BEYOND SURROGACY: GESTATIONAL PARENTING AGREEMENTS UNDER CALIFORNIA LAW

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INTRODUCTION

Although she cannot bear her own children, Crispina Calvert and her husband Mark desperately wanted to have a child that was genetically related to both of them. To fulfill their dream, the Calverts turned to a non-coital reproductive technology known as gestational surrogacy.[1] They contracted with a co-worker of Crispina's, Anna Johnson, to gestate their genetic fetus. Mark provided the sperm, Crispina provided the egg, and Anna provided the womb. Their agreement required that, after delivery, Anna would surrender the child to the Calverts. However, during the course of her pregnancy, Anna Johnson changed her mind and decided she could not part with the child developing within her. Anna Johnson

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1. Gestational surrogacy is a procedure that allows an infertile woman with intact ovaries to have one of her eggs fertilized and implanted into the womb of another woman, who is expected to carry the fetus to term. See *infra* note 23 and accompanying text for a discussion of Crispina Calvert's infertility. See *infra* note 25 for a more detailed description of this procedure. *See also infra* note 3.

For purposes of this Article, "gestational surrogacy" is defined as the *in vitro* fertilization (IVF) of an embryo from an infertile woman and her partner, and its subsequent gestation by a second woman. Variations on this technique exist, such as the impregnation of the genetic mother, followed by the lavage or "flushing" of the embryo from her womb, and its subsequent implantation into the gestational mother. For purposes of this discussion, however, the varieties of techniques which may be used to separate genetic and gestational motherhood are irrelevant.

sued the Calverts for custody, petitioning the court to declare her the legal mother. Johnson lost her case. A month after his birth, the court in *Johnson v. Calvert* gave the Calverts full legal and custodial rights over the boy.[2]

Gestational surrogacy is a non-coital reproductive technique in which Crispina Calvert's eggs were harvested from her ovaries, then fertilized in a laboratory with her husband's sperm, and the resulting zygote was implanted surgically into Johnson's womb.[3] Gestational surrogacy can be distinguished from the better-known traditional surrogacy procedure — wherein the gestational mother is also the genetic mother — in that gestational surrogacy separates the genetic and gestational features of mothering.[4] Unless she is a relative of the genetic parents, the gestational mother is not genetically related to the child she carries in her womb.[5] The child born of a gestational parenting agreement, therefore, can be said to have two biological mothers: a genetic mother and a gestational mother.

Until recently, biological motherhood was determined by whether a woman gave birth to a child; however, modern non-coital reproductive technologies are challenging the ways in which biological parenthood is defined. While medical technology has dramatically changed the biology of human reproduction, legal rules governing the issues raised by splitting and sharing the biological functions of motherhood have not kept pace. Instead, in the *Johnson* case, Crispina Calvert was termed the "real mother" and Anna Johnson's contribution was analogized to that of a "foster mother."[6]

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2. No. X633190 (Cal. Super. Ct. Oct. 22, 1990). See *infra* Part I, section A, for a more detailed discussion of this case.

3. For a more detailed description of the medical procedures used, see P. SPALLONE, BEYOND CONCEPTION, THE NEW POLITICS OF REPRODUCTION 56–64 (1989); and Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 CASE W. RES. L. REV. 1, 2–6 (1988–89).

4. Traditional surrogacy allows a fertile woman to be artificially inseminated with the sperm of a fertile man in order to bear a child which the natural father's infertile wife will later adopt. This procedure, which was highly publicized in In re Baby M, 109 N.J. 396, 537 A.2d 1227 (1988), is known as a surrogacy agreement. The agreement generally provides for the infertile couple (the sperm-contributing father and his wife) to pay the expenses involved in the pregnancy to the "surrogate" birth mother, often along with some additional compensation for her time and effort.

5. This Article uses the terms "gestational mother" or "birth mother" whenever possible. Use of the term "surrogate" is objectionable and dehumanizing. The birth mother has a personal, intimate relationship with the child who is the object of the agreement. She is a "surrogate" only in the sense that she is not expected to be the child's custodial parent. To the fetus growing in her womb, the gestational mother is not a surrogate for anything. She is the fetus's first human relationship.

6. *See infra* Part I, section A, for a discussion of the court's decision.

The novel dispute over legal maternity focused media attention on the need for a legal definition of motherhood. Although a few states have attempted to formulate rules for dealing with some of the legal problems raised by the use of non-coital reproductive technologies,[7] the California legislature has not yet addressed these issues.[8] The need for rules governing the determination of motherhood, where these techniques are used, has become acute, since disputes between parties using non-coital reproductive procedures have begun to arise in the courts.

Separating the biological aspects of motherhood into two distinct components creates analytic, moral, social, and legal difficulties.[9] When one woman contributes the genetic material and another nurtures the fetus until birth, disputes may arise initially over legal maternity and then over custody. Unfortunately for the parties involved in gestational surrogacy agreements in California, no clear answers to these questions currently exist. California statutory law only addresses non-coital reproductive technology by providing for the determination of legal paternity where a woman is artificially inseminated by an anonymous sperm donor. California does not yet address the issues of legal maternity raised by applying non-coital technologies to the maternal component of reproduction.[10] While it would be simple enough for the California state legislature to create a maternity presumption, a threshold question must be considered.[11] Which of two women who have contributed

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7. *See infra* note 75.

8. See *infra* Part III for a discussion of California statutes addressing the determination of legal paternity.

9. Some commentators have suggested that procreation may be segmented into "stages." *See* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 408–410 (1983); and Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986). The first stage of the process may be termed "conception," the second "gestation and birth," and the third "rearing." Dividing procreation into these (or other) stages demonstrates a recognition that medical technology can now control reproduction at various points between conception and birth. Previously, if a woman made reproductive decisions at all, she had little or no control over the ensuing process. Now, modern reproductive technology allows prospective parents to select the sex of the fetus, to screen it for genetic defects, and to remove and freeze embryos for later use. As discussed in the text, however, separating the various functions of reproduction and assigning them to different women inevitably leads to disputes over who is the "real" mother.

10. See *infra* Part III for a discussion of the relevant statutes.

11. A maternity presumption would actually be a substantive rule of law, conclusively determining which woman is the child's legal mother. See 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§ 5121–5122 at 541–573 (1977), for a discussion of the history and policy underlying legal presumptions. *See also infra* note 136 and accompanying text.

to the child's existence should be declared the child's legal mother?[12] For any legal solution to be both fair and effective, the underlying moral and social issues must first be examined. Then, a legal analysis of the competing claims can be made on the basis of the values to be implemented.

Before any rule can be formulated, issues of race, class and access to political power that lurk beneath the surface of commercial surrogacy agreements must be confronted. Although traditional surrogacy agreements are more likely to take place between women of similar race and class backgrounds, this may be less true for gestational surrogacy agreements.[13] A gestational mother may be of another race or social class than the genetic mother.[14] Alternatively, she may be a friend or family member who agrees to carry a fetus to term for a woman who is unable to complete a pregnancy.[15] A rule addressing this issue needs to be responsive to the various contexts in which these agreements may be made.

In cases where racial and socio-economic disparities exist, gestational surrogacy may approach the "rent-a-womb" scenario which many feminists fear.[16] Less extreme concerns include the po-

12. An alternate or additional question may be: Why should only one of these women be considered the child's mother? A detailed analysis of the issues raised by shared visitation or custody, however, is beyond the scope of this Article.

13. *See infra* notes 65–69 and accompanying text.

14. *See infra* Part I, section A.

15. Kim Cotton, a thirty-four year old, married English woman with two children of her own bore a child, under a paid traditional surrogacy agreement, for an American couple in 1985. Although she swore she would never repeat her surrogacy experience, Ms. Cotton is expecting twins, fertilized by IVF, for her friend Linda Mayne and Ms. Mayne's fiancé, Robin Nelson, in July 1991. *See* Independent, Jan. 4, 1991, Home News, at 2.

Kim Cotton is not the only woman to act as a gestational birth mother for a friend. Two Australian women gave birth to children fertilized from their sisters' genetic embryos. *See* Charo, *Legislative Approaches to Surrogate Motherhood*, 16 L. MED. & HEALTH CARE 96, 104 nn.70a–70b (1988).

16. This argument has been used to justify outlawing all forms of surrogacy. *See, e.g.*, Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 73–74 (1988).

Few scholars have examined the effects of surrogacy on the various constituencies of women who are likely to be involved in these arrangements. Some feminists have chosen to discuss the political, moral, and strategic consequences of choosing to support, enforce, or outlaw surrogacy contracts. No commentator has addressed directly the effects of surrogacy on women of color and low-income women. Instead, the interests of these women have been subsumed by the interests of women as a whole. It may be incorrect to assume that surrogacy affects all women in the same ways. Surrogacy may affect differently situated women in ways that are unique to themselves and their circumstances.

tential for exploitation and misunderstanding.[17] Underlying all of these considerations is the normative question of whether legal and social institutions should lend their enforcement powers to these agreements.

Those who argue for enforcement of gestational surrogacy agreements claim that this technology offers reproductive options to people who would otherwise be unable to have genetically related children.[18] Gestational surrogacy may also be seen as providing financial opportunities to women who would otherwise have fewer economic choices. Further, some might argue that women who enjoy pregnancy and childbearing may see this procedure as an opportunity to share themselves with women who are unable to bear their own children. Viewed in these ways, either form of surrogacy may be seen by some as an attractive alternative to traditional adoption.[19] Although surrogacy may be a positive experience when the gestational mother cheerfully agrees to surrender the infant after its birth and the contracting parents happily accept, the law must be prepared to address those cases where the agreement goes awry.[20]

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17. In the most publicized traditional surrogacy arrangement in the United States, the *Baby M* case, the court found that surrogacy contracts were void because of the coercive nature of a pre-birth relinquishment of parental rights. Since such relinquishment was not enforceable by statute in the adoption context, the court declared it was also against public policy in the surrogacy context. *See* In re Baby M, 109 N.J. 396, 434–44, 537 A.2d 1227, 1246–50 (1988).

18. Whether genetic parenting should be encouraged where the only option open to prospective parents involves expensive, perhaps dangerous, and still experimental surgeries is a question which should be examined by doctors, legislators, and more importantly, women. Considering the profound value that genetic parenting has for many people, however, whether the technology is freely available or legally and medically restricted may only determine the amount of desperation and the cost involved in choosing a non-coital reproductive alternative.

19. See Andrews, *supra* note 16, at 74, for a discussion of the analogy between adoption and surrogacy. Some of the debate over adoption and "true" parenthood is applicable to gestational surrogacy. Adoption, however, concerns a decision by the state to create parental rights in a person who may or may not be genetically related to the pre-existing child. The issues surrounding gestational surrogacy concern whether gestating a genetically unrelated child confers at least some of the attributes of legal or social maternity on the woman responsible for the gestation. In this manner, gestational surrogacy is distinct from adoption and presents unique challenges for legal and ethical theorists.

Further, as George Annas has noted, the analogy is not entirely accurate in its focus. "Adoption seeks to find rearing parents for children without them; surrogacy seeks a child for would-be rearing parents." Annas, *Fairy Tales Surrogate Mothers Tell*, 16 L. MED. & HEALTH CARE 27, 28 (1988).

20. It is likely that there is a much larger number of these arrangements than we may otherwise assume from the media. These private agreements generally only become public when they go wrong and the parties threaten or commence legal proceedings.

Coherent legal rules must be established to determine which woman will be given maternal rights when the parties dispute parentage and custody.

Gestational surrogacy can, therefore, be seen as a challenge to profound, often unexamined notions of motherhood.[21] This Article seeks to analyze the essential nature of motherhood in order to determine which of two women, both of whom have made biological contributions to a child's existence, will be given legal maternity rights. Part I discusses the decision in *Johnson v. Calvert*.[22] The *Johnson* case illuminates some of the problems that are likely to arise. Part II addresses feminist analyses of traditional surrogacy, which can and should inform an examination of gestational surrogacy. This section also addresses the interlocking race, class and gender issues which gestational surrogacy raises. Part III analyzes California statutes relating to artificial insemination and paternity, and discusses whether these rules are applicable to gestational surrogacy. Although extending the application of these statutes to a determination of legal maternity is possible, such a use would be awkward, inadequate, and contrary to the intent of the California legislature. Part IV suggests a statutory definition of legal maternity: The birth mother is the legal mother of the child unless and until she relinquishes her parental rights in a state-approved adoption proceeding.

I. DEFINING MOTHERHOOD: GESTATIONAL SURROGACY IN PRACTICE

A. Johnson v. Calvert

An infertile[23] Orange County, California couple, Mark and Crispina Calvert, agreed to pay Anna Johnson $10,000[24] to gestate

21. Until recently there has been no need to define explicitly who was a mother. The biological mother was the woman from whose womb the child was born. *See* Stumpf, *supra* note 9, at 187 n.1.

22. No. X633190 (Cal. Super. Ct. Oct. 22, 1990).

23. Crispina Calvert's infertility stemmed from the removal of her uterus, necessitated by uterine tumors. She has healthy ova, however. She is therefore capable of egg donation, but not gestation. L.A. Times, Aug. 14, 1990 at A1, col. 4 (Orange County ed.).

Infertility is medically defined as a condition whereby a woman is unable to successfully conceive after having had unprotected intercourse for at least one year. *See* Taub, *Surrogacy: A Preferred Treatment for Infertility?*, 16 L. MED. & HEALTH CARE 89 (1988); *see also* P. SPALLONE, *supra* note 3, at 65–66. Since conception is the fertilization of a woman's egg by a man's sperm, infertility affects both women and men. This Article, however, only addresses the effects of infertility on women.

24. L.A. Times Magazine, Jan. 20, 1990, at 10.

the Calverts' genetic embryo.[25] Anna Johnson, a licensed vocational nurse who worked with Crispina Calvert, is the single mother of a three year old daughter and a sometime welfare recipient. Anna Johnson is of African, Native American, and Irish heritage.[26] Mark Calvert is white; Crispina Calvert is Filipina.[27]

The pregnancy began well. The Calverts drove Johnson to her medical appointments, brought her food, and made two early payments on the surrogacy contract.[28] Sometime during her pregnancy, however, Anna Johnson changed her mind about the agreement she had made with the Calverts.[29] She claimed to have

25. The procedure the Calverts and Anna Johnson used is a combination of IVF and gamete intra-fallopian transfer (GIFT). IVF requires that a woman's reproductive cycle be modified by superovulation, i.e., the use of powerful hormones that stimulate excessive ovulation. Once the woman produces more than one egg within a single menstrual cycle, the eggs are "harvested" using a laparascope (harvesting involves the insertion of a lighted tool into the woman's abdomen, allowing the doctor to view the ovaries, followed by the insertion of a pair of forceps which are used to grasp and rotate the ovary, and the subsequent suctioning of the ripe eggs from the follicles). The eggs are then united with prepared sperm and placed in a fluid bath of nutrients derived from female reproductive organs and antibiotics. Eventually, it is hoped, fertilization will occur. Once fertilized, the embryo may be inserted into the womb of the woman who donated the ova or that of a woman biologically unrelated to the embryo (the GIFT procedure). See P. SPALLONE, *supra* note 3, at 56–64, for a more complete discussion of the procedures and risks associated with IVF. See also Sherwyn v. Department of Social Servs., 173 Cal. App. 3d 52, 56–75, 218 Cal. Rptr. 778, 780–81 (1985), for a description of surrogacy procedures.

The success rate of IVF is currently quite low, so it is likely that the woman from whom the ova have been removed will have to undergo a number of cycles of harvesting, embryo fertilization, and implantation. See P. SPALLONE, *supra* note 3, at 75, for a discussion of the success rate of IVF (citing 1985 figures from the Voluntary Licensing Board in Britain in which 364 women gave birth to babies out of 3,717 women undergoing IVF treatment). Patrick Steptoe, one of the developers of IVF, claims that out of 767 "clinical pregnancies" there were 500 births, and he alleges his Bourn Hall (England) clinic has a twenty percent success rate. He does not state, however, the number of attempts at either fertilization or implantation. *See* Steptoe, *The Role of In Vitro Fertilization in the Treatment of Infertility: Ethical and Legal Problems*, 26 MED. SCI. & L. 82, 83 (1986).

26. L.A. Times, Sept. 21, 1990, at A24, col. 3 (Orange County ed.); *see also* L.A. Times Magazine, Jan. 20, 1991, at 10. Although she is of a mixed heritage, Anna Johnson has been identified as "black" by the media.

27. *Id.* The race of the parties is relevant to the debate over whose genes are involved. At one point, Anna Johnson's attorney claimed that the child was the result of a sexual relationship which occurred between Johnson and an unnamed man, at about the time the Calvert's embryo was implanted. L.A. Times, Sept. 19, 1990, at B5, col. 4 (Orange County ed.). This fact is also relevant to the question of whether race plays any part in the courts' determination of whose interests deserve the most protection in this cases.

28. L.A. Times, Aug. 14, 1990, at A1, col. 4 (Orange County ed.).

29. It is unclear when this change occurred. Sara Duran, from whom Anna Johnson and her daughter rented a room, alleged that Johnson did not care about the baby

bonded with the child she carried for the Calverts while it was *in utero*. As a result, she changed her mind about relinquishing the infant to the Calverts.[30] As her due date neared, she sued the Calverts to gain full parental rights to the fetus, claiming "fetal neglect." Johnson claimed that the "fetal neglect" occurred when the Calverts put her under such stress that she began to experience contractions.[31] She stated that the Calverts were guilty of "moral depravity" when they served her with a *guardian ad litem* order while she was in the hospital experiencing premature contractions.[32] The Calverts claimed that they were concerned that Johnson would deliver the baby early and give it to another couple.[33]

Further conflicts ensued. At one point, Anna Johnson claimed that the baby was the product of a sexual relationship she had at approximately the same time that the Calverts' embryo was implanted.[34] Later, she conceded that the fetus was genetically related to Mark and Crispina Calvert.[35] However, Johnson argued that her Native American ancestry also made the child she carried Native American, and thus subject to tribal laws on adoption by non-Indians. Tribal officials immediately disagreed.[36]

On September 19, 1990, Anna Johnson gave birth to a baby boy. On October 22, 1990, the court held that the Calverts are his legal parents.[37] The court claimed that Anna Johnson's role was

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and only wanted the money. Johnson claims that this is untrue. L.A. Times, Aug. 30, 1990, at B1, col. 5 (Orange County ed.).

30. L.A. Times, Sept. 26, 1990, at B4, col. 3. Whether Anna Johnson truly "bonded" with the child has been questioned. L.A. Times, Aug. 30, 1990, at B1, col. 5.

31. L.A. Times, Aug. 28, 1990, at A1, col. 2 (Orange County ed.).

32. L.A. Times, Aug. 14, 1990, at A1, col. 4 (Orange County ed.).

33. *Id.*

34. L.A. Times, Sept. 19, 1990, at B5, col. 4 (Orange County ed.).

35. *Id.*

36. Ms. Johnson is part Cherokee and part Choctaw. Her claim that the child is protected by Native American tribal law is based on the fact that her (part-Indian) blood flowed into the placenta via the umbilical cord. Indian tribal law experts said that her claim would not stand, however, as genetic ancestry determines tribal membership. L.A. Times, Sept. 15, 1990, at B5, col. 1 (Orange County ed.).

37. Johnson originally was allowed daily and then twice weekly visits to the Calvert's home to see the baby boy. L.A. Times, Sept. 28, 1990, at A1, col. 5 (Orange County ed.). On October 22, 1990, the trial court found that the Calverts are the legal parents of their genetic child. Anna Johnson's maternity and visitation rights have been extinguished by the court's ruling. She is expected to appeal; however, an appeal is likely to be ineffective since by the time it is heard, the child will have come to know the Calverts as his parents. The court probably will not change the boy's legal or custodial status at that time. L.A. Times, Oct. 24, 1990, at A1, col. 3.

like that of a "foster mother" to the child she delivered, and that she cared for him when the "natural mother" was unable to do so.[38]

In the absence of a predefined standard for determining legal maternity where the genetic and gestational components of motherhood are separated, in cases like *Johnson*, that decision could be made on the basis of arbitrary, capricious, discriminatory and irrational factors. For example, a judge could make a decision on the assumption that a single, minority, nonwhite, welfare mother would be less able to care for a child than a financially stable, married, white couple. A judge may have a sense that it is somehow inappropriate to place a seemingly white child with a nonwhite mother.[39] One certainly wonders whether if Anna Johnson were a white, married college graduate, the court would have referred to her as a "human incubator."[40]

Further, Crispina Calvert is unable to gestate her own children. Although her ovaries are intact, her uterus was removed during a partial hysterectomy. Without resorting to some non-coital reproductive technique, such as gestational surrogacy, Crispina Calvert is unable to become a genetic parent. A woman's medical inability to carry her own child could weigh heavily in the decision to grant her legal maternity rights.[41] In addition, a written agreement

38. L.A. Times, Oct. 23, 1990, at A24, col. 1. The court did not issue a written opinion; however the judge did speak to the media at length when the court announced its decision.

39. Katha Pollitt has speculated that the Calverts may have chosen a black birth mother in order to ensure that the lack of a genetic connection between her and the child would be especially evident. *See* Pollitt, *When Is a Mother Not a Mother?*, THE NATION, Dec. 31, 1990, at 825. Pollitt's article is one of the most thoughtful pieces written on the moral and ethical issues involved in surrogacy.

Interestingly, the media focused a great deal of attention on the fact that Anna Johnson gestated a non-black child. Virtually no attention has been given to Crispina Calvert's race. It is as though by marrying a white man, Crispina Calvert became white herself and lost her Filipina heritage.

The tendency to want to place children with adults sharing the same ethnic and racial background has been codified by statute. California Civil Code section 275 states that racial, ethnic, cultural, and religious backgrounds are to be considered in placing children in foster care. CAL. CIV. CODE § 275(b)–(c) (Deering Supp. 1991). The same considerations are to be considered in placing children for adoption. CAL. CIV. CODE § 276(b)–(c) (Deering Supp. 1991).

40. L.A. Times, Oct. 24, 1990, at A1, col. 3.

41. Jane Ussher discusses the socio-cultural association of "womanhood" with "motherhood" and suggests that society views maternity as necessary to a woman's self-identity. Thus, women who choose not to have children, or are incapable of having them, may be seen as deviant or pitiful. J. USSHER, THE PSYCHOLOGY OF THE FEMALE BODY 99–100 (1989). If this close identification of a woman's role as mother with her female identity is actually a generally accepted belief as Ussher claims, then the court may have assumed that Crispina Calvert could not be complete without a child,

could lead the court to believe that the genetic mother had more of a "right" to custody than the woman who gestated the baby.[42]

Another factor could be that a woman like Anna Johnson might not appear to "deserve" to be the legal mother of the child she gestated for the Calverts. Anna Johnson previously had two miscarriages and two stillbirths but withheld this information from the Calverts at the time of the agreement.[43] The court could have seen Johnson's willingness to enter the agreement as a manifestation of a desperate desire to have another child. Possibly, the court assumed Johnson never truly intended to surrender the child. However, while the Calverts were also desperate to have a genetically-related child, the court apparently did not hold their overwhelming desire against them. The court ignored the obvious parallels between the parties' desires, as well as the difficult question of how to prioritize their respective rights by taking a position that Anna Johnson was in no way a mother to the child she carried. Moreover, the court's decision effectively punished Johnson for being unable to realize before signing the contract that she could not give up the child.

Anna Johnson's character was further denigrated by the media attention given to her legal difficulties. During her pregnancy, Johnson was discovered to have obtained $4,600 more in food stamps than she was actually entitled to receive.[44] Although initially charged with felonies for receiving the overpayments, a judge later reduced the charges to misdemeanors, claiming the payments were the result of an "oversight" by the county. Johnson eventually pleaded guilty to the misdemeanor charges.[45] Whether the overpayments resulted from fraud on the part of Johnson, or an oversight by the county, the media saw these problems as an indication

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while Anna Johnson had already fulfilled her role expectation as a mother of her three year old daughter. However, the inverse of this reasoning would also be true. If women's identities are inextricably linked to motherhood, then a woman who gives up her child has lost a portion of her identity.

42. The concept of "possessory rights" to children underlies much of the debate regarding all forms of surrogacy.

43. L.A. Times, Sept. 21, 1990, at B1, col. 2. It is unclear from the newspaper reports whether Johnson's reproductive difficulties occurred before or after she had her daughter, or what the cause of her difficulties may have been.

44. L.A. Times, Aug. 16, 1990, at B1, col. 6 (Orange County ed.). Note that in the *Baby M* case, the court found that Mary Beth Whitehead's inability to give up her child was perfectly normal maternal behavior. In re Baby M, 109 N.J. 396, 459–60, 537 A.2d 1227, 1259–60 (1988).

45. L.A. Times, Sept. 5, 1990, at B4, col. 1 (Orange County ed.).

of Anna Johnson's poor qualifications to be a mother to the child she gestated.

Neither the media nor the court, however, considered whether she was qualified to be a mother to her three year old daughter. Nor was any inquiry made by the press or the court concerning the Calverts' qualifications to be parents. There seems to have been an assumption that, because they were paying for the child, they had an absolute right to receive the benefit of their bargain.[46] Because no analysis of their parenting qualifications was made, however, it is difficult to evaluate the Calverts' claims to custody of the child.

Given different facts, assumptions about parental fitness may give way to an understanding of the depth of the gestational mother's commitment to the child she carries, and her unwillingness to part from it. For example, in the landmark *Baby M* case, the court held that Mary Beth Whitehead was the legal mother of the child.[47] In that case, Whitehead, a married mother of two, agreed to become impregnated by the sperm of William Stern.[48] The Sterns desired to become parents but believed that pregnancy would be injurious to Mrs. Stern's health.[49] After giving birth to a girl, Mary Beth Whitehead found that she could not part with the child. She attempted to retain custody, but the trial court enforced the surrogacy agreement and gave full parental rights and custody to the Sterns.[50] The New Jersey Supreme Court reversed the lower court's decision, and outlawed surrogacy agreements on the basis of public policy.[51] However, the appellate court allowed the Sterns to

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46. As George Annas notes in relation to traditional surrogacy,

> the exclusive use of this method by rich and upper-middle-class white couples proclaims its economic class and racial characteristics. For example, although Black couples are *twice* as likely as white couples to be infertile, this method is not promoted for Black couples, nor has anyone openly advocated covering the procedure by Medicaid for poor infertile couples.

Annas, *supra* note 19, at 28 n.12 (emphasis in original).

47. In re Baby M, 109 N.J. 396, 537 A.2d 1227 (1988). This was the first case to focus media attention on the issues raised by surrogacy.

48. In that case, traditional surrogacy was used. Mary Beth Whitehead's own egg was fertilized, so she was both the genetic and gestational mother. In re Baby M, 109 N.J. at 413, 537 A.2d at 1229.

49. Elizabeth Stern suffered from a mild case of multiple sclerosis and believed at that time that pregnancy would worsen her condition. In re Baby M, 109 N.J. at 413, 537 A.2d at 1235.

50. In re Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd* in part, *rev'd* in part, 109 N.J. 396, 537 A.2d 1227 (1988).

51. In re Baby M, 109 N.J. 396, 434–44, 537 A.2d 1227, 1246–50 (1988). In that case, legal maternity was not at issue, since Mary Beth Whitehead was both the genetic and gestational mother. The question was whether the New Jersey Supreme Court

retain custody, based on an analysis of the relative parental qualifications of Mary Beth Whitehead and the Sterns.[52]

Although the cases are obviously distinguishable because of the separation of the gestational and genetic functions in *Johnson*, it may be that by controlling for race and class, and hypothesizing a situation wherein the parties' backgrounds are similar, gestational birth mothers may be seen as more like traditional biological mothers than "human incubators." If so, they may deserve the legal rights of traditional biological mothers. Without a legal rule favoring one woman's claim, the race and class of the gestational mother may continue to influence the perception of her legal rights more than her physical link to the child, and the outcome of future cases could be based on the relative values placed on the parties' racial and social identities. This is particularly disturbing if one assumes that courts are likely to be swayed by biases against some gestational mothers. A statutory rule must be formulated to define legal maternity that can be applied evenly, without regard to the social background or status of the parties. Otherwise, surrogacy may be used to perpetuate an agenda that discriminates between the reproductive rights of certain classes of individuals.[53]

B. *Who Becomes a Gestational Mother?*

In 1982, 2.4 million, or 8.5%, of the married couples in the United States were diagnosed as infertile.[54] For many of these

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would enforce the surrogacy agreement against Whitehead, to deny her custody and visitation rights. *Id.*

52. 109 N.J. at 452–63, 537 A.2d at 1255–60.

53. See generally Annas, *supra* note 19, for an excellent discussion of the racism inherent in surrogacy agreements. Additionally, the potential use of non-coital reproductive technologies as a eugenics device is profoundly disturbing. *See* L.A. Times, Sept. 5, 1990, at E1, col. 2 (couple using sex selection to achieve a male fetus).

54. Of these couples, 1.4 million were secondarily infertile, that is they were already raising a child but could not conceive or carry another to term. In all, 4.5 million women suffered from impaired fecundity and were diagnosed as infertile. Taub, *supra* note 23, at 89 n.1 (citing a 1982 survey by the Center for Health Statistics). Taub also cites a 1987 study that claims that infertility has not increased since 1965. *Id.* at 90 n.5.

Known causes of infertility include environmental toxins; pelvic inflammatory disease (often caused by sexually transmitted diseases); sexually transmitted diseases; iatrogenic (doctor induced) causes such as drugs like DES (diethylstilbestrol, a drug used to prevent miscarriage during the 1950s and 1960s, and was later found to cause a host of problems in offspring of women who took it, including infertility and inability successfully to complete a pregnancy); intra-uterine contraceptive devices and pelvic operations; and surgical sterilizations. Many women of color, particularly those on government aid, were either forced or pressured into having tubal ligation sterilizations. Unfortunately, many of these women were not informed that once "tied," their tubes could not be "untied" and that their sterilizations were permanent. *See id.* at 91–92.

couples, surrogacy may be a last opportunity to have a child that is genetically related to either or both of them.[55] Unless the couple has a friend or relative willing to volunteer to act as a gestational mother, they will probably have to pay a stranger to gestate their genetic fetus.[56] This is an expensive process.[57]

Because commercial surrogacy involves the payment of fairly large sums of money to the gestational mother, there has been some concern that women will not choose to become paid gestational mothers in a truly voluntary manner.[58] Because financial inducements might seem particularly tempting to a woman who is unable to secure a job even at minimum wage, the potential for exploitation of low-income women as "baby factories" has concerned some commentators.[59] Exploitation, however, is rarely reported.[60] Until

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See also Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low Income Women, reprinted in* 11 WOMEN'S RTS. L. REP. 15, 30–32 (1989).

55. Women may be unable to become pregnant and successfully carry a pregnancy to term due to pelvic scarring from infection or surgery; prior tubal ligations or other sterilizations which leave the ovaries intact; or malformations of the fallopian tubes. Taub, *supra* note 23, at 92.

56. Agencies exist to broker surrogacy agreements, or the couple may choose to find someone on their own as the Calverts did. The Center for Surrogate Parenting in Beverly Hills, California, and the Infertility Center of New York, run by attorney Noel Keane (who arranged the *Baby M* agreement), are two of the best known surrogacy brokers. *See* L.A. Times, Aug. 14, 1990, at A1, col. 4 (Orange County ed.).

57. The technology used in gestational surrogacies is quite expensive. IVF has been reported to cost approximately $5,000–$10,000 per attempt. *See* L.A. Times, Sept. 5, 1990, at E2, col. 3. Surrogacy costs may run approximately $7,000–$12,000 for a complete pregnancy. *See* Mahoney, *An Essay on Surrogacy and Feminist Thought*, 16 L. MED. & HEALTH CARE 81 (1988). One commentator cites the standard fee structure as: $7,000–$12,000 to the agency; necessary additional amounts for the medical care, supplies, food, and clothing for the gestational mother; and approximately $10,000–$15,000 in direct payments to her. Overall, the cost of a traditional surrogacy arrangement (where the husband of the infertile woman artificially inseminates the gestational mother) can run to between $30,000–$50,000. The gestational mother generally only receives one-fourth of the money spent on the process by the couple. *See* Charo, *supra* note 15, at 96–97.

58. The coercive nature of commercial surrogacy troubled the *Baby M* court greatly. "In addition to the inducement of money, there is the coercion of contract: the natural mother's irrevocable agreement, prior to birth, even prior to conception, to surrender the child to the adoptive couple. Such an agreement is totally unenforceable in private placement adoption." In re Baby M, 109 N.J. at 422, 537 A.2d at 1240 (citing Sees v. Baber, 74 N.J. 201, 212–14 (1977)).

59. *See generally* Annas, *supra* note 19. *Contra* Andrews, *supra* note 16.

60. The potential for exploitation may be greatest for women who are undocumented aliens, since they may be the most financially desperate and the least likely to take legal action. *See* Charo *supra* note 15, at 100 n.33. R. Alta Charo reports the case of Haro v. Munoz, (no citation given) in which a Mexican woman apparently agreed to be a gestational mother for her American cousins. The gestational mother assumed that she would become pregnant, the embryo would be "washed out" from her uterus and then implanted in the other woman. In return, she apparently believed that she would

now, most women who have chosen to become traditional surrogate mothers have not been impoverished.[61] According to one study, these women have been primarily white, married, Protestant, twenty-six to twenty-eight year old high school graduates.[62] Although sixty-six percent had incomes under $30,000, thirty percent made between $30,000 and $50,000 annually.[63]

There is some reason to believe that traditional surrogate mothers may be chosen for different criteria than gestational mothers. Traditional surrogacy involves the artificial insemination of a fertile woman by a man who intends to raise the baby with his wife. The baby is therefore genetically related to the biological mother who contributes her egg and her womb, as well as to the sperm-donating father. The father's wife is unrelated to the baby and must adopt it to cut off the rights of the biological mother.[64]

Although generalizations are difficult to support empirically, it is reasonable to speculate that couples using traditional surrogacy will choose a woman who is physically similar to either or both of them, since she will be the child's genetic mother. While contracting parents' choices may cross class lines because wealthier women are unlikely to become paid birth mothers, in a society filled with racial prejudice, it is less likely that their choices will cross racial lines. Couples of the same racial or ethnic background may

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receive an American visa. The couple expected her to carry the fetus to term and then return to Mexico. Not only was there confusion among the parties, but also the agreement violated United States immigration rules. Even in this case, where the temptation was both cash and a residency visa, exploitation was not mentioned in the report.

61. Interestingly, low-income women of color may not be able to become pregnant as easily as white women. Further, they may have more difficult pregnancies.

According to a 1982 study, infertility is one-and-a-half times more frequent in black couples than in white couples, probably because blacks are more likely to have been exposed to the causes of infertility. Taub, *supra* note 23, at 90. Black women are also at greater risk of having low birth weight babies. Low birth weight is the leading cause of infant mortality and health problems in this country. Surprisingly, low birth weight seems to be a result of race and not purely socio-economic class. Black women who earn between $20,000 and $30,000 per year are twice as likely as white women in the same income range to be afflicted by this problem. Factors influencing birth weight may include: generations of poverty and related health problems; poor nutrition and health during adolescence; and inadequate prenatal care. *See* 2 ACLU REPRODUCTIVE RTS. UPDATE 6 (June 8, 1990). *See also* L.A. Times, Dec. 1, 1990, at A1, col. 1.

62. *See* Charo, *supra* note 15, at 96–97. The preference is to use married women as gestational mothers since, (1) they are presumed better able to understand the commitment they are undertaking (perhaps because they already have children), and (2) the agencies do not want to create single, unwed mothers! *See* Graham, *Surrogate Gestation and the Protection of Choice*, 22 SANTA CLARA L. REV. 291, 293 n.7 (1982). In Anna Johnson's case, she was already a single mother.

63. Charo, *supra* note 15, at 97.

64. *But see* ARK. STAT. ANN. § 10-201(a) (1989).

tend to prefer a child of their own race.[65] In traditional surrogacy arrangements, the likelihood of rich white couples exploiting low-income women of color may be somewhat illusory.[66]

In gestational surrogacy, on the other hand, the gestational mother's race may be of negligible importance to the couple who contracts with her. The embryo is not genetically related to the gestational mother. To maximize the chances of having a healthy baby, the contracting couple may be more concerned with the gestational mother's willingness to conform her behavior during pregnancy than with her race.[67] If that is the key factor in choosing a birth mother, then a woman of any race or class who is financially desperate may be particularly compliant. However, it is more likely that the most desperate women will be women of color.[68]

Although discussing traditional surrogacy, George Annas said that, "the core reality of surrogate motherhood is that it is both classist and sexist: a method to obtain children genetically related to white males by exploiting poor women."[69] This may be especially true in the gestational surrogacy context. While the reasons for having children are varied, some prospective parents may

65. Patricia J. Williams discusses the desire for a child who looks like oneself and relates the story of her godmother who was abandoned by her own mother because the child's skin was too dark to allow the mother to "pass" as white. *See* Williams, *On Being the Object of Property*, *reprinted in* BLACK WOMEN IN AMERICA 19, 26–27 (M. Malson, E. Mudimbe-Boyi, J. O'Barr & M. Wyer eds. 1990).

66. Unless non-coital reproductive technologies are paid for by government aid or private insurance programs, these treatments will only be available to wealthier prospective genetic parents. Few private insurers cover infertility treatments. According to one news report, Massachusetts requires insurers to cover infertility treatments if they also cover pregnancy. *See* Boston Globe, Jan. 30, 1990, Metro, at 1. This kind of legislation may backfire, however, if insurers may simply choose to stop covering pregnancy.

67. For example, a couple who believes that a pregnant woman should not drink alcohol or coffee, smoke cigarettes, engage in adventure sports, use recreational drugs, or have sex with a variety of partners may be disinclined to choose a gestational surrogate who does not share their beliefs. Further, a couple who believes that women should attempt unmedicated labor wherever possible may prefer not to select a gestational mother who would choose to employ pain-relieving medications during labor.

The control of a woman's activities during pregnancy has profound constitutional ramifications that are beyond the scope of this Article.

68. Over thirty percent of Black families living in the United States in the 1980s had incomes below the poverty level. The figure is only somewhat lower for Hispanic, Native American and Asian families. Brief for Amici Curiae National Council of Negro Women, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), *reprinted in* 11 WOMEN'S RTS. L. REP. 302 nn.1–4 (1989). The figures are 34% for African-American families, 26% for Hispanic families, 29% for Native American families, and 10.2% for Asian families. Due to the difficulty of reaching rural and inner city people, the numbers quoted may underrepresent reality.

69. Annas, *supra* note 19, at 27.

choose gestational surrogacy over adoption as a way to perpetuate their genetic bloodlines.[70] This has been suggested as one rationale for both sperm and egg donation and may be true in the gestational surrogacy context as well.[71] Because gestational surrogacy may be available only to those privileged enough to have access to the financial and medical resources required, surrogacy agreements may be used to perpetuate the genetic bloodlines of some racial and economic groups over others.

II. PRIORITIZING THE INTERESTS OF THE PARTIES

Determining which of the parties to a surrogacy agreement should be considered the legal parents is analytically problematic. Because the agreement to create a child does not spring from a preexisting relationship, courts and commentators are unsure whether to apply a family law or a contract analysis to these agreements.[72] Family law seems somewhat inapplicable because the surrogacy contract generally is made between strangers who do not intend to have any relationship that continues beyond the birth of the child. Because the subject of the agreement is the creation of a new person, however, traditional contract analysis is inappropriate as well. Unfortunately, because many states, including California, have not developed statutory rules defining the legal status of the parties to

70. In the *Baby M* case, the natural father, William Stern, is described as the only survivor of a family that was decimated by the Holocaust. Apparently, continuing his family name and bloodline were some of the motivations that drove William Stern to seek a surrogate mother for his child instead of choosing traditional adoption. Interestingly, the court does not question whether Stern's motivation is one that should be given legal effect. *See* In re Baby M, 109 N.J. 396, 413, 537 A.2d 1227, 1228 (1988). *See also* Robertson, *supra* note 3, at 13 (discussing the relative importance to men and women of having a genetic link to their children).

71. *See* Robertson, *supra* note 3, at 25. John Robertson discusses the desire to spread one's genes as a possible rationale for female egg donation. He notes that one woman testifying before the House of Representatives said, "I have good genes and I want to share them." *Id.* at 30 (citing *Hearings Before Subcommittee on Investigations and Oversight of the House Committee on Science and Technology*, 98th Cong., 2d Sess. 103 (1984)). Female egg donation is much rarer than sperm donation due to the risks and difficulties of hyperstimulating the donor's ovaries to produce multiple ova, surgically harvesting the ova, fertilizing *in vitro*, and then implanting them into the recipient during the crucial point in her cycle. *Id.* at 2–6. Men who wish to spread their genes obviously have more opportunity to donate massive quantities of sperm, and thus produce more offspring.

72. Children born to a married couple may be said to owe their existence to an agreement between the parties as well. However, the spouses' agreement to have and raise children together is traditionally supported as one of the bases of marriage. *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2340 (1989). Further, unlike surrogacy agreements, the scope of the marital relationship is not limited to childbearing.

surrogacy agreements, courts have had to rely on these two modes of analysis when faced with determining who should be given parental rights.

The family law approach would treat the question of maternity as if the dispute were a traditional custody battle.[73] This is the analysis used by the New Jersey Supreme Court in the *Baby M* decision.[74] After first analyzing the surrogacy contract and determining it to be an illegal paid adoption agreement, the court declared commercial surrogacy agreements void and against public policy as expressed by the legislature in the state adoption statutes.[75] Since the

73. *See* Blotner, *Third Party Custody and Visitation: How Many Ways Should We Slice the Pie?*, 1989 DET. C.L. REV. 163. Peggy Blotner reviews the historical and recent developments in the area of family law custody arrangements. Except perhaps for the *Baby M* case, most of the cases discussed deal with long-term (non)relationships between persons either related to children over whom they wish to obtain parental rights or with whom they have had an emotional relationship without being genetically related. This Article discusses the doctrinal theories behind "the best interests of the child" test; the "least detrimental alternative" test; the "non-exclusive parenthood" decisions; the cases finding legal rights in psychological parents and stepparents; and the "equitable parenthood (or estoppel)" decisions. Most of these theories make two assumptions, both of which are questionable in the gestational surrogacy context. First, they assume the court can determine which person among a number of adults will be the best parent to the child, applying a presumption that "biological parents" are generally best unless evidence to the contrary exists. This presumption is, of course, problematic in the context of gestational surrogacy. Second, these cases often take place after the parents' relationship has soured. Thus the (nonnewborn) children have usually lived with at least one of the adults contesting custody. In a surrogacy arrangement, the parents have no prior relationship, and the dispute arises around the time of, or before, the child's birth. For these reasons, adoption and family law rules are not sufficient to define and determine maternity in the gestational surrogacy context.

74. In re Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

75. The New Jersey Supreme Court implicitly characterized surrogacy agreements as baby selling. Because baby selling is illegal throughout the United States, by analogy to this proscribed act, surrogacy arrangements have been outlawed in many states. In New York and Kentucky, baby selling laws apply to surrogacy agreements. In Indiana, Missouri, and New Jersey (the home of the *Baby M* decision) any payments to a birth mother constitute illegal baby selling. Prior to the New Jersey Supreme Court decision that finally settled the issues, the lower court found that no baby selling had taken place, stating that "[a]t birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his." In re Baby M, 217 N.J. Super. 313, 372, 525 A.2d 1128, 1157 (1987), *aff'd* in part, *rev'd* in part, 109 N.J. 396, 537 A.2d 1227 (1988). In Louisiana and Florida, surrogacy is illegal by statute. In Michigan, commercial surrogacy is a felony punishable by five years in prison and a $50,000 fine. Surrogacy contracts are void and the birth mother receives custody unless the "best interests of the child" dictate otherwise. In Louisiana, Kentucky, and Nebraska, commercial surrogacy contracts are void from their inception. Indiana voids all surrogacy contracts, regardless of whether financial consideration is involved. In Florida, commercial surrogacy contracts are void; however, "preplanned adoptions" are allowed. Only in Arkansas and Nevada is surrogacy specifically allowed, but Nevada places a cap on the amount of money that the birth mother may receive. *See* Charo,

contract was void, the court fell back upon a traditional family law custody analysis.[76] That case, however, more closely resembles a traditional parental custody battle than a gestational surrogacy arrangement, since the custody dispute was between Mary Beth Whitehead, the genetic and gestational mother, and William Stern, the genetic father.[77]

The custody model of analysis follows established family law rules. In states using the custody model, traditional surrogacy is treated as analogous to an illegitimate birth where paternity is known.[78] After the child is born, the wife of the biological father must adopt the child to cut off the parental rights of the biological mother.[79] In cases where the biological mother contests custody,

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supra note 15, at 100–01. *See also* 23 FAMILY L.Q. 502–04 (1990) for a recent survey of surrogacy laws. This survey also cites the American Bar Association's approval of the "Uniform Status of Children of Assisted Conception Act" (USACA) which contains two approaches to surrogacy regulation. States may choose either to regulate surrogacy and allow married couples to contract with a woman to gestate a fetus that is genetically related to at least one spouse or to void all surrogacy contracts. This second option would leave the birth mother with all the rights pertaining to legal motherhood. *See id.* at 502.

Surrogacy has been outlawed in other countries as well. Israel outlaws all forms of surrogacy and requires a birth mother, who intends to be the rearing mother, to formally adopt the child she has gestated if she received a donated ovum. *See* Charo, *supra* note 15, at 105. In the United Kingdom, commercial surrogacy arrangements are illegal, while voluntary surrogacy is not. P. SPALLONE, *supra* note 3, at 174.

76. *See* In re Baby M, 109 N.J. 396, 452–63, 537 A.2d 1227, 1255–1260 (1988); compare the analysis used by the trial court, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd* in part, *rev'd* in part 109 N.J. 396, 537 A.2d 1227 (1988).

77. Elizabeth Stern, the wife of the genetic father, William Stern, was only a prospective adoptive parent, and not a party to the original agreement. In re Baby M, 109 N.J. at 452–63, 537 A.2d 1227, 1255–60.

78. ARK. STAT. ANN. § 10-201(a) (1989) presumes that a married woman who, with the written consent of her husband, gives birth to a child conceived by artificial insemination is the natural mother. Section (c) provides that an unmarried woman who becomes pregnant by artificial insemination will be considered the natural mother of the child she bears, except where a surrogacy agreement exists. Then the child is the legal issue of (1) the genetic father and his wife, (2) the biological father if single, or (3) the woman intended to be the legal mother where an anonymous donor's sperm was used to inseminate the gestational mother.

Where a surrogacy agreement exists and the birth mother is married, Section 10-201(b) provides the same result as Section (c). Prior to the 1989 amendments, Section 10-201 provided that the child of a married birth mother was the legal offspring of her husband. This issue was directly addressed in the 1989 amendments to clarify the paternity of a child born of a surrogacy agreement to a married woman.

79. In California, if the biological father is not also the presumed father as defined by Evidence Code section 621 (the mother's husband) or Civil Code section 7004 (a man who attempted an invalid marriage with the mother or lived with an unmarried woman at the time of conception), then only the mother's consent is required for a valid adoption. *See* In re Baby Girl M, 37 Cal. 3d 65, 207 Cal. Rptr. 309, 688 P.2d 918 (1984). This rule reaches anomalous results in the surrogacy context. Since the hus-

one commentator has noted that, "courts and Attorney General opinions have consistently stated in dicta that a surrogate mother has the same rights to her child as a mother who conceived with the intention of keeping her baby and that the best interests of the child would dictate the court's decision regarding custody."[80]

Since this approach presupposes that the gestational mother is also the genetic and legal mother, it may not be applicable to gestational surrogacy cases.[81] Courts may be unwilling to recognize the maternity claim of the gestational mother. In *Johnson v. Calvert*, the court characterized Anna Johnson a "foster mother" who merely performed a temporary service for the child which his "natural mother" was unable to perform, and denied her any parental rights.[82]

As an alternative to the family law approach, some feminist commentators have suggested a contractual analysis, emphasizing either the gestational mother's freedom of contract,[83] or her psychosocial coercion.[84] Still others have argued for a total ban on all

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band of a married woman is presumed to be the father of any children born "of the marriage," her husband's consent is required for a married birth mother to surrender the child to the contracting parents for adoption. Perhaps, in order to avoid the difficult questions that would arise in this type of situation, the *Johnson* court declared that gestational surrogates are not the mothers of the children they carry.

80. Charo, *supra* note 15, at 99 n.27. Some commentators would treat these situations differently since the birth mother entered the agreement intending to give up the child to the father and his wife. Some would strictly enforce the surrogacy agreement. See Andrews, *supra* note 16, at 76–77, for a discussion of the ideological problems surrogacy may cause for some feminists. The problems with a strict contractual view are that money damages to either side are not sufficient, specific performance is probably outlawed by the thirteenth amendment, and strict contractual construction may interfere with state laws against baby selling. *See* In re Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

81. In order to avoid protracted and messy custody battles, some genetic mothers have sought declaratory judgments during the gestational mother's pregnancy, requesting courts to issue orders finding them to be the legal mothers of the children born of surrogacy agreements. *See* Charo, *supra* note 15, at 105 nn.71–75.

82. L.A. Times, Oct. 23, 1990, at A24, col. 1.

83. *See* Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 599 (1988). One of the problems of contract analysis is that when a dispute over custody occurs, there is no effective remedy. The parties cannot be returned to the *status quo ante* because an additional interested party, the child, now exists who did not exist before the inception of the agreement. Rescission and restitution are impossible since, unlike an uncompleted agreement to buy a house, the embryo cannot be given back to the genetic parents in return for their payment to the gestational mother. Additionally, the thirteenth amendment may be interpreted to prevent specific performance, in which case the birth mother would not be required to relinquish the child.

84. *See infra* notes 97–103 and accompanying text.

surrogacies.[85] These feminist analyses of traditional surrogacy will be addressed in the following section.

A. *The Feminist Analysis*

Surrogacy agreements have posed a unique challenge for feminist legal scholars. Feminist analysis has struggled to decide whether surrogacy necessarily involves transforming women's reproductive capacities into commodities with a corresponding debasement of female reproduction. Because the debate over surrogacy agreements involves both freedom of contract issues and the potential exploitation of women's reproductive capacities, many feminists are ambivalent about whether surrogacy should be supported actively or banned entirely. While there is still no consensus, feminist arguments have generally focused on two issues: freedom of contract and the symbolic harm to society.[86]

(1) Freedom of Contract

One aspect of the doctrinal debate over surrogacy focuses on the law's historical failure to recognize women's ability to enter contracts freely.[87] For some feminist writers, denying women the right to make and enforce surrogacy agreements reveals lingering paternalistic notions about women's decisional maturity based on

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85. *See generally* Annas, *supra* note 19.

86. *See* Andrews, *supra* note 16, at 75–76. Lisa Ikemoto cites additional issues, some of which overlap Andrews's concerns. These issues include: increased equality through control of reproduction; control of one's body; enjoyment of the higher value placed on voluntary acts; exercise of personal autonomy; employment of a surrogacy arrangement to allow the contracting mother to avoid slowing down her career track (Ikemoto seems blindly to accept the idea that women and men should adapt themselves to a professional fast track, without attempting to adapt their careers to their family needs); and finally, enhancement of self worth by obtaining "equal citizenship." Ikemoto, *Providing Protection for Collaborative, Noncoital Reproduction: Surrogate Motherhood and Other New Procreative Technologies and the Right of Intimate Association*, 40 RUTGERS L. REV. 1273, 1302–04 (1988).

Additionally, some commentators have discussed the potential harm to women and children. The potential harm to children, both the birth mother's pre-existing children, and those born of a surrogacy agreement is a very serious concern, which is outside the scope of this Article. The potential harm to women is both speculative and individualized.

87. For a more complete analysis of the inadequacy of using contract principles to determine parentage see Carbone, *supra* note 83; Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFFALO L. REV. 515 (1990); and Suh, *Surrogate Motherhood: An Argument for Denial of Specific Performance*, 22 COLUM. J.L. & SOC. PROBS. 357 (1989).

their supposed hormonally-induced unpredictability.[88] This paternalistic attitude is seen as often masked by a concern for unfair pressure or coercion being applied to women in a sensitive and vulnerable state.[89] Feminists supporting a strict contract analysis, however, would argue that this concern may actually be a device to deny women the right to act as free moral agents. They would argue that the hormonal argument fails to recognize that while women may occasionally make unwise or ill-considered decisions, the burden of making those decisions and accepting the consequences properly falls on the individual woman. The feminist rebuttal to the hormonal argument is that by removing a woman's ability to make disastrous decisions, her ability to make successful ones is also compromised.

Feminists who support women's unfettered right to contract would argue that disallowing commercial surrogacy on the grounds of public policy substitutes an artificial "reasonable man's" perspective for the actual decision of the individual woman. This effectively disempowers the woman and silences her voice in the transaction. In essence, such a policy says that since no "reasonable man" could rationally give his consent to a pre-birth relinquishment of his maternal rights, (the awkwardness of the gendered terms reveals the absurdity of this analysis), then any woman who made such a decision could not be reasonable, and thus her consent must be denied.[90] The problem with this analysis is that the reasonable man is not a single welfare mother of six. Further, no reasonable man would ever find himself both financially desperate and faced

88. Women's "raging hormones" have been cited as the basis for irrational, emotional, or violent behavior since at least Biblical times. See Chait, *PMS and Our Sisters in Crime: A Feminist Dilemma*, 9 WOMEN'S RTS. L. REP. 267, 272–76 (1983), for a discussion of the history of the justifications for the cross-cultural biases against women based on their "hormonal imbalance." *See also* J. USSHER, *supra* note 41, at 1–17. Jane Ussher notes that in 19th century Britain, women's brains were considered to be linked to and controlled by their uteruses, and their periodic hormonal cycle would compete for resources and energy with their brains, to the detriment of their intellectual abilities.

89. The vulnerable state that potential gestational birth mothers are in must be financial since at the time of the agreement they are not yet pregnant. This argument is therefore applied to surrogacy somewhat awkwardly. If it has any validity, it more accurately fits into the context of coerced surrenders of children for adoption. *See* In re Cheryl E., 161 Cal. App. 3d 587, 207 Cal. Rptr. 728 (1984) (open adoption agreement could not override the mother's statutory right to reclaim her child where the mother's consent was invalidly obtained by a social worker who used undue pressure).

90. Of course, reasonable sperm donors relinquish their rights before conception as a condition of donation. The instrumental rationale for this is that without a rule allowing men to donate sperm without incurring the obligations of fatherhood, no man would donate sperm. See *infra* note 140 and accompanying text for a discussion of the policies supporting anonymous sperm donation.

with the uncertainty of how he will react to a contractually initiated pregnancy. The tensions between desperately needing the money to feed and clothe her existing children, and the emotional bond a pregnant woman may develop with a fetus, are not susceptible to a traditional reasonable man analysis. Additionally, those feminists who support a strict contract analysis would argue that if each individual woman is a mature, free moral agent, then she is capable of making this decision based on the circumstances of her own life, and not by reference to an "objectively reasonable" standard.

Even feminists who support a strict contractual approach must recognize that the state legitimately holds the power to void some contracts on the grounds of public policy. Agreements to sell oneself into slavery and to sell one's body parts are invalidated on the grounds that the state will not use its power to enforce agreements that the collective finds morally repugnant.[91] It is doubtful that even the strongest proponents of freedom of contract would encourage the enforcement of such agreements. Additionally, strict enforcement of these agreements would lead to the creation of a two-tier system of contract law. Agreements based on a traditional exchange of financial consideration for goods or services would be capable of breach, while agreements to exchange individual personal freedoms would be strictly enforced.[92]

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91. *See* Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 786 (1983) (distinguishing between legal rules against self-enslavement and rules against enforcing a party's agreement where that party is assumed to be unable to give binding consent — i.e., children).

92. See O.W. HOLMES, THE COMMON LAW 234–37 (1963), for a classical discussion of the common law right of a contracting party to breach and pay damages. Although the *Johnson* court relied on a purely contractual analysis of the relationship between the parties, the court avoided discussing this traditional rule. Effectively, the court required specific performance of the surrogacy agreement. Specific performance, however, is generally only required where the property which is the subject of the contract is unique and money damages are insufficient to compensate the non-breaching party. *See* Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 362 (1978); *see also* U.C.C. § 2-716 (1987). Additionally, specific performance is rarely granted in personal service contracts. *See* Bailey v. Alabama, 219 U.S. 219 (1911) (where an employee is compelled to work off a debt, on pain of imprisonment, the fact that the original agreement was voluntarily entered into does not negate a violation of the thirteenth amendment prohibitions against involuntary servitude); Robertson v. Baldwin, 165 U.S. 275 (1897) (thirteenth amendment does not apply to seamen's contracts, due to the special circumstances of shipping); Flood v. Kuhn, 407 U.S. 258 (1978) (baseball player may be traded or denied opportunity to play, showing of compelled performance required for violation of thirteenth amendment); American Broadcasting Companies, Inc. v. Wolf, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981) (although specific performance of a personal service contract probably violates the thirteenth amendment, where an employee agreed to an anti-competition clause in his contract he may be enjoined from working for his employer's competitor).

Because of the tensions created by the existence of both the issues of contractual liberty and the morally questionable validity of contracting for reproduction, any discussion of the enforceability of surrogacy contracts must take into account the nature of these agreements. The subject of the agreement is not the sale of a product, or the offer of a service, but the relinquishment of a child in return for a sum of money. This is illegal in the adoption context precisely because the exchange of money is perceived to turn an otherwise selfless act into a commercial transaction.[93]

The issue of payment also separates the supporters of surrogacy from its opponents. Opponents of commercial surrogacy believe that the payment involved is not only morally wrong, but also unfairly coercive. The consideration paid for the birth mother's agreement to bear and relinquish the child is seen as overriding a woman's ability to give meaningful consent.[94] Since large sums of money are involved, the woman's ability to make a sound judgment is assumed to be disabled. Thus, she is incapable of giving the informed consent necessary to enforce such an agreement. In rebuttal to this argument, Lori Andrews notes that women are assumed to be able to make other informed decisions concerning pregnancy and childbirth. Women are allowed to decide whether to become pregnant, whether to have an abortion, and whether to give up a baby for adoption.[95] If women can reasonably make those decisions, then, she argues, it follows that women also should be able to decide to become gestational mothers.

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93. *See* In re Baby M, 109 N.J. 396, 423–34, 537 A.2d 1227, 1240–50 (1988). *See also* Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983) (Michigan adoption statutes prohibiting the exchange of money may be applied to surrogacy agreements). Section 181 of the California Penal Code provides that "every person who . . . sells, or attempts to sell any person . . . is punishable by imprisonment." CAL. PENAL CODE § 181. There are no exceptions for adoption incentives paid to natural parents. Penal Code section 273 makes it a misdemeanor for a person or agency to pay or offer to pay money or any thing of value to a parent for (1) the placement of a child for adoption, (2) a consent to adoption, (3) co-operation in the completion of an adoption proceeding. CAL. PENAL CODE § 273 (West 1989).

94. See Andrews, *supra* note 16, at 75–76, for further discussion of this argument. This argument may appear especially compelling when applied to low-income women. It might be assumed that no welfare mother could pass up such a large amount of money. Instead of being one factor, for poorer women the money would become the entire rationale for choosing to be a paid birth mother. *Contra* Pollitt, *supra* note 39. Katha Pollitt argues that, for poor women, the opportunity to make so much money at once may be a sufficient inducement for them to engage in an act they otherwise would not consider.

95. *See* Andrews, *supra* note 16, at 75.

Those arguing against allowing women to contract for surrogacy find that it is different from abortion or adoption. First, the profit incentive is not initially present in a decision to abort or to surrender a child for adoption. Second, at the time of the agreement, the gestational mother may be unable to foresee the depth of the maternal bond she will develop with the child she carries.[96] There is a popular and strongly-held belief that gestation creates a bond between the birth mother and the child.[97] The general rule that birth mothers in adoptions have some period of time in which to decide to surrender the child tends to substantiate this belief.[98] While this assumption may not always be correct when applied to gestational surrogacy, as bonding may be a function of emotional, social, and cultural expectations, it is still an open question.[99] Some professionals involved in arranging traditional surrogacy agreements believe that because birth mothers are aware that they are going to give up the children they carry, they do not bond with these children in the same way that a woman does when she intends to keep her child.[100] Certainly women such as Anna Johnson and

96. *But see supra* note 30 and accompanying text. Anna Johnson's claimed bond was not seen as sufficient for the court to consider her the legal mother of the child she gestated.

97. Many traditional surrogate mothers experience a sense of loss and grief upon surrendering their infants. The emotions experienced are unpredictable. *See* Gittleman, *In the Matter of Baby M: A Setback for Surrogacy Contracts*, 40 RUTGERS L. REV. 1313, 1317 n.23 (1988) (New Jersey Developments).

98. Anna Johnson believes that gestational mothers should be given the same option. L.A. Times, Sept. 25, 1990, at B1, col. 4 (Orange County ed.). *See* CAL. CIV. CODE §§ 224.64 & 227.46 (West Supp. 1991) (withdrawal of consent by the birth parents is allowed before the adoption is final). *See also* Graham, *supra* note 62, at 292–93 n.4 (most states require a six month to one year waiting period before an adoption is finalized).

Courts are generally unwilling to terminate parental rights without giving the birth mother every opportunity to reclaim the child. *See* In re Baby Boy M, 221 Cal. App. 3d 475, 272 Cal. Rptr. 27 (1990) (where a fifteen year old high school student agreed to give up her child for adoption but later decided to marry the nineteen year old father and raise the child with him, the court allowed her to reclaim the child six months after his birth and surrender to the adoptive parents); *see also* In re Cheryl E, 161 Cal. App. 3d 587, 207 Cal. Rptr. 728 (1984) (court held that an open adoption agreement could not override the mother's statutory right to recover her child where the mother's consent was not validly obtained by a social worker who used undue pressure).

99. See Carbone, *supra* note 83, at 593–95, for a discussion of social pressures on mothers to bond with their newborns.

100. Ralph Fagen, co-director of the Center for Surrogate Parenting in Beverly Hills, California, claims that it may be wrong to assume that surrogate mothers automatically bond with the unborn child. *See* L.A. Times, Sept. 21, 1990, at B1, col. 2 (Orange County ed.). Lori Andrews suggests that bonding may not occur in all cases. Andrews, *supra* note 16, at 75. *But see* Gittleman, *supra* note 97.

Mary Beth Whitehead, who have fought to keep the children they bore for the contracting parents, would dispute this contention.[101]

If women are truly unable to predict the strength of the maternal bond, they may be unable to give their informed consent, and the contract would be void from its inception.[102] Like any other human relationship, that between mother and child develops over time.[103] Both pregnancy and the bond between mother and fetus is a process which must be experienced as it unfolds.[104]

Further, the law historically has been unwilling to hold people to certain agreements made before experiencing the circumstances under which the agreement must be fulfilled.[105] Thus, a prenuptial

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101. An Iowa woman who agreed to become a commercial surrogate for an Israeli couple has recently decided she wants to fight for custody of the boy to whom she gave birth. Kathleen King thought she and her invalid husband could use the $10,000 to supplement her welfare payments and pay some bills. She was screened by Noel Keane's infertility treatment center in New York and failed the psychological tests. After agreeing to sign a waiver, however, she was approved. United Press International, Jan. 14, 1991.

102. June Carbone misses the point of this argument, which is that some decisions cannot be made prior to the time at which their effects will be felt.

> Those who oppose surrogacy because of the affront to the maternal bond would condemn the mother's agreement to surrender the child. They therefore explain her willingness to enter the contract in terms of her underestimation of the bonding process, and they view any subsequent decision to retain custody as natural and correct. These writers value a decision made after childbirth more highly than one made before precisely because it is influenced by the mother's greater attachment to the child.

Carbone, *supra* note 83, at 598.

103. Note that in the reported surrogacy cases, many gestational mothers already had at least one child at home. Some people involved in the surrogacy industry believe that a prior experience of birth is required before a woman can reasonably decide to become a birth mother. *See* Charo, *supra* note 15, at 96. Lori Andrews notes that "a strong element of the feminist argument against surrogacy is that women cannot give an informed consent until they have had the experience of giving birth." Andrews, *supra* note 16, at 75. Andrews does not agree that a prior birth experience is necessary to informed consent. She supports her argument by noting that only one percent of surrogate birth mothers have attempted to rescind their agreement to relinquish the child, whereas over seventy-five percent of birth mothers in adoption cases have attempted to rescind their agreements. *Id.* at 74.

104. Bonnie Stark would allow women to make decisions at each step during a surrogacy agreement, based on the set of circumstances they experience at that time, rather than hold them to an abstract decision made prior to the actual time for fulfillment. Stark, *Constitutional Analysis of the Baby M Decision*, 11 HARV. WOMEN'S L.J. 19, 40–50 (1988).

105. One argument supporting this policy has been advanced in an article justifying the law's reluctance to enforce some agreements. "Where the promisor's own values have changed dramatically, the compulsory performance of a contract requiring his personal cooperation with the other party may pose a special threat to his integrity or self-respect." Kronman, *supra* note 91, at 783.

agreement never to divorce one's spouse is unenforceable, as is a pre-conception agreement to relinquish parental rights in an adoption proceeding.[106] Analyzed in this manner, the policy against irrevocably binding people to their agreements does not indicate a paternalistic attitude toward women's ability to make enforceable contracts.[107] Instead, it recognizes that some contracts simply are not enforceable, since at the time of the decision the contracting party did not have sufficient information to make a valid decision.[108] By viewing the unenforceability of some agreements in this manner, the key issue is whether rights exercised at the agreement stage should control subsequent rights to breach the agreement.[109]

Finally, while the arguments which would allow women to contract away their services as gestational mothers validate women's personal autonomy, they fail to take into account the fact that childbearing is not a commercial enterprise. While women have the capacity to make valid contracts, contract theories are inapplicable to pregnancy. It may never be clear whether any woman bonds with the fetus she carries, or whether she is able to foresee the depth of her attachment to the child that is born. Theories of consent, voluntariness and coercion may be ultimately irrelevant. The essential reality may be that, in the end, by treating women's reproductive abilities as services to be sold and children as goods to be marketed, the contract theory of surrogacy simply dehumanizes the participants.

(2) Symbolic Harm to Society

Contract analyses of commercial surrogacy inevitably do not reach the essentially depersonalizing nature of this procedure.[110]

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106. *See id.* at 764 n.8 and accompanying text.

107. *See id.* at 786 (distinguishing the rules against enforcing agreements for self-enslavement and those against enforcing a party's agreement where the party is assumed to be unable to give binding consent (i.e., children)). This argument may be inapplicable to women's agreements since women have often been treated as legal infants. *See* Chait, *supra* note 88, at 274 n.73.

108. *See supra* note 91.

109. *See* Stark, *supra* note 104, at 36–37. Bonnie Stark argues that any waiver is revocable as the woman's information increases and her decisions emerge. Further, she argues that women should be allowed to make decisions at each stage of the process, from conception through birth and relinquishment. *Id.* at 40–44.

110. Because of the symbolic effects of commercial surrogacy and the risks involved in pregnancy, the Warnock Committee Report (an influential multidisciplinary British Government Committee of Inquiry chaired by philosopher Baroness Mary Warnock) recommended that surrogacy be outlawed. The Committee's real concern may have been that they did not want to condone, and therefore require the government to supervise, paid surrogacy. This recommendation led to the 1985 Surrogacy Arrangements

The rational bargaining process central to contract theory ignores the emotional nature of the longing for a child. The argument that surrogacy is symbolically untenable attempts to explore the inadequacies of contractual analysis by addressing the social constructs surrounding reproduction and the invalidity of using market principles to determine motherhood.[111] This argument contends that by allowing commercial surrogacy, our society dehumanizes women, children and men by marketing certain aspects of their existence.[112]

The symbolic argument against allowing reproductive abilities to be the subject of a contract seeks to empower women by offsetting the disturbing view of women as mere incubators for fetuses.[113] Recent trends in the law focus on this frightening perception. While women's reproductive capacities are seen as immeasurably precious, and therefore, in need of protection from women's lifestyle choices,[114] individual women, like Anna Johnson, are often held to

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Act, which criminalized commercial surrogacy in Britain. *See* P. SPALLONE, *supra* note 3, at 174. The Committee did not recommend a ban on unpaid surrogacy. The Report stated that:

> (1) it is inconsistent with human dignity that a woman should use her uterus for profit, (2) to deliberately become pregnant with the intention of giving up the child distorts the relationship between mother and child, (3) surrogacy is degrading because it amounts to child selling, and (4) since there are some risks attached to pregnancy, no woman ought to be asked to undertake pregnancy for another in order to earn money.

Steinbrock, *Surrogate Motherhood as Prenatal Adoption*, 16 L. MED. & HEALTH CARE 44, 47 n.14 (1988) (citing Warnock Committee Report).

111. There is virtually no discussion among legal scholars as to whether unpaid surrogacy would send out the wrong symbolic message. This may be due to the assumption that unpaid birth mothers are likely to be related to the genetic parents and are thus performing an act of love, rather than carrying out a commercial transaction. *See* Charo, *supra* note 15, at 105.

112. A cynic might certainly retort that our society already transforms women's bodies into marketable objects (such as Playboy bunnies, cover girls, and Miss Americas), so why not let women cash in as well?

113. Note the court's description of Anna Johnson as a "human incubator." L.A. Times, Oct. 23, 1990, at A24, col. 3.

114. See N.Y. Times, Aug. 11, 1990, at 25, col. 2, for an article discussing the recent trend involving the singling out for prosecution of poor black women for distributing drugs to their fetuses through the umbilical cord. *See also Nightline*: *Jailing Pregnant Drug Users: Does it Help or Hurt?* (ABC television broadcast, June 19, 1990) (transcript on file with the *UCLA Women's Law Journal*). An editorial in the Los Angeles Times addressed the fallacy of protectionist thinking. In discussing whether women and their fetuses should be protected from possibly harmful exposure to toxic substances in the workplace, the editorial questions whether women would "be protected out of well-paying jobs — but no one is going to 'protect' women from low-paying jobs slinging hash, scrubbing toilets or emptying bedpans." Rivers, *Myths of Female Weakness*, L.A. Times, Nov. 18, 1990, at M1, col. 2. It is also unlikely that pregnant women will soon be protected from toxic substances like bleach, ammonia, and oven cleaner at home.

be of so little value that their interests are secondary to those of a fetus, or of a couple who contracts for their reproductive services.

This view of women's reproductive capacity as something too precious to be entrusted to women alone strangely parallels the belief that female reproduction is a marketable commodity: Because women's judgments concerning their own reproduction are seen as untrustworthy, others must make decisions for them. In effect, this is what happened to Anna Johnson. The court decided that she was not to be trusted to make the decision to refuse to surrender custody of the child, nor was she to be trusted to raise him. So, Anna was allowed to exercise her decision making ability to enter the agreement, but not to sever it. If this is the effect of allowing commercial surrogacy, then it sends out a message that women may place their reproductive abilities on the auction block, but that they may not revoke the offer.

Besides presenting a distorted view of women's wombs as "incubators" for sale, much of the symbolic harm expected to result from surrogacy is premised on analogizing it to baby selling.[115] This view focuses on the child as the commercial product of the

115. Because of potential conflicts with the thirteenth amendment (prohibition against slavery), it is likely that the parties would be allowed to contract for the gestational mother's services, but not for relinquishment of the child. The potential for violation of the thirteenth amendment by enforcing specific performance requirements and judicially forcing gestational mothers to relinquish the children of surrogacy agreements has concerned courts and commentators. *See* In re Baby M, 109 N.J. 396, 442–44 n.11, 537 A.2d 1227, 1250 n.11 (1988) (surrogacy is illegal baby selling).

June Carbone dismisses this issue by analyzing the "personal services" contracted for as "carrying the child to term," rather than the actual relinquishment of custody and parental rights. *See* Carbone, *supra* note 83, at 602 n.67. *See also* Dolgin, *supra* note 87, at 549 n.159. Under this analysis, the birth mother is being paid for the labor involved in the gestation and birth of the child. Additionally, the pay compensates her for foregone opportunities, including the loss of her ability to have her own child during this period. The relinquishment of the child after its birth would be a gratuitous, and, therefore, legal act similar to traditional adoption. However, because promises to make gifts are not enforceable until delivery, enforcement of the surrogacy agreement would not be possible under this analysis. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979).

Many of these analyses have been made in the context of traditional surrogacy in which the contest is between two biological parents for custody of the child. If the courts declare that the gestational mother is not a parent, then she would have no right to custody of the child. She would, therefore, have to relinquish the child to the genetic parents. This is the approach taken by the *Johnson* court. The court considered Anna Johnson to be a "foster mother" to the child who merely performed temporary services for the Calverts. L.A. Times, Oct. 23, 1990, at A24, col 3. This analysis ignores the fact that, unlike a foster parent, under the circumstances of that case, Anna Johnson was the only person who could have performed those services for the Calverts. Further, it completely obliterates the uniqueness of her participation in the process and reduces her to a fungible caretaker.

parties' agreement. Advocates of surrogacy claim that it is not baby selling. Instead they argue that if surrogacy is described as contracting for a service from the gestational mother that the genetic couple is incapable of providing for themselves, then it more closely approximates artificial insemination by a sperm donor.[116]

This analogy is too facile, however. Sperm donation is physically and emotionally distinguishable from gestation. Sperm donation can take only a few minutes and can be done frequently. Gestation takes approximately forty weeks, causes noticeable physical and emotional changes in the pregnant woman, and culminates in the often painful, exhausting, emotionally overwhelming, and sometimes mystical experience of childbirth. Utilizing a sperm donation analogy, therefore, provides a simplistic route for escaping a deeper analysis of the larger societal implications of treating women as incubators for rent.

Further, the symbolic content of gestation is distinguishable from sperm donation. Pregnancy is a uniquely female experience and female fertility and reproduction has historically been linked with the continuation of the species.

> Female reproduction is traditionally so closely associated with gestation that the gestational mother who rears is likely to be more important for the offspring and society than the woman who provides the egg. Thus, it is neither unreasonable nor necessarily sexist to think that the genetic or bloodline connections will be of lesser importance for women and their offspring than gestational connections, even if men would still place a premium on having genetic heirs.[117]

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116. This is the analysis used by the court in Johnson v. Calvert. *See* L.A. Times, Oct. 23, 1990, at A24, col. 3. Bonnie Stark notes, however, that gestational mothers and sperm donors are not similarly situated. "No male analogue to gestation, labor and birth exists. A sperm donor is at most comparable to an ovum donor. In fact, given the present state of technology, which requires a far more intrusive procedure to obtain an egg than to obtain sperm, there may be no comparison at all." Stark, *supra* note 104, at 28.

117. Robertson, *supra* note 3, at 13. Robertson argues for an expanded role for egg donation as a less harmful or confusing alternative for both parents and children than traditional or gestational surrogacy. Robertson suggests that, where the gestating mother is also the rearing mother, the egg donor should be allowed to relinquish parental rights before donation just as sperm donors are currently allowed to do.

Egg donation is unlikely to ever become as widely used as sperm donation. See *supra* note 25 for a description of the procedure used to harvest the ova. This procedure entails some risk to the donor, which Robertson suggests may be minimized by removing eggs only from women already undergoing IVF or abdominal surgery. *See* Robertson, *supra* note 3, at 34–36. His argument fails to take into account situations like that in Johnson v. Calvert where the mother who would rear the child is physically capable of donating ova, but not gestating the fetus. In those cases, adoption or gestational surrogacy may be the only available alternatives.

While female reproduction has been directly tied to its physical manifestation in pregnancy, male reproduction has focused on the genetic tie as the only evidence of biological paternity. Perhaps because, until the development of accurate blood testing, paternity has been difficult to prove conclusively, or because men are capable of reproducing much more frequently than women are, this genetic link has always been open to question as the legal and social basis of fatherhood.[118] As Katha Pollitt notes, in order to support men's genetic contributions as determinative of their claims to fatherhood:

> we can discount the aspects of procreation that women, and only women, perform. As the sociologist Barbara Katz Rothman has noted, [the *Johnson* court's] decision follows the general pattern of society, in which women's experiences are recognized to the extent that they are identical with men's, and devalued or ignored to the extent that they are different.[119]

Biology, in the form of pregnancy, has always determined legal and social motherhood.[120] In discussing the Supreme Court's view of the primacy of biology in defining maternal rights,[121] Janet Dolgin states that:

> biology is not enough to determine paternal rights, but may be enough to guarantee maternal rights . . . . Implicit here is the assumption that biological motherhood carries the *maternal* relationship along with it, or more strongly, that for mothers, but not for fathers, the biological link *is* the relationship.[122]

By defining motherhood as biologically grounded, the implication is that the physical manifestation and experience of biological female reproduction — pregnancy — is the determinant of motherhood. Where biology is split between two women, pregnancy is the

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118. Jane Ussher notes that psychological research in this area tends to focus on changing roles in *parenthood* rather than on women's changing self-image and role expectations during pregnancy as male researchers cannot experience gestation and birth. J. USSHER, *supra* note 41, at 80.

119. Pollitt, *supra* note 39, at 843.

120. Except where the biological mother has relinquished her parental rights in a statutorily approved adoption. *See* In re Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

121. Of course, the central issue in gestational surrogacy is which aspect of biology takes precedence: genetics or gestation?

122. Dolgin, *supra* note 87, at 531 (footnotes omitted). Janet Dolgin derives her rule from Lehr v. Robertson, 463 U.S. 248 (1983) (putative biological father not allowed to block adoption by the mother's husband where the putative father did not grasp the opportunity to develop a relationship with the child) and Caban v. Mohammed, 441 U.S. 380 (1979) (biological father who lived with the natural mother allowed to block an adoption). *See also* Quillon v. Walcott, 434 U.S. 246 (1978) (biological father not allowed to block adoption by mother's husband), and Stanley v. Illinois, 405 U.S. 645 (1972) (unconstitutional denial of equal protection and due process to make children wards of state where biological father had lived with mother and children for eighteen years until her death).

one aspect of procreation that can be seen as clear evidence of maternity.

B. *Choosing Between the Potential Mothers*

Although a strict contractual analysis with its emphasis on personal autonomy is compelling, eventually it must give way to a recognition of the fundamental place that gestation has always held in female reproduction. While it would be cruel to dismiss outright the profound interests of the genetic mother, we are forced to recognize that gestational surrogacy essentially presents a clash between two individual women's desires and rights to procreate. Unless they are completely in accord about shared parenting, no legal or moral rule could be announced which would satisfy both women's desires to be the child's mother simultaneously.[123] Instead, one woman's interests must prevail.

Incompatibility between the two women's differing interests would arise, for example, if the gestational mother wanted to obtain an abortion. The genetic mother's interest in the child has been created by a contractual agreement with the gestational mother. Thus the enforcement of the genetic mother's contractual agreement to obtain a child would necessarily subordinate the gestational mother's constitutionally protected right to an abortion.[124]

Allowing the gestational mother's interests to take priority over those of the genetic mother results in some disappointment to the genetic mother. Her procreative desires are merely delayed,

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123. Even if the parties are initially in agreement, shared parenting could lead to conflicts in the future. What if one mother wanted to take advantage of a job opportunity on another coast or continent than where the other mother lived? While shared parenting arrangements may work well in some cultures and families, as more women explore personally satisfying careers, the possibility that each woman would need to relocate increases.

124. Roe v. Wade, 410 U.S. 113 (1975) (women have a constitutionally protected right to seek an abortion at least during their first trimester of pregnancy). Whether a woman can waive a constitutional right by signing a contract is an important question. Generally, waivers of constitutional rights require that the party who waives her rights do so knowingly, intelligently and voluntarily. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); Johnson v. Zerbst, 304 U.S. 458 (1938). Whether a contract meets that standard might well depend on the terms and circumstances of the agreement. Veto power over a woman's right to an abortion was denied to her spouse in Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976). Note, however, that the Court has begun the process of eroding the rights granted by *Roe*. *See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (states are not required to provide access to abortion funding, facilities or personnel, even where lack of such access to state funds or facilities would result in the actual denial of a woman's otherwise protected ability to exercise her right to seek an abortion).

however, until she can find a child to adopt or another woman willing to gestate a child and surrender it to her. Allowing the genetic mother's contractual interests to be frustrated protects the gestational mother's more fundamental constitutional rights to control her own procreation.[125]

The issue of contracting away parental rights before the conception or birth of the child was discussed at length by the *Baby M* court which held that traditional surrogacy agreements were invalid attempts at paid private adoptions.[126] The New Jersey legislature, like the legislatures of most other states, had determined that paid adoptions which failed to follow the statutorily prescribed procedural rules were incapable of terminating the birth mother's rights. The court stated that, "the Legislature would not have so carefully, so consistently, and so substantially restricted termination of paren-

125. Further, this balancing approach would avoid the additional problem of how to handle a situation where the genetic parents decided, prior to the child's birth, that they did not want to accept the child after it was born and then attempted to compel the gestating mother to abort. This rule recognizes each woman's right to be free from outside interference with her right to choose whether and when to reproduce.

Whether a constitutional right to procreate exists has been the subject of some debate. Bonnie Stark discusses the *Baby M* trial court's attempts to find a constitutional right to procreate that would protect the interests of the contracting parents. Stark, *supra* note 104, at 26–33 (citing In re Baby M, 109 N.J. 396, 537 A.2d 1227 (1988)). Supreme Court decisions finding a right to reproductive privacy may be interpreted as also creating a corollary right to procreate. It is questionable whether these decisions involve a positive right to procreate or only a negative right to be free from government interference with certain privacy rights. Griswold v. Connecticut, 381 U.S. 479 (1965) held that married couples have a constitutional right to determine whether to conceive a child. That decision, however, was also predicated on an unwillingness by the Court to intrude into the marital bedroom. Roe v. Wade, 410 U.S. 113 (1975) held that a woman has a constitutional right not to bear a child and to terminate a pregnancy. The Supreme Court gave more concrete protection to the constitutional right to procreate in Skinner v. Oklahoma, 316 U.S. 535 (1942), which held that the right to procreate was unconstitutionally infringed upon by a statute that mandated compulsory sterilization for habitual criminals. Whether the right to procreate will be given further protection may soon be tested more directly. The Eighth Circuit is expected to rule soon on a case where a male prisoner has claimed that his right to procreate has been violated where he has been denied conjugal visits and the right to donate sperm to his wife. The District Court affirmed the prison's denial of sperm donation since it found that "reproduction was fundamentally inconsistent with imprisonment." *See* 2 ACLU REPRODUCTIVE RTS. UPDATE 7 (Mar. 16, 1990). *See also* Graham, *supra* note 62, at 317–18, for a discussion of the Court's protection of privacy rights and the impact on reproductive freedom.

126. In re Baby M, 109 N.J. 396, 537 A.2d 1227 (1988). It may be that the right to make meaningful choices concerning one's own procreation is so fundamentally personal that it is not waivable or alienable in any manner. As Stark has noted, "the constitutional protections to which the parties were entitled are not triggered because the parties entered a contract, they are triggered because that contract involves fundamental rights." Stark, *supra* note 104, at 38.

tal rights if it had intended to allow termination to be achieved by one short sentence in a contract."[127] In *Baby M*, of course, the gestational mother was also the genetic mother. Thus it was fairly easy for the court to find that her rights under a surrogacy agreement were no less than those under a paid adoption contract. If, however, one accepts that pregnancy has traditionally been the standard by which maternity has been measured, then there is no reason to reach a different result in the gestational surrogacy context.

A rule favoring the gestational mother is also the most morally supportable. If genetic parentage is considered supreme, then gestational mothers are reduced to mere "human incubators." That view demeans and dehumanizes all women. Further, as Katha Pollitt noted in her insightful analysis of this issue:

> by equating motherhood with fatherhood — that is, defining it solely as the contribution of genetic material — [the *Johnson* court] has downgraded the mother's other contributions (carrying the fetus to term and giving birth) to services rather than integral components of parenthood. Under this legal definition, a normally pregnant woman is now baby-sitting for a fetus that happens to be her own.[128]

III. DEFINING MOTHERHOOD: THE CURRENT STATE OF THE LAW

The debate over surrogacy has focused on which adult(s) should be given legal rights over the resulting child, and whether any form of surrogacy is morally acceptable at all in a society which both values the individual freedom to make parenting decisions, and supports the need to regulate at least some of those decisions where they may intrude on the rights of the child or others.[129] As the

127. In re Baby M, 109 N.J. 396, 429, 537 A.2d 1227, 1243–44 (1988).

128. Pollitt, *supra* note 39, at 842.

129. Analyses of the issues raised by surrogacy agreements have generally taken the following forms. Some commentators have discussed the constitutional issues implicated in allowing or banning surrogacy agreements. *See* Ikemoto, *supra* note 86; and Stark, *supra* note 104. Others have focused on the validity and enforceability of the surrogacy contract. *See* Carbone, *supra* note 83; Dolgin, *supra* note 87. Still others have considered the ethical issues. *See* Cahill, *The Ethics of Surrogate Motherhood: Biology, Freedom and Moral Obligation*, 16 L. MED. & HEALTH CARE 65 (1988); Macklin, *Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis*, 16 L. MED. & HEALTH CARE 57 (1988). Finally, some authors have considered the implications for feminists of supporting or banning surrogacy. *See* Andrews, *supra* note 16; Mahoney, *supra* note 57.

following discussion will show, the first question is not answerable based on current California statutes.[130]

The answer to the second question is founded on the moral judgments placed on commercial surrogacy agreements. Arguably, they provide an opportunity for otherwise infertile women to fulfill personal dreams of motherhood. However, adoption also creates such an opportunity and has the benefit of providing homes for otherwise unplaced children. Another argument for surrogacy characterizes it as an agreement for the provision of a service by the gestational mother. In reality, however, commercial surrogacy breaks female reproduction into discrete components, each of which ultimately may be for sale. Viewed as the marketing of women's reproductive capacities and the payment of financial consideration for the surrender of a child, surrogacy is dehumanizing to all of the parties concerned. Thus, the answer to the second question is inherently tied to the representation of these arrangements. However, even those who are repulsed by the thought of women selling their services as gestational mothers must recognize that the current demand for this technology is so high that banning it entirely would not solve the legal and moral problems. It would be disingenuous, therefore, for legislators and the courts to refuse to confront the intricate moral, social and legal issues raised by gestational surrogacy by resorting to a ban on commercial surrogacy or any other morally difficult non-coital reproductive technology. Instead, the issue of legal maternity must be directly addressed by the California legislature, in order to minimize the traumatic effects and unpredictable outcomes of litigation.[131]

As California law currently stands, biological maternity is not specifically defined. Traditionally, the woman who gives birth to the child has experienced both the genetic and gestational components of maternity, and thus is presumed to be its legal mother.[132] When biology is separated by the use of non-coital reproductive

130. This discussion specifically concerns California law. At present, no California statute directly addresses surrogacy arrangements.

131. This Article focuses specifically on California law for two reasons. First, because California statutory law currently does not address surrogacy, contracting parents may be encouraged to come to California to engage in a practice which is illegal or heavily regulated elsewhere. Second, California courts have recently faced the issues raised by commercial surrogacy in Johnson v. Calvert. See also *infra* note 133 for a discussion of another recently reported situation in which three adults are contesting custody of a child produced by a surrogacy agreement. Thus, commercial surrogacy is a topical issue in California, and one which must be resolved by the legislature before more of these cases are disputed in the courts.

132. *But see* ARK. STAT. ANN. § 10-201 (1989).

technologies, however, we are forced to choose between the gestational mother and the genetic mother to determine the child's legal mother. As evidenced by the *Johnson* decision, the genetic component may now be primary, and the woman with the genetic link to the child may be found to be its legal mother. Because, however, *Johnson* was a trial court case of first impression, in practice, persons involved in surrogacy arrangements in California are left to speculate about which woman the courts will ultimately consider the legal mother.[133]

Although a maternity presumption does not yet exist in California law, the law addresses questions of paternity raised by sperm donation and by extramarital sexual relations.[134] Since the paternity issues arising from sperm donation and artificial insemination may be considered somewhat analogous to gestational surrogacy,[135] it is worthwhile to examine the relevant statutes to determine if it is possible or wise to extend their application to this context.[136] As

133. The issue of the right to custody and/or visitation was recently raised again in California. Elvira Jordan, a birth mother who had made a traditional surrogacy agreement with Robert and Cynthia Moschetta, sued for custody when the contracting parents decided to divorce seven months after the birth of the daughter Elvira Jordan bore for the Moschettas. According to Jordan, she relinquished custody temporarily, conditioned on the Moschettas' attending marriage counseling for one year and unregulated visitation for herself. The Moschettas are also contesting custody, as Robert Moschetta wishes to raise the infant girl himself. Cynthia Moschetta, who already has a thirty year old son, claims an emotional bond with the child, which she says she developed during her six-to-eight week maternity leave. The case is complicated by the fact that the Moschettas did not complete the filings required for a stepparent adoption which would have terminated Elvira Jordan's parental rights before they began divorce proceedings.

In January of 1991, the Orange County Superior Court granted temporary custody to Robert Moschetta, gave Cynthia Moschetta twice weekly visitation rights, and denied visitation to Elvira Jordan. L.A. Times, Jan. 26, 1991, at B6, col. 1. *See also* L.A. Times, Jan. 15, 1991, at B1, col. 2; L.A. Times, Jan. 14, 1991, at B1, col. 2. However, on April 18, 1991, an Orange County Superior Court judge ruled that Cynthia Moschetta has no legal rights to the child and granted Elvira Jordan thrice weekly visitation rights pending permanent custody arrangements. *Surrogate Mother Gets Rights of Legal Parent*, L.A. Times, Apr. 19, 1991, at A1, col. 2.

134. Depending on the analysis given to the most nearly applicable California statutes, there is some reason to believe that either genetic or gestational mothers might be treated as having parental rights over children produced by gestational surrogacy. As the discussion in the text will show, using these statutes to determine maternity in the surrogacy context is, therefore, unworkable.

135. *See supra* note 25 and accompanying text. Gestation is physically distinguishable from sperm donation. Egg donation may therefore be more analogous to sperm donation, and, thus, the following statutes may be more applicable to egg donors than gestational birth mothers. See generally Robertson, *supra* note 3, for a complete discussion of female egg donation.

136. Using a paternity analogy may not be the best solution because of the unequal gender role expectations placed on mothers and fathers. Mothers are generally expected to contribute some essential nurturing during their children's early years. This belief

discussed above, however, gestation is distinguishable from sperm donation.[137] For women, egg donation may be the most analogous act to sperm donation, and thus the following statutes may be more directly applicable to egg donors.[138]

Anonymous sperm donors are precluded from asserting parental rights over any children resulting from artificial insemination.[139] California Civil Code section 7005(a) provides that if, under the supervision of a licensed physician, a woman is artificially inseminated with the sperm of a man not her husband, and both spouses consent in writing, the husband is treated as the legal father of the child so conceived.[140] Subsection (b) provides that a man who donates

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was previously expressed most explicitly in the "tender years doctrine" which gave custody to the mother during the child's infancy and early youth. *See* In re Baby M, 109 N.J. 396, 425 n.17, 537 A.2d 1227, 1256 n.17 (1988). *See also* Mahoney, *supra* note 57, at 86. However, since society generally expects fathers to provide financial support to their children, paternity statutes are in reality a method for determining which man should be required to support the child. *See* In re Marriage of Adams, 174 Ill. App. 3d 595, 528 N.E.2d 1075 (1988) (husband who did not give the statutorily required written consent for his wife to be artificially inseminated nonetheless was estopped from claiming non-paternity and was held to owe support payments because he failed to protest and to notify third parties of his refusal to consent), *rev'd* 133 Ill. 2d 437, 551 N.E.2d 635 (1990) (remanded to trial court to determine if Florida law should have been applied, both on a jurisdictional basis and since Florida law was more likely to declare the child legitimate, thus allowing him to receive the social advantages of legitimacy).

137. *See supra* note 117 and accompanying text.

138. See Robertson, *supra* note 3, for a description of the surgical procedures used to remove eggs from a woman's ovaries. *See also supra* note 25.

139. The United States Supreme Court recently denied certiorari in a case in which an Oregon man, Kevin McIntyre, donated his sperm to a friend, Linden Crouch. Crouch v. McIntyre, 110 S. Ct. 1924 (1990). Ms. Crouch has recognized McIntyre as the natural father of the child, although she has refused to allow him access to that child. McIntyre has alleged that he and Crouch had an agreement that he would assist her in raising the child. Relying on Oregon law, the mother argued that where a man donates sperm to a woman not his wife, he has no parental rights over the resulting child. However, applying contract principles, the Oregon Court of Appeals remanded the case to determine whether a valid agreement to allow McIntyre to participate in raising the child exists. The court stated that if he can prove such an agreement he may assume parental responsibilities. *See* 2 ACLU REPRODUCTIVE RTS. UPDATE 5 (Apr. 27, 1990). *Contra* In re R.C., 775 P.2d 27 (Colo. 1989) (Colorado Uniform Parentage Act provisions regarding relinquishment of parental rights by sperm donors do not apply where the donor is known and the unmarried mother agreed to recognize him as the natural father).

140. *See* CAL. CIV. CODE § 7005 (West 1983). Civil Code Section 7005 is section 5 of the Uniform Paternity Act which was adopted by California in 1975. CAL. CIV. CODE § 7005 (West. 1983) (Stats. 1975, ch. 1244, § 11, amended Stats. 1978, ch 429, § 34, Stats. 1979, ch. 889, § 1).

The policy behind denying paternity rights to sperm donors is to provide an incentive for sperm donation by not requiring the donor to assume the duties and responsibilities of child support. *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 179 Cal. App. 3d 386 (1986) (where a physician was not used to obtain sperm, the provisions of Civil

sperm used to impregnate a woman not his wife is treated as though he is not the biological father of the child. Thus, the Civil Code provides that where artificial insemination is used to overcome infertility in married men, the resulting child is the legal offspring of the spouses. This statute effectuates the policy of allowing married persons to control their own procreational decisions.[141]

A second California statute, Evidence Code section 621, provides that children born to a married woman while cohabiting with her husband are those of her husband, regardless of the biological father's identity.[142] The presumptions of section 621 may be rebutted only by evidence that the husband is impotent or sterile.[143] If he is, then the paternity of the child is to be resolved based on blood testing, by determining to which man the child is genetically related.[144] However, consistent with Civil Code section 7005, under

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Code section 7005 do not apply. Thus, where a woman inseminated herself with the sperm of a donor of her own choosing, the donor was able to receive a court order declaring him the natural father, visitation rights and a declaration that the mother's close woman friend was not a *de facto* parent.).

Originally, artificial insemination was frowned upon, as it was compared to adultery. Over time, however, it became more widely used and was incorporated into the Evidence and Civil Codes as discussed above. *See* Carbone, *supra* note 83, at 590 n.35.

141. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (married couples have the right of access to birth control). Janet Dolgin argues that artificial insemination allows women with infertile husbands to reproduce, while criminalizing or voiding surrogacy agreements denies the same right to men with infertile wives. Dolgin, *supra* note 87, at 528.

142. *See* Michael H. v. Gerald D., 109 S. Ct. 2333, *reh'g denied* 110 S. Ct. 22 (1989) (Supreme Court upheld California Evidence Code section 621 and found no violation of substantive or procedural due process where the putative biological father was denied an opportunity to a hearing on the issue of his paternity and where he was denied visitation rights over the objections of the mother and her husband). *See also* Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1982) (putative father denied opportunity to challenge conclusive presumption of paternity for mother's husband; visitation also denied where mother and husband intended to raise child as their own).

143. As of 1990, the husband, the child — through its *guardian ad litem* — or the mother (only where the putative father has acknowledged the child as his) may challenge the presumption. CAL. EVID. CODE § 621 (West Supp. 1990).

144. *See* CAL. EVID. CODE § 621 (West Supp. 1990). The use of blood tests to determine paternity is fairly recent. California adopted the Uniform Act on Blood Tests to Determine Paternity (now CAL. EVID. CODE §§ 890–897) in 1953. The California Supreme Court explained the policy behind this statute.

> The presumption of Evidence Code § 621 is not so much a conclusive presumption as it is a rule of substantive law that a husband will be treated as the father of a child born to his wife and conceived while they were cohabiting. It makes no difference whether the husband is the biological father, for the basis of the inquiry is whether he is the legal father of the child; he must be given the chance to prove that he is not the legal father by demonstrating the impossibility that the child was conceived during his cohabitation with his wife.

Evidence Code section 621(e) blood testing is not to be used to resolve paternity where a woman was artificially inseminated or conceived by any surgical procedure with the consent of her husband.[145] Thus, both statutes guarantee that the children of married men whose wives are impregnated by a sperm donor will be treated by law as if they were the biological children of the spouses.

Where it is the woman's infertility, however, that must be overcome by non-coital reproductive technology, the paternity statutes are not helpful in determining the legal status of the parties. Analyzing Civil Code section 7005 and Evidence Code section 621 in the context of gestational surrogacy produces an anomalous result.[146] Under Civil Code section 7005, if the genetic mother whose ovum has been fertilized and implanted into the gestational mother is treated as a sperm donor, she loses parental rights to the child whom she does not gestate. The intent of Evidence Code section 621(e) is to provide a rule of law that where a married woman uses surgical means to conceive a child, the spouses are to be considered the biological parents and the court may not consider evidence of the child's genetic heritage.[147] If the policy of Evidence Code sec-

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Jackson v. Jackson, 67 Cal. 2d 245, 248, 60 Cal. Rptr. 649, 651 (1967) (citing Kusior v. Silver, 54 Cal. 2d 603, 7 Cal. Rptr. 129 (1960)).

145. Note, however, that Evidence Code section 621 does not define "conceived." If the common definition is used, then one must infer that the statute means "becomes pregnant." However, advocates of surrogacy who wish to use this statute to support the genetic mother's claims to legal maternity may define "conceive" as "to have an embryo fertilized from her ovum." Black's Law Dictionary defines conception as "the beginning of pregnancy. As to human beings, the fecundation of the female ovum by the male spermatozoon resulting in human life capable of survival and maturation under normal conditions." BLACK'S LAW DICTIONARY 262 (5th ed. 1979). This definition seems to subsume "conception" into the states of both fertilization and pregnancy, since "normal conditions" implies human female gestation.

146. The validity of using these two statutes to determine parenthood in traditional surrogacy arrangements has been challenged in Sherwyn v. Dep't of Social Servs., 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985). There, plaintiffs were attorneys for over one hundred couples who had made traditional surrogacy agreements. The couples were concerned that the natural father would not immediately receive custody, but rather, like his wife, would have to invoke a stranger adoption to obtain full legal rights to his child. The court discussed artificial insemination by the husband, and by a third party donor, and *in vitro* fertilization, and concluded that all methods of technological reproduction created legal problems. Further, the court recognized that where the birth mother is married, the presumption that her husband is the father creates another layer of confusion. After raising these issues, however, the court determined that there was no justiciable controversy. It, therefore, vacated the trial court's judgment for the defendants and directed the trial court to dismiss the complaint.

147. California Civil Code section 7006(f) allows a child, the natural mother or a man presumed to be the natural father, pursuant to Civil Code section 7004(a)(1), (2) or (3) (i.e. a man married to, or who has attempted marriage with, the natural mother) to

tion 621(e) is to provide conclusive parentage and inheritance rights to the child intended to be the issue of a marital relationship, but produced by modern surgical practices, then the genetic mother legally should be considered the natural mother.[148] If the policy of Civil Code section 7005 is to encourage anonymous sperm donation, and if the donation of the ovum by the genetic mother is analogized to sperm donation as the most similar component of the female reproductive process, then the genetic mother should automatically relinquish all claim on the child.[149] Thus, interpreted together, Civil Code section 7005 and Evidence Code section 621(e) are inconclusive to determine which woman will be given legal maternity rights.

The awkwardness of attempting to manipulate these statutes into providing the basis for a legal determination of maternity arises from the fact that their original purpose was to alleviate concerns over illegitimacy. Evidence Code section 621 was originally enacted in 1872 as California Code of Civil Procedure section 1962(5).[150] Although Evidence Code section 621 has been amended a number of times since 1872, the changes have affected which impediments to conception may trigger a challenge of the conclusive presumption, and which types of evidence are admissible.[151]

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bring an action to determine the paternity of the child before its birth. CAL. CIV. CODE § 7006(f) (West Supp. 1990).

148. One might wonder if Evidence Code section 621(e) is interpreted to provide maternity rights to a married woman who employs a gestational birth mother, it would also apply to an unmarried woman as well.

149. See Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986), for a discussion of the policy concerning sperm donation. See also Robertson, *supra* note 3, at 3–6, for a discussion of the differences between sperm donation and egg donation. *But see supra* note 117 and accompanying text.

150. At that time, it stated that the "issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." Michael H. v. Gerald D., 109 S. Ct. 2333, 2338 (1989).

151. The changes include: A change in the underlying claim of physical impossibility (sterility as well as impotence); the type of evidence which will be allowed (blood tests); the presumed status of the child (child of the marriage, rather than legitimate); who may challenge the presumption (as of 1990, the child through its guardian *ad litem*, or the presumed father as specified in California Civil Code section 7004, as well as the husband, or the mother, only if the biological father has recognized the child); and the temporary disposition of the child (visitation or custody allowed *pendente lite* to those parties with whom such contact is in the child's best interests). CAL. EVID. CODE § 621 (West Supp. 1990) (originally enacted as CAL. CIV. PROC. CODE § 1826(a) in 1872, later amended as CAL. CIV. PROC. CODE § 1962(5), Stats. 1945, ch. 948, § 3, at 1835, further amended to CAL. EVID. CODE § 621, Stats. 1965, ch. 299, § 621). *See* S.B. 2015, 1989–90 Leg., for the original text(s) of the bill and its amendments which became the most recent version of CAL. EVID. CODE § 621 (Stats. 1990, ch. 543). *See also* B. WITKIN, CALIFORNIA EVIDENCE §§ 278, 872–73 (3d ed. 1986 & 1990 Supp.).

Evidence Code section 621 does not address the issue of maternity, since from its original enactment in 1872 until the present, biological maternity was visibly apparent, and legitimacy was determined by reference to the mother's marital status. Avoiding legal determinations of children as illegitimate was the main concern of the legislature and the paternity presumption reflected social notions about the value of legitimacy. As the majority opinion notes in *Michael H. v. Gerald D.*:[152]

> [Section 621] is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and the wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.[153]

Thus, the paternity presumption prevents husbands from declining to support children born during a marriage. This is the basis of the common law's repugnance to declare children illegitimate, where a legal, although perhaps not biological, father is available to support them.[154] The "integrity of the family unit" is actually a justification for requiring the husband, rather than the state, to support those children.[155] Therefore, unless the husband can prove that he had no access to his wife during the time the child could have been conceived, or that he was physically incapable of impreg-

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152. Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).

153. *Id.* at 2340 (quoting Vincent B. v. Joan R., 126 Cal. App. 3d 619, 623, 179 Cal. Rptr. 9, 10 (1982)).

154. *Id.* at 2343. However, see Justice Brennan's dissent for a discussion of the relevance of legitimacy in present day society. He argues that the stigma previously associated with illegitimacy is no longer a serious burden to families and children. *Id.* at 2351 (Brennan, J., dissenting). *See also* In re Melissa G., 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894 (1989) (distinguishing *Michael H.* as applying only to "intact families" where the husband and wife agreed to raise the child together and found that where the mother had left the presumed father eight days after the child's birth and gone to live with the putative biological father and had a second child with him, and where Melissa had lived with her mother and natural father and sister for four years, no public policy would be served by returning her to the presumed father); and In re Lisa R., 13 Cal. 3d 636, 119 Cal. Rptr. 475, 532 P.2d 123 (1985) (where a child, having spent four years in foster care after the death of her mother and her mother's husband had lived with her mother and biological father for five months before the mother returned to her husband, the biological father's interest outweighed any interest on the part of the state). *Compare* Michelle W. v. Ronald W., 39 Cal. 3d 354, 216 Cal. Rptr. 748, 703 P.2d 88 (1985) (where child lived with presumed father for four years and then mother left to marry the natural father, and both men held out the child as their own and supported her, the court constitutionally applied Evidence Code section 621 and denied the biological father the opportunity to establish his paternity).

155. *See Michael H.*, 109 S. Ct. 2333, 2352–53 (Brennan, J., dissenting).

nating her, he will be held to be the legal father of the child, with all the corresponding rights and duties.[156]

The policy of requiring a husband to support children born to his wife, during their marriage, made sense at a time when genetic paternity was virtually undiscoverable. The paternity presumption may be outmoded now that biological paternity can be determined with substantial certainty. Indeed, Justice Brennan, points out the questionable basis for preserving the presumption in his dissent in *Michael H.* He notes that originally the presumption served as a method of clarifying an otherwise nebulous tangle of relationships, but that since biological paternity is now readily determinable, the justification has come to be the maintenance of the integrity of the family unit.[157]

That justification is not applicable to surrogacy arrangements. The contracting genetic parents and the gestational mother have no pre-existing relationship. There is no singular "family unit" to be protected in these cases. Instead, there is the family relationship between the contracting parents, and that between the gestational mother and her child.[158] Both of these types of families have been protected historically, as reflected in the adoption and paternity statutes. Thus where the interests of these otherwise protected family relationships come into conflict, a tension exists between the protections afforded the contracting parents' marital relationship and the protections given to birth mothers. Unfortunately, since as discussed above, the interests of the parties are mutually exclusive, the legislature must decide to recognize the parental rights of only one party.

IV. CLOSING THE LOOPHOLES: A STATUTORY DEFINITION OF LEGAL MATERNITY

Because gestational surrogacy involves an unprecedented splitting of the biological components of motherhood, there is no direct legal precedent in these cases for determining who is the legal mother.[159] In order to avoid the intransigent issues raised by surro-

156. See Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1982), for a discussion of the history and policy of the paternity presumption. *See also Michael H.*, 109 S. Ct. at 2342–43.

157. *Michael H.*, 109 S. Ct. at 2352–53 (Brennan, J., dissenting).

158. Or there are three or more adults fighting over custody of the infant. *See supra* note 133.

159. This analysis focuses on situations in which three parents are involved: the gestational mother and the genetic mother and father. The child of a surrogacy agreement may, however, have more than three parents. Janet Dolgin postulates that such a

gacy technologies, some jurisdictions have codified a legal rule that the woman who gives birth to the child is the legal mother.[160] Other jurisdictions find that the genetic mother has full parental rights, cutting off any claim for the gestational mother.[161]

At present, private surrogacy agreements are unregulated, and unless they constitute baby selling, are allowed by California law.[162] Because California law does not address surrogacy, either in its traditional or gestational form, parties to gestational surrogacy agreements in particular are currently unable to determine who will be considered the legal mother should a dispute arise. Traditional surrogacy may, of course, be analyzed under family law rules. However, because the separation of the gestational from the genetic components of maternity has no precedent or parallel in law, each court's analysis may be different.[163]

To determine with certainty which of the two women claiming a biological or emotional link to the child is the legal mother, the California legislature must address the issue of maternity. Amending the Civil and Evidence Codes to include a conclusive statutory presumption of maternity, enforceable by the courts, would settle the questions raised by non-coital reproductive technologies.

The decision to create a conclusive rule of law is only the first step. Since only one of the two claimants can be the child's legal

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child might have five parents: the gestational mother, the genetic mother and father, and a contracting mother and father who would be the eventual custodial parents. Dolgin, *supra* note 87, at 549 n.156. Additionally, the gestational mother might also have a male or female partner who might become attached to the child while it was in utero.

160. In the United Kingdom and Australia, the woman who was pregnant and gave birth to the child is considered its legal mother. *See* P. SPALLONE, *supra* note 3, at 173. However, the Ontario Law Reform Commission has recommended that Canada enforce surrogacy contracts as binding. *Id.* The legal presumption and attendant rights and duties of motherhood will change if the legal mother relinquishes the child for adoption. Charo, *supra* note 15, at 109. *See supra* note 75 for a discussion of United States laws concerning surrogacy.

161. This is the presumption in effect in Israel. *See supra* note 75. Additionally, a similar solution has been proposed by Janet Dolgin. She would vest parental rights in the genetic parents during the pregnancy, but would give the gestational mother a revocation period after the birth in which to change her mind. *See* Dolgin, *supra* note 87, at 547–48.

162. See California Penal Code section 273 which disallows payments to birth mothers or others to induce them to terminate parental rights and turn over a child for adoption. CAL. PENAL CODE § 273 (West 1989).

163. The unpredictability of individual courts' decisions may lead to increased transaction costs. Financial costs might include the legal fees and costs involved in litigation or settlement, psychiatric fees for evaluations of parental fitness, or income lost during hearings and meetings. The likely emotional costs include the tension resulting from living in anticipation of an unfavorable ruling and the associated stresses on the relationships involved.

mother, the legislature must decide which woman to prefer.[164] Although the arguments justifying commercial surrogacy on the basis of freedom of contract and personal autonomy are compelling, they fail because pregnancy simply cannot be commercialized. The right to enter an agreement to carry a child for someone else does not result in a right by the other party to force the pregnant woman to relinquish her child.[165]

A rule that the gestational mother is the legal mother recognizes the primacy of gestation in female reproduction. Further, it supports the bodily dignity of women and reinforces their right to control when, whether and how they will reproduce. To this end, this Article proposes the following statutory amendments:

California Civil Code section 7005.1 — Legal Maternity would read:

(a) In accordance with Evidence Code section 621.1, a woman who experiences a physical pregnancy which results in the birth of a child is conclusively presumed to be the mother of that child.

(b) All rights, duties and obligations of maternity, including but not limited to the rights to terminate a pregnancy or to relinquish a child for adoption, are indefeasibly vested in each woman, who is physically pregnant with and gestating a fetus, within the jurisdiction of this state.

(c) No woman may be compelled to comply with any agreement made before the conception or birth of a child she has been pregnant with and given birth to, which would condition her parental rights in any manner or require her to relinquish custody, regardless of whether or not any financial consideration was paid, or whether any other inducements were offered by any person. The provisions of this section are not intended to interfere with or modify any adoption conducted in accordance with the duly enacted adoption regulations of the State of California.[166]

(d) All of the provisions of subsections (a), (b) and (c) apply to pregnancies resulting from coital sexual relations, non-co-

164. Since the Supreme Court believes that a child cannot have more than one legal father, multiple legal motherhood is also excluded. "The claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country." Michael H. v. Gerald D., 109 S. Ct. 2333, 2339 (1989).

165. Whether a woman who does not relinquish the child should pay damages is an open question. Where she is solvent, there is no reason not to compel her to return any payments made under the agreement.

166. *See* CAL. CIV. CODE §§ 221–230.5 (Deering Supp. 1991). Adoption was unknown at common law and is therefore purely statutory. In re Adoption of McDonald, 43 Cal. 2d 447, 274 P.2d 860 (1954); In re Adoption of Driscoll, 269 Cal. App. 2d 735, 75 Cal. Rptr. 382 (1969).

ital reproductive technologies, or any other method causing a woman to become pregnant.

Evidence Code section 621.1 — Legal Maternity would read:

(a) In accordance with Civil Code section 7005.1, any woman who experiences a physical pregnancy which results in the birth of a child is conclusively presumed to be the legal mother of that child.

(b) The marital status of a woman who gives birth to a child is irrelevant to the conclusive presumption of her legal maternity.

(c) The operation of this presumption cannot be terminated or suspended by any agreement made before the conception or birth of any child by the legal mother of that child, as determined above in subsection (a), requiring her to terminate her maternal rights and relinquish the child after its birth to any person. Nothing in this section is intended to interfere with the operation of any duly enacted rules of the State of California governing adoption proceedings.

The above proposed statutes would serve the purposes of determining legal maternity and avoiding the reduction of women's reproductive capacities to commercial services. The maternity presumption is intended to uphold the dignity of each woman's ability to make personal and private decisions concerning reproduction. Further, it reinforces the rights of personal autonomy concerning procreational decisions constitutionally guaranteed to each individual.[167] The proposed statutes treat gestational mothers identically in both the adoption and surrogacy contexts, by allowing each woman the right to determine, after the birth of the child, whether she will relinquish custody and terminate her parental rights.

This presumption also avoids placing women like Anna Johnson in the untenable position of being allowed to become pregnant to satisfy a contract, but later denied the right to change her mind. Another purpose of the maternity presumption is to avoid the racial and class issues implicit in the *Johnson* case, along with the undertones of involuntary servitude that enforcing a surrogacy agreement against a birth mother suggests.[168] A maternity presumption for the birth mother also equalizes the disparities in political, financial and social power between the gestational mother, who is likely to be in a financially weak position, and the contracting parents. Finally,

167. See *supra* note 125 for a discussion of the constitutional underpinnings of the privacy rights implicit in decisions concerning reproduction.

168. Additionally, a gestational maternity presumption avoids any thirteenth amendment conflicts that a presumption for the genetic mother would be forced to address.

the proposed presumption recognizes that while all the parties involved share the same longing for a child of their own, only one woman can be the child's mother. Using gestation, rather than genetics, as the basis for this determination reinforces each woman's right to bodily integrity and to control her own reproduction.[169]

The proposed maternity presumption would still allow those women who truly desire to provide children for women who cannot give birth the opportunity to make the decision to act as a gestational mother, and then relinquish their rights in an approved adoption proceeding.[170] Additionally, it would bring surrogacy agreements in line with traditional state policies on adoption by allowing pregnant women to make their final decision at the point at which they have the most information, that is, after the birth of the child.

CONCLUSION

There are no simple answers to the questions raised by non-coital reproductive technologies which allow motherhood to be split into its component biological functions and parceled out to different women. The basic problem is that technology has developed faster than the legal and moral analyses needed to regulate it. Two women hold competing claims to be legal mother of a single child. However, if the law is unable to recognize more than one legal father, it must also find that a child can have only a single mother.

Gestational surrogacy involves the direct conflict of two women's rights to control their reproduction. Only one woman can exercise control over the pregnancy itself, and then over the disposition of the child. That woman must be the gestational mother. Otherwise, her right to choose when and whether she reproduces becomes subordinated to the genetic mother's desire for a child, once the gestational mother has signed a surrogacy agreement.

If adults are allowed to enter into agreements in which they will share the biological duties of parenthood, then we must also create a doctrinal structure to sort out and assign priority to the interests involved. Without such a structure, if we continue to al-

169. Placing gestation before genetics also circumvents the lingering concerns over eugenics and the superiority of certain characteristics that may be a factor in some choices to utilize non-coital reproductive technologies.

170. The effects of surrogacy agreements on existing children who are currently unplaced is an important concern which must be considered by the legislature in developing any comprehensive policy on adoption and assisted reproduction. Such a discussion, however, is beyond the scope of this Article.

low the courts to engage in individualized analyses of each case, in some circumstances justice will be done, but possibly at great cost. Statutory regulation of surrogacy would provide more predictability of outcomes. A statutory presumption favoring the gestational mother would have the positive benefit of evening out the parties' disparate bargaining power and access to resources. A maternity presumption would also provide greater certainty of outcome and place the parties to a surrogacy agreement on notice that the gestational mother's claim would be preferred in a legal dispute.