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1988

### **Baby M: The Contractual Legitimation of Misogyny**

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**BABY M.: THE CONTRACTUAL LEGITIMATION OF MISOGYNY\***

RICHARD F. DEVLIN\*\*

"There are only women who are fruitful and women who are barren, that's the law"<sup>1</sup>

*Introduction*

The emergence of what have become known as the "new reproductive technologies"<sup>2</sup> is a phenomenon which is neither essentially good nor essentially bad. On the one hand, such developments provide opportunities for social choice, family planning and procreative autonomy which, until recently, were impossible. This expansion of horizons is clearly a "good". However, on the darker side, as a community, we must be concerned about the directions which such opportunities might take. There are very real dangers involved, including excessive genetic engineering, raised expectations of perfect "products" with the correlative dissatisfaction with the "imperfect", inequality of access to these new avenues of reproduction and, most importantly, the exploitation and instrumentalization of other human beings in this process.<sup>3</sup>

It is inevitable that law, as a constitutive element of social interaction,<sup>4</sup> will become embroiled in the value choices that we, as a society, must make. Consequently, lawmakers, and in particular

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\*This paper is dedicated to my sister-in-law, Sonia, and my niece, Emma, whose preference for, and experience of, a less patriarchal context for childbirth first sensitized me to the sexual politics of reproduction. I would like to express my gratitude to friends and colleagues at Dalhousie, in particular, Vaughan Black, Christine Boyle, Cynthia Cavett, Joan Dawkins, Alastair Bissett-Johnson and Susannah Worth Rowley, for their comments on an earlier draft of this paper. Particular thanks to Lynn Richards and Marilee Matheson. The paper would never have been completed without the criticism and encouragement of Alexandra Z. Dobrowolsky.

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<sup>1</sup>Margaret Atwood, *The Handmaid's Tale* (1985), p. 71.

<sup>2</sup>In one sense some of these so-called innovations are not so new at all. For example, at least as far back as biblical times there were arrangements for one woman to be impregnated by a man, who would on birth claim the child for his family, thereby negating the birth mother's maternal interests.

<sup>3</sup>For an excellent collection of feminist reflections on these issues, see (1986), 1 C.J.W.L., No. 2.

<sup>4</sup>See Devlin, "Tales of Centaurs and Men, A Preliminary Theoretical Inquiry into the Nature and Relations of Law, State and Violence" (1987), Osgoode Hall L.J. (forthcoming).

legislatures<sup>5</sup> and judges, must come to terms with the larger social economic, political and moral issues which the advent of biotechnology creates.<sup>6</sup> Lawmakers must transcend any myopic legalistic grid to which they might still furtively cling, and seek to fulfil their civic responsibility for others by making the most contextual and open decisions they can. They must candidly admit the difficulties of their task, the inadequacy of traditional legal<sup>7</sup> and social frameworks, and proceed honestly to articulate their best interpretation and resolution of the problems with which they must deal. Although they will not be guaranteed the achievement of "right answers",<sup>8</sup> they will at least have commenced a discourse that can allow for a democratic and participatory plurality of arguments on the merits of their decision.

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<sup>5</sup>For a sampling of pre-legislative research, reports and committees, see Report of the Committee of Inquiry into Human Fertilisation and Embryology (1984) (United Kingdom) (hereinafter "Warnock Report"); Ethics Advisory Bd. of the Dept. of Health, Education and Welfare, Report and Conclusions: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer, (U.S.) 44 Fed. Reg. 35,034 (1979); Human Embryo Transfer, Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology, (U.S.) 98th Cong., 2nd Sess. (1984); Council for Science and Society, Human Procreation: Ethical Aspects of the New Techniques (U.S.) (1984); Ontario Law Reform Comm., Report on Human Artificial Reproduction and Related Matters (1985) (hereinafter "Ont. L.R.C."). In Victoria, Australia, the Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (the "Waller Committee") has commissioned several reports. See Bravender-Coyle, *Medical Experiments and the Law* (1985), 59 *Law Inst. J.* 63.

<sup>6</sup>The dominant response in Britain to the new reproductive technologies has been couched in a moralistic discourse, primarily espousing traditional family values. See for example, Baroness Warnock, "The Enforcement of Morals in the Light of New Developments in Embryology" (1986), *Current Legal Problems* 17; and M.D.A. Freeman, "After Warnock - Whither the Law?" (1986), *Current Legal Problems* 33. Many American commentators work within the same framework. See, for example, Thomas A. Eaton, "Comparative Responses to Surrogate Motherhood" (1986), 65 *Nebraska L.R.* 686 at 687. A much wider understanding is required, one that understands the power relations which impact upon and determine the future direction of such technologies. It is not just a moral issue.

<sup>7</sup>For useful discussions of the lag between law and reproductive technologies, see for example, Keane, "Legal Problems of Surrogate Motherhood" (1980), *S. Ill. U.L.J.* 147; Black, "Legal Problems of Surrogate Motherhood" (1981), 16 *New Eng. L. Rev.* 373; K.M. Sly, "Baby Sitting Consideration: Surrogate Mother's Right to 'Rent Her Womb' For a Fee" (1982-83), 18 *Gonzaga L.R.* 539; Mawdsley, "Surrogate Parenthood: A Need for Legislative Direction" (1983), 71 *Ill. B.J.* 412; Note, "Surrogate Mothers: The Legal Issues" (1981), 7 *Am. J.L. & Med.* 323; Comment, "Contracts To Bear a Child" (1978), 66 *Calif. L. Rev.* 611; Comment, "Parenthood by Proxy: Legal Implications of Surrogate Birth" (1982), 67 *Iowa L. Rev.* 385; Comment, "Surrogate Motherhood in California: Legislative Proposals" (1981), 18 *San Diego L. Rev.* 341; Comment, "Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion" (1982), 16 *U. Rich. L. Rev.* 467; Andrea Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies" (1986), 96 *Yale L.J.* 187; J. Mandler, "Developing a Concept of the Modern Family" (1985), 73 *Georgetown L.R.* 1283; Avi Katz, "Surrogate Motherhood and the Baby-Selling Laws" (1986), 20 *Columbia J. of Law and Social Problems* 1.

<sup>8</sup>Ronald Dworkin, *Taking Rights Seriously* (1978).

At first blush, it may appear somewhat odd for a comment on a lower level American case to appear in a Canadian publication. However, if my opening comments are appropriate, then in view of the similarities of the issues raised and the legal systems within which we exist,<sup>9</sup> such a comment is manifestly appropriate. Indeed, it may even be essential so that we can evaluate the strengths and weaknesses of our southern predecessors when we are confronted with similar problems. More pointedly, we should be particularly concerned about the errors which they have made.

It is in this light that I wish to suggest that the decision of Sorkow J. in *Baby M.*, 525 A. 2d 1128, 13 Fam. L.R. (U.S.) 22, 2201, (N.J.S.C., 1987), is riddled with problems that we in Canada should be loath to repeat. First, I argue that in respect to the question of fact – what are the best interests of the child – the judge over-relied upon the testimony of the expert witnesses, thereby ignoring the interests of the mother. Consequently, this element of his decision manifests an unreflective and biased masculinist perspective on what are the best interests of the child. Second, by interning his analysis of the legal questions in the prison-house of traditional contractual analysis, he fails to respond to the larger social, economic and political issues raised by reproductive instrumentalism. When these two aspects are tied together, unpacked and deconstructed to reveal both their propositions *and* their silences we end up with a coherent statement of the invisible hand of free market misogyny masquerading as the simple application of the rules of law existing in 1987 in the state of New Jersey.

Before proceeding further, an issue of vocabulary needs to be clarified. Traditionally, the debate around contracts for babies has been overdetermined by the concept of surrogacy, more specifically, “surrogate motherhood”. Such a characterization is objectionable in that it enforces and perpetuates an androcentric disinformation campaign as to what is actually occurring in these situations. The woman who carries and gives birth to the child is *not* a surrogate, she is not replacing anyone else, she *is* the mother. To state the issue differently is to misrepresent and devalue the nature of mother/child relationships. The male who donates his sperm is the father, and that male’s spouse or partner is the social parent, the adopting parent. For those with a legalistic inclination, “surrogacy” contradicts the maxim: mater

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<sup>9</sup>My discussion is primarily directed towards common law Canada, rather than Quebec, whose Civil Code is somewhat divergent from that of the rest of Canada. For a thorough discussion of the Quebec context, see Joan Bercovitch, “Civil Law Regulation of Reproductive Technologies” (1986), 1 C.J.W.L. 385.

semper certa est. Language is a malleable instrument which carries with it heavily loaded ideological messages. In this paper, "mother" is the birth mother, "father" is the sperm donor, and "social parent" is the spouse or partner of the sperm donor.<sup>10</sup>

The structure of this paper is straightforward. First, I will briefly outline the facts of the case. Second, I will look at the question of fact and suggest that "neutrality" and "expertise", when critically evaluated, may be no more than the articulation of a male bias in advancing a solution to the complex issue of who should have custody of Baby M. Third, I will discuss the legal issues both raised and avoided and demonstrate their inherent malleability, thereby identifying Sorkow J.'s gender bias.

#### *Facts*

The facts of the case are well known and require little reiteration. In February 1986, Mr. Stern, a middle-class scientist, entered into a contract with a financially beleaguered Mrs. Whitehead and her husband. The contract provided that Mrs. Whitehead would attempt conception through artificial insemination by Mr. Stern's sperm, carry the foetus to term, then surrender the child to Mr. Stern and "terminate" (at p. 1134) her parental rights. In return, she was to be paid \$10,000 and all medical expenses. Upon the birth of Baby M., Mrs. Whitehead indicated (at p. 1144) she "could not and would not give up the child", but eventually surrendered her for one night. The following day, she demanded return of the child and after a few weeks confirmed her decision to retain custody. After a wrangling process, in the course of which the Sterns obtained a court order granting them temporary custody, Mrs. Whitehead and her family illegally left the state with the child.

After three months of fugitive existence, the Sterns' private detective located Mrs. Whitehead in a hospital in Florida. The child was removed from the Whitehead family and transferred to the Sterns. Custody proceedings ensued and Mr. Stern filed a complaint seeking enforcement of the contract. The Honourable Harvey R. Sorkow P.J.F.P. held that there was a valid enforceable contract, that damages were inappropriate, and that specific performance was required. Mrs. Whitehead was entitled to her fee and her parental rights were terminated.

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<sup>10</sup>See also S. Brodribb, "Off the Pedestal, onto the Block" (1986), 1 C.J.W.L. 408, note 6; George J. Annas, "The Baby Broker Boom" (1986), Hastings Centre Report (June) 30, p. 31.

*The Question of Fact*

The first sentence of this decision says a great deal more than it was probably intended to do. Sorkow J. states (at p. 1132):

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 clear statement determines in advance what the result is going to be.<sup>11</sup> If priority is to be given to the "best interests of the child" without further ado, then in view of the obvious economic and social inequality that exists between the two competing parties, barring some extenuating circumstances, the "choice" will undoubtedly favour the most advantaged, in this case, the Sterns. Put simply, due to the social and economic advantages of the Sterns it is extremely unlikely that the Whiteheads will gain custody of the child. This renders the rest of the decision a rationalization of what was an inevitable and foregone conclusion. Furthermore, by imposing this unidimensional framework of analysis upon the case, Sorkow J. ignores another equally important phenomenon, the reproductive interests of women. By conceptualizing and structuring the issues within a mutually exclusive either/or framework,<sup>12</sup> Sorkow J. obliterates in one quick swoop some of the most problematic concerns raised by the case.

Sorkow J. is, of course, fully conscious of the highly volatile political issues which the case encompasses. But rather than explicitly accept the political responsibilities of the judicial role, he seeks refuge in rhetorical and depersonalizing subterfuge. At an early point in the decision (at p. 1138) he states that:

... this court ... will decide on legal principles alone. This court must not manage morality or temper theology. Its charge is to examine what law there is and apply it to the facts proven in this cause.

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<sup>11</sup>This claim is put forward from my position as one who knows very little about family law. Of course, if one has a background in this area, a legally constructed perception, the greyness may well be more real. At the same time, however, ignorance allows the outsider to see the wood in spite of the trees.

<sup>12</sup>Charlotte Bunch, "Beyond Either/Or: Feminist Options" (1976), 3 *Quest* 3. Sorkow J.'s adversarial premises are manifest right from the beginning of his decision (at p. 1132):

"There can be no solution satisfactory to all in this kind of case. Justice, our desired objective, to the child and the mother, to the child and the father, cannot be obtained for both parents. The court will seek to achieve justice for the child . . ."

"Where courts are forced to choose between a parent's rights and a child's welfare, the choice is and must be the child's welfare and best interest by virtue of the court's responsibility as *parens patriae*."

One wonders, however, whether such antagonistic "principles" are suitable or even necessary for the resolution of social problems which are primarily about interconnection, not conflict.

This flight into a formalist perspective on law, in which the court's only responsibility is to discover the relevant rules and apply them to the facts of the case, is no more than an obfuscation of the difficult social, economic and political choices that must be made.<sup>13</sup> There is a plurality of legal rules, principles and policies, and a judge chooses from those options in order to "fit" what he or she has already determined to be the most appropriate result in a case. Moreover, in this particular case, as we shall see, Sorkow J. utilizes certain "factual" evidence in order to further support and legitimize his own predispositions. Both law and fact are valuable plastic instruments to rationalize a value choice that exists independent of, and prior to, the rules which are said to apply.

Having set this acontextual scene, without any evident sense of contradiction, Sorkow J. immediately proceeds to outline the parties' social, political and economic context. He paints an extremely rosy picture of the Stern relationship. They manifest all the virtues of middle-class America: affluence, professionalism, rationality, education, industry, privacy, stability, sincerity, honesty, popularity and fidelity to law. Mr. Stern is an immigrant survivor of the holocaust who has worked his way up the totem pole of American meritocracy, a paragon of virtue. Similarly, Mrs. Stern is portrayed as an ambitious woman who is extremely career minded and who has achieved a great deal in her life — for a woman.

The description of the Whiteheads is glaringly less sanguine. We are told that Mrs. Whitehead left school at an early age, worked part time in a pizza/deli shop, and married when she was only 16. Mr. Whitehead, who is substantially older than his wife, is a Vietnam veteran with an alcohol problem. The Whiteheads have been transient throughout the years of their marriage and at one point they separated. Moreover, they have had a bankruptcy and financial problems appear to continue. Thus, it is clear even at this early stage that the social and economic status of the parties is going to be a vital component in determining the best interests of the child. This advantage is further consolidated when the court evaluates the character and personalities of the two sides.

In order to determine which personality qualities are conducive to the best interests of the child, the parties called on 11 expert wit-

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<sup>13</sup>It is worthwhile noting that the only non-legal reference which Sorkow J. makes at this point is to religious considerations. The affirmative denial of such a perspective is one thing; the complete disregard of social, economic and political forces is another. Even to raise them would come too close to challenging judicial pretensions to neutrality.

nesses. Most of them were psychiatrists. In theory, the function of such witnesses is to test the appropriateness and mental stability of the competing parties. In practice, however, what occurs is that, in addition to the social and economic attack, we encounter a psychiatric and psychological challenge to the personalities of Mrs. Whitehead and, to a lesser extent, her husband.<sup>14</sup> Mrs. Whitehead is poorly educated and irrational; impulsive and irresponsible; self-centered, possessive and intolerant; domineering and controlling; exploitative, ruthless and conniving. She sees herself as victim and, at the same time, possesses an exaggerated sense of aggrandizement and self-importance. She is a poor wife because she refuses to succour her husband and his alcohol problem. In a word, she is psychopathological (at pp. 1150-56). Not once did any of these experts (or the judge) refer to her sacrifice of her own health and ultimate hospitalization for a massive gynecological infection which was induced, in large part, by her fugitive efforts to remain with her child.

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<sup>14</sup> A fairly lengthy aside is appropriate at this point. In one sense it is important to note that these are not the court's witnesses, they are called by the parties, they are another manifestation of the adversarial process. The Sterns called only two expert witnesses, Drs. L. Salk and A. Levine, while the Whiteheads called six: Drs. H. Koplewitz, P. Silverman, S. Nickman, B. Sokoloff, J. Velter and B. Klein. The other three experts were called by the guardian ad litem: Drs. M. Schecter, D. Brodzinsky and J. Grief.

In theory, through the adversarial joust of expert witnesses the "truth" about the best interests of the child will emerge. However, the judicial commentary on the evidence, credibility and authority of the witnesses is revealing. Sorkow J. dismisses the evidence of several of the Whiteheads' experts as being irrelevant, unworkable, inadequate or biased. Particularly interesting is his critique (at p. 1148) of the bias of Dr. Phyllis Silverman, "She began with a stated bias against men and questioned whether male and even female mental health professionals can properly evaluate women". Decoded, because she subscribed to the "F-word", feminism, her evidence is worthless. Moreover, it is irrelevant insofar as it addresses the psychology of Mrs. Whitehead and the impact upon her of the loss of her child. But Sorkow J. does not want to know about "the adult", only the child. One could hardly find a better example of the ostrich theory of judicial decision-making.

Just as revealing is Sorkow J.'s response to the most vindictive expert assault on Mrs. Whitehead, that of Dr. Schecter. Sorkow J. begins (at p. 1150): "In view of the decidedly minority view of Dr. Schecter's findings of mixed personality disorder, the court will give *no weight* to his diagnostic conclusion." [emphasis added] He then proceeds to reiterate in graphic detail the report, thus subtly influencing the minds of the audience by silencing one opinion and further legitimizing Sorkow J.'s own preference. The more wide-ranging concern about the use of expert witnesses occurs in the text.

It is at this point that we must begin to question the basic presuppositions of these expert witnesses. We cannot simply assume that expertise equals neutrality or objectivity. In a variety of disciplines and discourses from literature to philosophy, politics to science, a fundamental reassessment of the "taken for granted" that structure conventional wisdom is already well under way.<sup>15</sup> This reconsideration posits that there is an integral connection between gender and knowledge, that the world as we know it is premised on a primarily masculinist episteme and that, as a consequence, there has been a silencing of the different voices from female perspectives. If we accept the validity of this re-evaluation, then, as a direct consequence, it is no longer viable for us to concur in professionals' traditional pretensions to objectivity and expertise; "experts" are politically and epistemologically partisan.

One of the most celebrated and inspirational examples of this reconsideration is the work of psychosociologist Carol Gilligan, who criticizes Lawrence Kohlberg's highly influential theory of moral development which eulogizes individualism, rationality, abstraction and autonomy as the "highest level of moral stature".<sup>16</sup> Gilligan's response is that such an "ethic of separation" is built upon a male perspective which fails to fit with or, perhaps more importantly, tolerate female experiences of emotional attachment, contextualism and interdependence ("an ethic of care"). These alternative visions can be captured in the metaphors of "the ladder" and "the web", respectively.<sup>17</sup>

If we interpret the present case in the light of these competing visions, it becomes uncomfortably obvious that almost all of the expert witnesses fall within the characteristic of "ladder", in their praise of independence, autonomy, liberty and separation, as against the "web" of interdependence and the ethic of care. Thus, there do in fact exist at least two competing interpretations of what "the best interests of the child" might mean. However, in this case, the dominant

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<sup>15</sup> See for example, Evelyn Fox Keller, *Reflections on Gender and Science* (1985); A. Miles and G. Finn, *Feminism in Canada: From Pressure to Politics* (1982); E. Marks and I. deCourtivron, *New French Feminisms* (1980); Harding and Hintikka, *Discovering Reality* (1983).

<sup>16</sup> Kohlberg has produced a great deal of work espousing this theory. The most useful sources are his *Essays in Moral Development: Vol. 1 - The Philosophy of Moral Development: Moral Stages and the Ideal of Justice* (1981); *Vol. 2 - The Psychology of Moral Development: The Nature and Validity of Moral Stages* (1986).

<sup>17</sup> Again Gilligan's arguments span a variety of papers. But see in particular, *In a Different Voice: Psychological Theory and Women's Development* (1982). For a fuller bibliography see Joan C. Toronto, "Beyond Gender Difference To a Theory of Care" (1987), 12 *Signs* 644, note 1. It is extremely important to point out that the text is a crude simplification of what is an extremely subtle argument by Gilligan and her colleagues, but the "synopsis" is adequate for the limited purposes of this comment.

paradigm is accepted without question as being the only legitimate criterion for determination. This, of course, should not come as a surprise, as difference is frequently identified as deviant.

After concluding with an extremely lengthy review of the evidence of the mental health professionals, the judge goes on (at p. 1156) to emphasize "that expert testimony is adduced only to aid the trier of fact in reaching a decision". Within five lines, he again says the purpose of expert testimony is to aid the trier of fact to understand the evidence. In the next paragraph he adds:

This court notes that the testimony of experts deserves respect. Their testimony must, however, be submitted to the judgment and consideration of, and be weighed by, the trier of fact. Experts are to aid and assist the trier of fact, not to dominate or control him in the decision of the disputed question.

These are important statements but surely the reader must be concerned about the repetitiveness of these affirmations. The judge is insisting (at p. 1156) that he is not going to "slavishly parrot" the analysis provided by the experts and reinforces this three times in a very short space. We think he doth protest too much. Our suspicions are confirmed when the judge subsequently comes to give his final determination and reiterates, almost verbatim, the assessment and analysis espoused by the expert witnesses.

What we have happening here is a denial of the normative aspect of law. What we have is a process through which experts become final adjudicators. Put differently, scientism replaces normativism. This would not be problematic except that "scientific judgment" is based on as many unquestioned assumptions and paradigm biases as is any normative argument.<sup>18</sup> The turn to scientism can obscure rather than articulate the basic premises upon which a decision is made. In relation to the present case, we can identify a blurring of the lines between the descriptive and the normative. What "is" becomes what "ought" to be, and those who do not fulfil these masculinist criteria are perceived as deviant, unworthy of a parenting role. Decoded, those who do not fulfil the androcentric criteria are not competent to fulfil the best interests of the child. The noble dream of liberal realism, that the introduction of scientific information would make decision-making more likely to reach a just conclusion, has become a nightmare for contemporary disadvantaged groups. Not only must they make a persuasive normative argument, they must

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<sup>18</sup>T. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (1970); P. Feyerabend, *Against Method* (1975).

also take on the heavy artillery of authoritarian expertise, an exhausting, expensive and arduous process.

So, when Sorkow J. comes to give a decision on "the facts", as the objective neutral trier of facts, we are not surprised to hear a rationalization of his economic, social and gender bias. To set the scene, his first claim is that we know the Sterns desperately wanted a child. This is undoubtedly the case, but we must also remember that they wanted a child at their own instrumental convenience, after they had their careers established (p. 1139).<sup>19</sup> Unfortunately, due to Mrs. Stern's feared multiple sclerosis, it may have been dangerous for her to undergo pregnancy. In part this was due to her age. Because of her decision to pursue her career rather than maternity, the Sterns had put off having a child until she was 36. They had therefore chosen to forego parenthood in order to pursue their economic and intellectual desires. That is an initial choice and risk to which Sorkow J. does not pay attention.

This leads to a subtle but vitally important point. In a broader context, judicial endorsement of the contractual legitimacy of contracts for babies may support and reinforce the traditional and hierarchical division of labour which confines women to the "private sphere". Although, at first glance, contracts for babies may appear to increase the options for women by providing a mechanism that will allow them to first establish their careers and then "have a family in later life", the option is only true in a limited sense. First, due to its expensive nature, it is only available to middle or upper class women. Second, it encapsulates a "divide and rule" technique by which women's choice is restricted to either sacrificing their careers or (ab)using other women to mother the children. Third, and interconnectedly, rather than confronting the primary problem of why *any* woman should ever have to choose between motherhood and a career instead of being able to do both, this perceived remedy glosses over such concerns, thereby ultimately legitimizing the continued existence of the division of labour, and the *lack* of choice.

Having duly acknowledged the parental aspirations of the Sterns, the judge shifts his discussion to an analysis of the Whitehead relationship (at p. 1167), and delivers a diatribe that even goes beyond the onslaught of the mental health professionals! He averts to "separations" in the plural when we have been told they have had

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<sup>19</sup>For concerns about the danger of this "convenience argument", see "Warnock Report", ante, note 6, para. 8.17; see also Diana Brahams, *The Lancet* (28th July 1984) 238, p. 239.

only one. He refers to domestic violence, which is surprising as this is the first time that it is mentioned. Indeed, the evidence up to this point suggests that there was no domestic violence and Mrs. Whitehead even gave evidence that her husband was not an abusive or violent drunk. This disconnection is reinforced because Sorkow J. proceeds to add that Mrs. Whitehead dominates the family and that Mr. Whitehead is clearly in the subordinate role.<sup>20</sup> Perhaps the implication is that Mrs. Whitehead is the source of the violence?

Mr. Whitehead is accused of being uninterested but, in fact, he did go to Florida in support of his wife's desire to retain custody of the child. Yet the court seems to simply ignore this fact out of existence. Mrs. Whitehead is also accused of being impulsive. That is, the "sins" of her youth, such as dropping out of school and marrying at an early age, are being visited upon her now. There is a sinister analogy with prior sexual history. Moreover, she is severely criticized for "manipulative[ly]" and "narcissistical[ly]" bringing her older children into court. However, one must question whether Mrs. Whitehead was as conniving as Sorkow J. suggests or whether the responsibility really lies with her lawyer and/or the media.

There is more. Although Sorkow J. is forced to admit that there is strong evidence that she is a good mother, he protests that Mrs. Whitehead exhibits an "emotional over-investment". He adds that (at p. 1168):

. . . Mrs. Whitehead loved her children too much. This is not necessarily a strength. Too much love can smother a child's independence. Even an infant needs her own space.

Such a claim speaks volumes. Sorkow J. rejects love as being an organizing principle of human interaction. Rather he demands independence and autonomy, a classic statement of liberalism's preference for "rugged individualism" and "anxious privity",<sup>21</sup> the ethic of separation which stands in stark contradiction to the gynocentric, Gilliganesque approach which favours interdependence, empathy, solidarity and love.<sup>22</sup>

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<sup>20</sup>Both explicitly and implicitly we can sense the judge being upset at the gaucheness of this strong-willed woman. She has transgressed the traditional roles of male/female, domination/subordination; she is the strong party and, for her arrogance, she is perceived as being an unworthy woman to rear a child.

<sup>21</sup>Peter Gabel, Book Review, *Taking Rights Seriously* (1977), 91 *Harvard L.R.* 302.

<sup>22</sup>Ante, footnote 17. See also Roberto M. Unger, *Law in Modern Society* (1976), pp. 203-16; *Passion, An Essay on Human Personality* (1984); *Politics* (forthcoming, 1987) 3 vols.

This denigration of Mrs. Whitehead continues in the discussion of education. The judge praises the Sterns for having demonstrated the strong role that education has played in their lives. However, Mrs. Whitehead is pilloried for interfering in her son's education because she rejected the recommendations of the professional child study team. She is portrayed as a meddling mother who elevates her concerns for her children over the objective assessment by the professionals. Why could such concern not be interpreted positively, that she is a serious mother who actively participates in the education and growth of her children, rather than abandoning them to the dictates of a sterile, professionalized – i.e., scientific, unemotional – evaluation? Moreover, this attack ignores one of the reasons which Mrs. Whitehead gave for entering into an agreement with the Sterns in the first place: to obtain sufficient money to *allow for* the education of her other children (at p. 1142). In other words, she has demonstrated a compelling interest in education, yet once again this is simply ignored by Sorkow J.

Moreover, Mrs. Whitehead is accused of being incapable of having rational judgment. In particular, Sorkow J. points out that she left for Florida with the child and that this was poor judgment. However, one questions whether this was as irrational as the court suggests. It was obvious, as the decision subsequently confirms, that there was absolutely no chance of Mrs. Whitehead being entitled to retain custody of the child. She clearly foresaw this and decided to take the only action available to her – she fled the state. In other words, in view of her options, she acted extremely rationally. However, Sorkow J. simply interpreted this as being irrational. Rationality is clearly a malleable concept, especially when the person alleging irrationality feels vulnerable for having his authority flouted. For good measure, he takes up several paragraphs (at pp. 1169-70) to persuade us that Mrs. Whitehead is a liar.

Finally, Sorkow J. plays his trump card by “demotherizing” her, and caricaturing her as a “custodian”. Even though she had a past record of being a good mother, her existential status of being the mother of this child is denied, “severe[d]” and “terminate[d]” (at pp. 1170-71), with the consequence that she becomes a reified, legalized custodian. This is extremely insulting to a woman who has carried and nourished another person within her for a period of nine months. It demonstrates both an amazing insensitivity, indeed hostility, on the part of Sorkow J., and the imposition of legal jargon upon what are quintessentially human interrelationships.

On reflection, there is another side to the “best interests of the

child" perspective, one which is suitably underacknowledged by Sorkow J. Beyond the danger of genetic rootlessness,<sup>23</sup> it may not be in the best psychological interests of children to realize the history of their creation, that they were ripped away from their natural mother through the coercive apparatus of the state, that they were a commodity, bartered on the free market economy just like a thoroughbred horse – only much cheaper. It hardly inspires a high level of self-worth or self-esteem to realize that it was the power of the market that determined their history, their experiences, their life.<sup>24</sup> This may well be fertile ground for alienation. Sorkow J. is conscious of this danger but reinterprets and defuses it to be an issue of privacy; it is up to the "new family" to decide how to tell the child. This is hardly an adequate response to what is supposed to be the central determining factor in the case. Secondly, there is evidence to suggest that a child rapidly forms psychological ties with the parent who has custody.<sup>25</sup> In this case it was Mrs. Whitehead who had original – if "unlawful" – custody of the child for over four months; it would have been in her best interests to stay with her mother. Looked at in this light, principles such as the "best interests of the child" may, in fact, only be a camouflage for the best interests of the sperm donor.

Thus, in theory, there is supposedly a neutral, fact-finding process. What we encounter, in practice, is the imposition of an androcentric world view, in which the virtues of rationality, free choice and autonomy are all eulogized and attributed to the Sterns while legitimate, competing values demonstrated by Mrs. Whitehead are unacknowledged or minimized. By a manipulative blinkering of the issues, Mr. Stern's "intense drive to procreate"<sup>26</sup> is prioritized over Mrs. Whitehead's gestational bonding. We experience a shocking use of expert witnesses to destroy what should be a normative argument and a process of judicial reasoning apparently motivated by hostility. When we turn to questions of law, we shall see that Mrs. Whitehead did not fare much better.

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<sup>23</sup>Kass, "Making Babies – The New Biology and the Old Morality" (1972), 26 Pub. Interest; Kass, "Making Babies Revisited" (1979), 39 Pub. Interest 56.

<sup>24</sup>B. Joe, Public Policies Toward Adoption (1978), p. 18. There is also the reverse side of the coin, that the child will feel pressured to live up to her or his price to demonstrate that the purchasers got their money's worth.

<sup>25</sup>J. Goldstein, A. Freud and A. Solnit, Beyond the Best Interests of the Child (1983), pp. 17-19.

<sup>26</sup>At p. 1158. This theme serves as a chorus in Sorkow J.'s paean to the justice of exchange and rugged individualism: see also pp. 1136, 1139, 1156.

*The Question of Law*

There are two angles which we can adopt in order to understand Sorkow J.'s decision on the legal issues raised by this case. The first is to analyse what he explicitly decided and on what basis. The second is to delineate those aspects which he ignored, the counter-arguments, the gaps, the silences. By tying both of these approaches together we can reach a fuller – and more critical – understanding of Sorkow J.'s unarticulated presuppositions.

The very nature of the discourse adopted by Sorkow J. in this case exemplifies how a social and political problem is reinterpreted, encoded to be an abstract legal problem, decontextualizing the actors and setting them up as unsituated equal bargainers in a mythical economic environment. The legal rhetoric denies the politico-economic reality and at the same time constructs a new, distorted and even more oppressive reality.

Sorkow J. hammers the polymorphous social, political, economic and ethical issues raised by *Baby M.*, into the square hole of contractual analysis. His initial proposition is that there was consideration: "the male gave his sperm; the female gave her egg in their pre-planned effort to create a child – thus, a contract".<sup>27</sup> The balancing act envisioned in this seemingly logical formula is deceptively simple, and inaccurate. While it is true that Mr. Stern provided some of his sperm, what Mrs. Whitehead contributed was a great deal more than an egg. She gave a substantial portion of her life; she was incapacitated for a certain amount of time; she went through all the pleasures and fears of carrying a child to term; and, indeed, she may well have risked her life insofar as childbearing, even in the 20th century, is by no means a safe endeavour. On the other hand, there was very little risk in Mr. Stern giving some of his sperm.<sup>28</sup> Therefore, the parallel between the sperm and the egg is unacceptable.<sup>29</sup>

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<sup>27</sup>At p. 1158. Again this is one of the shibboleths which Sorkow J. reiterates on several occasions: see also pp. 1163, 1166.

<sup>28</sup>Sorkow J. does suggest (p. 1143) that Mr. Stern undertook a risk because "in the event the child possessed genetic or congenital abnormalities William Stern would assume legal responsibility for the child once it was born". One wonders about the nature and extent of this risk. The contract also provided that if it was discovered that the foetus was abnormal Mr. Stern could have it aborted. Thus, the contract allowed for Mr. Stern to have it both ways – a perfect child or an aborted foetus if it was not up to standard. Of course, the court struck down the provision for the abortion on demand as being unconstitutional, but that does not significantly increase Mr. Stern's risk, because he could automatically surrender the child for adoption on birth. Again he could have the best of both worlds, if he wanted.

<sup>29</sup>See also G. Corea, *The Mother Machine* (1985), pp. 226-27.

Nevertheless, it might be argued, the law will not assess the adequacy of consideration<sup>30</sup> – these were the terms which she accepted; if it was a poor bargain it is still not appropriate for the courts to intervene. There have been cases in which the courts are willing to assess the adequacy of consideration<sup>31</sup> and, besides, the needs of an embryo are qualitatively different from the value of a peppercorn.<sup>32</sup> Even within the dissatisfying framework of contractual analysis, the whole idea of consideration is underdeveloped and underanalysed in this case, ignoring completely the factor of gestation.

Sorkow J.'s discussion of consideration also allows us to identify the rhetorical permutations which play a vitally important, legitimating function in the decision. Consideration is the central component of the exchange or bargain model of contract law, based as it is on a laissez-faire philosophy of human interaction and state intervention. In other words, a deal is a deal, and Sorkow J. was unable to rectify the agreement or imply new terms on Mrs. Whitehead's behalf. However, the exchange model has never attained the position of unrivalled jurisprudential hegemony, because it has been modified by a justice-inspired, reliance model which seeks to protect those who, depending upon another, have acted to their detriment. Reliance theory allows for judicial intervention. It is in this light that we can highlight the shift in the judicial rhetoric, for while Sorkow J. continues to discuss Mrs. Whitehead in the framework of bargaining, he emphasizes the Sterns' naïveté (at p. 1145) and reliance (at p. 1158) upon Mrs. Whitehead. Indeed, he even explicitly suggests (at p. 1160) that she is in "the dominant bargaining position".

This is further reinforced when Sorkow J. interprets Mrs. Stern's multiple sclerosis as leaving the Sterns with no other option but to rely on Mrs. Whitehead. Is this so? Mrs. Stern's multiple sclerosis was mild and only remotely liable to exacerbation by pregnancy. Even the post-partem risks were less than 50-50, between 5-40 per cent. Sorkow J. was keen to take this evidence into consideration. Indeed,

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<sup>30</sup>*Bolton v. Madden* (1873), L.R. 9 Q.B. 55 at 56; *Calumsky v. Karloff*, [1947] S.C.R. 110, [1947] 1 D.L.R. 734; Richard Posner, *Economic Analysis of Law*, 3rd ed. (1986), pp. 85-88; G.H.L. Fridman, *The Law of Contract*, 2d ed. (1986), pp. 81-82.

<sup>31</sup>See for example *In re Greene*, 45 F. 2d 428 (S.D.N.Y., 1930), and more generally, Hugh Collins, *The Law of Contract* (1986), c. 3. See also Fuller, "Consideration and Form" (1941), 41 Col. L.R. 799. More often than not, however, the courts prefer to transfer the issue of adequacy of consideration to the issue of inequality of bargaining power or unconscionability, thereby hopefully leaving intact the exchange paradigm of contract law.

<sup>32</sup>*Whitney v. Sterns*, 16 Me. 394 at 397 (1839), is the classic American statement of the peppercorn theory of consideration.

he accepted Mrs. Stern's belief that the risk was "great".<sup>33</sup> But there was a noticeable paucity of evidence as to whether her multiple sclerosis would deteriorate independent of pregnancy, thereby reducing her potential input with respect to the rearing of a child.<sup>34</sup> Put tersely, it may not be in the best interests of a child to run the risk of having one parent disabled by multiple sclerosis, when there are other parents available who do not have the same liability. These statistics could have been matched, and the decision based, in part, upon any such evaluation. At the very least, however, it is an overstatement to say (at p. 1167) that "surrogacy [was] the only viable vehicle for them to have a family".

There was also the alternative of adoption. Although it may be true that it is difficult to adopt a "desirable infant" in the United States,<sup>35</sup> it is relatively easy to adopt what are euphemistically called "special needs children", those who are older, ethnic or handicapped. Could it be that the Sterns did not want to have one of these "less than suitable" children as their own? The main point, however, is that expectation rather than reliance is a more accurate description of the relationship between the Sterns and Mrs. Whitehead.

A third argument developed by Sorkow J. is that contract law will not permit a person to withdraw from a contract simply because she changes her mind. However, this is not like buying a car, or changing one's mind halfway through a meal in a restaurant. On this issue, Sorkow J. sets the discussion at a high level of abstraction in that he fails or refuses to recognize the experiential dynamics of gestation. The research of scholars like Dorothy Dinnerstein and Nancy Chodorow suggests that gestation involves a strong bonding process which has a major impact on the psychosocial personality of a woman

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<sup>33</sup>His preference for Mrs. Stern's subjective belief stands in stark opposition to his refusal to accept almost anything which Mrs. Whitehead said, and his claim that she is a liar (see pp. 1169-70).

<sup>34</sup>The suggestion here is not that only Mrs. Stern rather than her husband should fulfil the role of rearing parent. Rather, it suggests that *all things being equal*, the input of both parents is desirable, not just one. Nor does the text advocate a heterosexist preference; rather, it suggests that one relevant factor could be that two parents *may* be more beneficial than one.

<sup>35</sup>See B. Joe, *Public Policies Toward Adoption* (1979). It is curious that one of the authorities which Sorkow J. refers to (at p. 1137) is entitled, "Adoption, It's Not Impossible". Furthermore, when he discusses the reasons why adoption is becoming increasingly difficult his references are primarily to women's changing response to procreation. Is this another version of blaming the victim? The possibility of successfully adopting a "desirable" child in Canada is also low: Ontario Law Reform Commission on Human Artificial Reproduction and Related Matters (1985), vol. 1.

when she is pregnant.<sup>36</sup> The court simply ignores this by relying on abstract ideas of contract law, such as, you cannot change your mind after you have entered into a contract, "all sales are final".<sup>37</sup> The rejection of contextualism and the flight to formalism smacks of a willful ignorance of these issues.

These concerns about Sorkow J.'s self-imposed myopia are reinforced when we look beyond the narrow confines of contract doctrine. Adoption law explicitly takes into account the factor that it is impossible for a woman to know beforehand what she would feel when the child was born, whether she would love her or whether she could surrender her. Most jurisdictions provide that there is to be a specified time period within which a mother is presumed to be legally incapable of providing valid consent to the adoption.<sup>38</sup> Sorkow J. could very easily have drawn on this analogy to imply a term into the contract that Mrs. Whitehead be allowed a "reconsideration" or "confirmation" period in which to confirm her pre-gestational decision.<sup>39</sup> Thus, without necessarily falling into the danger of paternalistic protectionism, contract law could easily allow for gestational bonding to be a qualification on consent, available to women who elect to make use of it.

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<sup>36</sup>Nancy Chodorow, *The Reproduction of Motherhood: Psychoanalysis and the Sociology of Gender* (1978); Dorothy Dinnerstein, *The Mermaid and the Minotaur* (1977). See also B. Blum (ed.), *Psychological Aspects of Pregnancy, Birthing and Bonding* (1980); Katha Pollitt, "The Strange Case of *Baby M*", *The Nation*, (23rd May 1987) 681 at 686; Adrienne Rich, *Of Mother Born: Motherhood as Experience and Institution* (1977); Mary O'Brien, *The Politics of Reproduction* (1981); Sara Rudick, "Maternal Thinking" (1980), 6 *Feminist Studies* 432. Indeed, one supporter of such contracts inadvertently admits as much when she posits that "the surrogate may need help in erecting [!] a psychological barrier so that she does not experience the child or her own . . .": Katz, ante, footnote 7, p. 21, footnote omitted.

Again we have an example of omission and silencing that reveals at least as much, and probably more, than what is discussed in the judgment. It is a *fact* that bonding does take place both pre- and post-partem, but this is not something which is discussed or introduced as evidence, precisely because it would challenge the initial predisposition of the judge. On the contrary, Sorkow J. is at pains to emphasize the relationship built up between the Sterns and the child. Why are some facts important, while others are not?

<sup>37</sup>Katha Pollitt, *ibid*, p. 681.

<sup>38</sup>See for example, Adoption Act (U.K.), 1976, c. 36, s. 8(4); Children's Services Act, S.N.S. 1976, c. 8, s. 11.3; Ariz. Rev. Stat. Ann., para. 8-107 (1974); Ill. Ann. Stat., c. 40, para. 1511 (Smith Hurd, 1980); Mass. Ann. Laws, c. 210, para. 2 (Michiel Law Co-op, 1981). Moreover, such an implied term would dovetail with the explicit public policy underlying the New Jersey adoption laws: N.J. Stat. Ann., para. 9:3-17(b). This section expressly posits that: "it is necessary and desirable . . . to protect the natural parents from hurried or abrupt decisions to give up the child".

<sup>39</sup>See below for a discussion of Sorkow J.'s rejection of Adoption Law Analogies. Britain's Royal College of Obstetricians and Gynaecologists, Ethics Committee specifically objects to contracts for babies on this very issue: see Report of R.C.O.G. Report on In Vitro Fertilisation and Embryo Replacement or Transfer, para. 7.3 (1983).

Sorkow J. rejects such a proposition through recourse to a classic example of abstraction, legal formalism and *reductio ad absurdum*. He asks facetiously (at p. 1149):

Would [counsel] have all contracts remain in limbo until the result of the intended agreement is available and the makers could then conclude whether the result is what was intended and the contract then made enforceable?

Such rhetoric seems to deliberately miss the point. What is involved in this situation is an extremely specific type of contract dealing with a particular social situation. Abstract rules and formalistic analogies are inappropriate. What is essential is a sensitive, contextual, gender-conscious response which recognizes that there are factors which make contracts such as these worthy of special treatment, and that different criteria should be applied.

The issue of consent could also have been considered from the perspective of unconscionability, inequality of bargaining power and economic duress. Sorkow J. rejects such claims with only the most superficial reflection. He suggests (at p. 1157) that contracts for babies do not exploit women because the women who enter into such contracts do so freely; they are unlike unwed mothers who are pregnant, isolated and vulnerable. Such a particularistic, atomized perspective fails to consider the systemic poverty of American society, both on a class and gender basis. It consciously ignores the whole economic context of the parties, something which Sorkow J. was extremely enthused about in his decision on the factual aspect of the case.<sup>40</sup> Not even Sorkow J. could be immune to the now "taken for granted" fact that women earn, at best, less than two thirds of what men earn.<sup>41</sup> More specifically, reports indicate that the financial returns are

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<sup>40</sup>See above, section entitled "The Question of Fact", pp. 8-16.

<sup>41</sup>See for example, Five Thousand American Families - Patterns of Economic Progress (1974), p. 144; Smith, "The Movement of Women into the Labour Force" in Smith (ed.) *The Subtle Revolution* (1979); U.S. Comm'n on Civil Rights, *Comparable Worth: An Analysis and Recommendations* 13-17 (June 1985); 2 U.S. Comm'n On Civil Rights, *Comparable Worth: Issue for the 80's, A Consultation of the U.S. Comm'n on Civil Rights, Proceedings* June 6-7, 1984, at 1-47 (1984); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964* (1979), 12 U. Mich. J.L. Ref. 399, pp. 402-15; Freedman, "Sex Equality, Sex Differences, and the Supreme Court" (1983), 92 Yale L.J. 913, pp. 913-15; Frug, "Securing Job Equality for Women: Labor Market Hostility to Working Mothers" (1979), 59 B.U.L. Rev. 55, pp. 55-61; Jeffries and McGahey, "Equity, Growth and Socioeconomic Change: Anti-Discrimination Policy in an Era of Economic Transformation" (1985), 13 N.Y.U. Rev. L. & Soc. Change 233, pp. 256-58; B. Gelpi, N. Hartsock, C. Novak, M. Strober (eds.) *Women and Poverty* (1986); J. Dex L. Shaw, *British and American Women at Work* (1986). For a valuable compilation of statistics on women's poverty in Canada see Susannah Worth Rowley, "Women, Pensions and Equality" in *Charterwatch: Reflections on Equality* (1986), p. 283.

a vital motivational factor for women entering into such contracts,<sup>42</sup> and yet all they might receive is \$10,000.<sup>43</sup> Therefore, it was open to Sorkow J. to widen his perspective, respond to his acute awareness of the relative poverty of the Whiteheads, and introduce the factor of economic duress<sup>44</sup> to negate consent, and render the contract unenforceable. Rather, he latched onto Mary Beth Whitehead's "desire to give a gift to another childless family", converted altruism into a self-sacrificing and painful obligation, and ignored the all too real economic context of the agreement. An unwanted pregnancy is only one of a plethora of factors – and perhaps not even the most important – which may coerce women into contracts for babies. Resort to such an argument is distraction, not responsible decision-making.

At one point, Sorkow J. seeks to legitimize his decision, to prove (at p. 1158) that he is not "antifeminist" by adjudicating that the mother has the determinative power of deciding what to do with a "child" while it is still in the gestation period. He suggests that up until the point of birth the woman can always have an abortion, and to support this proposition he draws on the doctrine of privacy as outlined in *Roe v. Wade*, 410 U.S. 113 (1973). The benefits of such a qualification may be more apparent than real. *Roe v. Wade*, although it espouses the abstract constitutional principle that women have a right to abortion, has been significantly undermined in a series of

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<sup>42</sup>One study conducted in Michigan claimed that, although a substantial proportion of potential mothers stated their primary motivation was altruism, 89 per cent of those interviewed said they would "not do it without being paid" (New York Times, 18th January 1987). Parker claims that, "40% of surrogacy applicants were unemployed or on welfare" ((1983), 140 Am. J. Psychiatry 117). For a powerful account of the reality of the surrogacy industry in the U.S., see S. Ince, "Inside the Surrogate Industry" in R. Arditti (ed.), *Test-Tube Women* (1984), pp. 99-116: but see Eaton, ante, footnote 7, who disagrees.

<sup>43</sup>At first blush, this may appear to be a substantial sum, but worked out on an hourly basis over nine months it amounts to less than minimum wage. Furthermore, even this is not accurate, for the process frequently takes over a year because it usually takes several months to conceive. Indeed, in this case it took six months and nine inseminations for conception to occur. According to Katz, ante, footnote 7, current rates vary in the \$5,000-\$25,000 range. This is not the total sum of money to change hands in such a transaction. There are also legal fees which appear equal to those paid to the mother, as well as medical and psychological fees. This reinforces the claim that only the more affluent applicants have access to such a process. The discussion of price paid is extremely difficult because we do not know what is going on in this industry. Some argue that prices are going up, and that this will "solve" the problem of exploitation. However, there are also indications that as the option becomes more popular the market will expand and the "competition" will become more difficult for birth mothers, thereby necessitating that they will drop their fees. One recent case in San Diego reveals that a Mexican woman was paid only \$1,500. See Scott, "Pair Duped Her on Surrogate Mother Pact, Woman Tells Court", *L.A. Times*, 20th February 1987, para. 1, p. 22, col. 1.

<sup>44</sup>R. Hale, "Bargaining, Duress and Economic Liberty" (1943), 43 *Columbia L.R.* 603.

subsequent cases which allow states to refuse Medicare to women who seek an abortion for other than therapeutic reasons.<sup>45</sup> Consequently, the very people who may decide to have an abortion, including economically deprived women who agree to carry a child for a fee, are financially incapable of obtaining a legal abortion and are therefore economically compelled to go to term or else risk (their lives in) an illegal abortion. Moreover, it is extremely unlikely that a court would compel Mr. Stern, or another surrogate father, to pay for such an abortion. Hence, this father-like concession is not a real choice if Sorkow J. would only take judicial notice of the very likely fact that it is only the economically deprived in the first place who would want to become birth mothers.<sup>46</sup>

Additionally, the Sterns undertook a risk. It appears to be a norm within the industry that the fathers and social parents are cautioned that the mother may change her mind and keep the child.<sup>47</sup> It is unclear whether such information was communicated in the present case, despite the fact that there is ample evidence (at p. 1142) that the agency knew of Mrs. Whitehead's propensity to change her mind. Thus, if free market ideology is to be the name of the game, caveat emptor, let the buyer beware. Again an implied term could easily have been introduced to take this into account.<sup>48</sup>

A further, obvious, possibility that Sorkow J. does not deal with adequately is that the contract could be void as contrary to public policy. Historically, the courts have been reluctant to make decisions on this basis, as it is too blatant a method of revealing their own social, political and economic preferences. However, this case was already publicly recognized as one necessitating political preferences, so the judge may have been well advised to grasp the nettle and at

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<sup>45</sup>*Beal v. Doe*, 432 U.S. 438 (1977); *Maier v. Roe*, 432 U.S. 464 (1977). Indeed, in *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980), the Supreme Court held that state funding for an abortion could be refused even if the woman's doctor determined that an abortion was *necessary* in order to safeguard her health.

<sup>46</sup>This comment does not deal with the constitutional ramifications of the case. However, it is worth mentioning that the reference to *Roe v. Wade* raises another difficult constitutional problem for disadvantaged groups. The triumphs of the women's movement in *Roe v. Wade*; *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1977); *Griswold v. Conn.*, 381 U.S. 479 (1975), were all based upon the individualistic predilection for privacy. Now privacy is being advocated as the basis of women's constitutional right to reproductive self-determination: see Sly, ante, footnote 7, and Keane, ante, footnote 7.

<sup>47</sup>Eaton, ante, footnote 7, p. 711; K.M. Brophy, "Surrogate Mother Contract to Bear a Child" (1982), 20 J. Fam. Law 263, p. 264.

<sup>48</sup>The Sterns could have sued I.C.N.Y. on the basis of professional negligence, thereby avoiding the convoluted agency argument.

least be candid about the competing policy preferences. Such an argument would not have lacked relevant precedent. In England, for example, the Warnock Committee proposed that surrogacy was contrary to public policy on the basis that it became perilously close to baby-selling.<sup>49</sup> Moreover, in the English case of *A. v. C.* (1978), 8 Fam. Law 170, Comyn J. held that a contract between a man and a prostitute by which she agreed to become pregnant and surrender the child on birth was unenforceable because it was a pernicious selling of the child. The Court of Appeal upheld the decision ([1985] F.L.R. 445 at 458) and went even further by denying him access.<sup>50</sup>

More persuasive and analogous still is the existence in 24 American states of "baby-buying laws" which explicitly bar the payment of a fee to the mother in connection with the adoption of her child.<sup>51</sup> The relevant New Jersey legislation provides that:

No person . . . shall make, offer to make, or assist or participate in any placement for adoption and in connection therewith (1) pay, give or agree to give any money or any valuable consideration . . . or (2) take, receive, accept or agree to accept any money or any valuable consideration.<sup>52</sup>

and imposes a criminal sanction,<sup>53</sup> thereby rendering any contracts to the contrary unenforceable.

Sorkow J.'s response to such provisions is unconvincing and narrowly legalistic. He argues that surrogacy was not in the contemplation of the legislators when the adoption legislation was drafted, and that because it is a criminal statute it should be construed narrowly. But of course there are canons of statutory interpretation to the contrary: that we should follow the spirit, not the letter of the legislation; that the quest for legislative intent is misconceived; and that the issue in the present case is not the imposition of a penal sanction, but simply the non-enforceability of a contract that is void as contrary to the public policy against baby-farming. Indeed, in several other states the attorneys general had issued advisory opinions which proposed

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<sup>49</sup>Ante, footnote 7, paras. 8.4 and 8.5.

<sup>50</sup>But see, contra, *Re A Baby*, Times, Fam. Div., Latey J., 15th January 1985.

<sup>51</sup>L. Andrews, "The Stork Market: The Law of the New Reproductive Technologies" (1984), 70 A.B.A.J., 5th August, pp. 54-55; Katz, ante, footnote 7, p. 8. Similar provisions exist in England, see ante, footnote 38, Adoption Act, s. 50, and in Nova Scotia, Children's Services Act, S.N.S. 1976, c. 8, s. 14(3). See also Ont. L.R.C., vol. 1, p. 92.

<sup>52</sup>N.J. Stat. Ann., para. 9:3-54 (West Supp., 1985).

<sup>53</sup>*Ibid.*, para. 9:3-54(2)c: "Any person, firm, partnership corporation, association or agency violating this section shall be guilty of a high misdemeanor".

that similar legislation should apply to "commercial" surrogacy arrangements.<sup>54</sup>

Furthermore, there was precedential case law which posits that, independent of any statutes, any payment in connection with adoption is unenforceable because it is contrary to public policy.<sup>55</sup> Such case law and legislation are simply more specific examples of a more general, post-slavery principle that humans are not property and therefore cannot be sold. The decision is curiously silent on such issues, favouring instead a more technical, narrow approach.

Moreover, there was a conspicuous failure to discuss several recent cases from other states which may have helped to shed some light on the issues. For example, in *Syrkowski v. Appleyard*, 122 Mich. App. 506, 333 N.W. 2d 90 (1983), varied 420 Mich. App. 367, 362 N.W. 2d 211, the Michigan Supreme Court ruled that its Paternity Act made it illegal to pay a "surrogate". However, in *Surrogate Parenting Assoc. v. Kentucky ex rel Armstrong*, 704 S.W. 2d 209 (1986), the Kentucky Supreme Court held that its version of the baby-selling laws did "not apply to surrogacy arrangements". The decision not to refer to these precedents is just as revealing as any decision to refer to them.

Rather than confronting the difficult value choices that such a discussion would necessitate, Sorkow J. sought refuge in a spurious distinction. He proposes (at p. 1157) that it is possible to distinguish between "baby selling" and "baby sitting", for the latter is merely the provision of a service and the price paid is for the service, not the child.<sup>56</sup> This is exactly the distinction made by the leading entrepreneur of contracts for babies, Mr. Noel Keane.<sup>57</sup> The repercus-

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<sup>54</sup>Ky. Op. Att'y Gen. 81-18 (1981); Ohio Op. Att'y Gen. 83-001 (1983); Okla. Op. Att'y Gen. 83-162 (1983). The Attorney General of Louisiana reached a similar conclusion in an informal letter. But see Katz, ante, footnote 7, at pp. 18-25, who argues that there are relevant distinctions between baby-selling and "surrogacy arrangements".

<sup>55</sup>*Downs v. Wortman*, 228 Ga. 315, 185 S.E. 2d 387 (1971); *Willey v. Lawton*, 8 Ill. App. 2d 344, 132 N.E. 2d 35 (1956); *Doe v. Kelly*, (1981), 6 Fam. L.R. (B.N.A.) 3011, affirmed 106 Mich. App. 169, 307 N.W. 2d 438, cert. denied 459 U.S. 1183 (U.S.); *Re R.K.S.*, 10 Fam. L.R. (B.N.A.) (1983); *Re Baby Girl*, 9 Fam. L.R. (B.N.A.) 2348, but see also *In re Estate of Shirk*, 186 Kan. 311, 350 P. 2d 1 (1960). See also the Canadian case *Reid (Gray) v. Gray* (1976), 29 R.F.L. 63 (B.C.S.C.).

<sup>56</sup>Sorkow J. does not explicitly use these terms, although he clearly accepts such a conceptual dichotomization. See further Sly, ante, footnote 7, p. 53. He reinforces this point by adding that the child is already Mr. Stern's, and that he cannot buy what is his own. This reference to a proprietary interest in the child is disconcerting. For a fascinating feminist deconstruction of "property" and its cognates "proper" and "propriety" see Luce Irigaray, *This Sex Which Is Not One* (1985) trans.

<sup>57</sup>Keane, ante, footnote 7, p. 157; see also Sly, ante, footnote 7, p. 53.

sions of such a distinction are frightening, for it reduces a woman to an object, an "ambulatory incubator", a vehicle for "uterus rental". It fails to recognize the dignity of women as persons.

A further possibility that would allow the court to hold the contract void as contrary to public policy is to analogize with prostitution contracts.

When we turn to the question of remedies the decision goes from bad to worse. The normal remedy for breach of contract is damages, which, if applied to this case, would mean that the Whiteheads would have had to repay the money but retain custody of the child. Indeed, if the contract was of the same nature as most such contracts, payment would be by escrow account, with the consequence that the capital would have remained unpaid, although expenses would have been covered.<sup>58</sup> But the court hastily turned to the discretionary, equitable remedy of specific performance, without really justifying why damages were not adequate. Apart from the factor of intense disappointment, damages could have put Mr. Stern back in his original position; he could have donated sperm to a different woman and perhaps gained a child within a year. In addition, Sorkow J. could have awarded expectancy damages to take account of the disappointment factor. He did not do this for the very simple reason — monetary awards are unsuitable remedies because, as even the advocates of contracts for babies admit,<sup>59</sup> it is only poor women who will be in such a position! Instead, through the remedy of specific performance, traditionally conceived as benefiting the weaker party, Baby M. was ripped away from her mother. Moreover, there is a strong line of cases which posit that specific performance will not be ordered for a contract of personal services.<sup>60</sup> Finally, specific performance is only available if the claimants come with "clean hands"; in this case there was some doubt about the honesty of the Sterns because they had falsely claimed that Mrs. Stern was "infertile", when in fact she suffered from a mild form of multiple sclerosis, which is

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<sup>58</sup>Katz, ante, footnote 7, p. 21. The procedural history of this case seems to confirm that the \$10,000 had not yet been paid (see p. 1136).

<sup>59</sup>Keane, ante, footnote 7, p. 167.

<sup>60</sup>In England see *Rigby v. Connol* (1880), 14 Ch. D. 482, per Jessel M.R. In Canada see *Emerald Resources Ltd. v. Sterling Oil Properties Mgmt. Ltd.* (1969), 3 D.L.R. (3d) 630 at 647, affirmed 15 D.L.R. (3d) 256 (S.C.C.) [Alta.]. In U.S. see *Isofax, Inc. v. U.S.* 510 F. 2d 1369 at 1375; *Fitzpatrick v. Michael*, 177 Md. 248, 8 A. 2d 639 (1939). See also P. Singer and D. Wells, *The Reproduction Revolution* (1984), p. 122.

qualitatively different. But this is suitably ignored at this point.<sup>61</sup>

Even more interesting is the fact that the decision to order specific performance runs contrary to what has become known as the "tender years presumption", that it is in the best interests of a young child to be placed in the custody of her mother. Although this is by no means determinative, empirical research suggests that it is still the norm.<sup>62</sup>

The foregoing discussion of the question of law demonstrates that contractual analysis is manifestly unsuited to the nature of the problem, yet Sorkow J. has chosen these as the terms of discourse: offer and acceptance, expectation and reliance, consideration and breach, damages and specific performance. However, even if we were to accept such a conceptualization, that does not necessitate the conclusion which he reaches. The silences in his decision are deafening and the gaps pervasive. The indeterminacy and malleability of contract law, supplemented by potentially relevant adoption statutes, permitted Sorkow J. a wide spectrum of choice, which he deliberately ignored.

The whole analysis on the basis of contract law is pitched at an extremely high level of abstraction. There is no discussion of these persons in their social, economic and political context on the level of law. Of course there is on the level of fact, and that contextualism very quickly eradicates any possibilities that the Whiteheads will be given custody of the child. But then the court very quickly reverses itself and speaks with the "forked tongue"<sup>63</sup> of legal formalism, thereby denying the parties their real economic position by espousing a free market exchange version of contract law. Discussion at this level concentrates on unsituated monads. It lacks any serious discussion of who the parties are, or what their motivating factors might be.

But, in spite of himself, Sorkow J. is unable to maintain the

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<sup>61</sup>The issue of infertility is discussed at length in the case, but under the rubric of fraud. However, the judge adopted a rather unpersuasive argument based on his preference for a broad interpretation of the word "infertility" so as to include "medical risks". My point is in relation to the equitable remedy which necessitates that there be no doubt about the parties' honesty. The fact that Sorkow J. spent so much effort clarifying this point suggests that there was in fact substantial doubt on this issue.

<sup>62</sup>Weitzman and Dixon, "Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce" (1979), 12 U.C. Davies L. Rev. 473, pp. 501-505.

<sup>63</sup>Karl Llewellyn, "Some Realism about Realism" (1931), 44 Harvard L.R. 1222, p. 1252.

pretence of contractual neutrality, to mask his own predisposition, for he goes on to add (at p. 1166):

It is suggested that Mrs. Whitehead wanted a baby, now that she is older than when her first two children were born, to experience and fulfil herself again as a woman. She found the opportunity in a newspaper advertisement. She received her fulfillment. Mr. Stern did not.

The comment reveals a deep structural presupposition about Mrs. Whitehead, and perhaps all women. It says flatly that a woman is considered a babymaker, a machine for producing babies, that she needed to have this child to affirm her continued identity as a woman, to fulfil herself. But he then goes on to assume that once she had the child, that was the satiation of her needs. Her babymaking role ceases as soon as she gives birth to the child and her identity as a mother is terminated. This position ignores completely the whole nature of the reproductive process, a process of bonding, interconnection and interdependence. Only a male-identified judge, totally insensitive to the process of what it means to be a mother, could make such a statement.

One should not be surprised at any of this because, within just one paragraph of this misogynistic statement, the judge proceeds to eulogize the following statement of the guardian ad litem:

... "the child's best interests is the only aspect of man's law that must be applied in fashioning a remedy for this contract . . . for any contract that deals with the children of our society . . ."

Sorkow J. endorses this statement wholeheartedly but in doing so he reveals his own political perspective. The reference to "man's law" is not accidental. It is men who have economic superiority in our society, and it is men who determine what is in the best interest of a child, or at least it is men's value structures that underpin the determination. It is a male judge who identifies with other men in saying that we want this child to go to the party who can be perceived to be the classic, all-American family. It is, indeed, only a man's law that can be so insensitive to the interests of women.

### *Conclusion*

Situations such as *Baby M.* are classically hard cases. There is no obvious, or even persuasive, legal right answer to what is clearly a social, economic, political and, most importantly, human problem. This necessarily brief comment has no pretensions to resolving the issues raised by such a case.

Rather, it attempts to raise both our conscience and our consciousness. The problems raised by biotechnology are enormous, many

are perhaps as yet unrealized, and their resolution far off, if even possible. Any legal response must carefully balance the various advantages and disadvantages for *all* the parties involved, and society in general. It must be sensitive to both individual freedom and social responsibilities, self-interest and altruism, the social and economic inequalities inter and intra genders. It requires analysis, reflection and evaluation that is contextual and specific, not abstract and unidimensional.

The decision of Sorkow J. fails to live up to such (admittedly) high standards. The problem is that he fails to even come close; indeed, he fails to even try. The result is that he ignores completely the perspective of some of those who will be affected most directly by the practice of contracts for babies, the mothers. More than this, Sorkow J. goes beyond ignorance to outright assault on the dignity of such persons, by wallowing in his own legalistic, masculinist arrogance. He endorses a double-disciplining of Mrs. Whitehead, first, through his contribution to character assassination by the mental health professionals and, second, by his support for the exploitive imperative of commutative justice.

No doubt, with hindsight, people will say that Sorkow J. was correct, now that Mrs. Whitehead and her husband have separated – he made the correct decision in granting custody to the Sterns. However, this is a chicken and egg situation. Was the failure of the Whitehead family to maintain custody of the child the cause of the breakdown or the effect? We do not know. The simple fact that the Whiteheads are no longer together does not mean that Sorkow J. was right; rather it might mean that, due to the pressure which this situation imposed upon them, not only did the decision “terminate and sever” Mrs. Whitehead’s relationship with her child, it also undermined her relationship with her spouse. Law can be extremely destructive of interpersonal relationships.

Moreover, now that the case is on appeal (15th September 1987, *New York Times*), the fact that she is now a single parent should not be utilized to confirm that it is in the best interests of the child to be placed with a married couple. Single parents are good parents; presumptions to the contrary are discriminatory and vindictive.

The decision of Sorkow J. does nothing to deter contemporary North American society from sleepwalking into the dark night of an Atwoodian reproductive dystopia – indeed it might even hasten it.

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