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Baby M and the Cassandra Problem

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Amid the controversy and animated analysis that surrounded the New Jersey Supreme Court's issuance of the *Baby M* surrogate mother decision,[1] I was frequently heard to grumble that the case was unimportant and rather uninteresting—that it amounted to little more than the court's preference for the doctor over the garbage collector in a child custody dispute. However, in light of the sustained attention given the decision by my colleagues, I have been forced to reassess my position, and I now find that the case does indeed have a certain intrigue.

A fundamental tenet of judicial decisionmaking is that judicial decisions should be based upon legal principles rather than the policy preferences of the judges who issue them.[2] In *Baby M*, however, the courts' opinions provide a particularly telling example of the ways in which our principles are ultimately vulnerable to our preferences. Although we employ a variety of analytical techniques in an effort to insulate judicial decisionmaking from the subjective values of judges, these techniques never quite succeed. The *Baby M* opinions illustrate this problem by relying on a series of analytical techniques that themselves depend upon judicial value preferences to generate outcomes. Thus, the opinions invite extrapolation from the analytical disappointments of the courts' own reasoning to the very analytical system in which that reasoning occurs. But no matter how fundamental the nature of the problem appears to be, ultimately, we always resist the extrapolation. It seems that those who would prophecy perpetual subjectivity are destined, like Cassandra of Troy, never to be believed.[3]

Part I of this essay outlines the facts of the *Baby M* case and traces the

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1. *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988), *aff'g in part, rev'g in part, remanding* 217 N.J. Super. 313, 525 A.2d 1128 (1987). Hereinafter, the trial court decision will be cited as *Baby M, I* and the New Jersey Supreme Court decision as *Baby M, II.*

2. The decision of the trial court in *Baby M, I* was explicit about this. The court stated:

> Today, however, this court can only decide what is before it. . . . It will decide on legal principles alone. This court must not manage morality or temper theology. Its charge is to examine what law there is and apply it to the facts proven in this cause.

Baby M, I, 217 N.J. Super. at 334, 525 A.2d at 1138 (1987) (citation omitted).

Because judges are frequently unelected and typically insulated from political accountability, the judiciary is generally viewed as ill-suited to make policy choices. Politically accountable legislatures are thought to be institutionally more competent to make social policy.

3. *See infra* text accompanying note 66.

reasoning the New Jersey Supreme Court used to justify the legal conclusions that it reached. Part II then identifies the three common analytical techniques or modes of argument on which the state supreme court relied in conducting its analysis and suggests that each is itself too dependent upon unprincipled policy preferences to have excluded such preferences from the decisionmaking process. Finally, Part III suggests that no matter how strong an argument one might offer to demonstrate the systemic vulnerability of principle to preference, the demonstration could never be convincing. Such arguments are paradoxically self-defeating.

I. THE NEW JERSEY SUPREME COURT'S REASONING

Baby M involved a surrogate-parenting agreement entered into between William Stern and Mary Beth Whitehead, both residents of New Jersey. Prior to ruling on the enforceability of that agreement, the trial court recited the following facts:[4]

William Stern was forty-one years old at the time of the trial and had a Ph.D. in biochemistry. He had worked his way through school after the death of his father, who was one of only two members of his family to escape the Holocaust. Dr. Stern's wife, the daughter of a university professor, came from a religious family in which education was highly valued. She met Dr. Stern while earning her Ph.D. in genetics. She went on to earn an M.D. as well, specializing in pediatrics. The Sterns badly wanted children, but Mrs. Stern[5] had incurable multiple sclerosis, which was thought to render her unable to conceive a child without incurring an unacceptable risk to her own health.[6]

Mary Beth Whitehead was a twenty-nine-year-old mother of two children and a high school drop-out who got married at the age of sixteen. Her thirty-seven-year-old husband, a driver for a waste carting company, had a history of alcoholism and had twice lost his driver's license as a result of drunk-driving accidents. He once had been sued by the county welfare board for failure to make support payments while he and Mrs. Whitehead were separated. When the Whiteheads filed a petition for bankruptcy in 1983, they

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4. For the New Jersey Supreme Court's statement of the facts see *Baby M, II,* 109 N.J. at 411-21, 537 A.2d at 1235-40. The trial court's fuller, and explicitly more judgmental, rendition of the facts is set out at *Baby M, I,* 217 N.J. Super at 335-55, 525 A.2d at 1138-48.

5. The trial court refers to the Sterns as "Mr." and "Mrs." apparently in order to avoid the confusion that would result from referring to them both as "Dr." *See* 217 N.J. Super. at 325, 525 A.2d at 1133.

6. Although multiple sclerosis is not currently viewed as subject to serious exacerbation by pregnancy, the trial court found the Sterns' caution to be reasonable and understandable in light of the medical knowledge existing at the time of their decision not to risk pregnancy. *Id.* at 337, 525 A.2d at 1139.

failed to disclose some of their assets to the court. The Whiteheads had decided that they wanted no more children.

You get the idea.

After the Sterns were discouraged from pursuing their efforts to adopt a child because of the difficulty presented by their ages[7] and different religious faiths, they contacted the Infertility Center of New York to explore the possibility of alternative reproductive technologies. The Infertility Center put them in touch with Mrs. Whitehead, who had contacted the Center in response to a newspaper advertisement seeking surrogate mothers. Eventually, Mr. Stern and Mrs. Whitehead signed a written agreement pursuant to which Mrs. Whitehead would be artificially inseminated with Mr. Stern's sperm, would carry any child that was conceived to term,[8] and after birth would deliver the child to the Sterns. Mrs. Whitehead also renounced all parental rights to the child. In return, the Sterns agreed to pay her $10,000 and to assume all of her medical and incidental expenses. In a separate contract, Mr. Stern agreed to pay $7,500 to the Infertility Center.

Baby M was born on March 27, 1986, but after the birth Mrs. Whitehead changed her mind and decided not to give up the child. The Whiteheads' desire to keep Baby M was so strong that they defied a court order giving temporary custody to the Sterns, and absconded to Florida with the child. When the Whiteheads were finally apprehended, the Sterns initiated a permanent custody proceeding in a New Jersey family court. The court awarded permanent custody to Mr. Stern, permitted Mrs. Stern to adopt Baby M, and permanently terminated all of Mrs. Whitehead's parental rights.[9]

Mrs. Whitehead appealed, and the New Jersey Supreme Court granted direct certification.[10] The Supreme Court unanimously affirmed the trial court's award of custody to Mr. Stern, but reversed both the trial court's termination of Mrs. Whitehead's parental rights and its order permitting Mrs. Stern to adopt Baby M. It then remanded the case to a new trial judge for a determination of appropriate visitation rights for Mrs. Whitehead.[11] The New Jersey Supreme Court opinion discloses that, after the trial court's ruling, Mrs. Whitehead separated from Mr. Whitehead, became pregnant by another man, divorced Mr. Whitehead, and married the other man.[12] After

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7. Both Mr. and Mrs. Stern were forty-one years old at the time of the trial. *Id.* at 335, 525 A.2d at 1138.

8. Mr. Stern reserved the right to compel an abortion if amniocentesis revealed evidence of a genetic or congenital abnormality. *Id.* at 345, 525 A.2d at 1143.

9. *Id.* at 408-09, 525 A.2d at 1175-76; *see infra* note 33 (detailing New Jersey Supreme Court's rendition of these events).

10. 107 N.J. 140, 526 A.2d 203 (1987).

11. *Baby M, II,* 109 N.J.at 463, 537 A.2d at 1261 (1987).

12. *Id.* at 461 n.18, 537 A.2d at 1260 n.18.

reciting these additional facts, however, the court emphasized that they did not affect its decision.[13] In reaching this disposition of the *Baby M* case, the supreme court adopted the following line of reasoning:

Under New Jersey law, the natural parents of a child have equal claims to custody of that child, and custody is to be determined with regard to the best interests of the child.[14] The record, containing the testimony of eleven expert witnesses, required deference to the trial court's finding that the child's best interests would be served by awarding custody to the Sterns. Moreover, this conclusion accorded with the supreme court's own independent reading of the record. The stability of the Whitehead family was subject to doubt because of financial difficulties, Mr. Whitehead's persistent alcoholism, and Mrs. Whitehead's tendency to be an overly-controlling mother, which the court felt had jeopardized the psychological development of her children.[15] The Sterns, on the other hand, had a happy marriage, a stable and financially secure household, supportive friends, and a desire to nurture and protect the child while at the same time encouraging the child's independence. The Sterns' lack of parental experience was offset by their willingness to learn, their rational approach to problems, and their professional training. In addition, during the year and a half in which the Sterns had custody of Baby M, the child developed well and formed strong relationships with both Mr. and Mrs. Stern.[16]

Although the best interests of Baby M required awarding custody to the Sterns, the best-interests standard did not govern the termination of Mrs. Whitehead's parental rights. Under New Jersey law, parental rights can be terminated only after intentional abandonment, substantial neglect of parental duties, or a showing of unfitness.[17] Mrs. Whitehead's conduct did not satisfy this standard; therefore, her parental rights could not be terminated.[18] Because Mrs. Whitehead retained her parental rights, Mrs. Stern was precluded from adopting Baby M.[19]

The supreme court held that the surrogacy contract signed by Mr. Stern and Mrs. Whitehead could not alter the foregoing conclusions because the

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13. *Id.*

14. *Id.* at 453, 537 A.2d at 1256.

15. *Id.* at 457-58, 537 A.2d at 1258-59.

16. *Id.* at 458-59, 537 A.2d at 1259.

17. N.J. STAT. ANN. §§ 9:2-16,-17,-19; 9:2-13(d); 9:3-41 (West 1987), *cited in Baby M, II,* 109 N.J. at 425-26, 537 A.2d at 1242.

18. *Baby M, II,* 109 N.J. at 444-46, 537 A.2d at 1251-52. Mrs. Whitehead's contractual relinquishment of parental rights failed to constitute the requisite abandonment because, as is discussed below, the contract itself was illegal, and because the relinquishment of parental rights in connection with private placement adoptions can be revoked within a reasonable time after birth, as it was in this case. *Id.* at 427-28, 537 A.2d at 1252.

19. *Id.* at 429, 537 A.2d at 1244.

contract was illegal and unenforceable.[20] It violated New Jersey statutes prohibiting private placement adoptions for money, and statutes prohibiting the irrevocable relinquishment of parental rights in connection with private placement adoptions prior to birth and counseling.[21] In addition, the surrogacy contract violated New Jersey public policy in a variety of ways: it permitted natural parents to determine child custody without regard to the best interests of the child; it prevented a child from being brought up by both of its natural parents; it enhanced the natural father's right to a child in derogation of the principle that natural parents should have equal rights with respect to their children; it provided for the surrender of a child without prior counseling; and it permitted the payment of money to influence an adoption decision—all in violation of state policies expressed in New Jersey statutes and judicial decisions.[22]

Finally, the supreme court held that no constitutional right possessed by Mr. Stern compelled a contrary resolution of the case. Although the right of privacy embodied in the fourteenth amendment of the federal constitution, and recognized by the state constitution, encompassed a fundamental right to procreate,[23] neither Mr. Stern nor Mrs. Whitehead was deprived of that right; they were both permitted to procreate through Mr. Stern's artificial insemination of Mrs. Whitehead. In addition, the right to procreate was held not to encompass a correlative right to custody, care, companionship, or nurturing. If it did, the right could never be protected for one of the two separated natural parents without simultaneously denying it to the other natural parent.[24]

Likewise, the court stated that its decision did not offend the equal protection clause of the fourteenth amendment. The court recognized that New Jersey law honors parental rights in an infertile man whose spouse procreates through the process of artificial insemination (utilizing sperm provided by another man) while refusing to honor parental rights in an infertile woman whose spouse procreates through the process of artificial insemination (utilizing gestation services provided by another woman). However, the court claimed that the difference between contributing sperm (a process taking only a few moments) and contributing gestation services (a process taking nine months) justifies such differential gender treatment, thereby defeating any claim of an equal protection violation.[25]

Although the state supreme court declared surrogate-mothering contracts

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20. *Id.* at 421-22, 537 A.2d at 1240.
21. *Id.* at 423-34, 537 A.2d at 1240-46.
22. *Id.* at 434-44, 537 A.2d at 1246-50.
23. *Id.* at 448, 537 A.2d at 1253.
24. *Id.* at 448-49, 537 A.2d at 1253-54.
25. *Id.* at 449-50, 537 A.2d at 1254-55.

to be illegal and unenforceable under the facts of the *Baby M* case, the court found that such agreements entered into by volunteer surrogate mothers were not legally prohibited, provided they were not accompanied by any monetary payment, and provided the surrogate mother retained the right to change her mind, even after birth, about the relinquishment of parental rights. In addition, the court stated that the legislature had the power to modify the law and overrule the court's invalidation of surrogacy contracts, subject only to constitutional constraints.[26]

II. ANALYTICAL TECHNIQUES

The New Jersey Supreme Court's opinion in *Baby M* relies upon three customary analytical techniques in order to demonstrate that its result follows from existing legal principles rather than from the subjective preferences of the judges themselves. The first is argument by assertion—a technique by which the court announces a legal conclusion as an a priori proposition that needs no further analytical justification. The second mode of analysis is precedential—a technique by which the court justifies a conclusion through a demonstration of its similarity to, or difference from, another proposition that has already been authoritatively established. The third mode of analysis is functional—a technique by which the court justifies a conclusion through a demonstration that the conclusion logically follows from a concept or functional objective that is already recognized to be desirable. Ultimately, however, each technique depends for its validity upon the types of policy preferences that our insistence upon principled decisionmaking is designed to insulate from the process.

A. ASSERTION

Argument by assertion is effective when the asserted conclusion is self-evident. Although assertions offer no analytical support for the conclusions that they advance, the absence of analytical justification is unimportant as long as the audience to whom the argument is addressed will accept the assertion without further justification. In fact, because all analytical arguments must develop from some starting point, assertions are an inevitable part of syllogistic reasoning. If, however, an asserted conclusion is not self-evidently correct, mere assertion does little, if anything, to enhance its acceptability.[27]

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26. *Id.* at 469, 537 A.2d at 1264.

27. It is possible for an assertion to have persuasive impact because it is made by an authoritative source. Einstein's assertion that $E=mc^2$, for example, may be more persuasive than Spann's assertion of the identical proposition, but this enhanced persuasiveness does not result from any additional analytical justification. Those who believe that Einstein's assertions about such matters are self-evidently correct will accept the assertion without demanding any additional justification, but those who decline to defer to Einstein's authority will still wish to see his proof.

The difficulty with arguments by assertion is that they provide no assurance that legal principles rather than policy preferences lie beneath the assertions that are made.

The New Jersey Supreme Court's conclusion that awarding custody to the Sterns was in the best interests of Baby M is an example of an argument by assertion. After reciting a series of facts about the Sterns and the Whiteheads,[28] the court then announced a series of conclusions about why custody in the Sterns was in the best interests of the child, without offering any justification for its conclusions.[29] Rather, it seemed simply to have assumed that the Sterns' financial stability, supportive friends, professional background, and rational approach to problems were preferable to the Whitehead's financial instability, history of alcoholism and over-protective parenting.[30] Many would agree with the court, but some might not. In fact, some of our most pervasive cultural myths extol the virtues of individuals who are able to use initiative, persistence, and ingenuity to overcome poverty and adversity.[31] As a result of the court's decision, Baby M will be deprived of the opportunity to develop the character traits potentially acquired through the process of overcoming a less stable background. The opinion offers nothing to those who do not share the court's preference for upper middle-class stability to persuade them of its soundness. The take-it-or-leave-it nature of this portion of the court's opinion makes it simply a reflection of judicial preferences rather than a safeguard against them.

The *Baby M* opinion also illustrates how multiple assertions can be imbedded in an argument in a way that makes them mutually reinforcing. For example, one reason the supreme court awarded custody to the Sterns was to prevent disruption of the one-and-a-half years of bonding that had already occurred between the Sterns and Baby M.[32] But that bonding resulted solely from the temporary and pendente lite custody orders issued by the trial court.[33] In this context, an interim custody order is, in effect, a prediction

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28. *See Baby M, II,* 109 N.J. at 411-21, 537 A.2d at 1235-40.

29. *Id.* at 452-63, 537 A.2d at 1255-61.

30. *Id.*.

31. Think about Abraham Lincoln or Andrew Carnegie or Sojourner Truth. In fact, family stability and financial well-being may itself produce a dangerous despondency; consider the plight of Richard Cory. *See Richard Cory* in SELECTED POEMS OF E.A. ROBINSON (M. Zabel ed. 1966). One might respond that these myths really demonstrate that fundamental character traits rather than socio-economic circumstances govern the fullness and gratification derived from life. But if that is so, one wonders why the court was justified in focusing on socio-economic considerations at all in making a "best interests" determination.

32. This justification amounts to an assertion because the court offers no analytical support for its conclusion that the disruption of bonding would be undesirable, apparently believing the dangers of such disruption to be self-evident.

33. The trial court initially ordered custody of Baby M to the Sterns, pendente lite, after an ex parte consideration of their complaint seeking enforcement of the surrogacy contract. When the process server attempted to enforce the order, the Whiteheads fled with the child to Florida, where

about which party will ultimately prevail on the merits of the litigation.[34] The court's interim and final "best interests" assertions thereby became mutually reinforcing. The Sterns were awarded permanent custody to prevent disruption of the bonding that had formed as a result of the interim custody awards, and the interim custody awards were based on the prediction that the Sterns ultimately would be awarded permanent custody. Because arguments by assertion are offered without analytical justification, and therefore are not subject to analytical constraints, the interim custody prophecy was ultimately able to become a self-fulfilling one.

B. PRECEDENT

Precedential arguments are effective when a demonstrable similarity or difference exists between the issue currently confronting a court and an issue that has already been resolved in an authoritative precedent. By demonstrating that the current issue is either distinguishable or indistinguishable from the issue resolved in the precedent, the court can show whether or not the legal principle embodied in the precedent governs resolution of the current issue. Accordingly, under the doctrine of stare decisis, legal principles rather than judicial policy preferences are said to account for the resolution of legal issues.[35] Yet precedent does nothing to ensure principled decisionmaking when a precedent is held not to control resolution of the current issue.[36] Additionally, and more seriously, precedential arguments offer no method

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they were eventually discovered. The police in Florida enforced the court order, removed Baby M from the Whiteheads' custody and placed the child with the Sterns. The original ex parte order of the court was then affirmed by the trial court after consideration of both parties' arguments. *Baby M, II,* 109 N.J. at 416, 537 A.2d at 1237.

34. The customary standard for issuing such orders requires a court to balance the likelihood and gravity of any injury that the court's actions will cause the respective parties, considering each party's probability of prevailing on the merits. *See* Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958) (listing four factors court considers in balancing injury and likelihood of prevailing on the merits); American Hosp. Supply Corp. v. Hosp. Prod. Ltd., 780 F.2d 589, 593 (7th Cir. 1986) (creating formula to balance likelihood of prevailing on merits with gravity of injury). In *Baby M* the gravity of the injury threatening each party was very similar, thereby canceling this factor out of the equation. As a result, the party most likely to obtain interim custody was the party most likely to prevail ultimately on the merits.

35. For present purposes, the concept of precedent includes rules of decision emanating from prior fact situations or from statutes purporting to govern specified fact situations. The distinctive feature of a precedent is that it seeks to describe the cases it governs with a relatively high degree of specificity, unlike a general concept or functional objective, which operates at a very low level of specificity. *See infra* Part II-C (describing functional arguments).

36. For example, the trial court treated the body of New Jersey adoption law as a set of precedents, but asserted that the adoption laws were inapplicable. *Baby M, I,* 217 N.J. Super. at 372-73, 390, 399, 525 A.2d at 1157-58, 1167, 1171. This left the court with broad discretion in deciding whether to terminate Mrs. Whitehead's parental rights. The supreme court reversed this portion of the trial court decision precisely because it thought the adoption precedents did control, and thereby restricted the trial court's discretion to terminate parental rights. *Baby M, II,* 109 N.J. at 444-47, 537 A.2d at 1251-53.

independent of policy preferences to ascertain whether the current issue and the precedent in question are sufficiently similar for the precedent to be deemed controlling.

An example of the New Jersey Supreme Court's use of precedential analysis lies in its determination that the surrogacy contract entered into between Mr. Stern and Mrs. Whitehead was illegal and unenforceable.[37] As a major justification for its conclusion, the court offered that the contract violated New Jersey adoption statutes prohibiting the payment of money to secure a private placement adoption. In the court's view, the contract amounted to illegal baby selling.[38] This justification is supportable only if the adoption statutes in fact apply to the *Baby M* transaction and the surrogacy contract in fact falls within the scope of the baby selling prohibition. However, neither proposition can be established through recourse to the adoption precedents alone. Ultimately, recourse must be made to judicial preferences in order to give the precedents operative meaning.

1. Characterization as Adoption.

The appropriateness of the supreme court's characterization of the *Baby M* transaction as an adoption is far from self-evident. This is illustrated by the trial court's emphatic holding that the transaction did *not* constitute an adoption within the meaning of the New Jersey adoption statutes.[39] There are both similarities and differences between surrogacy agreements and adoptions, but it is difficult to say whether the similarities or the differences should control.

Both surrogacy and adoption involve the relinquishment of custody and parental rights by a natural parent, and both involve a legal adoption by someone who is not a natural parent. Because the relinquishment of parental rights is at stake, the counseling and revocability concerns expressed in the adoption statutes ought to be, at least to some extent, transferrable to surrogacy transactions. Likewise, because both significantly affect the future of the child involved, the best interest concerns of the adoption precedents remain quite relevant to children conceived as a result of surrogacy agreements.[40] These similarities argue in favor of applying the New Jersey adoption laws to surrogacy contracts.

However, there are also differences between adoption and surrogacy that

37. *Baby M, II,* 109 N.J. at 421-44, 537 A.2d at 1240-50.

38. *Id.* at 422, 537 A.2d at 1240.

39. *Baby M, I,* 217 N.J. Super. at 372-73, 390, 399, 525 A.2d at 1157-58, 1167, 1171.

40. To the extent that these precedential arguments begin to look like the functional arguments discussed in Part II-C below, that is because there is overlap between the modes of analysis I have isolated. Indeed, my ultimate point is that, for analytical purposes, all three techniques are essentially the same.

argue in favor of treating the two as different types of transactions. Surrogacy contracts involve contractual expectations not present in the traditional adoption context. Because a surrogate parent who relinquishes custody never intended to have a child of his or her own, but only intended to assist another couple in having children, our societal interests in protecting contractual autonomy and private ordering may outweigh our interest in protecting the surrogate's unanticipated biological attachment. Moreover, because disruption of one natural parent's biological attachment will ensue no matter which way the court rules, societal interests in preserving contractual expectations may ultimately govern the way in which the balance is to be struck. In addition, surrogacy could not have been within the contemplation of the legislature that enacted the adoption laws. As the trial court pointed out, the novelty of surrogate mothering indicates that the legislature was not responding to the special problems posed by surrogacy contracts when it enacted the adoption laws.[41] Therefore, there is little reason to think that those statutes, enacted to balance the competing interests implicated by a different set of problems, also strike the proper balance between this set of competing interests not considered by the legislature. Indeed, in its invitation for legislative action directed specifically at surrogacy, the supreme court itself seems to have recognized the great ambiguity surrounding its application of the New Jersey adoption statutes to surrogacy contracts.

The problem of proper characterization is reminiscent of the frequent categorization problems that arise under Article II of the Uniform Commercial Code, which applies to transactions in goods but not to services.[42] If surrogacy agreements are viewed as providing for the delivery of a child, as the supreme court viewed them,[43] the application of adoption precedents may seem appropriate. But if they are viewed as providing for the rendition of a service, as the trial court apparently thought,[44] the application of adoption law seems more strained. In fact, surrogacy agreements are hybrid transactions, and like hybrid transactions under the Uniform Commercial Code, are apt to be characterized either way. Moreover, the characterizations are likely to be inconsistent across jurisdictions and even within a given jurisdic-

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41. *Baby M, I,* 217 N.J. Super. at 372, 525 A.2d at 1157. The trial court is probably incorrect in its assumption that surrogate mothering is a new reproductive technology; it has roots in antiquity. *See* Areen, Baby M *Reconsidered,* 76 GEO. L.J. 1741, 1741 (1988). However, the trial court probably is correct that the legislature was not contemplating surrogate mothering when it enacted New Jersey's adoption statutes.

42. U.C.C. §§ 2-102, 2-106 (1981).

43. *Baby M, II,* 109 N.J. at 422, 537 A.2d at 1240.

44. *Cf. Baby M, I,* 217 N.J. Super. at 372, 525 A.2d at 1157. The trial court describes Baby M as a third-party beneficiary to the contract between Mr. Stern and Mrs. Whitehead. This characterization indicates that the baby was not, in fact, the subject of the contract, but rather a third party to it. Such an assumption implies that the subject of the contract was gestational services. *Id.* at 399, 525 A.2d at 1171.

tion.[45] Because characterization of surrogacy agreements is indeterminate, adoption precedents cannot alone govern the outcome of surrogacy disputes. A court must first determine whether the precedents apply, and it is unrealistic to expect that such a determination could be made without recourse to judicial preferences as an aid in resolving the ambiguity inherent in this question. In fact, it is difficult to see how the ambiguity could be resolved in any way other than through recourse to judicial preferences.

2. Scope of the Baby Selling Prohibition

After having decided that adoption laws govern surrogacy contracts, the New Jersey Supreme Court held that the contract between Mr. Stern and Mrs. Whitehead constituted baby selling of the sort prohibited by the New Jersey adoption statutes.[46] New Jersey law prohibits the payment or acceptance of money in connection with a private placement adoption.[47] Technically, the parties may not have violated this statute. The contract was signed by Mr. Stern and Mrs. Whitehead, both natural parents of Baby M who could therefore secure custody without an adoption. Although Mr. Whitehead also signed the contract, his involvement was tangential, limited to rebutting the presumption of paternity that would arise because of his marriage to Mrs. Whitehead. Mrs. Stern, the adoptive mother, was not a party to the contract. In addition, the contract provided that the $10,000 payment designated for Mrs. Whitehead was for the provision of her gestational services, not for adoption. Apparently, the parties structured the transaction in this way precisely because they wished to avoid the prohibitions of the baby selling statute.[48] The supreme court had little difficulty deciding that, despite its outward appearance, the contract was in essence a baby selling contract prohibited by the New Jersey statute.[49] But once again, the precise scope of the baby selling statute is difficult to ascertain through application of legal principles isolated from policy preferences.

The statutory language offers little help in determining the proper scope of its application, for the language broadly prohibits any payment "in connection" with a private placement adoption.[50] Presumably, this includes direct payments made to secure an adopted child, but does not include the taxi fare

45. The supreme court opinion discusses the differential legal status that has been accorded surrogacy agreements in various jurisdictions. *Baby M, II,* 109 N.J. at 442-44 n.11, 537 A.2d at 1250-51 n.11.

46. *Id.* at 423-34, 537 A.2d at 1240-46.

47. N.J. STAT. ANN. § 9:3-54 (West 1987), *quoted in Baby M, II,* 109 N.J. at 423 n.4, 537 A.2d at 1240 n.4.

48. *See Baby M, II,* 109 N.J. at 411-12, 423-24, 537 A.2d at 1235, 1241.

49. *Id.* 424-25, 537 A.2d at 1241.

50. *See* N.J. STAT. ANN. § 9:3-54, *quoted in Baby M, II,* 109 N.J. at 423 n.4, 537 A.2d at 1240 n.4.

paid to get home from the hospital with an adopted child. Accordingly, some basis other than statutory language must be found for determining the scope of the prohibition. The court chose to apply the prohibition to the Baby M contract because it found the dangers entailed in baby selling to be present in the Baby M transaction. Chief among these was the danger that financial incentives would play a distorting role in shaping surrogacy arrangements: economic considerations might cause surrogacy agencies to overlook potential problems with surrogacy arrangements in order to ensure that they receive their profits; women, induced by the desire to obtain monetary payments, might decide to become surrogate mothers and to give up their children even though the decision to do so was not truly voluntary; custody of a surrogate mother's child might ultimately go to the highest bidder rather than to the most suitable candidate for adoption; surrogacy might ultimately end up being used for the benefit of the rich at the expense of the poor; and psychological damage might be inflicted on a child who learns that he or she was the offspring of someone who gave birth only to obtain money.[51] For these reasons, the court chose to view surrogacy contracts as falling within the scope of the baby selling prohibition.

The problem with the court's justification is that it assumes economic motivation to be a bad thing. In a capitalist society, this assumption is a difficult one to maintain. Economic incentives are pervasive, and entities as reputable as the United States government rely heavily on them.[52] Moreover, many of us would probably not go to work in the morning if it were not for the economic incentive that gets us out of bed. It is untenable to suggest that a decision is unreliable merely because it is economically motivated. Therefore, if the court is to give this portion of its opinion any analytical appeal it must demonstrate that the economic incentives involved in surrogacy arrangements are qualitatively different from the incentives on which we rely so heavily in our everyday lives. More particularly, the court would have to distinguish impermissible surrogacy arrangements from permissible adoption arrangements. This is difficult because, as the court itself recognizes, adoption decisions are very likely to be motivated in part by economic considerations;[53] it is more expensive to raise a child than to relinquish parental rights. Although recognizing this likelihood, the court does not appear to appreciate the damage this recognition does to its own economic coercion argument.

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51. *Baby M, II,* 109 N.J. at 434-44, 537 A.2d at 1246-50. In this respect the court's precedential analysis begins to look very much like functional analysis. *See supra* note 40 (precedential arguments overlap with functional arguments).

52. Consider, for example, the elaborate maze of economic incentives that make up the Internal Revenue Code.

53. *Baby M, II,* 109 N.J. at 438, 537 A.2d at 1248.

Once again, only judicial preferences appear capable of distinguishing between permissible and impermissible forms of economic motivation.

C. FUNCTIONAL ARGUMENTS

Functional arguments are effective when a court is able to demonstrate that a particular outcome is logically compelled by an abstract concept or functional objective that has already secured general acceptance as being desirable. For example, the impermissibility of newspaper censorship might be established by showing that censorship offends the concept of free speech and undermines the objective of promoting an uninhibited exchange of ideas—things that are generally recognized to be desirable, as evidenced by the inclusion of a free speech guarantee in the Constitution. The difficulty with functional arguments is that they proceed from propositions that are too general to ensure that an outcome emanates from the principle being espoused rather than from policy preferences.[54]

An example of the *Baby M* courts' use of the functional argument technique lies in its holding that the equal protection clause permits the court to refuse enforcement of surrogate-mother contracts though permitting enforcement of surrogate-father contracts.[55] The Sterns had argued that the trial court's invalidation of surrogate-mother contracts amounted to unconstitutional gender discrimination because infertile men but not infertile women were permitted to contract for and adopt the children produced through a process of artificial insemination in which their spouses participated. In rejecting this equal protection claim, the state supreme court stated that because the brief involvement of a sperm donor in the process of artificial insemination was less significant than the nine-month involvement of a surrogate mother, differential treatment of the two was constitutionally permissible.[56]

The different degree of involvement in the artificial insemination process might, at first blush, appear to warrant differential gender treatment in the enforceability of preconception decisions to relinquish parental rights. The bonding that occurs between mother and child during the period of gestation is not likely to be replicated in the father until some time after birth. In fact, New Jersey law contains a strong presumption against granting custody of a newborn child to the father instead of the mother, presumably because of this

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54. It is this lack of specificity that distinguishes general concepts and functional objectives from precedents. *See supra* note 35 (describing precedential analysis).

55. By surrogate father contracts, I mean contracts in which a male supplies sperm for the artificial insemination of a woman who desires to bear a child. The trial court noted that under New Jersey law males are permitted to sell their sperm for this purpose. *Baby M, I,* 271 N.J. Super. at 313, 388, 525 A.2d 1128, 1165 (1987).

56. *Baby M, II,* 109 N.J. at 450, 537 A.2d at 1254-55.

different rate of bonding.[57] However, it is possible to view the court's differential gender treatment from another perspective that makes the equal protection problem seem more troubling.

The court's decision to enforce surrogate-father contracts but not surrogate mother contracts means that men who wish to sell their services as surrogate parents are permitted to do so, but women who wish to do the same thing are not. For a woman who is confident that she will not experience any unanticipated bonding after birth, the court's refusal to enforce her surrogacy contract ceases to constitute benign paternalism. Rather, it amounts to discriminatory judicial interference with her contractual autonomy that has adverse economic consequences.[58] Certainly such women exist, and a woman may know from past experience that she is one of them. Viewed from the perspective of such a woman, the court's gender discrimination is difficult to justify.[59] In order to conduct a proper equal protection analysis, a court would have to decide whether the bonding dimension or the economic dimension of surrogacy contracts should govern. The equal protection clause requires that similar circumstances be accorded similar treatment, but it does not specify the dimension along which similarities and differences are to be judged. As a substantive matter, the concept of equality is devoid of content. It requires additional input to acquire any operative meaning.[60] That input must come from somewhere, and ultimately it can only be supplied by the preferences of those judges who conduct the analysis. It cannot come from a functional analysis of the concept of equality itself, because the concept does not purport to supply the dimensions along which equality claims are to be

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57. *See id.* at 462, 537 A.2d at 1261 (implying that mother's bond with child is stronger at birth and early infancy than father's bond). The court's gender differentiation seems inconsistent with its earlier assertion that New Jersey statutory law and public policy require natural parents to be given equal rights with respect to their children, regardless of their marital status. *See id.* at 435-36, 537 A.2d at 1247. Indeed, one of the court's reasons for holding surrogate-mothering contracts illegal was that they violated this policy of equality by making the natural father's claim to the child superior to the claim of the natural mother. *Id.*

58. Such women will be unable to receive payment for gestational services while surrogate fathers will be allowed to receive payment for their services.

59. The problem seemingly would be more acute for those who advocate market control of child custody determinations, because judicial refusal to enforce surrogacy contracts would undermine the ability of the market to produce proper outcomes. *See generally* Landes & Posner, *The Economics of the Baby Shortage,* 7 J. LEGAL STUD. 323 (1978) (discussing market control in adoption context); Posner, *The Regulation of the Market in Adoptions,* 67 B.U.L. REV. 59 (1987) (same).

60. This is the point made in Westen, *The Empty Idea of Equality, 95* HARV. L. REV. 537 (1982). The Westen thesis generated spirited responses. *See* Chemerinsky, *In Defense of Equality: A Reply to Professor Westen,* 81 MICH. L. REV. 575, 576 (1983) (the equality concept is necessary morally, analytically, and rhetorically); D'Amato, *Is Equality A Totally Empty Idea?,* 81 MICH. L. REV. 600, 603 (1983) (equality has a substantive content of its own); Greenwalt, *How Empty is the Idea of Equality?,* 83 COLUM. L. REV. 1167, 1169 (1983) (identifying both formal and substantive principles of equality). For Professor Westen's reply, see Westen, *The Meaning of Equality in Law, Science, Math and Morals: A Reply,* 81 MICH. L. REV. 604, 663 (1983).

evaluated. Nor can it come from precedents, because precedent, too, requires additional input to acquire operative meaning.[61] The only remaining option is that the dimension is supplied by judicial assertion. But because assertions offer nothing in the way of analytical justification, they necessarily derive from the policy preferences of the judges who make them.

The argument through which the *Baby M* court concluded that Mr. Stern's fourteenth amendment right of privacy did not encompass a right to the custody and companionship of the child produced by his artificial insemination of Mrs. Whitehead provides another example of the assertion of policy preferences through functional argumentation.[62] The supreme court conceded the existence of a constitutional right of privacy encompassing a right to procreate. However, the court emphasized that the right to procreate became fully realized once a child was produced, and the right of privacy did not encompass any additional right to the companionship of one's offspring that required an award of custody to Mr. Stern.[63]

This argument, however, does not explain how the court determined that procreation was protected by the constitutional right of privacy but companionship was not. This admittedly abstract right appears to embrace a complex of values relating to autonomy, personal intimacy, marriage, intercourse, and family relationships.[64] As such, it is unclear why procreation should fall within the scope of the right but companionship with offspring should not. In fact, it is easy to imagine an argument valuing companionship more highly than procreation because without companionship the right to procreate could become largely meaningless. Rather than engage in any extended analysis of the concept of privacy, however, the court simply announced its conclusion.[65] In so doing, the court illustrated that although functional analysis and assertion may be at different ends of the analytical spectrum, they are, at bottom, very much alike.

Like an assertion, a functional argument seems incapable of achieving independence from the types of policy preferences it is designed to guard against. By hypothesis, the governing concept from which a functional argument proceeds must be stated in terms sufficiently abstract to make it acceptable to individuals whose views conflict about the proper resolution of

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61. *See supra* Part II-B (describing precedential analysis).

62. Although the court awarded custody to Mr. Stern, it did so on best interest grounds rather than on consitutional grounds. *See Baby M, II,* 109 N.J. at 453, 537 A.2d at 1256.

63. *Id.* at 448-51, 537 A.2d at 1253-54. While the court arguably recognized that a right to companionship *might* be constitutionally protected, *id.* at 450, 537 A.2d at 1255, it refrained from investigating whether such a right did in fact exist or what effect it would have on the dispute.

64. *See Baby M, II,* at 448, 537 A.2d at 1253-54 (listing constitutionally protected rights encompassed by the right of privacy).

65. For a detailed critique of the court's privacy analysis see Allen, *Privacy, Surrogacy, and the* Baby M *Case,* 76 GEO. L.J. 1759 (1988).

particular cases to which the concept will apply. As a result, the concept cannot be stated with enough precision to control the outcome of those cases. It is only by narrowing their scope that abstract concepts and functional objectives can acquire the specificity needed to generate outcomes. But such a narrowing succeeds only in transforming the abstract concepts and functional objectives into precedents, which themselves can operate only through recourse to assertions. Because assertions are nothing more than embodiments of the very preferences that our efforts at principled analysis are designed to guard against, the prospects for judicial achievement of genuinely principled results appear to be rather bleak.

III. THE CASSANDRA PROBLEM

In Greek mythology, Cassandra was the daughter of Priam and Hecuba, the King and Queen of Troy. In an effort to seduce her, the god Apollo gave Cassandra the gift of prophecy. But when she refused to submit to his desires, Apollo transformed the gift into a curse by dooming her prophecies, although true, to be disbelieved. During the Trojan War, when Cassandra warned about the danger of admitting the Trojan horse into the city of Troy, her warning went unheeded, and the city fell to the Greek invaders. After the fall of Troy, Cassandra was violated, taken captive by the Greeks, and given to Agamemnon, the Greek commander-in-chief, as his share of the spoils. Cassandra ultimately was murdered with Agamemnon by Clytemnestra, the unfaithful wife of Agamemnon and sister of the famous Helen.[66]

The Greek myths have endured because their themes transcend time and context. One transcendent theme of the Cassandra myth is that the truth of an insight does not necessarily determine its power to persuade. Indeed, Cassandra's plight depicts the existence of accurate insights which, because of their nature and regardless of their truth, are incapable of being believed. Such insights are fated to rejection even by those who would benefit most from their acceptance.

Baby M is intriguing precisely because it teases us with a prophecy that is incapable of belief. On a superficial level, the dissatisfaction that one is likely to feel with the New Jersey Supreme Court's reasoning can be attributed to a lack of analytical rigor. However, as the analysis offered in Part II was designed to reveal, the defects in the opinion can also be understood as defects inherent in the modes of argument that commonly characterize legal analysis. As such, the analytical inadequacies of the opinion can be extrapolated to all efforts at principled analysis, with inescapable nihilistic implica-

66. *See* T. BULFINCH, THE AGE OF FABLE 271, 273 (Mentor ed. 1962); H. ROSE, A HANDBOOK OF GREEK MYTHOLOGY 143, 230-31, 243, 247 (Dutton ed. 1959).

tions.[67] Cassandra, however, suggests that we have no choice but to decline the extrapolation because it would produce an insight of perpetual subjectivity that is simply incapable of belief. Nevertheless, one might still wonder what causes such an insight to be beyond belief and what consequences might flow from its necessary rejection.

A. CAUSES

The cause of Cassandra's curse was her refusal to sacrifice the virtue that she valued most highly. The virtue of the legal system is its emphatic adherence to principle, and like Cassandra, the system values its virtue above all else. When that virtue is threatened by suggestions of inevitable subjectivity, rather than submit, the system resists at all costs. Moreover, because its very existence is at stake, the system's self-preservation instincts permeate even its most unlikely facets.

The legal system has made a considerable investment in the viability of principled decisionmaking. Not only is the possibility of adherence to principle a basic assumption of our judicial selection process, it is essential to the customary justifications offered for vesting a significant amount of societal power in a politically unaccountable judiciary.[68] Moreover, those who participate in the system most directly—the judges, the lawyers, and the repeat-player clients—are accustomed to operating under a system of rules premised upon the viability of principled decisionmaking. As a result, inertial forces pose a formidable barrier to recognition of shortcomings serious enough to necessitate major alterations in the operative rules of the system. If major alterations were required, the current players would not only have to learn a new set of rules, but they would risk a loss of power to less-established players for whom the new rules were not so awkward and not so counterintuitive.

The occasional-players and outside observers have a more abstract interest in the viability of principle, but it is a substantial interest nevertheless. Because of their lack of familiarity with the system, they are likely to be confronted with adverse or questionable rulings they do not fully understand. This is especially true with respect to technical rulings that implicate esoteric

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67. *Baby M*'s nihilistic implications can be seen by taking the present analysis one step further. This analysis endeavored only to demonstrate that legal principles were incapable of insulating the court's decision from judicial policy preferences and that the principles, in fact, depended upon such preferences to acquire any operative meaning. If one were then to ask why the judges possessed those particular policy preferences, the gravity of the problem would become apparent. Either there is some explanation for the judge's preferences, which would amount to simply another principled explanation whose inadequacy could also be demonstrated, or there is no explanation at all—a thought that has distinct nihilistic overtones.

68. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118-28 (1977) (comparing methods of selecting judges and insulating selection from political pressure in both state and federal systems).

procedural or evidentiary doctrines. Among these players, tolerance for such rulings is premised upon a generalized faith that any principle for which an interest is to be sacrificed in seeming contravention of intuitive notions of justice must be an important one that will be honored consistently across cases. Moreover, any lingering dissonance between faith in the system's general fairness and perceptions of unfairness in particular cases is resolved through the conviction that while unjust results may constitute imperfections in practice, they do not undermine the theory of principled decisionmaking itself. Because there is no short term solution to the problem of perceived unfairness, this leap of faith is required to dissipate the dissonance.

More subtly, the darker side of human nature relies upon principle as an expedient in pursuing ends that would be intolerably threatening if pursued directly. Freud hypothesized that dreams function to protect our sleep from the rude awakening that would result if our baser sexual desires received explicit recognition while our conscious defenses slumbered.[69] Similarly, principled explanation permits us to avoid confrontation with the baser motivations that may lie beneath many of our societal actions.

On occasion, we permit a corporate or governmental entity to prevail on a legal claim against a vulnerable human being even though the benefit to the entity is marginal and the harm to the individual is devastating. Recourse to a principle of commercial stability or a presumption of administrative regularity permits us to avoid direct confrontation with more troubling questions about income distribution and economic power that may lie beneath our decision. On occasion we also decline to incarcerate obviously culpable criminals because the police failed to engage in the proper linguistic recitals. Recourse to an administrable principle of voluntariness permits us to avoid direct confrontation with more troubling questions about free will and social causation that may lie beneath our decision. On occasion we even tell women that they either can or cannot abort the fetuses that they carry. Recourse to a principle of viability permits us to avoid direct confrontation with the troubling thought that we could be making life-important decisions in a largely arbitrary manner without any supportable justification. Even the commentators, whose function it is to evaluate the acceptability of our legal analyses, operate under institutional constraints that make it unacceptable for them to question the fundamental soundness of a system of principled analysis. Commentators earn their livelihoods and enhance their reputations by maneuvering within the system, not by advocating its overthrow.[70] More-

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69. S. FREUD, THE INTERPRETATION OF DREAMS § VII(d) (1900).

70. I take this to be the point of Dean Carrington's suggestion that critical legal scholars should leave legal academics. Carrington, *Of Law and the River,* 34 J. LEGAL ED. 222, 227 (1984); *see also "Of Law and the River," and of Nihilism and Academic Freedom,* 35 J. LEGAL ED. 1, 1-26 (1984) (comp. by P. Martin 1984) (responses to Dean Carrington's suggestion).

over, the analytical skills they have refined would be useless outside of a system of principled analysis. If there were no longer such a system for the commentators to refine, but instead only a universe of unconnected random events, the commentators would soon become obsolete. Like the practitioners, commentators are unlikely to embrace epistemological perceptions that would result in their own demise.

This is equally true for the maverick commentators who nominally do espouse radical indeterminacy and prophecy the perpetual failure of principle.[71] They simply cannot mean what they say. Their work relies on the same analytical techniques that are used in the work of their more moderate counterparts, and they typically share the same desire to enhance their esteem and to feed their families. Moreover, their assault on the possibility of principle is paradoxically dependent upon the coherence of the very concept that they challenge. Without a serviceable concept of principle, principled demonstrations of incoherence could not hope to have much appeal.

The final reason that a suggestion of perpetual subjectivity is incapable of belief is that it literally is incapable of belief. Most of our analytical activity is directed at the question of which among a series of competing principles we should ultimately permit to prevail in deciding a case. We give very little thought to the notion that there is simply no principle whatsoever to consult. Indeed, our belief in causal connections and syllogistic reasoning is so indelible that an unprincipled universe is quite unimaginable—only the science fiction writers among us can even guess at what it would be like. Regardless of the degree of power one is willing to attribute to the inertial forces of the present system to maintain some version of the status quo, the overriding reason that a prophecy of unprincipled jurisprudence cannot ultimately be believed is that it cannot ultimately be conceived.

B. CONSEQUENCES

The consequence of rejecting Cassandra's prophecy was quite costly; it resulted in the fall of the city of Troy. Without the benefit of hindsight, however, it is difficult to imagine the consequences of rejecting a prophecy of perpetual subjectivity. Because we cannot imagine a universe that we have no choice but to reject, we cannot hope to imagine the consequences of that rejection. However, I have three suspicions that seem appropriate in this regard. The first is that the inherent incredibility of an unprincipled system of law breeds complacency. The second is that complacency breeds frustration. But my third suspicion is that our present inability to accept a prophecy of perpetual subjectivity won't much matter—once the prophecy comes to be believed.

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71. *See, e.g.*, Spann, Baby M *and the Cassandra Problem*, 76 GEO. L.J. 1719 (1988).

The theory of competition is that competitors provide an incentive to improve quality and reduce prices. When there is no competition, these incentives are absent, and complacency may cause products and services to be worse than they would be in a competitive market. The inherent unacceptability of any alternative to our current system of principled legal analysis gives the current system monopoly power. As a result, there is less incentive for the participants to make the system work as well as it is capable of working. Even when it malfunctions badly, as some now argue it does, it is still "the only game in town." Nevertheless, there is a paucity of demand for dismantling the system. Even its harshest critics are willing to operate within existing parameters, and would seemingly be satisfied with refinements that included serious income redistribution and greater tolerance of individual differences.[72] There is even less attention paid to the question of what an alternative system might look like.[73] The natural-monopoly status of the current system poses the risk of complacency not only in the system itself, but in its critics as well.

Because complacency reduces effectiveness, it also generates frustration. Those who are so dissatisfied with the current system that they desire a major overhaul are necessarily frustrated by the apparent lack of any viable alternative. Their only options are to repress their concerns or to continue their participation in a system that they may find more legitimating than legitimate. Not even the most radical responses, such as revolution or anarchy, offer any hope of escaping the epistemological dilemma. Although *Baby M* may have suggested that the prospects for judicial achievement of genuinely principled analyses are bleak, the prospects for abandonment of the effort appear even more dismal.

My final suspicion is that none of this will matter very much once the prophecy has come to be believed. I have invoked the myth of Cassandra to suggest that some ideas can be so inherently incredible that they have no hope of securing acceptance—we never even consider the possibility of their truth in our evaluation of their acceptability. I have also suggested that the impossibility of ever achieving principled legal analysis might constitute such an idea. What I have not done is emphasized the ultimate fate of Cassandra's own prophecy. Ultimately, of course, the prophecy came to be believed. The initial rejection was costly, but the prophecy was ultimately proven to be true. If the prophecy I have hypothesized turns out to be a true one, Cassandra suggests that it too will ultimately come to be believed. And if that never happens, it means nothing to assert that the prophecy is true.

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72. Although the legal realist and critical legal studies movements may have some true nihilists among its adherents, I suspect that they are few-and-far-between.

73. To the extent that the critical legal studies movement has been attentive to this issue, the arguments tend to remain both syllogistic and familiar.

CONCLUSION

The court's opinion in *Baby M* purports to be rooted in principle rather than the policy preferences of the judges who decided the matter, but that cannot actually be the case. The three analytical techniques on which the court relies to insulate its decision from judicial preferences in fact depend upon judicial preferences in order to acquire operative meaning. The technique of assertion amounts to nothing more than a reflection of preferences, and as such, offers nothing to persuade those who are not already convinced. The technique of precedential analysis purports to adhere to rules of decision that have been authoritatively established in statutes or prior judicial decisions, but the inquiries that must be made in order to determine whether a precedent controls, once again, can be made only through recourse to preferences. The technique of functional analysis purports to derive outcomes logically from general concepts or functional objectives, but because those concepts and functional objectives must necessarily be stated with too much generality to actually govern particular cases, functional analysis too requires recourse to preferences in order to function.

It is tempting to extrapolate the analytical inadequacies of the *Baby M* decision to all forms of principled analysis, because the defects that appear in the decision seem inherent in the techniques of principled analysis itself. But such extrapolation would have nihilistic implications which, like a Cassandra prophecy, are inherently incapable of belief. As a result, no matter how skeptical we become about the promise of principled analysis, we are consigned to perpetual adherence to that model because of our inability even to conceive of an alternative. Perhaps in time the dilemma will fade, but with our present level of epistemological sophistication, it is hard to imagine a way out.

In light of all this, it is difficult to know precisely what to conclude.