New Baby M Decision Will Breed Confusion
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Letters

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To the Editor:

You said the New Jersey Supreme Court's decision in the Baby M case brought clarity, justice and wisdom to the matter of surrogate motherhood (editorial, Feb. 4). To the contrary, the unwise decision will breed confusion and create a chilling effect upon legitimate human aspirations.

The Supreme Court decision is a clear case of overreacting to the grandstanding by the trial judge, Harvey Sorkow. Judge Sorkow initially had the right instinct: treat the case as a child-custody problem only. But media spotlighting gave him a national forum, and he responded by delivering a rambling treatise on surrogacy. He gave opinions on questions not germane to the case before him, especially the question of the validity of surrogacy contracts. His decision had the effect of goading the Supreme Court, but that Court should have shown restraint. Instead, it issued a second "landmark" opinion to upstage Judge Sorkow's. Both the trial court and the Supreme Court departed from the common law tradition of deciding the actual case and not issue speculative legislation for all future conceivable related cases.

The case before both courts simply called for a decision on child custody. Both courts indeed rendered such a decision: give William and Elizabeth Stern custody. The Supreme Court acted well within its jurisdiction in amending the custody decision to give the surrogate mother, Mary Beth Whitehead Gould, visitation rights and a chance to contest the custody later.

But then the Supreme Court began pontificating. It compared surrogacy contracts to the prohibition on paying money in adoption cases. Yet Mr. Stern was not adopting and had no need to adopt Baby M; he is her natural father. For the Court to say that the surrogacy contract "is illegal and perhaps criminal" is to chill unfairly the practice of surrogacy. Not only was criminality not involved in the Baby M case, but it is also unlikely that anyone could successfully be prosecuted criminally for entering into a surrogacy contract — even in New Jersey, and even now — because the adoption statute, under which the indictment would have to be drawn, simply does not and was never intended to cover surrogacy cases. Yet many people will be afraid to take that risk. The New Jersey Supreme Court has deterred the practice of surrogacy by its dubious and unnecessary speculations.

In applauding the decision, you betray a lack of compassion for childless couples who want to take advantage of modern technology to hire a surrogate mother. These people, even though they are in a very small minority in this country at present, have a real human need, and they are willing to put up their own money to pay for it. On the other side are consenting surrogate mothers who would like the income and who feel that the money amply compensates them for their labor. And let us not forget Baby M herself — she has come into the world because of surrogacy. What right does the state have to intrude upon these private consensual arrangements?

Certainly the surrogate mother should have a last clear chance to get out of the contract when the baby is born, no matter what the contract says. In that case, she forfeits the money. But if she chooses to give up the baby at that time, her choice is certainly as well informed as that of parents who give up their infant child for adoption. This result preserves the rights of consenting adults, while keeping out the heavy hand of the state.

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