

Mothers On Trial: Custody and the "Baby M" Case

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When *Mothers on Trial: The Battle for Children and Custody* was published, the truth was out: I was not a nice, male-identified, gender-neutral liberal feminist. I was a nice woman-identified radical. I did not believe that men and women had to be the same in order to be treated equally. I mistrusted gender-neutral legislation especially in those areas where women are most obviously different from men: in the areas of reproductive biology, heterosexual relations, pregnancy, childbirth, lactation, mother-infant bonding and the bottom-line responsibility for primary child care. After all, freedom of choice involves the right to have an abortion and the right to have and keep a baby if women so choose.

For saying all this, some feminists accused me of romanticizing the biological chains that bind us; and of biological determinism. I presumably wanted all women to be married, pregnant, and poor. I was against gender-neutral feminism and against women's right to buy or kidnap another woman's child or to rent another woman as a "surrogate uterus"—in the name of feminism.

In *Mothers on Trial* and elsewhere I note that mothers are women and therefore have few maternal rights and many maternal obligations; and that feminists fighting for father's rights or for the primacy of sperm are, to me, a pretty shabby spectacle. Were feminists in favor of joint custody because it would empower mothers (who are women) or because it would empower fathers and men, many of whom have no intention of assuming any primary child care responsibility after they win joint custody? Unfortunately relatively few men are trying to assume some child care responsibility. Such men do not do as many things, or the same things that women do in terms of housework or children. Nor are such men perceived in the same way as women when they

perform a "female" task. However, liberal feminists did not want to sacrifice joint custody as an *ideal*; many were more willing to sacrifice *real* mothers on the altar of abstract notions—real mothers who were suffering under the weight of child care responsibilities, poverty, custodial seige, and the threatened or actual loss of their children.

Once I started organizing around the Baby M Case, I called many feminist leaders. For example, Betty Friedan said she was "up in arms" about what the media and the courts were doing to Mary Beth Whitehead. She said: "I am outraged by this case! Where are the feminists? Where are the feminists?"

I replied, "Well, we're a small, raggedy-assed band out there every week outside the courthouse in Hackensack. Please come and join us. But you're quite right: National NOW, New Jersey NOW, the NOW Legal Defense and Education Fund has, as yet, not gotten involved." I had this conversation with at least thirty other feminist leaders. Many were sympathetic; no one came to help. After a while, it became clear that the "issues" (of surrogacy, adoption, custody) were "complicated" for feminists. And why? Well, there were infertile feminists and single adoptive mother feminists and feminists who had husbands whose ex-wives really didn't deserve custody or child support. There were lesbian feminists who were suffering custodially far more than Mary Beth Whitehead and decent middle class feminist couples (two career families) who couldn't adopt a child without first being humiliated. And anyway, abortion under seige was the real priority.

All true. But does this mean that women should have the right to exploit other women just like men do? Or the right to call such an arrangement "feminist"?

The refusal of many feminists to get involved in the Baby M Case or to agree with my view of custody did not stop them from asking me for help when one of our "own"—a custodially challenged career woman or lesbian needed a strategy or an expert witness. But feminists still didn't see the connection between supporting Mary Beth Whitehead as a way of organizing for the reproductive and custodial rights of all women.

Custody is not a new issue for feminists. In the nineteenth century, suffragists fought in the abolitionist movement against slavery; some fought for custody for mothers. For example, there was a woman named Mrs. Phelps, the wife and the sister of United States and Massachusetts state senators. When her husband was flagrantly unfaithful, beat her, threw her down the stairs, and when she dared to complain about this—he looked her up in a mental asylum. Eventually, with her brother's help, Mrs. Phelps (whose first name I do not have) was released from this imprisonment. She ran away that very day with one of her

children. Why did she have to flee with her child to retain custody? Because in the nineteenth century, and for all the previous centuries of patriarchal history, men have always owned wives and children, as legal chattel property. All during the eighteenth and nineteenth centuries, if a man divorced his wife, she was not legally entitled to ever again see her children. Like surrogate-contract mother Mary Beth Whitehead, legal wives had no legal rights.

Susan B. Anthony came to the aid of Mrs. Phelps, took her in, helped find her sanctuary. She did so without shame. Some of Anthony's abolitionist friends chastised her for doing so. They told her she was endangering the women's rights movement and the anti-slavery cause. Anthony disagreed. She said:

Don't you break the law every time you help a slave to Canada? Well, the law that gives the father the sole ownership of the children is just as wicked, and I'll break it just as quickly. You would die before you would deliver a slave to his master, and I will die before I will give up the child to his father.

How many liberal, gender-neutral feminists are there today who would utter these words, who would take this risk, who would act on such a belief?

By the end of the nineteenth century, nine states and the District of Columbia finally permitted a judge—a white, middle- or upper-class male judge—to decide if a mother was wealthy enough or morally fit enough to be allowed to continue her obligation to her child. With no child support. And this was progress!

A lot has been said about how much the maternal presumption, a legal doctrine, favors mothers. Let me tell you: the maternal presumption never meant anything in a court of law when the father said, "Well, your honor, this mother has no money. She's been a go-go dancer. I think she's mentally unstable. She's narcissistic. She dyes her hair." For reasons like these, mothers have been denied not just custody but even visitation. These were some of the "deep" psychological problems that William Stern and the court used to deny Mary Beth Whitehead her parental rights. (Parental usually means paternal, not maternal.)

Contrary to myth, when custody is contested, fathers win easily and routinely. It is a very different situation when the issue is child support. When a father walks out, there is very little the wife can do to make him stay, make him pay decently (above the level of state welfare), or to make him see his own children. This is the common plight of most custodial mothers. Most fathers don't fight for custody. Most mothers are stuck with it, whether they want it or not. Most mothers

rise to this occasion heroically, with no help from anyone. But when fathers fight for custody, fathers win custody anywhere from 60 to 82% of the time, even when they're grossly unfit, as fathers or as husbands, and even when they've never been their child's primary caretaker.

In my study, in the United States, between 1961 and 1981, 82 percent of those fathers who contested custody won custody within two years. Eighty-seven percent had done no primary child care. One third were wife batterers. More than one third kidnapped their children and took them on "sprees." Nearly two thirds of these fathers tried to sensuously brainwash children against their mothers. Two thirds refused to pay child support for the very children they claimed to love. It is not always the good guys who fight for and get custody. It is—at least two thirds of the time—the bad guys who fight for custody.

Just when feminists began to organize for the right to abortion, and for equal pay for equal work, at that precise moment in history, men in every state legislature and in the judiciary, men running Hollywood studios and T.V. stations and newspapers, men who were economic bosses and/or whose patriarchal kingdoms had begun to tremble as wives moved for divorce, men everywhere started to say, "Oh, you want equality? You want men's jobs? You want to leave us? Okay, bitch! We'll take your children. They were only on loan to you. It's our sperm and our dollars that matter. They were only on loan to you."

In the landmark case of Dr. Lee Salk against his wife, Kirsten, Dr. Salk was granted custody—not because Kirsten was unfit and not because he was an involved father, but because the judge found him to be more intellectually stimulating and richer than his legal wife who was, after all, only his womb-man or "surrogate uterus." Many people applauded this decision as a progressive and liberal decision—which indeed it was.

Then there's Mary Beth Whitehead's case. Mary Beth was a New Jersey housewife and mother, who, for reasons unknown to me and, indeed, of no real business of mine, signed a contract to be a surrogate mother. She was psychiatrically interviewed and, once a month for nine months, inseminated by Noel Keane's Infertility Center of New York.

Mary Beth was impregnated with the semen of William Stern. Dr. Stern forced her to undergo, against her will, but by contract, an amniocentesis test. Not only did he want a baby to whom he was genetically related, he wanted one who was genetically perfect.

Whitehead was contractually on notice that, if the baby was genetically defective, she must have an abortion. If she didn't have an abortion, then Dr. Stern would no longer be responsible for the child, legally or economically.

Mary Beth had the amniocentesis test. It made her so angry that she

didn't tell the Sterns the sex of her child. And when it was time to deliver, she chose to have her legal husband, Richard, in the delivery room with her.

A woman faces all kinds of medical consequences and physical risks, including death, during pregnancy. Although the initial non-medically facilitated contributions of the future mother and father are comparable—she contributes the egg, he contributes the sperm—the similarities stop there. She is pregnant for nine months. She carries the baby, feels it moving inside her. She goes through labor. She delivers. She begins to lactate. She breastfeeds the baby. Mary Beth did all these things. Additionally, throughout her life she was being socialized into motherhood. Motherhood is not what men are socialized into. William Stern's position was in no way identical to or even comparable with Mary Beth Whitehead's.¹

On March 27, 1986, when she gave birth, Mary Beth saw that her new daughter looked like herself and like her other daughter, Tuesday. At that point, Mary Beth felt that she had made a terrible mistake. She could not honor that surrogacy contract. It was too inhumane. It was beyond her capacity to do so.

She called Noel Keane, the lawyer who in many ways functions like pimps and profiteers do in terms of women's sexual and reproductive capacities, and said, "I can't go through with this." And he allegedly replied, "Well, Mary Beth, okay. Take your baby home. We will find another surrogate mother for the Sterns. The worst that could happen is that they might want some visitation." And she allegedly said, "I'll give them all the visitation they want. I feel so bad. I feel so guilty."

Mary Beth went home and continued to breastfeed her daughter. On March 30, 1986, three days later, she let the anguished and arrogant Sterns have the baby. Within twenty-four hours, Mary Beth arrived at their door, distraught, weeping, having had no sleep. She pleaded, "I need to have the baby back. It's my baby. I can't give her up." The Sterns gave the baby back. (If they really thought she was crazy or an unfit mother, why would they have done so?) By April 12, 1986, Mary Beth allegedly informed the Sterns that she could not surrender her daughter. Mary Beth Whitehead continued to breastfeed and care for her for four and a half months.

The Sterns went to a lawyer, Gary Skoloff. And he, in turn, went to his colleague, Judge Harvey Sorkow. Now at this point in time, there had been no paternity test. The existing birth certificate said "Sara Eliz-

¹Had Mary Beth wanted to donate the eggs and had their "harvesting" been painful, dangerous or expensive, then in that case, egg donation would not have been the same as sperm donation.

abeth Whitehead." The baptismal certificate said "Sara Elizabeth Whitehead." But Judge Sorkow ignored these facts. All that William Stern had to say to the judge was that he was the genetic father of the child (that is was his sperm) and that he was ready to economically support the consequences of his sperm—and, or yes, that the "surrogate" mother was mentally unstable.

The judge didn't say, "Well, let me interview this woman." He didn't say, "Let me interview this woman's lawyer." He didn't even say, "Well, let's at least have a psychiatric kangaroo court in my chambers." On the basis of hearsay alone, he issued a custody order, and then he ordered it enforced. So one day, five policemen, with guns drawn, came to Mary Beth Whitehead's home, handcuffed her, and threw her into the back seat of a police car. Only then did they actually read the birth certificate in her possession. The child's name was Sara Elizabeth Whitehead. But their order was for a "Melissa Stern." Scratching their heads, the police returned to the courthouse. And Mary Beth fled, with her baby daughter in her arms, to Florida.

William Stern responded by putting a lien on the Whitehead house. He effectively halted all the Whiteheads' cash flow. Remember, the Whiteheads were a struggling, working-class family while the Sterns were comfortably upper-middle-class.

Hiding in Florida, without any financial resources, Mary Beth had that famous conversation with Dr. Stern, a conversation he taped secretly, the one in which she threatened to kill herself and her child.

She said, "Bill, why have you done this to me and my family? Please take the lien off." And he replied, "It's my baby." She said, "It's our baby." And then she said, "Okay. What do you want me to do, kill myself? Is that what you want? Do you want me to kill the baby? Is that what you're asking for?" Frankly, if I had been in Mary Beth's place, I might have sounded crazier than she did. Any normal mother under those conditions would.

Detectives hunted Mary Beth down. The police and private detectives hired by the Sterns came time and again, and they finally took "Baby M" away. They did this after Mary Beth had been breastfeeding the child for four-and-a-half months.

After that, Mary Beth was allowed to see her baby only two hours at a time, twice a week, in an orphanage with an armed sheriff standing guard over her. She had to travel four to six hours roundtrip for each of those two-hour visits.

Mary Beth Whitehead was put on trial by the legal system. But she was also put on trial by the media and by society. Watching coverage of her ordeal was, to me, like watching a version of the New Bedford, Massachusetts gang rape on the pool table, over and over again, day

after day, where the men in the bar cheered the rapists on. You do something like that to a woman and you kill her. The victim of the New Bedford rape was driven out of town. She allegedly began to drink and take drugs. (I would too—wouldn't you?) And died in a car accident in Florida. They said it was an accident. It was the inevitable consequence of what the rapists and our woman-hating society did to her. In Mary Beth Whitehead's case, it was not just a few bad guys who cheered her rapists on. It was the entire country.

Some feminists said, "We must have a right to make contracts. It's very important. If a woman can change her mind about *this* contract—if it isn't enforced—we'll lose that right! And we'll lose the Equal Rights Amendment." They didn't consider that a contract that is both immoral and illegal isn't and shouldn't be enforceable. They didn't consider that businessmen make and break contracts every second, renegotiate them, buy themselves out—with only money at stake. Only a woman who, like all women, is seen as nothing but a surrogate uterus, is supposed to live up to—or be held down for—the most punitive, most dehumanizing of contracts. No one else. Certainly no man.

Judge Sorkow ruled that the contract was enforceable and awarded the Sterns custody "in the best interests of the child." Indeed, this was just one of many contemporary custody battles between a legally married man and woman or between an adoptive couple and an impoverished birth mother. The child is usually awarded to the highest bidder. Whoever earns more money is seen as "better" for the child. How can a stay-at-home mother, like Mary Beth Whitehead, who earns no money ever be seen as the better parent? Even when the mother has a comparatively lucrative career she is usually seen as a selfish career-monster and therefore bad for the child.

Judge Sorkow ruled that the contract was not baby selling. However, if the baby were stillborn, or the mother miscarried, contractually the mother only gets \$1,000. But if she delivers a perfect, whole, living baby, which she surrenders for adoption, then—and only then—is she entitled to the \$10,000. Is that baby selling or not?

Judge Sorkow also rejected the idea that surrogacy contracts exploit women and create an underclass of breeders. He reached this conclusion even though, under the contract, the surrogate mother gets approximately fifty cents an hour. (Mary Beth refused the \$10,000. It was put in escrow and the interest that accrued contractually went to William Stern.) Now think: who is going to be so economically desperate that she will be happy and grateful to get fifty cents per hour? It will probably be working-class women, impoverished women, and/or Third World women—whose fertility is seen as a resource to be plundered by men who want genetically perfect babies in their own spe-

matic image. This kind of genetic narcissism means that already living children who need to be adopted — poor, black, minority, disabled, abused, abandoned, neglected children — are not being adopted. As a society, none of us is adopting such children *before* we sign surrogacy contracts, and *before* we decide to reproduce ourselves biologically.

As a start, we planned a feminist press conference at the Courthouse. And we kept going back. We demonstrated with whomever came to the courthouse to join us, with whomever called to offer their support. Local mothers of young children. Outraged mothers and fathers of grown children. I called at least two hundred feminists to join us. One liberal feminist expert in reproductive rights and motherhood said that she couldn't jeopardize her new-found celebrity as a neutral expert on network talk shows by joining us and appearing to "take sides." Another liberal feminist said that Mary Beth was too tarred and feathered and would only hurt our need for "main-stream respectability." A third liberal feminist said that Mary Beth was causing a lot of "anxiety" among lesbian co-mothers and infertile women who might themselves want the option of hiring someone just like her.

Eventually, the case was appealed to the New Jersey Supreme Court. The Court overturned Judge Sorkow's decision upholding the contract. It ruled that the contract was against public policy (in terms of baby selling and baby buying and in terms of the birth mother's right to change her mind) and could therefore not be enforced. And although it affirmed the lower court decision granting custody to the Sterns the court nevertheless acknowledged Mary Beth Whitehead's status as the mother and awarded her visitation rights. (Of course, why reward those who kidnap children?)

A partial victory at last. But New Jersey is just one state. Many courts in other states are hearing cases just like Mary Beth Whitehead's. They could rule in other ways.

Mary Beth Whitehead—the woman is brave. She went after what belongs to all of us. And we must not let her and others like her fight by themselves for our collective rights.

I call on everyone to join us at a rally tomorrow outside of Noel Keane's Infertility Center in NYC.