

DEVELOPING MARKETS IN BABY-MAKING: *IN THE MATTER OF BABY M*

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INTRODUCTION

In the spring of 1985, the fortunes of two ordinary New Jersey couples, Richard and Mary Beth Whitehead and William and Elizabeth Stern, became profoundly and quite publicly entangled. The Whiteheads, a working-class couple from Brick Township, had been married for twelve years. They had met in Mary Beth's brother's luncheonette, where Richard (Rick) was a regular patron and Mary Beth a teenage waitress. Their early life together had been somewhat rough and tumble—frequent moves, a marital separation, a spell on welfare—but by the early 1980s, their circumstances had improved. Rick had a steady job as a garbage truck driver; the couple now owned a house, if heavily mortgaged. The Whiteheads also had two much-loved children, a son Ryan born in 1974 and a daughter Tuesday born a year later, and in this regard they were content. Shortly after Tuesday's birth, they had decided that their family was perfect and complete; to keep it that way, and with eighteen-year-old Mary Beth's approval, Rick had a vasectomy.

The Sterns, married only a year less than the Whiteheads, had met and married while they were graduate students at the University of Michigan. The couple had decided to postpone their family until Elizabeth (Betsy) had completed her medical training, when they would be more financially secure.¹ In 1985, after Betsy finished her residency, the Sterns moved from an apartment in the Bronx to the pleasant bedroom community of Tenafly.²

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¹ Direct Testimony of William Stern (Jan. 5, 1987), *in* 1 *BABY M CASE: THE COMPLETE TRIAL TRANSCRIPTS* 61–62 (1988) [hereinafter *TRIAL TRANSCRIPTS*]; Direct Testimony of Elizabeth Stern (Jan. 6, 1987), *in* 1 *TRIAL TRANSCRIPTS*, *supra*, at 53.

² “Fine schools, quality housing, recreational facilities, parks and woodlands, good cultural programs, diverse houses of worship, and quality borough services all help to attract newcomers to and keep older residents in this historic town and help to maintain a small town feeling.” The Borough of Tenafly, N.J.—Home Page, <http://www.tenaflynj.org/content/>

The location eased their daily commute to New York City, where Betsy worked as a pediatric oncologist and William (Bill) as a medical researcher. Although in almost every respect the Sterns appeared to live a comfortable, satisfying life, something was missing. Because of a medical condition, Betsy was unable to have children, and the couple felt this deprivation most painfully. They had briefly considered adopting, but waiting lists for infants were long. Moreover, as the only child of Jewish parents who had survived the Holocaust, Bill especially longed to have a biological child.³

The complementarity of desire, ability, and resources between the Whiteheads and the Sterns led to an interesting agreement between the two couples. Mary Beth agreed to be artificially inseminated with Bill's sperm and, if she became pregnant, to give the baby to the Sterns to raise as theirs in an arrangement known generally as traditional surrogacy. For their part, the Sterns agreed to pay Mary Beth \$10,000.⁴ The deal was arranged by the Infertility Center of New York ("ICNY"), opened in 1981 by a Michigan attorney, Noel Keane.

For the next several months, Bill and Mary Beth met up at the Vince Lombardi Rest Stop on the New Jersey Turnpike to drive together into New York City for the inseminations.⁵ Six months and eleven inseminations later, Mary Beth conceived, and on March 27, 1986, the infant soon to be known around the world as Baby M was born.

This is where the seemingly happy match between the Sterns and the Whiteheads came to an end. Within days of the birth, Mary Beth was overcome with love for little Sarah (the name she had put on the baby's birth certificate), and she refused to let the Sterns keep her. Weeks of desperate negotiations followed as Betsy and Bill implored Mary Beth to keep her promise, and Mary Beth became more fervently determined to keep her baby, threatening suicide if she could not. In early May, the Sterns sued to have the agreement enforced. Following an ex parte hearing to determine the temporary custody of the baby, Judge Harvey Sorkow of the Bergen County Court ordered that little Melissa (the Sterns' name for the baby) be turned over to them. The Whiteheads fled to Florida but were eventually found by private detectives. In a dramatic confrontation (related to the press

52/default.aspx (last visited Dec. 4, 2006).

³ Susan Edelman, *The Parents Behind the Baby M Tug of War—A Father Fighting to Keep His Only Blood Relative*, BERGEN REC. (N.J.), Sept. 9, 1986, at A1.

⁴ The \$10,000 was placed in escrow with the ICNY, payable when Mary Beth surrendered the baby to Bill. Under the terms of the agreement, if Mary Beth miscarried before the fifth month of pregnancy, she would receive no compensation except for the medical expenses. If she miscarried after the fifth month, she was to receive \$1,000. Appendix A: Agreement between Stern and ICNY, in 6 TRIAL TRANSCRIPTS, *supra* note 1, at 1–3.

⁵ Direct Testimony of William Stern (Jan. 5, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 126.

in great detail by Mary Beth's mother), the police took Baby M, who was finally delivered into the physical custody of the Sterns.⁶

The case that followed can easily be called the custody trial of the twentieth century.⁷ Every aspect of the six-week trial—from Tuesday's tears to Betsy's (real) hair color to expert testimony on the best way to play patty cake—was covered in depth and worldwide, as was the trial court's decision ordering specific performance of the contract and awarding the Sterns custody of the baby.⁸ The case remained in the news during Mary Beth's appeal to the New Jersey Supreme Court as paparazzi snapped away at Mary Beth arriving for her weekly supervised visitation and as partisans on both sides prepared amici briefs and battled it out on op-ed pages.⁹ On February 3, 1988, the New Jersey Supreme Court reversed the trial court decision, declaring that under New Jersey law, surrogacy contracts were "illegal and possibly criminal."¹⁰ Although it declared the surrogacy contract void, the Court awarded custody of the baby to the Sterns, no longer as a matter of contract enforcement but by applying the "best interest of the child" standard used generally in contested custody cases between parents. It then remanded the case for a determination regarding the scope of Mary Beth's visitation rights.¹¹

The case provoked philosophical debate, political organizing, and legislative action as ethicists, feminists, theologians, lawmakers, and local men and women weighed in on surrogacy's moral, legal, and practical significance. *Baby M* set the stage for debates about the commoditization of children, women's reproductive autonomy, and the meaning of family in

⁶ Bob Port and Stephen Hegarty, *Surrogate Mom in Pasco, N.J. Couple Fight Over 'Baby M.'* ST. PETERSBURG TIMES, Aug. 1, 1986, at 1A.

⁷ For the nineteenth-century contender, see MICHAEL GROSSBERG, A JUDGMENT FOR SOLOMON: THE D'HAUTEVILLE CASE AND LEGAL EXPERIENCE IN ANTEBELLUM AMERICA (1996).

⁸ See *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. 1987); BABY M: FROM CRADLE TO COURTROOM, A LANDMARK DECISION (1988) (a collection of articles that originally appeared in the Hackensack, N.J., newspaper THE RECORD).

⁹ See, e.g., BABY M: FROM CRADLE TO COURTROOM, *supra* note 8; MARY BETH WHITEHEAD WITH LORETTA SCHWARTZ-NOBEL, A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M CASE (1989) (including pictures of Mary Beth Whitehead running from photographers).

¹⁰ *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

¹¹ In granting Mary Beth liberal visitation, the lower court gently chided both sets of parents:

Mary Beth Whitehead Gould must accept and understand that Melissa is not Sarah and that her father and stepmother will be her parental-role models and provide the day-to-day, parent-child interaction which will largely determine what kind of person Melissa will become. . . . William and Elizabeth Stern must accept and understand that Melissa will develop a different and special relationship with her mother, stepfather, siblings, and extended family, and that these relationships need not diminish their parent-child relationship with Melissa.

In re Baby M, 542 A.2d 52, 54 (N.J. Super. Ct. 1988).

an era of technological possibilities,¹² concerns now directed at the ever more sophisticated forms of assisted reproduction that have come into being since 1985.

In this Essay, I want to explore the *Baby M* case from a different, less philosophical perspective. The question I pose is simply this: how did the Sterns and the Whiteheads find one another in the first place? After all, apart from their New Jersey location (and a shared fondness for Bruce Springsteen), the two couples had little in common.¹³ Mary Beth was a high school dropout; Betsy had a Ph.D. and M.D. from the University of Michigan. Rick was a Vietnam vet fighting an ongoing battle with unemployment and alcoholism; Bill led what close friends called “a quiet, industrious life.”¹⁴ The Whiteheads and the Sterns did not travel in the same social, employment, or consumer circles. How was it, then, that these two couples, strangers to one another with nothing in common but complementary desires, were able to connect and to reach a deal regarding the most intimate of arrangements: insemination, pregnancy, and parenthood? To put the question another way: How did a market for baby-making get going in New Jersey in the mid-1980s?

In asking this, I put aside the question of whether there *should* be such a market, as well as the question of what exactly surrogacy sells: the baby itself, the mother’s reproductive services, or the mother’s parental rights. I simply want to look at the market that did in fact exist and ask how it came about.

MARKETS

Before going further, we should stop to ask, just what is a market? The question may be a soft pitch for some, but because we are dealing with an unprecedented kind of transaction, at least circa 1985, it is worth starting from first principles. Economist John McMillan explains that a market for something exists if there are people who want to buy and others who want to sell it.¹⁵ A market, then, is simply a network in which buyers

¹² See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (2001); ELIZABETH ANDERSON, *VALUE IN ETHICS AND IN ECONOMICS* (1993); Debra Satz, *Markets in Women’s Sexual Labor*, 21 PHIL. & PUB. AFF. 107 (1992); Michael Sandel, Remarks at the Tanner Lectures on Human Values: What Money Can’t Buy: The Moral Limits of Markets (May 11–12, 1998).

¹³ Recognizing that high school does not always predict future achievement, the graduating high school yearbooks of Rick, Bill, and Betsy still offer a few clues. Bill was in the Latin Club, Library Staff, Spelunking Club, Chess Club, and United Nations Committee. Betsy’s high school career is captured by the motto underneath her senior picture: “An accomplished girl is a girl worth knowing.” Rick has a nice picture but apparently never joined a single club. High school yearbook photos on file with author.

¹⁴ Edelman, *supra* note 3 (“[The Sterns] don’t smoke, they don’t use drugs, they don’t drink. They’re so blah.”).

¹⁵ JOHN McMILLAN, *REINVENTING THE BAZAAR: A NATURAL HISTORY OF MARKETS* 5

and sellers interact to exchange goods or services for money. The market itself is the place where the trade occurs. It can be a physical place like Wal-Mart or Wall Street, or it can exist in the ether like eBay.

It is crucial to a market transaction that the parties to the trade, constrained as they may be by their own resources and by the rules of the marketplace, are nevertheless acting voluntarily.¹⁶ They may not be happy with their overall situation, but, under the circumstances, each is happier in the exchange and wants to make the deal. At least at the time of the transaction, each is happier with what they are getting than with what they are giving up. This is how markets create value. Without a market people may wish they could make a trade but they cannot. They are stuck with what they have. On the other hand, once a market brings an array of buyers and sellers together, there is no telling what they might exchange with one another.

Because trades produce gains, people are relentless in finding ways to realize them; as McMillan puts it, “markets have a way of breaking out.”¹⁷ They spring up in what might seem unlikely places, such as prisons or playgrounds, and they spring up in relation to new and imaginative ventures, like tanning or iPods. Some markets are carefully planned. Readers may remember seeing billboards a few years back of hipsters in silhouette somehow dancing to their own music through strange white earphones and wondering just what product was being advertised. Other markets develop spontaneously: consider the market in bootleg liquor that sprang up almost overnight during Prohibition or the market in rationed goods during the Second World War.

Of course, the development of a market is never *entirely* spontaneous. There must be a mix of background conditions that make a particular trade both desirable and possible. There must be buyers who want the product, whether because it is the kind of thing, like food, that people always want, or because some have learned to want it, as with iPods. There must also be sellers willing to provide the goods or services, and the parties must be able to find one another and to agree on terms. These are some of the basic necessities for market formation.

This Essay situates *Baby M* within the economic framework of a developing market. To be sure, commercial surrogacy—conception as economic exchange—is now a big business worldwide.¹⁸ I return here, however, to its origins. I argue that the market for surrogacy in the mid-1980s resulted from the intersection of four distinct factors that did not exist or would not have combined in just the same way ten years earlier or ten

(2002).

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 16.

¹⁸ The fertility business is a nearly \$3 billion industry in the United States alone. DEBORAH L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 3 (2006).

years later. The four factors are: cultural attitudes toward parenthood and toward maternity, the state of reproductive technologies, the absence of controlling law, and the entrepreneurial intervention of intermediaries.

It is the last of these that may explain why the match between Baby M's parents proved such a disaster. This is certainly how the New Jersey Supreme Court sized things up. After describing the Sterns' childless plight and Mary Beth's desire to help, the Court disapprovingly observed that "[t]he 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."¹⁹ This is, of course, the very essence and point of intermediation. Middlemen everywhere, to use the Court's phrase, are "propelled by profit."²⁰ Nonetheless, the Court made clear that, "[w]hatever idealism may have motivated"²¹ the Sterns or the Whiteheads, middlemen had no business arranging a sale of this sort: "In New Jersey the surrogate mother's agreement to sell her child is void."²² I suggest, however, that the problem that gave rise to *Baby M*—the mother's refusal to comply—arose not because intermediaries were *involved* but because they performed the job badly.

THE DESIRE FOR CHILDREN: INFERTILITY

For a market in babies (or baby-making) to exist, babies must be something people affirmatively want and are willing to trade for.²³ The first part of the proposition may seem self-evident: of course people want babies! While offspring might once have been desired for their contributions to the household economy or to secure care in one's dotage,²⁴ motivations for parenthood today, at least in the United States, have less to do with finances than with personal satisfaction.²⁵ Having children is understood as fun, a source of emotional fulfillment, and a good reason to browse the Pottery Barn for Children catalogue.²⁶ For many people, having chil-

¹⁹ *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1250.

²³ For an early and important argument defending a legal market in babies for adoption, see Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 323 (1978) (explaining how a market would increase the welfare of babies, birth mothers, childless couples, and tax-payers).

²⁴ In this regard, people did *not* always want babies. Babies need care and feeding, and even then they might die and be of no economic use. In earlier times, then, *children* were a more proven commodity; children, not babies, therefore commanded a price. See J. Mark Ramseyer, *The Market for Children: Evidence from Early Modern Japan*, 11 J. L. ECON. & ORG. 127 (1995).

²⁵ Gallup Poll, Vol. 55, No. 5, June 4, 1990.

²⁶ See Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 48-49 (1992) (observing that people want children for a range of reasons: to keep a marriage together, to meet social, spousal, or parental expectations, and to pass on the family name, genes, or silver). An expert witness testified that for Bill Stern, "the goal of

dren makes life worth living. As the wife of one surrogate-seeking couple put it, “You participate in life in a different way when you have children.”²⁷ The desire for *biological* children is particularly intense. While anthropologists point out the centrality of biogenetic relatedness in Euro-American kinship ideology,²⁸ the simple idea of wanting one’s own children is a familiar and widely held aspiration.

But the more pertinent question for this inquiry is not why people desire children, but how they feel and what they do when they cannot have them in the ordinary course. What is the social and affective significance of infertility? Not surprisingly, the answer depends in great part on cultural attitudes toward childbearing: the greater the social or personal significance of being a parent, the greater the stigma and the harder the blow of childlessness. After all, at various points in time, the meaning of parenthood has encompassed moral and civic obligation, marital and sexual success, personal maturity, and normality.²⁹ Attitudes and responses to childlessness therefore change over time; looking just at the second half of the twentieth century, they seem to change almost by the decade. For example, as historian Elaine Tyler May has explained, the “baby boom” of the 1950s resulted not only from post-war prosperity but from a profound change in the national political culture: “The ideology of domesticity, focused on the nuclear family with children, came to embody the hope for the future of the nation and the ultimate fulfillment of happiness and personal satisfaction for its citizens.”³⁰ Parenthood in the 1950s conferred not only full adult status, but also evidence of socially sanctioned heterosexuality and patriotic citizenship.³¹

This new “procreative consensus” had profound consequences for childless couples who in earlier periods might have mourned the absence

maintaining the genetic family line was a chance to ward off existential loneliness.” Michelle Harrison, *Social Construction of Mary Beth Whitehead*, 1 GENDER & SOC’Y 300, 302 (1987) (quoting Brodzinski deposition).

²⁷ *Baby Brokers Advertise For ‘Wombs to Rent,’* DETROIT NEWS, Sept. 20, 1989, at 4E.

²⁸ See Helena Ragone, *Chasing the Blood Tie: Surrogate Mothers, Adoptive Mothers and Fathers*, 23 AM. ETHNOLOGIST 352, 355 (1996). This assumed preference for biological children was reflected in a range of adoption practices and protocols. Until fairly recently, adoptive couples had to prove their infertility; agencies feared adopted children might become second stringers if the parents later produced their own biological children. See generally JUDITH S. MODELL, *KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE* (1994). Indeed, until the advent of open adoption in the 1990s, the very point of adoption was to simulate biological parenthood all the way down: parents were counseled to keep the adoption secret; new replacement birth certificates were issued naming the adoptive mother as the birth mother. See generally E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* (1998).

²⁹ See JAN VERVEERS, *CHILDLESS BY CHOICE* 3–6 (1980).

³⁰ ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS* 129 (1995). See also ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 135–61 (1988) (describing “the intense and widespread endorsement of pro-natalism” during the 1950s).

³¹ See MAY, *BARREN IN THE PROMISED LAND*, *supra* note 30, at 137.

of children but would have been less marginalized socially.³² In the 1950s, infertility, especially for women, became deeply stigmatizing: a source of pity and a marker of biological failure (at best) and psychological deviance (at worst).³³ With few successful medical interventions, adoption became an acceptable and more popular method of acquiring children. Childless couples mimicked biological parenthood by adopting children who, under prevailing practices, were often matched by physical characteristics, enabling the adoptive parents to “pass” as natural parents.

The 1960s and early 1970s wrought a dynamic series of changes in cultural attitudes toward parenthood. The Pill was invented, marketed, and used; contraception and abortion became legal. By the mid-1970s, a new procreative ethos had taken hold. Having children was no longer a matter of luck or fate but a decision that women had begun to make for themselves for the first time in history. Women’s Liberation—and the beginning of sex equality in education and employment—had arrived, and what many women seemed to want to liberate themselves from was families. Motherhood could be postponed! Graduate school beckoned! Being “child-free” (as opposed to childless) was no longer necessarily a tragedy but, as the Zero Population Growth movement reminded everyone, a socially responsible “life-style choice.”³⁴ During this period, at least within educated upper-middle-class circles, *mothers* and not the childless were regarded with pity.

Then came the 1980s, with its renewed focus on the family. Parenthood was now imbued with the satisfactions of capitalism. According to the prevailing ethos, working hard and delaying gratification were understood to produce certain rewards: leisure, consumer goods, and a fulfilling private life in which children played a central role.³⁵ As this new pronatalism took hold, many women began to rethink their earlier, perhaps too hasty, rejection of maternity. In addition, biological clocks started going off. Journalist Anne Taylor Fleming described her merciless decades-long quest to reproduce after having put it off to do other satisfying things:

³² Movie stars offer some insights into the status of childlessness. Mary Pickford and Douglas Fairbanks had no children together, yet they reigned as America’s most glamorous couple. See MAY, *BARREN IN THE PROMISED LAND*, *supra* note 30, at 88. Today it is hard to buy anything without being regaled at the cash register with cover shots of some celebrity’s latest baby.

³³ For an excellent discussion of this stigma, see Margarete J. Sandelowski, *Failures of Volition: Female Agency and Infertility in Historical Perspective*, 15 *SIGNS* 475, 495 (1990).

³⁴ See MAY, *BARREN IN THE PROMISE LAND*, *supra* note 30, at 201. To be sure, childlessness was not a universal preference during this period; many women wanted to become mothers and were distraught when they could not. See generally Margarete J. Sandelowski, *Fault Lines: Infertility and Imperiled Sisterhood*, 16 *FEMINIST STUD.* 33 (1990).

³⁵ MAY, *BARREN IN THE PROMISED LAND*, *supra* note 30, at 212–13. Movies captured the Zeitgeist. As one critic observed, “Men and women do not fall in love with each other in the movies anymore. They fall in love with babies. Babies are the new lovers—unpredictable, uncontrollable, impossible and irresistible.” Delia Ephron, *In this Year’s Movies, Baby Knows Best*, *N.Y. TIMES*, Mar. 13, 1988, at B1.

she and other “babyless baby boomer[s],” fast approaching age forty, became concerned with “cheating fate and getting [their] hands on an embryo, a baby, a life.”³⁶ To be clear, in providing this quick historical snapshot, my claim is not that the desire to have children is entirely or even primarily socially constructed. Infertility is a shattering diagnosis.³⁷ I am suggesting, however, that cultural attitudes regarding the meaning of parenthood, when combined with technologies that offer even the *chance* of biological parenthood, have made childlessness (and even adoption) less acceptable and that this in turn has important implications for the market demand for baby-making.

It is here that we meet up with Betsy Stern who, at age forty-one, discovered she could not easily have children, and with Mary Beth Whitehead, age twenty-six, who was happy to have more.

THE DESIRE FOR CHILDREN: FERTILITY

A market in surrogacy requires not only “buyers” who want babies but also suppliers who are willing to produce and part with them. This requires a more cabined and narrowly defined desire for babies: one that focuses on *childbearing* rather than *childraising*. Women who become surrogates accept—indeed, they seek out—what we might characterize as a partial or temporary form of motherhood: conception, pregnancy, and labor.³⁸ Moreover, they agree to do this for money. The agreement in *Baby M* was not what is sometimes called “altruistic surrogacy,” as when one sister carries a baby for another purely out of love. Mary Beth Whitehead was to receive \$10,000. There is (or was) something deeply unsettling about this. Giving up one’s child for profit suggests a form of maternity that is not only cramped, but also crass. It goes against everything that selfless American motherhood stands for. How, then, can a market for surrogacy take hold if the mother’s participation, and to some extent the couple’s, goes so violently against the cultural grain?³⁹

³⁶ ANNE TAYLOR FLEMING, *MOTHERHOOD DEFERRED: A WOMAN’S STORY* 13–14 (1994).

³⁷ See, e.g., Resolve: The National Infertility Association, <http://www.resolve.org> (last visited Dec. 4, 2006) (materials on coping with infertility).

³⁸ The deliberate “seeking out” distinguishes surrogacy from adoption. Unlike already pregnant women who place children for adoption, surrogate mothers affirmatively choose pregnancy for the very purpose of giving the baby to others to raise. As with infant adoption, this kind of motherhood is limited to gestation and birth. It is a physical version of what anthropologists call “stratified reproduction,” the disaggregation and distribution of maternal functions across several women. See generally FAYE D. GINSBURG & RAYNA RAPP, *CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION* (1995).

³⁹ I recognize that the social consensus on anything—including what one may buy—is seldom perfectly shared in a society. This explains why black markets—whether in liquor or rationed goods or babies—arise when a transaction is forbidden. This inevitability has led many jurisdictions to regulate, rather than to prohibit, various socially disputed forms of commercial exchange. See, e.g., MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* (2006) (discussing black markets in organ sales).

The answer is that for the participants, surrogacy is anchored (or at least moored) in acceptable pronatalist ideology. Surrogate mothers are deeply invested in maternity: their own and that bestowed upon the couple receiving the child. One surrogate explained it simply: "I'm a kind of mommy person, . . . and having a child is the single most wonderful thing I've done. . . . Nine months of my life is not that much to give to a couple."⁴⁰ Study after study reveals that women become surrogates for a combination of three reasons: they like being pregnant, they want the money, and despite the fact of payment, they regard having a baby for a childless couple as a gift—a blessing—of the highest order.⁴¹ The first of these is not so hard to understand, even for those who have not had the pleasure. Pregnancy is for some women a deeply satisfying experience, both physically and socially. It often bestows an enhanced public status: strangers smile at pregnant women and sometimes give them their seat on a bus.

But exactly because pregnancy is a public status,⁴² the mother must have a story—an explanatory ideology—for herself and a morally acceptable explanation for her family and friends about what happened to the baby after the nine months have passed. The explanation is a complex blend of altruism and gain. The compatibility of the two is not so unfamiliar. People regularly take salaried jobs even though the primary motivation is not monetary: consider public school teachers or public interest lawyers. Thus, despite the money, surrogate mothers conceptualize the transaction as a gift to the couple. As one surrogate mother explained, "Yes, this helped me financially[,] but what I got out of it was worth so much more than just the money."⁴³ Infertility centers capitalize on this

⁴⁰ David Gelman & Daniel Shapiro, *Infertility: Babies by Contract*, NEWSWEEK, Nov. 4, 1985, at 74. When the surrogate explained to her husband that she intended to sign on as a surrogate, his response was, "[h]ave you gone crackers or something?" *Id.*

⁴¹ Another reason given by some surrogates is the desire to compensate for an earlier reproductive loss, such as an abortion or having placed a child for adoption. Hilary Hanafin, *Surrogate Parenting: Reassessing Human Bonding*, Center for Surrogate Parenting, Inc., available at <http://www.creatingfamilies.com/hanafin.html> (last visited Dec. 4, 2006); see also Philip J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117 (1983). The possibility of surrogacy as a compensatory (if not redemptive) act may apply even in *Baby M*. Although Mary Beth had never ended a pregnancy or surrendered a child, she had given up the possibility of future pregnancies or children by agreeing to Rick's vasectomy. That may have registered as a maternal loss similar to, if not greater than, either abortion or adoption in its permanence. I note that both Hanafin and Parker screen candidates for surrogacy programs; Parker was Noel Keane's screener.

⁴² For a discussion of the rare but unhappy instances of concealed pregnancies, see Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006).

⁴³ RESOLVE: THE NATIONAL INFERTILITY ASSOCIATION, FACT SHEET 56: SURROGACY (GESTATIONAL CARRIER), at 2 (2004), available for purchase at <http://www.resolve.org> (on file with the *Harvard Journal of Law & Gender*). Not all surrogates (or at least not all of their boyfriends) are into altruism. One young man who had accompanied his girlfriend to Keane's Michigan offices stated quite clearly: "[T]he baby means absolutely nothing. It's

understanding. Response levels increased dramatically when one agency changed the wording of its advertising copy from “Help an Infertile Couple” to “Give the Gift of Life,” even though the payment scheme stayed the same.⁴⁴ As one mother put it, “What’s 10,000 bucks? You can’t even buy a car. . . . My father would have given me the money *not* to do it.”⁴⁵ I will say more about the price shortly, but for now I want simply to underscore the way in which the ideology of reproductive altruism makes surrogacy possible. Although the exchange has a price, providing parenthood to the infertile—giving someone a baby—is regarded as a price beyond rubies, and it is this characterization that surrogate mothers hang on to and with which most receiving couples agree.⁴⁶ There is, you might say, a market for altruism.

Surrogacy draws on maternal values in another way: it enables women to take care of their own children throughout the pregnancy, thus enhancing their existing status as mothers.⁴⁷ As Mary Beth Whitehead explained, the deal with the Sterns was, like other jobs she had taken (except maybe go-go dancing in her sister’s bar), a way of increasing the family income without taking her away from her children.⁴⁸ In this way surrogacy uniquely serves the preference of some women to be traditional stay-at-home moms while engaging in paid labor at the same time.⁴⁹ It recognizes the value of

like watching someone’s car for nine months. We’re in it for the money; it’s a business. That’s the way we look at it.” Anne Taylor Fleming, *Our Fascination with Baby M*, N.Y. TIMES, Mar. 29, 1987, § 6 (Magazine), at 33.

⁴⁴ See Ragone, *supra* note 28, at 355.

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.* at 356 (reporting that most surrogates believe that money is “never sufficient to repay the debt [that the couples] have incurred”).

⁴⁷ Surrogacy programs now require surrogates either to be mothers already or to have experienced pregnancy and childbirth in order for them to more fully appreciate the nature of their decision. See, e.g., SurrogateWeb, <http://www.surrogateweb.com/pages/faq?SWID=164cde413b5aa5ab7ea5e8353229074a> (last visited Dec. 4, 2006); A Center for Coastal Conceptions, http://www.centerforcoastalconceptions.com/sg_sur_become.php (last visited Dec. 4, 2006).

⁴⁸ WHITEHEAD, *supra* note 9, at 80. Whitehead also believed that providing another couple with a baby might in some sort of karmic way help her own infertile sister become pregnant. In addition, the money surrogates earn is generally used for *family* needs and expenses and is rarely spent on the mother herself. See Ragone, *supra* note 28, at 355. This may serve to pay the children and spouse back for the costs that the pregnancy imposes on them. *Id.* Fertilization can be time-consuming, and pregnant mothers are sometimes tired or cranky mothers. Consider also that the surrogate and her partner must abstain from sex during the entire fertilization process, an externality worth thinking through. To be sure, the Whiteheads may have had sex during the insemination period, relying on Rick’s vasectomy to stay within the spirit of the contract. During the trial Mary Beth announced that Rick was the baby’s father, although a paternity test put a quick end to the claim. 525 A.2d 1128, 1135 (N.J. Super. Ct. 1987).

⁴⁹ Not all surrogates stay at home. In a study of forty-one women recruited by Noel Keane between 1981 and 1985, nearly a third kept their regular jobs during their pregnancies. Nancy E. Reame & Philip J. Parker, *Surrogate Pregnancy: Clinical Features of Forty-four Cases*, 162 AM. J. OBSTETRICS & GYNECOLOGY 1220, 1221 (1990). On the appeal to mothers of working at home, see Eileen Boris, *Homework and Women’s Rights: The Case of the Vermont Knitters, 1980–1985*, 13 SIGNS 98 (1987).

reproductive work by women who, in the never-ending schism between career and home, often feel undervalued. Popular culture played its part in “widening this gulf by telegraphing to the less blessed endless pictures of us allegedly liberated hussies abstaining from motherhood and running marathons.”⁵⁰ On this score, surrogacy may produce at least the appearance of some social leveling: the surrogate’s fertility makes up for “perceived, if unacknowledged, economic differences” between the surrogate and the commissioning couple.⁵¹

In sum, we seem to have the essential ingredients for market exchange: willing couples who want to raise genetically related children and fertile women willing to produce them.⁵²

TECHNOLOGY

The market for surrogacy in 1985 was also determined by the state of reproductive technology. Non-technological surrogacy—a woman bearing a child for a childless couple—had been around for ages. Several infertile Biblical wives (Rachel, Sarah) commanded their husbands to “go

⁵⁰ FLEMING, *supra* note 36, at 181.

⁵¹ Ragone, *supra* note 28, at 358. It has also been suggested that payment may discourage maternal-fetal attachment during pregnancy. Internalizing that producing the baby is a job may in turn make relinquishment less difficult and renegeing less likely. See Hazel Baslington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57 (2002). This has interesting implications for attachment and bonding theories. If mothers can learn to detach through payment, perhaps mother-infant bonding is not as natural and instinctive as is often posited but is also learned behavior. See generally DIANE E. EYER, *MOTHER-INFANT BONDING: A SCIENTIFIC FICTION* (1992).

⁵² So far, I have discussed surrogacy as an arrangement with the couple on one hand and the surrogate on the other. In fact, the relational dynamics are more complicated and involve at least three other pairings. To begin with, commissioning husbands and wives may not come to the surrogacy decision with equal enthusiasm. Certainly a traditional surrogate is the *husband's* best option for a genetically related child, but little work has been done on the gender dynamics of reproductive desire. Would wives be as or more satisfied with adoption, for example, than with a child that is related only to the husband? See generally GAY BECKER, *THE ELUSIVE EMBRYO: HOW WOMEN AND MEN APPROACH NEW REPRODUCTIVE TECHNOLOGIES* (2000). Surrogacy also requires some degree of negotiation and understanding between the surrogate and her husband or partner. After all, though not a party to the contract, he is, like Rick Whitehead, necessarily involved in the arrangement. Not all husbands welcome their wife’s participation in surrogacy. Rick went along with Mary Beth’s decision reluctantly, fearing that he would “feel like less of a man” if she had a baby with another man’s sperm. However, as he later explained, he “swallowed his pride” when he realized the \$10,000 could help pay for college for Ryan and Tuesday. Michael J. Kelly, *Pain and Trouble for the Other Dad—Richard Whitehead*, BERGEN REC. (N.J.), Feb. 6, 1987, at A1. Finally, the relationship between the surrogate and husband of the commissioning couple is also complex. As Ragone points out, reproduction is usually associated with sex, yet in surrogacy the mother of the husband’s child is *not* his sexual partner. One consequence of this somewhat awkward intimacy seems to be that a closer relationship develops between the *wife* and the surrogate than between the husband and the surrogate. After fertilization, his social role is de-emphasized. See Ragone, *supra* note 28, at 359–61. Each of these relationships has implications for how the surrogacy market functions: who participates, who performs, who renegees.

in unto” their maids (Bilhah, Hagar) in order to beget children and build a family. By the mid-twentieth century, the mechanics of surrogacy had changed. Artificial insemination meant that husbands no longer had to “go in unto” anyone: “arm’s-length conception” was now available.⁵³ If the husband was the infertile partner, wives could be inseminated with donor sperm and, at least in the pre-DNA days of the early 1980s, no one inside or outside the family needed to know.⁵⁴ The situation was more complicated and less private in the case of female infertility because the production of a child using the husband’s sperm necessarily involved the participation of another woman.

If Betsy Stern had discovered her infertility ten years earlier, adoption would have been the couple’s sole route to parenthood. Ten years later, there was an expanded set of options. The Sterns probably would have attempted a combination of in vitro fertilization (mixing Betsy’s eggs with Bill’s sperm in a petri dish) and gestational surrogacy (implanting the resulting embryo into another woman who would then carry and deliver the baby).⁵⁵ Today, ninety-five percent of all surrogacy arrangements are for gestational surrogacy,⁵⁶ and the Sterns considered it even then. But as Bill testified, “at that time nobody in this country was doing it, it was strictly experimental.”⁵⁷ In 1985, if Bill Stern wanted to transmit Stern genes to the next generation, he needed a fully integrated surrogate. He needed a Mary Beth Whitehead.

⁵³ See SPAR, *supra* note 18, at 72–73.

⁵⁴ As one mother who conceived via artificial insemination explained, “We won’t tell [our daughter]—or our friends or family—because there’s no way she can find that father. It is our secret: It will go with us to the grave.” Anne Taylor Fleming, *New Frontiers in Conception*, N.Y. TIMES, July 20, 1980, § 6 (Magazine), at 5.

⁵⁵ Betsy’s age—forty-one in 1985—and the viability of her eggs would have been the primary complication. Age has limited the availability of surrogacy as a remedy for negligence. In an English case, *Briody v. St Helens & Knowsley Area Health Authority*, [2001] EWCA (Civ) 1010, (2002) W.L.R. 394 (Eng.), the plaintiff successfully sued her physician whose negligence caused her to have a hysterectomy. However, the court refused to award her the cost of hiring a traditional surrogate because the plaintiff’s age made it unlikely that she would have succeeded with in-vitro fertilization using her own eggs and a gestational surrogate. Traditional surrogacy—artificially inseminating a younger woman who would carry the baby to term—would therefore put the plaintiff in a better position than she would have been in.

⁵⁶ See RESOLVE, FACT SHEET 56, *supra* note 43, at 3. Indeed, thirty percent of surrogacy agencies in the U.S. now offer only gestational surrogacy. Mhairi Galbraith, Hugh V. McLachlan & J. Kim Swales, *Commercial Agencies and Surrogate Motherhood: A Transaction Cost Approach*, 26 HEALTH CARE ANALYSIS 11 (2005).

⁵⁷ Direct Testimony of William Stern (Jan. 5, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 82–83. In 1944, John Rock, a pioneer in infertility research, was able to retrieve an egg during ovulation and fertilize it outside the woman’s body, but he was unable to reimplant the embryo in a mother-to-be. It took researchers until 1978 to produce the first “test-tube baby.” See SPAR, *supra* note 18, at 22, 24.

THE STATE OF THE LAW

Law plays a crucial role in market development in several regards. In the first instance, it provides a system of property rights against which exchanges take place. People want to know with certainty what is theirs to sell and what interests they acquire when they buy something.⁵⁸ In the area of reproductive commerce, however, the question of whether or to what extent babies, sperm and eggs, or frozen embryos are property is complicated and only partially resolved. Still, even without a definitive property regime, the law can still clarify the legal relationships that result from the various procreative arrangements and in this way influence market development. Artificial insemination (“AI”) provides a good example. Although by the mid-1950s AI was easy to accomplish technologically, few doctors offered it as a treatment for infertility because of its murky legal status; a few early cases had held that a child born through AI was the product of adultery.⁵⁹ Once the law regarding paternity was settled—statutes now generally provide that a child born to a wife using donor sperm is legally the child of the married couple and not of the sperm donor⁶⁰—the market for sperm and insemination services took off.

While property rights create the background incentives, contract law stabilizes markets by clarifying when agreements or particular terms in agreements are enforceable. Parties are more likely to enter into deals if they know that the law will compel performance or at least compensate a breach. The inability to enforce a contract because it is illegal or violates public policy is likely to thwart the development of new markets and shut down existing ones (or drive them underground into “black markets” with their many associated inefficiencies). When the law is clear on enforceability, people gain confidence, and business picks up. California surrogacy firms now regularly advertise the state’s receptivity to contractual reproductive arrangements: “Infertile couples around the world have found California to be a favorable legal forum. . . . Prospective parents, surro-

⁵⁸ See JAMES BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* 17–23 (1975) (mutually beneficial market transactions are possible only when individual property rights are well-defined); Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97 (1991); See generally Harry N. Scheiber, *Regulation, Property Rights, and Definition of “The Market”*: Law and the American Economy, 41 J. ECON. HIST. 103 (1981) (legal rules and legal process have helped American capitalism).

⁵⁹ See Gaia Bernstein, *The Socio-legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002); see also Brent J. Jensen, Note, *Artificial Insemination and the Law*, 1982 BYU L. REV. 935 (1982).

⁶⁰ The child is legally the couple’s so long as the husband agreed to the insemination. This explains why Rick Whitehead, the husband of an inseminated wife, was asked to sign a “Refusal of Consent” as part of the overall agreement: “I, Richard Whitehead . . . recognize that by refusing to consent to the insemination, I cannot be declared or considered to be the legal father of said child conceived thereby.” Appendix A, Agreement Exhibit G, in 6 TRIAL TRANSCRIPTS, *supra* note 1, at 16.

gates, and egg donors can be reasonably certain that their intentions, as expressed by their agreement, will be upheld in California.”⁶¹

In contrast, the legal status of surrogacy in New Jersey before the *Baby M* decision was up for grabs. Unlike Michigan, where in 1981 a judge had ruled that paying surrogates violated the state’s prohibition on baby-selling,⁶² there were no adverse judicial opinions or statutory bans in New York or New Jersey. Indeed, the Michigan ruling was exactly why Noel Keane, the person who brought the Sterns and the Whiteheads together, had opened an East Coast office in the first place.⁶³ As he later commented, “If the point of the [Michigan] law was to . . . stop surrogate parenting in its tracks, . . . it has fallen on its face.”⁶⁴ Keane was acutely aware of the legal vacuum in which he operated, and he made sure that the couples who used his services understood that they bore the risk of this indeterminacy. The ICNY contract with Bill Stern stated clearly that “ICNY makes no representations or warranties with respect to matters of law or the legality of surrogate parenting.”⁶⁵

There is, however, one way in which the implications of an agreeable legal regime play out differently in a market for surrogacy than in many other enterprises. Unlike, say, corporations, where a firm can incorporate in Delaware but conduct its business wherever it is actually located, the relational aspects of a commissioned pregnancy make physical proximity between the parties more important. Close relationships between the surrogate and the receiving couple, especially the wife, are common; the satisfactions provided to the surrogate by this relationship are one reason why the agreements so rarely implode. “Distanced surrogacy” is certainly possible but may increase the likelihood of breach by the lonely surrogate whose loyalties may attach to the baby rather than the couple.⁶⁶

THE ROLE OF INTERMEDIARIES

Many buyers and sellers deal with one another without the efforts or interventions of middlemen. Verizon runs an ad offering 200 extra minutes; if consumers are interested, they contact Verizon. Similarly, if you want to sell your car, you might put a For Sale sign on a side window and wait to see who gives you a call. On the other hand, you could sell your

⁶¹ Thomas M. Pinkerton, *Surrogacy and Egg Donation Law in California*, <http://www.surrogacy.com/legals/article/calaw.html> (last visited Dec. 4, 2006).

⁶² See *Doe v. Kelley*, 106 Mich. App. 169 (Mich. Ct. App. 1981) (cited in NOEL P. KEANE WITH DENNIS L. BREO, *THE SURROGATE MOTHER* 336 (1981)).

⁶³ See Nadine Brozan, *Surrogate Mothers: Problems and Goals*, N.Y. TIMES, Feb. 27, 1984, at C12.

⁶⁴ Saundra Torry, *Wrestling With Surrogate Motherhood; More States Consider Regulating or Banning Paid Contracts*, WASH. POST, Feb. 12, 1989, at A31.

⁶⁵ *In re Baby M*, 537 A.2d 1227, App. B (N.J. 1988).

⁶⁶ The global outsourcing of surrogacy, especially now that gestational surrogacy is the norm, has interesting market (and regulatory) implications.

car to a car dealer (probably for less), get the cash, and be done with it. This has advantages for you and for buyers who want a car like yours and are more likely to find it at the dealer's than in your driveway.

Middlemen, or intermediaries, operate across a huge range of consumer, commercial, and financial markets; indeed, intermediation activities comprise at least a quarter of the gross domestic product.⁶⁷ Some, like the car dealer and most retailers and wholesalers, buy the goods for resale. Others, like real estate agents or dating services, act strictly as matchmakers, connecting parties who then contract directly with one another.⁶⁸ Without intermediaries, mutually beneficial deals may be lost because buyers and sellers will not be able to find one another or to strike a deal.⁶⁹ Middlemen take advantage of the lack or imbalance (the "asymmetries") of information that would-be trading partners have about one another, about the product, or about other aspects of the market. They save parties the time, effort, and money ("search costs") that it would otherwise take to find the right trading partner (someone who has what you want on acceptable terms). Intermediaries reduce transaction costs and, at the same time, earn a profit for themselves.⁷⁰ Intermediaries make money ("capture some of the gains of the trade") by improving the likelihood that a trade will take place.

In addition to matching, intermediaries perform other functions designed to smooth the way to a deal. These functions include seeking out suppliers, finding and encouraging buyers, helping set prices and terms, and sometimes monitoring performance.⁷¹ They inform buyers and sellers on the state of the market, enabling them to form reasonable expectations. Here, too, intermediaries bridge informational asymmetries: "When the characteristics of buyers and sellers are unobservable, intermediaries market information and provide guaranties for market quality. When the actions of buyers and sellers are costly to observe, intermediaries provide monitoring and contracting services."⁷² By providing these various coordination functions—helping buyers and sellers meet and transact—intermediaries create and operate markets.

With all this in mind, let us turn to the middleman responsible for much of what transpired in *Baby M*. I want to focus on how three intermediation functions—searching and matching, price setting, and quality control—played out in the transaction that enveloped the Whiteheads and the Sterns.

⁶⁷ Daniel F. Spulber, *Market Microstructure and Intermediation*, 10 J. ECON. PERSP. 135, 137 (1996).

⁶⁸ See Abdullah Yavas, *Marketmakers Versus Matchmakers*, 2 J. FIN. INTERMEDIATION 33 (1992).

⁶⁹ McMILLAN, *supra* note 15, at 45.

⁷⁰ Spulber, *supra* note 67, at 147.

⁷¹ *Id.* at 135.

⁷² *Id.* at 136. Consider rental agencies that supervise properties, monitor tenants, and sometimes collect rents for landlords.

ENTER NOEL KEANE

Although he described himself, with mock disparagement, as “[t]he East Dearborn kid who wasn’t smart enough for college,”⁷³ by the early 1980s, attorney Noel Keane was described by just about everyone else as “the undisputed father of surrogate motherhood.”⁷⁴ The most prominent of the handful of early lawyers and doctors offering surrogacy services, Keane was regarded as a pioneer. An early press piece in *The New York Times* reported that Keane “revolutionized the production of babies just as surely as that earlier son of Dearborn, Henry Ford, revolutionized the production of automobiles.”⁷⁵ Keane explained his passion for surrogacy in terms of religion and compassion. Affirming his strong Catholic faith, Keane explained, “I am making my stand on the side of the people who want to create life.”⁷⁶

I believe in surrogate motherhood because I believe there are thousands of people who want it and need it, including the surrogate mothers. I intend to help them. . . . If you have not been there, if you have not wanted children or had no problem in having your own, then you cannot presume to know what drives these childless people.⁷⁷

Responding to criticism of surrogacy by the Catholic Church, Keane stated, “well[,] that does not bother me. I follow my own conscience.”⁷⁸

Keane had arranged his first surrogacy contract in 1976 after a childless couple asked for his help in finding a woman to bear the child they so desperately wanted. Moved by their plight and intrigued by occasional news reports of similar arrangements here and there around the country, Keane agreed. Finding such a woman was no small challenge. Surrogacy was neither a household word nor a familiar (let alone acceptable) practice. As in other types of new markets, would-be suppliers were not readily identifiable; indeed, most women, unaware of a market in pregnancy, would not have identified themselves as potential suppliers. (Think about how eBay made you realize there was stuff in your closet someone would actually buy, just as it lured you into bidding on things you never knew you wanted.) To stir up business, Keane had to get the word out. His initial efforts fell flat. The classified sections of the *Detroit Free Press* and

⁷³ See KEANE, *supra* note 62, at 126.

⁷⁴ James S. Kunen, *Childless Couples Seeking Surrogate Mothers Call Michigan Lawyer Noel Keane—He Delivers*, TIME, Mar. 30, 1987, at 93. By 1987, Keane had arranged around one-third of the 500 or so births resulting from commissioned pregnancies nationwide.

⁷⁵ *Id.*

⁷⁶ KEANE, *supra* note 62, at 256. This is not the view of the Catholic Church. *Id.*

⁷⁷ *Id.* at 23–24.

⁷⁸ *Id.* at 255.

The Detroit News outright rejected Keane's advertisement soliciting surrogates.⁷⁹ Keane then turned to local college papers that were less fussy and took the ad (and his \$20).

Here things began to pick up. An inquisitive local reporter saw Keane's futuristic-sounding ad in *The Michigan Daily* and arranged to meet with Keane.⁸⁰ The interview was featured on the front page of the *Ann Arbor News*, complete with a photo of a couple in silhouette and Keane looking professorial in wire-rimmed glasses.⁸¹ The story was picked up by the Associated Press and published nationwide. Publicity snowballed as Keane granted more print and radio interviews, and made the first of his five appearances on *The Phil Donahue Show*, an early and extremely popular daytime talk show.⁸²

Keane grasped the situation well. As he explained in his memoir, "I now went on shows like Donahue for a simple reason. Other than placing classified ads, the only effective way of finding surrogate mothers was through television and news articles. The true fathers of the surrogate motherhood story, perhaps, are the Phil Donahue Show and *People Magazine*."⁸³ Applications from women seeking to be surrogates began to roll in.⁸⁴ Mary Beth Whitehead learned of surrogacy through a Keane advertisement in the local *Asbury Park Press*, though by this time the price was fixed and the test tube baby language had been replaced by more familiar vocabulary:

SURROGATE MOTHER WANTED. Couple unable to have children willing to pay \$10,000 fee and expenses to woman to carry husband's child. Conception by artificial insemination. All replies strictly confidential.⁸⁵

⁷⁹ See KEANE, *supra* note 62, at 40. A decade later, there was still reluctance to accept surrogacy ads. An Indiana lawyer submitted seeking-surrogate advertisements to 155 newspapers in 1987; twenty were accepted. See *Baby Brokers Advertise For 'Wombs to Rent'*, *supra* note 27, at 1E. Some brokers found success with small shopper newspapers and city arts publications. Others were more inventive: a Texas firm put flyers on thousands of car windshields in a Houston parking lot, and a Kentucky broker make up t-shirts that read "Babies by Levin." *Id.* Levin now uses the slogan for his website. See History of SPA, http://www.babies-by-levin.com/spa_google.htm (last visited Dec. 4, 2006).

⁸⁰ KEANE, *supra* note 62, at 40–41.

⁸¹ *Id.* at 42.

⁸² *Id.* at 173.

⁸³ *Id.* at 173–74. Over time, Keane's advertising became more discrete as niche surrogacy markets developed. In the early 1990s, Keane ran ads in Korean language newspapers in order to find Asian American women for insemination by Japanese husbands: "[The women] don't have to be Japanese-American. We're only looking for the Asian quality, particularly the eyes." See Mark Alpert, *New U.S. Export to Japan: Babies*, *FORTUNE*, Aug. 10, 1992, at 8. Fees for the service were approximately \$75,000 (excluding air fare).

⁸⁴ The campus ads alone produced over 200 responses from women seeking fees that ranged from \$200 to \$10,000. *Hiring Mothers*, *TIME*, June 5, 1978, at 59.

⁸⁵ *In re Baby M*, 525 A.2d 1128, 1162 (N.J. Super. Ct. 1987).

Keane's advertising strategy not only produced surrogate mothers; the publicity introduced—normalized—the idea of surrogacy to childless couples as well. By regularizing surrogacy, an enterprise that certainly at the beginning “skat[ed] on the thin edge of acceptability,”⁸⁶ Keane became the go-to guy for couples yearning for a child who could be (at least half) genetically their own. Baby M's own father, William Stern, got the idea after seeing an ad seeking surrogates in a New York newspaper and remembering Keane's earlier television appearance.⁸⁷ After sending for brochures from a few infertility centers, Betsy and Bill Stern settled on the ICNY.

The surrogate selection process worked as follows: women applied to Keane for acceptance as potential surrogates; he called them “hosts” in the early days. Acceptance was based on a preliminary screening by Keane, who often allowed the people seeking children and those wishing to be surrogates to select one another.⁸⁸ After they filled out a questionnaire detailing such factors as health, education, maternal status, and income, an in-house psychologist interviewed selected applicants in person to evaluate their ability to consent to a surrogacy arrangement. If the psychologist determined that the woman was able to give informed consent, she was accepted into the program. She was then eligible for selection by couples, themselves unscreened, seeking surrogates. In Keane's Michigan office, prospective parents and would-be surrogates met on Saturday mornings in something close to reproductive speed dating: each couple was assigned a private office through which surrogates would rotate. “On the heels of the surrogates, Noel Keane or his female assistant would slip quietly in to confer with the couples to see if any matches were in the offing.”⁸⁹ In New York, couples similarly sifted through albums of candidates; ICNY

⁸⁶ Deborah L. Spar, *For Love and Money: The Political Economy of Commercial Surrogacy*, 12 REV. INT'L POL. ECON. 287, 289 (2005). Spar observes that because of its uncertain legal status, traditional surrogacy remained relatively rare throughout the 1980s—only 100 matches in 1988. She characterizes surrogacy agreements as “the fodder for talk shows, perhaps, but not the makings of a market.” *Id.* at 295. My argument is that the talk shows themselves contributed significantly to the makings of the market. The broker—as broker—may also play an important *cultural* role in the normalization, and therefore the successful commercialization, of surrogacy. To the extent surrogacy was not an entirely acceptable practice at the start—something both surrogates and commissioning couples had to explain and justify to others—brokers may have performed something like a ritual purification. Taking Noel Keane as a model, by being a brash and aggressive sole practitioner looking for cases (Mary Beth Whitehead called him a former ambulance chaser), Keane took on the sins of the enterprise, leaving the participants free to pursue their questionable goals: the whole thing was the *broker's* idea, his doing, his fault. On this account, the broker does more than arrange the transaction; he also absorbs some of its social stigma. This is, after all, not an uncommon role for lawyers; consider divorce lawyers or those who arrange corporate takeovers.

⁸⁷ Direct Testimony of William Stern (Jan. 5, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 80.

⁸⁸ KEANE, *supra* note 62, at 20 (admitting that “some people were allowed to be surrogate mothers who upon hindsight might better have been rejected”).

⁸⁹ Fleming, *supra* note 43, at 33.

would then set up meetings between couples and selected candidates.⁹⁰ Although still headquartered in Dearborn, Keane traveled regularly to New York to meet with couples, though he never met the Sterns. Once the couple had chosen a surrogate, Keane then arranged for her to see a psychologist and a lawyer, and for the doctors who were to perform the inseminations. As the Court of Appeals for the Sixth Circuit later noted, “Keane operated both as a lawyer for the contracting father and as the manager of a business.”⁹¹

Mary Beth had not been the Sterns’ first choice. After reading through the 300 applications on file at the ICNY, they had found a woman who seemed terrific. However, as Betsy testified at trial, on the day of their scheduled appointment, “the water pipes in her house [] burst” and she cancelled.⁹² Only then did ICNY mention Mary Beth Whitehead, a “woman who was working with another couple . . . a very highly motivated person [who] wanted to do this in the worst way and [who] would do it for anybody as long as he had a viable sperm count.”⁹³ Impressed with the statement of motivation on her application—“I would like for other human beings to experience the gift of life and the joys of parenthood”⁹⁴—Bill and Betsy arranged to meet Rick and Mary Beth at a restaurant in New Brunswick. The meeting went well, and after an hour the Sterns decided that “she was like too good to be true and we didn’t want to give her up and so we agreed”⁹⁵

Several factors made Mary Beth particularly appealing. Because she had worked with another couple for eight months, the Sterns figured she knew what surrogacy was about and was unlikely to “show up on our doorstep.”⁹⁶ Moreover, Rick’s vasectomy seemed a clear indication that the Whiteheads “didn’t want any more children”⁹⁷ Bill testified that “Rick, in fact, had said if Mary Beth wanted to keep the kid, he’d walk right out on her”⁹⁸ With the deal informally agreed to, ICNY then drew up the formal documents; as Betsy recalled, everything was “straightforward and

⁹⁰ Keane’s leading competitor, Dr. Levin of Kentucky, did not permit the surrogates and couples to meet one another. Selection was made solely on the basis of written information. See John W. Phillips & Susan D. Phillips, Note, *In Defense of Surrogate Parenting: A Critical Analysis of the Recent Kentucky Experience*, 69 Ky. L.J. 877, 882–83 (1980–1981).

⁹¹ *Stiver v. Parker*, 975 F.2d 261, 264 (6th Cir. 1992).

⁹² Direct Testimony of Elizabeth Stern (Jan. 6, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 83.

⁹³ Direct Testimony of William Stern (Jan. 5, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 105. After eight frustrating months of unsuccessful inseminations with Mary Beth’s first couple, the husband was finally tested and found to have a low (unviable) sperm count. *Id.*

⁹⁴ *Id.* at 111.

⁹⁵ *Id.* at 119.

⁹⁶ *Id.* at 120–21. As Bill testified, “[S]he’s got to know what she’s been doing for all those eight months” *Id.* at 121.

⁹⁷ *Id.* at 119.

⁹⁸ *Id.*

simple and [ICNY would] take care of everything for us.”⁹⁹ On February 6, 1985, everyone signed.

On December 3, 1984, the Sterns paid ICNY its \$7,500 fee, and on February 6, 1985, they put \$10,000 in escrow for Mary Beth.¹⁰⁰ Neither price was negotiated; rather, both were set by ICNY.¹⁰¹ As with other issues, like searching, on which there are informational asymmetries, intermediaries often smooth the way by helping establish prices. Otherwise, agreeing on a price is time consuming and also something of a gamble, particularly in a market where parties have little idea about the market value of the exchange and where there are few repeat players, since most couples engage with surrogacy just once in their lives. Again, the middleman—here ICNY—extracts a surplus in exchange for shortening the period that buyers and sellers have to wait for a transaction.¹⁰²

It is important to remember that a brokered deal involves *two* prices: the broker’s own fee and the amount exchanged between the parties. The middleman’s markup often “depends positively on the rate of impatience”¹⁰³ This explains why the fee to surrogacy brokers is so high, often close to or equal to that paid to the surrogate. Commissioning couples are frustrated with their inability to produce a child *before* they enter the market—indeed, that frustration is what has driven them into the market in the first place—because their first preference would have been to proceed the old-fashioned way. They have to wait nearly a year (if things go well) even after they have contracted with the surrogate. Surrogacy brokers further shorten the entire waiting period by having a good supply of surrogates on hand.

Setting the second price—the one between the couple and the surrogate—is complicated because the exchange is emotionally laden on both sides and in ways that pull in opposite directions. Childless couples with means (and sometimes couples without) are often willing to pay anything: “We’d sell the car, the house even, if it comes to it. . . . There was nothing I wouldn’t give up if it meant we could have a child.”¹⁰⁴ At the same time, the fees paid to surrogates themselves are fairly low. As Mary Beth later pointed out, her \$10,000 would have cashed out at \$1.47 an hour.¹⁰⁵ The price (as well as the fact of payment discussed earlier) appears to be mediated by the mother’s belief in the value—the nobility—of her

⁹⁹ Direct Testimony of Elizabeth Stern (Jan. 6, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 92.

¹⁰⁰ Direct Testimony of William Stern (Jan. 5, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 98–99, 131–32.

¹⁰¹ *Id.*

¹⁰² Ariel Rubenstein & Asher Wolinsky, *Middlemen*, 102 Q. J. ECON. 581 (1987).

¹⁰³ *Id.* at 591.

¹⁰⁴ JUDITH LASKER & SUSAN BORG, IN SEARCH OF PARENTHOOD: COPING WITH INFERTILITY AND HIGH-TECH CONCEPTION 11 (1987).

¹⁰⁵ *Whitehead’s Appeal Says She Wasn’t Paid Minimum Wage*, ST. PETERSBURG TIMES, Apr. 15, 1987, at 1A.

service. Although surrogates want to be paid, they do not want to appear (and in general are not) mercenary. The reconciliation of payment and altruism—a kind of seller schizophrenia—is managed by keeping the price relatively low. The money signals that their labor has value; the modest sum underscores the essence of the deal as a gift transaction.¹⁰⁶

THINGS FALL APART

In thinking about what went wrong in this case, it is easy to say, as many did, that Mary Beth was a scoundrel,¹⁰⁷ or alternatively, that in refusing to surrender Baby M, she finally came to her senses and exposed surrogacy for what it is. The question of “what surrogacy is” in any moral sense remains a hard one. For some, the very facts of the case—the wealth disparity between the couples, the literal tug-of-war over an infant—sufficiently indict the enterprise. But I want to stick with the game plan, accept the market, and return our attention to the role of the middleman in all of this.

In addition to searching, matching, and pricing services, there is another reason why parties turn to intermediaries and pay their fees. Brokers also provide parties with some level of assurance about the quality of the deal.¹⁰⁸ They know more about customer characteristics and about product features than novice, one-time transactors who are far less able to efficiently investigate such things themselves.¹⁰⁹ Some assurances, like warranties,

¹⁰⁶ In economic terms, the low fee acts as a “utility bribe” stimulating participation by fertile women who rightly believe their work has value (hence deserving of some payment) but who would withdraw from the market if the payment were so high as to overshadow the altruistic component. See Gillian Hewitson, *The Market for Surrogate Mother Contracts*, 73 *ECON. REC.* 212, 222 (1997). Another way to look at the relatively low fee is as a screening mechanism. By offering a price that is not too high, middlemen screen out women so focused on money that they might be willing to engage in after-birth holdups or in undesirable behavior during the pregnancy. See Galbraith et al., *supra* note 56 (reporting that commercial brokers screen out women who are particularly needy precisely to make sure they are not doing it for the money alone). For the social meaning of payment, especially among intimates, see VIVIANA ZELIZER, *THE PURCHASE OF INTIMACY* (2005); VIVIANA ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994).

¹⁰⁷ The trial court said much worse. In granting custody to the Sterns and terminating Mary Beth’s parental rights, Judge Sorkow found that Mary Beth was

unreliable in so far as her promise is concerned . . . manipulative, impulsive and exploitive. She is also, for the most part, untruthful. . . . Her lack of candor makes her a poor candidate to report to the child in an age-appropriate manner and time, the facts of the child’s origin. She is a woman without empathy.

In re Baby M, 525 A.2d 1128, 1170 (N.J. Super. Ct. 1987); see also James Feron, *Testimony is Given on U.S. Surrogate Bill*, *N.Y. TIMES*, Apr. 12, 1987, at 39 (reporting that after the trial court decision, sixty-nine percent of the public agreed that surrogate mothers should be required to abide by their agreements).

¹⁰⁸ Spulber, *supra* note 67, at 147–48.

¹⁰⁹ See Gary Biglaiser, *Middlemen as Experts*, 24 *RAND J. ECON.* 212 (1993) (discussing how middlemen can improve a market).

attract parties because they are explicit. In other cases, the broker's general reputation draws business. A good example from the world of reproduction is Danish sperm banks which became known worldwide for providing a superior product ("the Danish stuff").¹¹⁰ Their reputation grew for several reasons: Danish sperm banks require men selling their sperm to undergo unusually rigorous testing and evaluation; the banks resell only to doctors; and Danish law requires strict anonymity. These are attractive features to both buyers and sellers concerned with quality now¹¹¹ and privacy down the road.¹¹²

Exactly what assurances does a *surrogacy* broker provide? Other than providing an array of approved candidates from which couples themselves selected a trading partner, Noel Keane's answer was almost none. The ICNY contract with William Stern was absolutely clear about this:

It is expressly understood that ICNY does not guarantee or warrant that the "surrogate mother" will in fact conceive a child fathered by Natural Father; nor . . . that if a child is conceived, it will be a healthy child . . . ; nor [that] the "surrogate mother" . . . will comply with the terms and provisions of the separate agreement entered into between herself and the Natural Father, including but not limited to, the "surrogate mother's" refusal to surrender custody of the child upon birth.¹¹³

Keane thus disclaimed any liability for whatever did or did not transpire once the parties had made their match and left ICNY.

But Keane could not have become the king of surrogacy if his clients were regularly frustrated in their quest for a baby. His reputation depended on the fertility and the fidelity of his candidates, and most Keane clients *were* satisfied.¹¹⁴ Before Mary Beth's refusal, only three other Keane deals had fallen through because the birth mother changed her mind; none received much notice, in part because none was litigated. For Keane, such

¹¹⁰ SPAR, *supra* note 18, at 38–39. The leader, Cryos International Sperm Bank, ships to more than fifty countries.

¹¹¹ See Robin Schatz, *40 Sperm Donors Not Tested*, NEWSDAY, July 15, 1993, at 153 (reporting that husband donors were not always tested for hepatitis, HIV, gonorrhea, or syphilis before surrogates were inseminated). The donors were all clients of Idant Laboratories, Noel Keane's insemination service.

¹¹² See SPAR, *supra* note 18, at 38–39.

¹¹³ *In re Baby M*, 537 A.2d 1227, App. B. (N.J. 1988).

¹¹⁴ For an exception, see *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992), in which a surrogate mother was inseminated with the untested sperm of a Keane client. Both she and the fetus contracted a sexually transmitted disease, and the baby was born with severe birth anomalies. The case was particularly complicated in that the child proved not to be the genetic child of the sperm donor but of the surrogate's husband. The court held that Keane, "the surrogacy business designer and broker, and the other defendant professionals who profited from the program, owed affirmative duties to [both the surrogate and the sperm donor], the surrogacy program beneficiaries." *Id.* at 268.

disrupted deals were no big deal, something to be expected in the intense world of surrogacy: "We're dealing with human beings with emotions, which makes it impossible to get to zero."¹¹⁵

But Mary Beth's behavior was not just, as Keane later described it, "less than ideal."¹¹⁶ ICNY had information about Mary Beth that might well have given the Sterns—and the Whiteheads—pause had it been disclosed. After interviewing Mary Beth for an hour and a half session, Keane's New York psychologist, Dr. Joan Einwohner, observed that although she "does not want to rear more children now that her own are in school . . . she expects to have strong feelings about giving up the baby at the end."¹¹⁷ Einwohner explained further that she had "some concern about [Whitehead's] tendency to deny feelings and [that] it would be important to explore with her in somewhat more depth whether she will be able to relinquish the child at the end."¹¹⁸ She then concluded her page and a half report: "Except for the above reservations, Ms. Whitehead is recommended as an appropriate candidate for being a surrogate volunteer."¹¹⁹ The Einwohner report was not shown to or discussed with Mary Beth, who stated at trial that she was not shown the results of the report.¹²⁰ When it was uncovered during the litigation, Mary Beth sued Keane and the ICNY for negligence and fraud for failing to properly caution her about the difficulties they knew she might encounter in giving up a baby.¹²¹ The Sterns also had never seen the report; Bill explained at trial that he relied on ICNY's expertise, "on the fact that they said she was tested and approved."¹²²

¹¹⁵ Jane Gross, *Fears Ease Over Contracts for Babies*, N.Y. TIMES, Apr. 2, 1987, at B2.

¹¹⁶ KEANE, *supra* note 60, at 24.

¹¹⁷ Einwohner Report, Apr. 26, 1984 (on file with the *Harvard Journal of Law & Gender*).

¹¹⁸ *Id.*

¹¹⁹ *Id.* Einwohner further noted that "It would be very important to [Ms. Whitehead] to have the emotional support of the adoptive parents during pregnancy and birth and a friendly relationship with them." *Id.* This never happened. By the eighth month, Mary Beth resented Betsy making suggestions regarding Mary Beth's health matters and requiring her to undergo amniocentesis, a diagnostic procedure rarely performed on twenty-six-year-old pregnant women. See Direct Testimony of Mary Beth Whitehead (Jan. 8, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 53–55.

¹²⁰ Direct Testimony of Mary Beth Whitehead (Jan. 8, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 52–53. The evaluation was conducted in 1984 when Mary Beth first registered with ICNY. After the contract with couple number one fell through, no additional evaluation was made.

¹²¹ The suit was later settled for some \$30,000. Guy Sterling, *Surrogate Mom Sues Infertility Center for Fraud*, N.Y. TIMES, Oct. 15, 1986, at B1. Mary Beth also sued the gynecologist who performed the insemination, alleging that she "showed a lack of care in determining whether Mrs. Whitehead was appropriate for a surrogacy relationship." This claim also settled out of court. Ron Hollander, *Mary Beth Settles Suit with Doctor, Attorney*, BERGEN REC. (N.J.), July 12, 1987, at A8.

¹²² Cross Examination of William Stern by Mr. Cassidy (Jan. 6, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 49. The Sterns, perhaps because of the disclaimer and perhaps because they won custody of the baby and simply wanted to move on with their lives, did not sue.

A second piece of undisclosed information also left Mary Beth feeling burned; she insisted it would have been a complete deal breaker had she only known. The issue concerned Betsy Stern's infertility. The contract between Mary Beth and Bill stated that "[t]he only reason for this contract is to enable William Stern and his infertile wife to have a child which is biologically related to William Stern."¹²³ Similarly, a Declaration of Intent, required by ICNY for the February 6, 1985, closing and copied out in longhand by Mary Beth, stated that "I understand that the child to be conceived by me is being done so only because the wife of William Stern, natural father, is unable to bear a child."¹²⁴ In light of the contract references to infertility and inability, the ICNY ad, and the very name "Infertility Center of New York," Mary Beth believed that the Sterns could not have children of their own. Indeed, on one of the insemination commutes into the city, Mary Beth ventured to ask Bill outright what was wrong with Betsy: "He told me that if Betsy was to have a child that she wouldn't live through it."¹²⁵

But this was not quite the case. Bill and Betsy had never tried to conceive a child together because in the early 1980s Betsy had diagnosed herself as having multiple sclerosis and, after talking to a few colleagues, concluded that a pregnancy would seriously endanger her health. The Sterns had left blank the question on an ICNY form regarding fertility status, but in any event, Keane's position had always been that why couples sought him out was none of his business. He accepted couples and sometimes individual clients without regard to marital status or medical history. At the trial, days of expert testimony were devoted to the question of whether Betsy Stern was either infertile (incapable of conceiving) or unable to bear a child (incapable of sustaining a pregnancy). In the end, the New Jersey Supreme Court found that at the time the deal was reached, "[Betsy's] anxiety appears to have exceeded the actual risk, which current medical authorities assess as minimal."¹²⁶ Nonetheless, the Court concluded that "[b]ased on the perceived risk, the Sterns [reasonably] decided to forego having their own children."¹²⁷

At trial, the dispute over Betsy's fertility served two purposes. The first was to tar Dr. Stern with careerist responsibility for her own fix. Mary Beth's lawyer, Harold Cassidy, threw down the gauntlet in his opening statement: "[T]he only reason that the Sterns did not attempt to conceive a child was . . . because Mrs. Stern had a career that had to be advanced."¹²⁸

¹²³ Iver Peterson, *Baby M and Controversy over Fertility*, N.Y. TIMES, Jan. 31, 1987, at 30.

¹²⁴ *Id.*

¹²⁵ Direct Testimony of Mary Beth Whitehead (Jan. 8, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 65.

¹²⁶ *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988).

¹²⁷ *Id.*

¹²⁸ Cassidy Opening Statement (Jan. 5, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 29.

Throughout the trial, Cassidy worked to portray Betsy as just “one more whiny boomer who forgot to have a baby,” to borrow Anne Tyler Fleming’s stinging phrase.¹²⁹ Mary Beth underscored the point: “Betsy valued her career with the same intensity that I valued motherhood.”¹³⁰ The apparent complementarities that had brought the two women together in the first place transformed into the very reason the deal should not be enforced: Betsy Stern did not deserve custody of the baby, because she did not want a child badly enough. She had not been willing to take a risk for motherhood.¹³¹

If the first purpose of the fertility testimony was to cast doubt on Betsy’s maternal commitment, the second was to defend against Mary Beth’s breach. Cassidy argued that the Sterns and the ICNY had misrepresented Betsy’s ability to reproduce. Mary Beth was not in the business of having babies for couples who could jolly well have their own. She wasn’t interested in “iffy” infertility but in *desperate* infertility: *that* was the object of her altruism.¹³²

Because the New Jersey Supreme Court held the contract void on public policy grounds (no baby-selling in New Jersey), it did not resolve the issue of fraud or misrepresentation.¹³³ Nonetheless, from the perspective of market development and intermediation, the issue of disclosure as related to broker reputation raises two interesting questions. First, *should* ICNY have uncovered and revealed Betsy’s medical history? In most commercial transactions, people do not usually care what brings the other party to the table. You may want to buy my car because you have no car or because you have three and hanker for a fourth. The used car dealer may affect an interest in this but is usually indifferent about the parties’ background motivations.

Surrogacy presents a somewhat different proposition. Women act as surrogates in part because they want to perform a service for couples who

¹²⁹ FLEMING, *supra* note 36, at 35.

¹³⁰ WHITEHEAD, *supra* note 48, at 92. Once things went south, Mary Beth revealed many grudges and sources of dissatisfaction, including the size of the plant the Sterns brought when they visited her in the hospital (“the dinkiest”). She regularly referred to Mr. Stern as a Mr. Sperm and also raised questions about Stern’s professed concerns regarding his Jewish heritage. As Mary Beth pointed out, Stern had married a Methodist, chosen a Catholic surrogate, and was planning to raise the baby Unitarian. Who knows why the Sterns did not seek a Jewish surrogate. Demographic studies suggest there are almost no Jewish surrogates; this may or may not have had something to do with their choice. See Itabari Njeri, *Surrogate Motherhood: A Practice That’s Still Undergoing Birth Pangs*, L.A. TIMES, Mar. 22, 1987, at 6:1.

¹³¹ See Cassidy Opening Statement (Jan. 5, 1987), in 1 TRIAL TRANSCRIPTS, *supra* note 1, at 29.

¹³² As Mary Beth’s attorney reminded the court in his closing argument, “Child bearing would have been an inconvenience for Mrs. Stern Infertility was a lie. Inconvenience was the truth.” WHITEHEAD, *supra* note 48, at 158. Brokers might similarly inquire about the commissioning couple’s fertility; recall that Mary Beth underwent eight months of insemination with an untested sterile husband.

¹³³ *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

are uniquely needy. Surrogates may be telling themselves fairy tales, as one critic contends,¹³⁴ but putting charges of false consciousness aside, the role of altruism in this decision to act as a surrogate seems undeniable. The value and meaning of this work diminishes if the couple were simply risk averse or too busy to have their own baby. Under such circumstances, the good will and the bodies of surrogates seem exploited, even to the surrogate. In a sense, ascertaining the fertility status of the couple might be viewed like a background finance report. Before entering the deal, the seller wants to know whether the buyer has (or in this case does not have) the means.

Indeed, before agreeing to bear a child, the surrogate mother might want to know more than the couple's fertility status. She might want to know—or be able to count on—the fact that the couple is likely to be good parents to her child. In a 1997 Pennsylvania case, Keane's client, a single man, killed the baby he had fathered with the surrogate when it was only a month old. He was charged with murder. In a negligence suit brought by the mother against Keane, the court held that because of the nature of the Infertility Center of America's ("ICA") business—"a business operating for the sole purpose of organizing and supervising the very delicate process of creating a child"—that a "special relationship" existed between the ICA and its "client-participants."¹³⁵

The second question about disclosure concerns Keane's reputation. The ICNY knew that Mary Beth might not go through with the deal and that the Sterns had not answered the question on their questionnaire about Betsy's infertility. All this came out at trial and in the press. Why then, in light of ICNY's seemingly shoddy performance, did the *Baby M* case bring Keane additional acclaim and business? Judge Wilentz's decision was meant to close down commercial surrogacy, not cause Noel Keane to install more phone lines. Should not the market have worked so that other more careful surrogacy brokers emerged to displace Keane?

There are several possible answers. It may be that the surrogacy market was so new and beguiling that consumers paid more attention to its possibilities than to one case of failure, featuring a surrogate who, however sympathetic to some, was also somewhat nutty. Mary Beth had, after all,

¹³⁴ George J. Annas, *Fairy Tales Surrogate Mothers Tell*, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY* 43, 43 (Larry Gostin ed., 1990). Annas describes the comforting myth or "modern fairy tale that babies can properly be viewed as a consumer product for those with money to purchase them, and that by permitting this transaction, we will all live happily ever after." *Id.* For Annas, surrogacy is nothing more than "a method to obtain children genetically related to white males by exploiting poor women." *Id.* On the other hand, psychologist Hilary Hanafin found that surrogates are often frustrated at having to convince family and friends that they are quite at peace with having relinquished the baby to the commissioning couple. Hanafin, *supra* note 41.

¹³⁵ The court held that the duty was owed "most especially [to] the child which the surrogacy undertaking creates." *Huddleston v. Infertility Ctr. of Am.*, 700 A.2d 453, 460 (Pa. Super. Ct. 1997).

threatened to kill herself and the baby and threatened to claim that Bill Stern had abused Tuesday. After all, only a handful of the hundreds of traditional surrogacy agreements brokered in the United States since Noel Keane wrote the first some thirty years ago have resulted in litigation. It would therefore seem that the market for commercial surrogacy works well, with satisfied customers on both ends of the deal and the middleman doing quite well in the middle. It may also be that the desire for a child is so consuming that in the market for baby-making, normal consumer skills and concerns do not operate normally.¹³⁶

Of course, that Keane continued to do well does not mean he did not lose market share. Other surrogacy brokers had higher admission criteria for surrogates and some couples may well have gone elsewhere; we cannot know for sure. In addition, technological advances were fast leaving traditional surrogacy in their wake. Within a very few years, the demand for traditional surrogacy had been replaced almost entirely by the demand for gestational surrogacy, and the new technology brought in new competitors.¹³⁷ The internet also changed how everyone does business. It is now quite easy to find surrogacy brokers online and to compare their services, prices, and results.

There have also been changes in *who* does business. Noel Keane may have been the father of it all, but women now regularly act as surrogacy brokers, pitching their services solidaristically with their clients' frustrations regarding infertility.¹³⁸ Indeed, surrogates themselves have begun opening their own agencies and, if not quite cutting out the middleman, then at least slipping into his position and capturing the excess profit themselves. In addition to pricing schedules offered now by all agencies, surrogate-brokers market a special combination of empathy and expertise. As surrogate Alice Webster, the founder of The Gift of Surrogacy, explains on her firm's website, "[m]y introduction into the world of surrogacy was filled with uncertainty, confusion, and disappointment This agency was created because I knew it could be done better."¹³⁹

¹³⁶ As Spar observes, fertility doctors confront a "statistical and moral conundrum": there are few incentives to stopping treatment; the patient wants to keep trying, the state has no guidelines, and the doctor profits from providing because there is the possibility of success. SPAR, *supra* note 18, at 53–57.

¹³⁷ See *supra* notes 55–56 and accompanying text.

¹³⁸ Similarly, the president of Reproductive Assistance, Inc. ("Helping create families") explains: "I started this company in 2002 because I was like you. I had been down the road of fertility problems . . ." Lisa Henkel, Reproductive Assistance, Inc., <http://www.reproductiveassistanceinc.com> (last visited Dec. 4, 2006). Surrogates now also experience solidarity with one another through online websites, such as Surrogate Mothers Online, the "Virtual Meeting Ground for the Surrogacy Community." Surrogate Mothers Online, LLC, <http://www.surromomsonline.com> (last visited Dec. 4, 2006). See also Shauna Lively-Aurelio, Surrogate Mothers Use of Online Messaging: A Study of Social Support (2004) (unpublished Ph.D. dissertation, West Virginia University) (on file with the *Harvard Journal of Law & Gender*).

¹³⁹ See The Gift of Surrogacy, About Us, <http://www.thegiftofsurrogacy.com/aboutus.html> (last visited Dec. 4, 2006). The President and CEO of SurroGenesis "has been a suc-

The “arrival” of women as brokers rather than purchasers or suppliers suggests something about the development of surrogacy as a business and about the relation of gender to intermediation more generally. Women would seem excellent candidates for surrogacy brokering. After all, motherhood and other forms of domesticity are understood to be their bailiwick. This explains consumer comfort with women as brokers in residential real estate and as matchmakers in dating services.¹⁴⁰ Why, then, did women come to the surrogacy business so late in the game? One explanation is surrogacy’s questionable status during its early years.¹⁴¹ There may have been considerable sympathy toward infertile couples and some toward the women trying to help them, but in many quarters there was only disdain for the man who earned a fat profit bringing the two together. On this early view (which some still hold), surrogacy was less about happy family formation than about selling women’s bodies. Until surrogacy became more acceptable, “nice” women trading on domestic traits were better off sticking to real estate. In addition, most of the early brokers were lawyers (with a few entrepreneurial doctors here and there). Because women in the mid-1970s were just beginning to enter those professions, most lacked what were then regarded as the necessary qualifications to arrange the transaction.

CONCLUSION

In removing surrogacy from the realm of permissible commercial activity in New Jersey, Justice Wilentz focused on what he saw as the pernicious role of the middleman. By taking money out of the equation, entrepreneurs would have to go elsewhere to extract surplus from trades like this, and that is certainly what happened. Surrogacy brokers decamped to jurisdictions where surrogacy was permitted or to those still in legal limbo, as New Jersey had been. But *Baby M* had revealed surrogacy’s potential for heartbreak—or as many contended, heartbreak’s inevitability—and many state legislatures took note.¹⁴² Some banned commercial surrogacy

cessful surrogate” and “understands surrogacy . . . from both sides of the pregnancy;” the Vice-President, the mother of surrogate triplets, combines “the knowledge she’s gained throughout her surrogacy journey” with managerial experience. SurroGenesis USA, LLC, About Us, http://www.surrogenesisusa.com/html/about_us.html (last visited Dec. 4, 2006); see also Conceptual Options, Our Associates, <http://www.conceptualoptions.com/associates.htm> (last visited Dec. 4, 2006) (founder, an egg donor with later fertility problems, “truly relate[s] with all parties involved”).

¹⁴⁰ See JEFFREY M. HORNSTEIN, *A NATION OF REALTORS: A CULTURAL HISTORY OF THE TWENTIETH-CENTURY AMERICAN MIDDLE CLASS 193–94* (Duke Univ. Press 2005) (noting how women’s “special knowledge” and “intuitive understanding” of the home worked to their advantage as real estate agents).

¹⁴¹ See generally Alan L. Otten, *Fertility Group Issues Ethical Guidelines on the Use of Artificial-Birth Methods*, *WALL ST. J.*, Sept. 9, 1986, at 1 (reporting serious ethical reservations regarding surrogacy by the American Fertility Society).

¹⁴² See Appendix II, *Status of State Legislation Proposed or Enacted Through Oct. 5,*

outright; others were content to make surrogacy contracts legal but unenforceable.

In many jurisdictions, brokers have come in for special mention. Some states, such as Colorado, ban payment to the mothers but permit it to the broker. Some countries, such as the United Kingdom, permit payment to the mother but completely ban it to the broker. It is an offense in the U.K. not only to broker a commercial deal but even to arrange without compensation for a volunteer surrogate.¹⁴³ And where surrogacy is legal, as in California, it appears to thrive.¹⁴⁴ In sum, couples can now choose from an array of surrogacy options. They can stay close to home if the local market satisfies, or they can forum shop in the global market of reproductive tourism.

And what became of the players in this case?

Bill and Betsy Stern remained in Tenaflly with Melissa and have granted no interviews since the decision was handed down. Tenaflly seems to have protected the Stern family in their desire for privacy. As one "Tenaflly native" told a reporter looking for a story on Melissa's thirteenth birthday, "Bringing up this child's past will only hurt her in the long run. . . . Nobody wants to revisit the pain and suffering surrounding the case. Nobody. And in this town, everybody knows everybody."¹⁴⁵

Mary Beth, now Mary Beth Whitehead Gould, lives in Bayport, Long Island, with her second husband, Dean Gould, whom she met on vacation while recuperating from the trial.¹⁴⁶ As she wrote in her 1989 memoir, "the purpose of my life was to have children" and she has had five: Ryan and Tuesday with Rick, "Sassy" (her nickname for Melissa), and Austin and Morgan with Dean.¹⁴⁷ Mary Beth's views about surrogacy have changed. Interviewed in 1999 with other notables for *People* magazine's Twenty-fifth Anniversary issue, she explained, "I look at people who are infertile now in a totally different light. I feel sorry for people who can't see too. That doesn't mean I'm going to take an eye out and give it to them."¹⁴⁸

1988, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY*, *supra* note 134, at 261.

¹⁴³ Surrogacy Arrangements Act, 1985, c. 49 (Eng.). The legality of broker compensation appears to have consequences for how the market works. A recent study comparing agencies in Colorado and California concluded that commercial brokers provided substantially more services to the mother and the couple than uncompensated brokers. See Galbraith et al., *supra* note 56.

¹⁴⁴ See Galbraith et al., *supra* note 56.

¹⁴⁵ Cori Anne Natoli, *Baby M, Away from Spotlight, Turns 13*, BERGEN REC. (N.J.), Mar. 28, 1999, at N07.

¹⁴⁶ Mary Beth became pregnant while the case was on appeal to the New Jersey Supreme Court. Her pregnancy, divorce from Rick, and remarriage to Dean two weeks later were all much reported in the press. See, e.g., Robert Hanley, *Whiteheads Divorce and Cite Battle for Baby M, Not Pregnancy as Cause*, N.Y. TIMES, Nov. 13, 1987, at B1.

¹⁴⁷ Mary Beth explained that she published her account of the case to speak out against the "terrible, terrible practice" of surrogacy and to pay off her lawyer's fees. See Elaine D'Aurizio, *Surrogate Mother Still Mourning Her Loss, 16 Years After Landmark Case Began*, BERGEN REC. (N.J.), Apr. 18, 2002, at L1.

¹⁴⁸ Elizabeth McNeil, *Mary Beth Whitehead Gould Nurtures 'Baby M,'* PEOPLE, Mar.

Although the Whiteheads were already divorced, Rick remained part of the celebration when the Supreme Court reversed the trial court, reinstating Mary Beth's maternal rights and granting her visitation. In 1988, however, he moved to Florida to be near his mother and brothers. Rick worked as a cement truck driver for Mid Coast Concrete, retired in 1994, and died in a hospice on Nov. 28, 2001.¹⁴⁹

Noel Keane continued his practice until his death from cancer at age fifty-eight in 1997.¹⁵⁰ He had arranged over 600 births since the first couple walked in twenty years earlier.¹⁵¹ ICNY stopped doing business in 1993 after charges that sperm donors had not been properly tested before the insemination of surrogates.¹⁵² It reopened as the Infertility Center of America ("ICA") and continues in business today, headquartered in Minneapolis.¹⁵³

Justice Wilentz, who wrote the decision in *Baby M*, died in 1996; the case featured prominently in his obituary.¹⁵⁴ Harold Cassidy, Mary Beth's attorney, remains, according to his website, "an advocate and defender of the rights of pregnant mothers."¹⁵⁵ What about Baby M herself? In 2005, a syndicated newspaper article featured a picture of one Melissa Stern of Tenafly, New Jersey. The article had nothing to do with surrogacy but was simply a human interest story on college students' use of technology. And there she was, just another freshman, working away on an assignment while plugged into her iPod.¹⁵⁶

15, 1999, at 16.

¹⁴⁹ Obituary, ST. PETERSBURG TIMES, Nov. 29, 2001, at 10.

¹⁵⁰ See Lawrence van Gelder, *Noel Keane, 58, Lawyer in Surrogate Mother Cases, is Dead*, N.Y. TIMES, Jan. 28, 1997, at B8.

¹⁵¹ *Id.*

¹⁵² See Schatz, *supra* note 111.

¹⁵³ See van Gelder, *supra* note 150.

¹⁵⁴ Thomas Martello, *Author of Baby M, Megan's Law Rulings Dies*, Associated Press, July 23, 1996.

¹⁵⁵ See Harold J. Cassidy & Associates, <http://www.haroldcassidy.com/> (last visited Dec. 4, 2006). Cassidy especially seeks to defend them against "the excesses and abuses of [the] abortion industry." One focus of Cassidy's current practice is litigation against physicians who perform abortions. See, e.g., *Acuna v. Turkish*, 345 N.J. Super. 500 (App. Div. 2002) (representing a woman who sued her abortion doctor for failing to clarify that if she had an abortion an "existing family member would die").

¹⁵⁶ *Gadgets Rule On College Campuses*, SHREVEPORT TIMES, Apr. 11, 2005, at 6B (on file with the *Harvard Journal of Law & Gender*).

