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Neoslavery—"Surrogate" Motherhood Contracts v. The Thirteenth Amendment

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The *Baby M* case[1] has gripped the nation for more than two years. Not limited to the parties involved, it concerns us all. The issues raised and the decisions reached are critical because they touch on a host of other, related issues. The advent of artificial manipulation of human reproduction challenges and redefines age-old social norms. Considering its importance, it would seem prudent to tread carefully, to stick close to familiar landmarks, to laws developed by trial and error over centuries. Judge Harvey Sorkow did exactly the opposite in his decision. Clearly eager to award custody to the Sterns, Judge Sorkow declared existing laws inapplicable, disregarded them, and proceeded to judicially legislate on his own. In so doing, he may have opened an incredible and potentially disastrous can of worms: legalization of male and female prostitution, creation of an "incubator" class of women, and the reinstitution of facets of slavery. But more of that later.

Judge Sorkow was asked to decide three issues. First, since Mary Beth Whitehead was described as a "surrogate" mother, what is a surrogate mother and what legal rights does such a mother have respecting her offspring? Second, was the contract the Sterns and Mrs. Whitehead entered into legal, and therefore binding? Third, what is best for the child?

Judge Sorkow apparently ignored the first two issues. Moreover, it is arguable that the facts bearing on the third were never aired; that Mrs. Whitehead, the modern Dred Scott, was largely convicted in the press; and that Judge Sorkow may have based his

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

decision on social class and personal prejudice rather than on an objective analysis of the facts and proper application of law.

As these issues are vital, and will become more so as time goes on and society is inevitably confronted with variations on the *Baby M* theme, it might be wise to examine this pilot case more closely, bearing in mind that there is no quick fix; that the only way to tackle this Gordian knot is on a point-by-point basis.

First, throughout, Mrs. Whitehead has been titled a "surrogate" mother. What, precisely, is a surrogate? Words have clear definitions. These definitions must be adhered to so as to avoid confusion that can destroy any hope of rational resolution. We cannot play fast and loose with the dictionary, altering meanings to suit convenience, without dire consequences. So how does Mr. Webster, and his New World Dictionary of the American Language, define "surrogate"? Surrogate: A deputy or substitute.

There is no question Mrs. Whitehead is the genetic, biological female parent, i.e. the mother, of Baby M. She cannot, by definition, be a "surrogate," as she is not a "substitute" or "deputy." If we ask, "Will the real surrogate mother please rise?" Elizabeth Stern, the adoptive mother, the stand-in for the genuine article, must rise. No verbal contortions can alter the biological fact that Mrs. Whitehead is the mother, the whole mother, and nothing but the mother, despite linguistic efforts to distort or obscure the truth.

Judge Sorkow chose to ignore her maternity in his opinion. All efforts seem marshalled toward masking her motherhood behind a verbal smokescreen. The applicable term is "railroading." Like it or not, Mrs. Whitehead's blood flows in Melissa Stern's veins, her heritage is stamped in Melissa's genes, and her son and daughter are Melissa's half-brother and half-sister. Nothing can change that.

Second, was the contract a legal, binding one? One does not need a law degree to realize that the New Jersey circus should never have seen a courtroom. The thirteenth amendment to the Constitution of the United States, the beating heart of the Republic, outlawed slavery in the United States, along with all ancillary, contingent, and supportive activities.

As the ink dried on General Lee's surrender, two parties could never again contract with each other for the purchase and sale of a third. Such was the substance and spirit of emancipation, concepts secured via a national bloodbath whose bitter consequences have rocked and scarred the United States since. The only victories won in that agony were the preservation of the

Union and the abolition of the legal right of two persons to commercially transfer (sell) another.

Until now.

The "surrogate" mother contract, unilaterally and arbitrarily validated by Judge Sorkow, reinstated the right of one person to contract with a second for the purchase and sale of the body and services (in this case, the filial love of a child for its parents) of a third. Simply stated, the Sterns entered into a contract with Mrs. Whitehead for the production, purchase, and sale of an infant human being. The gist of the contract was that the Sterns agreed to pay Mrs. Whitehead ten thousand dollars to conceive, carry, and deliver a baby. In return, Mrs. Whitehead agreed to sign over her parental rights to the resultant child to the Sterns. What occurred is obvious. All parties engaged in a contract to produce, buy, and sell a person in clear violation of the thirteenth amendment to the Constitution. Far from entering a legal contract, it actually appears they engaged in a criminal act. That Mrs. Whitehead subsequently decided to reject the money, not to sell her infant, not to violate the Constitution, logically seems commendable, not damnable. The vilification of Mrs. Whitehead was unjustified. If this case did come before a court, it should have come before a criminal court, not a civil court—the Sterns were seeking to enforce a blatant illegality.

Third, what is best for the child? It may never be possible to know the answer for Baby M, given the sensationalism and publicity accorded the case.

Clearly, however, Mrs. Whitehead was not given a fair, impartial hearing. Much was made of her socio-economic status compared with the Sterns. Judge Sorkow fairly waxed poetic over the prospects of a child raised in the home of two doctors compared with that of a high school dropout and a recovered alcoholic who is a traumatized Viet Nam veteran. It is true that the Sterns are richer than the Whiteheads, which is why they were able to "commission" the baby and buy her in the first place. Greater education and more money, while they may indicate a richer lifestyle, guarantee nothing. More than one recovered alcoholic have produced healthy, happy, productive, even heroic, offspring, while many uppercrusters have turned out real losers. "The inglorious sons of great fathers" are nothing new.

Beyond this, there is the deprivation visited upon the child legally decreed shorn of her siblings, uncles, aunts, cousins and grandparents—her entire natural family; the child who, by judicial fiat, is robbed of her heritage to accede to the demand for closed

adoption, for sole, exclusionary custody. It is eminently proper to ask if this is truly "in the best interests of the child."

There is no denying that cash and class played hefty roles in Judge Sorkow's decision to award Baby M to the Sterns; to grant immediate adoption by Elizabeth Stern; to reward members of his own socio-economic class at the expense of Mrs. Whitehead, who patently belonged to another class in our classless society.

It is interesting to see how this decision was reached. Mrs. Whitehead's psychological state was examined under a public microscope. Psychologists by the carload (oddly, of the same class as both Judge Sorkow and the Sterns) testified that she was "overly involved" with her children. She was accused of being "too protective," "hugging too much," and being too dominating an influence. It is fair to ask, "How much is too much?"

For example, she was declared "too involved in her children's lives" because she braided her daughter Tuesday's hair each morning. Why is braiding an eleven-year-old's hair an evil influence? Indeed, failure to properly supervise and involve herself in her daughter's toilet could more readily be termed neglect.

Almost every accusation levelled against Mrs. Whitehead's "interference" in her children's lives has been extolled, in other contexts, as praiseworthy devotion. The mother who refuses her underage son permission to join the army "interferes." So does the mother who refuses permission for a thirteen-year-old daughter to wed. Even the mother who deems it unwise for a child to work after school, and withholds consent for working papers, "interferes" in her child's life. Any parent who denies a child permission to purchase a much coveted item, be it a candy bar or a Cadillac, interferes with the child. History abounds with such parental interference. This is not usually labelled "psychopathic," "manipulative" behavior, but is recognized as responsible parental devotion. Failure to behave in such a manner always has been viewed as gross neglect of duty.

Finally, Mrs. Whitehead was convicted—right word—of instability in endangering Baby M when she slipped her baby out a window and fled with her to Florida.

A desperate mother, threatened with separation from her child, fleeing the duly constituted authority snapping at her heels, is the stuff of drama. The most famous instance springing instantly to mind is Eliza in *Uncle Tom's Cabin*,[2] who grabs her son, Harry, and jumps from ice floe to ice floe in a frantic effort to es-

2. Harriet Beecher Stowe, Uncle Tom's Cabin (Ann Douglas ed. 1981) (1852).

cape capture and the separation from her child the capture will bring.[3] Eliza's action imperilled Harry's life, yet Eliza is seen as the definition of maternal heroism and love. In fleeing, Mrs. Whitehead did as Eliza had done, at far less risk to her infant. Why is one a heroine and the other "emotionally unstable" and "manipulative"?

It does not matter that one was a mid-nineteenth century black slave and the other a late-twentieth century white woman who had unlawfully sold her right to her child prior to its conception and birth. Whatever their legalistic differences, both Eliza and Whitehead took flight for exactly the same reason: to avoid having their children snatched from their breasts. Eliza fled from a slavecatcher with the authority of the laws of the State of Kentucky guaranteeing him a right to his bought-and-paid-for property. Whitehead fled from her child's father, with Judge Sorkow and the power of the Superior Court of the State of New Jersey seeking the child Mr. Stern had bargained for, seeking enforcement by specific performance of a blatantly illegal contract. As the New Jersey Supreme Court unanimously found, the fact that one of the parties in the Whitehead instance was the father of the child in no way mitigated the illegality of the contractual arrangement. It did not and could not mitigate the consequently unlawful nature of the seizure of the child from her natural and fit mother.

Eliza and Harry were fictional characters. But almost all fiction is based on fact. There probably was an Eliza-like incident upon which Harriet Beecher Stowe based this episode. There were probably many incidents of desperate women daring anything to avoid enduring the agony of having their children ripped, however legally, from them. Slave mothers sometimes killed their children, and themselves, to prevent such separations, as Mrs. Whitehead threatened to do. She may have been bluffing. She may have lied in threatening to accuse Mr. Stern of molesting her daughter. Desperate mothers have ever done desperate things where their children are concerned. Such desperate acts were well known in the antebellum South, and were a persuasive reason for the abolition of slavery. The slave mothers were viewed as the most grievously injured victims, their unnatural separation from their young an abomination so gross an insult to nature and nature's God as to incite the vengeance of heaven itself, and require a blood reckoning to expiate, a prophesy that proved tragically accurate.

Viewed in this light, Mrs. Whitehead's flight with her baby in her arms is no different from Eliza's with Harry. Although Mrs.

3. *Id.* at 117-20.

Whitehead may indeed have consented to the contract, it was not, and by its very nature could not have been, an informed consent. Yet never during the trial was Mrs. Whitehead given a chance to tell her side, to acquaint His Honor with a basic fact of all mammalian life: a mother forms a natural, deep bond with her young.

Evolution, God, or both instilled this bond for a purpose. It exists despite manmade and man-interpreted laws that seek to deny its existence and abrogate its effects. Zoologists and anthropologists, if not jurists, affirm the existence of such a bond. But anyone who has owned a pet that has had young knows it without esoteric schooling. Anyone who has had the sad experience of owning a dog whose puppies have died knows the mother is devastated. The same is no less true of humans. Taking a baby from its mother usually, not always, but usually, has the same effect. To the mother, the child is the same as dead, and the mourning for a dead child never ceases. It is worse, perhaps, since the mother remains forever unaware of her child's fate and the uncertainty is an exquisite torture.

Aside from Mrs. Whitehead's psychological state, not yet objectively evaluated, along with the Sterns' psychological states, never examined as closely or as negatively as the Whiteheads', what kind of family life would the Whiteheads have provided?

At the time of trial, the Whitehead family consisted of Mr. and Mrs. Whitehead, grandparents and a half-brother and half-sister to the baby, several aunts, uncles, and cousins in a seemingly close family, and family friends. Consummately ordinary. The Sterns, on the other hand, had each other, and several friends. They had music and Tolstoy and far more money than the Whiteheads. But money, Judge Sorkow assured us, was not the deciding factor.

What would be best for Baby M really remained unclear as of the decision date. Given the subsequent separation of the Whiteheads, possibly due to the pressures placed on their marriage by the glare of intense, adverse, unrelenting, negative public scrutiny, the question is now moot. The home they might have provided has been destroyed, crushed, perhaps by the weight of cameras, sound equipment and printing presses. It is too late for the Whiteheads, and the Sterns' partial victory on appeal was somewhat aided by the default of the Whitehead marriage. But the issues transcend the individuals and will surely arise again in other cases. Society must be prepared for that inevitability.

This case is of intense public interest for many reasons, and affects an array of vital social concerns. For example, there is the

indisputable paternity of Mr. Stern. But Mr. Stern is not married to Mrs. Whitehead, so Baby M is a child born outside the wedlock of her parents, and she may be considered an illegitimate child.

Moreover, an intriguing new development has transpired. Mrs. Whitehead has had another baby, and the father, Dean Gould, was not her husband at the time the baby was conceived. Prior to Mrs. Whitehead's marriage to Dean Gould, therefore, Baby M stood in exactly the same position as this infant, both children fathered by men not Mrs. Whitehead's legal mate. Many in the media and legal communities voiced outrage at Mrs. Whitehead's "immorality" in having a child by a man other than her husband. The hypocrisy is obvious. It is grossly illogical to suggest that conception of a baby naturally and out of love is less "moral" than one conceived artificially and for profit.

For millennia manmade law has taken great pains to protect the father, his fortune, and especially his estate, from the claim of the illegitimate child via the, until recently, legal designation of such children as "bastards." Only within this century have any real steps been taken to right this ancient wrong, with the enactment of the Uniform Parentage Act in some seventeen of the fifty states.[4] The Uniform Parentage Act provides, in essence, that all parents, regardless of their marital state, have the same rights and obligations to their children.[5] Although New Jersey has a Uniform Parentage Act, it was never cited by either side during the trial. This was not a trial for custody of a human infant. Rather, it was a trial to enforce by specific performance the terms of a commercial contract; an attempt by the "purchaser" to force the "vendor" to deliver the "product" bargained for. Melissa Stern, in this scenario, was robbed of her humanity and reduced to a contracted-for object, clearly violating the thirteenth amendment to the Federal Constitution.

Over the centuries, manmade law has carefully vested all re-

4. *See* Alabama, Ala. Code §§ 26-17-1 to 26-17-21 (1975); California, Cal. [Civil] Code §§ 7000-7018 (West 1983); Colorado, Colo. Rev. Stat. §§ 19-6-101 to 19-6-129 (1986); Delaware, Del. Code Ann. tit. 13, §§ 801-818 (Supp. 1986); Hawaii, Haw. Rev. Stat. §§ 584-1 to 584-26 (1985); Illinois, Ill. Ann. Stat. ch. 40, ¶¶ 2501-2526 (Smith-Hurd Supp. 1988); Kansas, Kan. Stat. Ann. §§ 38-1110 to 38-1129 (1986); Minnesota, Minn. Stat. Ann. §§ 257.51-257.74 (West 1982); Missouri, Mo. Ann. Stat. §§ 210.817-210.852 (Vernon Supp. 1988); Montana, Mont. Code Ann. §§ 40-6-101 to 40-6-135 (1986); Nevada, Nev. Rev. Stat. §§ 126.011-126.391 (1986); New Jersey, N.J. Stat. Ann. §§ 9:17-38 to 9:17-59 (West Supp. 1988); North Dakota, N.D. Cent. Code §§ 14-17-01 to 14-17-26 (1981); Ohio, Ohio Rev. Code Ann. §§ 3111.01-3111.19 (Anderson Supp. 1987); Rhode Island, R.I. Gen. Laws §§ 15-8-1 to 15-8-27 (Supp. 1981); Washington, Wash. Rev. Code Ann. §§ 26.26.010-26.26.905 (1986); Wyoming, Wyo. Stat. §§ 14-2-101 to 14-2-120 (1977).

5. *See, e.g.*, N.J. Stat. Ann. § 9:17-38 (West Supp. 1987).

sponsibility—custodial, legal, economic—for the illegitimate child in the mother. Absent incontestable proof that they are unfit, "surrogate" (birth) mothers, actually the mothers of illegitimate children, should not be required to relinquish what amounts to their total custodial rights to the father and adoptive (true surrogate) mother.

Mrs. Whitehead was never accused of being unfit. If she were alleged an unfit mother for Baby M, she would logically be unfit to retain custody of her other three children, and steps would have to be taken to remove them from her. No such steps were ever contemplated.

A cynical old axiom holds that laws are made to protect and benefit those who make them. Judge Sorkow's decision abrogated all custodial rights of the unmarried mother which man has, for the convenience and the safety of his estate, vested in her from antiquity. Those rights are inconvenient in these altered circumstances. In so doing, Judge Sorkow, in effect, vested parents with an economically valuable property right in the custody of the persons of their children. He asserted the right of persons to commission the production and exchange of babies for a contractually agreed dollar amount. This creates a class of persons who are, effectively, commercially transferable commodities, a class non-existent in the United States since the surrender at Appomattox Courthouse in 1865.

To justify his decision, Judge Sorkow cited the property right men have in selling their sperm, reasoning that women therefore have a collateral right to rent their wombs.[6] The counterpart of the sperm, however, is the ovum, not the uterus. Neither sperm nor ovum is viable or valuable without access to a uterus, an absolute prerequisite, in which a conceptus can develop. So it was vital to decree that women have the right to rent their uteri. But this is a transparent charade. Nature endows but one purpose for the uterus: the development of a fetus from conception to birth. No one is interested in the uterus itself as "rental property"; rather they are interested in what the uterus produces. The uterus has only two possible products, menstrual fluid or a baby, and it is doubtful anyone truly wants a woman's menstrual fluid.

By extension, if women have the right to rent their uteri, they must also have a right to rent access to it. Nowhere did the judge define whether such access may be achieved naturally or artificially, nor did he define the time span of such rental. So women have an absolute right to rent their uteri, and natural or

6. *In re* Baby M, 217 N.J. Super. at 388, 525 A.2d at 1165.

artificial access to it, for months or minutes as they choose, which no policing agency can interdict. If upheld by the United States Supreme Court, this decision logically legalizes female prostitution in all fifty states, the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. Further, since women have the right to rent their reproductive apparatus, men must have the same right.

The male organ corresponding to the vaginal tract, nature's access to the uterus, is the penis. Men would have the right to rent their penises to whomever and under whatever circumstances they choose. Making homosexual and heterosexual prostitution a legal right would, ironically, convert the loathsome pimp into a respectable rental agent.

Whatever one's opinion on legalized prostitution, in view of the danger of spreading venereal diseases, and AIDS especially, so critical an issue deserves a more cautious approach than would be possible if Judge Sorkow's opinion became the law of the land.

In order to find for the Sterns, to enforce the "surrogate" mother contract, and to deprive Mrs. Whitehead of her parental rights to a child indisputably hers, it is necessary to vest parents with a transferable property right in the custody of their offspring. This creates—or recreates—a class of saleable persons (minors) in flagrant violation of the Constitution, making a mockery of the worst war in the history of the United States. The repercussions of this decision may make prostitution a right, and possibly create a breeder class of women to "incubate" the offspring of the wealthy who cannot or would rather not bear their own children.

Especially vulnerable are poor girls and women. No law exists to protect them from the already perfected technology permitting the routine mixing of the sperm and ovum and implantation of fertilized eggs of the wealthy in the uteri of such women. Witness the recent surrogate gestation of triplets in South Africa by Mrs. Pat Anthony utilizing the egg of her daughter, Karen Ferreira-Jorge, fertilized with the sperm of her son-in-law, Alcino.[7] In this instance, it was done out of love. But what is done for love can be done for money unless doing so for pecuniary gain is rendered criminal. It should also be borne in mind that Mrs. Anthony, in her own words, described herself as nothing more than an "incubator." Not a person, but a developmental vessel for fetal growth. The chillingly dehumanizing implications of this attitude, for all women, but especially for the more vulnerable poor,

7. Eric Levin & Sue Reid, *Motherly Love Works a Miracle*, People 38 (Oct. 19, 1987).

should it become an acceptable viewpoint, must be regarded with the gravest foreboding.

There is historical precedent for the use of the bodies of poor, especially black, women by wealthy whites to perform similar natural functions. It was a common southern practice to use black women as wet-nurses to suckle white babies, allowing white ladies to "preserve the shape of their breasts" by assigning the nursing of their infants to black "mammies." Similarly, using poor women as "incubators" would permit wealthy women to become genetic mothers, like Karen Ferreira-Jorge, while preserving their figures, colonizing the bodies of poor women to produce their babies. Black women have historically been used as care-givers to white children. They may be drafted to care for white children before birth as well as after.

Carrying this to the extreme, it may even be possible to bypass poor women of any hue, and, more cheaply, impregnate or implant a fertilized ovum in the uterus of a physically healthy, mentally retarded or autistic woman. There is little protection for an incompetent woman, legally in the same position as a minor, if her legal guardian deems it in her best economic interest to be repeatedly impregnated for money. Menarche occurs at about age thirteen, menopause at about fifty-three. Such a woman could "go on line" in late childhood and be "productive" for about forty years, all justified by her guardian as the only way she could be self-supporting. With the guardian, perhaps, reaping an agency fee. Such a scenario, with women treated like farm animals, could occur without regulation.

These are a few of the grave consequences the Pandora's Box of Judge Sorkow's decision, if upheld, might have unleashed upon us. In venturing into the realm of manipulation of the basic cell of human reproduction, science is also necessarily tampering with the basic cell of human society—the family. It behooves us to tread cautiously and gingerly on this volatile, unknown ground, using, and amending where necessity indicates, the known guidelines of the ages. We cannot afford to pander to the proclivities of wealth and privilege. Too much is at stake—the entire socio-political fabric of human existence. Who is mommy and who is daddy?, to be exact. Careless violation of the fundamental cell of an organism can wreak havoc. That may be as true of the organism of the body politic as it is of the body physical.

On February 3, 1988 the Supreme Court of the State of New Jersey unanimously overturned Judge Sorkow's decision on most

points.[8] The Justices awarded custody of the baby to the Sterns based upon the length of time she had lived with them and the bonds that have consequently been formed by the baby with them, recognizing "the unfortunate error" made by Judge Sorkow in having awarded custody to the Sterns in his decision, but conceding that they are now stuck with the results of that error and must go on from there. They restored Mrs. Whitehead's maternal rights; voided the adoption by Mrs. Stern; found the contract invalid, possibly criminal; and recognized that what had occurred was baby-selling, pure and simple, or at the very least, the sale of a mother's custodial rights to her baby, in clear violation of "public policy." The court, however, did not take the logical next step of recognizing that "baby-selling" (which infers "baby-owning") is a form of "person-selling," (which infers "person-owning") a vital and integral part of the slavery that was outlawed by the Constitution. It virtually invited the legislature to step in and create laws that would regulate "surrogacy" arrangements. Many states are currently considering such legislation, all of which would, in effect, regulate the practice of contracting for the production, purchase and sale of infant human beings. Since the thirteenth amendment clearly outlawed the trafficking in human flesh such legislation contemplates, all of these laws would be unconstitutional prior to their inception. These bodies would appear to be pondering how to regulate the illegal.

Unfortunately, neither the Sterns nor Mrs. Gould (formerly Mrs. Whitehead) wish to appeal to the United States Supreme Court. Sooner or later, though, and preferably as soon as possible, a test case should be brought before the United States Supreme Court to determine whether the thirteenth amendment, barring the contracting for, purchasing and selling of human merchandise, will be enforced.

In an ironic repetition of history, Judge Sorkow's decision may still be hailed as Solomonic, as Chief Justice Taney's *Dred Scott*[9] decision was lauded by many. Like the *Baby M* decision, it too sought to decide human issues without recourse to human reality. Chief Justice Taney's decision led directly to Fort Sumter. Where will Judge Sorkow's decision lead? "The evil that men do lives after them; The good is oft interred with their bones; So let it be with Caesar."[10] So, God help us, if it be with Sorkow.

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

9. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

10. Marc Antony's eulogy at the funeral of Julius Caesar. William Shakespeare, Julius Caesar, act 3, sc. 2.