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Surrogacy v. the Thirteenth Amendment

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SURROGACY v. THE THIRTEENTH AMENDMENT

*CYRIL C. MEANS, JR.**

INTRODUCTION

The child, and the adolescent and adult that the child will become, is the paramount party in interest in any case determining the legal parents of a child borne by a surrogate.[1] This article presents arguments on behalf of the child and adolescent-adult-to-be that the surrogacy contract[2] is invalid under the

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1. In this article, the misleading expressions "surrogate parent" and "surrogate mother" will not be used. The word "surrogate" means substitute. The natural mother is not the "surrogate mother," but the actual mother of the child; the child's surrogate mother is the adopter, the natural father's wife. The natural mother is actually a surrogate wife who substitutes for the natural father's wife in conceiving, gestating and bearing his child.

The expression "surrogate mother" was coined by Noel P. Keane and other advocates of commercialized surrogacy in an effort to steal a march on the debate by preempting its vocabulary. Such an expression implies that the adopter is the real mother of the surrogacy-produced child. In this article, therefore, the natural mother will be referred to either as surrogate or as mother.

In England, which has had nine years of judicial and legislative experience in dealing with surrogacy—a longer period than in any other common law country or state in the world—this semantic solecism has often been commented upon. A particularly lucid exposition was given by the Earl of Cork and Orrery in a House of Lords debate on a bill to amend the Surrogacy Arrangements Act 1985:

> So the woman who has the baby is the surrogate mother. She is the substitute. But for what? For the real mother? No, she is the real mother. So, for what is she a surrogate? She is the surrogate, according to the logic (if that is not too strong a word to use in relation to what lies behind this Bill or Act) for somebody who cannot have a baby. But that does not make her a surrogate mother, it makes her a mother. The woman who gets the baby is the substitute for that original mother who hands the baby over by a process of adoption.
>
> This is the perfectly ordinary, simple, straightforward situation that actually occurs. . .put. . .into ordinary common English.

173 PARL. DEB., H.L. (5th ser.) 174 (1986).

2. The draftsmen of the Surrogacy Arrangements Act 1985 used the word "arrangements" rather than "contracts." The term "contract" properly designates only an agreement that courts will enforce. Since 1978 English courts have held a surrogacy agreement "as being against public policy" so that no party "can rely upon it in any way or enforce the agreement in any way," holding that "this was a purported contract for the sale and purchase of a child." A. v. C., [1985] F.L.R. 445, 449 (Fam. & C.A. 1978).

thirteenth amendment[3] and the federal Anti-Peonage Act,[4] and that fourteenth amendment[5] substantive due process does not preserve the contract. The only existing population group analogous to the current cohort of surrogacy-produced children is that of full blood-stranger adoptees; a proper comparison between these two groups is presented to define the differences between these child-acquisition procedures and their impact on society.

The highly publicized *Baby "M"*[6] case illustrates the nature of the contractual relationships in a surrogacy arrangement and is referred to extensively throughout this article. After reviewing American legal precedent, this article turns to English law which began addressing these issues almost a decade ago. Thus we may learn from the English experience. This article urges serious consideration of the English solutions to this problem.

A surrogacy contract has an inherently dual nature: from impregnation through birth, it is a contract for personal services; after birth, if the child is born alive, it is a contract of sale.

The typical surrogacy contract provides that upon surrender of the born child to the natural father, a certain sum will be paid to the natural mother. If the child should die, a much smaller sum will be due to the natural mother.[7] These provisions reveal the nature of the agreement: a sale of services through birth;

Under our American Federal system, the situation is more complicated: the Thirteenth Amendment and the Anti-Peonage Act make impossible specific performance of surrogacy agreements throughout the Union as a matter of federal law. The Congress that enacted the Anti-Peonage Act excised from the bill a section that would have totally invalidated agreements coming within its scope and would have made them unenforceable even by actions for damages. Such contracts therefore continue to be governed by state law in regard to remedies other than decrees of affirmative specific performance. Because of this Federalism-caused complexity, this article will use the expression "surrogacy contracts" while advocating adoption of English precedent to declare their total invalidity under both federal and state law.

3. U.S. CONST. amend. XIII.

4. Anti-Peonage Act, March 2, 1867, ch. 187, 14 Stat. 546, [now 42 U.S.C. § 1994 (1982) and 18 U.S.C. § 1581 (1982)].

5. U.S. CONST amend. XIV.

6. *In re* Baby M, 217 N.J.Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *cert. granted*, 107 N.J.140, 526 A.2d 203 (Apr. 7, 1987).

7. For example in the Baby "M" case, paragraph 4(A) of the Surrogate Parenting Agreement (P-4) provided that "$10,000.00 shall be paid to Mary Beth Whitehead, Surrogate, upon surrender of custody to William Stern," but paragraph 10 provided that in "the event the child is miscarried, dies or is stillborn subsequent to the fourth (4th) month of pregnancy and said child does not survive, the Surrogate shall receive $1,000.00 in lieu of the compensation enumerated in paragraph 4(A)."

and, after birth, a sale of a living child.

It is this ambiguous nature of the contract that makes analysis of the conflict so complex. Those who favor validating surrogacy contracts argue that they are service agreements only. This article posits that whether the agreement is one for services only, or one for services plus the sale of a child, federal law prohibits the bondage it would impose on both the mother and the child.

CONTRACT FOR THE SALE AND PURCHASE OF A CHILD

Before 1865 and the passage of the thirteenth amendment,[8] human beings held in slavery were always transferable, whether by sale, gift inter vivos, or bequest in a will in the same manner as chattels. Could a father then purchase his own child?

A common case was that of a free father siring a child by a slave mother whom he owned. The free father already owned his child because of his ownership of the mother; under the rule *partus sequitur ventrem* the slave or free status of the offspring was determined by that of the mother.

Another less frequent situation was where a free father sired a child by a slave woman whom he did not own but whom he had rented from her owner. Less affluent husbands often did not have enough money to buy their wives a maid, but did have enough to rent one. Where the husband impregnated a rented slave, and she bore him a child, the offspring would belong to the mother's owner. If the father wanted his child, he would have to buy the child from the mother's owner. In *Moss v. Sandefur*,[9] a father tried to purchase and manumit[10] his daughter from the owner of a rented slave. Unfortunately, he died before completing the transaction and his child remained a slave.

These antebellum cases where the free father was white were not surrogacy cases. The free father's wife was also white

8. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII § 1.

9. 14 Ark. 381 (1854).

10. Manumission is the act of liberating a slave from bondage and giving him his freedom. BLACK'S LAW DICTIONARY 870 (5th ed. 1979). For an illustration of manumission, *see infra* note 14.

and, even if infertile, would not have welcomed into her nuclear family a child sired by her husband in a slave surrogate.

In the case of nonwhite free fathers,[11] the institution of slavery easily lent itself to a surrogacy scenario. One out of nine Negroes in the United States in 1860 was free because of individual manumission of himself or of a female ancestor.[12] After manumission, free Negroes were permitted to continue to live in some southern states; others required them to leave within a stated period.[13] Free Negroes often earned and saved enough money to buy and manumit their own wives and children.[14]

Let us consider a hypothetical case where the wife of a free Negro had proved barren after being purchased and manumitted by her husband who wanted sons. Like the Biblical Sarah,[15] she could have suggested that he purchase or rent a maid from their former owner and sire sons by the maid. Assume her husband rented a maid in 1855, impregnated her, and, after she bore him a son, he returned her to her owner, but bought his son, manumitting him and giving him to his wife to rear as a foster child. (There were no adoption statutes then and adoption did

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11. Numerous references will be made to Americans of African descent before 1865, both free and slave. Today, the majority of their descendants prefer to be called "black" rather than "Negro," although a few, like Mr. Justice Marshall, still prefer "Negro." In this article, references will be to what those persons called themselves in the age in which they lived, e.g., "free Negroes." This departure from contemporary linguistic usage is justified, it is believed, by fidelity to the history of the period discussed. For an informative treatment of the difference between notions of racial differentiation and nomenclature that prevailed in the era of Reconstruction and those that are current today, see St. Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987).

12. I. BERLIN, SLAVES WITHOUT MASTERS 137, Table 8 (1974) (based on Population of the United States in 1860, at 598-604 (Washington, D.C. 1864)). In 1860, the proportion of Negroes free was 11.0%.

13. For a descriptive note on manumission statutes of southern states in the antebellum period, and a list of such statutes, see I. BERLIN, SLAVES WITHOUT MASTERS 138-39 (1974).

14. A recent book by Professors Michael P. Johnson and James L. Roark, BLACK MASTERS: A FREE FAMILY OF COLOR IN THE OLD SOUTH (1984), recounts in meticulous detail the story of William Ellison (1790-1861) who became one of the richest men in rural South Carolina. Born in slavery, the son of his white owner and namesake, he was apprenticed to the local ginwright who taught him the art of manufacturing and repairing cotton gins. In 1810, at age 20, Ellison married Matilda, then 16, another slave owned by his master. In 1811, she bore him a daughter, Eliza Ann. In 1816, Ellison's owner-father manumitted him. The following year, Ellison had earned enough money to buy and manumit both Matilda and Eliza Ann. His subsequent sons by Matilda were born free.

15. Genesis xvi. 1-16.

not exist at common law.) In 1865, when the thirteenth amendment was proclaimed, that son would have been ten years old. The amendment would have freed his mother (the rented and returned surrogate). If the mother then demanded that the wife turn over to her her son, can there be any doubt about how a court would have decided such a dispute?

The rental of women for surrogacy purposes was legally possible in the Old South, and it probably did occur where free Negro husbands had infertile wives. A free father who purchased his own child from the rented mother's owner did in fact "purchase what was already his." If a free father sired a child by a surrogate who was free, she could not have been forced to surrender the child to the father. At common law, the mother's right of custody of an illegitimate child was paramount to that of every other person, including the father.[16] Thus, a surrogacy arrangement could not be enforced by any method when the mother was free.

Today's fathers who enter surrogacy contracts are thus not the first free men to rent a surrogate; they had exemplars aplenty before 1865. For example, in the *Baby "M"*[17] case, William Stern did not merely rent a uterus, as one expert witness has crudely put it. Anyone who has lived with a pregnant woman knows that not only her reproductive tract but the entire woman is involved in the pregnancy. Stern rented an entire woman.

There is an analytical distinction, however, between what a modern father purchases and what a free Negro father purchased when renting a surrogate. The modern father purchases only the mother's half of the parental rights for the purpose of transferring those to the adopting wife, whereas the free Negro father purchased 100% of the parental rights to his child from the owner.[18] This distinction is accurate, but is constitutionally

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16. *See* Wright v. Wright, 2 Mass. 109 (1806).

17. *In re* Baby "M," 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *cert. granted*, 107 N.J. 140, 526 A.2d 203 (Apr. 7, 1987).

18. The question arises: Is there a distinction between purchasing the person of the child and purchasing parental rights to the child?

Before 1865, a free Negro had no rights as a father to his slave-born child unless he purchased the child from its owner. If he then manumitted the child, he no longer owned the child but he could still maintain parental rights. A modern father (in a state that has enacted the Uniform Parentage Act) has, by virtue of his paternity, his own parental rights to the child. What he does not have is the mother's parental rights. Sale of her

irrelevant; the thirteenth amendment[19] unequivocally prohibits the sale and purchase of human beings. This prohibition surely applies to half of a child just as it does to a whole child.

Another distinction is that the free Negro father bought his child not from the slave mother who did not own even herself but from the owner; the modern father purchases his child from the mother, a free woman. This distinction makes modern surrogacy worse in this respect than pre-1865 slavery. In the two and one-half centuries (1619-1865) of African chattel slavery in this country, countless babies were sold for money, sometimes separately from their mothers, but never once did the mother sell her own child. The spectacle of mothers openly and willingly selling their own children, on a commercial basis, would not be encountered until the mid-1970s.

The thirteenth amendment invalidates the surrogacy arrangement—a bargain for the sale of a child. If the agreement is invalid, then the contractual remedy of specific performance is unavailable.

The thirteenth amendment was the supreme constitutional achievement of the United States in the nineteenth century. It would be unthinkable if the present generation of Americans were to discard that heritage.

CONTRACT FOR PERSONAL SERVICES

Characterization of the surrogacy agreement as a contract for personal services does not remove it from invalidation by the thirteenth amendment which also nullifies contracts for labor to settle a debt or other obligation.

The framers of the thirteenth amendment borrowed its text directly from Article VI of the Northwest Ordinance of 1787[20] in which the Continental Congress within that Territory prohibited both "slavery" and "involuntary servitude", which referred to indentured bondage. Shipmasters regularly contracted with

parental rights is the equivalent of sale of the child. In the modern surrogacy context, the contract strips the mother of her parental rights to the child by awarding them to a stranger, the father's wife. It is this total destruction of the mother's parental relationship to the child which is so repugnant. Neither the child nor parenthood should be bargainable.

19. U.S. CONST. amend. XIII. For full text, *see supra* note 8.

20. Northwest Ordinance, 1 Stat. 50 (1787).

would-be migrants to the American colonies and states to bring them hither in return for an indenture obliging them to serve for a term of years. On arrival here, the shipmaster would sell these servants, together with their indentures, to Americans who needed servants.[21]

Article VI of the Northwest Ordinance of July 13, 1787 provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted. . . ."[22] This prohibition was repeated in the constitution adopted by each of the states formed from the old Northwest Territory, upon its admission to the Union.[23] The southernmost tier of these states—Ohio, Indiana, and Illinois—was bordered by the Ohio River across which lay Kentucky and the other slaveholding states. Some southern slaveholders wished to move to the Territory with their slaves, but Article VI stood in the way. One ploy used by such would-be migrants was to execute deeds of manumission to the slaves while simultaneously taking back from them indentures for long periods of years. Then, when the Southerner migrated to the Territory, he could claim that he was bringing with him not slaves, but only indentured servants. Even so, the "involuntary servitude" prohibition in Article VI still presented an obstacle.

The constitution of Ohio, the first of the three states to enter the Union, dealt with this problem comprehensively:

> nor shall any male person, arrived at the age of twenty-one years, nor female person, arrived at the age of eighteen years, be held to serve any person as a servant, under the pretense of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a *bona fide* consideration, received, or to be received, for their service. . . . Nor shall any indenture of any negro or mulatto, hereafter made and executed out of this State, or, if made in

21. The apportionment clause of the Constitution refers to such persons as "free Persons, including those bound to Service for a Term of Years." U.S. CONST. art. I, § 2, cl. 3.

22. 1 Stat. 50, at 53.

23. OHIO CONST. 1802, art. VIII, § 2; IND. CONST. 1816, art. IX, § 7; ILL. CONST. 1818, art. VI, § 1; MICH. CONST. 1835, art. XI; Wis. Const. 1848, art. I, § 2; MINN. CONST. 1857, art. I, § 2.

the State, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships.[24]

After Ohio's admission, the legislature of the territory, in 1803, adopted a Virginia law whose purpose, to nullify the "involuntary servitude" clause in Article VI of the Northwest Ordinance, is apparent in its very first section: "All negroes and mulattoes (and other persons not being citizens of the United States of America) who shall come into this territory under contract to serve another in any trade or occupation, shall be compelled to perform such contract specifically during the term thereof."[25] This statute made specifically enforceable within the Indiana Territory indentures executed elsewhere. The next effort of the territorial legislature, passed in 1805 and reenacted in the revision of 1807, created a procedure for executing such indentures within the territory. Its first three sections provided:

> § 1 . . . . it shall and may be lawful for any person being the owner or possessor of any negroes or mulattoes . . . owing service and labor as slaves in either of the states or territories of the United States . . . to bring the said negroes or mulattoes into this territory. § 2. That the owner or possessor . . . shall within thirty days after such removal, go with the same [negroes or mulattoes] before the clerk of the court of common pleas of the proper county, and in the presence of the said clerk the said owner or possessor shall determine and agree with his or her negro or mulatto upon the term of years which the said negro or mulatto will and shall serve his or her said owner or possessor, and the said clerk is hereby

24. OHIO CONST. 1802, art. VIII, § 2.

25. This clause was adopted by the Legislature of the new Indiana Territory which was carved out of the Northwest Territory in 1809. This law may be found in the codified territorial laws. IND. TERRITORY L. 1803, ch. 2, in LAWS OF THE INDIANA TERRITORY, 1801-1806, at 26-31 (1886), also in F. PHILBRICK, THE LAWS OF THE INDIANA TERRITORY 1801-1809, at 42-46 (1930).

Professor Philbrick's Special Introduction to this volume runs to more than 200 pages, and contains a meticulously researched account of the controversies over slavery and indenture in the Territory. Between 1803 (after the admission of Ohio to the Union) and 1809, the expression "Indiana Territory" included what is now both Indiana and Illinois. In 1809, Indiana and Illinois were divided into separate territories.

> authorised and required to make a record thereof, in a book which he shall keep for the purpose. § 3. That if any negro or mulatto removed into this territory as aforesaid, shall refuse to serve his or her owner as aforesaid, it shall and may be lawful for such person within sixty days thereafter, to remove the said negro or mulatto to any place, which by the laws of the United States, or territory from whence such owner or possessor may or shall be authorised to remove the same [sic].[26]

While the 1805-07 legislation, unlike that of 1803, does not expressly use terms denoting specific enforcement, Section 3, holding over a repudiating servant's head the threat of being sent back to a slave state, was designed to intimidate him into continuing his service.

This 1805-07 law was called the Registered Servants Law.[27] It was even more blatantly in violation of Article VI than the 1803 act, which at least had the excuse of merely enforcing a contract made elsewhere. There was considerable antislavery sentiment against the Registered Servants Law, which, in Indiana, eventually (in 1810) sufficed to assure its repeal.

These laws were in effect in 1809 when the Territories of Indiana and Illinois were separated from the Northwest Territory and each allowed its own territorial legislature. In 1810, the Indiana legislature repealed both the 1803 and the 1805-07 legis-

26. IND. TERR. L. 1805, ch. 26, in LAWS OF THE INDIANA TERRITORY, 1801-1806, at 69-73 (1886), also in F. PHILBRICK, THE LAWS OF THE INDIANA TERRITORY 1801-1809, at 136-39 (1930). This 1805 act was reenacted, with only minor and inconsequential changes in language, in IND. TERR. L. 1807, ch. 64, in LAWS OF THE INDIANA TERRITORY 1801-1806, at 423-28 (1886), also in F. PHILBRICK, THE LAWS OF THE INDIANA TERRITORY 1801-1809, at 523-26 (1930).

The draftsmanship of Section 3 is incoherent. There should be the word "to" between "any place," and "which." And the words "from whence" should not be in the Section at all. With these emendations, the text expresses the meaning attributed to it by the Supreme Court of Illinois in Phoebe, a Woman of Color v. Jay, 1 Ill. 268, 270 (1828):

> Nothing can be conceived farther from the truth, than the idea that there could be a voluntary contract between the negro and his master. The [1805-1807] law authorizes the master to bring his slave here, and take him before the clerk, and if the Negro will not agree to the terms proposed by the master, he is authorized to remove him to his original place of servitude.

27. *Id.*

lation;[28] so no further indenturings and registrations could legally occur in Indiana. Illinois did not repeal this legislation during the remainder of its territorial period; indeed, in 1812 it continued the 1807 law.[29]

On its admission to the Union, Indiana's constitution provided:

> Art. IX, § 7. There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. Nor shall any indenture of any negro or mulatto, hereafter made and executed out of the bounds of this State, be of any validity within the State.[30]

Early in its statehood, Indiana was confronted with opposition to this clause. In 1820, a woman of color named Polly sued for habeas corpus.[31] Her master argued that he held her as his slave since she was the offspring of a slave purchased from the Indians. The argument was made on his behalf that because the language of Art. IX, § 7 was prospective ("[t]here *shall* be" (emphasis added)), he could not be divested of his right to her services which long antedated the constitution of 1816. The Supreme Court of Indiana held otherwise, and discharged Polly from service.[32]

In 1821, the same court heard another habeas corpus case brought by one Mary Clark, a woman of color.[33] Defendant Johnson returned that she was his servant by an indenture executed in Indiana on October 24, 1816 (almost four months after the new constitution had been established on June 29, 1816). By that indenture, he argued, "the said Mary (being a free woman) voluntarily bound herself to serve him as an indentured servant and house maid for 20 years."[34] The court held that by bringing

28. IND. TERR. L. 1810, ch. 28.

29. LAWS PASSED BY THE LEGISLATIVE COUNCIL AND HOUSE OF REPRESENTATIVES OF ILLINOIS TERRITORY, . . . IN 1812, at 5. (ed. M. Duncan 1813, reprinted 1920) (Act of Dec. 13, 1812).

30. IND. CONST. 1816, art. XI, § 7.

31. State v. Lasselle, 1 Blackf. 60 (1820).

32. *Id.*

33. The case of Mary Clark, a Woman of Color, 1 Blackf. 122, 12 Am. Dec. 213 (Ind. 1821).

34. *Id.* at 123, 12 Am. Dec. at 213.

the habeas corpus suit she had "clearly evince[d] that the service she renders to the obligee is involuntary"[35] and thus in violation of the prohibition of involuntary servitude in Art. IX, § 7. "It is a covenant for personal service, and the obligee requires a specific performance. It may be laid down as a general rule, that neither the common law nor the statutes in force in this State recognize the coercion of a specific performance of [such] contracts."[36] After distinguishing the cases of apprentices, soldiers, and sailors, the court observed that "[t]here are some contracts that may be specially enforced in equity; but they are of a very different nature from the contract before us. They . . . in no case have any relation to the person."[37] To Johnson's argument that the court should not interfere and prevent him from retaining Mary in his service by self-help, the court "unhesitatingly conclude[d], that when the law will not directly coerce specific performance, it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law. . . . The fact then is, that the appellant [Mary Clark] is in a state of involuntary servitude; and we are bound by the constitution, the supreme law of the land, to discharge her therefrom."[38]

The Case of Mary Clark is a leading authority for the true construction of the words "involuntary servitude" in a constitutional prohibition; it establishes the following points, both of which are applicable to the thirteenth amendment: (1) the fact that the servitude originated in a voluntary contract does not mean that it is still voluntary if the servant changes his mind; (2) *this* constitutional prohibition, unlike most others, runs not only against the government, but also against private persons: hence it outlaws self-help.

Clark's Case is important for another reason. It was published in the first edition of the earliest volume of Blackford's Reports in 1830, just two years before Henry Smith Lane began the study of law in Indiana. Later on, in 1867, Lane was to give an explanation of the meaning of the 1867 anti-peonage bill in

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35. *Id.*
36. *Id.*, 12 Am. Dec. at 214.
37. *Id.* at 125-26, 12 Am. Dec. at 216.
38. *Id.*

the United States Senate which follows the reasoning of the Indiana Supreme Court in *Clark's Case*.[39]

Parallel constitutional activity was occurring in Illinois. Upon admission to the Union, Illinois's constitution contained a provision closely following Ohio's but with the addition of a saving clause looking in the opposite direction:

> Art. VI, § 3. Each and every person who has been bound to service by contract or indenture in virtue of the laws of Illinois Territory heretofore existing, and in conformity to the provisions of the same, without fraud or collusion, shall be held to a specific performance of their contracts or indentures; and such negroes and mulattoes as have been registered in conformity with the aforesaid laws shall serve out the time appointed by said laws. . . .[40]

The "laws of Illinois Territory heretofore [i.e., before 1818, when the constitution was adopted] existing" were, of course, the Registered Servants Law (as finally codified by the Illinois Territorial Legislature in 1812).[41]

In a series of decisions, the Supreme Court of Illinois held that the Territorial Registered Servants Law had been void during the territorial period because it had been violative of Article VI of the Northwest Ordinance, but that it was validated by this saving clause in the new Illinois constitution. Consequently, the court specifically enforced the indentures that had been registered under those laws. The court made it plain that, but for the saving clause, the prohibition of "involuntary servitude" in Article VI, § 1 of the Illinois constitution would have invalidated those registered indentures, just as, in the territorial period, Article VI of the Ordinance had done (*de jure* if not *de facto*).[42]

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39. Cong. Globe, 39th Cong., 2d Sess. 1571 (Feb. 19, 1867); *see infra* note 56.

40. ILL. CONST. 1818, art. VI, § 3. Section 1 of this article abolished slavery and involuntary servitude; section 3 (the saving clause) preserved involuntary servitude with respect to persons indentured under the Territorial Registered Servants Law.

41. LAWS PASSED BY THE LEGISLATIVE COUNCIL AND HOUSE OF REPRESENTATIVES OF ILLINOIS TERRITORY, . . . IN 1812, at 5. (ed. M. Duncan 1813, reprinted 1920) (Act of Dec. 13, 1812).

42. Nance, a Girl of Color v. Howard, 1 Ill. 242 (1828); Phoebe, a Woman of Color v. Jay, 1 Ill. 268 (1828); Boon v. Juliet, a Woman of Color, 2 Ill. 258 (1836); Choisser v. Hargrave, a Colored Man, 2 Ill. 317 (1836); Sarah, a Woman of Color v. Borders, 5 Ill.

Thus, though different results obtained in Indiana and in Illinois, owing to the absence of the saving clause from the former's constitution and its presence in the latter's, the two state Supreme Courts were of one mind as to what a constitutional prohibition of "involuntary servitude," would accomplish: both agreed that it would bar specific performance of a contract of personal service.

There were no provisions concerning indentures in the constitutions of the remaining states admitted to the Union from the old Northwest Territory, nor did their courts render judicial decisions on the subject.

By 1864-65, when Congress was debating the proposal to the states of the thirteenth amendment, indentured servitude had waned as a significant phenomenon, but a similar situation had entered the Union in 1846 when we acquired from Mexico the Territory of New Mexico. This was peonage, a system of servitude by contract between master and peon which obliged the peon to work off a debt or other obligation owed to the master at an agreed rate. Like indentured servitude, peonage was specifically enforceable by statute.

The framers of the thirteenth amendment and of the federal Anti-Peonage Act[43] were familiar with the leading New Mexico case of *Jaremillo v. Romero*[44] wherein the court traced the history of the peonage system through its successive incarnations in Spanish, Mexican, and territorial law.[45] It was this sys-

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341 (1843). *Cf.* Jarrot, a Colored Man v. Jarrot, 7 Ill. 1 (1845), in which the saving clause did not apply. Plaintiff had never been indentured or registered under the Territorial statutes preserved by the saving clause. He was a slave held by a French settler, and not being within the saving clause, was liberated by ILL. CONST. 1818, art. VI, § 1. Accord, State v. Lasselle, 1 Blackf. 60 (Ind. 1820), which held Polly, a slave also of a French settler, liberated by IND. CONST. art. XI, § 7, which had no saving clause.

43. 14 Stat. 546 [now 42 U.S.C. § 1994 (1982) and 18 U.S.C. § 1581 (1982)].

44. 1 N.M. (Gild.) 190 (1857).

45. The Court in *Jaremillo v. Romero* was addressing the issue under the most recent Territorial legislation (the Act of 1852), when it said:

> By this [Act of 1852] he [the peon] must abide by and fulfill his agreement according to its terms, whether he owes or does not owe, pays or does not pay. Unless he can get his master's consent to rescind or prove some one of the causes specified to procure a cancellation, he may be prosecuted for a failure [to perform his contract], and so may the master, and the servant [may be] compelled to a compliance by a fine and imprisonment. . . .
>
> It [peonage] is seen to be carefully regulated by the legislature; that the relation of master and servant is formed by mutual consent only; that all free

tem of peonage at which the words "involuntary servitude" in the thirteenth amendment and the entire text of the 1867 Anti-Peonage Act were principally aimed.[46]

The *Jaremillo* Court relied upon language from White's Recopilacion: "The second onerous contract is that of renting, by which one person lets or grants to another person the service of his person or beast, or the use or enjoyments of a thing for a certain time."[47] It would be hard to pen language more apt to describe a surrogacy agreement, whereby a woman rents the reproductive services of her body and the ability to nurture an unborn child.

The New Mexican peonage system was capable of accommodating surrogacy contracts by allowing a peon woman to bear her master's child and surrender it to her master's infertile wife. There is one case, *Bustamento v. Analla*,[48] which may have originated in a surrogacy arrangement. A peon woman, Juana Analla, bore her master, Carpio Bustamento, two children, Catalina and George, who were reared in the house of their father from earliest infancy. Juana owed Carpio $147.00. Before an alcalde in 1847, Carpio forgave Juana $47.00 of that indebtedness in return for which Juana signed an adjustment of the account stating that "from this date the mother gives them [the two chil-

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> men and women, when no legal impediment exists, may celebrate this species of contracts; that the servant cannot leave his master's service during the time embraced in the contract, unless he proves some one of the two causes to exist, mentioned in the statute, or shall obtain his master's consent, and shall pay what he owes him; that if he shall refuse to serve in conformity with the contract, he may be compelled to its fulfillment by the magistrate with the chastisements of fine and imprisonment; that the master may procure summary proceedings before the judicial officer to enforce compliance; if the servant is a parent, and dies, the children are not compelled to serve in his stead; that the contract may be entered into before judges of probate or justices of the peace, who shall authenticate or attest the same, as they also may account between the parties. A peon or servant loses none of his rights as a citizen by contracting with a master to serve him. He is under no political disqualifications; he votes at all elections if otherwise legally qualified; his servitude does not render him under our laws ineligible to the offices of the precinct, the county, the legislature, or delegate in congress.
>
> Such are some of the features which the peon system (as commonly called) presents in this territory. . . .

Id. at 206-207.

46. *Id.*, 1 N.M. (Gild.) 190 (1857).

47. *Id.* at 195-196.

48. 1 N.M. (Gild.) 255 (1857).

dren] to Bustamento, that he may maintain and educate them as a legitimate father who will be responsible before God and man."[49] Carpio's marital status is not stated. Thus the birth of Juana's children may have been the result of a nonmarital or extramarital liaison unconnected with any surrogacy arrangement.

The present suit was brought by Juana against Marcellina Bustamento, a female relative of Carpio, who had been given Juana's daughter by Carpio. Juana sued in habeas corpus charging Marcellina with possession of her daughter under a claim of peonage. The Territorial Supreme Court decided in Juana's favor: she was the mother of an illegitimate child, and, as such, at common law, had a right of custody superior to all other persons, including the natural father.[50]

The case is valuable as an indication of what short shrift nineteenth century courts were inclined to give to contracts between parents of illegitimate children whereby one surrendered custody to the other.

In *Jaremillo v. Romero*,[51] the facts appeared that a father had contracted his minor daughter into peonage in order to pay off the father's debt to the master. The court held that no father could contract his child into peonage to pay off his own debts for a period longer than the child's minority.

The New Mexican statutory system of specifically enforceable labor contracts stands in sharp contrast to the common law rules. American courts have been historically reluctant to enforce specifically contracts for personal service.[52]

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49. *Id.*

50. The common law rule that a mother had a right to custody of her illegitimate child superior to that of the father can be found in the leading case of Wright v. Wright, 2 Mass. 109 (1806).

51. 1 N.M.(Gild.) 190 (1857).

52. American courts have universally followed the leading English case of Lumley v. Wagner, 64 Eng. Rep. 1209 (V. Ch. 1852), *aff'd*, 42 Eng. Rep. 687 (Ch. 1852). A Prussian soprano, Johanna Wagner, had contracted with a London theatre owner, Lumley, to sing at his theatre on specified dates, and not to sing at any rival theatre in England without Lumley's permission. Recreant to her contract with Lumley, Fräulein Wagner succumbed to the blandishments of a rival London theatre owner named Gye, who offered her more money to sing at his place. Needless to say, she did this without seeking Lumley's leave. Lumley sued her for specific performance. It was held that he might recover damages against her, and even have a negative injunction forbidding her to sing for Gye, but not an affirmative decree of specific performance commanding her to sing

Congressional debates leading to passage of the Anti-Peonage Act were heated.[53] The sponsor of the bill (S. No. 543), Senator Wilson of Massachusetts, described peonage as "a condition of modified servitude, which we have inherited from Mexico. It exists in New Mexico at this time, the only part of the country where I know it does exist. In some cases it is voluntary, but in most cases forcible."[54]

Senator Davis of Kentucky reacted to this description: "I suppose that to the extent that it is voluntary there is no necessity and no power on the part of Congress to interfere with it. But how far and to what extent is it voluntary? The system of apprenticeship is a servitude, and an involuntary servitude."[55]

Senator Lane of Indiana, a lawyer, attempted to elucidate: "We simply say by this bill that peonage shall be abolished, and the creditor shall be left to all his legal means of collecting his debt, but he shall not hold the peon in slavery. I understand that by this system the creditor not only had a right by an involuntary process to the labor of the peon, but the debtor if he chose might become the servant of the creditor and serve until the debt was paid."[56]

These debates in the Senate took place on February 19, 1867, on which day Senator Wilson moved to strike out the earlier version of the bill, and substitute a new version.[57] This substituted version is the one passed by both Houses.

Senator Lane's statement that the revised bill allowed the creditor "all his *legal* means" (emphasis added) of enforcing his contract but denied him any "right by an involuntary process to the labor of the peon,"[58] reflects the holding of *Lumley v. Wagner*,[59] by not forbidding the master an action for damages at law or even a negative injunction in equity, but denying him any affirmative decree of specific performance.

The earlier version of S. No. 543 had gone much farther.

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for Lumley.

53. The debates are reported in Cong. Globe, 39th Cong., 2d Sess. 239-41, 764, 789, 1571-72 (Senate, Jan.-Feb. 1867), and 1770 (House of Representatives, Mar. 1867).

54. *Id.* at 1571.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. 42 Eng. Rep. 687 (Ch. 1852) and *see supra* note 31.

That version, dated January 26, 1867, is not printed in the Congressional Globe, but exists in both a manuscript and a printed text in the National Archives.[60]

This earlier version (January 26, 1867) contained a Section 3, which read:

> *And be it further enacted,* That all debts, obligations, loans, or advances, either in money or other property, which have been made or incurred, and in liquidation of which the voluntary or involuntary service or labor of any person or persons who have heretofore been held in a state of peonage in the Territory of New Mexico, or in any other Territory or State of the United States, is, or shall hereafter be, required, claimed, maintained, or attempted to be enforced, are hereby declared null and void; and any person or persons whose service or labor, as such peons, is so claimed or required, shall be immediately discharged, by virtue of this act, from all such debts, obligations, loans, or advances of money or property, and shall never be held liable to any person for the recovery of the same or for any other consequences resulting from, or pertaining to, their former state of peonage.[61]

This section would have wholly invalidated the peon's contract with the master and would have made it impossible for the latter to recover damages in an action at law. It was eliminated from the substituted bill which passed both Houses. By eliminating Section 3, the sponsors of S. No. 543 tailored it to conform strictly to the *Lumley v. Wagner* model.[62]

If the earlier version had been passed, then American federal law would have been the same throughout the Union as it is in England: surrogacy contracts could not be enforced "in any way." By revising the bill's language, Congress allowed each state to decide whether damage actions or negative injunctions should be allowed in suits on contracts of personal service as a matter of state public policy. The Anti-Peonage Act, as passed, federally preempts only the affirmative specific performance

60. S. 543, 39th Cong., 2d Sess. § 3 (1867).

61. *Id.*

62. 64 Eng. Rep. 1209, *aff'd*, 42 Eng. Rep. 687.

remedy.[63]

The language of the bill as passed—"the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise"[64]—is broad enough to cover nonmonetary obligations as well as money debts and thus is commensurate with the institution described by Chief Justice Benedict in *Jaremillo v. Romero.*[65] The statute makes all state and territorial laws "by which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly" such service or labor "null and void."[66]

Congress passed the Anti-Peonage Act pursuant to its power to enforce the thirteenth amendment as granted by Section 2 thereof.[67] This act furthers the intent and purpose of the thirteenth amendment to ensure freedom of all persons from bondage. If the surrogacy agreement is a contract for personal services whose obligation is discharged only by the surrender of a child, it cannot be specifically enforced without violating the Anti-Peonage Act. Federal law pre-empts states from passing any law specifically enforcing such a contract. The peonage prohibited is not just servitude of the mother, but also involuntary servitude of the child whose transfer to the adoptive parent is contracted for before birth. Therefore, however a surrogacy contract is characterized, it is specifically unenforceable.

During the first half of this century, various southeastern states enacted laws which the Supreme Court held null and void as violative of both the thirteenth amendment and the Anti-Peonage Act.[68]

In its lengthy decision of the highly publicized *Baby "M"*[69] case, the trial court devotes a single paragraph to the thirteenth amendment, viz:

> The third argument [against surrogacy] is that to pro-

63. Anti-Peonage Act, March 2, 1867, ch. 187, 14 Stat. 546.
64. *Id.*
65. 1 N.M. (Gild.) 190 (1857).
66. Anti-Peonage Act, March 2, 1867, ch. 187, 14 Stat. 546.
67. "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.
68. Clyatt v. United States, 197 U.S. 207 (1905); Bailey v. Alabama, 219 U.S. 219 (1911); Butler v. Perry, 240 U.S. 328 (1916); United States v. Reynolds, 235 U.S. 133 (1914); Taylor v. Georgia, 315 U.S. 25 (1942); Pollock v. Williams, 322 U.S. 4 (1944).
69. 217 N.J. Super. 313, 525 A. 2d 1128 (1987).

> duce or deal with a child for money denigrates human dignity. To that premise, this court urgently agrees. The 13th Amendment to the United States Constitution is still valid law. The law of adoption in New Jersey does prohibit the exchange of any consideration for obtaining a child. The fact is, however, that the money to be paid to the surrogate is not being paid for the surrender of the child to the father. And that is just the point—at birth, mother and father have equal rights to the child absent any other agreement. The biological father pays the surrogate for her willingness to be impregnated and carry his child to term. At birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his.[70]

The trial judge believed that by characterizing the surrogacy contract as one for personal services, the thirteenth amendment would not apply, and thus failed to apply the appropriate law to such an agreement—the Anti-Peonage Act.

In his endeavor to exorcise the applicability of the thirteenth amendment from the case, the trial judge declared that the father "cannot purchase what is already his"[71]—his own parental rights as a father to his child. New Jersey has adopted a version of the Uniform Parentage Act[72] which advances the natural father's position from that of no rights at common law to a position of substantial parental rights. What the father is purchasing is not his half of the parental rights to the child but the mother's half so that he can transfer those to his wife, the would-be adopter of the child.

The agreement is thus a third-party beneficiary contract. In the *Baby "M"*[73] case, the immediate parties are William Stern and the Whiteheads; the donee beneficiary is Elizabeth Stern.

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70. *Id.* at 372, 525 A.2d 1157. The trial judge twice characterized the contract as one for personal services: 217 N.J. Super. at 374, 525 A.2d at 1158 ("personal service"); 217 N.J. Super. at 377, 525 A.2d at 1160 ("The bargain here was one for totally personal service"). And he even asserts that the surrogate's "right to perform [such] services" is "constitutionally protected", citing, as authority for this proposition, Lochner v. New York, 198 U.S. 45 (1905); 217 N.J. Super. at 387, 525 A.2d at 1165!

71. *Id.*

72. *See e.g.*, N.J.S.A. 9:17-44(b), 9:14-45(d) and 9:17-53(c)(West Supp. 1986).

73. *In re* Baby "M," 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *cert. granted*, 107 N.J. 140, 526 A.2d 203 (Apr. 7, 1987).

As between William and Elizabeth Stern, the maternal right to Baby M is a chattel given; as between Mary Beth Whitehead and William Stern, the maternal right to Baby "M" is a chattel sold.

The trial court's assertion that a father cannot purchase what is already his rests upon the unspoken premise that, before the passage of the thirteenth amendment in 1865, a father could not purchase his own child or the parental rights to his child. The fallacy of this premise has already been shown.

By focusing on the father and the service side of the bargain, the trial court avoided addressing the mother and the sales side of the contract. This tunnel vision enabled the court more easily to dismiss the applicability of the thirteenth amendment. Mary Beth Whitehead clearly made a prenatal contract for the postnatal sale of her child. Whether the buyer was to be William Stern or whether he was merely a conduit behind whom stands the true buyer, Elizabeth Stern, is irrelevant; that Mary Beth Whitehead was a seller is beyond cavil. Even if this sale is characterized as one for service, it is invalid under the Anti-Peonage Act; thus, the trial court made a grave error in its analysis of the law.

THE CONSTITUTIONAL CONTRAST BETWEEN ADOPTION AND SURROGACY

If surrogacy violates the thirteenth amendment as a contract for the sale and purchase of a child, why does it not equally forbid ordinary adoption between full blood-strangers?

The right to adopt exists only by virtue of statute; there is no constitutional right to adopt. On the other hand, no court has ever declared an adoption statute unconstitutional. Adoption is a system that the legislature of a state may enact; it has "supreme control over the subject."[74]

In ordinary adoption, where the adopters and the adoptee are entire blood-strangers, no money changes hands; this is expressly prohibited in all states by statutes against baby-selling.[75]

74. *In re* Malpica-Orsini, 36 N.Y. 2d 568, 570, 370 N.Y.S. 2d 511, 513, 331 N.E. 2d 486, 487-88 (1975), *appeal dismissed for want of a substantial federal question sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1976).

75. *See* ALA.CODE § 26-10-8 (1986); ARIZ. REV. STAT. ANN. § 8-114(B), 8-126(4)(C)-(F) (1986); ARK. STAT. ANN. § 56-211 (Supp. 1985); CAL. PENAL CODE § 273(a) (West Supp.

The thirteenth amendment, however, is not limited to prohibiting trafficking in human beings for money; it also forbids selling them for nonmonetary considerations or disposing of them by noncontractual transactions such as *inter vivos* gifts or bequests in wills.[76] In ordinary adoption, nonmonetary considerations are exchanged between the adult parties: the natural parent or parents is or are relieved of the legal obligation to support the child during minority;[77] the adopters acquire a child with attendant joys and responsibilities. Therefore, the ordinary adoption contract is a *prima facie* violation of the thirteenth amendment. Here, however, it is wise to recall one of the pithier dicta of Mr. Justice Holmes: "Upon this point a page of history is worth a volume of logic."[78]

Although the thirteenth amendment contains only one express exception—"except as a punishment for crime whereof the party shall have been duly convicted"[79]—the Supreme Court has recognized other, tacit exceptions. For example, in *Robertson v. Baldwin*,[80] the Court held the shipping articles of a merchant seaman specifically enforceable while noting that soldiers, sailors, and apprentices could be compelled to perform the service for which they had enlisted or been contracted without violating the thirteenth amendment.[81]

1983); ILL. REV. STAT. ch. 40 § 15526, 1701, 1702 (1986); MASS. GEN. LAWS ANN. ch. 210 § 11A (West 1986); N.J. STAT. ANN. § 9:3-54 (West 1986-87).

76. *See supra* note 8.

77. *See, e.g.*, N.Y. DOM. REL. § 32 (McKinney's 1987).

78. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

79. U.S. CONST. amend. XIII, § 1. For full text, *see supra* note 8.

80. 165 U.S. 275 (1897).

81. The pertinent passage in the Court's decision in *Robertson v. Baldwin* explains the Court's reasoning for allowing these exceptions:

> But we are also of opinion that, even if the contract of a [merchant] seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from *the necessities of the case*. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. [Here the Court adverted to certain tacit exceptions it had recognized to the First, Second and Fifth Amendments.]
>
> The prohibition of slavery, in the Thirteenth Amendment, is well known to

Here the Court justified the tacit exceptions on two separate grounds: (1) history, and (2) "the necessities of the case."[82] Inasmuch as adoption did not exist at common law and, wherever it does exist, does so solely by virtue of statute, there can be no historical basis for an exception to the thirteenth amendment in favor of adoption. The basis for the exception therefore must be the necessities of the case.

The necessities of the case discussed in *Robertson v. Baldwin*[83] are all necessities of society; and there is such a necessity of society to which legislatures have responded by enacting adoption statutes. In the case of ordinary adoption, a child has been brought into existence by parents who cannot or will not care for it. This gives rise to a necessity of the child to be taken care of until it reaches the age of majority. Society responds to the child's necessity in one of two ways: by institutionalizing it or by providing it with an adoptive home. Most people think the latter alternative better from the point of view of the child. Society's necessity is to respond to the child's necessity for nurture. It is this reciprocal necessity of the child and the state which justifies the exception to the prohibition against trafficking in human beings which the thirteenth amendment would impose. Note that the needs of the adults who are parties to the transaction are served, but they are not necessities. Standing alone, the needs of the adults would never justify making a tacit exception to the thirteenth amendment.

If we turn from ordinary adoption to surrogacy, the picture changes radically in regard to necessity. Adoption is the societal method of providing for the necessity of the child. From the

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> have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words "involuntary servitude" were [sic] said in the *Slaughterhouse Cases*, 16 Wall. 36 [1876], to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards.

165 U.S. at 281-83 (emphasis added).

82. *Id.*

83. *Id.*

child's perspective there is no necessity whatsoever that he be procreated and sold. He is not in existence when the surrogacy agreement is signed. It is an agreement by adults, of adults, and for adults, which they designed to satisfy their own needs and (some would add) greeds. No necessity of any child prompts such an agreement. So far is a surrogacy agreement from responding to the necessity of any child that one can say that it creates *ex nihilo* a child for the very purpose of imposing on that child a necessity as a *fait accompli*. Such an agreement cannot come within any rationally imaginable tacit exception to the thirteenth amendment.

There are those who argue that a surrogacy-produced and sold child will be loved even more than an ordinary blood-stranger adoptee: he will be the most wanted of children. History instructs us to distinguish between wantedness and love: In the days of slavery, every slave was wanted. Once a slave's master no longer wanted him, he was cast off by manumission or sale.

Ordinary adoption seeks to meet the needs of the child and society. Surrogacy, by contrast, arises out of adult desires which it addresses by a form of child-production and sale. These in turn result in a complex of adult relationships and disputes which society must then confront and resolve. In other words, ordinary blood-stranger adoption is a necessary evil. Surrogacy is an *un*necessary evil.

THE RIGHT TO "BEAR OR BEGET A CHILD"

The negative constitutional right to refrain from "bear[ing] or beget[ting] a child" is well established.[84] States cannot prohibit or curtail an individual's effort to refrain from reproduction; such governmental effort is unconstitutional under the substantive element of the due process clause of the fourteenth amendment[85] as violative of the individual's right of privacy which exists within the word "liberty" in the clause.

Only one Supreme Court decision asserts an affirmative right of "procreation," *Skinner v. Oklahoma*,[86] where an

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84. Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion).
85. U.S. CONST. amend. XIV § 1.
86. 316 U.S. 535 (1942).

Oklahoma law imposed involuntary vasectomies and salpingectomies on certain categories of convicted felons. The Court's decision rested on the equal protection clause, but a strong dictum couched in substantive due process clause language affirmed procreation as "one of the basic civil rights of man."[87]

The "bear or beget a child" language first appeared in Justice Brennan's opinion in *Eisenstadt v. Baird*:[88]

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . . [89]

Five years later, in *Carey v. Population Services International*,[90] Mr. Justice Brennan emphasized that what the Constitution protects is "individual decisions in matters of childbearing from unjustified intrusion by the State."[91]

Under this formulation, the commissioning "marital couple" is not "an independent entity. . .but an association of two individuals" each of whom must "be free from unwarranted governmental intrusion."[92] To argue that by refusing specific performance of a surrogacy agreement a state would be committing an unwarranted governmental intrusion into the decision-making of either of them is absurd. The procreation occurs between the surrogate and the father, not between the father and his wife. Therefore, there is no state interference with the right to procreate of either of the child's parents.

The adopting wife also has a fourteenth amendment substantive due process liberty to procreate and to bear a child. Fourteenth amendment rights, of course, run only against the

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87. *Id.* at 541.
88. 405 U.S. 438 (1972).
89. *Id.* at 453.
90. 431 U.S. 678 (1977).
91. *Id.* at 685.
92. *See supra* note 90.

state, not against private persons. (Thirteenth amendment rights run against both the state and private persons.) No state has attempted to interfere with the adopting wife's right to procreate or to bear a child. If she was fertile, she has chosen not to exercise it. If she was infertile, then Nature prevented her from exercising that right, but the vicissitudes of nature are not state action.

The best precedent on this question yet rendered by an American court is found in *Doe v. Kelly*:[93]

> While the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, . . . we do not view this right as a valid prohibition to state interference in the plaintiffs' [the commissioning couple's] contractual arrangement. The statute in question [Michigan's statute prohibiting paying money to adopt a baby] does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures. In effect, the plaintiffs' contractual agreement discloses a desire to use the adoption code to change the legal status of the child—i.e., its right to support, intestate succession, etc. We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.[94]

If the policy against selling existing babies in ordinary adoption is so strong as to survive fourteenth amendment challenge under the privacy rubric, how much stronger must be the policy against deliberately producing babies for sale and then selling them and how much weaker any fourteenth amendment challenge to such a procedure?

When different constitutional rights belonging to different persons collide, the courts have to choose which will prevail. Thus, where a criminal defendant's sixth amendment right to a fair trial collides with the media's first amendment right of free

93. 106 Mich. App. 169, 307 N.W.2d 438 (1981), *leave to appeal denied*, 414 Mich. 875 (1982), *cert. denied*, 459 U.S. 1183 (1983).

94. *Id.* at 173-74, 307 N.W.2d at 441.

press, the latter almost always prevails over the former.[95] And where a state university's solicitude for the first amendment's anti-establishment clause collided with the free-speech clause claims of religious students under the same amendment, the latter prevailed.[96]

Assuming *arguendo* that a constitutional right of infertile adults to employ a surrogate exists, then that right would collide with the thirteenth amendment right of the child not to be bought and sold, and of the adolescent and adult that that child will become not to be involuntarily bound. Likewise, the surrogate's thirteenth amendment right not to be compelled to surrender her child (even on the footing that such surrender would be a personal service rather than a sale) would collide with any such fourteenth amendment right (assuming there were any) of infertiles to employ a surrogate. Either way, the strength of the history and national policy behind the thirteenth amendment would surely prevail over the alleged right to hire surrogates and to buy their children.

ENGLISH PRECEDENT

In the past nine years there have been four judicial decisions concerning surrogacy by the English courts. *A. v. C.*[97] and *Derbyshire County Council v. Mrs. P. (First Defendant) and Mr. B. (Second Defendant)*[98] arose out of disputes between the commissioning couple and a surrogate who repudiated the agreement after bearing the child. *Re C*[99] and *Re: An Adoption Ap-*

95. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (trials); Press Enterprise Co. v. Superior Court [II], 106 S. Ct. 2735 (1986) (preliminary hearings).

96. Widmar v. Vincent, 454 U.S. 263 (1981).

97. A. v. C., [1985] F.L.R. 445 (Fam. & C.A. 1978). Earlier brief notes of the Family Division decision appeared in 8 Family Law 170 (1978), and of the Court of Appeal decision in 14 Family Law 241-42 (1984), but the only complete report of the decisions of both courts is the one in [1985] Family Law Reports 445-61, which was published nearly seven years after the courts handed down their decisions in that case. Both Family Law and Family Law Reports are published in London and Bristol by a private publishing house. Neither *A. v. C.* nor any of the later three cases has yet been published in the Official Reports.

98. Derbyshire County Council v. Mrs. P. (First Defendant) and Mr. B (Second Defendant), judgment rendered, at Stafford, by the President of the Family Division (Sir John Arnold), March 12, 1987 (copy of slip opinion (14 pp.) sent to Professor Means by Sir John Arnold, April 9, 1987) [hereinafter "Derbyshire County Council"].

99. *Re* C, [1985] F.L.R. 846 (Fam.). This case, decided in the Family Division (by

plication: Surrogacy[100] involved surrogates who were willing to follow through with their agreements after bearing the child. Only *A. v. C.* was appealed and ruled upon by the Court of Appeal, making it the only judicial decision on surrogacy thus far decided by an appellate court anywhere in the common-law world.

In both contested surrogacy cases, the courts awarded custody to the surrogate as mother of the child. In both uncontested cases, the surrogate was allowed to hand over the child she did not want to the couple that did want it, but only after the court found the commissioning couple suitable.

In three of the four cases—*A. v. C.*, *Re C*, and *Derbyshire County Council*—the surrogate was inseminated artificially; in *A. v. C.*, *Re C*, and *Adoption Application*—single births ensued; in *Derbyshire County Council* twins were born.

In two of the cases the commissioning couple sought and found the surrogate through a paid agent; in *A. v. C.* through an individual (a prostitute); in *Re C.* through two commercial surrogacy agencies, one American, the other English. In *Adoption Application* the surrogate sought out the commissioning couple by placing an ad in a magazine before such ads became illegal. In *Derbyshire County Council* also it was the surrogate who initiated contact with the commissioning couple through an "acquaintance," apparently mutual.

In three of the cases—*A. v. C.*, *Re C*, and *Derbyshire*,—the surrogate was in poorer economic circumstances and of of less education than the commissioning couple. In *Adoption Application* this disparity, if any, was not great.

It may well be asked why *Re C* and *Adoption Application*, being uncontested cases, were in court at all. In *Re C*, the "Baby Cotton Case," the London Borough of Barnet, in which was situated the maternity hospital in which the surrogate had given birth and in which the infant still remained, petitioned the Fam-

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Latey, J.) in January 1985, was widely publicized in the London press as "the Baby Cotton Case"—after Kim Cotton, the surrogate who bore the child. This publicity was a major factor leading to the enactment, six months later, of the Surrogacy Arrangements Act 1985, ch. 49.

100. *Re: An Adoption Application: Surrogacy*, judgment rendered in the Family Division (by Latey, J.), March 11, 1987 (copy of slip opinion (17 pp.) sent to Professor Means by Sir John Arnold, April 9, 1987) [hereinafter "Adoption Application"].

ily Division for a place of safety order since the Borough Council had no information about the American commissioning couple or their suitability as adopters of this English child.

After noting that the Surrogacy Arrangements Bill was then before Parliament, Mr. Justice Latey declined to address "the difficult and delicate problems of ethics, morality, and social desirability" of the "methods used to produce" this child or their "commercial aspects," holding these matters "not relevant. The baby is here. All that matters is what is best for her now that she is here and not how she arrived. . . . Mr. A is the baby's father and he wants her, as does his wife. The baby's mother does not want her. . . ."[101] Mr. Justice Latey then went on to examine the suitability of the commissioning couple as potential parents, and found them "warm, caring, sensible people, as well as highly intelligent," "both professional people, highly qualified" with "a very nice home in the country and another in town."[102] He therefore awarded custody to the A's.[103]

In *Adoption Application*, the same judge was asked to approve an application to adopt a child aged two years four months at the time of the application. In other words, this child had been conceived early in 1985, before the Surrogacy Arrangements Act became law, but born afterward. Mr. Justice Latey observed that "the 1985 Act had not been enacted when the arrangement in the instant case was entered into and carried out;"[104] that is, the ad, the agreement, and the (natural) impregnation all preceded the new law.

What the judge had to determine, therefore, was whether the section of the English Adoption Act[105] prohibiting payment of money in adoption had been violated by the monetary payments that had changed hands.[106] That section, generally forbids such payments, giving the adoption court discretion to approve them. Mr. Justice Latey held (1) that the payments did not come within the statutory prohibition but (2) if they did, he had

101. *Re C, see supra* note 99.

102. *Id.*

103. *Id.*

104. *Adoption Application, see supra* note 100.

105. Adoption of Children Act 1926, 16 & 17 Geo. V, ch. 29, § 9; Adoption Act 1958; 6 & 7, Eliz. II, ch. 5, § 50; Adoption Act 1976, ch. 36, § 57.

106. Adoption Application, *see supra* note 100.

discretion to approve them which he did in this case.[107]

These uncontested surrogacy cases furnish little guidance on the questions of public policy that arise in the course of contested cases. However violative of public policy the surrogacy arrangement may have been, if both surrogate and couple go through with it, they confront the court with a *fait accompli*: "The baby is here." So we must turn to the contested surrogacy cases to find serious discussion of questions of public policy. In *A. v. C.*,[108] the trial judge stated that

> [t]he agreement between the parties I hold as being against public policy. None of them can rely upon it in any way or enforce the agreement in any way. I need only give one of many grounds for saying this, namely that this was a purported contract for the sale and purchase of a child.[109]

Custody of the child was awarded to the mother but visiting rights were granted to the father. On appeal, the Court of Appeal held that the trial judge had "directed himself . . . in law perfectly correctly, with one slight exception" which was having granted visiting rights to the father which the Court unanimously terminated.[110]

The denial of visiting rights to that particular father rested on facts peculiar to that case. The principle that the surrogacy arrangement itself violates public policy as a purported contract for the sale and purchase of a child, however, is general and applies to all surrogacy arrangements.

The fact that *A. v. C.* was not fully published until May 1985 meant that both the Warnock Committee and the House of Commons in its debate on the Surrogacy Arrangements Bill were unaware of that decision. By the time the Bill was debated in the House of Lords, however, *A. v. C.* had been fully published, and two members discussed it, Lord Meston and the Earl of

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107. *Id.*

108. [1985] F.L.R. 445 (Fam. & C.A. 1978).

109. *Id.* at 449; compare with *Baby M, supra* note 70.

110. *Id.* at 455 (per Ormrod, L.J.). The appellate panel—consisting of Lord Justices Ormrod (who is a physician), Cumming-Bruce, and Stamp—decided unanimously to terminate the father's visiting rights. In every other respect they affirmed what Mr. Justice Comyn had decided below, including the question whether a surrogacy arrangement violates public policy, and why.

Caithness, the latter reading to the House the passage in Mr. Justice Comyn's judgment stating that surrogacy agreements were against public policy.[111]

Before the Surrogacy Arrangements Bill was debated in the House of Lords, Dame Mary Warnock, who had chaired the Committee of Inquiry into Human Fertilisation and Embryology, whose Report to Parliament[112] was one of the factors leading the Government to introduce the Bill, had become a member of the House, as the Baroness Warnock of Weeke in the City of Winchester. Her contribution to the debate was significant:

> There are now waiting in America a largish number of agencies wishing, and anxious, to start on this side of the Atlantic and I think that there is a market for such agencies. I regard it as a matter of extreme urgency that to set up such agencies should be made a criminal offence. . . . [P]eople are not prepared to have in this country agencies which exploit both the misery of the infertile and the willingness of women to act as surrogates.[113]

The fact that *A. v. C.* had not been fully published and seems to have been unknown to the Warnock Committee in July 1984 when it submitted its Report to Parliament, makes the following passages in that Report all the more significant:

> § 8.5 Any surrogacy arrangement would necessarily involve some form of agreement between the parties concerned, however informal. Although it may be assumed that in the majority of cases the agreement would be kept and the matter never brought before a court, it is likely that grave difficulties of enforcement would ensue in the event of a dispute over such an agreement. There is little doubt that the Courts would treat most, if not all, surrogacy agreements as contrary to public policy and therefore unenforceable. Where one party broke the agreement the other party could not expect to invoke the

111. 164 PARL. DEB., H.L. (5th ser.) 1524 (June 14, 1985); 165 PARL. DEB., H.L. 926 (June 28, 1985).

112. Report to Parliament by the Committee of Inquiry into Human Fertilisation and Embryology (Cmnd. 9314) (July 1984) (Chairman: Dame Mary Warnock).

113. 165 PARL. DEB., H.L. (5th ser.) 934 (June 28, 1985).

> court's assistance. Thus, if the carrying mother changed her mind and decided she wished to keep the child it is most unlikely that a court would order her, because she had previously agreed to do so, to hand over the child against her will. Nor in such a case would a court order the surrogate mother to repay any fee paid to her under the terms of the agreement.
>
> § 8.6 The Courts do, however, have jurisdiction over children which is quite separate from and independent of the law of contract. Where a court has to consider the future of a child born following a surrogacy agreement, it must do so in accordance with the child's best interests in all the circumstances of the case, and not according to the terms of any agreement between the various adults. The child's interests being the first and paramount consideration, it seems likely that only in very exceptional circumstances would a court direct a surrogate mother to hand over the child to the commissioning couple. The present state of the law makes any surrogacy agreement a risky undertaking for those involved.[114]

In the foregoing passages, § 8.5 is a fair description of what the English courts had already decided in *A. v. C.* several years earlier. Section 8.6 is virtually a prediction of the approach that would be taken in March 1987 by Sir John Arnold in his judgment at Stafford in the fourth and latest of the English surrogacy cases, *Derbyshire County Council.*

When the Surrogacy Arrangements Bill was debated in the House of Commons, the following exchange occurred between a Member (Mr. Beith) and the Minister for Health (Mr. Kenneth Clarke):

> Mr. Beith: Does the Minister accept the view of the Warnock committee, that it should be put beyond doubt that surrogacy arrangements cannot be enforced in the courts, or does he believe that there is no doubt that they cannot be enforced in the courts? What is the Government's view about that?
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> Mr. Clarke: . . . It is our view, on advice, that such

114. Cmnd. 9314 at 43, §§ 8.5, 8.6 (July 1984).

> contracts are not enforceable now. If anyone went to the courts in this country seeking to enforce a surrogacy contract—if someone brought an action trying to compel an unwilling surrogate mother to hand over the child or if the surrogate mother went to court to try to compel the would-be parents to pay the fee promised under the contract—it is confidently felt by most people, as the Warnock committee felt, that such a contract would be regarded as unenforceable by the courts and contrary to public policy. It might be helpful for that point to be put beyond doubt in statute at some stage, because, although that is believed to be the position, there is no point in sitting around waiting for a test case, with all the problems that would surround such a case for the parties involved.[115]

How surprised the Honorable Members would have been to learn that the test case had already occurred! These expressions of legal opinion by the Warnock Committee and the government take on greater significance when it is realized that they were reached independently of judicial precedent, yet are fully in accord with the unknown judicial precedent that already existed.

When introducing the Surrogacy Arrangements Bill, the Secretary of State for Social Services (Mr. Norman Fowler) gave the same reason for the conclusion that Mr. Justice Comyn had given in *A. v. C.*: "Frankly, I believe that it is simply unacceptable to sell children, whether before or after birth."[116]

As enacted, the Surrogacy Arrangements Act 1985 did not go quite so far as the Warnock Committee had recommended in legislating against surrogacy, but it did outlaw all commercial agencies and all advertisements designed to bring together surrogates and commissioning couples.[117]

In his March 12, 1987 judgment at Stafford, Sir John Arnold decided the most recent of the four English surrogacy cases—*Derbyshire County Council*—the second to resolve a dis-

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115. 77 PARL. DEB., H.C. (6th ser.) 54 (April 15, 1985).

116. *Id.* at 24.

117. For the debates leading to passage of the Surrogacy Arrangements Act 1985, see 74 PARL. DEB., H.C. (6th ser.) 1188-93; 76 PARL. DEB., H.C. 668; 76 PARL. DEB., H.C. 23-56; 79 PARL. DEB., H.C. 115-33 (1985); 160 PARL. DEB., H.L. (5th ser.) 1474-76; 163 PARL. DEB., H.L. 1023; 164 PARL. DEB., H.L. 1518-38; 165 PARL. DEB., H.L. (1985).

pute between a commissioning couple and a repudiating surrogate. Though bound, of course, by the Court of Appeal's judgment in *A. v. C.*, Sir John reached the same result by a different route without even mentioning that precedent:

> There was, as I have indicated, an agreement between the mother and Mr. B., not, I think, at all an agreement of which one of the terms was that care and control in a Wardship [i.e., custody] context should be given to Mr. B., the agreement foresaw an adoption by Mr. B. and Mrs. B., but whatever the exact nature of the agreement was, the Wardship jurisdiction is not one which is, or is ever, regulated by contract. It is a jurisdiction in which, as I have already indicated, the court's duty is to decide the case, taking into account as the first and paramount consideration, the welfare of the child or children concerned and if that consideration leads the court to override any agreement that there may be in the matter, then that the court is fully entitled to do. It is, therefore, not of great importance in this case to rule upon the validity, or otherwise, of the agreement which was made.[118]

In reaching the conclusion that the twins' best interests were served by leaving them with their mother, Sir John Arnold overrode the agreement. Nowhere in the judgment is there any reference to possible visiting rights for the father. The father had voluntarily disclaimed any such rights, reasoning that if the twins were to be reared by their mother, it would be less confusing if he were simply to fade out of the picture.[119] A similar attitude, it is understood, was manifested by William Stern in the *Baby "M"* case,[120] before the judgment in the court below. In *A. v. C.*, on the other hand, the father fought for visiting rights all the way to the Court of Appeal which denied him them. Some fathers, evidently, are more persistent than others.

118. *Derbyshire County Council*, Slip op. at 7-8.

119. Telephone conversation with Sir John Arnold, President of the Family Division (High Court of Justice), England, May 28, 1987.

120. *In re* Baby "M," 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *cert. granted*, 107 N.J. 140, 526 A.2d 203 (Apr. 7, 1987).

Conclusion

Surrogacy contracts are void under the thirteenth amendment and the federal Anti-Peonage Act; offend public policy; do not fit within the tacit exception allowed for adoption; and are not protected by the fourteenth amendment.

In respect of custody, the state law applicable to custody contests between the natural parents of nonmarital children generally should be declared applicable to children produced through surrogacy arrangements. With the contract removed from the issue, this is an appropriate way to determine custody. English precedent should be adopted to declare the surrogacy contract to be a "purported contract for the sale and purchase of a child" and therefore unenforceable "in any way." If, however, the agreement is characterized as one for personal services only, then it should be declared incapable of specific performance pursuant to the thirteenth amendment and the Anti-Peonage Act. Moreover, any other manner of enforcement of a surrogacy contract should be barred by public policy.

English precedent should be followed not because it is English, nor even because it is precedent, but because, in this matter, it embodies the essence of our own achievement in the universalization of human liberty. As Mr. Justice Marshall has recently reminded us, our original Constitution, whose bicentenary we celebrate this year, did not prohibit slavery or involuntary servitude. It would take a bloody Civil War and a thirteenth amendment to achieve that goal. But America's aspiration toward that goal was there from the beginning. The very same Summer of 1787 when the Federal Convention in Philadelphia was writing the fugitive slave clause and the clause preserving the slave trade for twenty years into our original Constitution, another equally representative body of Americans, the Continental Congress, in New York City, enacted the Northwest Ordinance, the first national prohibition of slavery anywhere within the United States. As we have seen, determined opponents tried to undo the effect of Article VI, and they succeeded partially and for a time, but in the end, it was Article VI, and not their efforts, that furnished the text of the thirteenth amendment.[121]

121. It may be a matter of more than parochial interest that these lines were written on July 13, 1987, the two hundredth anniversary of the passage of the Northwest Ordi-

The argument is frequently made that we are in great need of legislation on surrogacy—either to prohibit or to regulate it. What is usually ignored is the fact that it is already outlawed by the thirteenth amendment and the Anti-Peonage Act. There is room, however, for legislation making it a crime to practice or promote surrogacy arrangements. Like other constitutional texts, the thirteenth amendment does not embody criminal sanctions. Such legislation would be within the power of Congress under section 2 of the thirteenth amendment. State legislation with the same aim would also, presumably, be valid since it would not contradict or frustrate the federal purpose.

Today, the advocates of surrogacy are attempting to recreate, in a different age and context, the slave trade, indentured bondage, and peonage. They must be stopped. We are fortunate, in this generation, that our ancestors have bequeathed us the means to stop them. Unlike the abolitionists of yore, we have a Constitution, as amended, that universalizes freedom. Our courts have ready to hand the perfect weapon with which to slay the reborn monster—the thirteenth amendment. May they use it well!

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nance, at New York Law School, which is only three-quarters of a mile from the site where the Continental Congress enacted it.