existing alternatives, however, most of these couples are denied this opportunity. Many infertile couples have unsuccessfully undergone medical procedures to correct the physical traits that prevent conception. Others have attempted the traditional adoption procedures to no avail. The waiting list for an agency adoption is several years.⁴ Frequently couples are too old to be considered as prospective adoptive parents by the time their names reach the top of the list. Independent adoptions can sometimes be arranged.⁵ Experts in the field of adoption, however, are difficult to find. Further, birth mothers can be difficult to locate and sometimes change their minds shortly before or after birth.⁶ If the husband is the infertile partner, artificial insemination of the wife by a sperm donor is a scientifically viable alternative. Approximately ten to twenty thousand women each year undergo this procedure.⁷ *In vitro* fertilization or "test tube babies" is another avenue. At the present time, under optimum circumstances, there is a ten to twenty percent chance of success with *in vitro* fertilization.⁸ Thus, women

with prior gynecological problems are usually excluded from the program.⁹

The psychological effects of the inability to have and to raise children can be devastating.¹⁰ The inability to bear a child is often considered a violation of societal values. It may result in marital problems, temporary sexual dysfunction, increased alcohol consumption, guilt and depression.¹¹ Although support groups have evolved to help combat these difficulties,¹² they are often not an adequate substitute for the ability to raise a family.

Surrogate mothering evolved approximately four years ago in answer to the needs of some infertile couples.¹³ For those couples whose impediment to childbearing is the wife's infertility, another woman, the surrogate mother, is artificially inseminated with the sperm of the husband. To date, approximately two hundred children nationwide have been born by surrogates with the aid of approximately twenty five surrogate mothering agencies.¹⁴

Two such agencies are presently operating in Maryland.¹⁵ Surrogate Motherhood, Inc., of Columbia, Maryland is waiting its first birth during the summer of 1984, has several other pregnancies underway and expects the number of pregnancies to continue to increase.¹⁶ For a fee, these agencies coordinate infertile couples with surrogate mothers and supervise the artificial insemination process and the pregnancy. The surrogate mother also receives remuneration for her participation.

Surrogate mothering agencies are presently not regulated by law.¹⁷ Objection has been raised that surrogate mothering arrangements violate existing laws against the sale of children as well as adoption and paternity laws. In addition, public because of the belief that these agencies encourage adultery, exploit economically troubled women, and are tantamount to prostitution.

Although surrogate mothering agencies are unregulated¹⁸ and diverse in their administrative procedures and requirements,¹⁹ by legal necessity, all have certain requisites in common. Prior to insemination, the surrogate mother

and the agency execute a contract. If the surrogate mother is married, her husband is included as a party to the contract. The salient features of this contract include the surrogate mother's and her husband's covenant to relinquish custody of the child to the natural father. The parties agree to take all steps necessary to terminate their parental rights. They further agree that the surrogate mother will abstain from sexual intercourse for a proscribed period of time prior to and subsequent to artificial insemination. Finally, the surrogate mother's husband expressly withholds his consent to the artificial insemination of his wife for the purpose of her bearing a child for which he will have any legal responsibility. These covenants are important, since under Maryland law, a child conceived by the artificial insemination of a married woman, with the consent of her husband, is their legitimate child. The consent of the husband is presumed.²⁰ The covenant withholding consent to artificial insemination rebuts the presumption of legitimacy as to the surrogate mother and her husband. As a result of the surrogate mother's covenant to abstain from sexual intercourse, if paternity is judicially scrutinized, the issue should be resolved in favor of the natural father. Under the contract custodial responsibility remains with the natural father and he is assured that, at the least, the surrogate mother and her husband will use their best efforts to judicially terminate their parental rights.

Prior to insemination, the natural father and the agency execute a second contract. The germane provisions of this contract are that, for a fee, the agency will attempt to locate a potential surrogate mother and will provide a physician to perform the artificial insemination.²¹ The contract specifically provides that no portion of the fee is for the purpose of facilitating the adoption

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of any child. The reason for such a provision is to avoid conflict with state law. In Maryland, for example, it is unlawful for an agency to charge or to receive compensation for adoptive placement.²² Thus, under this contract, the ultimate adoption is not implicated and the agency is not precluded from charging or paying fees.

A third agreement between the natural father, the surrogate mother and her husband is made. This contract includes those covenants previously elucidated as to custody and parental rights and obligations and further specifies the remuneration the surrogate mother will receive.²³ For reasons previously stated, the natural father's wife is not a party to this contract.

Once all contracts have been executed, the surrogate mother is artificially inseminated with the sperm of the natural father. The procedure is timed to the ovulation period of the surrogate mother and may have to be repeated before it is successful.²⁴

Within seventy two hours of birth,²⁵ the natural father's and the surrogate mother's names are entered on the birth certificate.²⁶ Absent a contract judicial

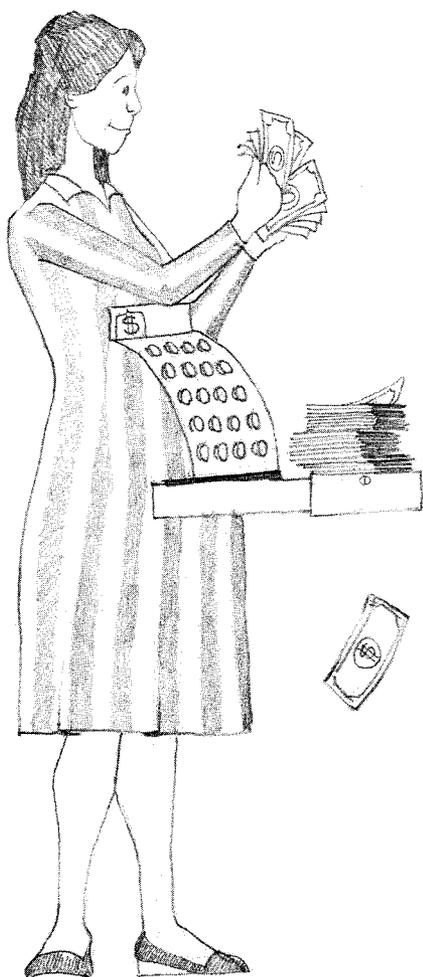
determination, the effect thus far is that the surrogate mother and the natural father are the parents of the child. For inheritance purposes, the presumption that the child is the off-spring of the surrogate mother's husband has been rebutted by way of contract. Pursuant to the contracts, the natural father, and by necessary implication, his wife, immediately receive the physical custody of the child. To complete the process, the natural father's wife petitions the court for the adoption of the child. The adoption process however, presents legal and practical difficulties.

As standard procedure, the surrogate mother's consent to the adoption must be obtained.²⁷ The birth certificate contains the name and address of the surrogate mother and this information is available to the natural father upon request.²⁸ However, the surrogate mothering process is conducted on a confidential basis. Thus, although the surrogate mother and her husband contractually agree to take all steps necessary to terminate their parental rights, absent an individual willing to act as an intermediary to preserve that

confidentiality and a court amenable to accepting and protecting same, the consent of the natural mother cannot be obtained. Her consent could not have been obtained by the agency in that once the agency recognizes that the surrogate mothering process is for the purpose of facilitating an adoption, it is precluded from charging a fee. The effect is that the adoptive mother may not be able to meet the statutory mandates required to complete the adoption process. In such a case, a surrogate mother, who is a disinterested party with respect to the welfare of the child remains the child's parent and the woman who cares for and nurtures him never achieves that status.

The Issues

A major issue of surrogate mothering involves the question of public policy.²⁹ In determining whether surrogate mothering is inconsistent with public policy, the judiciary must find: (1) that it contravenes an established societal interest; (2) injures the public or; (3) is inconsistent with sound policy and good morals.³⁰ Absent such a finding, surrogate mothering should be sanctioned and regulated in order to



Pecuniary gain usually is not the motivating factor behind the surrogate mother's decision to bear a child.

meet the vital societal needs and to protect the interests of all parties.

It has long been held that parents may not barter or sell their children nor may they demand pecuniary rewards as the price for their consent to adoption.³³ Such contracts are void as against public policy³⁴ and the judiciary has applied this principle to a myriad of situations so

The judiciary and legislatures should validate surrogate mothering based upon certain provisions of the United States Constitution.

as not to open the door to the unlimited sale of children.³⁵ The judiciary, however, has created exceptions to that general rule. Thus, in independent adoptions, the adoptive parents may pay the medical and hospital expenses incurred for the care of the mother and the child.³⁶ In Maryland, they may also pay the reasonable and customary fees for legal services.³⁷ The contract will be sustained (1) if it does not contemplate the severance of parental obligation;³⁸ (2) is in the best interests of the child;³⁹ (3) does not contain pecuniary gain as the natural mother's motivating factor;⁴⁰ (4) or transfers custody to one with a legal responsibility to the child.⁴¹

Surrogate mothering has opened an unexplored area of the law which can have a profound effect on the lives of people.⁴² The judiciary will tend to construe the applicable existing laws narrowly,⁴³ preferring to await a legislative sanction before recognizing these programs.⁴⁴ For instance, in April of 1983 circuit court Judge Jack Mudd of Louisville, Kentucky denied a surrogate mother the opportunity to relinquish her parental rights based upon the following rationale.⁴⁵ The court strictly construed Kentucky's presumption that the husband of the surrogate mother is the father of the child.⁴⁶ The court, however, could have construed the presumption as a rebuttable one, particularly if the husband had contractually withheld his consent and the surrogate mother had abstained from sexual intercourse.

In ruling as it did, the court indicated that children required the protection of someone other than those motivated by personal gain.⁴⁷ However, most surrogate mothers are not financially motivated.⁴⁸ Reports indicate that they are motivated by their empathy for infertile women,⁴⁹ a desire to have an impact on the lives of others,⁵⁰ a desire to help infertile women,⁵¹ and a desire to do something truly "special" for another.⁵² For those women motivated by the financial rewards, requiring them to maintain their parental relationship does not serve the best interest of the child. The prohibition against baby selling was designed to prevent the exchange of money as an inducement to the mother to give up her child. In surrogate mothering, the natural mother receives payment in consideration for becoming pregnant and carrying the child to term; she does not become pregnant for the purpose of maintaining a maternal relationship with the child.⁵³ Thus, a requirement that she maintain a personal or financial relationship will result in psychological difficulties for all parties, financial hardship for the surrogate mother and is not conducive to the establishment of an appropriate familial relationship.

The court was uncertain as to the environment of the natural father's home.⁵⁴ However, although the courts concern was germane it could have been satisfied by judicial inquiry at an evidentiary hearing.

Fourthly, Judge Mudd felt that children could not be sold as if they were commodities.⁵⁵ The common law prohibition against the sale of children developed during an era in which a woman, destitute and unable to adequately earn a living, would sell her child to a stranger. Clearly, that is the sale of children and must be prohibited. However, as previously indicated, this prohibition is inapplicable to surrogate mothering. Agreements to transfer physical custody and a personal pledge to terminate parental rights have been consistently recognized⁵⁶ as long as they meet at least one of the following exceptions.

Once the child is born, validation of the surrogate mothering contract is in his best interests.⁵⁷ The surrogate mother has stated via the contract that she is not desirous of retaining physical custody nor does she wish to assume and exercise her parental obligations and rights.⁵⁸ The natural father wants the physical custody of the child and, in conjunction with his wife, wishes to assume and exercise his parental

obligations and rights. He and his wife have planned for this child, made all appropriate arrangements, and the child has been living with them since birth. Thus, since custody should not be disturbed absent compelling reasons affecting the child's welfare⁵⁹ and since the maternal preference rule has been abolished,⁶⁰ the natural father should be allowed to retain custody.

As previously indicated, pecuniary gain usually is not the motivating factor behind the surrogate mother's decision to bear a child.⁶¹ In fact, one mother has seriously considered accepting no remuneration.⁶² Since the judiciary would not invalidate other altruistic acts, a surrogate mother should be allowed to carry her actions to their desired conclusion.

By transferring custody to the natural father who already has a legal responsibility toward the child⁶³ the fears that similar agreements will lead to the sale of children are circumvented by dealing with the natural parents and close family members.⁶⁴ The surrogate mothering contracts should be recognized and the natural father permitted to retain custody of his child. It follows that the surrogate mother should be allowed to terminate her maternal relationship in favor of the natural father's wife, who cares for and nurtures the child. It is appropriate that her relationship be legally sanctioned and she be charged with the responsibilities concomitant to the role she has chosen to undertake.

U.S. Constitution

The judiciary and legislatures should validate surrogate mothering based upon certain provisions of the United States Constitution. The Due Process Clause of the Fourteenth Amendment provides that, "no State shall deprive any person of ... liberty without due process of law."⁶⁵ Liberty denotes more than mere freedom from bodily restraint and includes the right of the individual to marry, establish a home, raise children and enjoy those privileges recognized at common law as fundamental to the pursuit of happiness.⁶⁶ In determining whether a privilege is fundamental the court looks to the traditions and collective conscience of the people. Those privileges which are deeply rooted will be deemed fundamental.⁶⁷ Applying that test, the United States Supreme Court has determined that in the area of contraception there is a fundamental right to marital⁶⁸ and individual⁶⁹ privacy. The United States Supreme

Court has yet to define the outer limits of this right to privacy.⁷¹ This right has been applied to decisions not to bear a child⁷² but has not been tested as to the decision to bear a child.

A state cannot regulate a woman's decision to become pregnant by natural means.⁷³ A contrary result would force her to seek governmental permission prior to pregnancy. However, in surrogate mothering, the natural mother becomes pregnant by way of artificial insemination. Whether a pregnancy thus created is constitutionally protected remains untested. However, since *Roe v. Wade*⁷⁴ gave women the constitutional right to choose to terminate a pregnancy by artificial means and most states have sanctioned the use of artificial insemination as to married couples,⁷⁵ it is only reasonable to conclude that a surrogate mother's decision to create a pregnancy is likewise protected.

When the framers wrote the United States Constitution they "undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect They sought to protect Americans in their beliefs, their thoughts, their feelings and their sensations."⁷⁶ Recognizing that they could not foresee what new changes and modifications might be indispensable in later years, they drafted the constitution in general terms so as to endure for ages.⁷⁷

Mindful of the framer's intent, the United States Supreme Court followed in their footsteps when the court announced the right of marital privacy in the area of contraception.⁷⁸ By utilizing the Fourteenth Amendment's broad concept of personal liberty, the Court opened the door to an expansive array of activities that may be constitutionally protected. Thus, the constitutional protection afforded the decision whether to bear or beget a child should be extended to include an infertile couple's right to beget a child by way of surrogate motherhood. In fact, the Court of Appeals of Michigan has implicitly recognized this constitutional protection in the area of surrogate mothering.⁷⁹ While a state may make a valued judgment favoring adoption over surrogate motherhood⁸⁰ and need not remove obstacles in the path of infertile couples that are not of its own creation,⁸¹ to prohibit surrogate motherhood and thus foreclose the right of many infertile couples to beget a child would be to frustrate the purpose of the United States Constitution and to preclude the way of life and harmony

previously sanctioned by the United States Supreme Court.⁸²

While the right of privacy means freedom from unwarranted governmental intrusion,⁸³ not every state regulation which infringes on that right is invalid. Thus, despite the constitutional protection afforded to surrogate mothering, a state may regulate these programs. To date, the United States Supreme Court has not elucidated one definitive test as to the permissible scope of state regulation. At a minimum, the regulation must be reasonably related to the asserted legislative purpose⁸⁴ and when a regulation frustrates or heavily burdens the exercise of a constitutional right, it will be validated only by a compelling state interest and must be narrowly drawn to express only that interest.⁸⁵ Thus, under the latter test, only a regulation that directly and substantially interferes with a constitutionally protected right will be subjected to the strictest standard of judicial review.⁸⁶ It is impossible to postulate as to which test the United States Supreme Court will ultimately apply. Undoubtedly it will depend upon the scope of the regulation before the court and the history of surrogate mothering programs as of the date of judicial review.⁸⁷

The following are some state interests that may support legislative action:

1) A state may proscribe standards for maternal eligibility, impose medical requirements for a period prior to and after birth, and prohibit abortion at the point of viability.⁸⁸ The protection of maternal health and the potentiality of human life have long been accepted as compelling state interests.⁸⁹

2) A state has an interest in insuring the legitimacy and care of its children. It may arguably prohibit unmarried persons from participating in the program and may mandate the extent and scope of parental obligations prior to and upon the birth of the child.

3) A state has an interest in insuring that its children are not "bought and sold."⁹⁰ Thus, a state can mandate that the surrogate mother not terminate her parental obligations in favor of a person not biologically related to the child. A state may arguably regulate the profit motive of the surrogate mothering agencies and the surrogate mothers. With respect to the agencies, most should have no difficulty in being classified as non-profit.⁹¹ They could remain viable on the revenue generated by assisting natural fathers in locating prospective surrogate mothers and all

personnel could continue to receive appropriate remuneration.

If a state prohibited remuneration to the surrogate mother or limited it to nominal consideration, it would effectively foreclose one means of achieving parenthood for infertile couples. Although pecuniary gain is not the motivating factor for most surrogate mothers,⁹² the majority might justifiably not undergo pregnancy if the remuneration was removed.⁹³ The surrogate mothering process typically extends for a period in excess of one year.⁹⁴ During this time, the woman subjects herself to the medical and psychological hazards and discomforts attendant to pregnancy and child birth. In fairness, she has the right to expect and receive remuneration. As a matter of due process of law, such a regulation would probably be invalid. The common law prohibition against baby selling is inapplicable to surrogate motherhood. Thus, a regulation predicated upon this premise would not be reasonably related to the asserted state purpose. The regulation would directly and substantially interfere with an infertile couple's constitutional right to beget a child. Since the legislative purpose is invalid, the state would have no compelling interest with which to validate their regulation.

Under the present law, there is no assurance that the surrogate mothering process is not being abused.

The fact that pregnant women who release their babies for adoption are prohibited from receiving compensation is not dispositive.⁹⁵ Those women would be paid as an inducement to terminate their parental rights in favor of a person not biologically related to the child. This is precisely what the common law prohibition sought to prevent. Surrogate mothers, however, are paid to become pregnant, to carry the child to term, and to subject themselves to the difficulties attendant to pregnancy and child birth. The state has other alternatives available to it to control the profit motive. That is, it may

prescribe reasonable remuneration commensurate with the time involved in the process and the hazards and discomforts concomittant with pregnancy and child birth. As a practical matter the profit motive is controlled by individual self-restraint. At the present time, the surrogate mother receives an average of ten thousands dollars.⁹⁶ On the basis of a one year process she is receiving one hundred and ninety three dollars and seventy nine cents per week. This is compatible with most entry level or para-professional salaries with one significant difference. Unlike her counterpart in the traditional work force, the surrogate mother subjects herself to her "job" twenty four hours a day throughout the process. Thus, she is actually receiving one dollar and fifteen cents per hour; a sum which is far below the national minimum wage requirements.

Finally, a state has a valid interest in prohibiting unnatural sexual practices.⁹⁷ However, that interest cannot be extended to include consensual artificial insemination of the surrogate mother with the sperm of the natural father. In *Doe v. Commonwealth's Attorney of Richmond*,⁹⁸ the United States District Court for the Eastern District of Virginia upheld, and the United States Supreme Court summarily affirmed, the constitutionality of a criminal statute which prohibited sodomy as applied to homosexual activity. However, the District Court did indicate that it was proscribing homosexual activity because it, "obviously had no portion of marriage, home or family life."⁹⁹ Thus, it can be inferred that to the extent a non-traditional practice has a place in marriage, home or family life, it would receive the protection of the Fourteenth Amendment. Whether this inference will be adopted by the United States Supreme Court is uncertain. However, an opinion of the United States District Court for the Northern District of Texas is noteworthy.¹⁰⁰ By extending the individual right of privacy to private consensual sexual activity, the court validated homosexual activity on the ground that if it were not so protected, the states would have the power to intrude and regulate the intimate sexual relations of married couples.¹⁰¹ That rationale is equally as meritorious when applied to surrogate mothering. That is, if on the basis of any of the interests previously elucidated, a state may prohibit surrogate mothering, then the state would be equally as free to further infringe on the right to individual privacy and proscribe the traditional

means of effectuating childbirth in order to insure that those same interests are protected. A state cannot so proscribe the traditional means of effectuating childbirth and, by analogy to *Baker*, the state may not prohibit surrogate mothering.

Maryland has statutorily sanctioned the artificial insemination of married women.¹⁰² To date, the statute has been applied to insure the legitimization of the resulting off-spring when the husband is infertile but his wife is capable of bearing children. Surrogate mothering applies only in the reverse situation. That is, the husband is capable of producing a child and it is his wife who is infertile. If Maryland now chooses not to apply that same statutory protection to this latter group of couples, the legislature and/or the judiciary will have created a classification of individuals who are being denied the equal protection of our laws.

The Equal Protection Clause of the Fourteenth Amendment¹⁰³ guarantees to all individuals the right to be free from invidious discrimination in statutory classifications and other governmental activity.¹⁰⁴ In the context of the family law, the United States Supreme Court has developed two groups of tests to determine the validity of an equal protection challenge.

The first group involves classifications that are not constitutionally suspect or impinge on constitutional fundamental rights. Within this group, several different tests have evolved. In 1972, the United States Supreme Court required that the classification, "be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."¹⁰⁵ This was a rigorous test and, in 1977, the Court lightened the government's burden by merely requiring that the classification rationally further some legitimate and articulated state purpose.¹⁰⁶ Still later, in 1980, the Court simply required that the classification not rest on grounds wholly irrelevant to the achievement of any legitimate governmental objective.¹⁰⁷ This latter test creates a presumption of constitutional validity. Thus, any of the legitimate governmental interests previously enumerated with respect to due process would be sufficient to support a governmental classification as to types of infertile couples.

If the classification is based upon

criteria which are constitutionally suspect¹⁰⁹ or impinges upon a fundamental right protected by the United States Constitution,¹¹⁰ the presumption of validity disappears and the Court will strictly scrutinize the classification to determine whether it promotes a compelling governmental interest.¹¹¹ The infertile couple has a fundamental right to beget a child. Further, any classification which would deny them this right may be constitutionally suspect. In determining whether a classification is "suspect," the United States Supreme Court has considered two criteria that may be applicable to surrogate mothering. First, the Court has considered immutable characteristics determined at birth.¹¹² Traditionally, this has been applied to classifications based upon race. However, if the reason it has been so applied is because race, like fertility, is a biological or genetic factor not subject to change, a liberal court may choose to apply this criterion to surrogate motherhood. Secondly, the court has considered political underrepresentation.¹¹³ Traditionally, this has been applied to classifications based upon alienage. If, however, the reason it has been so applied is protection of minority interests from legislation promulgated by those representing the majority viewpoint, again, a liberal court may choose to apply this criterion to surrogate motherhood. Should this latter test be applied, any statutory classification based upon types of infertile couples will probably not survive judicial scrutiny. The only state interest that is compelling is the common law prohibition against baby selling. Since that interest is inapplicable to surrogate motherhood, the classification should be invalidated and surrogate mothering should be sustained.

Existing Legislation

Surrogate mothering programs meet a vital societal interest. The utilization of these programs will expand as the needs of infertile couples increase and surrogate mothering is recognized by these couples as a viable alternative to the traditional adoption process. Without appropriate legislation, all parties to the process are in jeopardy.

Under the present law, the payment of compensation in connection with the placement of a child for adoption is unlawful.¹¹⁴ Thus, a surrogate mothering agency that charges a fee or receives remuneration in consideration of assisting a natural father in locating a prospective surrogate mother may find itself in violation of the law and subject

to criminal prosecution.¹¹⁵

An individual is prohibited from placing children, "in homes or with persons" unless it is licensed by the state.¹¹⁶ One of the goals of surrogate mothering is the placement of the child with its natural father. Surrogate mothering agencies, however, are exempt from the statutory mandate because the child is placed in the custody of its natural father.¹¹⁷ Under the present law, there is no assurance that the surrogate mothering process is not being abused and that the interests of the children born as a result of these arrangements are being protected.

Every birth certificate is required to include the name of the surrogate (birth) mother. However, surrogate mothering programs are conducted upon a confidential basis. In order to achieve anonymity, the surrogate mother's name cannot appear on the birth certificate. To that end, it may be necessary for a party to delete the surrogate mother's name from the birth certificate, to provide or enter false information for entry on the birth certificate, or to alter the birth certificate. In the event that the surrogate mother's name is omitted from the birth certificate, the certificate will be deemed to be incomplete.¹¹⁸ The occurrence of the latter event will place the responsible party in violation of the

law¹¹⁹ and will subject him to criminal prosecution.¹²⁰

The ultimate goal of surrogate mothering is the adoption of the child by the natural father's wife. After the surrogate (birth) mother's consent to the adoption was obtained,¹²¹ the natural father may request a copy of the birth certificate¹²² in order to enable his wife to comply with the adoption law. However, such an action will place him in breach of his contract which requires him to maintain the anonymity of the surrogate mother.

Surrogate mothering programs envision that the child will be considered to be the off-spring of the natural father. However, under the present law, a "child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed."¹²³ In the event that the surrogate mother is married, the law will require that the child be deemed to be the child of the surrogate mother's husband. Surrogate mothering agencies have eliminated this obstacle by requiring the surrogate mother's husband to contractually withhold his consent to the artificial insemination of his wife. This is problematic because, in the event of judicial review, the court may invalidate the contract, thus placing

the surrogate mother's husband in the role of the child's parent.

Finally, several courts have applied the common law prohibition against the sale of children to surrogate mothering and have invalidated these arrangements.¹²⁴ In that event, the natural father may not be allowed to retain the custody of his child and custodial responsibility may be placed with the surrogate mother. Additionally, the surrogate mother's husband may be deemed to be the father of the child and the natural father's wife may not be allowed to complete the adoption process.

As of May of 1984, six states had legislation pending with respect to surrogate mothering. In New York, Assembly Bill 5537¹²⁵ and Assembly Bill 6624¹²⁶ were pending before the Assembly Committee on the Judiciary. These bills would eliminate the fee to the surrogate mother and would provide statutory guidelines for the practice.

In Pennsylvania, House Resolution 109¹²⁷ was pending before the Rules Committee. This resolution provided for the appointment of a committee to study surrogate mothering.

In Rhode Island, House Bill 6132¹²⁸ was before the House Judicial Committee. This bill would add a "Surrogate Motherhood" chapter to the domestic relations code, would sanction



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payment to the surrogate mother, would require a written contract, and would require the natural father and his wife to guarantee the adoption of the child.

In South Carolina, House Bill 2098¹²⁹ would give the Family Court jurisdiction over surrogate mothering arrangements and would provide guidelines for the surrogate mothering contracts, the artificial insemination process, and the adoption of the child. Further, the Family Court would be required to order an investigation of the fitness of the adoptive couple, by a public or private child placement agency or a court representative, prior to the artificial insemination.

In Michigan, House Bill 4114¹³⁰ was pending before the Judiciary Committee. This bill eliminates the fee to the surrogate mother, but provides for the payment of those expenses actually incurred by her, i.e., medical, psychiatric or psychological expenses, attorney fees, living expenses and loss of wages. Further, the surrogate mother's written consent to the termination of her parental rights is required and is effective upon the birth of the child. Correspondingly, the bill requires the natural father and his wife to assume all parental rights upon the birth of the child, regardless of whether the child is born with "birth defects." In the event that the natural father or his wife die before the birth of the child, the bill requires the survivor of them to assume all parental responsibilities with respect to the child. In the event that the natural father and his wife die before the birth of the child, the surrogate mother's consent to the termination of her parental rights is void and the surrogate mother is required to assume parental responsibility for the child. The bill further requires that the following documents be filed with the Probate Court in the county in which the surrogate mother resides. That is, the surrogate motherhood agreement, the surrogate mother's consent to the termination of her parental rights, an acknowledgement by the surrogate mother's husband of the artificial insemination of his wife, an acknowledgement by the natural father and his wife, that they will assume parental responsibility for the child and an affidavit from a psychologist or a psychiatrist or an employee of a licensed child placement agency that the surrogate mother is capable of consenting to the termination of her parental rights. Interestingly, the surrogate mother is permitted to continuously update the Probate Court

file so as to provide her most recent name and address. Upon reaching the age of majority, a child conceived by way of surrogate motherhood is allowed to obtain this information.

In New Jersey, Senate Bill 481¹³¹ was pending before the Senate Judiciary Committee. This bill presents a radical departure from Assembly Bill 3139¹³² which would have made it a crime to participate in or to materially assist in a surrogate mothering arrangement. The former bill would permit an infertile couple to participate in a surrogate mothering program only if the wife is incapable of conceiving a child or carrying a child to term without significant risk to her life or if the wife has been unable to conceive for one year prior to the execution of the surrogate mothering contract. Further, the bill places the surrogate mothering process under the supervision of the Family Court, provides for the payment of all medical expenses incurred by the surrogate mother, sanctions the payment of monetary compensation to the surrogate mother, in an amount not to exceed ten thousand dollars, and requires term life and term health insurance policies for the surrogate mother and the infertile couple. The surrogate mother's written consent to the termination of her parental rights is effective upon the birth of the child and the infertile couple is required to institute adoption proceedings within ten days of the birth of the child. Finally, the bill requires that the records of the proceedings before the Family Court and the medical records relative to the artificial insemination be sealed.

As a result of the present law and the statutory ambiguities previously elucidated, surrogate mothering agencies in Maryland can flourish and grow. However, it is appropriate for the Maryland legislature to follow the lead of other states and promulgate legislation which would sanction surrogate mothering and protect the interests of all parties to the process.

At a minimum, this would require special exceptions to those areas of the law previously cited, i.e., adoption, child placement, vital records, legitimacy and the common law prohibition against the sale of children. Further, to insure the protection of all parties it may be appropriate to implement some of the provisions of the legislation pending in other states.

Conclusion

The presently existing adoption and medical procedures are not meeting the needs of many infertile couples who are

desirous of establishing a family. Surrogate mothering is an answer to that need and should be sanctioned. The common law prohibition against the sale of children is inapplicable to the surrogate mothering process and the Equal Protection Clause¹³³ and the Due Process Clause¹³⁴ of the United States Constitution require that surrogate mothering be sanctioned. This can best be accomplished by the promulgation of legislation which would (1) protect the best interest of the child, (2) provide that surrogate mothering is conducted without abuse and (3) insure that surrogate mothering has no adverse psychological effects on the surrogate mother, the infertile couple or the child.

Notes

¹ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1983). *Accord*, A. Kornheiser, *The Baby Chase* (1983) (twenty percent of American couples are infertile); Chamblin, *In Search of Parenthood*, *The Columbia Flier*, July 28, 1983, at 32 (there are ten million infertile couples nationwide); Small, *Baby Sellers or Sisters of Mercy? Surrogate Mothers Give Birth to a Legal Debate*, *People*, June 13, 1983, at 47 (there are three million infertile women nationwide).

² A. Kornheiser, *The Baby Chase* (1983) (it seems good, natural and right, to raise someone and give him a home and a value system, to love).

³ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1983).

⁴ *Id.* (some agencies have a four year waiting list to get on the prospective adoptive parent waiting list). *Accord*, Chamblin, *In Search of Parenthood*, *The Columbia Flier*, July 28, 1983, at 35 (Catholic Charities has a four year waiting list).

⁵ Interview with Natalie Rees, Attorney at Law, in Baltimore, Md. (Apr. 1984) (by following carefully proscribed procedures a couple can locate an adoptive child in approximately six months).

⁶ Chamblin, *In Search of Parenthood*, *The Columbia Flier*, July 28, 1983, at 35.

⁷ *Id.*

⁸ *Id.*

⁹ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984).

¹⁰ A. Kornheiser, *The Baby Chase* (1983).

¹¹ Chamblin, *In Search of Parenthood*, *The Columbia Flier*, July 28, 1983, at 33, 34.

¹² *Resolve and Families Adopting Children Everywhere are two such groups.*

¹³ Thompson, *Bill Seeks to Clarify Limbo of Surrogate Births*, *Wash. Post*, Mar. 19, 1984, at B1.

¹⁴ *Id.* *Accord*, Small, *Baby Sellers or Sisters of Mercy? Surrogate Mothers Give Birth to Legal Debate*, *People*, June 13, 1983, at 47 (There are approximately sixteen agencies nationwide).

¹⁵ Thompson, *Bill Seeks to Clarify Limbo of Surrogate Births*, *Wash. Post*, Mar. 19, 1984, at B7 (National Center for Surrogate Parenting, Inc. opened in Chevy Chase approximately three years ago); Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984) (Surrogate Motherhood, Inc. opened in March, 1983 in Columbia).

- ¹⁶ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984).
- ¹⁷ Md., Mich., N.J., N.Y., Pa., R.I., and S.C. are the only states in which legislature is pending.
- ¹⁸ Id.
- ¹⁹ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984). (surrogate mothers and natural fathers are meticulously screened, are closely supervised and undergo extensive counseling); Small, *Baby Sellers or Sisters of Mercy? Surrogate Mothers Give Birth to Legal Debate*, People, June 18, 1983, at 50 (Noel Keane admits to little, if any, surrogate screening); DeNike, *Clarifying the Issues Raised by Surrogate Mother Programs*, Baltimore Sun, June 21, 1982, at B2 (Harriet Blankfeld of the National Center for Surrogate Parenting, Inc. refused to divulge what medical standards, if any, her agency employs).
- ²⁰ Md. Est. & Trusts Code Ann § 1-207(b) (1974).
- ²¹ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984). (the agency fee is six thousand dollars).
- ²² Md. Code Ann. art. 16, § 83 (1981 Repl. Vol.).
- ²³ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984) (the fee is determined by the surrogate mother, but is generally ten thousand dollars).
- ²⁴ Id.
- ²⁵ Md. Health-General Code Ann. § 4-208(a) (1982).
- ²⁶ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984).
- ²⁷ Md. Code Ann. art. 16, § 72 (Supp. 1983).
- ²⁸ Md. Health-General Code Ann. § 4-217(b) (1982).
- ²⁹ *Syrkowski v. Appleyard*, 122 Mich. App. 506, 333 N.W.2d 90, 93 (1983).
- ³⁰ *In Re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1, 13 (1960); *Enders v. Enders*, 164 Pa. 266, 30 A. 129, 130 (1894).
- ³¹ *In Re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1, 13 (1960).
- ³² *Enders v. Enders*, 164 Pa. 266, 30 A. 129, 130 (1894). *Contra*, *In Re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1, 13 (1960) (public policy is dependent upon the facts and circumstances of the particular case).
- ³³ *In Re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1, 11 (1960); *Clark v. Clark*, 122 Md. 114, 119, 89 A. 405, 407 (1913); *Enders v. Enders*, 164 Pa. 266, 30 A. 129, 130 (1894).
- ³⁴ Id.
- ³⁵ *Savannah Bank & Trust Co. v. Hanley*, 208 Ga. 34, 65 S.E.2d 26 (1951) (contract which provided for mother to surrender physical custody of her child in consideration of receiving a legacy was void); *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980) (agreement to pay mother expenses paid by another was void).
- ³⁶ *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980).
- ³⁷ Md. Code Ann. art. 16, § 83 (1981 Repl. Vol.).
- ³⁸ *Enders v. Enders*, 164 Pa. 266, 30 A. 129, 131 (1894).
- ³⁹ *Clark v. Clark*, 122 Md. 114, 120, 89 A. 405, 408 (1913).
- ⁴⁰ *Reimche v. First National Bank of Nevada*, 512 F.2d 187, 189 (9th Cir. 1975) (seminal factor was that agreement was not initiated by mother).
- ⁴¹ *Enders v. Enders*, 164 Pa. 266, 30 A. 129 (1894).
- ⁴² *Syrkowski v. Appleyard*, 164 Mich. App. 506, 333 N.W.2d 90, 94 (1983).
- ⁴³ Id. (Paternity Act cannot be applied to surrogate mothering arrangements). *Accord*, *Davis v. Turner*, 337 So.2d 355 (1975) (adoption statutes curtail parental rights and must be narrowly construed).
- ⁴⁴ *Syrkowski v. Appleyard*, 122 Mich. App. 506, 333 N.W.2d 90, 94 (1983).
- ⁴⁵ Small, *Baby Sellers or Sisters of Mercy? Surrogate Mothers Give Birth to Legal Debate*, People, June 13, 1983, at 50.
- ⁴⁶ Id. E.g., Md. Est. & Trusts Code Ann. § 1-207 (1974).
- ⁴⁷ Small, *Baby Sellers or Sisters of Mercy? Surrogate Mothers Give Birth to Legal Debate*, People, June 13, 1983, at 50.
- ⁴⁸ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984).
- ⁴⁹ Id.
- ⁵⁰ Thompson, *Bill Seeks to Clarify Limbo of Surrogate Births*, Wash. Post, Mar. 19, 1984, at B1.
- ⁵¹ Id.
- ⁵² Worth, *Surrogate Mothers*, Howard Sun, Apr. 6, 1983, at 1.
- ⁵³ Interview with Matthew Myers, Esq., counsel for Surrogate Motherhood, Inc., in Wash. D.C. (Apr. 6, 1984).
- ⁵⁴ Small, *Baby Sellers or Sisters of Mercy? Surrogate Mothers Give Birth to Legal Debate*, People, June 13, 1983, at 50.
- ⁵⁵ Id.
- ⁵⁶ *In Re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1 (1960) (family agreement, not prompted by self-seeking by mother and made for welfare of child not violative of public policy); *Clark v. Clark*, 122 Md. 114, 89 A. 405 (1913) (agreement to relinquish custody in favor of grandfather not violative of public policy); *Enders v. Enders*, 164 Pa. 266, 30 A. 129 (1984) (agreement to relinquish custody in favor of grandfather not violative of public policy; he had legal responsibility to the child).
- ⁵⁷ *Clark v. Clark*, 122 Md. 114, 120, 89 A. 405, 408 (1913).
- ⁵⁸ *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90, 96 (1980).
- ⁵⁹ *Ross v. Hoffman*, 280 Md. 172, 372 A.2d 582 (1977).
- ⁶⁰ *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978); Md. Code Ann. art. 72A, § 1 (1983 Repl. Vol.).
- ⁶¹ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984); Thompson, *Bill Seeks to Clarify Limbo of Surrogate Births*, Wash. Post, Mar. 19, 1984, at B1; Worth, *Surrogate Mothers*, Howard Sun, Apr. 6, 1983, at 1.
- ⁶² Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984).
- ⁶³ *Enders v. Enders*, 164 Pa. 266, 30 A. 129 (1894).
- ⁶⁴ *Reimche v. First National Bank of Nevada*, 512 F.2d 187, 190 (9th Cir. 1975).
- ⁶⁵ U.S. CONST. amend. XIV, § 1.
- ⁶⁶ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
- ⁶⁷ *Griswold v. Conn.*, 381 U.S. 479, 487 (1965) (Goldberg, J., dissenting).
- ⁶⁸ Id. at 479.
- ⁶⁹ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
- ⁷⁰ *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977).
- ⁷¹ Id. at 684.
- ⁷² *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
- ⁷³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
- ⁷⁴ *Roe v. Wade*, 410 U.S. 113 (1973).
- ⁷⁵ E.g., Md. Est. & Trusts Code Ann. § 1-207(b) (1974).
- ⁷⁶ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
- ⁷⁷ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816).
- ⁷⁸ *Griswold v. Conn.*, 381 U.S. 479 (1965).
- ⁷⁹ *Doe v. Kelley*, 106 Mich. App. 1698, 307 N.W.2d 438, 441 (1981).
- ⁸⁰ See *Harris v. McRae*, 448 U.S. 297, 314 (1980).
- ⁸¹ Id. at 316.
- ⁸² *Griswold v. Conn.*, 1 U.S. 479, 486 (1965) (marriage is an association that prompts life and harmony in living).
- ⁸³ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).
- ⁸⁴ *Doe v. Bolton*, 410 U.S. 179, 194 (1973).
- ⁸⁵ *Roe v. Wade*, 410 U.S. 113, 155, (1973).
- ⁸⁶ *Carey v. Population Services, Int'l.*, 431 U.S. 678, 703 (Powell, J., concurring).
- ⁸⁷ Interview with Matthew Myers, Esq., counsel for Surrogate Motherhood, Inc., in Wash. D.C. (Apr. 6, 1984) (once the proponents can show that surrogate mothering addresses real problems, can be conducted without abuse, will have no adverse effects on the surrogate mothers and is in the best interests of the child, the United States Supreme Court will be more amenable to sanctioning these programs).
- ⁸⁸ *Roe v. Wade*, 410 U.S. 113 (1973).
- ⁸⁹ Id.
- ⁹⁰ *In Re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1, 11 (1960); *Clark v. Clark*, 122 Md. 114, 119, 89 A. 405, 407 (1913); *Enders v. Enders*, 164 Pa. 266, 30 A. 129, 130 (1894).
- ⁹¹ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984).
- ⁹² Id., Thompson, *Bill Seeks to Clarify Limbo of Surrogate Births*, Wash. Post, Mar. 19, 1984, at B7; Worth, *Surrogate Mothers*, Howard Sun, Apr. 6, 1983, at 1.
- ⁹³ Interview with Matthew Myers, Esq., counsel for Surrogate Motherhood, Inc., in Wash. D.C., (Apr. 6, 1984).
- ⁹⁴ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984).
- ⁹⁵ Md. Code Ann. art. 16, § 83 (1981 Repl. Vol.).
- ⁹⁶ Interview with Sharon L. Whitely, President of Surrogate Motherhood, Inc., in Columbia, Md. (Mar. 23, 1984).
- ⁹⁷ See generally *Doe v. Commonwealth's Attorney of Richmond*, 403 F. Supp. 1199 (1975), *aff'd*, 425 U.S. 901 (1976) *reh'ing denied*, 425 U.S. 985 (1976).
- ⁹⁸ Id.
- ⁹⁹ Id. at 1202.
- ¹⁰⁰ *Baker v. Wade*, 553 F. Supp. 1121 (1982).
- ¹⁰¹ Id. at 1147.
- ¹⁰² Md. Est. & Trusts Code Ann. § 1-207(b) (1974).
- ¹⁰³ U.S. CONST. amend. XIV, § 1.
- ¹⁰⁴ *Harris v. McRae*, 448 U.S. 297, 322 (1980).
- ¹⁰⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).
- ¹⁰⁶ *Maher v. Roe*, 432 U.S. 404, 470 (1977).
- ¹⁰⁷ *Harris v. McRae*, 448 U.S. 297, 322 (1980).
- ¹⁰⁸ Id.
- ¹⁰⁹ Id.
- ¹¹⁰ *Maher v. Roe*, 432 U.S. 464, 470 (1977); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973); *Skinner v. Oklahoma*, 316 U.S. 35, 541 (1942).
- ¹¹¹ Id.
- ¹¹² *Brown v. Board of Educ.*, 347 U.S. 483 (1954).
- ¹¹³ *Graham v. Richardson*, 403 U.S. 365 (1971).
- ¹¹⁴ Md. Code Ann. art. 16, § 83 (1981 Repl. Vol.).
- ¹¹⁵ Id.
- ¹¹⁶ Md. Code Ann. art. 88A, § 20 (1979 Repl. Vol.).

- ¹¹⁷ Md. Code Ann. art. 88A, § 20(b)(1) (1979 Repl. Vol.).
- ¹¹⁸ Md. Health-General Code Ann. § 4-207(b) (1982).
- ¹¹⁹ Md. Health-General Code Ann. § 4-226 (1982).
- ¹²⁰ Md. Health-General Code Ann. § 4-206 (1982).
- ¹²¹ Md. Code Ann. art. 16, § 71 (Supp. 1983).
- ¹²² Md. Health-General Code Ann. § 4-217 (1982).
- ¹²³ Md. Est. & Trusts Code Ann. § I-206(b) (1974).
- ¹²⁴ *In Re Shirk's Estate*, 186 Kan. 311, 350 P.2d 1, 11 (1960); *Clark v. Clark*, 122 Md. 114, 119, 89 A. 405, 407 (1913); *Enders v. Enders*, 164 Pa. 266, 30 A. 129, 130 (1894).
- ¹²⁵ A.B. 5537, 206th Sess. (1983).
- ¹²⁶ A.B. 6624, 206th Sess. (1983).
- ¹²⁷ H.R. 109, 167th Sess. (1983).
- ¹²⁸ H.B. 6132, 35th day of Mar. 10, 1983 Sess. (1983).
- ¹²⁹ H.B. 2098, 105th Sess. (1983).
- ¹³⁰ H.B. 4114, 82nd Sess. (1983).
- ¹³¹ S.B. 481, 201st Sess. (1984).
- ¹³² A.B. 3139, 200th Sess. (1983).
- ¹³³ U.S. CONST. amend. XIV, § 1.
- ¹³⁴ *Id.*

Sex-Based Wage Discrimination continued from page 6

For a discussion of comparable worth under the Equal Pay Act, See, Equal Work, Comparable Worth and Disparate Treatment: An Argument For Narrowly Construing *County of Washington v. Gunther*, 22 Duq. L. Rev. 65 (1983).

² In 1960, there were 23 million women in the work force. As of the second quarter of 1982 that figure had risen to 48 million. U.S. Department of Labor, Bureau of Labor Statistics, *The Female — Male Earnings Gap: A Review of Employment and Earnings Issues* (1982).

³ In 1939, median earnings for women who worked year round, full time, were 58 percent of the median earnings for men. Similar figures for 1981 showed women's earnings at 59% of the median for men. *Id.*, U.S. Department of Labor, Bureau of Labor Statistics.

⁴ *Id.*, U.S. Department of Labor, Bureau of Labor Statistics.

⁵ The percent of women in predominantly male fields in 1970 and 1981 are as follows:

	1970	1981
accountants	25.3	38.5
engineers	1.6	4.3
lawyers-judges	4.7	14.0
physicians	8.9	13.8
carpenters	4.9	6.3
truck drivers	1.5	2.7
protective service	6.2	10.1

Id., U.S. Department of Labor, Bureau of Labor Statistics.

⁶ Percentages of women in female dominated fields in 1970 and 1981 were as follows:

	1970	1981
registered nurses	97.4	96.8
sales clerks	64.8	71.3
secretaries	96.6	98.6
service workers	60.5	62.2
teachers, except college and university	70.4	70.6

Id., U.S. Department of Labor, Bureau of Labor Statistics.

⁷ In a recent study of wages in 250 occupations, seven of the lowest paying occupation groups were the same for men and women: farm laborers, food service workers, cashiers, waiters, waitresses.

cooks, nurses' aides and orderlies and bartenders, all of these occupations were both female intensive and relatively low paying. Rytine, *Earnings of Men and Women: A Look at Specific Occupations*, Monthly Labor Review, April 1982.

⁸ *County of Washington v. Gunther*, 452 U.S. 161, 102 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

⁹ Pub. L. No. 88-38, 77 Stat. 56 codified at 29 U.S.C. § 206(d)(1) (1976)). The Equal Pay Act is an amendment to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976). The Equal Pay Act provides in pertinent part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Id. § 206(d) (1) (1976).

¹⁰ For a discussion of the historical treatment of women in the workforce, See, Pollack & Smith, *Civil Liberties and Civil Rights in the United States*, 263-277, (West, 1978).

¹¹ *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir.), *cert. denied*, 398 U.S. 905 (1970).

¹² *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 91 L.Ed.2d 1 (1974).

¹³ *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, (3rd Cir. 1970).

¹⁴ *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 449 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

¹⁵ *Id.* at 449.

¹⁶ See, 29 CFR §§ 800.125, .126.

¹⁷ *Id.* § 800.127.

¹⁸ *Id.* §§ 800.129, .130.

¹⁹ *Id.* § 800.120. "[I]t is clear that congress did not intend to apply equal pay standards to jobs substantially differing in their terms and conditions."

²⁰ 108 Cong. Rec. 14, 767 (1962).

²¹ Comment, *Market Conditions as a Factor Other Than Sex in Title VII Disparate Impact Litigation*, 86 W. Va. L. Rev. 165, 170 (1983).

²² 110 Cong. Rec. 2581 (1964).

²³ *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 576 L.Ed. 2d 957 (1978).

²⁴ 42 U.S.C. § 200e-2(a) (1).

²⁵ 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

²⁶ *Wright v. National Archives and Records Service*, 609 F.2d 702, 712-13 (4th Cir. 1979).

²⁷ *Id.*

²⁸ See, e.g., *Dothard v. Raulinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) (height and weight requirements had discriminatory impact since they would

exclude 41.13% of the female population but less than 1% of the male population.

²⁹ For a discussion of the business necessity defense See, Comment, *Business Necessity Defense to Disparate Impact Liability*, 46 U. Chi. L. Rev. 911 (1979).

³⁰ *Milton v. Weinberger*, 646 F.2d 94 (C.A.D.C. 1982) (female employee was refused promotion for failure to answer a question during a final selection interview adequately justified her for non-selection as the question bore some relevancy to the job).

³¹ *Spaulding v. University of Washington*, 704 F.2d 686, 700 (9th Cir. 1984).

³² *Id.*

³³ *Id.*

³⁴ 42 U.S.C. § 200e-2(h) (1976).

³⁵ 110 Cong. Rec. 13, 647 (1964).

³⁶ *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.) *cert. denied*, 423 U.S. 865 (1965); *Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971).

³⁷ See, *International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1099 (3d Cir.), *cert. denied*, 449 U.S. 1009 (1980).

³⁸ 452 U.S. 161, 102 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

³⁹ *Id.* at 180-81.

⁴⁰ *Id.* at 181.

⁴¹ *Id.* at 166-67.

⁴² 740 F.2d 686 (9th Cir. 1984).

⁴³ *Id.* at 706. See, also, *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

⁴⁴ *Id.* at 700.

⁴⁵ *Id.* at 701.

⁴⁶ 539 F.Supp. 721 (W.D.Mich. 1982).

⁴⁷ *Id.* at 727.

⁴⁸ *Id.*

⁴⁹ See, Comment, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 Iowa L. Rev. 618 (1984); *Tough Comparable Worth Questions Remain Unresolved*, Legal Times (June 18, 1984).

⁵⁰ See, Comment, *Comparable Worth Theory of Title VII Sex Discrimination in Comprehension*, 47 Mo. L. Rev. 495 (1982). See, also, *Pay Bias Enters A New Age*, The National Law Journal, Vol. 6 - No. 17 (January 2, 1984).

⁵¹ Majors, *The Comparable Worth Muddle*, Journal of Contemporary Studies, Volume VII, Number 3 (1984).

⁵² As of January 1984, 18 states were conducting pay equity studies. The State of Maryland is currently conducting such a study.

⁵³ *AFSCME v. State of Washington*, 578 F.Supp. 846 (W.D. Wash. 1983) (currently on appeal). Class action initiated by the American Federation of State, County and Municipal Employees and the Washington Federation of State Employees on behalf of 15,500 workers in jobs primarily held by females.

⁵⁴ *Id.* Predominantly was defined as 70% one sex.

⁵⁵ *Id.* at 862.

⁵⁶ *Id.* at 867.

⁵⁷ *Id.* at 864.

⁵⁸ *Id.* See discussion at footnote 29 infra.

⁵⁹ *Id.* at 864.

⁶⁰ *Id.* at 865.

⁶² *Tough Comparable Worth Questions Remain Unresolved*, Legal Times (June 18, 1984).

⁶³ 585 F.Supp. 1152 (N.D. Ala. 1984).

⁶⁴ *Id.* at 1152; See, also, *Spaulding*, 740 F.2d at 708 (9th Cir. 1984) ["Relying on competitive market prices does not qualify as a facially neutral policy or practice for the purposes of the disparate impact analysis..."].