ESSAY

THIRTEENTH AMENDMENT REFLECTIONS ON ABORTION, SURROGACY, AND RACE SELECTION

Dov Fox†

INTRODUCTION

Pamela Bridgewater's *Breeding a Nation: Reproductive Slavery, the Thirteenth Amendment, and the Pursuit of Freedom* never had a chance.[1] South End Press went under shortly after publishing it in 2006, forcing the book out of print after a limited run.[2] It is next to impossible to get a copy today. The author, a law professor and civil rights activist, passed away in 2014 at age forty-five.[3] Her book has received next to no scholarly attention. That is a shame—its exhaustive history and gifted narration lay bare the program of human breeding that pervaded the antebellum South. Bridgewater shows how slavery was propagated through control over the sex and wombs of enslaved women.[4] These abuses were not just *like* slavery, she argued, but as central to that institution as forced

---

† Professor of Law, Herzog Endowed Scholar, and Director of the Center for Health Law Policy and Bioethics at the University of San Diego School of Law. Many thanks to Michele Goodwin for inviting my contribution to a symposium at UC Irvine on "Trauma, Policing, and the Thirteenth Amendment." The editors of the *Cornell Law Review* helpful revisions. For valuable comments, I am grateful to generous colleagues: Larry Alexander, Roy Brooks, April Cherry, Laurie Claus, Carter Dillard, Don Dripps, Doug NeJaime, Kimani Paul-Emile, Lisa Ikemoto, Craig Konnoth, Andrew Koppelman, Matthew Hughey, Miranda McGowan, Seema Mohapatra, James Gray Pope, Mike Rappaport, and Steve Smith.

1 PAMELA D. BRIDGEWATER, BREEDING A NATION: REPRODUCTIVE SLAVERY, THE THIRTEENTH AMENDMENT, AND THE PURSUIT OF FREEDOM (South End Press 2014).

2 Judith Rosen, *South End Throws in the Towel*, PUBLISHERS WEEKLY (July 24, 2014), https://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/63443-south-end-throws-in-the-towel.html [https://perma.cc/RE2X-DLQF].

3 *UW Law School Mourns the Loss of Pamela Bridgewater Toure '00*, UNIVERSITY OF WISCONSIN-MADISON LAW SCHOOL: LAW SCHOOL NEWS (Jan. 27, 2015), https://law.wisc.edu/current/Articles/UW_Law_School_mourns_the_loss_of_2015-01-21 [https://perma.cc/3XKR-3P49].

4 *See* BRIDGEWATER, *supra* note 1.

labor.[5] Bridgewater concluded that making women have children against their will strikes at the heart of their self-ownership and social fairness—the very liberty and equality that the Thirteenth Amendment was enacted to restore.[6]

This Essay carries these themes into the present day. It asks what the lens of reproductive slavery can teach us about three live controversies: abortion, surrogacy, and race selection. Among these, only abortion bans are vulnerable to a plausible Thirteenth Amendment challenge: namely, that criminalizing abortion access subjects women to "involuntary servitude." Pregnancy and childbirth are not as coercive in most contract surrogacy, when a woman agrees in advance to carry a child for someone else. That does not necessarily make her gestational service voluntary in the meaningful sense that gives its performance moral force—but it almost certainly has constitutional force for Thirteenth Amendment purposes. The final reproductive context under review here is fertility mix-ups in which assisted procreation patients end up with a baby of a different racial background. Negligence suits in these cases push the limits of Bridgewater's analysis. They evoke the racial division and hierarchy that animate what the U.S. Supreme Court has called the "badges and incidents" of slavery.[7]

Most people think of American slavery as the distinguishing institution of shackled auctions and plantation lashings.[8] This is the institution that the Civil War extinguished with its commitment that "neither slavery nor involuntary servitude . . . shall exist within the United States."[9] The Thirteenth Amendment codified the emancipation of former slaves—but it did more, too. During the Reconstruction-Era Black Codes, that constitutional guarantee also proscribed the bondage and chain gangs that bound debtors and their children to labor indefinitely with little if any prospect of ever paying back what they owe.[10] But more than a few courts and commentators since have sought to limit

---

5 *See id.*

6 *See id.*

7 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968).

8 *See* Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1736, 1740 (2012) (arguing that "the scopes of [slavery, involuntary servitude, and punishment] were well understood . . . at the time of the [Thirteenth] Amendment's adoption and [] remain well understood today").

9 U.S. Const. amend. XIII.

10 *See* Slaughter-House Cases, 83 U.S. 36, 72 (1873) (holding that "[w]hile the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude").

the reach of the Thirteenth Amendment to this eradication of peonage and chattel slavery.[11] Bridgewater rejected such cramped understandings.[12] She was not the first: Other scholars have proposed applying the Thirteenth against race-based denials of equal rights to own property, make contracts, or participate in court.[13] Some invoke that Amendment more generously to prohibit all kinds of oppressive conduct—from child labor, child abuse, and domestic violence to hate crimes, sex trafficking, and capital punishment.[14] Bridgewater built on these claims to argue that constitutional abolition was capacious enough to bar conditions of domination over matters of pregnancy and parenthood.[15] This is her core insight that this Essay will try to extend to the present-day contexts of abortion, surrogacy, and race selection.

I
ABORTION

Just one court has ever discussed the Thirteenth Amendment case against severe abortion limits—laws that are even more restrictive than those that impose minimally "undue burden[s]" under the Fourteenth.[16] In 1992, several women challenged the Utah law that made abortion a crime unless

---

11 *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 25 (1883); David P. Currie, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 400–01 (1985); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 217 (1991).

12 *See* BRIDGEWATER, *supra* note 1.

13 *See* MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY: 1810–1860, at 6, 33 (1981); James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 486 (2018).

14 *See* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 126, 155–56 (1992); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359, 1365, 1384 (1992); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 999 (2002); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 20, 93 (2004); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 47–49 (1995); Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 COLUM. J.L. & SOC. PROBS. 519, 556 (1995); Sarah C. Courtman, Comment, *Sweet Land of Liberty: The Case Against the Federal Marriage Amendment*, 24 PACE L. REV. 301, 328 (2003); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1098 (1998); Dawinder S. Sidhu, *Threshold Liberty*, 37 CARDOZO L. REV. 503, 541 (2015).

15 *See* BRIDGEWATER, *supra* note 1.

16 Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah 1992), *aff'd in part and rev'd in part on other grounds*, 61 F.3d 1493 (10th Cir. 1995).

"necessary to save [the mother's] life," prevent "grave damage to the pregnant woman's medical health," or respond to "grave defects" in the fetus.[17] The women argued that the law violated their guarantee of freedom from involuntary servitude by forcing them to carry and bear children.[18] The Tenth Circuit court recoiled from the comparison between abortion and slavery.[19] Judge Thomas Greene wrote that the constitutional analogy "strains credulity" and "borders on the frivolous," noting that abortion was still widely forbidden (for whites too) when the Amendment abolishing slavery was enacted in 1865.[20] Senators and scholars piled on: Arlen Specter condemned the view "that abortion bans go beyond the Thirteenth Amendment, which bans slavery" as "candidly, beyond the pale."[21] Steve Smith called it a "hatrabbit operation" to widen the Thirteenth "beyond what its authors could have contemplated."[22] John McGinnis wrote off the anti-servitude challenge to *de facto* abortion bans as "a pun on labor" more than an argument "seriously advanced in a court of law."[23]

The argument was not new to the courtroom. It dates back to an amicus brief filed in *Roe v. Wade*,[24] and two more in *Webster v. Reproductive Health Services*, the 1989 case in which the Supreme Court affirmed the Fourteenth Amendment right that *Roe* had set forth in 1973.[25] A handful of scholars—Loretta Ross, Laura Sjoberg, Laurence Tribe, Norman Vieira—have endorsed the view that severe abortion constraints amount to "involuntary servitude."[26] None have developed that

---

17 UTAH CODE ANN. § 76–7–302(2)(a), (d), (e) (West 1991).

18 *Bangerter*, 794 F. Supp. at 1548.

19 *See id.* at 1548–49, 1551 n.16.

20 *Id.*

21 *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, 111th Cong. 345 (2009) (statement of Sen. Specter).

22 Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583, 631 n.130 (1993).

23 John O. McGinnis, *Decentralizing Constitutional Provisions Versus Judicial Oligarchy: A Reply to Professor Koppelman*, 20 CONST. COMMENT. 39, 56 (2003).

24 Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 6, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

25 Brief for Organizations and Named Women as Amicus Curiae Supporting Appellee, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605); Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees at 11 n.23, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

26 *See* Loretta Ross, *Why Not Use the 13th and 14th Amendments to Achieve Reproductive Freedom*?, *in* REFLECTIONS AFTER CASEY: WOMEN LOOK AT THE STATUS OF REPRODUCTIVE RIGHTS IN AMERICA 17 (Center for Constitutional Rights ed.,

Thirteenth Amendment claim as rigorously as Andrew Koppelman did in a 1990 law review article.[27] There, he argued that certain abortion restrictions can mandate motherhood and deprive "control over one's reproductive capacities" in ways "partially *constitutive* of slavery for most black women of childbearing age."[28] The kinds of restrictions he had in mind were not limited to direct punishment of women themselves. The Supreme Court has held that any practices that the Thirteenth Amendment forbids an actor from "do[ing] directly, it may not do indirectly," either.[29] So his argument also applies to laws that have the effect of banning abortion, as by giving husbands veto power or barring medical specialists from providing it.[30]

Koppelman does not say that abortion restrictions necessarily violate the Thirteenth Amendment—he contends that consigning women to reproductive service triggers scrutiny under that bar on involuntary servitude.[31] Abortion bans impose "servitude" because bearing a child is "arduous, tiring and obstructive of other work"—indeed, contractions are among "the most strenuous work of which the human body is capable."[32] And this servitude is "involuntary" when a woman is prevented from refusing it. The work of carrying a pregnancy is obviously involuntary when a woman became pregnant because she was raped: She cannot possibly invite or sanction the consequences that follow from any sex act to which she does not consent. But neither does she assume such risks simply by agreeing to intercourse. And she does not accept sole and unalterable responsibility for managing them. Eileen

---

1993); Laura Sjoberg, *Where are the Grounds for the Legality of Abortion? A 13th Amendment Argument*, 17 CARDOZO J.L. & GENDER 527, 542–46 (2011); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335, 337 (1985); Norman Vieira, *Hardwick and the Right to Privacy*, 55 U. CHI. L. REV. 1181, 1189–91 (1988).

27 Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

28 *Id.* at 508.

29 Bailey v. Alabama, 219 U.S. 219, 244 (1911) (alteration in original).

30 Koppelman, *supra* note 27, at 527–30. For refinement and elaboration, see ANDREW KOPPELMAN, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion, in* PROMISES OF LIBERTY: THIRTEENTH AMENDMENT ABOLITIONISM AND ITS CONTEMPORARY VITALITY (Alexander Tsesis ed., 2010); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012).

31 Koppelman, *supra* note 27, at 484.

32 Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 23–24, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

McDonagh explains:

> Sexual intercourse merely causes the risk that pregnancy will occur, and consent to engage in sexual intercourse with a man, for any and all fertile women, implies consent to expose oneself to that risk. . . . Consent to jog alone in Central Park does not stand as a proxy for consent to be mugged and raped, should others so attack you.[33]

Consent to sex, even without contraception, does not thereby imply agreement to become pregnant, let alone to carry a fetus to term and give birth to a child.

Abortion bans inflict real harm. They deprive a woman of not only bodily integrity and individual agency in charting the course of her life, but also what Justice Ruth Bader Ginsburg has called "equal citizenship stature" as compared with men.[34] In earlier writings, she argued that exacting limits on abortion can express or entrench traditional sex roles: "It was man's lot, because of his nature, to be breadwinner, head of household, representative of the family outside the home; and it was woman's lot, because of her nature, not only to bear, but also to raise children, and keep the home in order."[35] These reflections buoy the position that abortion bans may impose a form of involuntary servitude that keeps women in their place. But there are glaring contrasts with the pre-abolition strain of forced gestation at the heart of Bridgewater's book. Koppelman himself concedes that the modern injuries are "lesser in degree than that inflicted on blacks by antebellum slavery, since it is temporary and involves less than total control over the body."[36] There are other differences too. Hereditary stereotypes of racial inferiority do not superimpose modern assumptions that women are mothers by nature, like for those who were enslaved before the Civil War. Nor are offspring thereby condemned to bondage when women today are forced to give birth under any laws that operate to keep them from terminating them pregnancies. The constitutional analogy is plausible, but hardly uncomplicated.

What is more, not every instance of involuntary servitude

---

33 EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 66 (1996).

34 Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

35 Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. 17, 19 (1988).

36 Koppelman, *supra* note 27, at 487; *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 45 (1997) (distinguishing forced pregnancy from "the slave picking cotton under the overseer's lash").

runs afoul of the Thirteenth Amendment. Ostensible violations may be justified under extreme circumstances to fend off even greater injustice or serve even more compelling state interests. In the abortion context, the foremost interest that restrictions invoke is that in preserving prenatal life from destruction. This interest is distinct from any that the fetus might have in itself, as the state of Texas argued unsuccessfully in *Roe v. Wade*.[37] The Supreme Court rejected Texas's claim of fetal personhood on the ground that "the unborn have never been recognized in the law as persons" or "accord[ed] legal rights."[38] The majority in *Roe* held that not even a fully developed fetus has interests of its own, apart from the interest in potential life that the *state* has in *it*.[39] The strength of that interest grows from the "outset of the pregnancy," as the woman approaches term, until, "at a later point in fetal development," it "has sufficient force so that" even a fundamental right "can be restricted."[40] The Court has held that, after the stage of viability, this interest can override the substantive due process right to terminate one's pregnancy under the Fourteenth Amendment.[41] But if the bar is higher to overcome would-be infringements of the Thirteenth, then even the potential-life interest probably will not "justify systematically subjecting women to involuntary servitude."[42] Only a stronger interest still, such as fetal personhood or species preservation, might be capable of carrying that level of justificatory force.

To be clear, however, the Thirteenth Amendment challenge to abortion bans withstands the common objections to it. That argument neither undervalues the magnitude of childbirth nor disparages the nobility of motherhood.[43] In 1916, the Supreme Court upheld a World War I-era statute that required every able-bodied man to build roads and bridges for six days a year.[44] That decision in the case of *Butler v. Perry* said that it was not "involuntary servitude" to make people perform certain obligations that they legitimately "owe to the state, such as

---

37 410 U.S. 113, 163 (1973).

38 *Id.* at 156, 161–62.

39 *Id.* at 163.

40 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 869 (1992). For discussion, see Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 294–98 (2014).

41 *Casey*, 505 U.S. at 846.

42 Koppelman, *supra* note 27, at 517–18.

43 *See id.* at 518–20; *see also* Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1607 n.55 (1979).

44 Butler v. Perry, 240 U.S. 328, 333 (1916).

services in the army, militia, on the jury, etc."[45] But pregnancy and motherhood are not this same sort of civic or "noble duty"—that is the phrase the Court used two years later to describe the kinds of community-preserving activities that are deemed necessary to secure our country's existence or sustain its core freedoms.[46] In a 1977 abortion case, Justice William Brennan remarked that the United States is this day and age free of any serious "demographic concerns" that "the rate of its population growth" is too low.[47] His observation rings even truer today, when the country supports 100 million more people than it did when he first made the point more than forty years ago.[48]

Non-demographic claims on the noble duty exception do not work any better to immunize abortion bans from Thirteenth Amendment scrutiny. The Court has long repudiated Justice Joseph Bradley's 1863 declaration that "[t]he paramount destiny and mission of woman" is "to fulfill the noble and benign offices of wife and mother."[49] An unwanted pregnancy is no blessing for the woman who does not want to carry a fetus or give birth to a child. In some cases, pregnancy risks medical dangers or serious disorders to woman or child. Other couples might feel ill-suited to parenthood, or prefer to steer their lives in a different direction. Those who have children already may lack the energy or resources to provide for more. To insist that all pregnant women are better off for the very role they reject is specious and patronizing. It is almost like saying that forced intercourse is not rape simply because people often enjoy sexual intimacy.[50] Whether sex is wanted or not is what differentiates it as fulfilling or felonious.[51] The wantedness of procreation can likewise mark the difference between its being mostly good or bad, uplifting or damaging, for the person who experiences

---

45 *Id.* at 332–33.

46 Arver v. United States, 245 U.S. 366, 390 (1918). Other examples include pretrial detention of material witnesses to a trial, *Hurtado v. United States*, 410 U.S. 578, 589 n.11 (1973), and compulsory vaccination for a fatal, common, and highly communicable disease, *Jacobson v. Massachusetts*, 197 U.S. 11, 29–30 (1905).

47 Maher v. Roe, 432 U.S. 464, 489–90 n.11 (1977) (Brennan, J., dissenting).

48 US Population by Year, MULTPL, http://www.multpl.com/united-states-population/table [https://perma.cc/7F69-CLAA] (last visited Feb. 16, 2019).

49 Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J. concurring). *Contra* Stanton v. Stanton, 421 U.S. 7, 14–15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.").

50 *See* Koppelman, *supra* note 27, at 488.

51 *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 35 (1988).

it.[52]

II
SURROGACY

The Thirteenth Amendment claim is less plausible in the surrogacy context. But viewing these disputes through the constitutional bar on involuntary servitude still bears fruit because it sheds light on what coercion means within complex power structures. In the late-1980s, Americans were gripped by the surrogacy battle over a little girl who was torn between two names, two homes, and two loving families. Surrogate mother Mary Beth Whitehead and her husband ran off with the child known as Baby M. This was after Whitehead accepted $10,000 from the commissioning couple, William and Elizabeth Stern. In exchange, Whitehead had agreed not only to gestate and give birth, but also to turn the little girl over to the Sterns, who would then be named her legal parents.[53] But the New Jersey Supreme Court voided the contract on policy grounds—on remand, the Sterns won custody, and Whitehead was awarded visitation.

Lost amidst fervid media coverage of this unfolding drama were judicial invocations of the constitutional prohibition on involuntary servitude. At the trial court level, Judge Harvey Sorkow "urgently agree[d]" with Whitehead's contention that enforcing the surrogacy contract would have subjected her to reproductive slavery. Judge Sorkow appealed explicitly to the Thirteenth Amendment for his legal judgment that "to produce or deal with a child for money denigrates human dignity."[54] But this view was dictum, not controlling precedent. Judge Sorkow ultimately declined to nullify the surrogacy agreement on Thirteenth Amendment grounds because he had "already held the contract unenforceable on the [alternative] basis of state law," making the constitutional conclusion unnecessary.[55]

And yet scholars since have elaborated on the Thirteenth Amendment case against surrogacy contracts—including in cases in which gestational carriers are not, like Mary Beth Whitehead, genetically related to the resulting child. Critics say that viewing surrogacy as nothing more than a valuable

---

52 *See* Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 477–79 (2013).

53 In re Baby M, 537 A.2d 1227, 1235–40 (N.J. 1988).

54 In re Baby M, 525 A.2d 1128, 1157 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 537 A. 2d 1227 (N.J. 1988).

55 *In re Baby M*, 537 A.2d at 1245–64, 1253 n.12.

service and free-market exchange misses the ways in which that practice trades on inequalities of sex and status. On this account, surrogacy enforcement treats women in desperate circumstances as human breeders, by pressuring them to suppress the emotional bonds that most cannot help but develop with the offspring they bear.[56] For Patricia Williams, surrogacy agreements echo the "heavy-worded legalities" that had been used to justify forcing her own enslaved forebear, more than a century earlier, to gestate a child as property for her slaveholder.

> My great-great-grandmother's powerlessness came about as the result of a contract to which she was not a party; Mary Beth Whitehead's powerlessness came about as a result of a contract that she signed at a discrete point of time—yet which, over time, enslaved her.[57]

Some grants of consent—to sex or a police search, for example—can be withdrawn or revoked at any time, at least if that change of heart is made clear. Others—military enlistment or commitment to a rehab center—cannot be undone so easily, if at all. In a similar vein, even where a person consents by contract to enter into a relationship of servitude, that servitude can still be involuntary for constitutional purposes. For example, in *Bailey v. Alabama*, the Supreme Court held that the Thirteenth Amendment barred a Jim Crow anti-fraud statute that made it a crime to "refuse to perform" labor contracts.[58] The Court explained that punishing such refusal effectively compelled "service in

---

56 *See* Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 470–71 (2004); April Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 89–93 (2001); Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKLEY WOMEN'S L.J. 29, 48–54 (1993); Jamie Levitt, *Biology, Technology and Geneology: A Proposed Uniform Surrogacy Legislation*, 25 COLUM. J.L. & SOC. PROBS. 451, 459–60 (1992); Mark R. Patterson, *Surrogacy and Slavery: The Problematics of Consent*, *in* Baby M, 8 AM. LITERARY HIST. 449, 459–60 (1996); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 250–51 (1995); Mary Lyndon Shanley, *"Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction*, 18 SIGNS 618, 624 (1993); Lorraine Stone, *Neoslavery—"Surrogate" Motherhood Contracts v. The Thirteenth Amendment*, 6 L. & INEQ. 63 (1988); Yvonne M. Warlen, *The Renting of the Womb: An Analysis of Gestational Surrogacy Contracts Under Missouri Contract Law*, 62 UMKC L. REV. 583, 583–84 (1994); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1937–39 (1986).

57 PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 225–26 (1991).

58 219 U.S. 219, 238 (1911).

payment of a debt."[59]

Cross-border surrogacy—though ostensibly agreed-to—often resembles the control of debt slavery more than the reciprocity of free contracts.[60] In countries like India, Nepal, and Thailand, agencies recruit surrogates from a destitute underclass for whom "[t]his is not work, this is *majboori* [helplessness]. . . . it's just something we *have* to do to survive."[61] Western couples come to the bargaining table in a vastly superior position afforded by their greater wealth and education. And contracts are frequently enforced by threat or force. April Cherry is among scholars—including Khiara Bridges, Michele Goodwin, Lisa Ikemoto, and Seema Mohapatra—who identify "gender hierarchy, class oppression, subordination based on race and ethnicity" when "impoverished third world women provid[e] reproductive services for the benefit of individuals in the first world."[62] When poverty persists, its coerciveness generates what Margaret Radin calls a double bind:

> If poverty can make some things nonsalable because we must prophylactically presume such sales are coerced, we would add insult to injury if we then do not provide the would-be seller with the goods she needs or the money she would have received. If we think respect for persons warrants prohibiting a mother from selling something personal to obtain food for her starving children, we do not respect her personhood more by forcing her to let them starve instead.[63]

The double bind complicates the moral case for preventing people from trading their freedom, organs, sex, or gestation to survive or support their families under conditions of social, legal, and economic compulsion.[64]

But disparities are rarely so stark in the United States,

---

59 *Id.* at 241–42.

60 *See* Khiara M. Bridges, *Windsor, Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1133 (2014); Michele Goodwin, *Reproducing Hierarchy in Commercial Intimacy*, 88 IND. L.J. 1289, 1293 (2013); Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 J.L. & INEQ. 277, 286 (2009); Seema Mohapatra, *Stateless Babies and Adoption Scams: A Bioethical Analysis of Commercial Surrogacy*, 30 BERKELEY J. INT'L. L. 412, 439 (2012).

61 Amrita Pande, *Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN J. GENDER STUDIES 141, 14560 (2009).

62 April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy, Some Thoughts on Reproductive Tourism, Autonomy & Justice*, 17 U. PA. J.L. & SOC. CHANGE 257, 271 (2014).

63 Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1910–11, 1917 (1987).

64 *See* MARILYN FRYE, THE POLITICS OF REALITY 2–6 (1983).

where surrogates retain rights to privacy, informed consent, and bodily integrity.[65] American surrogates are less likely to be illiterate, economically vulnerable, or otherwise disadvantaged when negotiating terms of their reproductive work.[66] In the U.S., "most surrogate mothers are in their twenties or thirties, White, Christian, married, and have children of their own."[67] A 2017 study of 124 surrogates identified at California agencies found that they experienced greater obstetrical complications and longer hospital stays, as compared with pregnancies those same women had carried to term without any arrangement.[68] The researchers speculated that adverse outcomes may have something to do with the higher prescription rates for fertility drugs or implantation with multiple embryos that are set forth under the terms of some surrogacy agreements.[69] On the other hand, power differentials between the parties might also invert after a pregnancy begins, at which point the commissioning parents may feel more pressure "to acquiesce to the surrogate's every whim for fear of surrogate breach."[70] These agreements are not enforced under any criminal law like the labor contract in *Bailey*.[71] A surrogate cannot be locked up for refusing to carry or continue a pregnancy in the way to which she had agreed.[72] Liquidated damages and other kinds of civil remedies—short of specific performance—keep a surrogate from laboring under the legal or physical compulsion that Bailey was.[73] To be sure,

---

65 *See* Sonia Allan, *The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations*, *in* SURROGACY, LAW, AND HUMAN RIGHTS 113, 129 (Paula Gerber & Katie O'Byrne eds., 2015); Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy Contracts*, 61 J. SOC. ISSUES 21, 30–31 (2005); Vicki C. Jackson, Baby M *and the Question of Parenthood*, 76 GEO. L.J. 1811, 1816–20 (1988); Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL'Y & L. 555, 560 (2013); Julie Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1352–53 (2014).

66 *See* Olga B.A. van den Akker, *Psychosocial Aspects of Surrogate Motherhood*, 13 HUM. REPROD. UPDATE 53, 56-57 (2006).

67 Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 611 J. SOC. ISSUES 21, 31 (2005).

68 *See* Irene Woo et al., *Perinatal Outcomes After Natural Conception Versus In Vitro Fertilization (IVF) in Gestational Surrogates: A Model to Evaluate IVF Treatment Versus Maternal Effects*, 108 FERTILITY & STERILITY 993 (2017).

69 *See id.* at 994–96.

70 *See* Deborah S. Mazer, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J.L. & FEMINISM 211, 226 (2016).

71 Bailey v. Alabama, 219 U.S. 219, 230 (1911).

72 Nor can she be compelled to comply with an earlier promise to undergo an unwanted abortion or caesarian section.

73 *See* Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2372–73 (1995); Pamela Laufer-

courts can still make her transfer parental rights pursuant to a valid contract. And this may be tragic—to make a surrogate surrender the baby she gestated and birthed and longs to keep. Enforcing her promise to relinquish over her present objection to raise him may be "involuntary." But it is not "servitude."[74]

Surrogacy disputes can risk taking on racialized meanings when a surrogate carries a baby of a different ethnicity or race. Mary Beth Whitehead was white like Baby M and the Sterns. Even those skeptical of Whitehead's legal claim appreciated her "deep, biologically rooted sense of maternal desire" for the baby she gestated and birthed.[75] Black surrogate Anna Johnson's claims received far less solicitude after she was implanted with an embryo from the sperm and egg of intended parents Mark and Crispina Calvert, who were white and Filipina.[76] Johnson was denied the visitation rights awarded to Whitehead. Valerie Hartouni argues that the racial difference between Johnson and the baby is what made her maternal bond appear "deviant" enough for the judge in her case "to pathologize it as criminal" and "dismiss it as groundless."[77] For Dorothy Roberts, *Johnson v. Calvert* summons a "vision of Black women's wombs in the service of white men."[78] Hartouni and Roberts remind us that race can shape understandings of American kinship. But the connection they draw between Anna Johnson and the "[s]lave women" who were "compelled to breed" prior to the Thirteenth Amendment is unconvincing.[79] Doug NeJaime and Buffie Scott give good reason to think that the

---

Ukeles, *The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, 43 N.C. J. INT'L L. 96, 134–35 (2018). This is not to overlook the very real and heart-rending cases of court-ordered cesareans and state restrictions on where, when, and how drug-addicted and other badly-off women have their babies. *See* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CAL. L. REV. 781, 816–18 (2014).

74 *See* Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 142–44 (1990); Sarah S. Boone, *Slavery and Contract Motherhood: A "Racialized" Objection to the Autonomy Arguments*, *in* ISSUES IN REPRODUCTIVE TECHNOLOGY I: AN ANTHOLOGY 349, 351 (Helen Bequaert Holmes ed., 1992); John Robertson, *Surrogate Mothers: Not so Novel After All*, 13 HASTINGS CENT. REP. 28, 32, 33 (1983); Bonnie Steinbock, *Surrogate Motherhood as Prenatal Adoption*, 16 L. MED. & HEALTH CARE 44, 48 (1988).

75 VALERIE HARTOUNI, CULTURAL CONCEPTIONS: ON REPRODUCTIVE TECHNOLOGIES AND THE REMAKING OF LIFE 91 (1997).

76 *See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993); Martin Kasindorf, *And Baby Makes Four*, L.A. TIMES MAG., Jan. 20, 1991, at 10–11; Seth Mydans, *Science and the Courts Take a New Look at Motherhood*, N.Y. TIMES, Nov. 4, 1990, at E6.

77 Hartouni, *supra* note 75, at 91.

78 Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 263–64 (1995).

79 *Id.*

visits awarded to Whitehead and not Johnson probably had far more to do with the fact that Whitehead alone, since her own egg was used to conceive, also shared DNA with the child she gestated and gave birth to.[80]

III
RACE SELECTION

Allusions to reproductive slavery emerge in a third context when white fertility patients complain that embryo or donor services unexpectedly gave them a baby of color.[81] This analogy seems misplaced in the absence of any person or group who might plausibly be subject to the servitude identified in the first section of the Thirteenth Amendment. But that Amendment also has a second section which empowers Congress to enforce abolition "by appropriate legislation."[82] In the 1968 case of *Jones v. Alfred H. Mayer Company*, the Supreme Court held that Section Two authorizes Congress "to eradicate the last vestiges and incidents of a society half slave and half free," what the Court referred to as the "badges and incidents of slavery."[83] This phrase finds no expression in the Constitution's text. As examples, the *Jones* Court mentioned restraints on the ability to "purchase, lease, sell and convey property," but otherwise left it to Congress to define.[84] While scholars agree that it includes more than release from shackles and peonage, there is "no generally accepted understanding as to [its more precise] meaning."[85]

Jennifer Cramblett invoked these open-ended marks of slavery in her negligence claim against the sperm bank that

---

80 *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2302 (2017); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 121–23 (2009).

81 *See* Andrews v. Keltz, 38 N.Y.S.2d 363, 368 (N.Y. Sup. Ct. 2007); Dorinda Elliot & Friso Endt, *Twins—With Two Fathers: A Fertility Clinic's Startling Error*, NEWSWEEK, July 3, 1995, at 38; Mark Fuller, *Tube Twins From Different Sperm*, TIMES, June 20, 1995; Dareh Gregorian, *Fertility Clinic Is Sued on Egg Mixup*, N.Y. POST, Mar. 27, 1999, at 1; Michael Lasalandra, *Woman, Ex and Hospital Settle Over Sperm Mixup*, BOSTON HERALD, Aug. 27, 1998, at 12; Marlise Simons, *Uproar Over Twins, and a Dutch Couple's Anguish*, N.Y. TIMES, June 28, 1995, at A03; Ronald Sullivan, *Sperm Mix-Up Lawsuit Is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4.

82 U.S. CONST. amend. XIII.

83 392 U.S. 409, 441 n.78 (1968).

84 *Id.* at 440–41; *see also id.* at 445 (Douglas, J., concurring). The expression has much longer standing pedigree in constitutional doctrine. For discussion, see ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 137–60 (2004).

85 Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 564 (2012).

thwarted her efforts to select a white donor. According to her wrongful-birth complaint, Cramblett was raised "around stereotypical attitudes about people other than those in her all-white environment." Her relatives spoke "openly and derisively about persons of color," and Cramblett "did not [even] know [any] African Americans" by the time she left home for college. Then she gave birth to an "obviously mixed race[] baby girl." Cramblett knew a thing or two about not fitting in, having grown up a lesbian in a small conservative farm town. So when she and her wife Amanda Zinkon decided to start a family, they wanted a sperm donor who looked like them—starting with one who was white like they are. Among hundreds of white donors, No. 380 stood out because he also shared Zinkon's blond hair and blue eyes. Cramblett's features would already be reflected in the child, they figured, since she would be contributing her DNA when she carried the pregnancy.[86]

After the first trimester, Cramblett called the sperm bank to order additional samples from the same donor, so that their daughter-to-be could have a biological sibling. "Okay, you want eight vials of sperm from *Donor No. 330*," the receptionist confirmed with Cramblett: "No, I said . . . *No. 380*." Asked if she had "requested an African American donor," Cramblett replied, "[W]hy would I . . . ? My partner and I are Caucasian." The technician who had retrieved their sperm sample from the lab misread the handwritten note recording their donor preference. The switch did not deny either of them any greater or lesser biological connection to their child that they otherwise would have enjoyed. If they had gotten the donor they had selected, half of the girl's genetics would still have come from Cramblett, while the other half still would not have come from Zinkon, but an anonymous donor (just a different one). And as far as they could tell, the only salient difference between the donor they chose and the one they got is that one identified as white, the other as black. Front and center in Cramblett's complaint was that they had expressed a clear preference for a white donor, and got a black one. She objected to getting a

---

86 *See* Complaint for Wrongful Birth and Breach of Warranty at 6–7, Cramblett v. Midwest Sperm Bank, LLC, 2014 WL 4853400 (Ill. Cir. Ct. Sept. 29, 2014) (No. 2014-L-010159). For discussion, see Joe Mullin, *White Woman Sues Sperm Bank—Again—After Getting Black Man's Sperm*, ARSTECHNICA (Apr. 25, 2016, 6:33pm), https://arstechnica.com/tech-policy/2016/04/white-woman-sues-sperm-bankagainafter-getting-black-mans-sperm/ [https://perma.cc/4E2E-375P]; Meredith Rodriguez, *Lawsuit: Wrong Sperm Delivered to Lesbian Couple*, CHI. TRIB. (Oct. 1, 2014, 7:22am), http://www.chicagotribune.com/news/local/breaking/ct-sperm-donor-lawsuit-met-20140930-story.html [https://perma.cc/5U3D-9WQG].

baby of color—one who is no less healthy or genetically related to them than she would have been if they had gotten the donor they wanted.[87]

Cramblett tried to make the racial difference about what would be better for their daughter—or, more precisely, for the hypothetical white child who might otherwise have been born in her place. Cramblett argued that she and Zinkon lacked the "cultural competency" of personal experience or practical resources to navigate the "challenges [of] transracial parenting."[88] They had never had to confront racist stereotypes themselves, or learn about African-American history and culture, or even make black friends, let alone braid hair with kinks in it. So how could they help their child develop a healthy racial identity or acquire the tools she would need to deal with discrimination and navigate a race-conscious society?

One response is that it is not obviously better for a child to think about race as central to her identity, or to learn about it in conventional terms, than it is to see it as a less defining or familiar feature of herself. Another is to wonder whether Cramblett and Zinkon will actually be disadvantaged in raising their daughter-of-color by the fact that they themselves have not experienced the racism that she likely will. Professor Richard Banks asks:

> [W]hy would one conclude that [black parents] have been ennobled rather than damaged by such experiences? And why would white parents not have benefited from all their years spent on the white side of the racial divide? Who better than a white parent to explain to a black child how white people are likely to view and respond to him? It is as plausible that white parents might have useful knowledge about race that black people lack, as it is that black people may have developed unique and beneficial insights as a result of their experiences.[89]

Empirical evidence supports this view. Or at least it does not substantiate the intuition that a child's interests in identity-formation or coping-skills are better served by being raised in a same-race household than by parents of different races. There are not any studies comparing mixed-race children born

---

87 *See* Complaint at 4–5, Cramblett v. Midwest Sperm Bank, LLC, No. 2014-L-010159 (Ill. Cir. Ct. Sept. 29, 2014).

88 Complaint at 5, Cramblett v. Midwest Sperm Bank, LLC, 230 F. Supp. 3d 865 (N.D. Ill. 2017) (No. 16-c-4553).

89 Ralph Richard Banks, *The Multiethnic Placement Act and the Troubling Persistence of Race Matching*, 38 CAP. U. L. REV. 271, 288–89 (2009).

of assisted reproduction to black parents as opposed to white ones. But the best studies of black children adopted by white-versus-black parents show that children raised in multiracial families fare as well as same-race adoptees on standard measures of self-esteem, educational achievement, and social and psychological adjustment.[90]

This suggests that Cramblett's complaint was not just about her daughter's welfare. It was also about Cramblett's own loss associated with her frustated expectations that she, Zinkon, and their child would continue to realize the comforts and convenience associated with whiteness. Having a child of color marked her as yet another kind of outsider among her "insensitive family" and "all-white environment" in which "schools were better." Cramblett had long sought to cover her own stigmatized same-sex orientation. But her daughter's unexpectedly African American features were "irrepressible." The girl's mixed race disrupted Cramblett's vision of a family life that would help to normalize her standing among relatives and neighbors who had struggled to accept their lesbian relationship. Instead, the mix-up further alienated her from peers and loves one, driving her and Zinkon to move "far from where [they] live" to a more diverse neighborhood where the schools were worse and they had no friends, but at least they could find someone to cut their daughter's hair and the family would not be made to feel so unwelcome.[91]

Cramblett's lawsuit sounds in the register of racial division. She laments the fact that she expressed a clear preference for a child who would be identifiably white, and instead got one who was black. Her objection to getting a healthy baby of color—no more or less related than she would have been if they had gotten the donor they wanted—calls forth an enduring history of racial bias, discrimination, and hierarchy.[92] And it risks sending a message that purely white babies are better, or more worth having, in a way that makes others not as good, and their substitution a cause for protest as a matter of law. But that expressive connection to the modern remnants of slavery is not enough to make her

---

90 *See* RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION, RACE, AND IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD 221–23 (2d ed. 2002); David D. Meyer, Palmore *Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL'Y 183, 202 (2007).

91 Complaint at 5, Cramblett v. Midwest Sperm Bank, LLC, No. 1:16-cv-04553 (N.D. Ill. Apr. 22, 2016).

92 *See* W. Carson Byrd & Matthew W. Hughey, *Biological Determinism and Racial Essentialism: The Ideological Double Helix of Racial Inequality*, 661 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 13 (2015).

complaint one of the badges and incidents that Cramblett invokes. Section Two of the Thirteenth Amendment does not empower Congress to stamp out every practice that risks perpetuating racial inferiority, whether by design or effect.[93] This command more plausibly targets pervasive or prominent wrongs like segregation, miscegenation, and racially restrictive covenants. These are conditions that more closely and clearly echo the ways in which slavery imperiled core rights and freedoms.[94]

Cramblett's lawsuit was ultimately dismissed for violating state policy against recognizing claims for "wrongful birth."[95] But that label mischaracterizes her grievance. She does not regret her daughter's existence or wish that she had not been born. And she is not saying that her daughter is illegitimate or unworthy of her love. Any implication that she regards the girl's birth as in any sense "wrongful" is a lamentable relic of an outdated nomenclature. Her point is that black-white mismatches can disadvantage families who reside in places that remain hostile to racial difference. They pay a price of bias and discrimination. Cramblett sued to affirm the residential, educational, and other privileges that she had hoped to enjoy by parenting a child whose shared whiteness would have made it easier for her to assimilate and prosper. Her petition gives reason for pause, but not because it negates the aphorism that babies are blessings. The problem is that it sounds in the register of racial division. Specifically, she sought to offset the very harms that millions of black families endure every day without cause for challenge. Only for Cramblett did the systemic injustices at issue result from medical negligence. What makes her complaint so remarkable

---

93 *See* G. Sidney Buchanan, *The Thirteenth Amendment and the Badge of Slavery Concept: A Projection of Congressional Power*, *in* THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT 175, 177 (1976); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 116 (1990).

94 *See Jones*, 392 U.S. at 441–43; United States v. Nelson, 277 F.3d 164, 189–90 (2d Cir. 2002); United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 873 (5th Cir. 1966); Pennsylvania v. Local Union No. 542, 347 F. Supp. 268, 299 (E.D. Pa. 1972); LeGrand v. United States, 12 F. 577, 581 (E.D. Tex. 1882); United States v. Cruikshank, 25 F. Cas. 707, 711 (D. La. 1874), *aff'd on other grounds*, 92 U.S. 542 (1876).

95 Order, Cramblett v. Midwest Sperm Bank, LLC, No. 2015 L 000282 (Ill. Cir. Ct. Sept. 3, 2015). Cramblett tried unsuccessfully to refile her complaint in federal court. *See* Plaintiff's Complaint for Consumer Fraud, Common Law Fraud, Willful and Wanton Misconduct, Common Law Negligence, Breach of Contract and Breach of Warranty, Cramblett v. Midwest Sperm Bank, LLC, No. 1:16-cv-04553 (N.D. Ill. Apr. 22, 2016).

is how explicit it makes the social tax of being black in America, "costs that white people" like Cramblett ordinarily "do not bear."[96]

The U.S. Supreme Court acknowledged the stubborn legacy of racial bias and discrimination in the 1984 Florida family law dispute of *Palmore v. Sidoti*. Linda Sidoti had been awarded custody of a three-year-old daughter after she and her husband Anthony split. Anthony successfully sued to get his daughter back a year later, after Mrs. Sidoti got engaged to an African American man, Clarence Palmore, Jr. The trial court was persuaded that the girl's staying in the multiracial household would lead her to "suffer from . . . social stigmatization."[97] On appeal, the Supreme Court conceded that the "reality of private biases and the possible injury they might inflict" may leave the girl better off with her father, explaining that "living with a stepparent of a different race" could subject her to "pressures and stresses not present if the child were living with parents of the same racial or ethnic origin." But that did not make the custody transfer legitimate. Chief Justice Warren Burger held for a unanimous Court that constitutional commitments to racial equality forbid child-placement decisions based on the collateral effects of social prejudice. The law cannot force acceptance of interracial families, but neither may it elevate racial intolerance by "giv[ing] them effect."[98]

Race plays an even more conspicuous role in assisted reproduction. Sperm banks cater to the racial preferences of prospective parents like Cramblett by supplying color-coded catalogs and drop-down menus to help them isolate only white donors with the flip of a page or click of a mouse. I have criticized these sorting practices for reinforcing the racial preferences they trade on and for promoting the view that race deserves a prized place in family formation. In a 2009 essay,[99] I compared those labeling practices to a 1960 Louisiana county ballot measure that the Supreme Court struck down in the

---

96 *See* Kimani Paul-Emile, *When a Wrongful Birth Claim May Not Be Wrong: Race, Inequality, and the Cost of Blackness*, 86 FORDHAM L. REV. 2811, 2814, 2817–18 (2018); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1730–31, 1759 (1993) (arguing that the "property interest in whiteness" cuts across class, "even to those whites who are without power, money, or influence").

97 Palmore v. Sidoti, 466 U.S. 429, 431–32 (1984).

98 *Id.* at 433. For discussion, see Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 541–42 (2014).

99 *See* Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1865–66 (2009).

case of *Anderson v. Martin*.[100] It involved a local election rule requiring that a candidate's race appear next to his name on in the voting booth.[101]

My point was not that inviting people to exercise their racial preferences in sperm bank catalogs is as bad as Louisiana's designating candidates by race in Civil Rights-era voting booths. What provoked the analogy for me was an insight by Justice Tom Clark, writing for a unanimous Court that racial identifiers portray "color [a]s an important—perhaps paramount—consideration" for how individuals think about and carry out a core function of citizenship.[102] The prominence of race in assisted reproduction expresses a similarly divisive conception of what it means to be a parent, I argued, by legitimizing the assumption that parents should have children of their same race. This focus on donor race risks sending a message that purely white babies are better, or more worth having, in a way that makes others less favorable.[103]

Sperm banks do not go so far as to classify donors along terms that can be ranked, for example, by offering samples from white donors in gold vials and black ones in bronze, or by charging more for white gametes than black.[104] And as long as vendors and agencies do not draw special attention to race, I would still allow them to identify it as one among other factors for prospective parents to consider. So I would not go as far as those who would ban race-conscious donor selection under the Thirteenth Amendment. Some argue that this practice "reflects the conviction that mixing 'blood' with those who are not white could sully or taint whiteness."[105] Others say it reinforces the perceived "threat of racial contamination" that has been enlisted "to justify racial separation and subjugation . . . during America's slavery and post-slavery eras."[106] Legal scholars like Camille Gear Rich tie Cramblett's

---

100 375 U.S. 399 (1964).

101 *Id.* at 401.

102 *Id.* at 402–03.

103 *See* Fox, *supra* note 10099, at 1869–72.

104 *See* Dov Fox, *Race Sorting in Family Formation*, 49 FAM. L.Q. 55, 62–65 (2015).

105 Seline Szkupinski Quiroga, *Blood Is Thicker than Water: Policing Donor Insemination and the Reproduction of Whiteness*, 22 HYPATIA 143, 151 (2007); *see also* Jonathan M. Berkowitz & Jack W. Snyder, *Racism and Sexism in Medically Assisted Conception*, 1 BIOETHICS 25, 28–29, 33 (1998) (arguing that preconception racial selection is "racist because it forces one to think in terms of race, to place a value upon race, and to prefer one race over another").

106 CAMISHA A. RUSSELL, THE ASSISTED REPRODUCTION OF RACE 129 (2018).

claims to racial essentialism and ordering.[107] Suzanne Lenon and Danielle Peers argue that what Cramblett is really saying is that the mix-up denied her "the spoils of these inherited structural violences."[108] Patricia Williams in turn contends that Cramblett is claiming "racial deviance as a breach of birthright."[109] To Dorothy Roberts, her suit sends the message that the "genetic trait (or taint) of race . . . overwhelm[s] the kinship bond that these mothers and their babies have in common."[110] Roberts maintains that the Cramblett dispute evinces a "reproductive caste system"[111] which seeks to keep the "white bloodline free from Black contamination."[112] These arguments evoke a shameful past.

Until the Civil Rights-era, American government enforced the doctrine of racial purity to maintain and sanction the domination of whites over blacks.[113] At one time or another, thirty-eight states had anti-miscegenation laws that barred marriage between blacks and whites, including every one in which blacks comprised at least five percent of the population.[114] It was not until 1967 that the Supreme Court struck down interracial marriage bans. Their design, the Court noted, was to promote "White Supremacy" by preventing "a mongrel breed of citizens, and the obliteration of racial pride."[115] Until the middle of the twentieth century, adoption agencies facilitated race-based family formation by classifying children into gradations of "racial admixture"—from fully white

---

107 *See* Camille Gear Rich, *Contracting Our Way to Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child*, at 48–49 (unpublished manuscript) (arguing that race-sorting reduces donors to their genetic race and makes it a commodity to be bought and sold).

108 Suzanne Lenon & Danielle Peers, *'Wrongful' Inheritance: Race, Disability and Sexuality in* Cramblett v. Midwest Sperm Bank, 25 FEMINIST LEGAL STUD. 141, 160 (2017).

109 PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 186–87 (1991); *see also* Patricia J. Williams, *The Value of Whiteness: A Lawsuit is Being Waged Against the "Wrongful Birth" of a Black Child*, NATION (Nov. 12, 2014), https://www.thenation.com/article/value-whiteness [https://perma.cc/22D6-HQMX] (arguing that Cramblett effectively claims that her daughter "dispossesses her mother" by "taking the space of a more qualified, more desired white candidate").

110 Dorothy E. Roberts, *Why Baby Markets Aren't Free*, 7 U.C. IRVINE L. REV. 611, 617 (2017).

111 *Id.* at 614.

112 ROBERTS, *supra* note 78, at 268.

113 *See* IAN F. HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 117 (1996).

114 *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 219–20 (2003).

115 Loving v. Virginia, 388 U.S. 1, 7 (1967) (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).

to not at all—based on their skin color, nose width, lip thickness, and hair texture.[116] Most states even allowed white parents to annul the adoption of any child they did not realize was a different race.[117]

This not-so-distant history provides support for the view that equality norms operate to void complaints for confounded race as a matter of public policy. Courts might still undertake to recognize the fact of this social reality, and the consequences it can have, without reinforcing its troubling meaning or force. That is what the Inter-American Court on Human Rights set out to achieve when it struck down Costa Rica's IVF ban for enforcing discriminatory sex stereotypes that women should be mothers.[118] The court sought to avoid legitimizing these stereotypes, even as it was forced to recognize the prominent role they continue to play in social life.[119] In the United States, the Supreme Court's admonitions in *Palmore v. Sidoti* may cut against courts striking this delicate kind of balance.[120] But this would not mean that reproductive specialists should be immune from liability for reckless switches any time that prospective parents had expressed interest in a donor of a different race.

For plaintiffs like Cramblett, courts should provide at-most modest recovery that tries, as best as possible, to disclaim any racial component. Judges should clearly demarcate this award as responding to the thwarting of broader interests in offspring selection more generally, whether to forge genetic ties or avoid debilitating disease. Compensation need not be tied to any race-specific injury or mark that more particular loss as a serious one. The law of remedies does not always insist that award levels align perfectly with the estimated severity of harm inflicted. A familiar example is the punitive damages that are designed to deter and punish wrongdoing.[121] The smaller, baseline award in cases like Cramblett's would also allow for the possibility of greater damages when similar errors keep interracial or minority couples from exercising their preference for a donor who shares their background. Such race-

---

116 ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 7, 124, 130–33 (2008).

117 *See* KENNEDY, *supra* note 114, at 235–36.

118 *See* Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

119 *See id.* at 89–90

120 *See supra* notes 97–98 and accompanying text.

121 *See* Marco Jimenez, *Remedial Consilience*, 62 EMORY L.J. 1309, 1357–58 (2013).

conscious recovery is hardly trouble-free. Besides varying compensation levels along plaintiffs' race, this allowance would still naturalize racial matching, and cast racial discordance under suspicion. But redress under these circumstances would at least blur racial hierarchies, rather than reinforce them, and affirm the worth of black or brown families, not denigrate them.[122]

CONCLUSION

Pamela Bridgewater argued that viewing modern manifestations of

> reproductive abuse on a historical continuum has the marvelous potential to bring about more inclusive, perhaps stronger, reproductive freedom as it would require an exploration of who the targets of reproductive abuse were (are), as well as who was (is) perpetuating the targeting and how.[123]

Bridgewater lamented the modern tendency to "view the Thirteenth Amendment as dead or dormant because the judiciary has underutilized, and inconsistently applied, the Amendment," and, accordingly, that it "never achieved its full revolutionary potential."[124] And yet appeals to reproductive slavery risk doing more bad than good when they are enlisted to resolve hard moral questions by comparison to one of the few practices that even people who rarely see eye-to-eye can agree is unequivocally evil.[125] The enormity of slavery's injustice was so plain, so profound, that analogies struggle to escape its absolute wrongs.[126] Imperfect metaphors risk insulting the memory of enslaved persons, drawing the ire of their descendants, and jeopardizing the search for common ground. Bridgewater is surely right that invoking abolition offers creative approaches to stubborn reproductive controversies. But this strategy, for all its promise, can also

---

122 *See* ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 17–19 (2013); Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 590–91 (2013).

123 Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 403 (2000).

124 *Id.* at 423.

125 *See, e.g.*, Order Granting Motion to Dismiss, Tilikum et al. v. Sea World Parks & Entertainment, Inc. et al, No. 3:11-cv-02476 (S.D. Cal. 2012) (dismissing complaint that SeaWorld's use of orcas in captivity violated the Thirteenth Amendment).

126 *See* Debora Threedy, *Slavery Rhetoric and the Abortion Debate*, 2 MICH. J. GENDER & L. 3, 6–7, 12, 19 (1994); McConnell, *supra* note 11, at 241–42.

risk crowding out prospects for good-faith conversation and practical compromise.