BABY M: NEW BEGINNINGS AND ANCIENT MILEPOSTS

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Were the great Greek dramatists today among us, they might have found in the contemporary labors of the New Jersey Supreme Court some dramatic material for their prizewinning Athenian tragedies. These early tragic poets, like Shakespeare, often drew upon history as the subject and theme of their dramatic action. Concerned with the Fates' reign over life and death, the Alpha and Omega of human existence, they might have elevated the plights of Karen Ann Quinlan[1] and "Baby M"[2] to lyric dimension.

The tale of a father, whose ancestors were all evilly destroyed, and a mother who, for compassion and fortune, bartered for, bought and sold a baby crudely wrought by the mystery of medicine to revitalize the father's line, would not appear foreign to their wise imaginings; nor would the aristotelian quest for justice and the chorus of comment which ensued when their best laid plans were unravelled by the ancient longings of a mother's heart.

Yet it is upon the present, not past, juridical stage that William Stern, Mary Beth Whitehead and their progeny, Baby M, play their compelling parts before a society wanting of an old and new wisdom.

In the winter of 1985, William Stern and Mary Beth Whitehead and her husband, Richard Whitehead, sought to en-

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1 *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

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

gender a family for William and Elizabeth Stern by penning a so-called surrogate parenting agreement, commercially prepared by the Infertility Center of New York (for $7,500), providing a $10,000 fee for the artificial insemination of Mrs. Whitehead with Mr. Stern's sperm, the bearing of the resulting child and its delivery to the Sterns who, after the necessary termination of Mrs. Whitehead's maternal rights, would effect the baby's adoption by the infertile Mrs. Stern.

Harmony and nature brought forth a healthy girl child in the spring of 1986. Discord and human frailties unhappily led to a bitter trial over her fate during 1986 and 1987, and a signal opinion of the New Jersey Supreme Court on the eve of her second birthday in 1988.

Unable to conform her maternal instinct to contractual agreement, Mrs. Whitehead, after initially surrendering the child to Mr. and Mrs. Stern, begged and obtained her solicitous temporary return, and embarked upon a sad Florida odyssey culminating in an ex parte New Jersey pendente lite award of custody to the Sterns which was ultimately and harrowingly enforced by Florida authorities. The infant's custody was reaffirmed by the trial court, pending its final judgment, and Mrs. Whitehead was awarded limited visitation with Baby M.

In turning to an American courtroom, Mr. and Mrs. Stern sought to enforce the provisions of the surrogacy contract that would: 1) permanently place the child in their custody; 2) terminate Mrs. Whitehead's parental rights; and 3) allow the adoption of the child by Mrs. Stern. After an extraordinary thirty-two day trial, in which the media chorus played a subtle yet important role (sometimes, unhappily, at the expense of those before the court) in bringing this dilemma to the American public and fostering a forthright and keen debate which led to the necessary public policy consensus upon which decision-makers eventually act, the trial court upheld the contract's validity and, in accord with its terms, immediately allowed the adoption of the baby, now called Melissa, by Mrs. Stern.[3]

In reaching his conclusions, the trial judge first found that statutes concerning adoption, termination of parental rights, and payment of money in connection with adoptions were uncontemplated by the legislature with regard to surrogate contracts and thus simply did not apply to them. In the absence of specific stat-

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[3] 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

utory guidance, the court then concluded that surrogacy contracts are valid and the specific performance of their terms will be granted only when it is demonstrated to be in the best interests of the child before the court. This equitable calculus—the child's best interests determine contractual validity—became the fundamental basis for the lower court opinion permanently placing Baby M in the home of Mr. and Mrs. Stern.[4]

Differing in mind and heart over the premises and answer of this formula, Mrs. Whitehead appealed and the New Jersey Supreme Court, concerned for all, granted direct certification of the cause. Chief Justice Wilentz, writing for an unanimous court, found the surrogate contract to be in conflict with the law and public policy of the State of New Jersey and therefore illegal and invalid. Concluding that the payment of money to "surrogate" women is illegal, perhaps criminal, the seven-member tribunal voided both the termination of Mrs. Whitehead's parental rights and the adoption of the child by Mrs. Stern.[5] This said and done, the court then granted custody, in the "best interests" of the infant, to Mr. Stern and remanded the issue of visitation by her mother for an abbreviated hearing and determination before a different trial judge,[6] who subsequently found that these same "interests" will be served by unsupervised, uninterrupted, liberal visitation of mother and child.

In an essay adapted from his recent Chief Justice Joseph Weintraub lecture, Associate Justice Alan B. Handler of the New Jersey Supreme Court reminds us: "Some cases are better resolved by a process or procedure that encourages an ongoing dialogue rather than by an inflexible decision that purports to fix individual rights and duties but simply will not stay in place because of the intractable complexity of the underlying problems."[7] It is in this spirit that we are privileged to join many distinguished commentators in the *Seton Hall Law Review* in the important process and promise of Justice Handler's dialogue.

Empirical evidence shows that possibly one in every seven couples is infertile. There is also evidence to suggest that the pain of infertility is unbearable and if endured for a prolonged period will be the occasion of marital breakdown. This suggests

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[4] *See Baby M*, 217 N.J. Super. at 390-401, 525 A.2d at 1166-72.

[5] *See Baby M*, 109 N.J. at 421-22, 537 A.2d at 1240.

[6] *Id.* at 463, 537 A.2d at 1261.

[7] *See* Handler, *Social Dilemmas, Judicial (Ir)resolutions*, 40 RUTGERS L. REV. 1 (1987).

that while infertility has bitter personal implications, it also has serious implications for society as a whole and for the institution of marriage in particular. It should come as no surprise then that surrogate motherhood, technically one of the less difficult alternatives to natural childbirth available today, is viewed as one more means to deal successfully with the problem of infertility. Some would say that it is one more way to give the gift of life, and add that since we have developed the medical technology, the only thing that remains to be done is regulate to the use of surrogacy. The fact that it is possible and does remedy a deficiency constitutes for these people the argument that it ought to be available.

Stated in this fashion, the argument presents an almost irresistible temptation to take it up at the level of meta-ethics so as to dispose of its central weakness which is to derive a value from a fact, an "ought" from an "is." However, given the urgency of the issue itself, and the degree of legislative activity and public policy debate devoted to surrogacy, it is probably more practical, at least in the short-term, to look at this argument from a somewhat less elevated level.

In a distinguished article, Richard A. McCormick made the telling observation that "when sterility gets absolutized as a disvalue in our thought patterns, strange things can happen."[8] It is unlikely that the justices of the New Jersey Supreme Court were considering this observation when they drew up their landmark decision in *In re Baby M.* But a careful reading of their decision suggests that they might as well have been doing so. Of course at one level, the court's decision addresses the specific details of the case that is now known as *Baby M.* But at another level, the same decision assumes a much larger task beyond the confines of the dispute between Mary Beth Whitehead and William Stern and central to the concerns of public policy appropriate to a society such as ours. In that sense the details and the texture of the court's decision can be understood as a guide by which the general public may tease out the legacy of *Baby M* in particular and the implications of surrogacy in general. If the broad implications are as troublesome as the specific legacy, something unambiguously stated in the court's analysis, then there is every reason for us to pause and rethink this entire matter before proceeding any further. Whether intentional or not, the line of argumenta-

[8] McCormick, *Therapy or Tampering? The Ethics of Reproductive Technology*, AM., Dec. 7, 1985, at 402.

tion adopted by the supreme court makes it possible for us to consider in concrete terms what happens when infertility is understood as an absolute disvalue, and forces us to ask to what lengths does such a disvalue justify us in going to negate it? Does it, for example, warrant what the court described as the coercion of contract by which the natural mother agrees irrevocably to surrender her child prior, not only to birth, but even to conception? Further, does it warrant the natural mother's agreement that she will not contest any proceedings undertaken to end her rights as a parent? Finally, does it warrant an *a priori* concession, again on the part of the natural mother, that the primary interests of the child would best be served by awarding custody to the natural father and his wife?

The answer to all three questions is yes based on a presumption that has, up to now in the discussion of surrogacy, lived a charmed life so as to escape any rigorous criticism. The presumption is that values and disvalues exist in self-containing isolation and justify the selection of a particular means solely by virtue of its effectiveness in realizing the value or negating the disvalue. Some will argue that at the bottom of this is the old argument of the end justifying the means. In fact, it represents a growing tendency to measure everything so egocentrically that the individual is the center of a universe that has no boundaries beyond his reach. In that sense it represents the perversion of Robert Browning's injunction that "a man's grasp should exceed his reach, or what's a heaven for?"[9]

It was not the intention of, nor would it have been appropriate for, the New Jersey Supreme Court to comment on the implications of the *Baby M* case from this philosophical perspective. What is so compelling about the texture of the court's analysis, however, is the way it lends itself to a philosophic discussion. The centerpiece to this is the ringing declaration that "[t]here are, in a civilized society, some things that money cannot buy."[10] In part, this is a rejection of pragmatism which welcomes something because it works. More important to the purpose of subjecting surrogacy and its implications to an exacting criticism, is the court's rejection, again by implication, of ethical egoism.[11]

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[9] See R. BROWNING, ANDREA DEL SARTO 1855 (1st ed. 1855).

[10] *Baby M*, 109 N.J. at 440, 537 A.2d at 1249.

[11] *See* W.K. FRANKENA, ETHICS 16 (1963) Ethical egoism is described as a normative theory

> which represents one rather extreme kind of reaction to the ethics of traditional rules. This is the ethics of what Butler calls self-love and of

Ethical egoism measures human behavior and judgment strictly by the advantages they bring to individuals as they pursue good and avoid evil. To be an ethical principle, it has to be applicable universally, allowing everyone to pursue his or her own perceived good without interfering with the pursuit of others. History shows that this has never been possible for the human community and prompts the conclusion, based on the inherent logic of the question, that ethical egoism is untenable as an ethical theory.

The significant thing here is that the New Jersey Supreme Court, whether wittingly or not is beside the point, has judged surrogacy to be a thorough-going example of ethical egoism, and rejected it for the irreconcilable conflicts of rights it unavoidably provokes.

For example, the court found that "[t]he whole purpose and effect of the surrogacy contract was to give the father exclusive right to the child by destroying the rights of the mother."[12] Some will respond by saying that the whole point of the contract, assuming informed consent in this case on the part of the woman, is the voluntary surrender of the exercise of those rights. But this is too superficial a response for what the court is suggesting. Apart from the fact that it considers the possibility of informed consent most unlikely under the circumstances, the court is also implicitly asking whether consent to necessity is really consent or whether it is acquiescence. That is, the inherent logic of surrogacy presumes the fiction that the woman who bears the child, whatever else she might be, is not a mother to that child. Lest reality intrude, a contract is used to deny the moral bond between a woman and the child who has come to term in her womb. The court implies that to deny the moral bond is to deny the biological connection. And that is impossible. In other

what Freudians call the ego; but it should be noted that an ethical egoist need not be an egotist or even an egoistic or selfish man in the everyday senses of these terms. Ethical egoism is an ethical *theory*, not a pattern of action or trait of character, and is compatible with being self-effacing and unselfish in practice. Even if an ethical egoist is consistent with his theory in the conduct of his life, he may still not do the things that we ordinarily call egotistic, egoistic, narcissistic, or selfish. Whether he does these things will depend on whether he thinks they are to his advantage in the long run, and he need not think this; in fact, he may think that modesty and consideration for others are, like honesty, "the best policy" for him to go by. He may, in other words, be quite an "enlightened" egoist.

Id.

[12] *Baby M*, 109 N.J. at 436, 537 A.2d at 1247.

words, surrogacy is a form of ethical egoism, and as such entails an irreconcilable conflict of interests.

This emerges more clearly in the court's discussion of the right to procreate: "To assert that Mr. Stern's right of procreation gives him the right to the custody of Baby M would be to assert that Mrs. Whitehead's right to procreation does *not* give her the right to the custody of Baby M . . . ."[13] The court concludes that such an assertion means that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation. It is not too difficult to see where that conclusion logically leads. Surrogate motherhood is a contradiction in terms. One person, party to the surrogate arrangement, can only exercise his rights on condition that he deny the rights of the other party involved. That is the nature of surrogacy and underscores the perverse irony to be found in the phrase, "surrogate motherhood." If there is one thing surrogacy cannot stand for here, it is motherhood. This in its final analysis is what the court means by "coercion of contract."

A civilized society will indeed be moved by the plight of the infertile. But the decision of the New Jersey Supreme Court alerts us to the probability that by absolutizing the disvalue of their lot, we may in the end fail them as extremely, while compounding the very problem we sought to resolve in the first place.

The Greeks and Shakespeare well knew human conflicts and the larger laws which shape our ends. It is plain that the decision of the New Jersey Supreme Court, fashioning extant law to the particular plight of "Baby M," remains of a general piece with these ever present principles. In an era now marked by the prospect of participation in our own human evolution through genetic engineering and plagued by the tragedy of AIDS, it is inspiriting to note that this tribunal has reaffirmed the lessons which have long served to guide the human community.

[13] *Id.* at 448, 537 A.2d at 1254.