CAN YOU WRITE a commercial contract for a baby? Can a man buy his own child? Who owns the frozen embryos of a dead woman; can they be willed to third parties? It has been five years since the controversial and emotional "Baby M" case was legally settled, but we have barely begun to understand its implications.

The public read the headlines and moved on. But given advances in the so-called "New Birth Technologies" we are faced with a bewildering future for the very definition of the family, if not of the individual. In a world awash with rhetoric about family values, there are lessons to be learned from a close examination of the case and the public reaction to it.

We are a civilization obsessed with the model of the individual contractor as the ultimate social unit. In some ways, as Sir Henry Maine forcefully reminded us, the shift from social relations based on Status—what sociologists would now call "ascribed status"—to those based on Contract is the major shift in
Western society over the historic period. The model for relations of Status was of course kinship—the family. A king was the father of his nation; God was the father of his people; the Church was the mother of us all. In the world of Contract, however, all parties are equal and autonomous contractors bound by their agreements. Society itself is such a contractual arrangement. The islands of Status, like slavery, have gradually been swept away, especially in the United States. Here, as Lawrence Friedman so graphically describes it, King Contract triumphed in the nineteenth and twentieth centuries as the model for all agreements between those acting rationally in their own interests.

One area held out for Status: the family. Or did it? This is the issue the Baby M case raised. And while there was indeed a settlement of sorts, it was an uneasy one, and one that was not convincing to a large segment of the American public. For Mary Beth Whitehead had not just demanded to keep “her” baby; she had challenged the power of almighty Contract. She issued this challenge in the name of motherhood. But as we shall see, motherhood, for all its hype, is a slender reed in the contractual wind.

A contract forbidding bonds

In March 1986 a baby girl was born to Mary Beth Whitehead, a housewife in Brick Township, New Jersey. It was her third child—she already had a girl (Tuesday) and a boy (Ryan); she called it Sara Elizabeth. Mr. Whitehead, however—at that point employed as a garbage collector—was not Sara’s father. The baby had been conceived and born as a result of a contractual agreement between the Whiteheads and William and Elizabeth Stern, a biochemist and physician respectively, of Tenafly, New Jersey, whereby Mrs. Whitehead was artificially inseminated with Mr. Stern’s sperm. The contract was drawn up on February 6, 1985 by a lawyer, Noel Keane, of The Infertility Center of New York, a private organization concerned with bringing together infertile couples and potential surrogate mothers. The Center’s fee for this service was $7,500.

The motives of the parties seemed fairly clear at the time. Mrs. Stern was unable to bear children for medical reasons. Mr. Stern had lost all his family in the Nazi genocide and desperately wanted to have a child of his own blood as a kind of
psycho-physical replacement for the lost kin. Mrs. Whitehead saw an advertisement for the clinic, and considering her family's marginal economic condition and the relative ease and pleasure with which she had already twice given birth, felt capable of performing as a surrogate mother. She was to receive $10,000 for her services and all expenses would be paid by the Sterns. The parties met, Bill and Betsy liked Mary Beth, and she felt well-disposed to them. Richard Whitehead at first was dubious but eventually agreed. The contract—or “Surrogate Parenting Agreement”—was accepted and signed.

Let us pause here to consider this all-important contract. Right up front it states, in Clause 2, that “the sole purpose of this Agreement is to enable William Stern and his infertile wife to have a child which is biologically related to William Stern.” In the next clause it puts the whole issue on the line:

MARY BETH WHITEHEAD, Surrogate, represents that she is capable of conceiving children. MARY BETH WHITEHEAD understands and agrees that in the best interests of the child, she will not form or attempt to form a parent-child relationship with any child or children she may conceive, carry to term and give birth to, pursuant to the provisions of this Agreement, and shall freely surrender custody to WILLIAM STERN, Natural Father, immediately upon birth of the child; and terminate all parental rights to said child pursuant to this agreement.

So before any of the details—even before any mention of the artificial insemination—the contract insists that the natural mother of the child who must “conceive, carry to term and give birth to” it, should not “form a parent-child relationship” with it. Clearly this must refer to the post-birth situation since, we must immediately ask, how can the mother not form a relationship with the child to whom she has been so intimately attached for nine months? And if, as there is much evidence to show, the most fundamental point of this parent-fetus bonding process occurs at birth itself, then short of bypassing the actual birth process how can the mother voluntarily refuse to form such a bond?

The contract, however, not only assumes she can but makes this the most fundamental of its conditions. It is as if the designer (Keane) knew in advance that the most difficult part of such an agreement was not the numerous medical details, but the prohibition of a natural process: that it was this that was
most likely to derail the proceedings and therefore had to be gotten out of the way first.

The next provision obtains Richard Whitehead's agreement to the same conditions and to the artificial insemination, and "rebut[s] the presumption of paternity of any offspring conceived and born pursuant to aforementioned agreement." This is because the law, in the absence of proof to the contrary, does assume any children born to a wife to be the natural children of her husband. (This goes back to Roman law. *Pater est quem nuptiae demonstrant*: the legal father of a child is he who can show marriage to the mother.) The third provision of this clause enjoins Mrs. Whitehead to cooperate in medical examinations, carry the baby to term, and surrender all parental rights.

The next clause concerns the payment of the fees and expenses, and includes agreement to paternity testing. If Stern is found not to be the father, then the deal is off, and the Whiteheads must reimburse the Sterns for all expenses incurred.

Clause 5 asks the Whiteheads to "understand and assume all risks, including the risk of death, which are incidental to conception, pregnancy and childbirth, including, but not limited to, postpartum complications." Clause 6 demands "psychiatric evaluations" of the Whiteheads, and permits a release of these to ICNY or the Sterns. The evaluation was indeed made and the psychiatrist, Joan Einwohner, concluded thus:

"It is the examiner's impression that Ms. Whitehead is sincere in her plan to become a surrogate mother and that she has thought extensively about the plan. However, I do have some concern about her tendency to deny feelings and think it would be important to explore with her in somewhat more depth whether she will be able to relinquish the child in the end."

There was more to this effect. The explorations in more depth never took place, and this evaluation was never communicated to the Sterns by ICNY.

The issue of miscarriage was then addressed. If the miscarriage occurred before the fifth month—no compensation for the mother; if after the fifth month, she would receive $1,000 for her services. Physical examinations and the possibility of no pregnancy were then dealt with. Then, in Clause 13, came the matter of abortion:
MARY BETH WHITEHEAD, Surrogate, agrees that she will not abort the child once conceived except, if in the professional medical opinion of the inseminating physician, such action is necessary for the physical health of MARY BETH WHITEHEAD or the child has been determined by said physician to be physiologically abnormal. MARY BETH WHITEHEAD further agrees, upon the request of said physician to undergo amniocentesis or similar tests to detect genetic and congenital defects. In the event that said test reveals that the fetus is genetically or congenitally abnormal, MARY BETH WHITEHEAD, Surrogate, agrees to abort the fetus upon demand of WILLIAM STERN, Natural Father, in which case the fee paid to the Surrogate will be in accordance with paragraph 10. If MARY BETH WHITEHEAD refuses to abort the fetus upon demand of WILLIAM STERN, his obligations as stated in this agreement shall cease forthwith, except as to obligations of paternity imposed by statute.

Thus the contract was not for a child as such but for a genetically and physiologically perfect child. Anything less could lead to a demand for abortion, and if this was refused, then the "surrogate" was stuck with the defective infant, no fee, and no expenses. The "natural father" would be in the clear. The next clause does admit that some such defects cannot be detected in advance, and if these occur then Stern "assumes the legal responsibility" for any such child. This is remarkably vague compared with the harsh specificity of the conditions imposed on the mother. Does "legal responsibility" extend to permanent custody or refer only to acknowledgement of paternity and child support?

In Clause 15, the "surrogate" agrees not to "smoke cigarettes, drink alcoholic beverages, use illegal drugs or take non-prescription medications," etc. And in the final clause Richard Whitehead agrees to execute a "refusal of consent" form. In this, Richard expressly refuses his consent to the artificial insemination while agreeing to all the other clauses. This is necessary so that Richard cannot be "declared or considered to be the legal father of the child conceived thereby."

I have spelled out the conditions of the contract for several reasons. Without knowing precisely what was in the contract it would be hard to have any sensible discussion (although much passionate debate was undertaken by parties who had never read the contract and had no idea what the specific provisions were). Also, as we have seen, the contract was loaded in favor of the
"natural father" from the start, as one might expect since he was paying the fees. With a stroke of the pen, and the payment of a hefty sum of money, he appeared to gain enormous control over "the surrogate": He could require insemination, amniocentesis, the regulation of maternal habits, prevention of the formation of parent-child bonds, risk of death, and even abortion (if the child were imperfect). Very few of those who insisted that "a contract was a contract" and that Mrs. Whitehead was bound to submit to its clauses, knew the clauses even existed in this form.

This was a contract, for a monetary consideration, concerning the conception, gestation, birth, and custody of a human being, in which a natural mother was asked to agree not to develop any maternal feelings, and to turn over her child unconditionally to the sperm donor who had paid for this privilege. But there it was. She had "freely entered into" the contract. She was of sound mind. She was not coerced by anything but financial need.

**Bonds negate the contract**

But when Sara was born on March 27, 1986, the arrangement fell apart. Mrs. Whitehead did not want to give up the baby. She was flooded with feelings of guilt over surrendering Sara as well as guilt over disappointing the Sterns. But it came to her with overpowering strength that she was selling her baby "like a slave." She couldn't do it. The bond was simply too strong. She was allowed to take the baby home, but the Sterns insisted on their rights and eventually, with grief and desperation, Mrs. Whitehead gave up the child. The Sterns immediately named it Melissa and started the adoption process. Mrs. Whitehead refused to go through with the adoption and would not accept the $10,000. She was in such a distraught state that on March 30 the Sterns agreed to let her have the child "for a few days." When she again refused to relinquish the baby, the Sterns, armed with a lawyer (Gary Skolof), adoption papers, and the agreement, successfully applied for a court order to claim Sara/Melissa.

Their claim was heard by Superior Court Judge Harvey Sorkow on May 5th. Mrs. Whitehead had been breast-feeding the baby for forty days at this point. She was not represented at the hearings and the judge never interviewed her. He depended solely on the testimony of the Sterns' lawyer. The judge apparently had no qualms about the legitimacy of the contract and
issued an *ex parte* order giving the Sterns sole custody. The grounds were that Mary Beth Whitehead had shown "mental instability" in her refusal to honor the contract, and that she might flee with the baby.

A bizarre scenario followed, almost Kafkaesque in its details, many of which cannot be given here since it is not the drama that concerns us but the legal issues. In summary, on May 5th, immediately after obtaining the order, the Sterns alerted the local police in Brick Township and descended on the Whitehead home with their court order. They produced the order, which demanded the surrender of one "Melissa Elizabeth Stern." They were momentarily stalled when the Whiteheads claimed no such baby existed and showed a legal birth certificate for "Sara Elizabeth Whitehead." While the police puzzled over this discrepancy, the infant was passed through a back window to Mr. Whitehead, who indeed fled with her to Mary Beth's parents' home in Florida. Once the disappearing trick was discovered, Mrs. Whitehead was handcuffed and arrested by the police, who later released her since they could not find any actual basis for arrest. Once released she too fled to Florida to join her husband and the baby and she resumed breast-feeding.

They stayed successfully in hiding, making fifteen moves over the course of almost three months, during which time Mrs. Whitehead repeatedly called William Stern to try to persuade him to stop the hunt and let her keep the baby, promising joint custody if he agreed. He refused to agree, taped the conversations (including Mary Beth's threats of suicide) on the advice of his lawyer, and hired private detectives to find the Whiteheads. Judge Sorkow had frozen the Whiteheads' bank account, the bank was about to foreclose on their mortgage, and they were out of funds. A judge in Florida issued an order, based on Sorkow's *ex parte* order, for repossession of the child. Later, when faced with all the facts, he rescinded the order, but by then it was too late.

The Sterns waited until Mrs. Whitehead was in a hospital being treated for an infection, then sent in armed private detectives and local police to the Florida home. Mary Beth's mother was manhandled and thrown to the ground. The baby was pulled from her crib, taken back to the police station, and handed over to the Sterns, who took her back to New Jersey. She had been
Breast-feeding for 123 days at this point, and the judge ordered her weaned by the police. The Whiteheads returned to New Jersey, but were not allowed to see her for more than five weeks, when the judge allowed twice-weekly visits of one hour in a supervised facility with guards present. Mrs. Whitehead was specifically prohibited from breastfeeding her baby; her children were not allowed to see their sister. The Whiteheads by this time had a lawyer—on a pro bono basis, since they had no money—and they sued for custody. Suits, countersuits, motions, and petitions followed, until at last the trial date, before the same judge whose order had set in motion this bizarre train of events, was set for January 5, 1987, in the New Jersey Superior Court, Family Division, in Hackensack.

When is a deal not a deal?

The story so far is bizarre enough, but the layman may be excused for wondering why the courts could not quickly and easily settle the issue. Yet the baby was conceived and born under circumstances for which no exact legal precedent existed. Nor was there any state or federal legislation which entirely covered the case. It was not unequivocally a simple custody matter, nor was it just an issue of legal adoption, nor was it a blatant case of “baby selling.” States have laws covering these cases, but the surrogate mother case was, to say the least, murky. No statute or precedent seemed to cover it clearly. Hence the intense general, legal, and media interest in the “Baby M” trial as it had now become.

Whose baby was she? Did she belong to the mother who bore her, and hence the mother’s legal husband, or did she belong to the genetic father who had a contract for her? Seventy percent of the public, according to polls by the Bergen Record and Newsweek, believed that “she signed a contract, she should hand over the baby.” The minority (less than 20 percent) felt “a baby can’t be taken from its natural mother, contract or no contract.” The law had no immediate answer.

The response of the overwhelming public majority is interesting. The sanctity of contracts was elevated over the sanctity of motherhood. And indeed the law does by and large encourage contracts and holds the keeping of them to be a good thing. But the public was misled in thinking that if a contract or agreement
is signed, then that is that: The conditions must be met. In fact, while any contract may be drawn up, the courts may or may not decide to honor it in the event of a breach of the contract by one party. They may very well decide that the contract was not legal in the first place, since there are some things about which we may not write contracts. But even if they decide it was legal, the issue then becomes: What kind of restitution will they order to the injured party? In the case in question, Mary Beth Whitehead (and her husband) might well have been in breach of the contract, but the question remained: Would the courts order “specific performance” of the contract—that is, the handing over of the child to the injured parties (the Sterns)—or would they decide that a monetary penalty (damages) and costs to the injured party would suffice?

Contrary to public opinion, courts have traditionally been reluctant to order specific performance. And this reluctance has been particularly strong in what are called “personal service” contracts—typically contracts of employment. They have been reluctant because to enforce such a contract is tantamount to enforcing servitude. If someone breaks a contract of employment, by leaving a job before the specified time for example, then a court will certainly award damages to the employer, but it will rarely insist that the term of service be completed, since this would interfere with what is seen as a basic constitutional right to freedom of movement. Employees are not serfs. Similarly with the contract of marriage: If one partner breaches this contract, then damages may be awarded to the other, but the court will never insist that the partner in breach of the contract be forced to continue in the marriage. People who hold the “a deal is a deal” principle rarely seem to invoke this when it comes to their own divorces.

New Jersey, following this general rule, is reluctant to enforce specific performance of personal service contracts. In fact the standard as applied in New Jersey is particularly exacting compared to other states. New Jersey further insists that specific performance should not be granted when it is either contrary to the public interest or would require the court to act inequitably. The New Jersey Supreme Court had ruled that specific performance should be denied if it violates basic principles of human dignity or would be “harsh and oppressive” to one of the parties. Thus with contracts to bear children and renounce parental rights,
courts should be unwilling to enforce compliance when one or both parties are resistant.

But for the moment we are simply trying to establish that there is no simple "a deal is a deal" doctrine as far as the law is concerned, and that in this the law is a lot wiser than the public. But then, that is one reason we have the law in the first place: to protect us against our own worst instincts (or perhaps, more exactly, our own worst social and historical constructs).

As far as specific performance is concerned, the law seems clear: If there exists a market where one can obtain an adequate substitute, then the contract should not be enforced. And "subjective harm" is not the issue. That you desperately wanted the specific item in question (sentimental value, perhaps) is not at issue. You can get an adequate substitute. This establishes that performance of a contract is by no means automatic, and one might well argue that a sperm-donor father has a "market" out there in which he can obtain an adequate substitute. The substitute will still be his child. As A. Corbin, an expert on contract law, has stated, the onus is on the party seeking specific performance to prove that "a substantial equivalent for all practical purposes" is not readily obtainable from others in exchange for a monetary payment.

It is again remarkable how many people, presented with this argument, respond that it is "repugnant" to discuss a child in this manner—as the subject of a monetary agreement. These are often the same people who saw nothing wrong with the contract in the first place and insisted passionately that it should be upheld!

Equally, we have to consider the issue of "informed consent." A valid contract is unenforceable if one of the parties was, for example, under duress, or if relevant information was withheld from any of the parties, or for any reason that renders one of the parties not in a position to give "informed consent" to the document. Thus if you have a gun to my head when I sign, or if I am legally insane, then even though my signature is on the contract the court will declare it void. In this case, even if we regard the contract as valid in establishing parental rights for Mr. Stern, can we hold it as valid in extinguishing the parental rights of Mary Beth Whitehead? Can a woman in fact ever give "informed consent" to a promise to relinquish the child of her body? When it comes to giving up a child for adoption, for
example, every state except Wyoming holds that *consent to adoption prior to birth is invalid unless ratified after birth.*

The question, then, is open: Should a surrogate mother have fewer rights in this matter than the mother of a baby put up for adoption? There is here, it might be argued, a genetic father with rights in the child. This is not disputed. In the adoption case there is a genetic father also, but he is rarely ever consulted. The issue is, as we have said, whether an agreement is sufficient to extinguish the mother’s parental rights.

Nor must we lose sight of the overriding consideration of the “best interests of the child”—fondly known in legal circles as “BIC.” BIC arises only if the issue of custody is reached, that is, if the courts decide that parental rights reside in both father and mother. This would require a fitness hearing in which the court would try to determine which of the parents was most fit to have custody, and would probably allow visitation rights by the other parent, much as in a divorce case.

More to the point, perhaps, in countering the “a deal is a deal” mentality is the issue of what contracts can legally be written. All states and the federal government have statutes which specifically rule out certain things as subjects of contracts. Thus prostitution, slavery, and baby selling are prohibited in all states. Any contract, for example, to provide sexual services or to sell a baby could indeed be written and signed, but if a party defaulted and was sued, the suit would get nowhere and the plaintiffs might even be open to criminal prosecution.

**Can a father buy his baby?**

In the various surrogate mother cases around the country that had cropped up, the specific issue of a mother refusing to give up her child had not arisen, so the Baby M case was to set an important precedent. But in anticipation of such cases, and in response to other issues in surrogate mothering being brought to court, many states had given relevant judgments and advanced legal opinions through their attorneys general. One of the most popular opinions was that surrogate mothering violates state “baby selling” statutes. Is this a fair analogy? Is surrogate mothering a form of baby selling?

Legal opinion largely said “yes.” At the time, Kentucky provided the best testing ground since the courts at different levels
had taken different views and so aired most of the possibilities. The attorney general of Kentuckv believed that surrogate mothering constitutes illegal baby selling. A Kentucky court, however, held that surrogate arrangements are very different from adoption arrangements. Kentucky did indeed have strong laws against selling children, but the court asked how a natural father could be characterized as either adopting or buying his own baby. He pays not for the child per se, but for the services of the surrogate in carrying and bearing the child. Since he cannot be buying his own child, the arrangement does not violate baby selling laws. The Kentucky Court of Appeals finally agreed with the attorney general: This is an adoption procedure (by the father’s wife at least); money changes hands; it does contravene Kentuckv laws.

**Looking to the Constitution**

Thus any such contract must first get over the hurdle of whether or not it is “void as contrary to public policy.” Even if it makes it past that test, the issue of “specific performance” is still open. But there is yet another hurdle. Such a contract may still be void if it infringes one or other of the parties’ constitutional rights. What relevant constitutional issues might the surrogate mother cases raise? This has been much discussed but boils down essentially to three issues: the constitutional prohibition of slavery (the Thirteenth Amendment and Anti-Peonage Act); the “right to privacy” derived from the Fifth Amendment and applied, for example, to a woman’s right to abortion in the famous *Roe v. Wade* case; and the equally derivative “right to procreate” with its corollary the “right to marry.” The “right to procreate” is ambiguous insofar as it does not specify whether it extends automatically to custody rights over the results of its exercise. This case was to test just how far a right to procreate went. Then there is the mother’s “right to the companionship of her children.” And we could go on.

The fact is that often these basic constitutional rights (or basic rights derived from the Constitution) seem to be obscure or in conflict. They only become definitive through court rulings in specific cases. And these rulings can appear to conflict in turn. Much ingenious ink is spilled by eager students in law journal “notes” in attempts to reconcile the varying interpreta-
tions of the Constitution. For our purposes it is enough to note that the contract and its enforcement have to face the constitutional hurdles mentioned. Some commentaries, for example, have insisted that since the child is being given up to its father, it is not being enslaved, and therefore the Thirteenth Amendment is not infringed. But this overlooks the issue of whether the contract effectively enslaves the mother. The whole issue is muddied by the fact that family relationships have always been treated by all courts as special cases: Thus children are, according to some ultra-liberal critics, effectively enslaved to their parents with the acquiescence of the courts, and marriage contracts are treated differently from ordinary commercial contracts.

As I have mentioned, one of the most interesting aspects of the surrogate parenting issue is precisely this blurring of what have traditionally been separate areas: family relationships and contractual commercial relationships. The writers of "surrogate parenting" contracts seem to want to have it both ways: They want the contracts upheld as commercial documents, and at the same time they want constitutional protections for the privileged "parental" (i.e., non-commercial) status of the "father."

The combination of unprecedented consequences of non-coital reproductive techniques and the clash of principles in contract versus motherhood, as well as the specifics of the human drama in New Jersey, was what I believe made the Baby M case so intensely interesting to the world. We were not just deciding the fate of one baby, but perhaps getting close to redefining the nature of the family, and even the individual, in a world of Lockean contractual relations gone haywire.

The court convenes

I shall not dwell in detail on the trial, since it rapidly became a media circus with the world press corps and all the major television networks in noisy attendance. For three weeks it was the nation's favorite soap opera. The details then are known to the world. And in any case, it is not so much the trial per se as the judge's decision that concerns us here. But we must look briefly at his conduct of the case, because his view reflected closely the majority opinion in the media and the polls. This opinion was of course largely middle-class opinion, and the middle-class commentators, with some notable ex-
ceptions, were uncompromisingly on the side of their peers the Sterns, and almost contemptuous of the claims of the feckless, working-class Catholic Whiteheads (who were, of course, never described as such).

For a start, the judge managed to rule out a great deal of testimony that might have been relevant, and to include a great deal that was not. He refused to hear experts who lacked direct knowledge of the parties in the case. Thus the authors of influential books on parent-infant bonding were barred from speaking, while a number of low-level and in some cases grossly incompetent “experts” were allowed to testify because they had interviewed the Whiteheads and/or the Sterns. Evidence about the long-term harm to a mother of losing a child was not allowed, because the purported harm to this mother had yet to occur and was therefore “hypothetical.”

Mary Beth Whitehead faced other obstacles. A guardian ad litem—Lorraine Abrahams—had been appointed to represent Baby M. This meant that a further set of “experts” could be called to testify, without breaking ranks, against Mrs. Whitehead. Their testimony was supposed to be independent—and the guardian swore to this in court—but in fact they met for a total of more than twenty-four hours with the guardian, before and during the trial, and were obviously working in tandem. Together with the experts called by the Sterns they hammered away at Mary Beth’s character.

Somewhere in all this the contract issue got lost. The judge initially had ordered two trials: one on the contract, one on custody. The Appeals Court ordered only one trial, so the judge decided, with almost theological finesse, that it should be one trial but in two parts. The first part was heard in a matter of hours, with each counsel arguing the case for and against the legitimacy of the contract. The judge barred any expert testimony on the contractual issue, and insisted that he was not going to get “mired in inquiries dealing with ethics, morality and theology.” This meant that the first part of the trial was going to be very brief indeed. As the judge and Skolof wanted, the trial moved quickly into the custody phase, which in turn became a battle over Mrs. Whitehead’s character.

Skolof was a custody lawyer, and before the trial he had announced that his tactic was to turn this into a custody battle, which he “knew how to win.” First, he delayed the trial as long
as possible with numerous requests for more time. The longer Baby M was with the Sterns, the less likely was any court to order her return “in the best interests of the child.” This tactic worked perfectly, and it took an order of the Supreme Court of New Jersey to get the trial started on January 5th.

Skolof’s next tactic was to present a picture of the Sterns as an upright, middle-class, well-educated professional couple who could give an excellent home to the baby (including trips to Bloomingdale’s), as against the working-class, impoverished, unreliable Whiteheads who could not. In particular, the calm, serious, and capable Mrs. Stern (pediatrician), was to be contrasted with the whimsical, manipulative, dishonest, overprotective, and undereducated Mrs. Whitehead (ex-GoGo dancer). Harold Cassidy, the Whitehead’s pro bono lawyer, refused to meet Skolof on his own terms. He would not indulge in “expert” mud-slinging against the Sterns; instead, he tried to build up a good picture of Mrs. Whitehead as a wife, mother, and neighbor, with his experts doing their best to counter the accusations of the Sterns’ (and the guardian’s) highly paid witnesses. The result of this mismatch was a foregone conclusion, and it is to that result we must now turn.

**Parens patriae super**

Judge Harvey Sorkow rendered his judgment on March 31, 1987, after a three month trial of unprecedented media attention and world-wide publicity. He set the tone from the start:

The primary issue to be determined by this litigation is what are the best interests of a child until now called “Baby M.” All other concerns raised by counsel constitute commentary.

This attitude was to determine the whole judgment. Most of the legal issues discussed at length earlier were dismissed by Judge Sorkow as “non-issues.” As Skolof had wanted, the trial became a custody battle and the judgment a custody judgment. There can be no equitable justice for the adult parties in the case, said the judge, and in any case it wasn’t his place to find it. “The court will seek to achieve justice for the child.” It will do this on the basis of the doctrine of parens patriae, roughly, “the country as parent.”
One must remember that Sorkow was essentially a family court judge, not a contract lawyer or a constitutional expert. He saw his business therefore as the subordination of any other consideration to the "best interests of the child," this being the traditional matter of family court disputes. His dismissal of contract and constitutional issues as "mere commentary" reflected this stance.

All should listen again to the plea of the infant as voiced so poignantly by several of the professional witnesses, statements with which this court agrees to such an extent that it will use its total authority if required to accomplish these ends.

Thus dominated by the notion of parens patriae, and clearly of the opinion that the Whiteheads were unsuitable parents while the Sterns were exemplary, he proceeded to validate the contract, terminate Mrs. Whitehead's parental rights, order the adoption by Mrs. Stern of Baby M, and grant sole custody to the Sterns with no rights of visitation for the Whiteheads. Everything was premised on the "best interests of the child." For example, on the issue of "specific performance" the judge ruled:

This court holds that whether there will be specific performance ... depends on whether doing so is in the child's best interest.... We find by clear and convincing evidence, indeed by a measure of evidence reaching beyond reasonable doubt, that Melissa's best interest will be served by being placed in her father's sole custody.

So much for specific performance. On the contract itself, the judge leaned heavily on the fact that there was no New Jersey statute covering surrogacy as such. Laws against baby selling did not apply, he said, because the baby was not sold to her natural father, who only paid for the surrogate's services. The surrogate was indeed a rented uterus. Adoption statutes did not apply, he said, because Mr. Stern did not need to adopt his own child, and, he noted, adoption by Mrs. Stern was not mentioned in the contract. Failing any statutes to govern the case, he argued, the contract should be treated as an ordinary commercial contract, regardless of the peculiar nature of its conditions. Thus, when it came to the issue of Mrs. Whitehead's parental rights, the judge refused to accept that statutory tests, as in adoption cases, applied. There is a presumption, in law, that the biological mother is the fit parent unless a hearing
specifically finds her to be unfit, that is, engaged in active, harmful behavior with regard to the child. Mrs. Whitehead was not entitled to such a presumption, said the judge, because in the contract she agreed not to be a "mother." So presumptions about motherhood could not apply to her. She had signed away her rights to maternity.

Constitutional matters got equally short shrift, although the judge was more cautious here. While the best interests of the child should dominate all other concerns once the child was conceived, he argued, it was indeed an invasion of privacy and unconstitutional to enforce any of the clauses up to the time of conception. And even after conception, it was clearly unconstitutional to enforce the abortion clause. But all the other clauses, including the all-important termination of parental rights clause, must be "specifically performed."

The sole legal concepts that control are parens patriae and the best interests of the child. To wait for birth, to plan, pray and dream of the joy it will bring and then be told that the child will not come home, that a new set of rules applies and to ask a court to approve such a result deeply offends the conscience of this court.

Nothing is said about the destructive effects on the mother who may wish to keep the child of her body. In fact this is dismissed as another non-issue. She can just go back to where she was, he says. She didn't really want any other children of her own anyway, and her husband had had a vasectomy to this end. Therefore, it was in no way harsh or inequitable to enforce specific performance here. The "right to procreate" issue again is interpreted entirely in favor of the father. In fact, the judge held, any state interference with this right of the father to specific performance would itself be unconstitutional.

The essential provisions of Sorkow's decision were as follows:

(1) The surrogate parenting agreement of February 6, 1985, will be specifically enforced.

(2) The prior order of the court giving temporary custody to Mr. Stern is herewith made permanent. Prior orders of visitation are vacated.
(3) The parental rights of the defendant Mary Beth Whitehead are terminated.

(4) Mr. Stern is formally adjudged the father of Melissa Stern.

(5) The New Jersey Department of Health [is] directed to amend all records of birth to reflect the paternity and name of the child to be Melissa Stern.

(6) The defendants (Whiteheads) ... must refrain from interfering with the parental and custodial rights of the plaintiff.

**Enlightenment in Trenton**

Most people, in my experience, stopped following the trial at this point. If they knew anything of the appeal to the New Jersey Supreme Court it was what the media chose to stress: that the Supreme Court confirmed the grant of custody of Baby M to the Sterns. But the court’s verdict deserves closer consideration, because on every other point it was a stunning reversal of the lower court’s decision. On February 3, 1988, in a unanimous opinion written by Chief Justice C. J. Wilenz, the court:

(1) Found the contract to be invalid and contrary to New Jersey law and public policy;

(2) Found the *ex parte* order giving temporary custody to the Sterns to have been invalid;

(3) Voided the adoption of Baby M by Mrs. Stern;

(4) Restored Mrs. Whitehead’s parental rights;

(5) Affirmed the order giving custody of Baby M to Mr. Stern; and

(6) Remanded to the lower court—but with a different judge—the question of the nature and extent of Mrs. Whitehead’s future visitation rights.

Note my original argument was that even if the contract were found valid, it should not be enforced. Yet since the court, however, invalidated the contract largely on the basis of its in-
compatibility with New Jersey law, the question of its enforceability did not arise.

The court was firm in its rejection of surrogacy contracts:

We invalidate the surrogacy contract because it conflicts with the law and public policy of this State ... we find the payment of money to a “surrogate” mother illegal, perhaps criminal, and potentially degrading to women.... [W]e void both the termination of the surrogate mother’s parental rights and the adoption of the child by the wife/stepparent. We thus restore the “surrogate” as the mother of the child.

The illegality of the contract stems from its use of money to procure an adoption through private placement.

Its use of money for this purpose—and we have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead—is illegal and perhaps criminal.

In addition, the court decided, the contract was in fact “coercive.” Prior even to conception, the mother agreed irrevocably to surrender the child to the adoptive couple. She also illegally agreed to surrender her parental rights. The court turned the “best interests of the child” argument—used by the lower court entirely to boost the Stern’s case—completely around. The contract itself, the court said, totally ignored the “best interests of the child.”

In this case a termination of parental rights was obtained not by proving the statutory prerequisites but by claiming the benefit of contractual provisions.... The contract’s basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child’s best interests shall determine custody....

In other words, the contract preempted the right to decide custody “in the best interest of the child” that can only lie in the power of the courts. It was not the child’s interests that the contract sought to protect, but the father’s. The rights of the child were never considered. Indeed: “The surrogacy contract guarantees permanent separation of the child from one of its natural parents,” thus running contrary to public policy in the state. “The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child, the father’s
right no greater than the mother's.... The whole purpose of the
surrogacy contract was to give the father the exclusive right to the
child by destroying the rights of the mother....”

But above all, the court reserved its severest condemnation
for the issue mentioned above: the failure of the contract to give
any regard for the best interests of the child, which, ironically,
as we have seen, was the doctrine central to Judge Sorkow's
decision. “There is not the slightest suggestion that any enquiry
will be made at any time to determine the fitness of the Sterns
as custodial parents, of Mrs. Stern as an adoptive parent, their
superiority to Mrs. Whitehead, or the effects on the child of not
living with its natural mother.”

They conclude severely: “This is the sale of a child, or, at the
very least, the sale of a mother's right to her child, the only
mitigating factor being that one of the purchasers is the father.”
So the father here is buying his own child, the court says; he is
paying money to obtain exclusive rights to it. He can't do that
under the law. The contract is invalid from beginning to end.

On the issue of “informed consent,” they found that no po-
tential surrogate could be said to be fully informed in advance of
pregnancy and birth:

Under the contract, the natural mother is irrevocably committed
before she knows the strength of her bond with her child. She
never makes a totally voluntary, informed decision, for quite clearly
any decision prior to the baby's birth is, in the most important
sense, uninformed, and any decision after that ... is less than volun-
tary.

The justices also recognized the potential harm to the mother
otherwise ignored by Judge Sorkow:

The long-term effects of surrogacy contracts are not known, but
feared—the impact on the child who learns she was bought...; the
impact on the natural mother as the full weight of her isolation is
felt along with the full reality of the sale of her body and her
child....

As regards the father's “right to procreate” they insisted that
it was “no more than that.” It was fulfilled by the artificial
insemination and did not extend to the right to custody. This
latter right had to be independently established (as in this case
they felt it had been).
On the crucial point of the *ex parte* order, which had started the whole thing rolling, they argued as follows:

When father and mother are separated and disagree, at birth, on custody, only in an extreme, truly rare, case should the child be taken from its mother *pendente lite*, i.e., only in the most unusual case should the child be taken from the mother before the dispute is finally determined by the court on its merits. The probable bond between mother and child, and the child's need, not just the mother's, to strengthen that bond, along with the likelihood, in most cases, of a significantly lesser, if any, bond with the father—all counsel against temporary custody in the father.

It should also be noted that the court went out of its way to repudiate at length the "too harsh" judgment of Mrs. Whitehead's character and even, surprisingly, faced up to the otherwise taboo issue of social class—something that the lower court, the public, and most of the commentators had tried to ignore, treating obvious class differences between the Sterns and Whiteheads as though they were personal merits and defects of the individuals involved.

We have a further concern regarding the trial court's emphasis on the Sterns' interest in Melissa's education as compared to the Whiteheads'. That this difference is a legitimate factor to be considered we have no doubt. But it should not be overlooked that a best-interests test is designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life. "Best interests" does not contain within it any idealized lifestyle; the question boils down to a judgement, consisting of many factors, about the likely future happiness of a human being. Stability, love, family happiness, and, ultimately, support of independence—all rank much higher in predicting future happiness than the likelihood of a college education....

One might have been forgiven at this point for expecting a resounding decision in Mrs. Whitehead's favor on the custody question. But in the end the court ducked from this issue. While Mary Beth might provide love, she might also not provide stability or the possibility of autonomy. The Sterns' experts were against her; her own witnesses were divided; and above all, "most convincingly, the three experts chosen by the court-appointed guardian *ad litem* of Baby M, each clearly free of all bias and interest, unanimously and persuasively recommended custody in the Sterns."

This is the only place where this otherwise extraordinarily well-
argued judgment falls into absurdity. But it was clear that the
members of the court, for all their good sense and sound argu-
ment, could not, like most of the rest of middle-class America,
find it in their hearts to deprive little Melissa (as she now was)
of her trips to Bloomingdale's. Having dumped the major ex-
pert—Judge Sorkow—without ceremony, they fell back on the
other experts to save them from the consequences of their own
logic and enable them to deliver Baby M up to the Sterns in her
own "best interest."

At the same time, the court restored fully Mrs. Whitehead's
parental rights and hence her rights to visitation. She is the
"legal mother," they said, and added somewhat ironically that
she should not be "punished one iota because of the [illegal and
possibly criminal] surrogacy contract." This was of course only
with respect to visitation; she had already been punished since
the illegal and criminal contract was what caused the issuance of
the original *ex parte* order, which is what led to Baby M being
kept in the primary custody of the Sterns for a year and a half,
which in turn became a major argument for leaving her there so
as not to disturb her settled situation.

**Offspring without sex**

Our brief on the details of Baby M really ends here. But we
have to recognize that "surrogate parenting" is only one of sev-
eral New Reproductive Technologies (NRTs), all of which raise
some similar issues. So-called *in vitro* fertilization, where sperm
and egg are brought together in a petri dish, and the resulting
fertilized egg implanted in the womb of, say, an infertile woman,
has raised hopes for "curing" infertility ever since the technique
was developed in Oldham, England, in 1978. But the egg of an
infertile woman, together with her husband's sperm, can also be
implanted by simple artificial insemination techniques into a sur-
rogate mother.

This raises an interesting conundrum, since the surrogate in
this case does not contribute any genetic material to the child
she bears. Yet she is still the "genetrix" in our sense, and the *in
utero* bonding and bonding at birth will still have taken place.
How would her claim stand up in court? There could be no
issue of breach of the adoption laws here since the wife of the
sperm donor—the equivalent of Elizabeth Stern—would be also
the genetic mother of the child. How should the claim of the totally genetic parents here stack up against resistance by the genetically unrelated surrogate? Does the contribution of a bit of the male donor's limitless supply of sperm, and the flushing out of a few ova from the female donor's fallopian tubes match up to nine months gestation and the risks of childbearing and childbirth? Is the surrogate in this case going to feel the child is any the less "hers" because she did not contribute the egg?

Even more bizarre scenarios can be considered. Take the case of an infertile husband with a wife who is fertile but cannot, for some reason, give birth. Her flushed-out ovum could be combined with sperm from a donor and implanted in a surrogate. Here we would have four people involved: a genetic mother married to a prospectively social father plus a genetic father (probably unknown) and an actual genetrix or birth mother. One can run around the possibilities, with the most bizarre being sperm and eggs from unknown donors being externally fused and then implanted in a surrogate who surrenders the eventual child for adoption to two other (possibly infertile) social parents: five people, none of whom had sex with any of the others. In the case of frozen sperm, a child could be that of a dead man; and with frozen embryos a child could be born to long dead parents. With frozen sperm and ova from dead parents being combined, children could technically be orphans at the moment of conception. It will only take a breakthrough in incubator technology to bypass the surrogate mother altogether, and produce offspring not only without sex but without mothers either; then we are truly in Huxley land. For the moment, however, the "rented womb" is still needed and hence will run into all the problems discussed in this chapter should the genetrix lay claim to the child.

Several countries have now introduced legislation to control or outlaw such procedures, so injurious do they seem to accepted notions of love, marriage and the family, and to the "normality" of parent-child relationships. The British Parliament has endorsed embryo research but criminalized surrogacy. The issues evoke deep feelings everywhere, and there is no consensus. On the one side the scientists and doctors, and an increasing number of infertile couples, claim "progress," while the opposition claims everything from "inhumanity" to the gross "unnaturalness" of the whole business. (The Catholic Church is a
leading voice in this opposition.) Feminists seem to be divided on this issue. Some see surrogacy as freeing women from the necessity of childbirth to pursue careers and self-fulfillment, others see surrogacy as the apotheosis of sisterhood and cooperation among women, and yet others see it as an attack on the woman in her role as mother and a handing over of even more patriarchal control to males—especially the medical profession, which particularly excites their indignation (and not without reason).

It is scarcely surprising that there should be such passionate debate. This great leap forward in technology leaves us unprepared for what appears to be a total redefinition of the family, of marriage and "lawful procreation," and even of the individual. How much of himself—and in this case certainly herself—does the individual own, for example? If I may sell an ovum to some third party, have I any rights and duties towards the end product? If I donate sperm (actually I would be more likely to sell it) do I have paternal (or even contractual) obligations to its eventual bawling and gurgling consequences? The majority of us simply find these possibilities too remote from our traditional (and often religiously backed) notions of family and parenthood and love for offspring.

But how can we attack or defend such practices as "unnatural" if we have no established standards of what is "natural" in the first place? And how can we have these standards if relativism informs all our enquiries and tells us that whatever definitions we come up with will be merely social or cultural constructs? I would agree, for example, with those who say that the nuclear family is not a sacrosanct "natural" entity but simply one kind of institutional possibility. I have been saying so for thirty years or more. But as a student of mammalian behavior I would have to disagree that "motherhood" is a similar construct, depending on context for its meaning. A hard look at the mammals (including ourselves) tells us that no matter what the genetic link may be, the genetrix does indeed bond with the child in the womb and at parturition, and hence has a "natural" claim to it. If this is true, it at least gives us somewhere to start.

Thus a woman who has gone through gestation and parturition will be "primed" to bond with her child. If the bond takes, then she is not likely to repudiate it simply because she knows the genes in the child are not her own. The child is already
eliciting "mothering" responses, as indeed a non-related adopted infant will do for the parents who take it into their care. Claims of genetic relatedness, then, should not take precedence over those involving powerful proximate—especially bonding—mechanisms.

Other cultures take in stride the idea that a child may not have a father or that children can be born to a dead man. These are not the important things. All these cultures still try to satisfy the basic individual needs for sex, shelter, provisioning, property, dominance, companionship, love, bonding, respect, kinship, children, etc. The various institutional forms by which they do this can vary widely—they are indeed "cultural constructs"—but they are forms which still must answer basic individual needs or risk severe cultural dislocation. This is where relativism fails. Cultural constructs must be rooted in biological reality or they will surely collapse. The NRTs will survive only insofar as they acknowledge these basic realities. We have looked at only one example—if we try to force bonded mothers to give up their children in the name of contract (a cultural construct) we will fail, or at least deserve to fail. But the same principle can be extended to any of the other NRTs. Do they help or hinder the pursuit of those proximate motivations that are programmed into us by evolution to ensure the production of future generations? Here comparative ethnography may help us in showing the limits of human tolerance for variation—which are in fact quite wide. We have to learn how to rewrite the old rules to meet the new circumstances, and to control the new circumstances in the face of timeless realities.

Efforts so far to deal with the issue of NRTs have been largely legislative and restrictive. Surrogacy, for example, simply gets outlawed. Legislators—and social scientists—are happiest as philosopher-kings. But as the Baby M case has shown, we often do not know in advance what the problems will be. Thus a case by case approach may well generate more workable solutions to actual problems than will grand schemes of legislation aiming to solve hypothetical problems all at once. If I may venture an opinion on the surrogacy issue: I do not think surrogacy should be banned, since it has been proven to work in many cases with quite satisfactory results. I do obviously think, however, that a surrogate mother (even if genetically unrelated to her child)
should not be required to give up the baby if she does not wish to. That seems to me to be the moral of this case. We can deal with the case of the unfrozen embryo, the product of a long-dead billionaire (and his mistress) whose fortune has already been divided among the other heirs excluding the unstable great-niece in whom the revived embryo has been implanted by an unscrupulous lawyer, when it arises. Michael Crichton is probably already at work on the novel.

**An American dilemma**

Thus we come round full circle to the issue that the Baby M case thrust into our unwilling consciousness: How far are we willing to take our insistence on the dominance of the model of contract in social relationships? In a secular society, which is nevertheless riddled with sentimental religiosity, are there still some areas that we consider sacred and off-limits to the rules of contract? The advocates of traditional family values seem to think so, and are horrified when children are allowed to sue parents for breaches of implied “family contracts.” We are in a socially schizophrenic state. We cling on the one hand to the secular contract model as the only model compatible with our individualist assumptions about how society should work. On the other hand, we seem to want certain areas declared out-of-bounds to the basic rule of contract.

But we simply can’t decide where the boundaries are. Even the boundaries of the contracting individual are now becoming fuzzy, and organic products of one’s own body (or parts fused with those from other bodies) become commodities subject to contractual agreements. This dilemma cuts across the usual liberal and conservative distinctions. Conservatives are as likely to be confused about the relative weights of contract and status as liberals are. Those who vociferously defend “family values” are equally likely to be those who stoutly defend the sanctity of contracts and the autonomy of the individual. And as we have seen, the issue divides feminists at least three ways.

For the moment, given the New Jersey precedent, it is illegal to write a commercial contract for a baby. But for frozen fertilized ova? The kinds of decisions we are faced with are decisions not just about specific cases, but about the kind of society we want to be. The winning of a revolutionary war provoked us to
rethink this problem in the late eighteenth century. The issue of slavery prompted us to rethink it yet again in the late nineteenth century. Perhaps the stubbornness of a New Jersey mother, in her love for her newborn child, will be the catalyst for a new such rethinking in the late twentieth century. We now have the advantage of a profounder understanding of the evolutionary basis of human nature and the limitations of social constructs. But we are very unhappy with the idea of such limitations, particularly when they affect our most cherished ideas. The chances of our getting it right are not good.