BORNE FOR ANOTHER*

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I

What has what Lewis Carroll called "the love-gift of a fairy tale"[1] in common with Article 16 of the Universal Declaration of Human Rights?[2] Both, I suggest, refer to an ideal and a value we still cherish in our society. Fairy tales, properly so-called, end in the golden haze where hero and heroine "live happily ever after". Those who read or hear them conjure up from that irreplaceable expression an idyllic prospect of wedded bliss and family life.

The Universal Declaration employs language apparently more precise:

> "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."

I suggest that what is really embodied therein is an ideal and a prohibition. Nobody should be prevented by the state from marrying and setting out to establish a family. Everyone is free to embark on the enterprise of living happily ever after, like Darby and Joan, blessed, perhaps, as the Psalmist sang, to "see children born to your children".[3]

But for many couples, the foundation of a family, hailed in the *Family Law Act* 1975 (Cth.) as "the natural and fundamental group unit of society"[4] is a goal they find they cannot achieve.

At the beginning of its Interim Report of September 1982 the IVF Committee stated:

> "Infertility affects the lives of some 250,000 couples in Australia, that is, about 10% of the married population. For many of them it is a serious, even tragic, deprivation."[5]

Couples who discover that their marriage is infertile and who will not accept a childless future may seek medical or surgical treatments to

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1 In *Through the Looking Glass* (1872), Introduction, St. 1.
2 Adopted by the General Assembly of the United Nations in 1948.
3 In Psalm 128.6.
4 In s. 43(b).
5 At p.4.

circumvent their condition. In vitro fertilisation is one of them. Tubal surgery is another. For some artificial insemination, now a well established practice in a number of Victorian public hospitals, will enable them to establish a family. For others the use of donor sperm in IVF, or the use of donor ova in IVF, or the use of donor embryos in IVF, will lead to a successful pregnancy. These are all practices which the IVF Committee, in its Second Report, recommended should be permitted in the Victorian community. Those recommendations have been accepted by the Victorian Government, and legislation to give effect to the Committee's recommendations on the comprehensive regulation of IVF programmes, and on the status of children born as a consequence, will be introduced in the Parliament this year.[6]

For many infertile couples, however, these scientific and medical developments are unavailable or unavailing. For them the only method of establishing a family is by taking to themselves a child born to another.

II

For centuries adopting another's child has been a means whereby childless couples have been able to establish families. Its legislative regulation in Australia, however, has a history which began less than 60 years ago.[7] Though from the outset the Victorian statute was predicated on the principle that the relationship of parent or parents and child should be created between adopter and adopted only after a judicial determination of the suitability of the would-be parents, adoption practice was largely applicant-centred. "All too often", an English commentator wrote, "the adult's right to a child has been the deciding factor in planning for the child: either in keeping him in institutional care, or in precluding him from adoption because an adoptive parent had a 'right' to a 'perfect' child and he had a health problem".[8] In the last two decades fundamental changes in philosophy have produced significant changes in practice. In its Report of March 1983, the Victorian Adoption Legislation Review Committee declared:

> "The primary objective of adoption is to help a child, who would not otherwise have a family and who would benefit from family life, become a member of a family which is able to give him/her love, care, protection and the security which comes from permanent nurturing relationships. Adoption enables a child to achieve permanent security in a substitute home with an adult or adults fully committed to fulfilling parental responsibilities and obligations and to ensuring the well-being of the child."[9]

[6] Since this Lecture was delivered, the *Status of Children (Amendment) Act* 1984 (Vic.) was passed by the Victorian Parliament. The *Infertility (Medical Procedures) Bill* 1984 (Vic.), introduced at the same time as the *Status of Children (Amendment) Act*, is still before the Parliament.

[7] See the *Adoption of Children Act* 1928 (Vic.).

[8] P. Sawbridge, "Seeking New Parents: A Decade of Development", in J. Triseliotis (ed.) *New Developments in Foster Care and Adoption* (London, 1980), p.163.

[9] P.2.

The real thrust of this change is in the assessment and approval of the would-be adopting parents. Not only has adoption practice become child-centred, it has also encompassed the need, the often desperate need, to know who were the child's natural parents, as part of "the primary objective". This specific change, already reflected legislatively,[10] must affect some people who would consider adopting a child.

Accompanying these changes has been an enormous fall in the number of children placed for adoption. In Victoria there were 1526 adoption orders made in 1967-68. By 1974-75 the number had fallen to 746. In 1981-82 it was 287.[11]

The main reason for the fall is that single mothers are keeping and rearing their babies. The change in community attitudes to single-parent, especially unmarried mother families, accompanied by and perhaps influenced by the availability of social security support which was first provided in 1973, is one of the most significant developments shaping the future of Australian society. It is unlikely that this trend will be easily reversed. The fall in the number of children placed for adoption has encouraged some childless couples to embark on journeys which may lead them to an available baby in some overpopulated, underdeveloped part of our uneven, unequal universe. It has played a part, the IVF Committee has been told,[12] in stimulating the development of IVF programmes in Victoria, including those using donor gametes. It has played a part, too, in the promotion of proposals that are conveniently labelled, in the reference made to the New South Wales Law Reform Commission, as "'surrogate mothering' arrangements (arrangements under which a woman agrees to bear a child for another person or persons)".[13] That brief explanation provides a broad framework for what follows.

III

In the first week of 1984 *The Age* published the following notice:

> SURROGATE MOTHER WANTED
>
> Dear Surrogate Mother, we are a happily married couple who would dearly love a child, have been trying all available treatment for blocked fallopian tubes including IVF. We have not been able to achieve a full-term pregnancy. If you can help, please write to Mr. & Mrs. R.

A post office box number completed the advertisement.[14] In the days following publication the Victorian Minister of Health asked the advertisers to get in touch with his Department, so that the legal implications

[10] See the *Adoption of Children (Information) Act* 1980 (Vic.) and the *Adoption of Children (Information) (Amendment) Act* 1981 (Vic.)

[11] See Report of the Adoption Legislation Review Committee — Victoria, 1983, Table 1, p.3. (Hereafter ALRC Report.)

[12] In both written submissions and in presentations to the Committee, details of which are tabled in its *Interim Report*, September 1982, Appendixes A and D, and its *Report on Donor Gametes in IVF*, August 1983, Appendixes C and D. And see par. 3.7 of the latter Report, dealing with the position of participants in IVF programmes on adoption lists.

[13] Received by the Commission in October 1983.

[14] *The Age*, 4th January, 1984.

of the plan they proposed could be explained and examined. A woman from Adelaide announced that she would be willing to act as a surrogate mother, for a fee of $10,000.[15]

Among the matters which the Minister mentioned as problems were the status of the child produced under the proposed arrangement, its custody if marital difficulties ensued, and any payments made to the surrogate mother. That, he was reported as saying, "could . . . involve legal questions of slavery".[16] The Premier, speaking as acting Attorney-General, said he saw nothing unlawful in the couple seeking another woman to bear a child for them. But he agreed that there was uncertainty, at least, about the child's status and about "the legal obligations and duties of the two or three parties that are involved in the agreement".[17]

At the beginning of February 1984, a Sydney woman and her de facto husband were accused of selling their baby for $10,000.[18] They were charged with the specific offence of attempting to make false entries in the State's birth register. The police stated that the mother entered hospital using the name of the baby buyer. Four days after the delivery the baby was handed over in exchange for a cheque for the agreed amount. The cheque was dishonoured, the baby recovered by the Department of Youth and Community Services, on the ground that it was "under improper guardianship", and its future made to depend on a judicial order about its custody and care.[19]

These are two recent episodes which serve as a local backcloth for an examination of some of the problems which the practices labelled as "surrogate mothering" present to us. There are others. I have been told of an instance known to a doctor in this city where a private family arrangement was made so that a formerly childless couple appeared with a child, in fact born to the sister of the infertile wife and her husband.[20] I speculate that this is not a single instance. In some cases, I surmise, there has been a false entry in the Register of Births. In other cases, I surmise, after the passage of some time, an application for adoption by the wife of her husband's natural child, perhaps preceded by a successful application in the Supreme Court in its wardship jurisdiction, has been made. Victoria's adoption legislation makes special provision for step-parent and relative adoptions, and there is no adoption agency involvement until after an application is lodged.[21] The majority of Victorian adoptions in recent years has involved a natural parent and her or his spouse.[22]

15. See *The Age*, 5th January, 1984; *The Sydney Morning Herald*, 7th January, 1984; *The Age*, 20th January, 1984; *The Australian*, 20th January, 1984.
16 *The Age*, 5th January, 1984.
17 Ibid.
18 See *The Sun*, 3rd February, 1984.
19 *The Sydney Morning Herald*, 4th February, 1984.
20 Private communication from a member of the IVF Committee.
21 See s. 17(3) of the *Adoption of Children Act* 1964 (Vic.), and see also ALRC Report, pp.55-56.
22 ALRC Report, p.51.

Though it is still necessary for the Director-General of the Department of Community Welfare Services, or his nominee, to submit a report to the court considering the application, the time for submission is short: within 30 days of an application being lodged.[23] Lawyers experienced in the practice of family law consider that it is rare for such an application to founder, especially if it is made after the child its subject has been cared for by the step-parent for some time, and more especially if a Supreme Court order for custody has previously been made. As Mr. Roper said on 4th January 1984, "The advertisement (in *The Age*) raised the possibility that the use of surrogate mothers by infertile couples happened more widely than was known.

"It may be going on more privately than on page two of *The Age*."[24]

IV

From what I have just said it is clear that in the simplest instances of surrogate mothering arrangements there need be no participation by doctors or lawyers. The woman who has agreed to bear a baby for others has sexual intercourse with the would-be father, or with another, if he is also infertile. Then nature takes its ordinary course. In 1983 there were reports of such a case in New South Wales.[25] (A single infertile woman may acquire a child in these circumstances, and so may a single man. Instances of both are referred to in American writing on surrogate mothers.[26] The distinct problem attendant on these arrangements, where from the outset a child is to be intentionally deprived of a father or mother, deserves separate attention.)

But there are other possibilities. That which has received most publicity in the United States and, though to a lesser degree, also in the United Kingdom, is the making of a surrogate mother contract. The surrogate, who has no family or other connexion with the infertile wife or couple, agrees to undergo artificial insemination with sperm provided by the husband, to carry the baby to term, and to deliver the baby into the custody of the couple after birth, surrendering all parental rights. The agreement provides for the medical and attendant expenses of the surrogate to be paid by the couple. There is also a stipulation for a fee to the surrogate. The amounts paid or promised were in the range of $5,000 to $10,000 in 1981-82.[27] In the last 12 months amounts of $25,000 to $30,000 have been mentioned.[28] Arrangements leading to agreements have been and are being

[23] See s. 12(1) of the *Adoption of Children Act* 1964.
[24] *The Age*, 5th January, 1984.
[25] The most comprehensive account is in *New Idea*, 21st May, 1983.
[26] See H. T. Krimmel, "The Case against Surrogate Parenting", *The Hastings Center Report*, October 1983, p.35, esp. citations in notes 1 and 2.
[27] P.J. Parker, "Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry", (1982) 5 *Intl. Jo. of Law & Psychiatry*, 341; *The Washington Post*, 24th January 1983.
[28] See *The Herald* (Melbourne), 21st April 1984, referring to an American company "preparing to set up business in Britain charging $28,000 for babies born to other women". And see Postscript.

made on a regular basis by several doctors or lawyers who describe their activities as established programmes. In Kentucky, Dr. Richard Levin has claimed he "is the first physician in the world to institutionalize" surrogate mother arrangements within the corporate framework of Surrogate Parenting Associates Inc.[29] His arrangements ensure, he has claimed, the anonymity of the surrogate and the couple seeking a child; otherwise, he has said, "some day she may show up at your door wanting the baby back".[30]

In Dearborn, Michigan, Mr. Noel Keane, who has described himself as having "become a legal expert on surrogate parenting simply by being a maverick attorney who did on-the-job training", has made arrangements for more than 100 couples.[31] He has enrolled 300 women prepared to act as surrogates. There have been, it was stated in 1983, more than 40 babies delivered as a result, and 15 couples, "awaiting the arrival of their already conceived children". Mr. Keane has now founded the Infertility Center of New York, "to facilitate services for East Coast and International couples who seek his assistance".[32] The brochure published by the centre sets out "The Process" in its successive steps:

1. First inquiry — by letter or telephone
2. First visit to The Center — meeting with Administrator and review of surrogate files
3. Registration (signing of contract) with The Center and payment of ICNY fee
4. Selection of surrogate
5. Optional meeting with surrogate
6. Surrogate's physical examination
7. Meeting with legal representative and signing contract with surrogate
8. Medical arrangements for artificial insemination of surrogate carried out by The Center
9. Counselling for couple
10. Center's personnel keep in touch with surrogate and her physicians during pregnancy and report to couple (or couple has the option of maintaining direct contact with the surrogate)
11. Birth of baby
12. Homecoming
13. Legal adoption by the wife

[29] *The New York Times*, 27th May, 1980.
[30] Ibid.
[31] Noel P. Keane and Denis L. Breo. *The Surrogate Mother* (New York, 1981), p.238. In January 1983, when the Baby Doe episode, in Lansing, Mich. was the subject of daily newspaper, radio and television reports, accounts of Mr. Keane's arrangements were described in many of these: See, e.g. *The Washington Post*, 24th January, 1983.
[32] I have a copy of a circular letter to medical practitioners, undated, signed by Ms Donna Spiselman, CSW, Administrator of the Center, and the brochure. The brochure states that the Center was founded in 1983, and contains the statement about the numbers of babies born and expected to be born which appears in the text. Mr Keane is Executive Director of the Center; it has a 10 person Board of Advisers, of whom 3 have M.D.s, two J.D.s, and 1 is a registered nurse.

In the circumstances described the surrogate is both the genetic and the birth mother of the baby. There could be, given the scientific and medical developments with which we are familiar, variations. For instance, a spouse who could not carry a baby but who had functioning ovaries could have her ovum fertilised in the laboratory and the resultant embryo transferred to a surrogate who would bear it for the genetic mother. Or a spouse capable of bearing a child might nonetheless have her ovum fertilised naturally or in the laboratory, and then transferred, choosing not to be pregnant for personal or professional reasons. In a letter to doctors circulated by the Administrator of the Infertility Center of New York, she writes:

> "In the near future the Center will offer two additional options to couples who wish to become parents — ovum transfer and in vitro implantation, in a surrogate."[33]

I shall not canvas these separate though related possibilities today, but continue to focus my attention on what is at present the most common situation in the surrogate programmes.

V

There is a cluster of legal difficulties presented by that situation, as the Victorian Minister of Health and the Acting Attorney-General stated in their comments on the advertisement which appeared on 4th January 1984. Some have already come before courts in the United States and in England.

In 1978, Comyn J., a judge of the Family Division of the English High Court of Justice, was confronted with a dispute between a mother and a father over the custody of their newly-born baby.[34] The father, a 27 year old professional man, was living with a 32 year old divorced woman who had two children, one of whom was with the couple. They wanted a child, together, as a prelude to marriage, but the woman was unable to have another baby. So they decided to pay a prostitute £3,500 if she agreed to be artificially inseminated with the man's sperm and bear the child. The woman spoke to a prostitute at Bow Street Magistrates' Court. She declined the offer, but countered with her own: she would find someone for a fee of £500. She did, a woman described as "on the fringe of that world", who agreed to act for £3,000. She and the father went to a clinic where, no questions asked, the insemination was carried out. It was successful. She was housed rent-free. When the baby was born his mother refused to part with him, despite further inducements proferred by the father and his future wife. The father instituted wardship proceedings in which he asked for care and control of the baby. The judge granted the mother care and control, but allowed very limited access to the father, since the paternity of the child was not in any doubt and he did not consider that it was clearly not in the interests of the child to be visited by his father.

[33] Ibid.
[34] *A. v. C.* (1978) 8 *Family Law* 170.

He found that the mother had not received the promised payment. Comyn J. appeared to treat the father in the same way as the father of any illegitimate child. He added to his order, however, the requirement that none of the parties was to disclose to the child the circumstances of his conception without leave of the Court. The case was listed, and reported, as *A.* v. *C.*

Ms. C. appealed against the access order. The Court of Appeal decided, unanimously, to allow the appeal and prohibited any access by Mr. A. to his son.[35]

In juxtaposition, there is what became labelled the Baby Doe Case, where the names of the surrogate mother (and her husband), and the putative rather were broadcast at first throughout the United States and then around the world.[36] On 10th January 1983, in Lansing, Michigan, a baby boy was born to Mrs. Judy Stiver, a married woman living with her husband, who bore him after being artificially inseminated, as part of a surrogate mother contract arranged by Mr. Noel Keane. The other party was Mr. Alexander Malahoff, who provided his sperm for the procedure. He had agreed to pay $10,000 to Mrs Stiver when the baby was born and she handed the child over to him. Mrs Stiver also agreed to avoid sexual intercourse with her husband until she was pregnant.

The baby was born microcephalic, that is, with an abnormally small head; this is usually a sign of mental retardation. He also developed a streptococcal infection. In those first few hours of life Mr. Malahoff accepted the boy, as agreed, and arranged for his baptism. There was controversy about treating the baby; doctors at the hospital where he was born obtained a court order which enjoined Mr. Malahoff from interfering with the treatment of Baby Doe — so entitled because of a growing uncertainty about paternity. This culminated in Mr. Malahoff rejecting the baby; he was not, he said, the father. Blood and tissue tests confirmed that he was right. All this was blazoned on the front pages and the TV screens of America. Mr. Malahoff, now separated from his wife, instituted an action claiming $30,000 damages from the Stivers, on the ground that they were in breach of contract by having sexual relations during the insemination period. The Stivers were asked by the Michigan Department of Social Services to surrender custody of Baby Doe, making him a ward of court, so that an adoption might be arranged. The legal proceedings were but one arena for the events unfolding. The results of the tests which determined the paternity of the child were revealed on a daytime TV show.[37]

[35] (1978) 8 *Family Law* 170, 171 (note).
[36] *The Herald* (Melbourne), 1st February 1983; *The New York Times*, 23rd January 1983, 3rd February 1983, 7th February 1983; *Time* Magazine, 14th February 1983, p.64.
[37] Ibid. Esp. *Time*, 14th February 1983.

Both *A.* v. *C.*[38] and the Baby Doe case are "whose baby" conflicts, presenting judges, it might be argued, with only a variant of the custody battles long familiar in family law litigation. The development of a contractual framework for surrogate mothering may be seen as an attempt to avoid such conflicts, or to reduce their incidence, in addition to their function in setting out in advance the obligations and responsibilities of the surrogate mother and the expectant parents of the projected baby. Such contracts have already been the subject of judicial scrutiny and legal analysis in the United States.[39]

The assiduous Mr. Keane acted for several couples, cloaked under the law's medieval aliases of Doe and Roe, who brought action against the Attorney-General for the State of Michigan[40] seeking a declaration that certain sections in Michigan's adoption statute were unconstitutional. The provisions were those which make it a criminal offence if there is any exchange of "any money or other consideration or thing of value in connexion with" any aspect of an adoption.

In Victoria, section 47 of the *Adoption of Children Act* 1964 (Vic.) makes it an offence, punishable by fine or imprisonment, for payments to be offered, made or received in connexion with adoptions, unless authorised by the court or the Director General of Community Welfare Services. There are similiar provisions in the adoption legislation of all common law jurisdictions. Their overall purpose is to prevent baby-selling, and more specifically to inhibit the erosion of free choice, of voluntary consent, in the decisions of the natural parents or parent to surrender their child so that it may become the child of others.

Clearly the existence of these prohibitions taint the standard surrogate mother contract. You will recall the outline set out in the Infertility Center of New York's brochure. The contract both provides for a fee to be paid to the surrogate mother and for her surrender of the baby for adoption by the wife of its father. Such a contract would, it may safely be predicted, be characterised, therefore, as illegal and unenforceable. The Attorney-General of Kentucky, where Dr. Richard Levin conducts his surrogate service, stated in January 1981 that surrogate contracts were illegal and unenforceable in that Commonwealth.[41] Two years later the Attorney-General of Oklahoma published a similar opinion.[42]

[38] (1978) 8 *Family Law* 170.

[39] *Kentucky* v. *Surrogate Parenting Associates Inc.* (1983), 10 F.L.R. 1105; *Oklahoma Att.-Gen. Opinion 83-162* (1983), 9 F.L.R. 2761; K. M. Brophy, "A Surrogate Mother Contract to Bear a Child", (1981-82) 20 *Jo. Fam. Law* 263; E. A. Erikson, "Contracts to Bear a Child", (1978) 66 *Cal. L. Rev.* 611; T. M. Mady, "Surrogate Mothers: The Legal Issues" (1981) 7 *Am. Jo. Law & Med.* 323; C. Sappideen, "The Surrogate Mother — A Growing Problem", (1983) 6 *U.N.S.W. L.J.* 79.

[40] (1981) 307 N.W. (2d) 438.

[41] See George J. Annas, "Contracts to Bear a Child: Compassion or Commercialism", *The Hastings Center Report*, April 1981, p.23, at p.24. The citation is Op. Atty. Gen. 81-18. But see now *Kentucky* v. *Surrogate Parenting Associates Inc.* (1983) 10 F.L.R. 1105.

[42] See fn. 39, above.

There is a more sombre shadow cast by these statutory provisions. Since they create criminal offences, there is no doubt that two or more persons agreeing to carry out activities which flout them are engaging in a criminal conspiracy.[43]

So the 1981 case, conveniently referred to as *Doe* v. *Kelley*,[44] was of high import. The plaintiffs stated that Jane Doe, wife of John Doe, had undergone a tubal ligation rendering her biologically incapable of having a child, and that the couple "wish to have a child biologically related to John Doe". Mary Roe, described as a secretary employed by John Doe, agreed to be the surrogate mother and the Does agreed to pay her $5,000 plus her medical expenses.

The Does contended that the adoption prohibitions infringed their constitutional right to privacy, protected by the Bill of Rights provisions of the U.S. Constitution. The U.S. Supreme Court had stated, they proceeded to argue, that a decision whether or not to bear or beget a child was protected against state interference. The Supreme Court's landmark 1973 decision that state statutes prohibiting all abortions were unconstitutional was arrayed in support.[45]

At first instance the circuit court judge decided that the plaintiffs failed in their attack.

> "The State's interest", he said, "expressed in the statutes at issue here is to prevent commercialism from affecting a mother's decision to execute a consent to the adoption of her child. . . . It is a fundamental principle that children should not and cannot be bought and sold. . . . The evils attendant to the mix of lucre and the adoption process are self-evident and the temptations of dealing in 'money market babies' exist whether the parties be strangers or friends. . . . Mercenary considerations used to create a parent and child relationship and its impact on the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community."[46]

The Michigan Court of Appeals dismissed the plaintiff's appeal. It held, in a brief opinion, that:

> "The statute in question does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the State's adoption procedures. In effect, the plaintiffs' contractual agreement discloses a desire to use the adoption code to change the legal status of the child. . . . We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation."[47]

[43] Both at common law and under the provisions of the very recent *Crimes (Conspiracy and Incitement) Act* 1984 (Vic.), inserting a new s. 321 (1) in the *Crimes Act* 1958.
[44] 307 N.W. (2d) 438.
[45] *Roe* v. *Wade* (1973) 410 U.S. 113.
[46] See (1980) 6 F.L.R. 3011.
[47] (1981) 307 N.W. (2d) 438, 441.

Both the Supreme Court of Michigan and the U.S. Supreme Court refused to review the decision.[48]

The aim of the case, and consequently the true impact of the decision, is captured in a few sentences in the brief of Counsel for the Attorney-General:

> "Plaintiffs have initiated this lawsuit because few women would be willing to volunteer the use of their bodies for nine months if the only thing they gained was the joy of making someone else happy by letting that couple adopt and raise her child. Thus, contrary to plaintiffs' exhortations, in all but the rarest of situations, the money plaintiffs seek to pay the 'surrogate' mother is intended as an inducement for her to conceive a child she would not normally want to conceive, carry for nine months a child she would not normally want to carry, give birth to a child she would not normally want to give birth to and then, because of this monetary reward, relinquish her parental rights to a child that she bore."[49]

Mrs. Stiver, who bore Baby Doe, said, in numerous interviews, that she became a surrogate mother so that she and her husband could have a vacation and pay some bills.[50]

A further forensic attempt to circumvent the adoption provisions was made the following year in Michigan. This time the parties were undisguised.[51] George Syrkowski, a childless husband, made an agreement with a married woman, Corrine Appleyard, that she be artificially inseminated and bear his child. The amount set was $10,000. In June 1981, three months after Mrs. Appleyard became pregnant, Mr. Syrkowski sought a court order, under the terms of Michigan's *Paternity Act*, that he was the to-be-born child's natural father and, with Mrs. Appleyard's consent, that he be granted custody after birth. He sought a further order that his name appear as father on the birth certificate. The Court asked the Attorney-General of Michigan to intervene in the case, in the public interest. He did, and submitted that since Mrs. Appleyard's husband had consented to the artificial insemination, the expected baby must be considered as the legitimate child of the Appleyards, under the terms of Michigan's artificial insemination legislation![52] (A similar argument could be mounted in relation to the draft uniform enactment to establish the status of AID children born in Australia. The purpose of that legislation is, of course,

[48] See (1983) 51 *U.S. Law Week* 3553.
[49] Quoted in Doris J. Freed and Henry H. Foster, "Family Law in the Fifty States: An Overview", (1983) 16 *Fam. Law Quarterly*, 289, 298.
[50] Supra fn. 36.
[51] *Syrkowski* v. *Appleyard*, (1981) 8 F.L.R. 2139; (1983) 9 F.L.R. 2260.
[52] *MCLA* 333. 2824 (6).

to create the relation of father and child between the infertile husband and the child born to his wife, both of them desiring to keep and rear it.)[53]

Two days after Mrs. Appleyard gave birth to a daughter the trial court dismissed Mr. Syrkowski's application, on the grounds that it had no jurisdiction over the subject. Gribbs J. held that:

> "The legal and public policy considerations associated with the relief sought by Mr. Syrkowski went beyond the scope of the paternity statute."[54]

Furthermore, the judge said,

> "Existing authority demonstrates that surrogate parent arrangements are contrary to public policy".[55]

The baby was taken home by the Syrkowskis; on her birth certificate the space for "father's name" was left blank. Mr. Syrkowski's appeal to the Court of Appeals was dismissed.[56]

In the most recent forensic episode, a wholly different view has prevailed. A Circuit Court in Kentucky has held that surrogate contracts do not violate the law of that Commonwealth. The judge held that since the father in the surrogate arrangement had a natural and legal relationship with the child, the adoption statutes did not apply. Therefore, the judge continued, the proscription against adoption payments did not affect the agreement. If there was to be a legal barrier against the payment of a fee for the termination of the mother's parental rights, it should be created by the legislature.[57]

VI

These cases exemplify the major questions which surrogate mothering agreements and their execution present. Whose baby is it? Are the agreements contracts tainted by illegality and so completely or substantially unenforceable? How will conflicts for custody of a baby whose mother won't part with her child, or whose father and his spouse won't accept it, be determined? In a common law jurisdiction the judicial resolution of these questions must be left to the accidents of litigation and the application of established principles, standards and rules of law to the case before

[53] See now the *Status of Children (Amendment) Act* 1984 (Vic.), which inserts new ss. 10A-10F in the *Status of Children Act* 1974 (Vic.).
Section 10C(2) provides that
Where a married woman, in accordance with the consent of her husband, has undergone a procedure as a result of which she has become pregnant—
(a) the husband shall be presumed, for all purposes, to have caused the pregnancy and to be the father of any child born as a result of the pregnancy; and
(b) any man, not being her husband, who produced semen used for the procedure shall, for all purposes, be presumed not to have caused the pregnancy and not to be the father of any child born as a result of the pregnancy.
Section 10C(3) states that the presumption of law which arises by virtue of Section 10C(2) is irrebuttable.

[54] See (1981) 8 F.L.R. 2139.

[55] Ibid.

[56] (1983) 9 F.L.R. 2260.

[57] *Kentucky* v. *Surrogate Parenting Associates Inc.* (1983) 10 F.L.R. 1105.

the court. Of course there is opportuntiy for judicial law-making — but the judge or court "can do so only interstitially", as Mr. Justice Oliver Wendell Holmes Jr. said more than 75 years ago. "They are", he went on, "confined from molar to molecular motions".[58] Today it is agreed on all sides that in a democratic society major changes or developments in the law must be effected by legislation.

In *Syrkowski* v. *Appleyard*, the trial Court ended its judgment by directly seeking legislative intervention:

> "If the State of Michigan is ultimately going to recognize 'surrogate parent arrangements', comprehensive legislation is needed to resolve profound societal concerns relating to rights, obligations and interests of all parties affected by the arrangements."[59]

In his 1981 Southey Memorial Lecture Sir Ninian Stephen put it so:

> "An elected legislature as the identified and visible maker of laws can be seen to be responsive to legitimate pressures, and to the strongly held views of the community. Courts, on the other hand, confer no democratic legitimacy upon the law they make and their judgments are neither responsive to, nor afford any relief for, the pressures of community concern which bear so strongly upon an elected legislature which must periodically go to the people".[60]

Attempts to secure the enactment of enabling and regulating legislation have been initiated in several American States. It is no surprise that Michigan is one of them. House Bill 5184 was introduced in the State legislature a month before judgment was pronounced in *Syrkowski* v. *Appleyard*.[61] Its sponsor, House of Representatives member Richard Fitzpatrick, announced that "surrogate mothering is growing in popularity because it meets the urgently felt needs of those who resort to it better than any other alternative they see".[62] The Bill emphasises the free choices of the participants, and fixes a maximum surrogate mother's fee of $10,000. It sets out a series of requirements for a surrogate mother agreement, and provides for "surrogate adoption" by the wife of the child's father. A similar Bill has been introduced into the Alaskan legislature, and another in South Carolina.[63]

Those who support surrogate mother arrangements seek the speedy enactment of these measures. In their advocacy, they emphasise the goal of enabling an infertile couple to achieve a family. The end, they say, is their happiness. It is "early adoption", and analogous to the employment of donor sperm in those cases where the husband, not the wife, is infertile. AID is a procedure established and acceptable in our and other western democracies, albeit only recently the subject of examination and

[58] In *Southern Pacific Co.* v. *Jensen* (1917) 244 U.S. 205, 221.
[59] Quoted in P. J. Parker, supra fn 27, p.347.
[60] "Judicial Independence — A Fragile Bastion", (1982) 13 M.U.L.R. 334, 342.
[61] Parker, op.cit. p.346.
[62] Ibid.
[63] Freed and Foster, op.cit. p.299.

regulation. In the Michigan draft Bill, the pattern of that state's AID legislation is moulded to the needs of the surrogate situation.[64]

In addition to the considerations and arguments mentioned, biblical episodes which are said to anticipate today's practices are marshalled to support the call for legislation.

VII

The biblical instances are well-known.[65] Are they cogent examples for today's society? All three patriarchs experienced infertility in their marriages. The agony of childlessness, accentuated by the fecundity of her sister, is captured in Rachel's cry to Jacob: "Give me children or I shall die!"[66] Two generations before that Abraham exclaimed, "O Lord God, what will thou give, for I continue childless."[67] Sarah's gift of her maid Hagar to Abraham so that perhaps "I shall be builded up through her"[68] is the first instance proferred by advocates of surrogate motherhood. Rachel copied the example of her husband's grandmother, giving him her maid Bilhah "that she may bear upon my knees and I also may be builded up through her".[69]

In each case, however, the text of the Bible is plain. Sarah gave Hagar to her husband "to be his wife",[70] and the same language is employed for Bilhah.[71] Rachel did name the two sons Bilhah bore to Jacob.[72] But Ishmael is nowhere called Sarah's child. Nor are Dan and Naphtali entitled the sons of Rachel. When Sarah, for whom "it had ceased to be after the manner of women", gave birth to Isaac, she importuned her husband to expel Hagar and Ishmael, so that he would not share the inheritance of her son.[73] Rachel gave birth to Joseph, and died in childbirth after the delivery of her second son, Benjamin.[74] In the complete enumeration of Jacob's twelve sons, they are classified by their mothers: Dan and Naphtali are "The sons of Bilhah, Rachel's maid".[75]

Clearly, Abraham took a second, albeit subsidiary wife, and Jacob a third. It was, despite the splendid example of Isaac and Rebecca, a polygynous society. Jewish legend embellishes the marital character of both these unions. Both Hagar and Bilhah are accorded impressive pedigrees, the latter being described as Rachel's half-sister, born to her father and

[64] Parker, op.cit. p.349.
[65] See, e.g., Herbert T. Krimmel, "The Case against Surrogate Parenting", *The Hastings Center Report*, October 1983, p.35, at p.36.
[66] Genesis 30.1.
[67] Genesis 15.2.
[68] Genesis 16.2.
[69] Genesis 30.3.
[70] Genesis 16.3.
[71] Genesis 30.4.
[72] Genesis 30.6-8.
[73] Genesis 21.10.
[74] Genesis 35.17-18.
[75] Genesis 35.25.

one of his concubines. Hagar and Bilhah both were made freed women before their marriages.[76]

These events reveal, as I said, the deprivation of barrenness. They also reveal the feelings of Sarah (whose example Rachel was constrained to copy), for Abraham. They are no model or pattern for surrogate mothering in today's understanding.

VIII

There is resistance in the U.S.A. to enabling legislation. For instance, in Alabama, a Bill proscribing all surrogate mother arrangements was introduced at the time enabling and validating legislation was appearing in Michigan and other states.[77]

Surrogate mothering has been condemned chiefly because of what was labelled in *Doe* v. *Kelley* as "the mix of lucre and the adoption process".[78] While its supporters have labelled the payments made or promised a fee for the surrogate's services, opponents have called them the price of a child. Which characterisation is right?

It is tempting for a lawyer to employ the criteria used to distinguish between a contract for services and a contract for the sale of goods, say in relation to a commissioned portrait. Using the latter expression is itself significant. The last statement made by Counsel for the Attorney-General of Michigan in *Doe* v. *Kelley*, "and then, because of this monetary reward, relinquish her parental rights to a child she bore",[79] is an effective argument for the conclusion that the money, above any expenses, is the price of the baby.

Child-selling has a long and ugly history. Part of it is as a branch of the larger history of commerce in human beings. In the second half of the last century the practice called baby-farming developed, where unwanted children were boarded out to unscrupulous women, in circumstances where many of the infant boarders died or disappeared.[80] It is paradoxical that that term has come to be used today in connexion with an enterprise where the baby is the desideratum. And more paradoxical still that statutes prohibiting adoption payments, which may be traced in some part to the evils of baby-farming, now stand blocking the path of today's surrogate practices.

In Australia, there has been almost unanimous opposition expressed to trade in human tissue. The Australian Law Reform Commission condemned it in its Report on Human Tissue Transplants, and the statutes

[76] Louis Ginzberg. *Legends of the Bible* (Philadelphia, 1975), pp.108-109, 121-122, 172-176.
[77] Freed and Foster, op.cit. p.299, citing Alabama H.B. p.593.
[78] See (1980) F.L.R. 3011, 3013.
[79] Freed and Foster, op.cit. p.298.
[80] See *Encyclopaedia Britannica*, (1958 ed.) Vol. 2, pp.842-3. Students of Evidence will remember *Makin* v. *Attorney General of New South Wales* [1894] A.C. 57, which provides a local glimpse of the business. The Makins were both convicted of murder.

enacted throughout Australia to give effect to those recommendations, prohibit any payments except by written authority of the Minister.[81]

In its report on Donor Gametes the IVF Committee said that it "considers that it would be inhuman to traffic in human tissue. This is especially apparent where the tissue is male and female gametes".[82] How much more inhuman is the sale of a living child. I regard this as much weightier a consideration than the pragmatic arguments, well-made as they are, that the profit-motive in surrogate mother arrangements will result in suppression of unfavourable medical and psychological and personal information by the would-be surrogate, and could result in serious anxiety levels during the pregnancy, affecting the unborn child.[83] In its submission to the Inquiry into Human Fertilisation and Embryology, the Warnock Committee, the Law Society of England condemned "womb leasing" as undesirable, and proposed consideration of legislation to make it a criminal offence for a woman to offer for reward of any kind to bear a child for another, and for a man or woman to offer such a reward to a woman, or for anyone to act as agent in any such transaction.[84]

If payments other than say, medical or like expenses, are not to be countenanced, there is still the possibility of the volunteer surrogate, who may be compared to the donor of a male or female gamete. While this is a situation far removed from the highly-paid surrogate, and accordingly more attractive, I still find the comparison unacceptable. The gamete donor does not undertake a nine-month pregnancy and delivery of a child who will be disposed for others. The baby born after sperm donation is the biological child of the woman who bears for herself and her husband. Even in the most difficult case, that of embryo donation, the child born is nurtured from embryo to full term and born for herself and her spouse by the woman who received the embryo. She has the pangs and pains; "in sorrow thou shalt bring forth children".[85] The child is not borne for another. There is no real analogy with ordinary adoption, where a child already born is handed over to others. Where a single mother decides not to rear her baby, or where a couple whose circumstances have changed cannot or won't bring up their baby, there is no deliberate creation of a child for others, planned as such from before conception.

An American commentator examining the case of Baby Doe, though focussing on the commercial aspects of the enterprise, wrote this:

> "[H]e was seen and discussed, as a piece of inferior merchandise; an imperfect creature come into the world as damaged goods. . . . It was

[81] See, e.g., ss. 38 and 39 of the *Human Tissue Act* 1982 (Vic.).
[82] At p.18.
[83] See the excellent review by Carolyn Sappideen, "The Surrogate Mother — A Growing Problem", (1983) 6 U.N.S.W.L.J. 79, esp. 93-94, and the references in the notes on those pages.
[84] *The Times*, 20th April 1983. See also the report of advice formulated by the Central Ethical Committee of the British Medical Association: *The Times*, 27th February 1984. And see Postscript.
[85] Genesis 3.16.

> easy to condemn Stiver for feeling no motherly connection to the child, yet surrogate motherhood necessarily precluded those feelings, indeed made reasonable her self-imposed detachment. It was easy, too, to be appalled by Malahoff's rejection, but the baby he originally ordered up was to be his own, not another father's. . . . A procedure has been devised in which a human being is literally conceived as a manufactured product."[86]

It is, I consider, as inhuman to treat a baby as a thing produced as it is to traffic in tissue. All talk about human rights assumes the unique quality of humanness. It was, perhaps, the most terrible lesson of World War II to learn that human beings had been characterised as *untermentschen* — sub-persons, to be dispatched, in many instances, like billets into the infernal furnace of the Moloch of our century.

IX

Of course the goal of surrogate mother arrangements, of having a child borne for others, is human happiness — that of the would-be parents and those close to them. But the means may result in "The Baby in the Factory".[87] It is no new dilemma. One of America's greatest legal philosophers of our century once wrote:

> "To possess the end and yet not be responsible for the means, to grasp the fruit while disavowing the tree, to escape being told the cost until someone else has paid it irrevocably: this is . . . the chief hypocrisy of our time".[88]

So from another source I cull an enquiry framed in harsh terms, which we may feel obliged to ask ourselves, in seeking to avoid Edmond Cahn's indictment. In his great novel exploring the heights and the depths of the human spirit, Fyodor Dostoevsky put this question into the mouth of one of *The Brothers Karamazov*:

> "Imagine that you yourself are building an edifice of human destiny that has the ultimate aim of making people happy and giving them finally peace and rest, but that to achieve this you are faced inevitably and inescapably with torturing just one tiny baby, say that small fellow who was just beating his fists on his chest, so that you would be building your edifice on his unrequited tears — would you agree to be its architect under those conditions? Tell me, and don't lie."[89]

[86] Roger Rosenblatt, "The Baby in the Factory", *Time*, 14th February 1983, p.64.
[87] Ibid.
[88] Edmond Cahn, "Drug Experiments and the Public Conscience", in Lenore L. Cahn, (ed.). *Confronting Injustice: the Edmond Cahn Reader* (Boston, 1962), p.368, p.372.
[89] Originally published in book form in 1880. The quotation is from Book 5, Ch. 4. This translation from the Russian was made by Mr. Boris Christa, M.A., then Lecturer in Russian in the University of Melbourne, for the first edition of Brett and Waller, *Cases and Materials in Criminal Law*, (Melbourne, Butterworths, 1962). It concludes the final chapter, entitled "Subjects and Objects", which sought to examine the theory of objective liability in the criminal law thrown into the sharpest relief in 1960 by the decision of the House of Lords in *D.P.P.* v. *Smith* [1961] A.C. 290. The aftermath of that decision is well known. I leave readers to make their own comparisons between that controversy and this one.

No examination of the issue I have sought to explore, briefly, today, would be complete without an answer to that interrogatory.

POSTSCRIPT

Since this Lecture was delivered there have been further attempts to recruit surrogate mothers by newspaper advertisements in Victoria.[90] In the same month it was revealed that two women in Britain were carrying babies as surrogate mothers, as a result of agreements made by an American agency. The agency charged 15,000 pounds, of which 6,500 pounds was to be paid to the surrogate.[91] In the same week as that news was published a working party established by the U.K. Council for Science and Society presented a report condemning surrogate motherhood contracts. It stated that these could be almost as exploitative as prostitution, and degraded the process of childbirth.[92] The Warnock Committee's report is rumoured to contain recommendations that legislation to ban commercial surrogate motherhood agencies should be enacted in Great Britain.[93]

[90] See *The Age* for the last two weeks of May 1984, especially 24th May 1984.
[91] *The Irish Times*, 25th May 1984.
[92] *The Times*, 24th May 1984.
[93] *The Times*, 16th June 1984.