

# The 'Baby M' Court Case in the US

cindy jaquith

*Some months back a New Jersey court gave a ruling on a surrogacy case which has sparked off intense debate in the west on the entire issue of surrogate motherhood. In the Baby M case, the child was taken away from the surrogate mother on the basis of a contract she had signed with the father of the child and his wife. A myriad of prejudices against women and working people—some falsely presented as feminist ideas—have been put forward, along with a generous dose of pseudoscience and mysticism both in the court and outside it.*

THE New Jersey court case of "Baby M" reveals a brazen disregard for children. By taking the child away from her mother, Mary Beth Whitehead, and by upholding a 'surrogate mother' contract, Judge Harvey Sorkow has struck a blow against rights the working class has fought for more than a century and a half.

The case began when William and Elizabeth Stern went to a surrogacy agency to hire a woman to bear them a child. Agency head Noel Keane arranged a contract between William Stern and Mary Beth Whitehead. Whitehead signed papers agreeing to be artificially inseminated with Stern's sperm, carry a pregnancy to term, and then deliver her baby to the Sterns for \$ 10,000 plus medical expenses. But in the course of pregnancy and the birth of the baby, in March 1986, Whitehead decided she wanted to keep her child, whom she named Sara. She informed the Sterns and said they would keep their \$ 10,000.

The Sterns filed a suit and immediately got Judge Sorkow to order Whitehead to hand her daughter over to the Sterns. The Sterns then went to Whitehead's house with five cops to seize five-week-old Sara. Whitehead escaped with the child to Florida, but private detectives hired by the Sterns tracked them down. The detectives took Sara away and turned her over to the Sterns, who renamed her Melissa.

## Whitehead's Contract

Surrogate mother contracts are similar to involuntary servitude contracts in many respects, and just as exploitative, unjust, and invalid. The woman signs a contract guaranteeing that she will carry a pregnancy for someone else for nine months. According to Judge Sorkow's ruling, she is legally bound to this contract whether or not she changes her mind.

This is bad enough—but even worse given the nature of the rights she gives up. Whitehead relinquished control of her body for nine months with the contract she signed. She had to agree to "assume all risks" of the pregnancy, "including the risk of death." She had to agree to "abortion on demand of William Stern" if the fetus showed signs of "physiological abnormalities," determined by the doctor being paid by Stern.

Whitehead herself could not choose to have an abortion without "breaking" the contract. She also had to agree not to smoke, drink liquor, or use medications not prescribed by the Stern-paid doctor during her pregnancy. While these conditions were imposed on Whitehead, the contract allowed Stern to terminate the agreement immediately if Whitehead had a miscarriage in the first five months. And he wouldn't have to pay her a cent.

The other side of the contract that has no validity is that Whitehead agreed nine months beforehand to surrender a child she planned to bear. This is completely inhumane, both to the child and mother. Under adoption law, a woman has

a period of time after her baby is born to decide if she wants to put the child up for adoption, even if she concluded at some point in her pregnancy that this is what she wanted to do.

## Women's Right to Choose?

Gary Skoloff, the Sterns' lawyer, made the fantastic argument in court that surrogacy contracts are actually an advance for women's rights. "You prevent women from becoming surrogate mothers and deny them the freedom to decide. . . it's being unfairly paternalistic and it's an insult to the female population of this country," he claimed.

This argument was defended by Jan Sutton, spokesperson of a group called National Association of Surrogate Mothers. "Surrogate child-bearing is not exploitation of women," she wrote in a letter to the *New York Times*. "It is our individual right voluntarily to create a child for another family. To deprive women of this right is clearly a threat to feminist concerns."

Surrogate contracts are not an extension of the fight for women's right to control their own bodies. That fight is to secure the right of the woman to decide when and if to have children, free from interference from the government, church officials, doctors, husbands, lovers, boyfriends, or any other individuals. This struggle has embodied the fight for birth control; sex education; safe, legal abortion; and protection from forced sterilisation. It is interconnected with the broader struggle by women to be treated equally with men in all aspects of society and not be disqualified because of pregnancy, children, or lack of children.

Surrogacy contracts run completely counter to this struggle, what it has already achieved, and the future it points to. Far from an expansion of women's rights, these contracts deny rights previously conquered by women and working people as a whole.

A *New York Times* magazine reporter visited the offices of Noel Keane. "His comfortable, two-story offices in Dearborn, Mich, were full of prospective surrogate mothers, often with husbands and babies in tow, and infertile couples who had come to check out the candidates for surrogacy," wrote reporter Annie Taylor Fleming.

"The well-groomed couples . . . were each assigned a private office, through which the surrogates were rotated, to proffer their fertility and show off the living, gurgling proof thereof." For each woman and eventual baby he successfully markets, Keane pulls down \$ 10,000 for himself.

Male companions of the women also get into the business. One man who accompanied his female friend to the office told Fleming, "I'll take care of her when she's pregnant again, but the baby means absolutely nothing. It's like watching someone's car for nine months. We're in it for the money; it's a business." Keane argues that he provides a public service,

that he is showing sensitivity to "the pain and cries" of the "infertile." Judge Sorkow upheld this notion of the 'rights' of the infertile. He ruled that state "refusal to enforce these surrogate contracts. . . would constitute an unconstitutional interference with procreative liberty since it would prevent childless couples from obtaining the means to have families."

### 'Rights' of 'Infertile'

To believe Keane and Sorkow, a new class of oppressed people—the infertile—has arisen. No one should deny them their 'right' to 'their own' child, a 'right' supposedly guaranteed by the US Constitution.

But Keane and Sorkow have things turned upside down. The government has an obligation to guarantee that every child has protection and nurture—health care, education, and decent living conditions. This obligation extends to other dependent human beings as well, such as the aged and people who are incapacitated by physical or mental illness.

But the government has no obligation to guarantee every adult the 'right' to 'their own' child. Judge Sorkow claims the law should recognise surrogacy contracts in order to satisfy an 'Intense drive to procreate'. There is no instinctual drive to procreate, however. There is an instinct to have sex—procreation is, sometimes a consequence.

The attitude that people must have 'their' child with 'their' genes so they can continue 'their bloodline' or 'family name' is deeply rooted in class society. William Stern presented this reactionary notion in the court case, explaining he had no living relatives because many were killed by the Nazis. He said he needed Whitehead's baby to continue 'his' bloodline.

The Nazis, of course, are the most famous advocates of continuing certain bloodlines. They also ended up trying to exterminate other bloodlines they deemed socially unfit.

Under capitalism, the welfare of the child is not the principal concern nor are the rights of the woman who gives birth. Defining the line of inheritance is. The working class, which has no property to pass on to its offspring, is nevertheless affected by ruling-class ideology about the family. Fears, insecurities, and hopes of immortality, all bred by class society, lead many working people to try to 'continue the family name'. This introduces enormous pressures, with the children being the greatest victims.

Surrogate mother contracts are simply the latest—and one of the most degrading—manifestations of the way capitalism treats children. If surrogacy served some socially useful purpose, it could be argued that society should promote its practice. But it serves no progressive purpose. Humanity is not on the brink of extinction. Many children are being born and many more will be. There is not a social need to increase the number of babies.

Surrogacy is not like adoption, which is socially necessary today. Despite the fact that adoption is immersed in profit-making and that abuses against the children and parents involved do occur, there is a need for this institution to help children without care.

And this is its starting point—not the 'need' of some adults to have 'their' child. The concept of adoption is that society must find a way to provide care to all children lacking it. That's progressive.

The concept of surrogacy is that society owes all adults the 'right' to 'their' child. There's nothing progressive at all about that—it is reactionary.

It opens the door to such things as the international baby racket that has received so much publicity and condemnation. According to the *New York Times*, the number of foreign-born babies adopted in the United States shot up from 4,868 in 1981 to 9,945 in 1986. The real number is undoubtedly much higher. Most come from Asia or Latin America. Some are outright stolen from their mothers by baby dealers; others are torn away under extreme duress by these merchants.

This happens because there are fewer children in this country available for adoption than there used to be, even though racist prejudices still prevent the adoption of many US-born children who are 'not white'. Capitalist businessmen preying on couples without children see a profit to be made, because the baby 'shortage' has driven the price of babies up.

But the fact that there are fewer homeless babies in the United States is good. It marks human progress on several fronts—in relation to society's treatment of children and other human beings, the advance of science and technology, and the advance of women's rights.

In many primitive societies, when it wasn't possible to feed everybody, it was the practice to kill some infants and other dependents. Under feudalism and lasting beyond, the first-born sons in the families of the landed nobility had special rights over other children. This practice has also been wiped out.

The brutal exploitation of child labour in textile mills, coal mines, and agriculture has become illegal in this country. The labour movement won this victory, as it won the right to free, compulsory education through high school. A century ago, many children were still losing their parents in shipwrecks, epidemics, or other events. The number of human beings perishing under such circumstances is greatly reduced today in this country. And children without parents live under much better conditions.

Social attitudes toward 'orphans' and 'adopted children' have also been changing in a progressive direction. These children are less often seen as somehow abnormal and deserving different treatment than children who live with a biological parent. Prejudices have also subsided with regard to children born to unmarried women—so-called 'bastards' or illegitimate children.

Humanity as a whole has advanced and deepened its solidarity for all members of society. This has been the product of struggle by workers and farmers. And it is linked to advances in science and technology that have helped working people shed various aspects of exploitation, inequality, and prejudice.

### Is Technology the Enemy?

It is important to recognise the progressive role science and technology play—including under capitalism. This is especially true in the light of arguments that surrogate births show society is becoming the victim of technology and predictions that science will turn most working-class women into 'breeders' of babies for the rich.

The trend is actually the opposite—women are having fewer children today than ever before and they have taken giant steps away from their socially imposed role as 'breeders'. This has happened because of women's victories in the fight for abortion rights and birth control, changing attitudes toward women, changes in women's own self-perception, and science.

Scientific discoveries mean that women today are better informed about sex and health. Access to birth control and abortion, while still restricted to some degree, allows them far more decision-making power about when and if to have children. Technology has also produced labour-saving devices that have greatly reduced the hours women spend on domestic labour, further freeing them to participate in the labour force and society as a whole. Women have seized on these advances to struggle for and win greater rights.

One result of this is a decline in the number of children women have, now that they have more freedom to plan pregnancy or decide not to have children at all. According to the US Census Bureau, the average number of people per household was 2.67 in 1986, down from 3.14 in 1970. There is also greater social acceptance of couples who live together and decide not to have children, and of adults who choose to live alone, also a growing category, according to the Census Bureau.

One consequence is the 'shortage' of children to adopt. A new phenomenon has arisen in relation to this, that of couples frantically seeking 'their own' child, frequently after not having had children earlier in life. Prior to this, many children were adopted by relatives or neighbours who already had children and took in others as an elementary act of social responsibility.

Technology has helped make possible the current situation where there are fewer children to adopt. Technology has benefitted women and all working people—increasing life spans, lowering infant mortality, boosting food production, and reducing labour time. And as such, it is being used by the working class to lessen exploitation and reduce class, race, and sex inequalities. It is not technology that is responsible for abuses like surrogacy, it is capitalism, with its drive for profit and its warping of human values.

Surrogacy is and will remain a marginal practice. Far from being 'the wave of the future', it is actually a throwback to the past. Judge Sorkow's ruling upholding surrogacy contracts has simply opened up the debate about this practice, exposing its real nature to many working people for the first time. On April 10, the New Jersey Supreme Court overturned Sorkow's ban on visitation rights for Whitehead. She now has the right to see her daughter once a week for two hours.

Judge Harvey Sorkow, who presided over the New Jersey trial, called it a "routine custody case". His portrayal of the trial as a dispute between a "father" and a "mother" confused the issues and distracted attention from the exploitative and unjust nature of surrogacy contracts. A custody case usually arises when two people who have been jointly raising children separate and cannot agree on who will get the children. William Stern and Mary Beth Whitehead were never jointly raising Whitehead's newborn daughter and never intended to.

Stern's sole 'claim' to the child was a scrap of paper called a surrogacy contract. In upholding this 'contract', the judge argued that Stern is the 'biological father' of Whitehead's child. According to the judge, this gives Stern a 'right' to "his own biologically genetically related child". Whitehead was merely "the surrogate" hired by Stern to "carry his child to term".

Psychologist Lee Salk, a witness called by Stern's lawyers, went so far to propose that Whitehead be termed a "surrogate uterus" rather than a "surrogate mother", to remove any suggestion that she has a legitimate relationship to her daughter. But it is precisely Whitehead's biological, social, and emotional relationship to the child that is key to the case. Stern's supposed 'biological' connection is irrelevant. Stern is not the 'father' of Whitehead's child. Richard Whitehead, who is living with Mary Beth Whitehead and her other children, is the 'father' in this case. Being a 'father' is not determined biologically (leaving aside the fact that there is no scientific way to prove it was Stern's sperm that made Whitehead pregnant).

Throughout human history, a 'father' has been the husband or companion of a woman who is raising children. It is based on his relationship to the woman that a man becomes 'father' to the children. Due to death, divorce, or husbands who walk away, many women may then live with someone else, who then becomes a 'father' to her children. They remain 'fathers' as long as they are living with the woman and sharing responsibility for the children. In a growing number of cases, women are bringing up children without 'fathers' at all.

Being a sperm donor gives no man a right to raise the resulting child, any more than being an egg donor gives a woman that right. (In the practice called 'surrogate gestation', a woman is implanted with the fertilised egg of another woman. The 'surrogate gestator' carries the pregnancy and gives birth, turning the baby over to the other woman. The practice is used in some cases by a couple of one race who hire a woman of another race to bear a child who will also "look like them".)

Neither eggs nor sperm can be the basis for deciding who is the 'mother' or 'father' of a child, or who has the right to bring that child up. It is the woman who carries the pregnancy, gives birth to the baby, and begins nurturing that baby who has the right and responsibility to raise the child—and the right to all the social benefits she needs to do so. The only reason the state should intervene to take her child away is if she is guilty of child abuse.

Nothing of the kind was proven in the case of Mary Beth Whitehead. The Sterns brought into court an army of psychologists and social workers who insisted Whitehead was an 'unfit mother'. Their evidence? Whitehead had a 'narcissistic personality disorder', in part because she dyed her hair; she gave her children pandas, instead of pots and pans, to play with; she had a shouting match with a nun who teaches her son at a Catholic school; she once worked as a dancer in a bar; and her husband was an alcoholic.

Lawyers also proudly pointed out that the Sterns make more than \$ 90,000 a year, while Whitehead is dependent on the \$ 28,000 her husband makes as a sanitation worker.

But none of this is relevant to whether Whitehead is 'unfit' to raise her child. What is relevant is that she gave birth to the child and began raising that child.

### What are Society's Responsibilities?

In the struggle to end women's oppression and guarantee children the best care possible, the working class needs a twofold approach. It needs to fight for women's right to enter the work force and all arenas of society without any restrictions or discriminatory treatment because of their child-bearing capacities. It also needs to fight for the government to carry out its responsibility to provide care for children and all other dependent human beings, instead of allowing the burden for this care to fall on individuals, especially on women.

The government should provide lowcost child care from infancy on up. It should guarantee an education, medical care, decent housing, and recreation for all the young, aimed at helping them develop into independent human beings. All laws or practices that discriminate against children—based on class, race, sex, handicaps, or 'legitimacy'—should be eliminated.

The working class must also challenge any disqualification of women based on their having or not having children.

This being with championing the right of women themselves to freely decide when and if to bear children. It means

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puterised tomography nor nuclear imaging are tested in the same way as drugs are required to.

Not only instruments but many medical and surgical procedures are also introduced without adequate trials. For instance results of the systematic trial of amniocentesis were published only last year after its extensive use for over a decade. The chorion villi biopsy is already extensively used without any scientific trial. Because of such a situation many innovations like gastric freezing, high concentration oxygen for neonates, the use of hyperbaric oxygen in intensive care, insulin coma for the treatment of schizophreniae etc were introduced without evaluation, used and subsequently abandoned after they were proved ineffective or unsafe.

Amniocentesis and chorion villi biopsy remind us their large scale misuse for female foeticide in India. In fact some of the technological innovation appear explicitly geared towards use of sexist and racist cultural practices to gain fast currency and early returns on the resultant technology.

Every country that is attempting to meet the genuine needs of people, has to take crucial decision about selecting appropriate technologies as an alternative to the costly, rendering services to few and profit oriented technologies. In the field, activists are also required to select and develop alternative technologies to provide immediate relief to people. Therefore, in addition to the technology being a political question, it is also a direct practical problem in political practice. This has led many to experiment with various alternative methods of medical care using simple but effective technology and develop models to prove their feasibility. This question is also linked with proliferation of the non-

the right to safe, legal abortion and birth control, as well as sex education in the public schools. It means protection of women from forced sterilisation.

Women's physical ability to bear children should not be used as a pretext to super-exploit them on the job paying them less than men, excluding them from certain jobs, or denying them employment if they are pregnant or already have children. The working class should demand equal pay for equal work and affirmative action so women can achieve full equality in employment and education.

Workers should demand full maternity benefits for women, including the right to return to the same job—without loss of accrued seniority time—after the birth of a child. Absence from work because of pregnancy should be treated exactly like other contractual situations related to leaves from work.

For women who have children, the working class should demand all the state aid they need to care for them. And it should defend their right to have the courts compel men who walk away from shared responsibility for children to pay child support.

The struggle for these demands is part of the fight for a different type of government, one that acts in the interests of workers and farmers, not a handful of capitalist families. By bringing such a government to power, working people will lay the basis for further measures to provide care for children and to achieve equality for women

government organisations and needs detailed discussion.

Such experiments in alternative technologies are not limited to using different physical tools but encompass the way medical care is delivered and attempts to humanise it.

—Amar Jesani

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- Sattaur O, Cherfao J, and Mackenzie D, Nobel prize for inventors of monoclonals, *New Scientist*, 18th October 1984, p 3-4.
- Schiller F, Neurology: The electrical root, In *Historical Aspects of the Neurosciences*, Eds, Rose FC, Bynum W F, Raven Press, New York, 1982, p 4.
- Skilling H H, *Exploring Electricity*, Ronald Press Co., New York, 1948.
- Solomon P and Patch V, *Handbook of Psychiatry*, Lange Medical Publications, Los Altos, Ca, p 465.
- Spillane J D, *The Doctrine of Nerves*, Oxford, London, 1981.
- Taylor D C, One hundred years of epilepsy surgery: Sir Victor Horsley's contribution. *Journal of Neurology, Neurosurgery and Psychiatry*, 49: 485-488, 1986.
- Veith I, *Hysteria: The History of a Disease*, University of Chicago Press, Chicago, 1965, p 232.
- Walter W G, The future of clinical neurophysiology. In *Handbook of Electroencephalography and Clinical Neurophysiology*, Ed. Remond A, Vol I, Elsevier, Amsterdam, 1971, p 43.
- Weinberg S, *The First Three Minutes*, Bantam, New York, 1977, p 145.
- Williams D, The last word. In *Epilepsy (Proceedings of the Hans Berger Centenary Symposium)*, Eds. Harris P, Mawdsley C, Churchill Livingstone, London, 1974, p 347.
- Winter H J, Science, In *A Cultural History of India*, Ed. A L Basham, Oxford, London, 1975, p 149.

Bindu T Desai

Division of Neurology Cook County Hospital  
1835 W Harrison Street  
Chicago  
Ill 60612  
USA