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## (Baby) M is for the Many Things: Why I Start With Baby M

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## GREAT CONTRACTS CASES

### (BABY) M IS FOR THE MANY THINGS: WHY I START WITH *BABY M*

CAROL SANGER\*

For several years now I have begun my first-year contracts course with the 1988 New Jersey Supreme Court case *In the Matter of Baby M*.<sup>1</sup> In this essay, I want to explain why. I offer the explanation in the spirit of modest proselytizing, recognizing that many of us already have a favored method or manner into the course: some introductory questions we pose before leaping into (or over) the introductions already provided by the editors of the many excellent casebooks available. But I have found that *Baby M* works extremely well in ways that others may want to consider.<sup>2</sup> It provides an introduction to all the central topics and themes typically covered in a contracts course, and it does so with just the right mixture of familiarity and intrigue. The *familiarity* is with the facts of the actual case (though student memory shrinks with each passing year) and with the general structure of surrogacy arrangements. The *intrigue* develops as students glimpse that even the familiar is more complicated when viewed through a legal lens. Events and transactions that once seemed straightforward become unexpectedly dense as overlays of structure and logic, vocabulary and value emerge. Teaching *Baby M* is

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\* Professor of Law, Columbia Law School. Thanks to my contracts colleagues, Barbara Black, Victor Goldberg, Avery Katz, and to Jeremy Waldron.

1. 537 A.2d 1227 (N.J. 1988).

2. For an earlier discussion on teaching *Baby M*, see Majorie Shultz, *The Gender Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 61-63 (1991). I recognize that other cases may have their own attractions as course openers, and so my purpose here is not so much as sell *Baby M* as to consider more generally the goals and attending methodologies of the first week of class.

something like showing students a “reveal codes” key, as they discover that a complex ciphered system underlies the apparent simplicities of a real life arrangement.

Before pressing that key here, I want to underscore that I use *Baby M* as an introduction to the study of contracts and not as a debate or referendum on the complicated issues provoked by the practice of surrogacy. My treatment of *Baby M* is therefore streamlined and focused in a number of ways. The first concerns the case itself. I give my students an edited version that omits most of the custody and visitation discussion, concentrating instead on the issues of contract. I therefore include and assign Appendix A, the actual contract between Mary Beth Whitehead and William Stern.<sup>3</sup> As lovey-dovey as the court’s initial description of this joint venture into reproduction may be (the parties were “innocent and well intended”<sup>4</sup>), translating their desires into the detailed language of legal obligation concretizes the arrangement, often to startling effect: “MARY BETH WHITEHEAD understands and agrees that . . . she will not form or attempt to form a parent-child relationship with any child or children she may conceive, carry to term and give birth to . . . and shall freely surrender custody to WILLIAM STERN, natural father, immediately upon birth of the child . . . .”<sup>5</sup>

The second way I streamline the case concerns the allocation of time. Because first-year Contracts at Columbia is a one-semester, four-hour course, discipline is required from the start. I spend about two ninety-minute classes on the case, launching in on Day One after various house-keeping and tone-setting announcements. Time constraints also influence my teaching style. The opening class is part expository, part general discussion, and only a little Socratic. That is, I don’t begin in high Kingsfield mode but try at this early stage to model rather than demand thoughtful answers, by which I mean answers that both respond to the question and provide support for the opinion expressed. The goal here is to encourage and normalize participation, and *Baby M* makes this easy. The case is so riven with relevant issues that it is not hard for most student responses to illuminate one or another contractual point. Being able to welcome such contributions in circumstances, where their relevance is evident to all, sets an initial tone of respect and may also counter the intellectual infantilization (and terror) that I recall marked my own “One-L” experience in an earlier century. I also tell students upfront that they will

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3. *Baby M*, 537 A.2d at 1265. An edited version of the case can be found at <http://www.law.columbia.edu/sanger>.

4. *Id.* at 1227.

5. *Id.* at 1265. Students are often surprised by the specificity of the undertakings. For example, “WHITEHEAD agrees not to smoke cigarettes, drink alcoholic beverages . . . or take non-prescription medications without written consent from her physician.” *Id.* at 1268.

not be tested on *Baby M*; this increases student engagement with the case, both immediately and throughout the course.

When things get going—lots of hands up, a variety of viewpoints, sustained exchange among the students (and not just student-instructor)—I let the conversation continue or depending on the time remaining, I “bookmark” the topic for later in the semester. Certainly toward the end of class, I interrupt the discussion and simply list with quick commentary issues mentioned, but unexplored, that we will engage and develop during the remainder of the course. There is some quiet satisfaction (for me) in this. Leaving compelling issues prematurely has a nice tantalizing effect; students get a glimmer of how unexpectedly interesting Contracts is going to be. They also get an initial dose of learning to tolerate lack of resolution.

With these practical constraints in mind, I turn now to the specific issues and themes offered by a close reading of *Baby M*. I present them here in somewhat the sequence I use in class, though the order is not crucial; depending on what else one teaches or what themes or methodologies are emphasized generally, different aspects of *Baby M* are likely to appeal, and almost all have introductory value.

### 1. Reading Cases/Legal Methods

*Baby M* opens with a three-paragraph summary of the decision. These introductory paragraphs provide a terrific entry, not only into the case, but into the process of *reading* cases. One by one the three paragraphs offer progressive insight into how the New Jersey Supreme Court is going to construct, sell and limit its decision. In this way the introduction to *Baby M* works well as a way of starting or supplementing training in courses in legal methods or legal process: the “[a]nalysis and synthesis of judicial precedents, the interpretation of statutes, the coordination of judge-made and statute law, and the uses of legal reasoning.”<sup>6</sup> In addition to legal reasoning, there is also legal rhetoric, and *Baby M* jumpstarts any investigation into a court’s use of language.<sup>7</sup>

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6. The language is drawn from the Columbia Law School Curriculum Guide description of the legal methods course, a free-standing, three-week course first-year that Columbia students take before starting the traditional curriculum.

7. The “unpacking” of judicial language in contracts often begins with Cardozo’s arch observation in *Wood v. Lucy, Lady-Duff Gordon*, 118 N.E. 214 (N.Y. 1917), that “[t]he defendant styles herself ‘a creator of fashions.’” See Karl Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637-38 (1962) (quoting the first five sentences of the opinion to show how the defendant “is subtly made into a nasty person”). Judge Richard Posner agrees that “Cardozo has subtly loaded the dice against the defendant by implying that she may be a phony,” but points out that the description of Lady Duff-Gordon as a “creator of fashions” was taken from the contract itself, appended to her brief; “Cardozo is merely quoting a clause of the contract undoubtedly drafted by Lady Duff-Gordon or her lawyer.” RICHARD POSNER, *CARDOZO, A STUDY IN REPUTATION* 95 (1990). I side with Llewellyn here; the insinuating work in the verb (“styles herself”) rather than in the description of what she styles herself.

I begin by asking the class when it first became clear to them how the court was going to rule. While the answer is certainly fixed by the second paragraph (“We invalidate the surrogacy contract . . .”<sup>8</sup>), canny students will spot earlier linguistic clues: the court’s ominous use of “purports” in the very first sentence (“In this matter the Court is asked to determine the validity of a contract that purports to provide a new way of bringing children into a family”<sup>9</sup>) or the chilling description of surrogacy’s purpose (“The intent of the contract is that the child’s natural mother will thereafter be forever separated from her child.”<sup>10</sup>). With no background whatsoever in family law, students grasp that contracting for eternal separation does not sound promising. Indeed, the court sharply corrects the standard jargon of surrogacy, noting that in the contract “the natural mother [is] inappropriately called ‘the surrogate mother.’”<sup>11</sup> The court’s displeasure with surrogacy continues in similar asides and rhetorical devices throughout the opinion, and the strength of its displeasure is meant to make the result seem inevitable. Of course, the result is *not* inevitable; a lower court in New Jersey confidently upheld the surrogacy contract as did the Supreme Court of Kentucky on quite similar facts.<sup>12</sup>

Having set the tone of disapproval in paragraph one, paragraph two explains what the court intends to do about it. The answer is quick and pointed. The court invalidates the contract because it “conflicts with the law and public policy of this state.”<sup>13</sup> While the court (and the class) will develop that holding in detail later, Judge Wilentz provides an immediate if abbreviated version: “[W]e find the payment of money to a ‘surrogate’ mother illegal, perhaps criminal, and potentially degrading to women.”<sup>14</sup> This summary raises two questions. The first is a definitional and a very “One-L” concern: the difference in meaning between “illegal” and “criminal.” A brief explanation here is a crowd-pleaser: it is concrete; the distinctions are relatively clear; students write them down convinced they are now on the road to becoming lawyers. After all, for many this may not be just their first class in contracts but quite possibly their first class in law school. In contrast, it is harder for students to take notes on the court’s second ground for invalidating the contract: potential degradation to women. Just what *is* the rule here? Is Judge Wilentz citing a rule or expressing a value? Are we to understand that

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8. *Baby M*, 537 A.2d at 1234.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986). Judge Wilentz noted that Kentucky “had taken a somewhat different approach to surrogate arrangements.” See *Baby M*, 537 A.2d at 1250.

13. *Baby M*, 537 A.2d at 1234. See also June Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581 (1988).

14. *Baby M*, 537 A.2d at 1234.

potential degradation to women (whatever that phrase may mean) is a basis *generally* for striking down contracts? If so, one might ask in passing: what are we to make of the employment of Dallas Cowboy cheerleaders or perhaps Hooters waitresses? The point here is not to start a rumble about sex-based degradation versus contractual (not to mention, which I don't, reproductive) freedom, but rather to encourage the class not simply to mechanically write things down, but to read critically. Do the particular grounds of objection announced by the court have wider applicability? Does the court actually rely on its pronouncement here? And what *does* the phrase mean as a matter of fact and certainly as a matter of law?

In paragraph three, the court rounds out its regulatory conclusions with two provisos. May women in New Jersey *ever* conceive and bear children for infertile couples? The answer appears to be yes. They can do it for free or they can do it in the future should the legislature decide to get into the act and "alter[ ] the current statutory scheme."<sup>15</sup> Both points open important areas of discussion and I will say more about the relation between common law and legislation below. I want to focus here, however, on the fascinating questions of how and why money makes the crucial difference. The court makes it very clear that the exchange of money is key to surrogacy's downfall: there is "no offense to our present laws when a woman voluntarily and without payment agrees to act as a 'surrogate' mother."<sup>16</sup> There are several points to draw from the distinction between gratuitous transfers and those for which money is received. The first is the practical consequence of a change of heart. Changes of heart (or of mind) don't usually give us a way out of our contracts.<sup>17</sup> But the *unpaid* mother who has promised to give up her child has no contract to break. To develop this point, I ask the class to consider an altruistic post-*Baby M* woman who conceives a child gratis for her infertile sister with her brother-in-law's sperm and then decides she would prefer to remain a mother rather than become an aunt. May the disappointed couple sue for breach of contract? Apparently not. Students now start to have some sense of what the phrase "legally enforceable agreement" means.<sup>18</sup>

The role of money also raises theoretical questions. *Why* is surrogacy tainted if paid for but fine if done for free? What is it about *money* that makes the transaction suspect? The question may lead students, as it did the court, to a discussion of economic pressure. "[E]ven in this case, one should not pretend that disparate wealth does not play a part simply because the contrast

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15. *Id.* at 1235.

16. *Id.*

17. For an excellent discussion of how the law apprehends the phenomenon, see E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* (1998).

18. Does the couple have *any* legal recourse? I give little attention to the topic of reliance at this stage but simply mark the question of whether a gratuitous promise may ever be enforced because someone is "disappointed" by the promisor's change of heart.

[between the Sterns and Whiteheads] is not the dramatic ‘rich versus poor.’<sup>19</sup> Yet the court only gestures at income disparity and resulting bargaining inequalities as a basis for invalidating the contract. Instead it seizes on a much bigger impediment: “There are, in a civilized society, some things that money cannot buy.”<sup>20</sup> For some this may resonate with undergraduate reading of Michael Waltzer, who argues that injustice occurs when one domain of human life is infiltrated and polluted by the allocation of values in another domain, and that money is the most common go-between, breaking down the boundaries between different spheres of justice.<sup>21</sup> But for the moment, with some dark hints about votes, or pardons, and sex, I leave open the question of what else can’t be bought and why.

## 2. Choice of Law

First-year students are sometimes instructed—perhaps commonly in their legal research and writing classes—that clients rarely walk into an attorney’s office with placards around their necks announcing the nature of their problem (*torts!*). Rather it is the *lawyer’s* job to figure out how to characterize the facts. Yet because most law school curricula are organized rather strictly by subject matter, we come rather close to hanging placards on our own teaching materials. In fact, a crucial part of deciding a case—or practicing law—is conceptualizing the facts of a problem so that one knows what legal compartment to choose. I use the phrase “choice of law” here not in the jurisdictional sense, but to refer to the process by which lawyers and judges decide how to categorize the nature of the problem at hand. To be sure, such calculations do come up in Contracts—most often when sorting out the connections between Contracts and Torts. Thus students learn in *Sullivan v. O’Connor* that bungled plastic surgery might be actionable either as medical negligence *or* as a broken promise by the doctor.<sup>22</sup> The practical and conceptual significance of doctrinal choice of law is reprised in warranty materials, statute of limitations, remedies, and the requirements of privity may doom one cause of action and enhance another.

*Baby M* offers an early and complex example of how one court identifies and chooses among doctrinal candidates. Is surrogacy straight-out baby selling

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19. See *Baby M*, 537 A.2d at 1249. The court noted that:

[I]t is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent. Put differently, we doubt that infertile couples in the low income bracket will find upper income surrogates.

*Id.*

20. *Id.*

21. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

22. *Sullivan v. O’Connor*, 296 N.E.2d 183 (Mass. 1973).

and therefore *criminal*? Are the parties' *constitutional* arguments about the right to raise children sufficiently viable so that the case should be decided on privacy or equal protection grounds? Or is this at core a custody dispute between two natural parents so that the principles of *family law* should apply? And if it is at core an issue in family law, what family law doctrines should apply? The regular "best interests of the child" standard? Perhaps, or, as Mr. Stern argues, surrogacy is just a more advanced twist on artificial insemination, so that by analogy to New Jersey's law on artificial insemination, the contributor of genetic material has no parental rights, and so Mrs. Whitehead must lose.

While the court notes each of these possibilities, it makes clear at the outset that this is a contracts case (as students will suspect by virtue of being taught it by their contracts professor). Yet even within contract law, choices remain. There are different kinds of contracts, each apparently invoking somewhat different bodies of law. Thus before the court knows what law to invoke, it must decide how to characterize surrogacy. Is it a sale—whether of the baby herself or of the mother's custodial rights? If so, then sales issues, such as prohibitions on selling children or the warranty of goods, become relevant. (The Stern-Whitehead contract has several warranty-like provisions and exclusions.<sup>23</sup>) At this point one can also insert a small advertisement for the Uniform Commercial Code, mentioning it as the body of law governing contracts for the sale of goods, without necessarily getting into whether *Baby M* involves a sale or whether the baby is a good.<sup>24</sup>

Or is surrogacy better understood as an employment contract? This raises the interesting question of just what it is that Mrs. Whitehead has been employed to do and whether there are existing regimes that regulate work of this kind—whether payment into Social Security, OSHA concerns or minimum wage requirements. The nature of her services, which seem to be along the lines of conception and gestation, can lead as well to discussions of what kind of bodily services the law does or does not permit.<sup>25</sup> This may be more than one wants to get into here, but for the hearty, the discussion is always interesting.

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23. *Baby M*, 537 A.2d at 1265.

24. This might also be the spot to mention the existence of private commercial codes, which govern transactions in particular industries. Lisa Bernstein's work on diamond markets provides an excellent introduction. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

25. For a provocative discussion on this point, particularly as it relates to women, see Martha Nussbaum, "*Whether From Reason or Prejudice*": *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693 (1998). As Nussbaum points out, "Professors, factory workers, lawyers, opera singers, prostitutes, doctors, legislators—we all do things with our bodies for which we receive a wage in return." *Id.* at 693. The article focuses on prostitutes, and does so in ways that are likely to inform a discussion of surrogacy.



As this discussion goes on, I ask the class to list the various categories of law considered by the court as it characterizes the surrogacy transaction between Whitehead and Stern. These go on the board. I then touch lightly on the question of *why* the court accepts, rejects or synthesizes the various possibilities. It is likely too early to focus in detail on the judicial techniques used to make these decisions—analogy, interpretation, and so on—but I tell them that like MacArthur and the Philippines, the relation between *Baby M* and legal taxonomy is an issue to which I shall return.

### 3. Sources of Law

As well as the issue of taxonomy, there are also questions about the sources of law used to dispose of the case. In this regard, *Baby M* raises and illuminates the play between common law and legislation. Indeed, the court begins and ends its decision with reflections on the topic. The introduction clarifies that “our holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts.”<sup>26</sup> And in its conclusion, the court once again nods toward Trenton: “[T]he Legislature remains free to deal with this most sensitive issue as it sees fit, subject only to constitutional restraints.”<sup>27</sup> Students are thus made aware at the outset that there are multiple sources of authority even within a particular body of substantive law and that there is a hierarchy among them. Statutory law trumps common law but is itself constrained by the Constitution. Analyzing the facts in *Baby M*, the New Jersey Supreme Court found no statute that applied directly to the practice of paid surrogacy; it then created a rule to govern such contracts at the same time inviting the legislature, within constitutional limits, to decide the matter otherwise.<sup>28</sup>

### 4. Connecting the First-Year Curriculum

I suspect there is a sense among students that the first-year classes were chosen by random spin in some prehistoric year and while each is somehow foundational, none has much to do with the others. To be sure, most of us acknowledge (sooner or later) the relation between contracts and torts when we get to warranties or between contracts and crimes in the section on illegality. Sometimes the cross-referencing is tacit; *Carnival Cruise Lines*,<sup>29</sup> which

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26. *Baby M*, 537 A.2d at 1235.

27. *Id.* at 1264.

28. The limitation the New Jersey Supreme Court seems to be concerned about is whether the constitutional right of a mother to the custody of her child is interfered with by a surrogacy contract depriving her of that right. *See id.* at 1255 n.15. To get to this point, the court would have to find that the judicial decision upholding the contract was state action; this the court wisely declines to do. I do not get into any of this in class unless severely provoked.

29. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

discusses the validity of a choice of forum clause in a form contract, is often found in both contracts and civil procedure casebooks. But more could be done to show students how the foundational courses relate to one another. *Baby M* raises issues across several curricular lines. There is the link between contracts and crimes, revealed by the possibility of baby-selling. There are difficult questions of property: to what extent are children owned by their parents? *Baby M* also links up with procedure and has something interesting to say about the consequences to litigants of processes that may fall somewhat short of due.

Whitehead argued that the central reason that Mr. Stern was awarded the baby during the custody phase of the case was because of civil procedure gone wrong. When Whitehead refused to give the baby back to the Sterns, Stern got an *ex parte* order awarding him temporary custody. Whitehead panicked, snuck the baby out a back window and fled to Florida where she and the baby spent the next three months, more or less, on the lam. This frenetic moving was accompanied by other unattractive behavior, such as falsely accusing Stern of child molesting and threatening to kill herself and the baby. At the trial Whitehead argued that it was the *ex parte* order that made her crazy. The order brought “the weight of the state” down on her and made her act in ways unlike her normally commendable self. She argued that it was “doubly unfair to judge her on the basis of her reaction to an extreme situation rarely faced by any mother, where that situation was itself cause by an erroneous order of the court.”<sup>30</sup> The New Jersey Supreme Court more or less agreed: “We do not countenance, and would never countenance, violating a court order as Mrs. Whitehead did, even a court order that is wrong; but her resistance to an order that she surrender her infant, possibly forever, merits a measure of understanding.”<sup>31</sup> I do not cover this point as an introductory matter every year, but find it useful to pick up on when later discussing contractual terms that determine procedure, such as arbitration clauses and their relation to procedural fairness.

##### 5. Contracts as Transactions Over Time

*Baby M* is a wonderful way to illustrate contract as a process that occurs over time. The case lays out an entire contractual transaction from start to finish. The court begins with an analysis of the parties’ motives and their search for one another. It then moves to negotiations, formal contracting, attempted modification, stop-and-start performance, breach, defenses and the possibility of remedy. There are several pedagogical advantages to laying out the chronology in this straightforward way. The first is simply, but usefully, descriptive: *Baby M* provides an overview of the entire course. Indeed, the

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30. *Baby M*, 537 A.2d at 1239.

31. *Id.* at 1259.

case is like a walk through the table of contents of most casebooks. There is psychological as well as organizational gain in providing an overview. Over the years and at several law schools, I have noted a common first-year frustration: student inability to see *at once* how the pieces of contract law—consideration, offer and acceptance, breach, remedy and so on—fit together into a coherent whole. Because the components of a contract are necessarily taught *seriatim*, the relation between them is often not apparent until students have in mind the full scope of the process, as well as the individual ingredients. (In a six-point class, this could happen in April.) Acknowledging or foreshadowing that we are proceeding step-by-step along a discernible timeline—a kind of intellectual paint by numbers with only a faint outline provided by a few overarching concepts such as theories of enforcing promises—serves as a pre-emptive strike against standard first-year anxiety and impatience.

For those unmoved by first-year anxieties, the transactional overview introduces an important analytical point. After laying out the chronology of the dispute between Whitehead and Stern, I explain that one of the on-going tasks of the course will be to decide which points in the chronology of any deal are (or ought to be) legally significant. That is, the students need to learn that we may not be equally invested in all the facts in the background narrative (though we may come to be very interested in seeing which ones a court—in both the majority and minority opinion—chooses to stress). For example, the court in *Baby M* spends some time reviewing why the parties got interested in surrogacy in the first place: Mrs. Whitehead's desire to "to help her family" by earning \$10,000 and her genuine sympathy for the infertile; and Mr. Stern's desire to "continue his bloodline . . . [since] most of family had been destroyed in the Holocaust."<sup>32</sup> These detailed and sympathetic descriptions of motive prompt the question: do we *care* why the parties, here or elsewhere, enter into any particular contract? After all, we are told that "the history of the parties' involvement in this arrangement suggests their good faith."<sup>33</sup> Does the law care? We may agree that it is sad about Mr. Stern's forebears and noble of Mrs. Whitehead, but should a court attend to the parties' motives for entering an agreement of this kind when deciding whether or not to enforce it? The court's answer here seems to be "sometimes"; certainly if a contract is entered into under duress—a kind of coerced motive or initiating cause—it may be unenforceable on that ground alone.<sup>34</sup>

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32. *Id.* at 1235.

33. *Id.*

34. If inclined, one can also introduce the difference between motive and consideration. Mrs. Whitehead entered the contract out of sympathy for childless family members *and* for \$10,000. I do not usually raise the issue here, but wait until the distinction arises in normal course at which point *Baby M* can be retrieved as a test problem or reinforcing example.

## 6. Damages

Many casebooks begin with an introduction to the basic scheme of contract damages. The common logic is that it makes sense at the start to appreciate the end game: damages help to clarify what is at stake in a contract dispute. *Sullivan v. O'Connor*<sup>35</sup> is often used effectively in this regard. In the context of a bargained-for nose job, the court sets out the case for and against (and to some extent the relation between) expectation, reliance and restitution damages. *Baby M* does similar work in an equally challenging situation. What exactly is Mr. Stern seeking in his lawsuit? The child. That is, he wants the contract specifically enforced. In this regard *Baby M* is at least as interesting as Blackacre as an example of unique goods.<sup>36</sup> Of course, students are often hesitant to hand over Baby M as the prize to the winner of the lawsuit. At the same time, they may agree that because Mrs. Whitehead broke her promise, the Sterns should get something. But what form might that something take? Should there be monetary relief for their sheer disappointment? Should the Sterns be satisfied with, say, an adopted baby?<sup>37</sup> Perhaps, but some may balk at adoption as a satisfactory substitute for what Mr. Stern expressly bargained for, his own genetically related offspring. But if Whitehead breached and Stern cannot have Baby M as a matter of contract law, what will satisfy? Here one can play with the amount of money that would satisfy the Sterns' expectations. How much would it take to put them in the position they would have been had the contract been performed: the cost of another surrogate contract? The cost to adopt?

Putting specific and substitutional remedies aside, what else might the Sterns recover? Students will note the Sterns had planned "extensively" for the baby's arrival, including "practical furnishings of a room" and usually argue for reimbursement of these expenses. And certainly, some will argue, they should get back any money already paid to Mrs. Whitehead. Or should they? Is it reasonable for Mrs. Whitehead to get nothing unless she performs entirely?<sup>38</sup> While she has done some of what she agreed to do (unlike a painter

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35. 296 N.E.2d 183 (Mass. 1973).

36. I have found that while specific performance in this case is often met with disgust by law students who find the whole transaction nothing less than babyselling, there is also nodding and doctrinal approval by civil law students (LLMs), who are happy to explain that in their legal systems specific performance is *not* reserved for unique goods but is the general default remedy for any breach of contract.

37. Could adoption serve as a cover?

38. See *Baby M*, 537 A.2d at 1267. Under the terms of the contract the parties agreed that "in the event that the child is miscarried prior to the fifth (5th) month of pregnancy, no compensation as enumerated in paragraph 4(A) [the \$10,000] shall be paid to MARY BETH WHITEHEAD, Surrogate," but shall instead receive \$1000. *Id.* at 1267. This leads into the interesting matter of *why* a party has failed to perform and how contract law (or the parties themselves) account for the cause rather than the mere fact of nonperformance.

who paints half the house before walking away) she has not given Stern *anything* of what she promised to give. While such questions need not be answered here, they foreshadow complexities to come.

Two additional kinds of damages—liquidated and punitive—are also suggested by the case and round out the range of damage possibilities. The contract itself provides that if Mrs. Whitehead miscarriages after the fourth month of pregnancy, she is entitled to \$1000. Thus the parties themselves have set up a schedule of payments for excusable non-performance at various stages. To be sure, the first day of class may not be the best time to work on issues of partial performance and liquidated damages. Nonetheless, students may spot the clause while reading the contract and one can at least mark the topic. The second issue is Mrs. Whitehead's interesting argument for a remedy in the nature of punitive damages. She urges the court to award custody of the child to her even if it should find she is not the better parent in a custody contest. She argues that denying Stern the child will help "to deter future surrogacy arrangements."<sup>39</sup> Therefore, students can consider whether damages in contracts should be used to deter undesirable conduct, as they will soon find is the case in torts.

## 7. Applying The Law

Now we come to the actual law of the case. The decision in *Baby M* is bold. It invalidates not only the specific contract between Whitehead and Stern, but it does so on the ground that *all* contracts for paid surrogacy are invalid. Why is this? If Mrs. Whitehead and Mr. Stern were happy with their arrangement (as was certainly the case when they entered into it), why should the State of New Jersey object to what two well-intentioned citizens have willingly agreed to do for one another? Students who mull this question (in the five seconds we usually give students to mull before an answer is expected) usually float the concept of illegality. They say something like: "Well, in fact people *cannot* contract to do anything they want: you can't hire a contract killer or pay a prostitute." But the New Jersey Supreme Court stopped short of putting surrogacy in the category of pure criminality ("we find the payment of money . . . illegal, *perhaps* criminal . . ."<sup>40</sup>). Why then is the contract invalid? The court's answer is that it "conflicts with the law and public policy of this State."<sup>41</sup> But what law? What policy? Indeed, what *is* public policy?

### a. Conflict with Existing Laws

The conflict between the contract and existing law hinges on the court's determination that the Whitehead-Stern surrogacy agreement is really a

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39. *Id.* at 1238-39.

40. *Id.* at 1234.

41. *Id.*

contract for the adoption of a child.<sup>42</sup> As such, it repeatedly violates the procedural safeguards of New Jersey's adoption statutes: money is paid "in connection with the placement of a child for adoption";<sup>43</sup> the surrogate birth mother receives no counseling; and she agrees to give up her child before it is born. In addition, the surrogate birth mother is contractually bound to relinquish the child when it is born; failing to do so is not a revocation but a breach. In contrast, a birth mother covered by adoption statutes may change her mind with impunity, within a set time period.<sup>44</sup>

I use New Jersey adoption law as a way of investigating impositions on consent. *Why*—in the case of adoption—is the birth mother's consent revocable? *Why* must she have counseling? What is it the legislature wants her to know? *Why* must she wait until the child is born to agree to relinquish it?<sup>45</sup> The point here is not to learn adoption law but to query why and through what mechanisms legislatures regulate consent. I often ask for examples of other familiar instances of pre-contractual disclosure or retired waiting periods or guaranteed revocation.<sup>46</sup>

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42. The court pieces together evidence for its conclusion from the terms of the contract. A key provision states: "The sole purpose of this Contract is to enable WILLIAM STERN and his infertile wife to have a child which is biologically related to WILLIAM STERN." *Id.* at 1265. While Mrs. Stern was omitted as a party to the contract precisely to avoid implicating the adoption statutes, in fact the child cannot be "hers" unless she adopts it. The court finds further support for its conclusion by noting that the trial court conducted an in-chambers adoption hearing immediately after rendering its verdict upholding the Whitehead-Stern surrogacy contract. In an abundance of caution, the trial court had both Mr. and Mrs. Stern adopt the baby. Perhaps the caution was justified; after all, Mr. Whitehead was listed on the birth certificate as the father. *Id.*

43. *Baby M*, 537 A.2d at 1240.

44. One can point out that the lower New Jersey court found that none of these regulatory schemes applied to surrogacy. The lower court "reasoned that because the Legislature did not have surrogacy contracts in mind when it passed those laws, those laws were therefore irrelevant." *Id.* at 1238. It therefore treated the contract as a garden-variety contract that satisfactorily met basic contractual requirements. *Id.*

45. This issue can also be presented in law and economics terminology. Prior to the child's birth, the legislature has decided that the mother has fatally imperfect information and is excused on that ground alone. As Margaret Brinig explains, it is not the mother's *ex post* regret but her *ex ante* lack of perfect, "or even minimally adequate information" that matters; she "cannot have gauged precisely the long-term effects of what she promised before conception." MARGARET BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 73 (2000).

46. For example, I sometimes ask how many in the class have ever rented a car. After the deal had been struck, did the rental agent go over parts of the contract by flipping the pages, tapping a pencil at different spots while muttering, "Initial here; initial here; initial here." This process is familiar to many students who remember the tapping and their own compliant initialing. I explain that the pencil tapping was both the disclosure and counseling.

b. Conflict with Public Policy

There may be some reluctance to introducing public policy as a grounds for resolving contract disputes before the students have set foot on much doctrinal *terra firma*. At the same time, observing how the court, in the absence of authoritative law, pieces together a position from a range of existing laws shows students another method of argumentation. At the same time, students might enjoy the warning issued by the California Supreme Court: “It has been well said that public policy is an unruly horse, astride of which you are carried to unknown and uncertain paths.”<sup>47</sup>

In this part of *Baby M* opinion, the court arrays a series of governmental objectives as revealed in the laws relating to surrogacy and concludes that the practice is inconsistent with too many of them to be upheld. This follows the formula already announced—that public policy in this state is to be found “as expressed in statutory and decisional law.”<sup>48</sup> The court notes that New Jersey favors contact between children and *both* parents, and that when custody is in dispute, a best interests inquiry—not a binding contractual term—is supposed to decide the matter. Indeed, the court is specially outraged by what it sees as surrogacy’s utter dereliction of responsibility toward children: “Worst of all, however, is the contract’s total disregard of the best interests of children.”<sup>49</sup> This is wrought in part by the economic pressure that is brought to bear on women to become surrogates; the court describes the “essential evil [of] taking advantage of a woman’s circumstances (. . . the need for money) in order to take away her child . . .”<sup>50</sup> There is much one could discuss here. *Are* women disadvantaged by surrogacy contracts? Are parties entering into surrogacy contracts in fact oblivious to the best interest of children? Could one argue that they *do* consider the well-being of the child, perhaps by satisfying themselves about the parental qualities—social or biological—of the other before signing up? While these topics may be appealing, I am less interested here in the substantive arguments about surrogacy than in developing a general sense of how courts determine public policy. The substantive arguments are useful to the extent they suggest that public policy on a political issue is not always immediately apparent or universally accepted.<sup>51</sup> Other statutes (laws

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47. *Bovard v. American Horse Enterprises, Inc.*, 201 Cal. App. 3d 832, 839 (Cal. Ct. App. 1988) (quoting *Moran v. Harris*, 131 Cal. App. 3d 913, 919-20 (Cal. Ct. App. 1982)) (refusing to enforce contract for sale of roach clips and bongs is supported by public policy derived from statutory prohibitions against the use of marijuana).

48. *Baby M*, 537 A.2d at 1240.

49. *Id.* at 1248.

50. *Id.* at 1249.

51. A familiar example of alternative views about public policy is found in *O’Callaghan v. Waller & Beckwith Realty Co.*, 155 N.E.2d 545 (Ill. 1958). The majority upholds the landlord’s exculpatory clause in part by refusing to derive from the current housing shortage an unfair bargaining advantage for landlords. The majority notes that “[j]udicial determination of public

governing artificial insemination or other forms of assisted conception) or other goals (universal procreation for married couples) might be appealed to and a different public policy detected. Still, students are made aware that public policy is discerned or assembled from parallel or tangent law rather than concocted from a judge's subjective preference. As I discuss below in the section on jurisprudence, the court may appeal not only to existing legal rules but to principles as well.

## 8. Perspectives

First-year students at Columbia take a required course in the second semester called "Perspectives on Legal Thought." According to the catalogue description, the course generally includes "an examination of such topics as legal realism, critical legal studies, gender and race issues in law, law and economics, or other historical and philosophical influences on contemporary legal values and processes." Even before my exposure to this curricular specialty, I had long considered and treated first-year Contracts as a vehicle for introducing students to various perspectives, approaches and methodologies in legal thought and scholarship. As we know, there are many vantages from which one can approach the study of contracts: doctrinal, historical, economic, transactional, theoretical, practical (counseling, drafting), critical and so on.<sup>52</sup> While there is not time even in a six-credit course to do justice to all of these, it is certainly possible to touch upon many, at least once during the semester or year. *Baby M* is wonderfully amenable to a range of theoretical and disciplinary analyses and so provides a useful basis for introducing them. In this section, I sketch out four examples of what I (hesitate to) call *Baby M's* "perspectival breadth."

### a. Law and Economics

*Baby M* provides a refreshing introduction to law and economics, especially useful for students who tend either to tremble or glower upon even hearing the phrase. One way to look at the case is simply as establishing a simple proposition: in New Jersey, there will be no markets in children created by surrogacy contracts. That proposition provides the opportunity to explain

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policy cannot readily take account of sporadic and transitory circumstances. They should rather, we think, rest upon a more durable moral basis." *Id.* at 547. In contrast, the dissent finds "a recognized policy of discouraging negligence and protecting those in need of goods and services from being overreached by those with power to drive unconscionable bargains." *Id.* at 548.

52. Certain casebooks, like STEWART MACAULAY, JOHN KIDWELL, WILLIAM WHITFORD & MARC GALANTER, *CONTRACTS: LAW IN ACTION* (1995), begin with an explicit overview of six such approaches. The editors list six: classic, realist, neutral principles and procedures, law and economics, critical legal studies and law and society. *Id.* at 3.



what markets are and why they are crucial to commercial transactions.<sup>53</sup> As the court archly observes, “[A]ll parties concede that it is unlikely that surrogacy will survive without money.”<sup>54</sup> The case also discusses market formation. The court sets the stage with two parties desirous of trading—idealistic fertile women and desperate infertile couples—against the backdrop of a shortage of adoptable babies. Judge Wilentz then explains, “The situation is ripe for the entry of the middleman who will bring some equilibrium into the market by increasing the supply through the use of money.”<sup>55</sup> The middleman here, the Infertility Clinic, performed just as brokers should: “The path of Mrs. Whitehead and the Sterns to surrogacy were similar. Both responded to advertising by ICNY.”<sup>56</sup>

*Baby M* can also be used, now or later in the course, to discuss other basic economic concepts such as rational choice (the parties themselves decided that the creation and transfer of Baby M was worth \$10,000); wealth maximization (both Stern and Whitehead understood themselves at least *ex ante* to be better off after their trade); externalities (the impact of surrogacy contracts on third parties, such as the surrogate mother’s other children); and the relation between the kinds of damages available and efficient breach (what effect on Mrs. Whitehead’s decision to keep the baby if the default rule was specific performance, or if she was liable for the pain and suffering of the Sterns).<sup>57</sup>

b. Feminism and Jurisprudence (or the Relevance of Gender)

Unlike law and economics, whose relation to the study of contracts seems apparent and perhaps foundational, the relevance of gender may appear remote or even dangerous. That is to say, my cheerful suggestion about raising gender issues in one’s introductory materials may sound less like a wonderful opportunity than a very bad idea—why play with feminist fire until you have to and certainly not on the very first day?<sup>58</sup> But fear of feminism, like fear of

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53. Students sometimes introduce questions here about non-market exchanges, such as deals struck within families. This in turn offers an opportunity to discuss general categories of contracts: commercial contracts, consumer contracts, and those agreements between intimates, like *Baby M*, that the law has not quite figured out where to lodge within contract law.

54. *Baby M*, 537 A.2d at 1248.

55. *Id.* at 1249.

56. *Id.* at 1236.

57. For a more sustained description of surrogacy in economic terms, see BRINIG, *supra* note 45, at 70-77. See also Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL’Y 22 (1989).

58. To be clear about the meaning of these terms: although “sex” and “gender” are often used interchangeably, sex usually refers to biological differences and gender to what the society chooses to make of sexual differences. (Pink as the color for baby gifts for girls is a matter of culture, not biology.) I prefer the sex/gender terminology to “feminism.” If the term feminism comes up, I generally posit a working definition—the proposition that women should not be disadvantaged on account of their sex, and let it go at that. For a longer discussion of the

economics or theory or teaching a revised section 2-207, is worth overcoming. The gains are significant and the subject is, after all, inevitable. Women are all over the various casebooks, mostly as parties, although occasionally as judges or editors. Moreover, as neutral as one might want the law to be, there is little point in pretending that the sex of Audrey Volkes (dancing lessons in perpetuity), or Mrs. Williams (the infamous cross collateral clause) or Shirley MacLaine (“Bloomer Girl”) or Alice Sullivan had nothing to do with how their cases were decided.<sup>59</sup> Certainly sex has mattered crucially as an historical matter; as we know, married women could not enter contracts at all until the statutory reprieve provided by the Married Women’s Property Acts in the mid-nineteenth century. Using gender as an occasional category of analysis is prompted not only by traditional materials or by history, but by the education many students have already received before coming to us. Many will have encountered, either in theory or practice, the concept of disadvantage or distinction on account of sex during their undergraduate studies.

And what is meant by using gender as a category of analysis? When asking if gender is relevant, I think the question is simply this: has the sex of the parties mattered either with regard to how the underlying transaction transpired or to how the court applies the law? In many cases the question may not apply or the answer will be no. But sometimes, as here, the answer is yes. *Baby M* works particularly well to introduce issues concerning the relevance of sex because the court itself does it first. Thus the professor is not advocating here, just analyzing. Certainly in a contract for motherhood (or in pre-nuptial agreements) the sex of the parties goes to the heart of the transaction. More important, however, is the court’s sense of how sex matters to the application of doctrine. Does the court see things differently because one of the parties to the transaction is a woman? In *Baby M*, the answer seems to be yes. The court discusses such standard doctrines as coercion, capacity and breach but within a gendered frame of reference. For example, the court observes:

[Whitehead] was guilty of a breach of contract, and indeed, she did break a very important promise, but we think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there?<sup>60</sup>

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recognized complications of teaching feminism in law school, see Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 LOY. L.A. L. REV. 225 (1993).

59. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (Cal. 1970); *Sullivan v. O’Connor*, 296 N.E.2d 183 (Mass. 1973). See also *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533 (Cal. Ct. App. 1966).

60. *Baby M*, 537 A.2d at 1259.

Judge Wilentz simply announces what women care most about, and he deducts from that both a gender-specific source of duress and an acceptable motive for breach.

This critique does not insist that Judge Wilentz is wrong and gender should *not* count in *Baby M*; it is only to note that the court decides that it does. Whether and to what extent it *should*, of course, is one of the on-going challenges of feminism and an issue unlikely to be resolved on the first (or last) day of a contracts class. But *Baby M* is not a bad introduction to the problem. Because of Whitehead's most intimate relation to the subject matter of the contract (the daughter), the normal application of contract doctrine will not apply. This sets the stage nicely for a later case, *Simeone v. Simeone*,<sup>61</sup> in which the Pennsylvania Supreme Court refuses to overturn a prenuptial contract on grounds of duress or public policy. Instead the court tells the disappointed wife to buck up and stop whining about the deal she herself made:

Society has advanced to the point where women are no longer regarded as the "weaker" party in marriage, or in society in general . . . . Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded . . . . Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts.<sup>62</sup>

### c. Contracts in Historical and Social Context

Why do certain legal doctrines and theories emerge at certain times? Figuring out the relation between the deal, the law and the period in which both arose can be regarded either as an inquiry in the "law and society" tradition or, depending on when the contract arose, as contextualized legal history. Good examples of this kind of thick description and analysis include Richard Danzig's study of *Hadley v. Baxendale*;<sup>63</sup> Judith Maute's account of *Peeveyhouse*;<sup>64</sup> A.W.B. Simpson's terrific accounts of *Raffles v. Wichelhaus*<sup>65</sup> and *Carbolic Smoke Ball*;<sup>66</sup> or Lea VanderVelde's analysis of *Lumley v.*

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61. 581 A.2d 162 (Pa. 1990).

62. *Id.* at 399-400.

63. See Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975); see also 156 Eng. Rep. 145 (1854).

64. *Peeveyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962).

65. See A.W. Brian Simpson, *Contracts for Cotton to Attire: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287 (1989).

66. See generally Robert W. Gordon, *Simpson's Leading Cases*, 95 MICH. L. REV. 2044 (1997).

Wagner and the special fate of nineteenth-century female breachers.<sup>67</sup> There is also the thick description of a more economically-oriented transactional analysis.<sup>68</sup>

While *Baby M* is not itself a case study, it links up in a fascinating way with an earlier historical phenomenon. Surrogacy provides a twentieth-century example of a problem prominent in the nineteenth: to what extent may parties use contract to secure family formation? In the nineteenth century, the issue played out with regard to marriage: a breach of the promise to marry was a formidable cause of action resulting in punitive damages and aided by generous evidentiary rules. In his excellent study, *Broken Promises: Judges and the Law of Courtship*, historian Michael Grossberg explains how and why such actions flourished and then receded over the course of the nineteenth century, as social attitudes towards jilted brides moved slowly from sympathy to skepticism.<sup>69</sup>

Surrogacy revives the use of contract as a mechanism of family formation—now as a method of acquiring *a child* rather than a spouse. In so doing, *Baby M* focuses attention on the extent to which contract law may be used to secure preferences in the intimate realm of the family. Contracts cases are beginning to abound with regard to such contractual matters as the sale of eggs, the disposal of frozen embryos and wives, and visitation agreements between birth mothers and adoptive families.<sup>70</sup> While these topics may be of special interest to those who also teach family law, contracts among family members are no longer merely quaint or engaging as historical artifacts. The extent to which husbands, wives, children and other intimates may contract around or out of existing laws that govern family obligations and composition

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67. See Lea S. VanderVelde, *The Gender Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992). For other contextualized accounts of the specific cases and doctrines, see Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295 (1989); Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169 (1997); Louis Wolcher, *The Privilege of Idleness: A Case Study of Capitalism and the Common Law in Nineteenth Century America*, 36 AM. J. LEGAL HIST. 237 (1992); Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

68. See Victor P. Goldberg, *In Search of Best Efforts: Reinterpreting Bloor v. Falstaff*, 44 ST. LOUIS U. L.J. 1465 (2000); Victor P. Goldberg, *An Economic Analysis of the Lost-Volume Retail Seller*, 57 CAL. L. REV. 283 (1984).

69. MICHAEL GROSSBERG, *BROKEN PROMISES: JUDGES AND THE LAW OF COURTSHIP IN GOVERNING THE HEARTH, LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

70. For a discussion of embryos, see *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *J.B. v. M.B.*, 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000); for artificial insemination, see *L.A.L. v. D.A.L.*, 714 So. 2d 595 (Fla. Dist. Ct. App. 1998); for open adoption, see *Michaud v. Wawruck*, 551 A.2d 738 (Conn. 1988).

is now a vibrant and intellectually challenging matter somewhat up for doctrinal grabs, as the lines between commerce and kinship, imposed and bargained-for obligation, become more murky by the day.

d. Jurisprudence

We have already seen how *Baby M* raises questions about the sources of law, about the interplay between common law, legislation and public policy. That discussion also links up to such jurisprudential concerns as the distinction between rules and principles.<sup>71</sup> Thus *Baby M* raises interesting questions about the way in which courts proceed—and about how courts think citizens ought to proceed—in their dealings with one another in the absence of clear controlling rules. *Riggs v. Palmer*<sup>72</sup> is often used in this regard: should the law permit a murderer to inherit under his victim's will where there were no technical or procedural defects regarding the relevant statute of wills? *Baby M* similarly asks us to consider whether the Sterns and Whiteheads (and the New York Infertility Clinic) should have inferred from the absence of clear legislative guidance that they were free to make (and to have the law enforce) their own contractual arrangements. In both cases, there is an ill-defined sense that there is something disquieting about allowing existing arrangements to take their course. But if the legislature has left the matters untouched, at least so far as explicit and direct rules and regulation are concerned, how should the court proceed? Here the concept of principles debuts: what are they; how they differ from rules; what happens when principles compete; and so on.<sup>73</sup>

e. Lawyering

For those interested in contract drafting, *Baby M* offers up a number of good problems. For example, why was Mrs. Stern omitted as a party to the contract? The court observes that this was not oversight but an intentional decision aimed at circumventing New Jersey adoption law. Could the contract have been drafted so as to dodge the New Jersey statutes more successfully? Should Mrs. Stern have gone unmentioned throughout? Should Mrs. Stern never have attempted to adopt the baby, but simply been satisfied with Mr. Stern as the sole legal parent?<sup>74</sup> Or are there limits to what the law will or should permit by way of technical compliance?

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71. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-28 (1977).

72. 22 N.E. 188 (1889).

73. For more on rules and principles, see Lloyd Weinrib, *Law as Order*, 91 HARV. L. REV. 909, 912-14 (1978).

74. See *Baby M*, 537 A.2d at 1267. Clause 9 of the contract states: "In the event of the death of MR. STERN . . . it is hereby understood and agreed by MARYBETH WHITEHEAD . . . that the child will be placed in the custody of WILLIAM STERN's wife." *Id.* This appears to be a sort of guardianship provision aimed at securing the child's custody within the Stern family come what may.

A second drafting problem also concerns Mrs. Stern. One of the preliminary recitals in the contract describes Mrs. Stern as the “infertile wife” of William Stern. During the trial, however, it became clear that Mrs. Stern was not *exactly* infertile. She had (perhaps) a mild form of multiple sclerosis, a disease which “in some cases renders a pregnancy a serious health risk.”<sup>75</sup> As the court notes, Mrs. Stern’s “anxiety appears to have exceeded the actual risk, which current medical authorities assess as minimal.”<sup>76</sup> One might ask whether Whitehead could have made more by way of a defense from the discrepancy between Stern’s representations regarding his wife’s infertility and the actual state of physical affairs. If Whitehead expressly intended to give “the gift of life,” might it have mattered to her that in this case the gift was not quite necessary: Mrs. Stern could likely have had her own child. Is the contractual declaration of Mrs. Stern’s infertility a form of misrepresentation? Again, whether or not one chooses to raise such issues in an introductory class, these and other specific provisions can be reprised throughout the course.

## 9. Conclusions

I recognize that for those who enjoy, or who are tempted to try, a one case introductory approach to contracts, other opinions may offer similar resources. But although *Baby M* may not be pedagogically unique, its amenability to a variety of introductory purposes, plus its rich presentation of facts and law—to which students return for examples and hypotheticals throughout the semester—make it especially valuable.<sup>77</sup> My particular affection for the case may stem as well from my companion interests in family law and in the more general question of how contract doctrine is sometimes put to work to accomplish seemingly non-contractual social goals, whether to prevent a plant closing, enforce a job-training program or create a family.<sup>78</sup>

In thinking one last time why the case remains so appealing, I offer a final thought. *Baby M* requires students to start “thinking like lawyers” pretty smartly. The seemingly sexy facts—contested infants, desperate mothers, interstate tragedy and so on—challenge students to clarify their *emotional* response to the facts with something more analytical. Surrogacy is no longer

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75. *Id.* at 1235.

76. *Id.*

77. I recognize that *Baby M* is not perfect in every regard. Even when edited, it is lengthy. Moreover, introducing the concept of public policy before students are familiar with more conventional doctrines may encourage them to reach too quickly for public policy and other open-ended doctrines like unconscionability. I thank Avery Katz for these reservations about using the case to start the course.

78. The use of reliance to try to keep GM in town or of third party beneficiary law to enforce a job training program are two examples; see *Charter Township of Ypsilanti v. General Motors Corp.*, 506 N.W.2d 556 (Mich. Ct. App. 1993); *Martinez v. Socoma Industries*, 521 P.2d 841 (Cal. 1974).

an issue about women's oppression or autonomy, children's needs or couple's rights, but a formal agreement through which well-intentioned adults acting in good faith attempt to order their affairs using the most ordinary of legal devices—contract. Whitehead and Stern are regular people with familiar desires—higher income for one, a family for the other. It is contractual solution, not their circumstances, that have set things in motion. In reducing the dramatic appeal of the case to a fact pattern, students move from “My Opinion about Surrogacy” to a more disciplined understanding and application of contract rules. Thus students may consider anew whether Mrs. Whitehead or Mr. Stern was the bully or the victim; whether the court's decision is good or bad for women; whether freedom of contract is as attractive as once imagined; or whether particular realms of endeavor should be placed outside its reach. The point is that whether students rethink or retrench their views about surrogacy, they now do so against a complex contractual framework of analysis.

This is all to say that *Baby M* is layered in ways that two classes only begin to uncover. But to borrow from Maurice Sendak, “Let the wild rumpus start.”<sup>79</sup>

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79. MAURICE SENDAK, *WHERE THE WILD THINGS ARE* 25 (1963).