

July 2015

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Ronald C. Griffin

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Recommended Citation

Griffin, Ronald C. (1989) "Death of the Family: What's Become of the Parents and the Children," *Akron Law Review*: Vol. 22 : Iss. 3 , Article 3.

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DEATH OF THE FAMILY: WHAT'S BECOME OF THE PARENTS AND THE CHILDREN

by

RONALD C. GRIFFIN*

When this article was in its infancy I thought about my childhood, the inspiration I got from my parents, and television. I didn't grow up in misery. I did not have to scheme to get toys or my parents' attention. I took my security for granted. My parents did what they believed they should do for their children.

In the 80's, I worry about children and their misfortunes - the economic and social forces eroding their aspirations. How are they coping with parents who are incapable of parenting, with the custodial parent's divorce, and with unemployment? Who's supplying the children with the information and skills they need to become responsible adults: parents, television, schools or peers? In this day and age something must be done to revive family life and to check family misfortunes, both fiscal and emotional, that are threatening a child's welfare. If something isn't done quickly, America will become the first nation in history in which elderly people enjoy more security than children.¹

To that end I recommend that family obligations be analyzed in contractual terms.² If the law encompasses what courts do with specific conduct, contract law

* Professor of Law, Washburn University of Topeka; B.S., Hampton Institute, 1965; J.D., Howard University, 1968; LL.M., University of Virginia, 1974.

I wish to thank James J. Long, a third year law student at Washburn University, and Nancy Sanfilippo, Queen's University, Kingston, Ontario, Canada, for their assistance in the Preparation of this article.

¹ This is a sentence summary of two lectures presented by Daniel Patrick Moynihan at Harvard University. A similar statement appears in the February 3, 1986 Congressional Record. Senator Daniel P. Moynihan, "Family and Nation," *The Godkin Lectures*, Harvard University, April, 1985; see S. Res. 330, 99th Cong., 2d Sess., 132 Cong. Rec. 859 (1986).

² There is a contract between biological parents and governments. The parents promise to act in a child's best interest. The government promises forbearance, i.e., to resist the temptation to exercise possessory rights in children. There is a contract between parents and their children. The parents promise to act in their child's best interest, i.e., to provide food, clothing, shelter and education. The child promises obedience.

The contract between parents and governments is rooted in the *parens patriae* doctrine--the government's obligation to defend children when parents can not protect their lives, limbs or property. See *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 2410-11 (1984). The contract between parents and children is rooted in the history of nuclear families: P. ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 339-407 (1962), "The Family in American Drama," *Synopses of the Reports of the Symposium, 34th Annual Convention of the English Literary Society of Kyushu, Japan*, 1981, and social philosophy, e.g., the works of John Locke, Thomas Hobbes and David Hume. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 49-52, 53-57 (1979).

Contracts can evolve from common action. ATIYAH, at 56-57; that is, action creates tacit agreements. The parties, i.e., parents and governments, subject themselves to reciprocal rights and responsibilities.

can moderate parental behavior through vehicles such as family counselling. It can sort out family duties and supply legal rationales for resolving family disputes in a constructive way. This article begins with a background discussion - history, literature and insights - then addresses the law and legal analysis.

BACKGROUND

Personal misfortune, perhaps national tragedy, dictates the existence and composition of a family. There are philosophical reasons for having children. In some cases, reason does not play a role. For example, we need children to replace people killed by the plague; we need children to replace the adults lost in war; or we need children to cope with loneliness or some other loss.

Ideal families are composed of mothers, fathers and children.³ If a couples' combined income in the United States is barely enough to sustain their standard of living, one or both of them will decide that the woman's job is more important than childbearing.⁴

History

History is replete with instances where nations have done despicable things - invaded and plundered one another. Some have done it for pride, while others have done so out of greed and for breeding space. When a minority group (invader) gained control of a majority group, the former used every imaginable device to keep control. Treaties, alliances, marriages into families linking the conqueror with the vanquished were not uncommon.⁵ When a majority group (invader) gained control over a minority group, after an invasion had run its course, the majority group did not push these social schemes. The latter group utilized them as weapons to protect what was left to them.⁶

The English family, America's prototype, was a product of economic misfortune and national tragedy (invasions). The Celts were overridden by the Angles and

Parents do what's expected of them while the government does the same. Each expects the other to fulfill its responsibilities. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

These contract claims are anchored to a bottom line idea: children are a nation's prized resource. Parent's rights should be subordinated to children's rights. If parents can not teach a youngster good manners, and the art of living, children should be taken from them. Custody should be granted to people who can teach those things.

³ REEVES, AMERICAN JOURNEY 71 (1982).

⁴ Kaye, *The Birth Dearth*, The New Repub., Jan. 19, 1987, at 21.

⁵ TUCKMAN, A DISTANT MIRROR: THE CALAMITONS 14TH CENTURY 47 (1978); McCrum, CRAN & McNEIL, THE HISTORY OF ENGLISH 68, 69, 75 (1986) (hereafter McCrum).

⁶ See MEINIG, THE SHAPING OF AMERICA: A GEOGRAPHICAL PERSPECTIVE ON 500 YEARS OF HISTORY Vol. 1, 210 <http://exchange.uakron.edu/akronlawreview/vol22/iss3/3>

the Saxons.⁷ Angles and Saxons had to make peace with the Vikings.⁸ The Angles, Saxons and Vikings had to make peace with the French Normans.⁹

English life was short and brutish. People married one another to cope with loneliness and raise their standard of living.¹⁰ Children born to a couple were hapless wafes for almost the first seven years of their young lives.¹¹ Childhood described a period in which people could not provide for themselves.¹² Infancy was a tag clipped to people between two and three years of age (they entertained adults.).¹³ Youngsters cavorted with adults in apprenticeship programs at ten.¹⁴ Childhood ended when a person entered an apprenticeship;¹⁵ adulthood began when the apprenticeship ended.¹⁶

In the Seventeenth Century social arrangements changed: someone decided that civilization ought to be driven by educated men.¹⁷ Formal education replaced apprenticeship programs.¹⁸ Children were granted limited access to adults to learn about life.¹⁹ All of this coincided with the decline in the birth rate and the emergence of a deep seated feeling, (a luxury parents couldn't afford over the centuries) for children.²⁰

Linguistic inventions created opportunities for intellectuals to write about English families and those ideals and values which shaped human behaviour.²¹ All men, said one English writer, are equal in their capacity to inflict misery upon others.²² Life, he said, is short and brutal.²³ Individuals and individualism are the life blood of a society.²⁴ Individualism, wrote another author, is the pursuit of self-gratification.²⁵ Society, he said, is an assemblage of individuals pursuing self-

⁷ McCrum, *supra* note 5, at 53, 56, 57, 60.

⁸ *Id.* at 68-72.

⁹ *Id.* at 73-78.

¹⁰ P. Aries, *Children: The Sentimental Revolution*, 6 WILSON Q. 48 (1982).

¹¹ TUCKMAN, *supra* note 5, at 48, 52. P. ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 365 (1962). See SCHOLTEN, CHILD BEARING IN AMERICAN SOCIETY: 1650-1850 66 (1985).

¹² P. ARIES, *supra* note 10, at 47.

¹³ *Id.* at 48.

¹⁴ *Id.* at 47-48.

¹⁵ *Id.*

¹⁶ *Id.* See also N. POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 13-14, 42 (1982).

¹⁷ The printing press fanned the flames of change. N. POSTMAN, *supra* note 16, at 20-23, 37-38.

¹⁸ P. ARIES, *supra* at note 10, at 48.

¹⁹ *Id.*

²⁰ *Id.* at 48, 49.

²¹ See McCrum, *supra* note 5, at 85-86, 93-95, 98-103. It spawned men like Hobbes, Locke and Hume. Charles Dickens was a master writer. His books amounted to portraits of families, people and human values. See DICKENS, HARD TIMES (Penguin Bks 1969), and, BLEAK HOUSE (Bantam Bks 1980).

Locke was a determined enemy of the poor. He believed that impoverished families had no right to expect (provide) leisure for their children after age three. Laslett, Locke's Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus 43 (1967).

²² 6 ENCYCLOPEDIA BRITANICA, MACROPAEDIA 891 (1974).

²³ 4 ENCYCLOPEDIA BRITANICA, MACROPAEDIA 657 (1974).

²⁴ MAGPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE 3 (1962).

²⁵ *Id.* at 3. G. LODGE, THE NEW AMERICAN IDEALOGY 10 (1975).

gratification.²⁶ Families are havens into which individuals retreat to tend to their injuries and disappointments.²⁷ Government is an institution erected by men to protect families, individuals and property.²⁸ Public ministers are appointed by sovereigns to resolve disputes between men on the basis of equality and justice.

These notions were exported to North America with minority groups (colonists) bent upon dominating a continent governed by Indians. At the conclusion of each colonial campaign we find treaties, marriages and miscegenous families being pushed onto the vanquished Indians.²⁹ The size and composition of the families moderated or inflamed the tension between the groups.

Life, then, was a struggle with nature. The larger the colonial population, the sturdier the families, the easier the colonial task of subduing the continent. A family provided a frontiersman with companions and resources.³⁰ Fathers could treat their child's labor as property; they could surrender it to a third person to fund family obligations.³¹ Local government could make grandparents care for children when the parents died or contract with foster parents to provide care denied a youngster by blood relatives.³²

These arrangements evolved into formal obligation, e.g., promises supported by consideration. Although time and events swept away the assumptions upon which the frontier family was built, the family shell, with its complex of rights and duties assigned to adults, remained unchanged. A family was a tag clipped to a group composed of adults and children. Families were built upon companionship, marriages (status) and contracts (obligations). Government was empowered to contract with biological parents and foster parents for child care.³³ Couples could make contracts devoted to child care in separation agreements.³⁴ The conduct of the

²⁶ *Id.*

²⁷ P. ARIES, *supra* note 10, at 48.

²⁸ See G. LODGE, *supra* note 25, at 100; 14 ENCYCLOPEDIA BRITANICA, MACROPAEDIA 689 (1974).

²⁹ Meinig, *supra* note 6, at 70-72, 210.

³⁰ HINER & HAWES, *GROWING UP IN AMERICA: CHILDREN IN HISTORICAL PERSPECTIVE* 45 (1985). Daniel Smith's article--Antinomy and Affection: Parents and Children in Eighteenth-Century Chesapeake Families--appears in the anthology. His observation is the basis for the statement in the text. See also Stern, Smith & Doolittle, *How Children Used to Work*, 39 LAW & CONTEMP. PROB. (Part 2) 93, 95 (1975).

³¹ See, e.g., *Bray v. Weeler*, 29 Vt. 514 (1857) (father's creditors tried to attach his sons wages). G. ABBOTT, *THE CHILD AND THE STATE* 52, 478 (1938).

³² HAWES & HINER, *AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK* 65 (1985). The page citation comes from an article written by Constance Schultz entitled, "Children and Childhood in the Eighteenth Century." See Acts and Laws of His Majesties Colony of Connecticut in New England 95-96 (1715); 1 Virginia Statutes at Large 336-37 (1646); Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, 39 LAW & CONTEMP. PROB. (Part 2) 75, 81 (1975).

In 1985, Wisconsin revived an old practice. Its saddle grandparents with a duty to support an infant born to an unmarried woman until she turns eighteen; the mother got married or the father join the armed forces. Engle, *Family Planning Rivals Join to Pass Wisconsin Law*, *The Washington Post*, Dec. 27, 1985, at 1, col. 2.

³³ Smith, *Organization of Foster Families for Equality and Reform*, 431 U.S. 816, (1976).

³⁴ E.g., *Ward v. Goodrich*, 34 Colo. 369, 82 P. 701 (1905); *Campbell v. Campbell*, 24 N.C. 188, 66 S.E.2d

parties could be evaluated under “best efforts” and “good faith” tests.³⁵ When a family was disrupted, the government was obliged to do what was in a child’s best interest.³⁶

Literature

Gerhart Hauptman got it right when he wrote about industrial society.³⁷ Civilization is a thin veneer under which people pursue their self-interest.³⁸ Public morals (manners) frequently give way to savagery, leaving everyone in misery.³⁹ Fortunately there are a few people (willing to promote the interest of others) who can beat back savagery. They are colorless souls in colored bodies striving to do the right thing.

Americans appear to be an industrious lot: men and women striving for happiness, measured in material terms.⁴⁰ On a national level this activity produces gigantic piles of wealth. On an individual plane this activity is a source of barren lifestyles, misery and personal tragedy.⁴¹ We lionize people who pursue profit and seek economic growth at the expense of the weak and the oppressed.⁴² We shun

672 (1951); *Richardson v. Richardson*, 261 N.C. 521, 135 S.E.2d 532 (1964); *State v. Langford*, 90 Ore. 251, 176 P. 197, 200 (1918). *Shankland v. Shankland*, 301 Ill. 524, 134 N.E.67 (1922).

³⁵ Best efforts is a phrase people use to describe the options available to a person in trouble under the law. A person has the option to do nothing or the best that can be done under the circumstances. If a mother has the option to do nothing about her transient life style or change it, e.g., to get a job and rent an apartment she can afford for the benefit of her child, that’s best efforts. *In re Colbert*, 474 So. 2d 1143, 1145-46 (Ala. Civ. App. 1985). In a child abuse case, “good faith” and “best efforts” are parental defenses to a government petition to take custody of a child. *In re Katherine C.*, 122 Misc. 2d 276, 471 N.Y.S.2d 216 (1984).

³⁶ The best interest of the child test is a legal construct courts use to express its sentiments about a child’s association with disreputable people, e.g., convicts, drug abusers and criminals. *In re Solomon*, Civ. No. D004212 (Cal. March 17, 1987).

³⁷ Tragic things happen to people: life would be incomplete without some suffering. Suffering is precipitated by man’s inability to cope with crises. Civilized society does not breed authentic villains. It sustains weak people (twisted by their environment or driven by blind instinct) who cause others harm. GARTNER, GERHART HAUPTMANN: STUDIES IN MODERN EUROPEAN LITERATURE AND THOUGHT 13, 45-49, 63-64, (1954).

³⁸ Hauptmann thought material circumstances and self-absorption impeded man’s pursuit of happiness; too many people live with paranoia. Man’s saga, according to Hauptmann, his faltering, lonely, strides towards happiness, resembles Nietzsche’s view of man. See GARTNER, *supra* note 37, at 44-46. Gartner reviews this theme in Hauptmann’s *Till Eulenspiegel*. NEITZCHE, BEYOND GOOD AND EVIL 90-109 (1983). See also ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 628 (1979).

³⁹ People are haunted by false beliefs. An individual’s reactions, based upon those beliefs, invariably cause others harm. Hauptmann presses this point in two plays: *Vor Sonnenaufgang* and *Die Ratten*. GARTNER, *supra* note 37, at 18, 22-23.

⁴⁰ See C. LASH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS, (Preface) XVI, 25-26, 40, 45, 47, 72 (1978). Having jettisoned traditional ideas about religion, science and politics, young Americans have plunged into the future without a social gadget to cut through the uncertainties. In a post industrial society, all they have to fall back upon is themselves. Self-absorption is a remedy for some people. Others rely upon competition and materialism to fill the void in their lives. KOHN, NO CONTEST: THE CASE AGAINST COMPETITION 2, 9 (1986).

⁴¹ C. LASH, *supra* note 40, at 11.

⁴² *Id.* at 219. Lash alludes to this in Chapter 10 of his book, i.e., *Paternalism Without Father*.

See KOHN, *supra*

people with broken spirits.⁴³ We discriminate against people who are materially less fortunate. We mock those who shrink from their fate, run from their potential or squander their talent.⁴⁴

We pride ourselves on individualism;⁴⁵ we wrap ourselves in the United States Constitution to protect our beliefs and practices.⁴⁶ We perceive the law as a thin film, perhaps, a quilt covering an infinite variety of human activity.⁴⁷ We fall back upon the statutes to remind others of appropriate public behavior. We use statutes as a weapon to defend ourselves against the government.⁴⁸

America is built with slogans like “private initiative” and “survival of the fittest.”⁴⁹ Men, in the beginning, had neither time nor affection to spend on children.⁵⁰ Since the nation thrived without spending time or affection on children for so long, why should we be concerned about the expenditure now?

Insight

The United States is a party to a global struggle over the ownership and use of the world’s resources.⁵¹ If we starve our children by denying them time and affection, while teaching them the intellectual skills they will need to compete with children of the next generation, from other nations, we will lose many resource contests. If we ignore our children, and reject the advice of our best sociologists and psychologists,⁵² the next generation will have less wealth, because they will have

⁴³ The disposal and control of useless people is the function of government. Government’s mission is to promote and maintain a climate in which the properties class can pursue its individualistic goals. G. LODGE, *THE NEW AMERICAN IDEOLOGY* 109-10 (1975). See SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 21-22 (1986); KOHN, *supra* note 42, at 2, 4 & 9)

⁴⁴ C. LASH, *supra* note 40, at 219. The author says that parents, who are part of the corporate rich class, express outrage when their child squanders her opportunities. *Id.* at 220.

⁴⁵ G. LODGE, *supra* note 43, at 119, 153-154.

⁴⁶ *E.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Wisconsin v. Yoder, 406 U.S. 205 (1972).

⁴⁷ See ATIYAH, *supra* note 38, at 628. Phenomenology has inspired a considerable amount of scholarship. Law amounts to public pronouncements, rules and regulations public institutions willingly follow; or benefits its enjoyed by a person without spending a dime or time to get them. See Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

⁴⁸ Griswold v. Connecticut, 381 U.S. 479 (1965); Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Roe v. Wade, 410 U.S. 113 (1973).

⁴⁹ G. LODGE, *supra* note 43, at 118-19.

⁵⁰ In American history something has driven a wedge between parents and children: infant mortality in one century, economic necessity and scientific break-throughs in another. HAWES & HINER, *supra* note 32, at 39; MEAD, *CULTURE AND COMMITMENT* 65, 73-77 (1970); WINN, *CHILDREN WITHOUT CHILDHOOD* 17-18 (1981). After the Civil War, freedmen could not form close attachments with their children. On various pretexts, from destitution to illegitimacy, young people were boarded with the land gentry to work on the farms. GROWING UP IN AMERICA: CHILDREN IN HISTORICAL PERSPECTIVE 193-207 (1985).

⁵¹ FINE, *MINERAL RESOURCE DEPENDENCY CRISIS: SOVIET UNION AND UNITED STATES, IN THE RESOURCE WAR IN 3-D--DEPENDENCY DIPLOMACY DEFENCE*, WORLD AFFAIRS COUNCIL OF PITTSBURGH 37, 41-44, 50-56 (1980); THUROW, *ZERO-SUM SOLUTION* 138-39 (1985).

⁵² G. LODGE, *supra* note 43, at 332-34; C. LASH, *supra* note 40, at 126-30, 151-53; N. POSTMAN, *supra* note 16, at 93-99; WINN, *supra* note 50, at 17-18 (1981).

fewer social skills to collect it, to spend on the improvement of everyone's life.

Contract lawyers can start a new legislative course for the nation. With the right amount of understanding, lawyers can treat some of the problems facing families in crisis. A family might be in crisis because a parent is an alcoholic. Because it is a personal problem, lawyers can do nothing about it until the alcoholic violates the law in some manner such as drunk driving. A family might be in crisis because a gang has wooed a child from the nest. Lawyers can do something about that if the child is a truant by forcing him to attend school. If he has committed a crime, lawyers can put the youngster into the custody of the government.

The following model Statute may point the way to resolving some of these problems. It is also a starting point for legal analyses.

FAMILY LAW ACT

PREAMBLE

Because, marriage was a haven into which people might retreat;

Because, family was touted as a source of security and companionship;

Because, the economy has tossed marriage and family about like rudderless boats;

Now, therefore, be it resolved that marriage and family shall be defined by this statute; and the rights and the duties of the parties to these relationships shall be governed by this statute to the extent that it conflicts with the common law.

DEFINITIONS

1. Marriage is a status derived from a contract. The contract is an exchange of vows between a man and a woman.

2. Family is a status derived from marriage. It features mother, father and child. It could be adult and child related by blood, sentiment or contract. The term refers to a relationship between an adult and a child.

3. Adult is a status assigned to people who can read, write and compute. An adult can be a parent if his relationship is based upon conception, impregnation, adoption or contract.

adults; e.g., people who cannot read, write or compute; or people who are incapable of performing these skills proficiently.

5. Childhood is an age in which unformed adults learn how to read, write and compute.

6. Parent is a status conferred upon a person who has a biological or contractual relationship with a child. A child may be a parent if she conceives a human being; or, he impregnates a female who gives birth to a human being.

7. Foster parents are adults deputized by the government to render services the state owes children.

8. State describes a political unit; e.g., Kansas, exercising powers mentioned in Amendment X of the U.S. Constitution.

9. Education is a process by which adults dispense information (e.g., history, science, religion, literature, ethics and etiquette) and skills (i.e., reading, writing and computation) to a child or children.

SURROGACY

1. Adults can make a contract to buy a female's reproductive function. The adults must be at least 21 years of age. The contract must be in writing. The validity, performance and enforcement of the contract will be governed by the laws of State X.

2. Adults who agree to sell their reproductive function must be screened for mental illness and biologically transmittable diseases. The information uncovered in the screening process should be disclosed to the adult purchasing the reproductive function.

PARENT AND STATE

1. There is a contract between parent and state. Parents promise to provide a child with food and clothing, shelter and education. The state promises forbearance (to leave parents to their own devices to raise children).

2. Performance and enforcement of this contract are subject to statutes on juvenile delinquency, child abuse, child neglect, and common law (trust, good faith, due diligence and best interest of the

3. Breach of the contract empowers the state, through government, to curb, suspend or terminate a parent's relationship with a child; to take custody of the child; to contract with other adults to provide child care.

FOSTER PARENTS

1. There is a contract between foster parents and state. Foster parents promise to provide a child with food and clothing, shelter and education. The state, through government, promise to pay foster parents for their services.

2. Formation, performance and enforcement of foster parent contracts are governed by the laws of Kansas. Children who are recipients of a foster parent's services are parties to a third party beneficiary contract.

LAW

Model

In light of the above model, one may recommend the following. First, words like "marriage", "family" and "trusteeship" should be treated as tags.⁵³ People should clip them to different social arrangements. For example, marriage would be a private haven into which men and women retreat. Family would describe a relationship between adults and children.⁵⁴ Families would include mothers, fathers

⁵³ In the 1980's, society is less critical of single women with children. SIDEL, *supra* note 43, at 17. Being single, female, with children to support, however, means having few options in an exceedingly harsh world. *Id.* at 46. Mothers have to spend large chunks of time--time they could spend on personal development--on nurturing children. *Id.* at 25-26. Marriage amounts to economic security. *Id.* at 40. Family is an exclusionary term. See Ray, *The Figure in the Judicial Carpet: Images of Family and State in Supreme Court Opinions*, 37 J. LEGAL ED. 331, 335 (1987). It congers up notions like "Conservator of Childhood" and "slavery." SIDEL, *supra* note 43, at 31-32; N. POSTMAN, *supra* note 16, at 150. Trustership is a lawyer's stab at plotting the duties of parents. See Carignan v. State, 469 P.2d 656 (Okla. 1970); 67A C.J.S. Parent and Child § 16, at 201-202.

⁵⁴ Couples deciding to add a person to their marriage by copulation or contract. See Rust, *Whose Baby is It?* 27 A.B.A.J. 52 (1987). In Michigan surrogacy contracts are valid, provided, the surrogate mother receives no payment. Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981) *cert. denied*, 459 U.S. 1183 (1983). One contract was upheld to give a Michigan Circuit Court subject matter jurisdiction over a biological father's request for a declaration of paternity. Syrkowski v. Appleyard, 420 Mich. 367, 362 N.W.2d 211 (1985). In Kentucky surrogacy contracts are valid, provided, the youngster is the "Natural Child" of the father. Surrogate Parenting Associates v. Com. ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986). Adding a youngster to a marriage is a liberty question. Roe v. Wade, 410 U.S. 113 (1972); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). The Constitution protects a person's decision to bear on beget children. *La Fleur*, 414 U.S. at 640. If a couple decides to do something worthwhile, e.g., add a youngster to the marriage, the government should not curb that.

and children, or adults and children related by blood, sentiment or contract.⁵⁵

When adults were treated as trustees,⁵⁶ they would be empowered to contract with one another⁵⁷ and third parties to promote a child's welfare.⁵⁸ When they misused their power, e.g., denied a child a needed blood transfusion, the government could curb or dissolve the trustee relationship.⁵⁹ The government could extract concessions from natural parents, in contractual form, when there was statutory authority to do this.⁶⁰ It could use an implied contract, constructed from the parent's custodial duties and the government's forbearance, as a pretext for curbing parental power. It could contract with foster parents to provide care when the natural parents were unfit custodians.⁶¹

When the government was forced to use an expressed or implied contract the child would become the consumer of private services - a third party beneficiary.⁶²

⁵⁵ The nuclear family has undergone a dramatic transformation. The most significant change (affecting children and grandparents) has been the increasing disappearance of their traditional caretakers. Women have entered the labor force in large numbers, reducing the time they can spend with dependants. Reeves, *American Journey* 70 (1982). Statistics reveal that individuals have replaced families as the basic unit of society. *Id.* at 71. In 1930, the average number of people in a household was 4.1; in 1950 it was 3.4; in 1980 it was 2.8. *Id.* See Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 880-81 (1984).

⁵⁶ Adults are given property rights in their children, but the rights are limited by the interests of the child and the state. 67A C.J.S. § 10, at 188-89. Parents are invested with the following rights: the right to a child's services; the right to direct their activity; the right to make decisions regarding their care and control, education, health and religion. *Id.* at 188. These rights aren't negotiable, *Id.* at § 16, 201; they are derived from an agreement, expressed or implied, between biological (adoptive) parent and state. *Id.* at 202. The state will not curb parental prerogatives, as so long as parents performance conforms with the (implied) promises made to the state.

⁵⁷ E.g., *Ward v. Goodrich*, 34 Colo. 369, 82 P. 701 (Colo. 1905).

⁵⁸ The method for enforcing the husband's duty was for the wife or child to buy what it needed and charge it to the husband. The "doctrine of necessities" is the basis for the textual claim. When a father fails or refuses to supply his child with necessities the child may pledge his father's credit. The father will be liable to the supplier, provided the goods are necessities. That term encompasses: food, clothing, shelter, medical care, dental care, legal services when needed, furniture and house-hold goods. CLARK, *THE LAW OF DOMESTIC RELATIONS* § 6.3, 189-92 (1968).

⁵⁹ *Jefferson v. Griffin Spaulding County Hospital*, 247 Ga. 86, 274 S.E.2d 457 (1981); *Carignan v. Oklahoma*, 469 P.2d 656 (Okla. 1970). If a parent has been convicted of crimes and imprisoned; the mother has a history of mental illness; there's evidence that the father did nothing to stem an abusive episode between a mother and child, or rectify the situation causing it, the government may curb parental rights or sever them.

⁶⁰ *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 824-25 (1976). *Burk v. Department of Health and Rehabilitative Services*, 476 So. 2d 1275 (Fla. 1985). See Bussiere, *Florida Court Upholds Parental Rights*, *Youth Law News*, Jan. - Feb., 1986, at 19, col. 1.

⁶¹ *Id.* at 826.

⁶² The government has made an arrangement with a third person to provide food, clothing shelter and nurturing. If the services are supplied for a stipend, the arrangement amount to contract. If the Government's motive is to supply a youngster with specific a serviced, it had a duty to provide, the legal arrangement is a third party beneficiary contract. RESTATEMENT OF CONTRACTS 2d § 302 (1981). The government is the promisor; the foster parent is the promisee; the youngster is the third party beneficiary. The youngster's rights vest when she is aware of the arrangement and relies upon it; or when the youngster brings suit. *Id.* at § 311(3).

When there was a breach, he or she could sue the contract makers for damages⁶³ or seek equitable relief.⁶⁴ The behavior of adults and government would be measured by best efforts, good faith and best interest of the child tests.⁶⁵

Views

In all of this restructuring, what is critical is the moment in time when the government might overturn a couples' decisions. It could not overturn a decision to have children⁶⁶ or a decision about the site of birth.⁶⁷ It could overturn a decision about how a child was born⁶⁸ if the child is viable, and the type of people who could attend the birth.⁶⁹ The government could overturn some abortion decisions,⁷⁰ and family policies like home schooling,⁷¹ which affect a child after he is brought into the world. If a child was put at risk, the parents (the foster parents or the biological ones) would become agents - people deputized to perform duties the government owed children, e.g., to protect life, limb and property.⁷²

⁶³ When a beneficiary has an enforceable claim he can obtain judgments against promisor or promisee. When a beneficiary secures a judgment against the promisee, and he's compliant with the terms of the judgment, the promisee is subrogated to the beneficiary's rights. He can use them against the government; that is, those rights are the basis for a claim against the promisor. RESTATEMENT OF CONTRACTS 2d § 310, Comment C.

The beneficiary is entitled to consequential damages--a sum of money to compensate for personal injury caused by the breach. Less obvious damages are recoverable, provided, they were contemplated by the promisee at the time of contract formation. CALAMARI & PERILLO, CONTRACTS § 14-15, at 594-95 (3rd ed. 1987).

⁶⁴ Theoretically, a youngster could request an order directing the promisee to supply his mother's bible, proper clothing, nutritious food and an opportunity to get schooling. See RESTATEMENT OF CONTRACTS 1st § 384, Comment d (1932). DOBBS, REMEDIES § 2.10 (1973).

⁶⁵ The good faith, e.g., Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 371 (1980), and (best effort discussion appears at footnote 35). Due process arises in foster care cases. E.g., Brown v. County of San Joaquin, 601 F. Supp. 653 (E.D. Cal. 1985).

⁶⁶ Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 476 (1965). See Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 840 (1985).

⁶⁷ No law requires a woman to give birth in a hospital or with a physician in attendance. Wolfson, *Midwives and Home Birth: Social Medical and Legal Perspectives*, 37 HASTINGS L.J. 909, 931 (1986).

⁶⁸ E.g., Raleigh-Fitken-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537, (1964), cert. denied, 377 U.S. 985 (1964) (special guardian appointed for a fetus to consent to a blood transfusion offered to a Jehovah's witness mother and rejected).

⁶⁹ Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 721 (7th Cir. 1975) cert. denied, 425 U.S. 916 (1976).

⁷⁰ Roe v. Wade, 410 U.S. 113 (1973).

⁷¹ In Kansas, local school boards are powerless to investigate situations involving home instruction to determine compliance with the compulsory school attendance law, KAN. STAT. ANN. 72-1103 (1984 Supp.). Upon receiving a report that a child is not enrolled in either public or private schools, the Department of Social and Rehabilitative Services has the power to investigate the home setting to determine whether home instruction complies the compulsory attendance law. KAN. STAT. ANN. § 38-1501 (1984 Supp.). Home instruction is deemed unsatisfactory when it consists of unaccredited, unplanned and unscheduled classes conducted by an uncertified teacher. *In re Sawyer*, 234 Kan. 436, 672 P.2d 1093 (1983). See Kansas Attorney General's Opinion No. 85-159, Nov. 21, 1985.

⁷² See Schall v. Martin, 467 U.S. 253 (1984). When a parent's control falters, control of the child can be transferred to the state. The government's duty is to protect the child's property; shield him against physical injury; shelter him against the criminal element. See CLARK, DOMESTIC RELATIONS § 17.1, 572 (1968).

FAMILY CRISIS

Surrogacy

Harper's Magazine published an article written by Judith Levine.⁷³ The complications of surrogate motherhood, she wrote, have prompted twenty-seven state legislatures to propose laws regulating surrogacy.⁷⁴ Several state courts have entered the fray. There have been non-judicial rulings. Catholic and Orthodox Jewish leaders have forbidden married couples to enter into surrogate arrangements calling them adulterous and a threat to the bonds of matrimony.⁷⁵

Surrogate mothering, Levine said, is situated in a zone where law and ethics, commerce and the body, intersect and widely divergent moralities collide.⁷⁶ Law-makers and judges cannot possibly foresee every problem. Yet they must begin to make some binding decisions; families, especially children, can no longer afford to wait.⁷⁷

Richard Whitehead is a sanitation worker.⁷⁸ He makes \$28,000 a year.⁷⁹ That is the family's income; his wife, Mary Beth (the surrogate mother) is a homemaker.⁸⁰ The Sterns, a biochemist and a pediatrician, have a joint income of more than \$90,000.⁸¹ The class overtones coating surrogate motherhood are unsettling.

These agreements are mainly between upper class couples and working class women.⁸² There is a potential for exploitation: poor pay for surrogate mothers and awful working conditions. For example, Mary Beth Whitehead's contract earns Mary Beth \$10,000; that's \$1.50 an hour for 6,480 hours of work.⁸³

These agreements lie in a vague territory between contract law and family law--and neither seems sufficient to regulate them. Would Hobbes, Locke and Hume treat these agreements as non-binding?⁸⁴ Assuming that surrogate contracts

⁷³ Levine, *Dilemma in Swaddling Clothes: Surrogate Mothers, Natural Fathers, and Baby M*, Harper's Magazine, Vol. 274, pages 47-48, April, 1987.

⁷⁴ *Id.* at 48.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See ATIYAH, *supra* note 38, at 41-58. You can make a contract for anything under the sun, Hobbs said, except those things forbidden by the Central Government. *Id.* at 42. Government, is a servant, said Locke. *Id.* at 52. It should do what the people want. *Id.* at 47. Hume rejects the notion that utterances can be transformed into legal obligations by stringing together some words. *Id.* at 53. Legal obligations are imposed upon

are binding,⁸⁵ can the natural father control the surrogate mother's behavior?⁸⁶ Can he prohibit her from smoking, drinking, or having an abortion or, in a difficult delivery, force her to undergo a Caesarean section?⁸⁷ Can couples turn to surrogates for eugenic purposes: contract with a woman to produce a tall, blond marathon runner, a brilliant mathematician or a child free of AIDS? Does the Model supply palatable answers to these questions?

How would a court remedy a breach of a surrogate contract? If the mother backs out, can she be forced to deliver the goods?⁸⁸ If the father reneges and decides

statements when the utterers perceive that what they will get, i.e., the compensation, is in their self-interest. *Id.*

⁸⁵ Individuals can shroud themselves in privacy to protect their power to bear or or beget children. The question presented is: Whether the Constitution or some statute forbids a person from taking compensation for the utilization of that power. Some argue that the 13th Amendment is relevant. *Amici Curiae*, Brief for Appellant, *In re Baby M.*, 525 A.2d 1128, 217 N.J. Super 313 (1987) *aff'd in part, rev'd in part*, 109 N.J. 396, 526 A.2d 203 (1988). (Odyssey Institute International, Inc.). I believe the language in that amendment is limited to the social setting from which it came--a society that condoned peonage, indentured servitude and slavery. Two of the three contracts, i.e., peonage and indenture servitude, amounted to service agreements to discharge debt. Slavery described the institution which condoned the buying of human beings to serve forever.

Since Whitehead is not selling her services to discharge a debt and Stein is not buying a slave, this contract is beyond the scope in the 13th amendment.

In an adoption, a person cannot accept compensation for placement. N.J. STAT. ANN. § 9:3-54 (West 1977). Further, adoptions cannot be effectuated without the natural mother's consent. N.J. STAT. ANN. §§ 9:2-16 and 9:3-46(a). These statements are pulled from the New Jersey statutes, asserted to be applicable in the *Baby M* case. *Amici Curiae*, Brief for Appellant, *In re Baby M.*, 217 N.J. Super 313, 525 A.2d 1128 (1987). The meaning ascribed to these words is limited to the setting from which they emerged, that is, unplanned or coerced pregnancies; or unwed mothers incapable of shouldering the burden of childrearing. Since the pregnancy was neither unplanned nor coerced, and the biological mother was wed, this contract went beyond the language in the cited statute.

This was a contract to accept a person's sperm to produce a child out of marriage. The women promised to provide her body to receive the sperm; to conceive and carry the child to term; to participate in a process to terminate her custodial rights, e.g., the right to make decisions affecting the child's health, education and religious training for consideration. The contract was reduced to writing; the sperm donor surrendered the sperms and money recited in the agreement. If there are no statutes voiding this agreement, and the agreement operates beyond the scope of the 13th Amendment, the court should say its valid.

The *Baby M* case comes down to a liberty questions: Liberty is positive and negative: the right to be left alone (negative); the opportunity to do something worthwhile (positive). Liberty is rooted in the fourteenth amendment. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The fourteenth amendment operates on the states. Can a court ratify a contract in which a woman sells her liberty, e.g., the right to make decisions affecting her child's health, education and religious training, for money? The constitution does not forbid it.

⁸⁶ If the contract is valid, the biological father has some control over the surrogate mother's performance, i.e., behavior. This contract should be performed in good faith. The mother should not use her body in a way that might jeopardize her capacity to carry the fetus to full term. If the surrogate mother engages in dangerous behavior the biological father should enjoin it.

⁸⁷ *Levine*, *supra* note 73, at 48. The argument at footnote 46 is the basis for an answer.

⁸⁸ When a child is viable, the state can curb or overturn a women's decision to abort a child. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973). It can suspend custodial rights to insure that a child survives the delivery process. *Hoener v. Bertinato*, 67 N.J. Super 517, 171 A.2d 140 (1961); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981). See *Bowes & Silegstad, Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 *Obstet & Gynecol.* 209, 210 (1981). The state can seize a child from its mother, i.e., terminate custodial rights, if it finds her unfit. The mother should be provided with due process. The decision to terminate parental rights should rest upon clear and convincing evidence. *Santosky*

he does not want the child, can a judge force him to take the baby?⁸⁹ In all of this, is the baby reduced to a commodity? Does the surrogate mother have property rights in the child?⁹⁰ Does the child have rights?⁹¹

Hobbes, Locke and Humes would treat these agreements as binding. These thinkers were correct when they wrote about the function's government, property and contracts.⁹²

Endowing government with the power to make rules (defining offenses against property) restores time people can spend on self-improvement.⁹³ Property is anything people can use, consume, exchange and waste. People can appropriate more property than they can use, provided it is procured by contract; by way of money, barter or promises.⁹⁴ People make contracts covering every imaginable activity, even making babies, provided it is not forbidden by statute. Labor is property. Labor spent on producing a child gives the biological mother (nuptial mother or surrogate mother) a property interest in the offspring.⁹⁵

An agreement is an exchange of promises. It is a device by which people allocate losses linked with an event, like giving birth. If the agreement omits a clause on losses, or the parties overlooked them during negotiations, the court is left to its

v. Kramer, 455 U.S. 745 (1982). In the Baby M case the respondents said that specific performance was a remedy for breach. Brief for Respondent, *In re Baby M.*, appeal Doc. No. M-1337, pages 107-111, July 30, 1987.

⁸⁹ There is no statute on the subject. When a child is born to parent a statute endows them with custodial rights. If they abandon their rights the state must care for the child under the *parens patriae* doctrine. I have not found a doctrine that one can use to compel a person to accept a human being. If the Article II of the Uniform Commercial Code were read expansively, to cover this Baby M case, there is nothing in it a court could utilize.

⁹⁰ These questions have to be answered in a theoretical realm. Property is a relationship between a person and a thing. Property interest describes a relationship between individuals and a thing. Property can be fashioned out of labor, i.e., transforming raw material into a valuable object. Property interests, as in title, estates, lien and parenthood, can be created by statute or contract.

Ms. Whitehead has property in Baby M to the extent that her body performed the functions to transform sperm and egg into a human being.

⁹¹ This question has to be answered in the theoretical realm. When a fetus is viable the state endows her with rights: e.g., the right to choose between life and death, the rights to birth, to nurturing, nutrition, clothing and association. When a child is born its entitled to custodial care.

⁹² Men and women are capable of inflicting misery upon one another. They should surrender personal sovereignty to a state so they can spend more time in self-improvement. See ATIYAH, *supra* note 38, at 42-43. People can contract for everything under the sun except those things forbidden by the central government. *Id.* at 43-44. People can use mantras, i.e., stringing together a series of words, to transform utterances into contractual obligations. *Id.* at 53. Self-interest, i.e., the realization that the item received is more valuable than the item surrendered, can be used to convert utterances into obligations. When the utterers perceive that the utterances provide something each needs, a contract comes into existence. *Id.* at 54.

⁹³ ATIYAH, *supra* note 38, at 42-43.

⁹⁴ G. LODGE, *supra* note 43, at 102-106; ATIYAH, *supra* note 38, at 46.

⁹⁵ This notion strikes a responsive cord. Under Roman Law, fathers could claim their children as property. LEDLIE, SOHM'S INSTITUTES OF ROMAN LAW 459 (1907); Letter from Dr. Ronnie Warburg to Dean Howard Glickstein, page 3 (August 21, 1987). (This letter was published by the Institute of Jewish Law, Touro College, New York.)

own devices to distribute them.⁹⁶ The court might start with the contract between the surrogate mother and the biological father. During the performance phase it might say the mother is required to take conventional prenatal precautions that amount to good faith.⁹⁷ Discrepancies between conventional precautions and the mother's acts would constitute breach. The father could use these discrepancies as reasons for suspending his promise to pay; seeking injunctive relief; terminating the contract; or filing a petition with others to get the government to take protective custody of the fetus.⁹⁸

Under the Model, the court might say that a surrogate mother is like any other pregnant woman--there is a trust relationship between the mother and the fetus.⁹⁹ A breach of that trust would give the government a reason to dictate how the mother should behave until the child is born.

As to breach of contract, there is a discrepancy between a promise in a document and a promisor's performance. The father's remedy is in equity: The subject matter is unique (fusion of a sperm and an egg); the surrogate mother is subject to the personal jurisdiction of the court; damages is an inadequate remedy (you can not buy a clone).¹⁰⁰

A court could order the respondent to surrender the child, provided the father

⁹⁶ During contract negotiations it is assumed that the parties have spent time on the content of performance. When a breach occurs it is presumed that the parties have spent time on the composition of damages. Plaintiffs can recover damages that are foreseeable, certain and unavoidable. Damages must be rooted in cause and effect relationship, i.e., the breach of contract must cause damages. The damages must be something one can express arithmetically; something the plaintiff could not avoid; or something that was too costly to reduce. See FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17-21, 23, 131 (1981); ATIYAH, *supra* note 38, at 425, 432; CALAMARI & PERILLO, *CONTRACTS, Third Party Beneficiaries*, 605-606, 610 (3rd ed. (1987)).

⁹⁷ See FRIED, *supra* note 96, at 74-78; FARNSWORTH, *CONTRACTS* 526-28 (1982).

⁹⁸ If a fetus could survive outside the mother's womb, a mother's decision to do something which threatens that viability is a reason for taking custody from her. The government can do this under the *parens patriae* doctrine. *Jefferson v. Griffin Spalding County Hospital*, 247 Ga. 86, 274 S.E.2d 457 (1981). That doctrine endows the government with the power to protect children when they cannot protect themselves. There is a general discussion of the doctrine at footnote 72. See Hubbard, *Legal and Policy Implications of Recent Advances in Prenatal Diagnosis and Fetal Therapy*, 7 *WOMEN'S RIGHTS L. REPT.* 201, 212-13 (1982).

⁹⁹ There is an analogy between Locke's notion of limited government, and a biological mother's claim to her child. ATIYAH, *supra* note 38, at 47-48. Personal sovereignty is surrendered to a central authority in both cases: mother and government. Power over a person is limited by the promises being made. Government promises its citizens that it will protect life and property. In the case of a surrogate mother, she promises to conceive a child, carry it to term and surrender it to the biological father for adoption. If the government repudiates its promises, the people can challenge the government. *Id.* If the biological (surrogate) mother repudiates her promises, e.g., makes a decision which threatens the viability of a fetus, the biological father, the biological father's spouse or the fetus can challenge the biological mother's authority.

In the final analysis, time determines the description affixed to these arrangements. They are a service contract at conception. They are third party beneficiary contracts, at the moment when the child becomes viable (father has purchased the biological mother's promise to do what's necessary to insure the viability of the fetus). A second third party beneficiary contract comes into existence when the child is born (father has purchased the biological mother's promise to surrender the child for adoption by the father's spouse). *See* *Briggs v. Abbott*, 107 Conn. 189, 199, 85 A.2d 1128 (N.J. Super. Ch. 1987).

is prepared to pay the sum promised for him.¹⁰¹ If the father committed the first breach, the surrogate mother could demand damages or sue off of the contract to recover restitution.¹⁰² If the father's breach amounted to a rejection of the child, the government could dissolve the trust relationship between the biological father and child.¹⁰³ The government could assume custody of the youngster; give custody to the surrogate mother; contract with a third person (foster parent) to provide food and clothing, shelter and education.¹⁰⁴

Birth

Jefferson v. Griffin Spalding County Hospital Authority is a case in which a mother's behavior is questioned.¹⁰⁵ On January 22, 1981, the Griffin Spalding Hospital Authority petitioned a court for an order granting a physician the power to perform a Caesarean section and any blood transfusions upon a mother (Jefferson), an out-patient resident of Butts County, Georgia, in the event she presented herself to the hospital for delivery of her unborn child.¹⁰⁶

The child was due on or about January 26, 1981. The superior court conducted an emergency hearing on January 22, 1981, and wrote the following:

This petition [was] filed and served on defendant today. When the court convened at the appointed hour, defendant did not appear, in spite of the fact that both she and her husband had notice of the hearing.

Defendant is in the thirty-ninth week of pregnancy. In the past few weeks she has presented herself to the Griffin Spalding County Hospital for prenatal care. The examining physician has found and defendant has been advised that she has a complete placenta previa; that the after birth is between the baby and the birth canal; that it is virtually impossible that this condition would correct itself prior to delivery; and that it is a 99% certainty that the child cannot survive natural childbirth (vaginal delivery). The chances of defendant

¹⁰¹ In theory the court could grant specific performance. Fransworth, *supra* note 97, at 820-21. I would caution against the use of the U.C.C. Model Statute, Uniform Commercial Code (U.C.C.) § 2-716(1) Comm 2. The Code was erected to police the traffic in farm animals, wild beasts and inanimate objects. Since children are none of these things, the Code should not be used to police contracts involving them.

¹⁰² The biological mother could use quasi contract to recover damages in restitution. There is a direct relationship between the biological mother and father. The mother has provided the father with a benefit, i.e., service. If there is a contract between them, there is a rational basis for thinking that the mother expected compensation. See *Callano v. Oakwood Park Home Corp.*, 91 N.J. Super 105, 219 A.2d 332 (1966). FARNSWORTH, *supra* note 97, at 100-04.

¹⁰³ Abandonment would be a justification for terminating parental rights.

¹⁰⁴ *Santasky v. Kramer*, 455 U.S. 745 (1982).

¹⁰⁵ *Jefferson*, 247 Ga. at 86, 274 S.E.2d at 457. The court issued its decision on February 3, 1981.

surviving vaginal delivery are no better than 50%.

The examining physician is of the opinion that a delivery by Caesarean section prior to labor beginning would have an almost 100% chance of preserving the life of the child, along with that of the defendant.

On the basis of religious beliefs, defendant has advised the Hospital that she does not need surgical removal of the child and will not submit to it.¹⁰⁷ Further, she refuses to take any transfusions of blood. The Lord, she said, has healed her body; whatever happens to this child will be the Lord's will.

The question presented is: Whether rejection of an offer to supply medical services to facilitate childbirth is an abuse of the trust relationship between mother and child; a violation of Georgia law and the Constitution of the United States? Can the Model provide a plan a court might implement to preserve the rights of both the mother and the fetus?¹⁰⁸

The life of the mother and child are intertwined in this case; rejection of an offer to perform a caesarean section could extinguish the child's life. The mother has wrapped herself in the Constitution to protect her religious practices and beliefs. Her practices may be curbed by the government, however, if they cause violence or contribute to another's death.¹⁰⁹

The court held that an expectant mother, in her last weeks of pregnancy, lacks the right to refuse necessary surgery and medical treatment when the life of the unborn is at stake.¹¹⁰ The Supreme Court has said that the state has an interest in protecting the lives of unborn, viable children (viability usually occurring at about 7 months or 28 weeks).¹¹¹

Ms. Jefferson was hiding her desires behind her status as a parent (trustee) and as a member of a certain religion. Under the model, it would be an abuse of the trust relationship to do nothing in the face of danger; to allow providence to determine a child's fate. Since the mother proposes to do nothing to help a viable child and the doctor's treatment is life saving surgery, Jefferson should be stripped of her right to reject the doctor's offer. The government could suspend the Jefferson's trusteeship

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 88, 274 S.E.2d at 459.

¹⁰⁹ *Id.* at 89, 274 S.E.2d at 460. The Georgia Superior Court reached that conclusion.

¹¹⁰ *E.g.*, *Raliegth Fitken - Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 42, 201 A.2d 537 (1964) *cert. denied*, 377 U.S. 985 (1964).

¹¹¹ This language is a part of the remarks of Justice Hill. *Jefferson*, 247 Ga. at 90, 274 S.E.2d at 460. See

and take custody of the child until it is brought into the world by surgery.¹¹²

Delinquency

Debra Shatz lived in Houston, Texas.¹¹³ On June 7, 1983 she disappeared. Her abandoned car was found the following day. Police bloodhounds tracked her scent from the car to the home of the Ports and their son, David. The police found guns, bloodstains and several bullet holes in the house. The police arrested David when he returned home. He confessed that he had killed the missing woman.¹¹⁴

The police made a grave mistake during the missing person investigation: they took David's confession without giving him his "Miranda" warning.¹¹⁵ Since the confession could not be put into evidence by the state, the prosecutor subpoenaed David's parents to testify about the bloodstains, bullet holes and anything the accused might have told them.¹¹⁶

The Ports refused to speak to the prosecutor on religious grounds. They did not want to bear witness against their son.¹¹⁷ Since there was no "parent-child" privilege under Texas law, the court was forced to make a rule of evidence or incarcerate the parents for contempt.¹¹⁸

Can the government's arrangement with the public (to prosecute wayward souls) be squared with the deference the government owes parents performing parental duties? Is there something in the Model, that we have previously discussed, or the model statute that the court could use to decide the question?

There is a contract (Hobbes and Locke would say there is one) between government and parents. The government promises forbearance - to resist the temptation to seize custody of a youngster to raise him - for a promise to provide a youngster with food, clothing, shelter and education. There is a contract between a

¹¹² On these points, the Georgia Supreme Court adopted the opinion of the Georgia Superior Court. If a mother is entrusted with the care of a youngster, born or unborn, and she abandons her duties, the Government should protect the youngster. *Jefferson*, 247 Ga. at 89, 274 S.E.2d at 460. This is consistent with the model theory advanced, but the model statute is not supportive.

Under the model statute a fetus could be described as a child, since it cannot read, write, or compute. The mother is definitely a parent, since she is biologically related to the fetus. The harder question is: Whether rejection of life saving surgery is repudiation of a parent's statutory duty? The statute refers to a parent's duty to provide food, clothing, shelter and education. Since the statute missing is a clause on life saving surgery, one can infer that Jefferson's rejection is beyond the scope of the statute.

¹¹³ See *Parents, Children and the Law*, Newsweek, Aug. 27, 1984, at 18 (hereinafter *Parents*); Morris, *Jailed Parents Break Silence in Teen's Case*, U.S.A. Today, Nov. 8, 1984, at 3-A, col. 2.

¹¹⁴ *Parents*, *supra* note 113, at 18, col. 1.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ The Ports had claimed parent-child privilege and tenants of their Jewish religion as grounds for not testifying. Morris, *supra* note 113, at 3-A, col. 2.

child and its parents. The parents promise food and clothing, shelter and education for the child's promise of obedience.

The government has to assert that it has not breached its contract with the parents. Secondly, the law requires it to seize people who have committed crimes. Thirdly, government action does not amount to bad faith since the parents were not forced to breach their educational vow. Finally, its action does not amount to a tortious interference with an established contract since David committed the first substantial breach. There is no contract between David and his parents.

Some might say that it is fanciful to impose contractarian ideas upon governments and parents. There is no evidence for it; the parties did not use offer and acceptance. If the notion is rooted in the *parens patriae* doctrine - a promise to provision parents with power to shelter children from preying strangers, upon which parents rely - there must be a showing that a strong person (parent) is defending a weak person (child); and that the weak person's life or property is threatened by someone other than the government.

There is something in the model which could be used in this case. Although the government has used some statute to seize custody of David, it has not breached its promise nor dissolved the trust relationship. The trust imposes a duty upon the Parents to provide a moral education, to show fidelity for one's offspring. The government must argue that the trust depends upon custody of the youngster and that custody ended when the government seized David.

The parents, on the other hand, must argue that the trust does not depend upon custody; that the trust encompasses decisions affecting a child's wellbeing, e.g., food and clothing, selecting a proper high school or testifying against a son in a criminal case. In the final analysis, and in every case, parents must make decisions which protect their children. Since the subpoena forces them to do otherwise, the parents should argue that the government cannot use that device.

This case ought to be resolved on policy grounds. Can David hide his crime behind his parents' vows and religious convictions? Is there a contract rooted in the *parens patriae* doctrine? Would a trust concept make it too difficult to prosecute David? Is there a less onerous way to get at needed evidence?

The Constitution protects a person's right to practice his religion. But it does not prevent the government from seeking testimony from a person when he has been served with a subpoena. Since David's parents have been served with process they are required to speak. Their silence forces the government to incarcerate them.¹¹⁹

Foster Care

Alfred and Carol Pryor were licensed by the Michigan Department of Social Services as foster family parents.¹²⁰ Justine Mayberry was placed in their home in October, 1977, after the Bay County Probate Court temporarily removed him from the custody of his natural mother, Kay Mayberry. At the time of the initial placement Justine was twenty-two months old and deaf.¹²¹ Justine was returned to his mother's custody on two separate occasions, but was ultimately removed to the Pryor's home.¹²²

On November 18, 1979, Justine, then about four years old, was attacked by a German Shepherd dog while sitting on the front porch of the Pryor's home.¹²³ Because of his deafness and his inability to speak, Justine was unable to cry out for help. Justine suffered serious injuries and permanent brain damage as a result of the attack.¹²⁴ Justine was placed in a state residential facility because of his physical and mental disabilities.

Ken Mayberry filed a suit in June, 1985, against the Pryor's for negligent supervision, and against the defendants, Ralph and Susan Day, the owners of the dog. The Pryors moved for summary judgment on the ground that their foster parent status entitled them to invoke the parental immunity defense, but the court ruled against them.¹²⁵

We are not persuaded, said the court, that the traditional rationales for the parental immunity doctrine, i.e., preservation of the family unit and domestic tranquility, protection of family resources and a reluctance to interfere with parental decisions, requires or justifies extending the defense to foster parents.¹²⁶ The goal of foster care is not to create a new family unit or encourage permanent emotional ties. Foster care is designed to provide a stable, nurturing, non-institutionalized environment while the natural parents or caretakers work out the problems which precipitated the child's removal or, if parental rights have been terminated, until suitable adoptive parents can be found.¹²⁷ The parental immunity doctrine, is linked with adults and children related by blood or marriage.¹²⁸ Since the defendants (Pryors') were related to the plaintiff by contract, the parental immunity doctrine was not available to them.

¹²⁰ *Mayberry v. Pryor*, 422 Mich. 579, 374 N.W.2d 683 (1985). Subsequent citations refer to the Regional Reporter.

¹²¹ *Id.* at 582, 374 N.W.2d at 684.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 592, 374 N.W.2d at 689.

¹²⁷ *Id.* at 587, 374 N.W.2d at 686.

¹²⁸ *Id.* at 584-85, 374 N.W.2d at 685.

The court resolved this case in tort. Having mentioned contracts,¹²⁹ it wasted an opportunity to deal with Justine's case in contract. Could Justine sue the Pryors in contract? Is the Model illuminating? Was Justine a third party beneficiary? Did the Pryors breach a contract? What could Justine recover in damages?

The Model is illuminating. There is a contract between the Pryors and the government.¹³⁰ The Pryors promised to provide Justine with care while the government promised to compensate the Pryors for their services. If the government designated the Pryors as their agent to discharge a duty they owe Justine, Justine can sue the Pryors for damages as a third party beneficiary.

The difficulty, however, is finding a reason for treating Pryor's behavior as breach. There is nothing in the facts to indicate that they were untruthful (bad faith) in their dealings with the government or failed to supply child care. There is a breach, however, if the type of care could be characterized as a momentary lapse of vigilance. The quality of care accorded Justine was as important as the amount of care. Since the quality of care differs from the quality one might expect of caretakers charged with a youngster who can neither hear nor speak, the Pryors' behavior should be treated as breach. Under the Model, Justine is entitled to damages.

Separation Agreements

A and B have executed a separation agreement. A has given B custody of their offspring, C. A has promised B that he will send money to support C. Some months later B decides to enroll C in a home school. B wants C to have fellowship with like-minded children. B wants C in an environment which reinforces B's social and religious beliefs. B is miffed with the local school that C attended, which emphasized the study of man over God. If A opposes B's actions and stops payments, what are B's remedies? What is A's remedy? Does the Model provide answers to these questions?

There is an obligation between A and B. B promises A that it will supply C with food and clothing, shelter and education. A promises that he will make support payments. The obligations are rooted in the writing between the parties and further refined by relevant statutes and regulations. There might be a statute, regulation or doctrine regulating what B can do when A enrolls C in a home school.¹³¹

The statute might specify: (a) amount and variety of subjects a child should be taught at different ages; (b) competencies (measured in standardized tests) in

¹²⁹ *Id.* at 589-92, 374 N.W.2d at 687-88.

¹³⁰ *Id.* at 586, 374 N.W.2d at 686.

¹³¹ *See, e.g., In re Sawyer*, 234 Kan. 436, 672 P.2d 1093 (1985); Attorney General (Kansas) Opinion No. 85-159, November 21, 1985; Special Committee on Education, Proposal No. 17--Compulsory Attendance--Nonpublic School and Home Schooling Options, accompanying Kansas H.B. 2008, Dec. 4, 1984 (hereinafter *Special Committee*).

reading and mathematics at different ages; (c) certification of teachers; (d) a registration statement (noting church affiliation, number of grades taught, number and age of the books used in the home school).¹³²

If B enrolls C in a school with uncertified teachers, that may be a breach. If there is a discrepancy between the home school B established and the home school statute, that may be a breach. If B's action is the first breach, A could suspend his performance under the separation agreement.¹³³

B might prevail against A on a contract theory.¹³⁴ There could be a statute forcing A to support C.¹³⁵ Under the statute, C would be a child because he is the offspring of A.¹³⁶ The duty of care would go on so long as the family member, i.e., adult or child related by blood, was in need of care.¹³⁷ If C is A's offspring, and in need of care, A would have to convey money to support him.

The Model indicates that there is a trust relationship between B and C. Parents should provide their children with an education information about mathematics, reading and writing, religion and ethics. Parents should assess, classify and dispense (filter) information based upon a child's vocabulary, modernity and experiences. Parents have a right to impose their religious convictions on their children, but they can not impose them upon the public.¹³⁸

The hypothetical resembles *Mozert v. Hawkins County Public Schools*.¹³⁹ If C resides in Tennessee and she is forced to read books in conflict with B's religious convictions, B can halt the flow of information, provided: (1) she registers her objection with the school; (2) she announces that she is going to teach her child how to read at home; and (3) the state allows her to conduct a reading class at home.

CONCLUSION

What is proposed in this article can be criticized on the evidence (controversial cases), the history of contracts and the transactions which modern courts regard as binding.¹⁴⁰ Cases sprinkled with literary observations are not the stuff which make

¹³² Special Committee, *supra* note 131, at 212-14.

¹³³ *See, e.g.*, Ehlinger v. Bodi Lake Lumber Co., 324 Mich. 77, 36 N.W.2d 311 (1949); Van Velsor v. Dzewel Towski, 136 Vt. 103, 385 A.2d 1102 (1978).

¹³⁴ *See* Ward v. Goodrich, 34 Colo. 369, 82 P. 701 (1905) and the cases listed at footnote 34.

¹³⁵ *See* Haxton v. Haxton, 705 P.2d 721 (Or. 1985).

¹³⁶ *Id.* at 729.

¹³⁷ *Id.* at 730.

¹³⁸ *See* *Mozert v. Hawkins County Public Schools*, 827 F.2d 1058 (6th Cir. 1987).

¹³⁹ *Id.*

¹⁴⁰ Contracts were invented to justify acquisitiveness; to give credibility to individualism; to elevate promises to icon status. G. LODGE, *supra* note 43, at 101-06; ATTYAH, *supra* note 38, at 53-54. In the beginning people could contract for anything. *Id.* Over time powerful men chipped away at the scope of contracts, to confine it to commercial activity. H. COLLINS, THE LAW OF CONTRACTS 34, 41 (1986), McDowell, *Contracts in the*

spicy conversation. However, great literary works precede epic social changes. Throughout history exceptional writers have forecasted problems which society had to face. What was reported in Charles Dickens *Bleak House* - miserable family lives - had to be addressed by modern social scientists like Christopher Lash.¹⁴¹

Robertson Davies, the author of the *Deptford Trilogy*, presented life in the 20th Century.¹⁴² We live in an unsettled time.¹⁴³ People are driven by rules which behave like unruly waves. They toss marriages and families around like rudderless boats.¹⁴⁴ People are lashed to tradition, legislation and outworn judicial decrees, we can not relax. Society is spirited, but the people who live in it are sentiment-free.¹⁴⁵ Every arrangement, business or social, has a reason for being - profit or security. When the reasons evaporate, the arrangements end. This article attempts to provide legal reasons, through contract and trusts concepts, for keeping marriages and maintaining family life.

Collegial Criticisms

Critics claim that the sample statute does not resolve anything in the article. A few said the contract approach masked the problem of exploiting the poor,¹⁴⁶ while others believed it disrupted the family. The model provided the government with plausible, easy pretexts for limiting family liberty - associational, religious and educational choices under the first and fourteenth Amendments.

On the issue of surrogacy, some blacks said procreation was happening in and out of marriage. Blacks had conceived too many babies in the 1980's; too many

Family, 55 B.U.L. REV. 43 (1965). They used words like private sphere (Collins used it in his text at pages 34 and 41), public policy, statutes and legality to get their way. See CALAMARI & PERILLO, *CONTRACTS* §§ 1-1, 22-1, pp. 1-3, 888-90 (3rd ed. 1987).

¹⁴¹ Dickens wrote about fear and disorientation, discontented families and numbing life experiences. He devoted a number of pages to what the propertied class felt - a loss of power and influence, confirmed for them daily, in the impudent behavior of their servant's children. DICKENS, *BLEAK HOUSE* 368-74 (Bantam 1985). Christopher Lash made a similar observation in his book. C. LASH, *supra* note 40, at 218-20.

¹⁴² Deptford symbolized all the sleepy towns dragged into the 20th Century. They were overrun by world events. R. DAVIES, *THE DEPTFORD TRILOGY* 98 (1983). Some townsmen latched onto the past, i.e., outworn tradition, and perished. A few abandoned tradition, putting the past behind them, to build a future their parents could not foresee. "Boy" Staunton was such a builder. He thrived on the public's opinion of him. Appearances were the thing. Coping with reality meant remembering something one could use profitably - people, objects and experiences. *Id.* at 118, 295.

¹⁴³ See MEAD, *CULTURE AND COMMITMENT* 67, 73-77 (1970).

¹⁴⁴ R. DAVIES, *supra* note 142, at 155, 187, 367-68. The Leola Cruikshank story (her attempt to go from small town girl to big city sophisticate), to keep her marriages and family going, is the best example of that.

¹⁴⁵ R. DAVIES, *supra* note 142, at 362-63.

¹⁴⁶ This is a values argument. There are three ways to respond to it. First, class consciousness might quell a rich man's desire to contract with a poor woman. Second, economic necessity would have to be acute to push a poor woman into a deal. Third, when bargaining for the service, the poor women might have the upper hand. If the demand for a woman's reproductive function exceeds supply, the poor women could dictate the price and terms of performance. See NUNO, *Surrogate Motherhood: The Need for Social Acceptance*, 13 OHIO

babies had entered the world out of wedlock (burdened with nasty legal stigmas); too few adults had assumed their parental duties; fewer still had adopted destitute children. Using one's economic power to buy a woman's procreative power, they said, seemed ludicrous.

Japanese intellectuals were bewildered by the sections on pre-natal care and juvenile justice. The eldest member of the Japanese family determined the fate of family members.¹⁴⁷ Their decisions were non-reviewable. When extended families were reduced to nuclear units, triggered by a son moving away, neighbourly Japanese custom and statutes governed family behavior. There was not much litigation.¹⁴⁸

Responses

In reference to the Statute, my critics had a point. It could have been placed in the foreground and used explicitly in the surrogacy and the pre-natal care cases. Critiques from Afro-American and Japanese associates also brought a new cultural perspective to the model.

What would happen if the statute had been used in the surrogacy and pre-natal care cases? First, one would be struck by the vacuous language. While the statute is explicit about prohibited behavior (entering into a surrogacy agreement under age), it is inexplicit about personal behavior during performance. Beyond this observation, the reader would have discovered that some matters were omitted from the statute, reflecting sentiments about society, how it ought to be organized, and personal values.¹⁴⁹

The Whitehead case and the surrogacy section, raised questions about validity and breach. Under the statute those issues were governed by the laws of Kansas. If Whitehead had procured funds from the Stearns in bad faith, and knowingly concealed information about her ability to conceive children in the bargaining process, the written contract would have been invalid. Assuming the written contract was invalid, a quasi-contract would have been installed in its place. There was a direct relationship between the parties; the surrogate had received a benefit, i.e., money; the Stearns had a right to expect a service from Whitehead as compensation.¹⁵⁰

¹⁴⁷ Conversation with Jan Katata, Professor of Anthropology, Fukuoka University, Fukuoka, Japan, June 12, 1985.

¹⁴⁸ *Id.*

¹⁴⁹ Scientific inquiry should dwarf law making, until threats to society are both apparent and imminent. Violence, the physical and emotional varieties, should be policed. Crimes should be classified as uncivilized behavior. Government rules on crimes should be explicit - not susceptible to substantive due process challenges. Criminals should be subjected to meaningful punishments, e.g., incarceration and the duty to pay the crime-victim restitution. Statutes had to survive scrutiny under a proportionality test. If a statute banned a practice, or took something from an individual, it had to preserve the largest amount of liberty possible under the circumstances.

If there were questions about the quality of the surrogate's performance, e.g., smoking or drinking while pregnant, or some gesture, evincing a disinclination to surrender custody after birth, they would be answered under topics like good faith, breach and specific performance.¹⁵¹

In the pre-natal care case, the mother's behavior would fall under the "Parent and State" section of the statute. Although the statute proclaimed a contract between the parents and the state, it did not specify a time when it was binding, e.g., conception or birth. If 180 days was equated with being a legal person, a rule derived from an abortion case,¹⁵² the contracts would come into force on the 180th day. If the mother's performance was classified as child abuse, i.e., conduct threatening a child's life, or bad faith, the government could curb her power to determine the child's fate. While the child was in government custody, rules could have been assembled to force the mother to submit to medical treatment.

In summary, if the statute had been put into the foreground, it would have been a starting point for contract analyses. The statute was a compromise: a blend of explicit rules, proscribing dangerous and exploitative behavior, and standards, to accommodate evolving human behavior which society found satisfactory.

Did the contract theory or the model statute supply the government with too many reasons for limiting family liberty? That appeared to be one critic's concern after he had read the paper. Of course, an answer could not be produced for him instantly. The right answer depends upon reflection about the type of liberty under discussion. Upon reflection, the right answer was NO.

Philosophically speaking, liberty amounted to an opportunity to make choices.¹⁵³ It was the absence of encumbrances; i.e., duty to do or forebear something ordered by the State.¹⁵⁴ Practical liberty, on the other hand, was the right to use one's faculties, talents and property; to live and work where one pleased; to pursue any livelihood that was a lawful calling; to make contracts to achieve lawful ends.

In this article, the statute was an encumbrance upon individual liberty, as opposed to family liberty. It postponed the date when women could make surrogacy contracts; it forced eligible women to submit to psychological and physical examinations. Although the statute imposed duties upon parents to care for children, these duties were replicas of pre-existing obligations imposed upon adults by family law.

Finally, there was a version of liberty that emerged with recent revisions of

¹⁵¹ See, e.g., J. Berryman, *The Specific Performance Damage Continuum: An Historical Perspective*, 17 OTTAWA L. REV. 295 (1986).

¹⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵³ J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 94-95 (1959).

contracts.¹⁵⁵ Contract law amounted to pure theory - formation equations and damage computations; thick and thin analysis, appraising events thickening the borders of contracts, in an inward fashion, thereby narrowing the realm in which new ideas and desires could play; and policy (what it takes to keep communities content).¹⁵⁶ If contract law created a large realm in which ideas and desires initially played, liberty referred to a person's opportunities, in a shrinking realm, to trade things.

In this context, concern about family liberty, as opposed to individual liberty, did not make much sense. It was indecipherable. One way to make sense of the critic's comments was to compare the offerings - what the theory or the statute conferred upon the government - with the associational and religious prerogative granted parents by the First and Fourteenth Amendments. All seemed compatible.

Despite these valid remarks, one thing remains certain, America's direction and lack of dedication to its children is unlikely to change without legislative help. The crisis of economic and social blithe will continue, and the children will bear the harsh results. While the model is not a quick cure-all for the deeply rooted economic and societal problems many Americans face, it is a suggestion of how we might preserve one of our nation's most vital resources.

¹⁵⁵ Liberty was the absence of encumbrances; the right to make choices. *Id.* at 25, 94-95. A right was a claim against an individual or a governmental unit (something conceived in the bargaining process or the political debate preceding contract formation or promulgation of a statute). Events, e.g., war and scientific discoveries, the ability to make new life, were broadening the borders of contracts, in an inward fashion, narrowing the arena in which liberty could play.

¹⁵⁶ The sentence refers to rules and standards folk ways and public etiquette. See Farber, Book Review, *Down by Law: A Guide to Critical Legal Studies*, *The New Republic*, Vol. 198, Issues 3, 807 and 3,808, pages 36-40, January 2 and 9, 1988. <http://www.ohioakronlawreview.com/vol22/iss3/3>