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What the Baby M Case Is Really All About

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Surrogate motherhood is one of those moral problems which, like euthanasia and abortion, has no satisfactory solution. There is no consensus on how to handle it, and some important values will be compromised no matter what is done. Is the practice "giving life," as proponents see it? Or selling babies, as its opponents say? The celebrated *Baby M* case[1] raises these questions squarely. On the plaintiffs' side are the right to procreate and the right of the biological father to his children; on the defendants' side are the same right of the biological mother to her children as well as a public policy embodied in adoption and other laws against selling babies and making them the subjects, like corn and meat, of ordinary contracts. And, as on abortion and euthanasia, there is fierce disagreement in our society about which values are most important in reaching a solution. When accepted, indeed revered, values like these are pitted against each other we can expect proponents and opponents of particular solutions to react emotionally and even to produce indictments, like Ms. Stone's, of those with whom they disagree.

Ms. Stone disagrees with the trial judge's opinion in the *Baby M* case and accordingly throws the book at him. She accuses him of bias[2], judicial legislation[3], and opening "an incredible and potentially disastrous can of worms: legalization of male and female prostitution, creation of an 'incubator' class of women, and the reinstitution of facets of slavery."[4] She disagrees, as well, with the New Jersey Supreme Court's opinion in the case because it upheld the trial judge's custody award of Baby M to the Sterns[5] and failed to recognize the transaction between Marybeth Whitehead[6] and William Stern as "a vital and integral part of the slavery that was

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

2. Lorraine Stone, *Neoslavery-"Surrogate" Motherhood Contracts v. The Thirteenth Amendment*, 6 Law & Inequality 63, 63-64 (1988).

3. *Id.* at 70-71.

4. *Id.* at 63.

5. *Id.* at 72-73.

6. Marybeth Whitehead is now divorced from her former husband, Richard

outlawed by the Constitution."[7] Behind this bombast is an intransigent political position: Mrs. Whitehead should have Baby M simply because she is the child's biological mother. As Ms. Stone sees it, that is the overriding bond; it rules out Mr. Stern, the biological father, and Mrs. Stern, the would-be adoptive mother, as suitable custodians for Baby M because neither of them is the "genuine article,"[8] and it justifies Mrs. Whitehead's conduct before, during, and after the trial because she is "a desperate mother"[9] trying to regain her child. This position is currently fashionable in some feminist circles[10] and was espoused by Mrs. Whitehead's lawyers at the *Baby M* trial[11] and on the appeal.[12] Judge Sorkow rejected it but the supreme court accepted it.[13] Let us see exactly what questions were before Judge Sorkow at the trial, what he decided, and what happened to his decision on appeal.

Marybeth Whitehead and her husband Richard were the parents of two children. They signed an agreement with William Stern, a married but childless man, whose wife was afraid pregnancy would worsen her mild case of multiple sclerosis. Mr. Stern agreed to pay Mrs. Whitehead to be inseminated with Mr. Stern's sperm. Mrs. Whitehead agreed to have any resulting child and to turn it over, as soon as it was born, to the Sterns. A baby girl was conceived and born, but Mrs. Whitehead changed her mind about giving the baby up. The Sterns sued in Judge Sorkow's court to recover the child.

What were Judge Sorkow's options? There was no statute directly on point. Neither were there any litigated cases on which he could rely for precedents. He might have refused to hear the case, saying that it is not one of the situations for which the law provides a remedy. The parties might then have settled the dispute themselves. (Other similar cases have been settled quietly

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Whitehead, and is married to another man, Dean Gould. *See In re* Baby M, 109 N.J. 396, 412 n.1, 537 A.2d 1227, 1235 n.1; N.Y. Times, Mar. 30, 1988, at 12, col. 1.

7. Stone, *supra* note 2, at 73.

8. *Id.* at 64.

9. *Id.* at 66.

10. *See, e.g.*, Juliette Zipper & Selma Sevenhuijsen, *Surrogacy: Feminist Notions of Motherhood Reconsidered*, in Reproductive Technologies: Gender, Motherhood and Medicine 118, 129-30 (Michelle Stanworth ed. 1987).

11. "Mrs. Whitehead maintains she should receive custody because she is the mother." *In re* Baby M, 217 N.J. Super. 313, 354, 525 A.2d 1128, 1147 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

12. "Their position is that in order that surrogacy contracts be deterred, custody should remain in the surrogate mother unless she is unfit, regardless of the best interests of the child." *In re* Baby M, 109 N.J. 396, 454, 537 A.2d 1227, 1257 (1988).

13. At least in part. It thus restored her parental rights. *See infra* pp. 78-80.

out of court).[14] For the law's own good, refusing to take the case was probably the best solution. The law does not fare well when it is called upon to deal with issues like those in the *Baby M* case chiefly because there is no certainty or agreement on what resolution is right. If the law opts for one set of values over another it is likely to be evaded or ignored by those who think it made the wrong choice.[15] If it takes a compromise position it is no more likely to solve the problem.[16]

Judge Sorkow, recognizing that there could "be no solution satisfactory to all" took the case "to achieve justice for the child."[17] After a thirty-two day trial over the course of more than two months, he decided squarely for the Sterns, taking Baby M out of the tug of war in which she was embroiled between the two contending sets of parents and putting her into a single family. In making his decision the judge considered all of the issues and came up with a flexible construct which, if followed, would allow other courts to reach different or similar results depending on the facts before them.

Judge Sorkow separated the issues into two categories: those of contract and those of custody. He held that contracts like those between the Sterns and the Whiteheads are not only permissible but are constitutionally protected. He held that such contracts must comply with ordinary contract rules but that they are subject to three special rules as well, designed to protect the mother and the resulting child. First, the mother may rescind the contract anytime before conception. Second, she may abort the fetus despite the contract provisions in accordance with the guidelines set out in *Roe v. Wade*.[18] Third, the child's welfare overrides the contract; the contract will not be enforced unless enforcement is in the child's best interests. Thus he linked and subordinated the contractual aspects of the case to the custody question. Custody depends on the child's best interests. The "best interests" standard is well-understood and is in use throughout the United States to

14. *See* Michele Galen, *Surrogate Law*, Nat'l L.J., Sept. 29, 1986, at 10, cols. 2 and 3.

15. Accordingly, criminal abortion laws in the United States did not stop abortions. *See* Jane Brody, *Abortion: Once a Whispered Problem, Now a Public Debate*, in The Great Contemporary Issues, Women: Their Changing Roles 468, 468-69 (Elizabeth Janeway ed. 1973).

16. The U.S. Supreme Court's compromise on abortion, Roe v. Wade, 410 U.S. 113 (1973), has not solved the problem. Protesters still demonstrate at abortion clinics and states continue to pass statutes restricting abortion. *See, e.g.*, N.Y. Times, Aug. 13, 1988, at 1, col. 1; *id.* at 6, col. 1.

17. *In re* Baby M, 217 N.J. Super. 313, 323, 525 A.2d 1128, 1132 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

18. 410 U.S. 113 (1973).

determine both contested custody proceedings[19] and the enforceability of parents' contracts about their children.[20]

As he wrote it, Judge Sorkow's decision affected only the parties to it; his own court could have overruled it; it didn't bind coordinate or higher courts or courts in other jurisdictions. All could reach other solutions to similar problems. It did not prevent the state legislature from acting and it certainly had nothing to do with prostitution, an incubator class, or slavery. Neither did the judge seem biased or guilty of the kind of activism that usurps legislative prerogatives. His opinion is based squarely on the testimony of the twenty-three fact and fifteen expert witnesses who appeared before him, not on "cash and class" as Ms. Stone charges,[21] and its underlying thread is a determination of the custody dispute between the contending parents, based on the best interests of the child. That is concededly a judicial rather than a legislative function.

On appeal, the New Jersey Supreme Court agreed with Judge Sorkow that "custody was the critical issue."[22] Far from being "stuck with the results of [his] error," as Ms. Stone puts it,[23] the supreme court applauded Judge Sorkow's analysis of the testimony on custody as "perceptive, demonstrating . . . understanding of the case and . . . considerable experience in these matters."[24] It agreed substantially with both his analysis and conclusions on custody.[25] It disagreed with him only on the less important contract issues. It held that the contract between Mr. Stern and Mrs. Whitehead did not enjoy constitutional protection and was illegal in New Jersey. In view of the lack of any statute or case addressing surrogate contracts, this conclusion is just as supportable as Judge Sorkow's opposite conclusion. The status of surrogate contracts in New Jersey was certainly a question on which reasonable courts might disagree. There is, however, an unforgivable flaw in the supreme court's opinion. Saying "when all is said and done, the best interests of the child are paramount,"[26] and finding that

19. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) "In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved." *Id.* at 433.

20. *See, e.g.*, Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954).

21. Stone, *supra* note 2, at 66. As the New Jersey Supreme Court pointed out, the Sterns are not rich and the Whiteheads are not poor. *In re* Baby M, 109 N.J. 396, 439, 537 A.2d 1227, 1249 (1988).

22. *In re* Baby M, 109 N.J. at 418, 537 A.2d at 1238.

23. Stone, *supra* note 2, at 73.

24. *In re* Baby M, 109 N.J. at 418, 537 A.2d at 1238.

25. *Id.*

26. *Id.* at 466, 537 A.2d at 1263.

Baby M's best interests required giving custody of her to the Sterns,[27] the court, nevertheless, reinstated Mrs. Whitehead's parental rights and sent the case back to the trial court for a determination of when and under what circumstances she would be allowed to visit the child.[28] This compromise put Baby M right back into the middle of the tug of war between contending parents from which Judge Sorkow so carefully extracted her.

In so subjugating the child's best interests to those of her mother, the New Jersey Supreme Court was undoubtedly influenced by the argument of counsel about the special nature of the bond between mother and child. It said:

> [S]he is not only the natural mother, but also the legal mother, and is not to be penalized one iota because of the surrogacy contract. Mrs. Whitehead, as the mother (indeed, as a mother who nurtured her child for its first four months — unquestionably a relevant consideration), is entitled to have her own interest in visitation considered.[29]

To this extent the New Jersey Supreme Court and Ms. Stone agree. Ms. Stone pushes further, however, than the court was willing to go. She says "it is arguable" that the facts bearing on what is best for Baby M were "never aired."[30] She is thus disagreeing with both Judge Sorkow and seven justices of the New Jersey Supreme Court. She equates Mrs. Whitehead's flight to Florida with Baby M and Eliza's trip, her son Harry in tow, over ice floes in *Uncle Tom's Cabin*, but slides over the distinctions between Mrs. Whitehead, a free woman running from her child's father, in the wake of her broken promise and in violation of a court order, and Eliza, a slave mother running from a slavemaster.[31] The supreme court, while certainly sympathetic to Mrs. Whitehead, refused to countenance "violating a court order as Mrs. Whitehead did."[32]

To support her basic position that Baby M should have been awarded to Mrs. Whitehead, Ms. Stone labels the child "illegitimate," and states the law as vesting all responsibility for an illegitimate child in its biological mother "[a]bsent incontestable proof that [the mother is] unfit."[33] Ms. Stone is wrong about the label

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27. *Id.* at 459, 537 A.2d at 1259.

28. *Id.* at 466, 537 A.2d at 1263. For the trial court's decision on visitation, see *In re* Baby M, N.Y. Times, Apr. 7, 1988, at 1, col. 2 (N.J. Super. Ct. Ch. Div. Apr. 6, 1988).

29. *In re* Baby M, 109 N.J. at 466, 537 A.2d at 1263.

30. Stone, *supra* note 2, at 63.

31. *Id.* at 66-67.

32. *In re* Baby M, 109 N.J. at 459, 537 A.2d at 1259.

33. Stone, *supra* note 2, at 70.

and the law. New Jersey has adopted the Uniform Parentage Act, making the rubric "illegitimate" obsolete. Under New Jersey law the "parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents,"[34] and "the claims of the natural father and the natural mother are entitled to equal weight."[35] "[T]he child's best interests determine custody."[36] Mrs. Whitehead's fitness, according to the New Jersey Supreme Court, is significant only on the question of terminating her parental rights.[37] Though it reversed the trial court's termination of Whitehead's parental rights, it recognized the possibility that Baby M's best interests might require a suspension of Mrs. Whitehead's visits.[38]

The worst thing about both Ms. Stone's position and the New Jersey Supreme Court's opinion is that they call up a picture that seems inaccurate when applied to Mrs. Whitehead and offensive when applied to women in general. Rather than the "desperate mother" of whom Ms. Stone speaks[39] or the "rather harshly judged" woman, "given her predicament"[40] of whom the New Jersey Supreme Court speaks, Whitehead comes across as a self-absorbed childish woman playing at adult games — an amateur instead of a professional at the jobs she undertakes: marriage, motherhood, surrogacy. The wreckage around her is evidence of her dangerous dabbling — a broken first marriage, leaving in its wake a sterile ex-husband whose vasectomy she agreed to before her experiment with surrogacy,[41] and two children whose parents are divorced; a "very important" broken promise to the Sterns, as the New Jersey Supreme Court called it;[42] and a resulting court case. With a new baby and a new husband, she is about to turn her experiences into money, becoming a lecturer and writer on surrogate motherhood.[43]

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34. N.J. Stat. Ann. § 9:17-40 (West Supp. 1988).

35. *In re* Baby M, 109 N.J. at 453, 537 A.2d at 1256.

36. *Id.*

37. *Id.* at 454, 537 A.2d at 1256-57.

38. *Id.* at 466-67, 537 A.2d at 1263. Mrs. Whitehead was granted visiting rights. *See* N.Y. Times, *supra* note 28. Recent studies show that joint custody in bitter divorces is worse for a child than single parent custody. N.Y. Times, Mar. 31, 1988, at 19, col. 1. In view of the bitterness between Whitehead and Stern, the grant of visitation rights to Whitehead may be bad for Baby M.

39. Stone, *supra* note 2, at 66.

40. *In re* Baby M, 109 N.J. at 459, 537 A.2d at 1259.

41. *In re* Baby M, 217 N.J. Super. 313, 339, 525 A.2d 1128, 1140 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

42. *In re* Baby M, 109 N.J. at 459, 537 A.2d at 1259.

43. *See* N.Y. Times, Mar. 30, 1988, at 12, col. 1. Mrs. Whitehead seems determined to make money from all of her experiences, old and new. She and her sec-

Whatever one thinks of Mrs. Whitehead personally, the New Jersey Supreme Court and Stone view of her bodes ill for women generally. According to it, a biological mother is linked by an overpowering bond to her young.[44] Her consent to give up a child is, by definition, uninformed[45] or "irrelevant,"[46] it is "well beyond normal human capabilities" for such a woman to part "with her newly born infant without a struggle,"[47] she may be expected to do anything — even endanger her baby — to prevent herself from being separated from it.[48] She is, thus, a poor, driven, irrational creature who needs protection from herself and from others.[49] It is, therefore, right to excuse her from her promises, to prevent her from engaging in certain conduct like having children for infertile couples, and to keep her out of other paying jobs as well — in Stone's view, those of wet nurse, nanny, prostitute, egg donor, or womb renter.[50] I have spent a good deal of my professional career fighting against the proposition that women are such slaves to their biological destinies, unable to act as rationally as men, and in need of special "protections." I am suspicious of people who and laws which would prevent women from earning money. I subscribe to the view that whatever one's work and whatever job one undertakes ought to be done responsibly and carefully with a sense of professionalism. Professionals complete the tasks they begin even if it is easier or more pleasant not to. That, rather than Marybeth Whitehead's example, is what the law should expect of both women and men.

The *Baby M* case is likely to have another bad effect: state legislation on surrogate motherhood before there is societal consensus on the subject. The conflicting decisions of the trial and appellate courts on the legality of surrogate contracts and the publicity accorded them have put pressure on state legislatures to act. They are now considering a variety of bills dealing with the practice of surrogate motherhood. These fall into three categories: bans on the practice, bans on payment for it, and statutes permitting but regulating it in various ways. It would be a grave mistake, I believe, to ban either the practice itself or payment for it. The

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ond husband received $20,000 from Star Magazine for exclusive coverage of their marriage. *Id.* at col. 3.

44. Stone, *supra* note 2, at 66-68.

45. Stone, *supra* note 2, at 64-65; *In re* Baby M, 109 N.J. at 437, 537 A.2d at 1248.

46. *In re* Baby M, 109 N.J. at 440, 537 A.2d at 1249.

47. *Id.* at 459, 537 A.2d at 1259.

48. Stone, *supra* note 2, at 66-68; *In re* Baby M, 109 N.J. at 459, 537 A.2d at 1259.

49. *See In re* Baby M, 109 N.J. at 459, 537 A.2d at 1249-50; Stone, *supra* note 2, at 71.

50. Stone, *supra* note 2, at 70-72.

law cannot effectively end something which so many people want to continue; any legal ban on surrogate motherhood is destined to be evaded or ignored.[51] Neither can the law effectively devalue a valuable commodity; attempts to do so will merely foster the growth of a "black" or "gray" market in the product.[52] Surrogate motherhood for money will continue no matter what the law says. If we are to have legislation before consensus, then the best approach is permissive regulation. It should be designed to encourage surrogate motherhood to become a profession, like the practice of law or medicine, with a code of ethics and a cadre of professionals. Professionals practice for money, of course, but they also frequently donate their services free of charge in appropriate cases.

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51. *See supra* note 15 and accompanying text.

52. This is the case with adoptions. *See* Michele Galen, *Baby Brokers: How Far Can a Lawyer Go?*, Nat'l L.J., Feb. 9, 1987, at 1, col. 3.