

SURROGACY, SLAVERY, AND THE OWNERSHIP OF LIFE

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Surrogate parenting¹ is one of the most discussed solutions to the problems of female sterility, infertility,² and disability.³ Surrogacy is also discussed as a possible option for fertile, able-bodied women who would like to raise children but do not wish to undergo pregnancy. It is uncertain how many couples or individuals seriously consider surrogacy. In recent years, however, hundreds of women have signed contracts to become surrogate mothers,⁴ giving up their parental rights in exchange for rewards such as money or the joy of altruism.

The practice of surrogacy has raised a complex web of legal issues. Among the most important are whether surrogacy is best characterized as selling babies or providing personal services; whether participants should undergo mandatory screening; whether legal paternity is affected by surrogacy; whether surrogacy contracts are enforceable in whole or in part; whether surrogacy fosters the exploitation of women, children, and the poor, thereby undermining public policy; and finally, whether state and federal governments may legally interfere with an individual's private procreative choices.⁵ Courts have already faced a number of difficult cases concerning the validity and enforceability of surrogacy contracts,⁶ and legislatures of

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1. "Surrogate parenting" can be characterized as a practice whereby a woman ("surrogate mother") bears a child for another woman, man, or couple. In the highly publicized cases of the past decade, a surrogate mother has agreed prior to conception to be artificially inseminated and to surrender custody of the resulting child in exchange for a fee.

2. See, e.g., NEW APPROACHES TO HUMAN REPRODUCTION: SOCIAL AND ETHICAL DIMENSIONS 117-216 (L. Whiteford and M. Poland eds. 1988) (social science and ethical perspectives); *Colloquy: In Re Baby M*, 76 GEO. L.J. 1717 (1988) (legal and ethical perspectives); *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY AND STERILITY 62S (Supp. 1 1986) (bio-medical and ethical perspectives); M. WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILIZATION AND EMBRYOLOGY 42-47 (1985) (ethical perspectives).

3. See, e.g., Asch, *Reproductive Technology and Disability*, in REPRODUCTIVE LAWS FOR THE 1990s 69 (N. Taub & S. Cohen eds. 1989).

4. See Torry, *Wrestling with Surrogate Motherhood*, Wash. Post, Feb. 12, 1989, at A31, col. 4.

5. See NEW APPROACHES TO HUMAN REPRODUCTION: SOCIAL AND ETHICAL DIMENSIONS, *supra* note 2, at 162.

6. See *Surrogate Parenting Associates, Inc. v. Kentucky ex rel. Armstrong*, 704 S.W.2d

at least six states have enacted laws that tightly regulate or prohibit commercial surrogacy.⁷ In the meantime, ethical and constitutional debate regarding the practice of surrogacy continues in both the academic and family service communities.

Opposition to surrogacy often stems from a sense that it violates general notions of human morality. Notably, this kind of opposition is sometimes premised on the claim that surrogacy is tantamount to the unlawful and immoral institution of slavery.⁸ To equate surrogacy with slavery, however, distorts both practices. It is therefore not helpful to think of the two as simply different examples of the same immoral principle. Nevertheless, while surrogacy is certainly not the same thing as slavery, American slavery had the effect of causing black women to become surrogate mothers on behalf of slave owners.⁹ Thus, although slavery and surrogacy are not coterminous, this particular aspect of American slavery may be instructive for present efforts to determine rationally surrogacy's legal and moral status.

Support for surrogacy is sometimes premised on privacy-related constitutional rights and liberties.¹⁰ Professor John A. Robertson has argued that the constitutional right of privacy regarding procreation, as evidenced by Supreme Court cases ranging from *Meyer v. Nebraska*¹¹ to *Eisenstadt v. Baird*,¹² limits

209 (Ky. 1986) (surrogacy held not to violate Kentucky statute prohibiting buying and selling of babies); *In re Adoption of Baby Girl L.J.*, 132 Misc.2d 972, 505 N.Y.S.2d 813 (Sur. Ct. 1986) (surrogacy agreement not expressly prohibited by legislature and therefore allowed despite court's strong reservations); *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (1981) (state statute subjecting to court scrutiny any exchange of consideration in adoption proceedings, other than court costs, held not to violate constitutional right to privacy, and Michigan statutes prohibiting payment to surrogate mothers held constitutionally permissible), *cert. denied*, 459 U.S. 1183 (1983); see also Allen, *Privacy, Surrogacy and the Baby M. Case*, 76 GEO. L.J. 1759, 1760 n.7 (1988); *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *aff'd in part, rev'd in part, remanded*, 109 N.J. 396, 537 A.2d 1227 (1988).

7. See Torry, *supra* note 4.

8. See, e.g., Schneider, *Mothers Urge Ban on Surrogacy as Form of 'Slavery'*, N.Y. Times, Sept. 1, 1987, at A13, col. 1.

9. Slave mothers had no legal claim of right or ownership over their natural children they had given birth to. Slave owners not only had ownership over the slaves but owned their children too, and could buy and sell them to third parties without regard to the wishes of the natural mother. This phenomenon of American slavery thus resembled a de facto system of certain elements of surrogacy. See *infra* note 24 and accompanying text.

10. See Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 954-66 (1986).

11. 262 U.S. 390 (1923) (invalidating a state law prohibiting elementary schools from teaching subjects in any language other than English).

state regulation of noncoital reproduction to cases of serious harm.¹³ He argues that “moral condemnation, commercialism, and slippery slopes” should not justify interference with fundamental decisions about family function.¹⁴ But surrogacy arguments based on the right of privacy are not without their difficulties. As I have argued in detail elsewhere,¹⁵ it is doubtful that women or childless couples have privacy rights entitling them to engage in commercial surrogacy. On the other hand, the proposition that States may not regulate surrogacy, but must enforce all surrogacy agreements like other commercial contracts, is even more doubtful.¹⁶

My comments here, then, are intended to take issue with two very seductive and often-used arguments in the surrogacy debate: one cited in *opposition* to surrogacy—the slavery equation argument, and the other cited *in favor* of surrogacy—the privacy argument.

I. SLAVERY

In a different way or to a different degree than adoption,¹⁷ surrogacy has been characterized as “baby selling,”¹⁸ that is, as commercial trafficking in human beings. Accordingly, contemporary surrogate parenting has been dubbed by some as a form of slavery.¹⁹ In addition to “baby selling,” the “womb renting” and “autonomy sharing”²⁰ aspects of surrogacy contracts also make the surrogate mother, like the child she bears, a victim, a kind of slave.

The characteristic feature of slaves is that they lack self-ownership. Slave owners sell, use, and dominate. Although there are a few who would argue that slavery is not inherently immoral, ethicists commonly use slavery as the paradigm case of a socio-economic practice that is profoundly and patently im-

12. 405 U.S. 438 (1972) (invalidating Massachusetts law prohibiting contraceptive distribution to non-married persons).

13. See Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, 16 LAW, MEDICINE & HEALTH CARE 18 (1988).

14. *Id.* at 19-20.

15. See Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759 (1988).

16. See *id.* at 1771-74.

17. Often the fact that surrogacy agreements precede the child's conception is pointed to as the feature distinguishing it from adoption.

18. Schuck, *Some Reflections on the Baby M Case*, 76 GEO. L.J. 1793, 1794 (1988).

19. See Schneider, *supra* note 8.

20. Schuck, *supra* note 18, at 1794 n.3.

moral.²¹ According to ethicists, slavery is plainly wrong, and thus anything that closely resembles slavery must also be wrong. Legal scholars also use slavery as a paradigm, but as a paradigm of practices that are illegal under the Constitution and unacceptable to public policy. Hence the normative advice given to policymakers by both ethicists and jurists is the same: Avoid practices that have too many traits in common with slavery.

Labelling surrogacy as "slavery" is thus both a moral and a policy condemnation. This kind of condemnation implies that well-meaning surrogates, as well as their consumers and facilitators, are immoral or complicitous in immorality. When taken to an extreme, this logic implies that well-meaning lawyers and judges, like Noel Keane²² and Judge Sorkow of the *Baby M* case,²³ who help draft and enforce surrogacy agreements, are parties to immorality.

Surrogacy, however, is not slavery, and equating the two does not prove surrogacy immoral. By treating the two practices as moral equivalents, one ignores the enormous scope of control the slave owner exerts over the slave, a feature quite lacking in surrogacy arrangements. Nevertheless, the following little-known, true story illustrates how one aspect of slavery can shed light on the moral and legal policy debates regarding surrogacy today.²⁴

In the early 1800s, a happy little girl by the name of Polly Crocket was living in Illinois. One dismal autumn night, Polly was kidnapped and sold into slavery in Missouri. Her first owner was a poor farmer; the second, a wealthy gentleman named Taylor Berry whose wife trained Polly as a seamstress. Polly grew up and was permitted to marry another of Berry's slaves. Polly managed to have two children, Lucy and Nancy,

21. Cf. Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445 (1983) (considering morality of voluntary slavery). But see G. DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 127-29 (1988) (presumption against slave as involuntary bondage may be rebutted in particular cases).

22. Noel Keane is the foremost legal expert on surrogacy arrangements, having arranged many surrogate contracts, including the one involved in the *Baby M* case. See Torry, *supra* note 4. Mr. Keane is also the author of a book on surrogacy. See N. KEANE, *THE SURROGATE MOTHER* (1981).

23. In re *Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *aff'd in part, rev'd in part, remanded*, 109 N.J. 396, 537 A.2d 1227 (1988).

24. See Delaney, *Struggles for Freedom*, in *SIX WOMEN'S SLAVE NARRATIVES* 9 (1988) (woman held wrongly in slavery sues to have her daughter Lucy delivered out of slavery and returned to her; court awards the mother "the right to own her own child").

before her husband was sold to a distant owner “way down South.”²⁵

The years passed. With deaths and marriages, the ownership of Polly and her daughter was passed in and out of the Berry family. Encouraged by Polly, daughter Nancy escaped to freedom in Canada. Desperate to join her, Polly attempted to escape and made it all the way to Chicago. Because the Fugitive Slaves Laws were in effect, however, “negro-catchers” were permitted to arrest her and return her to her owner in Missouri.²⁶

Upon return to Missouri, Polly took the bold step of finding a good lawyer. She successfully sued for her freedom on the theory that she was not a slave, but legally a free woman who had been wrongfully sold into slavery.

Now a free woman and anxious to have her family together again, Polly decided to buy her daughter Lucy out of slavery. But Lucy was not for sale. Lucy was “legitimately” owned by a Mr. Mitchell, who wanted to keep Lucy to please his wife. Polly filed a lawsuit against Mr. Mitchell on September 8, 1842, for the possession of her daughter, Lucy.²⁷ During the seventeen-month pendency of her mother’s civil suit, poor Lucy was locked away in jail.

Polly’s suit finally ended in victory, and she was awarded possession of Lucy. On the final day of the trial, Polly’s lawyer, the slave-holding jurist Edward Bates, summed up his case to the jury:

Gentleman of the jury, I am a slave-holder myself, but thanks to Almighty God I am above the base principle of holding anybody a slave that has a right to her freedom as this girl has been proven to have; she was free before she was born; her mother was free but kidnapped in her youth, and sacrificed to the greed of negro-traders, and no free woman can give birth to a slave child, as it is in direct violation of the laws of God and man.²⁸

This poignant story vividly illustrates the sense in which the legal concept of ownership completely lacks inherent moral content. It can work like a two-edged sword. Polly legally owned herself, yet she lived most of her life as a slave. Once

25. *Id.* at 14.

26. *Id.* at 23.

27. *See id.* at 33.

28. *Id.* at 42.

she proved in court that the master who possessed her did not lawfully own her, she gained standing to sue for the recovery of her own daughter, Lucy. But Lucy was also the precious putative property of another owner, who had acquired her through a “legitimate” commercial transaction and was not willing to sell her to Polly. Extant property law favored Mr. Mitchell; it certainly could not compel him to sell. Thus, Polly resorted to slave law to prove unlawful possession. By proving that she was not in fact a slave at the time of her daughter’s birth, Polly was able to persuade the court that she was the rightful owner of her daughter. In the end, mother and daughter owned themselves. But the institution of slavery remained intact, and Mr. Mitchell was out the price of a housemaid.

This story is a stark reminder that as a result of the American slave laws, all black mothers were de facto surrogates. Children born to slaves were owned by Master X or Mistress Y and could be sold at any time to another owner. Slave women gave birth to children with the understanding that those children would be owned by others.

The story of Polly also teaches us several other important lessons. First, Polly’s case reminds us that well-meaning people, including business people, lawyers, and judges sometimes participate in unjust, immoral practices. Most people would agree with this proposition in the abstract but are reluctant to confront it in concrete cases. To declare that a controversial practice, engaged in by well-meaning citizens, is immoral is to appear presumptuous, intolerant, and self-righteous. These kinds of attitudes are often thought of as threatening to the philosophical underpinnings of modern liberal government, as manifest by the often asked questions: Who are you to judge? What gives you the right to say? Liberalism is sometimes interpreted to treat all moral judgment as moralism and all public moral inquiry as an invasion of privacy. As a result, notions of morality are rarely invoked in public discourse and are thus relegated to secrecy. This is not good. Sometimes we have to be willing to criticize public officials and even our friends and neighbors in light of our own moral intuitions. That is, after all, how we eventually abolished slavery.

Polly’s case also brings to mind a subtler point. The fact that the law is receptive to the claims of some individuals wronged by a practice does not necessarily vindicate the practice. Polly’s

daughter was returned to her because of an earlier injustice. But the practice of slavery—with its resulting surrogacy—continued. The fact that Polly was able to get judicial redress within the legal framework of slavery did not legitimate slavery. Analogously, the fact that Mary Beth Whitehead Gould of the *Baby M* case also got her day in court when things went wrong does not necessarily mean we should condone the practice of surrogacy. A corollary to this is that just because child custody arrangements are judicially obtainable when surrogacy agreements are breached does not mean we should support the practice.

Polly's case suggests a third point. Even in social contexts where the expectations of motherhood do not exist—where one understands that one is a member of an enslaved race without meaningful claims to one's own children—the desire to parent and to enjoy the companionship of one's children can be very strong. We can imagine that Mary Beth Whitehead Gould's anguish at losing her daughter was not unlike Polly's.²⁹ Both women's sense of security—responsibility and identity—were very connected to the children to whom they had given birth but supposedly had no right to parent.³⁰

A fourth and final message to be drawn from Polly's case is that the law can easily accommodate the commercialization of human life. We must therefore be careful. As the legal positivists John Chipman Gray and Hans Kelsen made plain, in principle, anything can have a right to anything.³¹ In our juris-

29. Mary Beth Whitehead had entered into a surrogate-parenting agreement with William Stern in which she agreed to be artificially inseminated with Mr. Stern's sperm, to carry the child to term, and to turn over the child to the Sterns. In return for this and Ms. Whitehead's renouncement of parental rights to the child, Mr. Stern agreed to pay her \$10,000 and all medical and related expenses. After the birth of "Baby M," Ms. Whitehead decided not to give up the child. Her intense desire to keep Baby M led Ms. Whitehead to defy a court order granting the Sterns temporary custody and to take the child away with her to Florida. A court awarded the Sterns permanent custody of Baby M but allowed Ms. Whitehead to retain her parental rights and to have some visitation rights. See *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *aff'd in part, rev'd in part, remanded*, 109 N.J. 396, 537 A.2d 1227 (1988).

30. A woman's security may be linked to her children by the responsibility she feels for bringing them into the world and providing them with the psychological and financial care they need. In addition, a woman's sense of identity is tied to her children by virtue of the strong physical connection with them experienced during the final stages of pregnancy and a belief that the children's genetic and biological makeup creates a link with her past, and her stake in the future. See Allen, *supra* note 6, at 1790.

31. See J. GRAY, *THE NATURE AND SOURCES OF LAW* 28-63 (1909) (rights can be ascribed to human beings, supernatural beings, animals, inanimate objects, and juristic persons such as corporations); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 93-109 (1945) (rights can be ascribed to anything).

prudence, the conceptual vocabulary is in place to make alienable property³² of women, of children, of kidneys, of hearts, of spleens, and even an individual's cell line.³³ The concepts of property and ownership are elastic enough to let us buy and sell anything we want. We cannot simply look to the language of law to know where to draw the lines. We must first draw the lines where we want them to go and then make those lines into law.

II. PRIVACY

Under the modern jurisprudence of constitutional privacy, the Constitution embodies protection for certain privacy rights regarding human reproduction. These include the right to procreate,³⁴ to use contraception,³⁵ and, under *Roe v. Wade*,³⁶ to obtain medically safe abortions. Courts and commentators have appealed to constitutional privacy rights as a basis for concluding that surrogacy agreements must be validated and specifically enforced.³⁷

Privacy and equal protection arguments favoring surrogacy, and against state prohibitions, are not convincing. To be sure, surrogacy involves the intimate decision to bear a child, which courts have repeatedly held to be an appropriately private decision.³⁸ But the pre-planned, commercial, third-party, and burdensome nature of surrogacy makes it strikingly unlike ordinary child-bearing and adoption. The argument is often made that since sperm donation and artificial insemination are available to women, surrogacy must be available to men.³⁹ There is a relevant difference between the burdens imposed upon a man, who in an hour of time can make a sperm dona-

32. See Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); see also D. MEYERS, *INALIENABLE RIGHTS* (1985) (philosophical discussion of inalienable rights).

33. See Moore v. Regents of Univ. of California, 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494 (1988).

34. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

35. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

36. 410 U.S. 113 (1973).

37. See, e.g., *Doe v. Kelley*, 106 Mich. App. 169, 174, 307 N.W.2d 438, 441 (1981); *Surrogate Parenting Associates, Inc. v. Kentucky ex rel. Armstrong*, 704 S.W.2d 209, 212 (Ky. 1986); Bitner, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 236-37 (1985); Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 82 (1982).

38. See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).

39. See Schuck, *supra* note 18, at 1798.

tion, and the burdens imposed upon a woman, who must endure a nine-month pregnancy and all the emotional and physical health risks associated with pregnancy.

“The right to privacy” is ill-suited as a principle of adjudication in custody suits between natural fathers and natural, surrogate mothers. The procreative privacy interests of both mothers and fathers would seem to argue for access to their natural children, even where one parent originally intended to be only a surrogate mother. Contract principles seem inapposite in the child custody context as well. Surely, procreative privacy rights—rights of constitutional dimensions—and the best interest of the child dwarf mere contractual rights. The New Jersey Supreme Court was convinced of this point. It unanimously rejected the argument that childless couples have constitutional privacy rights demanding state validation and enforcement of surrogacy agreements.⁴⁰

Surrogacy agreements are best viewed as unenforceable personal commitments or vows between unmarried individuals. When disputes over child custody arise, courts should decide the cases as child custody disputes are always decided, without regard to the principles of commercial contract law. Any prenatal agreement to waive or terminate parental rights should be deemed void as a matter of public policy. Would-be surrogate mothers should be deemed to have constitutional privacy rights so strong as to limit their own capacities for alienating their procreative and traditional parental prerogatives. This approach is permissive, in the sense that it does not criminalize surrogacy agreements. It is restrictive, in that it is likely to discourage the practice, certainly the business, of surrogacy.

Some feminists have a more welcoming view of surrogacy than mine.⁴¹ They say surrogacy is a source of liberation for women. It frees them from traditional roles which limit childbirth to marriage. Yet the motives and values actual surrogates emphasize are the motives and values of Nineteenth-Century “true womanhood.”⁴² One strains to see female liberation in a

40. See *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

41. See, e.g., Davis, Commentary: *Alternative Modes of Reproduction: The Locus and Determinants of Choice*, in REPRODUCTIVE LAWS FOR THE 1990s, *supra* note 3, at 421. But see Chavkin, Rothman & Rapp, *Alternative Modes of Reproduction*, in *id.* at 405.

42. See Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (Summer 1966) (characteristics of Nineteenth-Century womanhood were domesticity, self-denial, submission to male domination, and a willingness to fulfill the needs of others).

practice that pays so little, capitalizes on the traditionally female virtues of self-sacrifice and caretaking, and enables men to have biologically related children without the burden of marriage.

Finally, one of the more compelling arguments for surrogacy focuses on its potential to aid disabled women.⁴³ It is argued that disabled women should be able to parent, but they often cannot because of physical infirmity or confinement to wheelchairs that makes gestation risky or impractical. This argument for surrogacy has considerable force, but less so when one considers that it requires sacrifices by one disadvantaged group to help another.

It is often speculated that in the long-run it is poor women and women of color who will stand to suffer most by uses of surrogate mothers and surrogate gestators.⁴⁴ Some fear that minority women will become the "surrogate class." This outcome would be ironic in the case of black women because, as a class, black women have a higher rate of infertility than white women⁴⁵ and are less able to pay for surrogacy services on their own behalf. Although religious and political beliefs could constrain participation, opportunities to earn money through surrogate gestation may be difficult to refuse for the poor women of the future.

III. CONCLUSION

I suspect Professor Peter Schuck would denigrate these objections to surrogacy as "natural law."⁴⁶ He has argued that surrogacy can be seen as a "praiseworthy act of generosity and commitment to the creation of a wanted life."⁴⁷ He believes surrogacy "will generate very large, widely distributed private and social benefits."⁴⁸ Unless its costs outweigh its benefits, he argues, "the law should uphold surrogacy contracts, not categorically condemn them."⁴⁹ Because my sense of the relevance and strength of non-consequentialist concerns differs from his,

43. See Asch, *supra* note 3.

44. See Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in *REPRODUCTIVE LAWS FOR THE 1990s*, *supra* note 3, at 23.

45. See *id.* at 49.

46. See Schuck, *supra* note 18, at 1798-1801.

47. *Id.* at 1793.

48. *Id.*

49. *Id.* at 1793-94.

I disagree that the burden of proof is on opponents of surrogacy.

An ample basis for viewing the burden of proof on the side of surrogacy proponents is suggested by the socially retrogressive character of surrogacy and the equal, competing "privacy" interests of biological parents in the companionship of their offspring. As previously urged, the practice of surrogacy depends upon Nineteenth-Century conceptions of female self-sacrifice and self-denial. It depends as well on our willingness to yield to additional pressures to commercialize certain aspects of human life. Although privacy rights are cited in an effort to explain why surrogacy contracts must be validated, the privacy principle is simply not dispositive. Privacy rights do not dictate that parental rights must be deemed commercially alienable, nor that surrogacy contracts must be treated as more than unenforceable personal commitments. More importantly, privacy rights do not dictate which one of two competing natural parents should have custody of a child that both want to rear.