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### On the Proposed Legalization of Commercial Surrogacy: I Thought We Had Abolished the Sale of Human Beings

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## Keywords

United States, New York, New Jersey, surrogacy, mother, gestation, Baby M., Mary Beth Whitehead, birth mother, surrogate mother

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## Acknowledgements

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## ON THE PROPOSED LEGALIZATION OF COMMERCIAL SURROGACY: I THOUGHT WE HAD ABOLISHED THE SALE OF HUMAN BEINGS

Phyllis Chesler

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### KEYWORDS

United States, New York, New Jersey, surrogacy, mother, gestation, Baby M., Mary Beth Whitehead, birth mother, surrogate mother

Where were you the day we decided to put biological motherhood on trial? The day a judge in New Jersey ruled that a man's contract with a woman about his sperm is what's sacred and that pregnancy and childbirth are not? The day the psychiatrists decided that a biological mother's desire to keep her breast-feeding infant was proof of mental illness and that her flight "underground" was proof, not of heroism, but of an evil so great that the state had no choice but to publicly torture her for a period of two years, to ensure that no other woman would ever again try to break a contract with a man about his sperm. —Phyllis Chesler, *Sacred Bond: The Legacy of Baby M.* (1988)

**M**ORE THAN THIRTY YEARS AGO, I viewed the rise of legal, commercial surrogacy with fear and trembling. I immediately saw it as another kind of custody battle, one that pitted wealthy people against impoverished women.<sup>1</sup>

In 1986, I had published a pioneering and controversial book about custody battles—*Mothers on Trial: The Battle for Children and Custody* which documented the most profound anti-mother biases among both male and female lawyers, judges, and mental health professionals (Chesler, 1986).<sup>2</sup>

In 1987, when I read the headlines about the Baby M case, I immediately met with the birthmother's lawyers and traveled to New Jersey to organize pro-birthmother demonstrations outside the courthouse in Hackensack. Mary Beth Whitehead, Baby M's birthmother, had signed a surrogacy contract but chose not to give

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<sup>1</sup> I do not oppose altruistic surrogacy arrangements between friends or relatives in which no money changes hands. I do support providing legally enforceable protections for all those involved. However, these arrangements sometimes come to grief and when they do the birthmother-surrogate is always the more vulnerable and less moneyed party in any lawsuit.

<sup>2</sup> In 2011, I updated this work with eight new chapters and documented that certain things had gotten worse e.g. false accusations of child alienation by mothers, accurate allegations of child incest by fathers which led to awards of paternal custody.

up her daughter; at the time, she was within her legal right not to do so. Whitehead was a married mother of two other children, a high school graduate, and a Catholic.

She was breast-feeding her newborn when a court order sent armed officers to remove the baby so that the judge might perform a second parent adoption. At that point, I began to work with Harold Cassidy, the lawyer who represented Baby M's mother. In record time, Cassidy persuaded the New Jersey Supreme Court to legally ban surrogacy in that state (*Matter of Baby M*, 2020). Custody still resided with the sperm donor-father and his wife. Mary Beth retained her visitation rights and remained her daughter's sole legally recognized mother. However, visits soon ceased and their relationship was never repaired.

In 1988, I published a book about surrogacy: *Sacred Bond: The Legacy of Baby M* which contained a critique of commercial surrogacy in general and which covered the across-the-aisle activism this case inspired (Chesler, 1988).

This is where I ran into the liberal, gender-neutral feminist position on the subject. Many a good feminist warned me that if Whitehead was allowed to break her contract with a sperm donor, that no woman would ever again be trusted; that if we deserved the right to an abortion, then likewise, we deserved the right to rent out our wombs, anuses, mouths, hands, and vaginas for money. We had the "agency" to do so and stigmatizing or criminalizing those who did so was cruel and anti-feminist.

There was also a strong undercurrent of class bias among such feminists. The adoptive mother-to-be and the sperm donor father had advanced educations and were solidly middle class. Why would I prefer a high school graduate and a husband who was a sanitation worker as parents as compared to a more educated and monied couple?

Many feminists came around when Mary Beth was castigated by the mental health professionals who were appointed in the case because she played "Patty-Cake" incorrectly. I was able to get more than one hundred signatures on a public letter which stated "By These Standards We Are All Unfit Mothers" (Chesler, 1988; Peterson, 1987). The letter was signed by 135 well-known feminists and celebrities, was widely quoted in the mass media, and which I archived in my book, *Sacred Bond*.

I was also joined by many radical feminists in a large demonstration I organized outside Noel Keane's surrogacy clinic—the very clinic which had arranged this nightmare. The demonstration was also widely cited. Among other things, Keane had failed to show the "intended parents" the psychological report which stated that Mary Beth seemed "ambivalent" about giving up a child.

Many Catholics in New Jersey had joined our demonstrations—so far, so good, but when the Catholic Church came out against surrogacy, rather hilariously, some feminists castigated me for "being in bed with the Pope."

This all took place a long time ago. Now, years later, the issue of commercial surrogacy is back—and back with a vengeance.

Actually, commercial surrogacy as an issue and as a reality did not disappear. On the contrary. Countries worldwide and many American states began legalizing it. And guess what? Due to serious abuses inherent in this practice, they also began to change their minds. As foreign markets shut down, the demand became more intense in many American states.

Thus, New York State is now very intent on legalizing commercial surrogacy precisely because Third World and European countries have increasingly banned it (Wikipedia, 2020). Non-citizens are no longer allowed to hire a surrogate in India, parts of Mexico, Thailand, and in most European countries (Surrogate.com, 2019; Surrogacy Laws by Country, 2020). Crackdowns on human trafficking in terms of surrogacy have taken place in the Philippines and Cambodia.

Even as the practice has been condemned by both the European Parliament and the United Nations, various American states have upheld surrogacy contracts even when the “intended parent” or parents turn out to be very unsuitable, clearly even dangerous to an infant (M.C. v. C.M., 2017; Office of the United Nations High Commissioner for Human Rights, 2019a; Office of the United Nations High Commissioner for Human Rights, 2019b; UN General Assembly, 2016).

In New York State, in the spring of 2019, a small group of us, aided by a lobbyist, miraculously succeeded in keeping commercial surrogacy illegal in New York State. Our opposition was quite powerful and determined. They still are.

In January of 2020, Governor Andrew Cuomo announced that “New York’s surrogacy ban is based in fear not love, and it’s past time we updated our antiquated laws to help LGBTQ couples and people struggling with fertility to use commonplace reproductive technology to start families” (Cuomo, 2020). Cuomo’s bill has the dangerously misleading name “The Parent Child Security Act.”

Please note that Governor Cuomo does not even write: “*women* struggling with fertility,” only “people struggling with fertility.” I will not focus here on the ways in which “politically correct” people are using language to systematically disappear the word and the biological reality of: “women.”

The market for birthmother-surrogates primarily consists of infertile women, gay men, and Hollywood, television, and music celebrities, all of whom want “designer” gene babies in order to complete their families. Gay men are womb-less by Nature—but they do not wish to be cheated of parenthood for this reason alone. Heterosexual women and lesbians may have suffered an illness which has rendered them infertile; perhaps they’ve also delayed parenthood for the sake of their careers; or been negatively affected by environmental toxicities. They, too, do not wish to be cheated of parenthood for these reasons. Such people have money, feel entitled to get what they want and are willing to pay for it. From their point of view, economically marginal or impoverished women can be bought for “chump change,” especially when their economic options are so limited.

The groups that support “The Parent Child Security Act” are proudly and allegedly “progressive” groups. They are pro-business, pro-medical-reproductive businesses, and pro-lawyer businesses which handle adoptions, surrogacy, and infertility. The present list of groups include: Academy for Adoption and Assisted Reproductive Attorneys, Albany Damien Center, Alliance for Fertility Preservation, American Society for Reproductive Medicine, Auburn Theological Seminary, The Breaties, Central Conference of American Rabbis, Equality New York, Family Equality, Gay Men’s Health Crisis, Hispanice Health Network, Hudson Valley LGBTQ Community Center, Human Rights Campaign, Lambda Legal, Latino Commission on AIDS, The LGBT Community Center of NYC, Lesbian and Gay Democratic Club of Queens, The LOFT: LGBT Community Center (Westchester County), Men Having Babies, National Center for Lesbian Rights, National Council of Jewish Women NY, New York Attorneys for Adoption and Family Formation,

New York City Bar Association, New York State Bar Association, New York Transgender Advocacy Group, Oasis, Latino LGBTs Wellness Center, RESOLVE: The National Infertility Association, Stonewall Democratic Club of NYC, SAGE: Advocacy & Services for LGBT Elders, The Chick Mission, The LGBT Bar Association of Greater New York, UJA-Federation of New York, Union Theological Seminary, and Women's Bar Association of NY (Protecting Modern Families Coalition, 2020).

Although the business of commercial surrogacy seeks to satisfy the genuine longing for a newborn child of one's own, it is also a rather heartless undertaking, one that resembles (but is not exactly the same) as slavery. Rape and sexual assault no longer take place. The birthmother is not required to do agricultural or domestic labor for her master while she is pregnant. However, a slave master was often genetically related to his slave child, that is, he was the father, and the slave mother had as little control over remaining in her child's life as do today's birthmother surrogates. True, unlike slave mothers, our reproductive Handmaids get paid and are only monitored, controlled, perhaps even confined for the duration of their pregnancies, not afterwards.

Still, one can see the eerie parallels between reproductive prostitution and female slavery.

If commercial surrogacy is not exploitation of the poor—then why do wealthy women never serve as gestational mothers for poor and infertile women who could never afford their “services”? Surrogates are always poor women, often with other children to support, and with few economic choices. Some anti-surrogacy activists fear that in New York City, the inevitable pool of birthmother-surrogates will be poor women of color who will bear white babies from harvested Caucasian eggs.

In Mary Beth Whitehead's day, surrogates were paid \$10,000 or less plus medical expenses. Today, they are paid between \$30,000 to \$40,000 with \$5,000 more for each extra baby. Implantations may not work immediately. Thus, this sum comes to \$3,300 a month for “work” performed 24/7 for at least a 12-month period. This amounts to an hourly fee of about \$4.57.

However, I am not suggesting that paying a higher fee for baby selling would render this human rights violation acceptable.

In my view, commercial surrogacy is baby selling, baby buying, reproductive prostitution, and the commodification of women. It is a big business, one in which doctors and lawyers profit far more than the birthmother-surrogates do.

Commercial surrogacy is essentially matricidal. Surrogacy has now become a way of slicing and dicing biological motherhood into three parts: an egg donor, who undergoes painful and dangerous IVF procedures; a “gestational” mother who faces all the risks of pregnancy and childbirth; and an adoptive mother or father (Klein, 2017; Rothman, 1989).

This vivisection of motherhood makes it almost impossible for a birthmother-surrogate to win custody or visitation for any reason (Raymond, 1995; Corea, 1985). Only the purchasing sperm donor (the “intended parent”) has a genetic and legally enforceable relationship to the newborn. His partner, male or female, is often the odd person out in terms of the child's genetic makeup, traits, and appearance and must adopt the child.

Commercial surrogacy contracts also breed a false equality between sperm, egg and nine months of pregnancy and childbirth. They completely disappear the pregnant woman and childbirth. Doing so disenfranchises womankind even further and privileges external genetic material over the biological reality of pregnancy, which includes an exchange of blood, cells, emotions, ideas, and so on. Many pregnant women bond with the developing embryo in their bodies whether or not the genetic material belongs to them or to their husbands. Developing fetuses also bond with their birth mothers and this may be one of the many reasons that adopted children are so often at risk psychiatrically.

Saying that this is a possibility is highly taboo.

A five-minute donation of sperm and a painfully harvested egg are not the same as, and should not pre-empt, nine months of pregnancy and childbirth with all its attendant short- and long-term medical risks.

Legalizing commercial surrogacy in New York state will turn it into a site for reproductive trafficking. Why not adopt children who are in need of families?

In the past, gay individuals and couples, as well as single heterosexuals, were rejected as adoptive parents. This is no longer true (Spence-Chapin, 2019). Why is this option not being exercised? Genetic narcissism, loyalty to one's ancestors, anti-black racism, and a desire not to be investigated by state authorities are possible answers.

Surrogacy also has risks. No one can predict whether the "gestational breeder" (what a heartless phrase this is), will develop a life-threatening illness or will remain forever haunted by the child she bore and gave away.

But there is something else, something that few people are willing to consider. Children obtained via surrogacy are, by definition, also separated from their birthmothers and are thus subject to whatever trauma this separation may cause. Children obtained via commercial surrogacy are essentially adopted children.

However, there is another reason people might choose commercial surrogacy over adoption. Were the "intended parents" to adopt, they would have to be carefully vetted. Their past histories would be scrutinized by mental health professionals and by the state. Most surrogacy legislation and contracts only provide for vetting the birthmother-surrogates, no one else.

To some extent, the egg donor is vetted. Many people choose white, blonde, "pretty" girls with blue eyes. Is the purchaser vetted? Not really. But this is very dangerous. Doesn't it matter if the "intended parents" have criminal records; are pedophiles, alcoholics or drug addicts; run brothels here or abroad; engage in trafficking, or, like some biological parents, are simply incapable of providing a stable and loving home for a child?

Despite the hair-splitting insistence that the birthmother-surrogate is not selling the baby — she is merely renting out her womb — if she does not turn over, that is, sell the baby at birth, she is violating the contract and will receive no money. Indeed, if the birthmother-surrogate decides to keep the baby she has carried for nine months, she will face a lawsuit which she is totally ill-equipped to wage.

Ironically, almost counter-intuitively, many progressives, including feminists, who favor women's empowerment, support surrogacy—just as they support por-

nography and prostitution. Such feminists claim that women deserve equality because we are no different than men; that even women in desperate circumstances have “agency;” that women have to eat and feed their children, and that we cannot negatively judge the (forced) choices they make.

Some progressives, including feminists, may view biological motherhood as an animal function, best relegated to the lower classes, just as upper class women once sent their newborns to a wet nurse. Some lesbian feminists seem to identify with the plight of their gay brothers and not with womankind whose resources they are happy to strip-mine. Whether they are socialists or capitalists, their sympathies are surprisingly male-identified, and disassociated from woman’s fate.

To be fair, they are also in favor of scientific progress which may overturn all biological givens and which may question whether anything is biologically “given.” Such feminists also tend to be in favor of social constructionism and transgender transitions.

Does banning commercial surrogacy in any way endanger women’s right to abortion? I think not. Viewing a woman as merely a vessel for property that contractually belongs to “intended parents” erodes and is in direct conflict with the grounds for a woman’s right to an abortion (Paulin, 2017). The embryo/fetus/developing child is part of the woman, it belongs to her because it is in her body. This fact gives her the right to terminate a pregnancy. If others—the surrogacy profiteer, the sperm or egg donor—claim this right, then what is to stop the state or the church from making this same claim?

If the New York State Assembly legalizes commercial surrogacy, we, the taxpayer, may be stuck with another kind of bill for the neglected, abused or unwanted children born of commercial surrogacy and for the long-term health care needs of birthmother-surrogates whose pregnancies led to complicated medical conditions.

I will give the last word to Harold Cassidy, Mary Beth Whitehead’s lawyer, at a 1988 press conference which followed the New Jersey Supreme Court’s decision, which reinstated Whitehead’s parental standing and ruled commercial surrogacy as against public policy.

“Today’s decision is a major triumph for human decency. Paying a woman to give away her baby is not a medical solution to infertility. Instead, it is a commercialization of conception, pregnancy, and childbirth that is contrary to public policy and unquestionably harmful” (Chesler, 1988).

That was then. In 2019, New Jersey legalized commercial surrogacy. New York State hopes to do so in 2020.

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**Phyllis Chesler**, Ph.D, is an Emerita Professor of Psychology and Women’s Studies at City University of New York. She is a best-selling author, a feminist leader, a retired



psychotherapist and an expert courtroom witness. Dr. Chesler is a co-founder of the Association for Women in Psychology (1969), The National Women's Health Network (1974), and The International Committee for the (Original) Women of the Wall (1989). She is a Ginsburg/Ingerman Fellow at The Middle East Forum, and a Fellow at the Institute for the Study of Global Anti-Semitism and Policy (ISGAP).

Dr. Chesler was an early 1970s abolitionist theorist and activist: She wrote about and delivered speeches which opposed rape, incest, pornography, sex and reproductive prostitution, and sex trafficking. She organized and/or participated in demonstrations outside the movie *ITAL Snuff*; outside Dorian's Red Hand to protest the murder of Jennifer Levin by Robert Chambers after a night of drinking there; organized repeated demonstrations outside the Hackensack, New Jersey courthouse where the Baby M hearings were underway and outside the surrogacy pimp Noel Keane's NYC clinic; outside the courthouse when Joel Steinberg was sentenced for the murder of Lisa Steinberg; and in numerous ways that concerned the trial of Aileen Carol Wuornos for which she assembled a team of expert witnesses which were never called upon.

She is the author of eighteen books, including the feminist classic *Women and Madness*, as well as many other notable books including *With Child: A Diary of Motherhood*; *Mothers on Trial: The Battle for Children and Custody*; *Sacred Bond: The Legacy of Baby M; Woman's Inhumanity to Woman*; and *Women of the Wall: Claiming Sacred Ground at Judaism's Holy Site*. After publishing *The New Anti-Semitism* (2003), she published *The Death of Feminism: What's Next in the Struggle For Women's Freedom* (2005) and *An American Bride in Kabul* (2013), which won a National Jewish Book Award. In 2016, she published *Living History: On the Front Lines for Israel and the Jews 2003-2015*, in 2017 she published *Islamic Gender Apartheid: Exposing A Veiled War Against Women*, and in 2018, she published *A Family Conspiracy: Honor Killings*, and a Memoir: *A Politically Incorrect Feminist*.

Dr. Chesler has published four studies about honor-based violence, focusing on honor killing, and penned a position paper on why the West should ban the burqa; these studies have all appeared in *Middle East Quarterly*. Based on her studies, she has submitted affidavits for Muslim and ex-Muslim women who are seeking asylum or citizenship based on their credible belief that their families will honor kill them. She has archived most of her articles at her website: [www.phyllis-chesler.com](http://www.phyllis-chesler.com)

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