AT ISSUE

[This issue of *Reproductive and Genetic Engineering* inaugurates a new column by Janice Raymond that will be a regular feature of the journal. Intended as an analysis of current and developing issues in the fields of reproductive and genetic technology, policy, and ethics, it does not necessarily reflect the viewpoints of the editors.]

IN THE MATTER OF BABY M: REJUDGED

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There was much rejoicing after the recent rendering of the New Jersey Supreme Court decision "In the Matter of Baby M." On February 3, 1988, the higher court overturned the 1987 lower New Jersey court decision validating surrogate contracts. The New Jersey Supreme Court found the surrogate contract "contrary to... the law and public policy of this State... [and] the payment of money to a 'surrogate' illegal, perhaps criminal, and potentially degrading to women" (p. 4). The court separated the contract issue from the custody issue, however, and affirmed the lower court's awarding of custody to Bill Stern. But the court did restore Mary Beth Whitehead's parental rights. This means that Whitehead is the legal mother of the child, Elizabeth Stern's adoption order is thereby null and void, Whitehead may visit the child, and at some time in the future, she may seek a new custody hearing.

There is much that is positive in the recent court ruling and, on review, much that is lacking. The decision deserves a close reading, especially for its attention to feminist concerns. On the more favorable side, the court restored Mary Beth Whitehead as the legal mother of the child. In doing this, it challenged the inequity of the word "surrogate," noting

"the natural mother is inthat appropriately called the 'surrogate mother" (p. 4). The ruling highlighted the importance of this key statement by placing it within the very first paragraph of the decision and appropriately framing the term "surrogate" in quotation marks to indicate its misuse.

The major reasons for ruling the contract illegal are based on the state's adoption laws that prohibit the use of money in adoption; limit termination of parental rights only upon surrender of a child to an appropriate agency, or where a parent is shown to be unfit; and allow the mother to revoke her consent in a private placement adoption. The court also ruled that the surrogate contract was a violation of public policy, because it obligated the mother to surrender custody before the child is born. It concluded that the contract hinders the best interests of the child in severing her from her natural mother, destroys the equal rights of the mother to the child, and makes no provision for counseling the mother before she consents to surrender the child. It also ruled that adoptions cannot be influenced by money, the "surrogacy contract being based on such payment" (p. 2). Thus, the core of the ruling is centered on baby selling, best interests of the child, adoption laws, and custody.

¹All the lone page references quoted in this column refer to the decision rendered by the Supreme Court of New Jersey, 1988, "In the Matter of Baby M," February 3: 1-95.

^{*}I am indebted to Catharine A. MacKinnon's development of gender neutrality and gender specificity as they have functioned in law. See her recent work, Feminism Unmodified: Discourses on

The decision is essentially *gender neutral** Although the ruling was not based on surrogacy's consequences for women as a class, it contains incipient *gender-specific allusions* that indicate that the court at least noticed the violation of women. That it did not raise these concerns to primary legal standing indicates an inability or unwillingess to grasp the real oppression of women by surrogacy and the erasure of women's civil rights and claim to equal protection under the law. It also implies that children are more important than women.

The court, for example, did recognize that in addition to surrogate contracts being "the sale of a child," they are also "at the very least, the sale of a mother's right to her child" (p. 46). The court did not recognize that, at its essence, the surrogate contract is the sale of a woman's right to her person, and specifically to her body, for reproductive purposes. Although the decision mentioned the payment of money as "potential degradation to women," it did not affirm the actual and present degradation to women of a contract that treats women as reproductive objects and commodities to be bought and breeding cattle in like marketplace. As a violation of human dignity, such treatment is fundamental degradation of a woman's person. It is inducing a woman into a form of reproductive prostitution and reproductive slavery, both of which are prohibited by law. The surrogate agency as reproductive the surrogate broker reproductive pimp, and the "surrogate" used as reproductive prostitute invisible.

Although not acknowledging that the surrogate contract promoted the use of

Life and Law, 1987, Harvard University Press, Cambridge, MA. Gender specificity recognizes "the most sex-differential abuses of women as a gender" and the reality that this is not a mere sex "difference" but "a socially sitated subjection of women" (pp. 40-41). It also recognizes that treating women and men as the same in law-as if all things are equal at the starting point - is gender neutrality.

women as breeders and the exploitation of a lower economic class of women, the court did recognize that the surrogate contract takes "advantage of a woman's circumstances" (p. 48). It did address the lower court's callousness toward the argument that surrogate contracts exploit an economically disadvantaged group of women.

The Sterns are not rich and the Whiteheads are not poor. Nevertheless, it is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top 20 percent income bracket as among those in the bottom 20 percent...one should not pretend that disparate wealth does not play a part simply because the contract is not the dramatic "rich versus poor." (pp. 49-50)

The court also discerned that it "is unlikely that surrogacy will survive without money" (p. 47). The surrogate agencies, through the writings of their paid psychiatrists such as Philip Parker, portray the motives of "surrogates" as altruistic. They prefer to highlight their so-called altruistic motivation because they know it sounds better. The court maintained that "Despite the alleged selfless motivation of surrogate mothers, if there is no payment, there will be no surrogates, or very few" (p. 47). Ultimately, of course the whole discussion of female psychological motivation for surrogacy shifts attention away from the profit motive of the surrogate agencies. Few ask, for example, what motivations of the surrogate brokers, such as Noel Keane and Richard Levin, are. Few ask what kind of men make money by selling women's bodies in the spermatic marketplace.

As a matter of public policy, he violation of a woman's person, dignity, and integrity -inherent in surrogate arrangements -receives no legal standing in this decision. As an allusion, the court noted "The fact...that many women may not perceive surrogacy negatively but rather see it as an opportunity does not

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diminish its potential for devastation to other women" (p. 53). The court, however, confined the violation of women in surrogacy to legal allusion-to the status of casual inference and suggestion.

Many would say why belabor the gender issue? Isn't all that matters the conclusion, and as legal decisions go, the New Jersey Supreme Court ruling "In the Matter of Baby M" was a landmark one? Not when the matter at hand relates specifically to women's rights, the violation of women, and surrogacy's consequences for women as a class. A gender-neutral legal decision does not recognize the centrality of surrogacy's consequences for women. In not giving the violation of women primary legal standing in this decision, women's systematic inequality is made invisible and thus kept in place. The decision, as gender neutral, can then be used to further this inequality and is subject to potential gender-specific abuse. That potential abuse to women is forecast in the decision itself.

The lower court had ruled that in validating surrogate contracts, individual's right of procreation and right of privacy were protected and enhanced. The higher court revoked this and ruled that the right of procreation is a limited one and does not extend beyond sexual intercourse or artificial insemination. The right to procreate does not extend to the right to use any reproductive person, in this case, the socalled surrogate, to carry a child. Nor does the right to procreate extend to "The custody, care, companionship, and nurturing that follow birth...they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation" (p. 62). This is a key ruling the so-called "right procreate" has become a legal banner in the United States under which surrogacy has been touted as a natural right. And the court recognized that this so-called "right to procreate" could only be affirmed in the surrogate arrangement if

another's right of procreation were destroyed. So far, so good.

Unfortunately, the court affirmed the limitations to the rights of procreation and privacy by upholding limitations on women's rights. The court concluded that a person's rights of privacy and selfdetermination are qualified by their effects on "innocent third persons" and by "state interests." As an example of these limitations, the court in a lengthy footnote invoked Roe v. Wade to affirm that a woman's right to terminate her pregnancy was "not absolute." "The balance struck in Roe v. Wade recognizes increasing rights in the fetus and correlative restrictions on the mother as the pregnancy progresses" (p. 64). Thus it said, a court-ordered Caesarean section performed on an unwilling pregnant woman struck this correct "balance" between the rights of the mother and those of the fetus "because unborn child's interests outweighed mother's right against bodily intrusion..." (p. 64).

This is what results when a genderneutral right of privacy is affirmed to benefit women instead of addressing the rights of women specifically. Where women's rights are not paramount, the same right of privacy may be used to keep women's inequality in place. Moreover, where rights to privacy and procreation are limited by innocent third parties and the state (gender neutral), and not by the harm done specifically to women, that harm is allowed to stand. What appears to be a positive ruling for women can, down the legal road, turn out to be a disastrous legal precedent, especially where cases of women being deprived of rights are used to support such gender-neutral legal rulings. Although these gender-neutral limitations on the rights to privacy and procreation may benefit women in surrogate arrangements (for the present), this kind of legal reasoning and the court's specific ratification of court-ordered Caesareans as legal footnotes in this case may serve as a precedent to erode women's rights in fetal surgery, in

medically ordered pregnancy interventions, and in other areas as yet unnamed. This is the most troubling section of the decision.

The court's rulings on gender equality are also mixed. On the one hand, it rejected the superficial equation between donating sperm and becoming pregnant under a surrogate contract. "A sperm donor simply cannot be equated with a surrogate mother ...even if the only difference is between the time it takes to provide sperm for artificial insemination and the time invested in a nine-month pregnancy" (p. 65). On the other hand, it found that the surrogate contract violated the mother's equal right to the child and proclaimed the father's right to be greater: "... the rights of natural parents are equal concerning their child ... The whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother" (p. 43). Many might regard this as a positive statement. It asserts, however, a false equality.

In Roe v. Wade, the Supreme Court concluded that the father had no equal right to be consulted about a woman's decision to terminate a pregnancy. Equal rights were not affirmed in the abortion context, and thus no consent of the biological father was deemed necessary for a woman to procure an abortion. As in abortion where the woman's right to terminate a pregnancy is primary because it is her body, the woman should have primary rights in pregnancy. Most of what takes place occurs in the woman's body. The woman has a prior and primary right not only to her body, but to what issues from it. Furthermore, this prior and primary right is based on her prior and primary relationship and contribution to the fetus becoming a child. The father's relationship and contribution to the fetus becoming a child is not equal to the mother's, at least not at this point. The father does not assume the risks of conception, pregnancy, and birth, nor does he do the work of carrying the fetus for nine months. To assert that both parents

have "equal rights" to the child at birth allows a vacuous definition of equality to stand. The court here also contradicts its later conclusion that sperm is not equal to egg, gestation, and birthing. It seems that Bill Stern is affirmed as having an equal right to the child by virtue of his spermatic contribution alone.

This is all the more contradictory, because the court rejected biological determinism as the basis for parenthood: "The parent-child biological relationship by itself, does not create a protected interest in the absence of a demonstrated commitment to the responsibilities of parenthood" (p. 67). It also steers clear of the rhetoric of maternal-infant bonding and maternal instinct. It avoids the lower court's male "genetic paean to fulfillment," thus destabilizing institutionalization of father-right that the lower court decision had affirmed.

The court also rejected *contract* determinism (a deal's a deal; she voluntarily signed the contract, didn't she, so she should hold up her part of the bargain?). In fact, it spoke of "the coercion of the contract." Feminists have pointed out the inducements that lead women into surrogate contracts. And every time we note these societal and economic pressures, we are told that no one holds a gun to any woman's head forcing her into a surrogate contract. More recently, we have been told that focusing on the inducements that women are under enter surrogate arrangements is portraying women "as incapable of responsible decisions" (Andrews, 1987: 46). To its credit, the court appreciated the complexity of consent. It discerned that pressure does not only exist at the barrel of a gun. Money is an "inducement" and there is "the coercion of contract." Furthermore, it recognized that there could be no real informed consent before birth and even before conception, challenging the presumption of simplistic voluntariness.

She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the

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most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary. Her interests are of little concern to those who controlled this transaction. (p. 45)

The literature on surrogacy has stressed the necessity for "surrogates" to be evaluated psychologically, medically, and otherwise to assess the woman's fitness for compliant breeding – one who won't change her mind and make trouble for the sperm donor and surrogate broker (otherwise known as her ability to separate herself from the child at birth). Many of the bills to regulate surrogate contracts that are now pending in U.S. state legislatures have provisions for mandatory surrogate fitness testing, especially of a psychological genre. The New Jersey Supreme Court turned this fitness test on the sperm donor and his wife, underlining that what was more important was to determine their fitness to be parents.

Moreover, not even a superficial attempt is made to determine their awareness of their responsibilities as parents...There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother, (p. 46)

In an understatement, the court recognized that Mary Beth Whitehead was "rather harshly judged" by the lower court decision. It argued forcefully, however, that her actions in the aftermath of her loss of the child were understandable and not unreasonable.

We do not know of, and cannot conceive of, any other case where a perfectly fit mother was expected to

surrender her newly born infant, perhaps forever, and was then told she was a bad mother because she did not. We know of no authority suggesting that the moral quality of her act in those circumstances should be judged by referring to a contract made before she became pregnant...We do not find it so clear that her efforts to keep her infant, when measured against the Sterns' efforts to take her away, make one, rather than the other, the wrongdoer...There has emerged a portrait of Mrs. Whitehead, exposing her children to the media, engaging in negotiations to sell a book, granting interviews that seemed helpful to her...that suggests a selfish, grasping woman ready to sacrifice the interests of Baby M and her other children for fame and wealth...There is not one word in that record to support a claim that had she been allowed to continue her possession of her newly born infant, Mrs. Whitehead would have ever been heard of again; not one word in the record suggests that her change of mind and her subsequent fight for her child was motivated by anything other than love... (pp. 79–81)

Although the court recognized that the portrait of Mary Beth Whitehead that emerged from the trial court and the "expert" witnesses at the trial was distorted, it based its awarding of custody to Bill Stern - at least in part-on that very same distorted picture. It concluded that "In short, while love and affection there would be, Baby M's life with the Whiteheads promised to be too closely controlled by Mrs. Whitehead. The prospects for a wholesome independent psychological growth and development would be at serious risk" (pp. 77-78). While it criticized the harsh portrayal of Whitehead by the lower court and the "expert" witnesses, the court let stand the that harsh *effects* of portrayal Whitehead's loss of custody: "... the evidence and expert opinion based on it reveal personality characteristics,

mentioned above, that might threaten the child's best development" (p. 82).

In spite of this, one might have expected that Mary Beth Whitehead would have been awarded custody, given the court's ruling that surrogate contracts are contrary to the statutes and public policy of New Jersey. If the contract is contrary to public policy, as well as invalid and unenforceable by New Jersey law, then how can the results of an invalid and unenforceable contract (awarding custody of the child to Bill Stern) be valid and enforceable? The court answered that the participation of the Sterns in an invalid and illegal contract does not require that they be deprived of the child. Using adoption as a precedent, it held that "adoptive parents' participation in illegal placements does not mandate denial of adoption...use of unapproved intermediaries and the payment of money in connection with adoption is insufficient to establish that the would-be adoptive parents are unfit or that adoption would not be in the child's best interests" (pp. 72-73).

The court further based the awarding of custody to Bill Stern on the *actual* best interests of the child, given what had already occurred – the *ex parte* order when Whitehead was required to turn over the baby to the Sterns, the lower court's awarding of custody to the Sterns, and the child's term of residence with the Sterns.

... we must look to what those best interests *are*, *today*, even if some of the facts may have resulted in part from legal error...The custody decision must be based on all circumstances, on everything that *actually* has occurred...There is a track record of sorts – during the one-and-a-half years of custody Baby M has done very well, and the relationship between both Mr. and Mrs. Stern and the baby has become very strong, (pp. 69–78)

Whitehead had argued that had the contract been declared invalid and unenforceable one-and-a-half years ago,

this track record would not have been established. The higher court responded by stating that although the results might have been different, the issue was "hypothetical" and the court had to decide on the basis of actual and present "best interests" of the child.

Finally, the court concluded there is no legal prohibition against surrogacy "when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights" (p. 94). One can only note that this is a rather glib treatment of the issue as if money were the only culprit in surrogate arrangements. The court's rather brief conclusion about "voluntary" and "noncommercial" surrogacy demonstrates once more what happens when the dignity and integrity of women have no legal standing.

Within noncommercial "voluntary" surrogate setting, the results to women as a class are the same as in a commercial and "induced" setting. This "alternative" form of surrogacy still reinforces women as breeders and as mere "maternal environments." Although there is "coercion of contract" no "inducement" of money, there could be the coercion of family or the inducement of "altruism" - fostered within a societal in which women's context renunciation and giving to others is normative and even celebrated. Within this context, having a baby for a sister or another family member, for example, may be rationalized as the "greatest gift" a woman can give to another. The consummate act of female giving has been mothering. The newest version of this, posed by altruistic surrogacy, is the giving of self even more - through the giving away of a child to those who supposedly cannot have their own children. Thus, a definition of self-sacrificing motherhood as relinquishing motherhood. Mothers have always been enjoined to "let go" of their children and now even before conception!

It is highly likely that most of these noncommercial and voluntary surrogate

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arrangements will take place within family contexts where the emotional pressure of family members on the possible "surrogate" could be tremendous. Those with lesser power in the family will be expected to be more altruistic. This happened in the Alejandra Muñoz case in which Muñoz, a poor, illiterate Mexican woman was brought across the border illegally to bear a child for relatives, deceived about her role, and then threatened with exposure after she fought to keep her child. The potential for exploitation is not necessarily less, merely because no money is involved and the arrangements take place within a family setting. The family has never been a safe haven for women. It is unfortunate that the court chose to flag noncommercial and voluntary surrogate arrangements legally permissible. Much more needs to be said on the so-called altruistic version of surrogacy.

In its opening words, the court stated that "... our holding today does not preclude the Legislature from altering the current statutory scheme. within constitutional limits, so as to permit surrogacy contracts" (p. 5). It offered the same challenge in its closing words. Why, one might ask, did the court not at least suggest that the legislature could permit or prohibit surrogate contracts. Given its penchant for neutrality in other areas, the court might have been consistent in its challenge to the legislature. Or better still, it might have invited the legislature to alter the "current statutory scheme ... so as to {prohibit} surrogacy contracts."

In its penultimate paragraph, the decision concluded with another challenge.

Legislative consideration of surrogacy may also provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology – *in vitro* fertilization, preservation of sperm and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of technology – especially for infertile couples – while minimizing the risk of abuse, (pp. 94-95)

Not exactly. The problem is to face the fact that these technologies are harmful, injurious, and devastating to women - to women who are used by them and to women who use them. The issue of infertility is really a smokescreen that covers over what is done to women. This brings me back to the basic problem with this decision as a legal ruling – its gender neutrality. Women have no primary legal standing in this decision. And until that happens, nothing substantial will change. We cannot address the new reproductive technologies in law or public policy until we address their effects on women as a class, until we note the normalization of using women's bodies for raw material here and elsewhere, until we talk about male dominance, and until we understand that the abstract equality of a genderneutral legal decision offers no real or lasting equality for women.

REFERENCE

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