

APPROACHING SURROGATE MOTHERHOOD: RECONSIDERING DIFFERENCE

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INTRODUCTION

The many ethical, social, and legal problems involved in the surrogate motherhood process create a maze of issues available for study—the meaning of parenthood, the validity of the contracts, the objectionable nature of baby-selling, and the permissibility of regulation. Surrogate motherhood conflates the controversy over the exchange of reproductive assistance for consideration, and the parsing out of the many aspects of motherhood, intent to mother, gestation, and egg donation, resulting in a multiplicity of legal issues and controversies. Perhaps because there are so many legal issues involved, many disparate approaches to considering the legality of surrogate motherhood have developed. Therefore, different analyses of surrogate motherhood, though dealing with the same topic, are often completely unrelated analytically. The study of surrogate motherhood therefore lends itself to incongruity and confusion. For example, viewing surrogate motherhood from the perspective of contract is quite different from approaching the issue as a derivation of adoption.

The goal of this paper is to examine and evaluate the different ways of approaching the legal and ethical questions surrounding surrogate motherhood. Ultimately, I will outline an overarching approach that gives due consideration to the fundamental issues involved and also can be used to parse out and consider other distinct approaches. My goal is to clarify the complex legal context in which the legality of surrogate motherhood developed, and to introduce a framework to consider and evaluate these different approaches.

I will discuss each approach independently, first from the perspective of policy, and then by examining the corresponding legal statutes, case law, or doctrines that reflect this policy.¹ I will present each approach and then critically examine its effectiveness, appropriateness, and legal validity. Some of the approaches tend to favor surrogate motherhood while others criticize it. However, the structure of the paper will focus on the different approaches to the issue, and not whether they support or oppose the process. Invariably,

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1. I point this out because I realize that some of the approaches are closely related to each other or might best be approached comparatively. In order to distinguish between approaches that have often been conflated, I will begin by separating them. In the final section, once I develop my own theory, I will attempt to use that theory to evaluate and reintegrate the approaches previously considered independently.

similar legal approaches can be used to argue for and against surrogate motherhood.

While the different approaches I have chosen are not necessarily exhaustive, I intend them to represent the major approaches to surrogate motherhood used by legal commentators, policy-makers, and feminists. I will first examine the rights-based approach to surrogate motherhood, which considers surrogate motherhood to be a right entailed in reproductive freedom. Next, I will consider the market approach to surrogate motherhood. This approach examines the similarities between surrogate motherhood and baby-selling or prostitution and considers how subjecting baby-making services to market forces affects personhood and freedom of contract.

Lastly, and most central to this paper, I will consider what I call "gendered" approaches to surrogate motherhood. While these approaches may have sex-neutral counterparts, they most often accompany, or focus on, a gendered purpose. Therefore, I find it most useful to deal directly with the gender issues involved. Advocates of women's rights have made arguments both for and against surrogate motherhood. Some feminists have argued that surrogate motherhood must be allowed to substantiate a woman's right over her body. Proponents of this argument perceive surrogacy as a step toward the liberation of womanhood by allowing payment for women's services.² Others argue that surrogate motherhood exploits women as child bearers and is patriarchal at its core.³ I will dissect these different gendered approaches by explaining them in light of what I perceive as three distinct stages in the legal treatment of women and the understanding of equality between men and women. First, I will examine arguments that focus on the potential exploitation of women by surrogate motherhood contracts. Second, I will explore the liberal feminists' intent and contract based theories. Lastly, I will consider the difference movement in feminist theory. I will explain why I believe that considering differences between men and women expresses the most pertinent account of gender specific contracts, and I will then consider the application of this approach to surrogate motherhood. Ultimately, I argue that a gender conscious approach, which recognizes the differences between men and women, provides the best legal response to surrogate motherhood. I explain that such an approach would result in considerable restrictions on the use of surrogate mothers.

2. See generally SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970); CARMEL SHALEV, *BIRTH POWER* (1989); LORI ANDREWS, *NEW CONCEPTIONS* (1984).

3. See, e.g., ANDREA DWORKIN, *RIGHT WING WOMEN* 181-88 (1983).

I. THE RIGHT TO PROCREATIVE FREEDOM

A. *The Push for Reproductive Creativity*

Modern day realities encourage the development and use of assisted and collaborative reproduction for those who have fertility complications and for those who cannot conceive children of their own.⁴ Use of all non-coital reproductive procedures is on the rise, including surrogate motherhood.⁵

On the one hand, surrogate motherhood is an ancient form of assisted reproduction used by women in Biblical times. In the first book of the Old Testament, *Genesis*, Abraham's wife, Sara, and Jacob's wives, Rachel and Leah, all enlisted other women in their quests to have children. Rachel said to Jacob, "Behold my maid, Bilhah, go in unto her, and that she may bear upon my knees, and I also obtain children by her."⁶ However, the difference between these scenarios and modern day surrogate motherhood is that under Biblical law, a man could have many wives or concubines. In these Biblical stories, the surrogate mother was herself legally married to the man with whom she procreated.⁷ Therefore, the woman was in essence a surrogate wife, not a surrogate by contract. She did not have to give up her child; rather, she agreed to raise her child in the household of the father and his primary wives. Bilhah was always acknowledged to be the mother of her children.

Surrogate motherhood, as now commonly understood, entails contracting for a child, not enlisting an extra wife to solve fertility problems. This understanding of surrogate motherhood is modern. While artificial insemination was first successful in achieving pregnancy in 1799, surrogate motherhood contracts were first initiated in the mid 1970's.⁸ In the last two decades, gestational surrogacy, which involves the use of *in vitro* fertilization (IVF), has become increasingly popular.⁹ In gestational surrogate motherhood, an egg is first inseminated with the intended father's sperm and then implanted in the surrogate mother's womb. The egg is ordinarily extracted from the intended mother. While not necessarily "high tech," surrogate motherhood is part of the push for innovations in the realm of non-coital reproduction.

4. JOHN ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 97-100 (1994).

5. See *id.* at 4-5 (describing the "reproductive revolution").

6. *Genesis* 30:3-4.

7. See Pinhas Shifman, *New Reproductive Technologies and Jewish Law*, 12 JEWISH L. ANN. 127, 133 (1997).

8. See CAROLE PATEMAN, THE SEXUAL CONTRACT 154-89 (1988); Dianne M. Bartels, *Surrogacy Arrangements*, in BEYOND BABY M 173, 175-76 (Dianne M. Bartels et al. eds., 1990).

9. The first child born successfully of IVF was Louise Brown in 1979. See George Tagatz, *Techniques for Assisted Reproduction*, in BEYOND BABY M 89, *supra* note 8, at 101.

The increasing demand for surrogate motherhood comes from a number of sources: infertile couples who desire to procreate using their own genetic material; homosexual men who desire to have a child with their own genetic material; and couples or individuals who simply want children and are frustrated by adoption agencies. While available data suggests that overall infertility rates have not increased significantly in recent years,¹⁰ the current preoccupation with fertility treatments can largely be attributed to the greater proportion of couples in higher socio-economic brackets experiencing infertility problems.¹¹ Coupled with the growth in technologies, the increasing percentage of delayed child bearing by middle and upper class women has greatly increased the use of fertility treatments. It is well established that fertility declines with age.¹² After thirty-five, fertility decreases dramatically, which greatly increases the desire and availability of funds for fertility treatments, including IVF and surrogate motherhood. The economic power and familiarity with control to which many of these women or couples are accustomed increases their sense of entitlement to these procedures.

Because surrogate motherhood provides a potential solution to infertility problems and can create the desired genetically related children, to many it is obvious that this potential should be developed and used. Those who view surrogate motherhood as a cure to infertility approach it as a source of reproductive freedom and as a solution to a debilitating problem. Proponents assert a right to procreative autonomy, including the right to contract with consenting collaborators for the purpose of bearing a child. Linking surrogate motherhood with procreative freedom has led advocates to view it as an element of procreative liberty guaranteed by the Constitution. The right to genetic continuity is viewed as part of the right of reproductive choice for the contracting father and his partner.¹³

B. The Constitutional Right to Procreate

John Robertson is the best-known proponent of the rights based approach to surrogate motherhood. He makes a constitutional argument for the

10. Nadine Taub, *Surrogacy: A Preferred Treatment for Infertility?*, in *SURROGATE MOTHERHOOD* 221, 222-23 (Larry Gostin ed. 1990).

11. Sevgio O. Aral and Willard Cates, Jr., *The Increasing Concern With Infertility: Why Now?*, 250 *J. AM. MED. ASS'N* 2327, 2327-31 (1983).

12. W.D. Mosher, *Fecundity and Infertility in the United States*, 78 *AM. J. PUB. HEALTH* 181, 181-82 (1988).

13. See generally John Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 *VA. L. REV.* 405 (1983) (arguing for substantive procreative rights) [hereinafter *Control of Conception*]; John Robertson, *Surrogate Mothers: Not So Novel After All*, *HASTINGS CENTER REP.* 28 (1983).

protection of procreative liberty, including non-coital reproduction.¹⁴ Robertson argues that Western society places a high priority on private discretion and choice in reproduction.¹⁵ The Supreme Court established a right to use contraception in *Griswold v. Connecticut*¹⁶ and *Eisenstadt v. Baird*,¹⁷ and established the right to abortion in *Roe v. Wade*.¹⁸ While the right to procreate has received less explicit support by the Court,¹⁹ Robertson argues that this is only because coital reproduction has rarely been challenged.²⁰ He argues that "dicta in cases ranging from *Meyer v. Nebraska* to *Eisenstadt v. Baird* clearly show a strong presumption in favor of marital decisions to found a family."²¹ He believes that it is therefore reasonable to conclude that the right to coital reproduction is fundamental, and that regulation curtailing the right should be subject to strict scrutiny under the Constitution.

He then argues that because coital reproduction is constitutionally protected, it is inconsistent to deny families with infertility problems the same constitutional protection because they cannot reproduce naturally. He makes an analogy to the First Amendment's protection of a blind man's right to read books. A blind man cannot be restricted from obtaining braille or other means of assisted reading. He concludes: "Thus if bearing, begetting, or parenting children is protected as part of marital privacy or liberty, those experiences are no less important when they are achieved non-coitally with the assistance of physicians, donors of gametes and embryos, or even surrogates."²² This argument is premised on a belief that the alleged constitutional right to procreate rests in the protection of the bearing of children, not in the means of bearing children.

This argument can be challenged on a number of fronts. First, Robertson's constitutional argument reaches farther than is justified. The cases from which Robertson derives the right to procreation, *Roe*, *Griswold*, and

14. John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, in *SURROGATE MOTHERHOOD*, *supra* note 10, at 25 (1990).

15. *Id.*

16. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that the use of contraceptives by married persons is a protected privacy interest).

17. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the right to use contraceptives exists for unmarried individuals as well as married couples).

18. *Roe v. Wade*, 410 U.S. 113 (1973).

19. With the possible exception of *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (upholding right of prisoner not to be sterilized). However, this holding is not directly on point, since it deals with sterilization and not the right to procreate.

20. Robertson, *supra* note 14, at 25.

21. *Id.* See also *Control of Conception*, *supra* note 13, at 414-15 n.23 (describing the current scope of a constitutional right to procreate and citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Eisenstadt*).

22. Robertson, *supra* note 14, at 26.

Eisenstadt, deal specifically with privacy. The right to use contraception and the right to an abortion, as well as the right to family privacy and decision-making, are based on a right of privacy, as initially construed in *Griswold*. Contracting for a surrogate mother contains public elements that are not entailed in coital reproduction. The surrogate motherhood process is based on a contract that needs implicit sanction or explicit validation from the state if it is contested. The process also requires administrative assistance by the state through adoption proceedings and record keeping. Furthermore, an outside broker usually arranges surrogacy contacts. Most importantly, these contracts are based on an arrangement with a third party, a surrogate. In light of these significant distinctions from coital reproduction or contraception, surrogate motherhood is not entitled to the strong presumptive right afforded to family privacy and contraceptive rights. Granted, abortion involves a third party doctor. Unlike surrogate motherhood, however, the primary focus of the abortion procedure involves an individual woman who is making the reproductive choice.

There is a liberty or privacy interest involved in making the personal reproductive choice to hire a surrogate mother. The United States' tradition of deference to individual decisions about coital procreation and parenting supports autonomy and liberty in non-coital reproduction as well. However, once such a decision necessitates public assistance and intervention, public regulation is appropriate and strict scrutiny protection is not afforded. Certainly, a lower level of scrutiny than the strictest scrutiny *Robertson* envisions would be sufficient. Prohibitions on adultery, incest, fornication, statutory rape and prostitution all regulate procreative liberty.²³ These proscribed relations are not considered constitutionally protected privacy rights in the same way as contraception between the married couple that *Robertson* envisions. Adoption, the most basic non-coital means of reproduction, is subject to regulation, although it may result from a private decision to have a child. The right to adopt is not afforded the same protection as coital reproduction precisely because of the many interests involved: those of the state, the birth mother, and the child. Therefore, *Robertson's* claim that all private decisions surrounding reproduction, whether coital or non-coital, should be protected fundamental rights does not give enough credence to the public aspects of non-coital reproduction. These public aspects make non-coital reproduction subject to regulation and a lower level of scrutiny even if

23. Prostitution is illegal in all states except Nevada, which delegates the regulation of prostitution to county officials. RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 155 (1996). Fornication is still a misdemeanor in many jurisdictions and in others it is illegal if open and notorious. Adultery is still a crime in 25 states. *Id.* at 99-110.

Robertson is correct in his argument that coital procreation is a right protected by the Constitution.

Furthermore, as pointed out by Marsha Garrison, “[t]he Supreme Court has . . . never held that the right to bear a child ensures the right to have one’s parental status recognized.”²⁴ Rather, the Court has made it clear that “the mere existence of a biological link” is inadequate to ensure parental rights.²⁵ Therefore, Robertson’s assumption that procreative liberty entails the right to parenthood, i.e., a man’s right to be determined the legal parent of the child of his sperm, is not well grounded.²⁶

In addition to the exaggerated strength of Robertson’s rights claims, the rights that he claims belong to the intended parents are not exclusive. Others have used the concept of procreative liberty to defend the surrogate’s right over her own body, arguing that a contract cannot compel surrogates to use their bodies in particular ways—either to forgo the right to abortion or to be “fetal containers.”²⁷ According to this argument, a woman’s right to autonomy over her own body and her right to rear offspring is part of reproductive freedom.²⁸ George Annas writes:

There has been much confusion about constitutional rights in the surrogacy arrangement. The only real rights at stake are those involving the rights to custody of a child resulting from an unwed pregnancy And whatever “procreation” rights might be raised to a constitutional level in the area of custody, the rights of the mother must be at least as strong as those of the father.²⁹

Even if a procreative right exists, it does not apply only to the couple contracting for the surrogate mother, but applies to all who are involved in the procreative act. Therefore, the rights approach would result in a balancing act in the case of a contested surrogate motherhood contract, rather than a clear

24. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 837, 857 (2000).

25. *Lehr v. Robertson*, 463 U.S. 248, 248 (1983).

26. ROBERTSON, *supra* note 4, at 40 (urging that the procreative liberty doctrine protects “[u]se of a surrogate . . . since it enables an infertile couple to have and rear the genetic offspring of both husband and wife in the case of gestational surrogacy, and of the husband in the case of full surrogacy”). See also John L. Hill, *What Does it Mean to be a “Parent?” The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 383 (1991) (concluding that as the law currently stands, the right of procreation includes the right to parent a child).

27. George Annas, *Pregnant Women as Fetal Containers*, HASTINGS CENTER REP. 13, 14 (Dec. 1986).

28. See *id.*; George Annas, *The Baby Broker Boom*, HASTINGS CENTER REP. 30 (June 1986).

29. George Annas, *Fairy Tales Surrogate Mothers Tell*, in SURROGATE MOTHERHOOD, *supra* note 10, at 43, 48.

victory for the intended parents; procreative freedom can be applied to both the surrogate mother and the father.³⁰

The strongest articulation of the claim for surrogate motherhood from the perspective of procreative liberty is: "Those who would ban or criminalize surrogacy have a heavy burden to explain why they would allow the state to stifle an activity that fulfills a human need without imposing any tangible harm on others."³¹ However, even if a woman consents to surrogacy, it is still possible that such a contract is harmful. A fourth criticism of Robertson's approach is that it does not give sufficient credence to the possible harms surrogate motherhood poses to others. Robertson claims that procreative rights justify a strict scrutiny, compelling interest of the state test that would consider whether any possible harms are compelling, which he argues they are not. As argued above, however, the claim for strict scrutiny for procreative freedom is doubtful. If the procreative freedom to engage in non-coital reproduction does not justify strict scrutiny, then potential harms to the surrogate and the child may certainly pass for rational or legitimate state interests if a state is determined to regulate surrogate contracts. Robertson labels any harm to the surrogate mother as "symbolic."³² He acknowledges Margaret Radin's arguments, among others, that commercial surrogate motherhood may harm the surrogate and/or the child, but when considering these harms he reverts to a one-sided rights view: "However, a ban on payment will probably make it impossible for many couples to obtain the surrogate assistance needed to achieve their reproductive goals."³³

While the rights based approach has some appeal as a protection of personal liberty, such an approach cannot definitively determine that surrogate motherhood must be constitutionally protected. Regardless of how significant an infertile couple's desire for reproductive assistance from doctors and from the state may be, not all procedures that relieve infertility must be protected.

II. COMMODIFICATION

Conceptually, the surrogate motherhood arrangement may be either commercial or altruistic. However, despite the surveys and publications that attest to the altruistic and loving motivation behind those who become

30. Cf. Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, in *SURROGATE MOTHERHOOD*, *supra* note 10, at 3 (arguing that in surrogacy arrangements the gestational mother and the genetic father are the legal parents; that a contract requiring a gestational mother to relinquish her parental rights should be unenforceable; and that if she changes her mind, custody should be determined by the best interests of the child standard).

31. *Id.* at 7.

32. Robertson, *supra* note 14, at 32.

33. *Id.*

surrogate mothers, the vast majority of surrogate mothers would not consider carrying the child without compensation.³⁴ This section examines approaches to surrogate motherhood that focus on the commercialization of baby-making services.³⁵ These approaches have two separate formulations: surrogate motherhood as commodification of children or, alternately, as commodification of gestational services.

A. Surrogate Motherhood as Baby-Selling

As part of her overall theory of property and personhood, Radin argues that certain property is tied up with personhood and that such property should be protected from the free market.³⁶ Radin firmly places parent-child relationships among such services/entities that should be shielded from the free market:

If we permit babies to be sold, we commodify not only the mother's (and father's) baby making capacities—which might be analogous to commodifying sexuality—but also the baby herself. . . . Commodifying babies leads us to conceive of potentially all personal attributes in market rhetoric, not merely those of sexuality. Moreover, to conceive of infants in market rhetoric is likewise to conceive of the people they will become in market rhetoric, and this might well create in those people a commodified self-conception.³⁷

This powerful argument is a lucid explication of what is so troubling to us about baby-selling, despite the fact that selling a baby to a loving family who will cherish it is a far cry from selling a person into slavery. Slavery is clearly different; it is a sale of the use of human capacities, which Radin believes explains why altruistic adoption is permissible while altruistic slavery is still

34. These altruistic motivations include the desire to provide others with the ability to have children, the desire for pregnancy and reproduction, and the opportunity to relive and master a previous incident of relinquishing a child. Philip Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117, 118 (1983), cited in Robertson, *supra* note 14, at 41; Dianne M. Bartels, *Surrogacy Arrangements*, in BEYOND BABY M 173, *supra* note 8, at 176-77.

35. See, e.g., Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 549-70 (1994); John L. Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415-16 (1991). These articles are discussed in Part III. We can distinguish these arguments from arguments that the contracts themselves are enforceable because these commentators argue that intent (or the fact of a contract) should determine parentage, which can be distinguished from an argument that regardless of parentage the contract should be enforceable. See *infra* Part III.

36. MARGARET RADIN, REINTERPRETING PROPERTY 35-71 (1993).

37. MARGARET RADIN, CONTESTED COMMODITIES 137-38 (1996).

reprehensible: "[E]nslavement is not permitted even without consideration."³⁸ Baby-selling is problematic because of what it says about humanity and the way it changes our perceptions of personhood. On the other hand, slavery is inherently abusive, whether or not it is commercial.³⁹

Commodifying children is considered morally reprehensible and is a practice that nations worldwide prohibit.⁴⁰ In arguing that surrogate motherhood is not distinguishable from child selling, Radin points out that commissioning an adoption constitutes the sale of a child, which adoption laws prohibit.⁴¹ A person or couple commissions an adoption if they approach a woman and offer to pay a fee in consideration for her becoming pregnant with her boyfriend and relinquishing the child to them after birth. Radin argues that such an arrangement would be problematic: "[W]e would no doubt characterize this regime as one in which babies are being produced for sale."⁴² All states prohibit prenatal arrangements for children by prohibiting agreements to relinquish parental rights prior the child's birth.⁴³ Furthermore, a number of states mandate a "change of heart" period even after the child is born.⁴⁴ Arguably, surrogacy is tantamount to impermissible commissioned adoption, with the extra benefit of being able to control the output by contributing and monitoring the child's genetic input.⁴⁵

But can surrogate motherhood be distinguished from baby-selling? Possible distinctions are two-fold. The first distinction concerns the intended parents' elevated status; the impregnating father also has rights to the child. However, the fact that the father would also have a claim to the child does not erase the birth mother's claims, which are still being sold. The second distinguishing factor is the intended couple's special role in motivating the birth of the child.⁴⁶ But the commissioning couple's initiation of the child's life does not distinguish surrogacy from the example of a commissioned

38. *Id.* at 139.

39. This is not to say that there may not be significant dangers to a child from adoption or commercial adoption. In fact many such abuses have been recorded. Rather, I am distinguishing between a sale into slavery which is inherently abusive to that person, and commercial baby-selling which may or may not lead to abuse of that child.

40. *See, e.g.*, CAL. PENAL CODE § 273 (West 1999) (criminalizing adoption contracts).

41. *See* Radin, *supra* note 37, at 136-37.

42. *Id.* at 136.

43. *See* Samuel Green & John Long, MARRIAGE AND FAMILY LAW AGREEMENTS 311 n.693 (1984) (characterizing state adoption laws).

44. *See* Susan M. Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble with Specific Performance*, 4 N.Y.L. SCH. HUM. RTS. ANN. 375 n.2, 382-83 (1987).

45. *See* Radin, *supra* note 37, at 140.

46. *Cf.* Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L. J. 187, 196 (1986) (parsing out the different stages of parenthood involved in new reproductive technologies, emphasizing the distinct role of intention).

adoption discussed above, in which the intended couple also initiates the birth, yet payment would be illegal under adoption laws.

Most advocates of surrogate motherhood alter their perception of the contract to distinguish surrogacy from illicit payment for a child.⁴⁷ Advocates of surrogate motherhood argue that the baby is not being sold at all; rather, they view the arrangement as one for gestational services. According to this view, while the substance of the contract is the same, the form of the sale is one for services and not for the child itself.

There are some, however, who accept and even promote surrogate motherhood as a form of baby-selling.⁴⁸ Richard Posner argues that we should enforce surrogate motherhood contracts because they are market efficient.⁴⁹ He rejects typical arguments against enforceability and argues that these contracts are indistinguishable from any other contracts. Judge Posner speaks of commercial surrogacy in purely economic terms, and diminishes noneconomic side effects as patronizing, unfounded, and ignorant of the way contracts in a marketplace work.⁵⁰ Posner is "skeptical" of direct attacks suggesting that commodification will damage personhood.⁵¹ He explains that people are what they are, and that if they want to buy children their nature will not change by allowing it.⁵² Posner categorizes the aversion to forms of commodification as a fear that market reliance would "extinguish altruism" and lead to increased selfishness.⁵³ However, Radin's argument involves more than combating selfishness and trying to change people's inclinations—it focuses on what belongs in the marketplace.

In any event, Posner does not attempt to distinguish surrogate motherhood from baby-selling. In fact, in a very controversial series of articles, he cautiously advocates commercializing adoption.⁵⁴ Using a simple demand and

47. See, e.g., *The ACLU Statement of Policy on Surrogacy*, in *SURROGATE MOTHERHOOD*, *supra* note 10, at 293, 294. The ACLU states that it considers any surrogacy contract that outlines payment for a child as void because, "Children have a right not to be sold as chattel." *Id.* at 294. However, in the same subsection the policy statement reads: "The [ACLU] does not, however, oppose agreements to compensate the mother for providing gestational services." *Id.* The distinction is formal and not substantive—it is how the contract phrases the consideration.

48. Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 21-24 (1989). See also CYNTHIA MARTIN, BEATING THE ADOPTION GAME 2-3, 315 (1988) (stating that some couples are justifiably willing to pay large sums for a baby).

49. Posner, *supra* note 48, at 21-24.

50. *Id.* at 27-31.

51. *Id.* at 26-27.

52. *Id.*

53. *Id.*

54. See Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60-61 (1987); Elisabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). See also Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV.

supply economic analysis, he concludes that the lack of children available for adoption is due to artificial constraints on the market. Posner argues that permitting a free market in adoptions would create many benefits, and that critics exaggerate many of the fears.⁵⁵ In making this argument, he cites a number of examples of legitimized baby-selling. One such example is surrogate motherhood in which “the father (and his wife) ‘buys out’ the natural mother’s ‘share’ in their joint product.”⁵⁶ Approaching surrogate motherhood as a form of baby-selling strikes me as an honest and analytically sound approach to surrogate motherhood.⁵⁷

The problem with Posner’s view of surrogate motherhood is that it is neither supported by current legal doctrine nor justifiable in light of current societal norms. The law prohibits the sale of babies, and many feel that this law is well-justified for the sake of the child and for humanity at large. As Posner himself recognizes, “[D]ebate about a free market in babies is academic. But that should not be an objection to an article published in an academic journal.”⁵⁸ This may be true, but the sale of babies is illegal and still regarded as a reprehensible affront to humanity, regardless of any positive utilitarian effects. Consequently, Posner’s analysis is ineffective as a legal argument.

As for Posner’s argument that surrogate motherhood is a contract, and that we should uphold contracts as expressions of will under modern contract law, a wide array of contracts are unenforceable or prohibited. Restrictions on the freedom to contract apply to transactions ranging from vote purchases to minimum wage regulation.⁵⁹ Intention and mutual benefit might exist in many situations to which a contract could be applied. However, since the

2305, 2330-34 (1995) (discussing the baby-selling analogy to surrogate motherhood and concluding that the analogy to baby-selling only strengthens the conclusion that surrogacy transactions should be legal).

55. Posner, *supra* note 48, at 23-24.

56. The other two examples of baby-selling cited by Posner are gray market adoptions, which charge a large fee, and the ‘family compact’ doctrine, which allows a woman to enter into an enforceable contract to give up her baby for adoption by a close relative. See Posner, *supra* note 54, at 71-72.

57. Jed Somit views surrogate motherhood as a form of legalized baby-selling. Jed Somit et al., *Independent Adoptions in California; Dual Representation Allowed*, in 1 *ADOPTION LAW AND PRACTICE* § 5.02[4] (Joan Heifetz Hollinger et al. eds., 2000). In a section on “Blackmarketeering” Somit writes, “Making money from adoptive placements, while at odds with the idealized image of adoption as an altruistic service, is not inherently evil.” *Id.* In the next paragraph he argues, “Surrogacy and ova donor contracts are premised upon the same mercantile theory,” and cites *Johnson v. Calvert*, 286 Cal. Rptr. 369, 372 (Ca. Ct. App. 1991) (holding that the intended parents are the legal parents in gestational surrogate motherhood), as an example of a court upholding the concept of payment for children. *Id.*

58. Posner, *supra* note 54, at 64.

59. See, e.g., 18 U.S.C.A. § 241 (1999) (outlawing vote tampering); N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1989) (voiding as against public policy agreements exempting owners of certain public recreation or amusement establishments from liability for damages caused by negligence).

repudiation of *Lochner*,⁶⁰ freedom of property does not mean freedom to contract in all otherwise economically efficient ways. As the supreme court of New Jersey remarked in *Baby M*, "The point is made that Mrs. Whitehead agreed to the surrogacy arrangement There are, in a civilized society, some things that money cannot buy."⁶¹

B. Surrogate Motherhood as the Sale of Gestational Services

Most advocates of surrogate motherhood view the surrogate contract as a contract for gestational services, rather than as baby-selling. In the case of *Baby M*, the agreement itself was intentionally structured as an arrangement for Mary Beth Whitehead's services in order to avoid laws forbidding payment for adoption.⁶² Those approaching surrogacy from a market perspective, either condemn such a sale through analogies to prostitution⁶³ or praise it for allowing women to be fully in control of their bodies.⁶⁴ It is arguable whether perceiving surrogate motherhood as the sale of gestational services is reasonable, or simply a different formula for the same substantive contract, which is payment for a child. The whole point of the contract is to obtain a child, not the gestational services.⁶⁵ In most cases, parties structure these contracts so that the money is paid only after transferring custody of the baby, and after the surrogate surrenders her parental rights.⁶⁶ I do not agree that adjusting one's perspective can alter the reality of the substance of the contract.

Assuming that surrogate motherhood could legitimately be perceived as a sale of gestational services, some compare such a sale to prostitution. Prostitution is condemned because it is *a priori* exploitative and an improper sale of sexual services. Similar to baby-selling, a woman's sexuality is

60. Note, *Resurrecting Economic Human Rights: The Doctrine Of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1366 (1990) (discussing *Lochner v. New York*, 198 U.S. 45 (1905), and noting that the decline of the *Lochner* theory of fundamental economic rights was "more precipitous than its ascent").

61. *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988).

62. *Id.* at 1240-41.

63. See, e.g., RADIN, *supra* note 37, at 131.

64. See, e.g., SHALEV, *supra* note 2, at 12. This argument will be discussed in depth, *infra* Part III.B.

65. See *infra* Part III for a further discussion of the problems of perceiving surrogate motherhood as the sale of gestational services.

66. See R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, in SURROGATE MOTHERHOOD, *supra* note 10, at 88, 93-95. Some valiant attempts have been made to avoid having contracts look like they are involved in baby-selling. In Israel, under the Surrogate Motherhood Agreements Law, payments must be made periodically, and full payment must be offered to the surrogate mother upon involuntary miscarriage of the child. Surrogate Motherhood Agreements Law, 1996, S.H. 1577.

beyond the realm of products that are properly marketed because it is part of her person.⁶⁷

One can argue that the sale of gestational services can be differentiated from the sale of sexual services. Prostitution involves an intimate act between two persons and allows a man to have control over a woman's body. In surrogate motherhood, the surrogate does not sell physical control over her body; the father is not contracting to manipulate her body directly.⁶⁸ However, she is selling a biological process, a piece of her personhood, which is caught up with her being, similar to prostitution.⁶⁹

C. *The Fear of Commodification in the Law*

The fear of commodification has had much influence on the legal consideration of surrogate motherhood. The New Jersey Supreme Court in *Baby M* decided that the surrogate motherhood contract was invalid on two grounds.⁷⁰ First, the court determined that the surrogacy contract conflicted with statutory provisions for adoption: "(1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions."⁷¹ The court found the Sterns' attempt to arrange the transaction in such a way as to circumvent the New Jersey laws forbidding payment for the adoption of a child to be inadequate. The court held: "[I]t seems clear that the money was paid and accepted in connection with an adoption. . . . [W]e need note only that they would pay nothing in the event the child died before the fourth month of pregnancy, and only \$1,000 if the child were stillborn, even though the 'services' had been fully rendered."⁷² Since the surrogacy was defined as a

67. See RADIN, *supra* note 37, at 132-36.

68. See Heidi Malm, *Commodification or Compensation: A Reply to Ketchum*, 4 HYPATIA 128, 130-31 (1989); Heidi Malm, *Paid Surrogacy: Arguments and Responses*, 3 PUB. AFF. Q. 57, 59-60 (1989) (arguing that prostitution and surrogacy can be substantially differentiated by arguments for different relegation of control). Of course, the surrogate allows the doctor to manipulate her body. However, the doctor is a third party facilitator and is not purchasing the power to manipulate her body. This distinction is not meant to override the similarities, only to emphasize the difference between the two arrangements.

69. See *infra* Part III.C. for an in depth discussion of what is wrong with prostitution and baby-selling beyond the problem of commodification.

70. *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988).

71. *Id.*

72. *Id.* at 1241.

commercial adoption, the court then determined that the other elements of the adoption law were not satisfied.⁷³

The second ground was an extrapolation and generalization of the first, a general policy against commodifying baby-making and thereby alienating a baby from its natural parents: "The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child The whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother."⁷⁴ The court discussed how the surrogate contract violated policies behind adoption laws, protecting the best interests of the child, and requiring informed consent to surrender: "This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition of the payment of money in connection with adoptions exists here."⁷⁵ Whether perceived as the sale of gestational services or as the sale of the child, the court held that a contract for such a sale is not enforceable because it undermines the state's policy to protect children and to make parental rights distinct from market forces.⁷⁶

D. Commodification is a Valid but Limited Approach to Surrogate Motherhood

I believe that the commodification argument that Radin outlines is cogent and relevant.⁷⁷ None of her detractors have been, to my mind, able to adequately discount her fears about surrogate motherhood and the problem of commodifying personhood. However, despite the power and intuitiveness of approaching surrogate motherhood as a matter of commercial contract, there are a number of reasons why such an approach is not sufficiently comprehensive.

First, the fear of commodification, which promoters of surrogate motherhood often called "symbolic," is abstract and vulnerable to claims that it is speculative. A broad reading of the commodification argument would

73. *Id.* at 1247. These requirements include the provision that termination of parental rights can occur only where there has been a voluntary surrender of a child to an approved agency or to the Division of Youth and Family Services, (D.Y.F.S.), N.J. STAT. ANN. § 9:2-16,17 (West 1993); N.J. STAT. ANN. § 9:3-41 (West. Supp. 2000); N.J. STAT. ANN. § 30:4C-23 (West 1997), and the requirement that the surrendering mother be provided advice and counseling through D.Y.F.S. prior to giving her irrevocable consent. *In Re Baby M*, 537 A.2d at 1242-45.

74. *In Re Baby M*, 537 A.2d at 1247.

75. *Id.* at 1248.

76. *Id.* at 1240.

77. See RADIN, *supra* note 37, at 132-36.

find similar reasons to ban the selling of sperm, eggs, blood, and by extension of surrogate motherhood, child rearing (as opposed to gestating) services. While arguments can be made as to why some or all of these services or biological entities should be marketable while others should not, (i.e., gestation is more of a "personal" contribution because it entails the use of a womb to carry a child for nine months as opposed to contributing seed after a short extraction process) surrogate motherhood by its very nature is different in kind from other procedures aimed at enabling fertility.

No doubt commodification is a troubling part of the process of surrogacy, in the ways that selling gestational services are similar to selling ova and sperm. However, the issue of commercialization is more complex when it comes to surrogate motherhood. Procuring a person to perform the service of gestation is not just another extreme on a spectrum of buying personal property. We cannot separate gestation from the body in the way we can an egg or sperm; and therefore, it is significantly more troubling. It is not only about selling a body part or fluid, it is selling a part of womanhood—her gestational capacities.

Because gestation is a service that is so tied up with gender and the distinctions between men and women, a rich understanding is lost in the gender neutrality inherent in a pure market approach to surrogate motherhood. Surrogate motherhood is a gendered transaction providing for use of a woman for her pregnancy. Since pregnancy is unique to women, pregnancy is a woman's issue.⁷⁸ Unlike any other reproductive innovation, surrogate motherhood is uniquely female and necessitates a qualitatively greater investment from the female third party than do any other of the non-coital reproductive innovations.

In the next section, I will turn to three different gender conscious approaches to surrogate motherhood. A gendered approach can entail various different formulations, and subsume elements of the rights and market approaches. As an overriding principle, however, these approaches are distinct in that they are largely specific to surrogate motherhood as a

78. *But see Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (holding that the exclusion of pregnancy-related disabilities from a state administered disability insurance plan did not constitute sex-based discrimination in violation of the equal protection clause). The *Geduldig* holding was based, in part, on the conclusion that classifications based on pregnancy do not constitute classifications based on sex. Rather, the court held that the disability insurance plan divided potential recipients into pregnant and non-pregnant persons. *Id.* at 496 n.20. See Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 533-39 (1983). However, later cases and state legislation modified such reasoning by recognizing pregnancy as a women's issue. See Montana Maternity Leave Act, MONT. CODE ANN. § 49-2-310 (2001); California Fair Employment and Housing Act, CAL. GOV'T CODE § 12945 (West 1992); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

reproductive collaborative process and focus on the unique role of the woman as the gestator of the fetus.

III. GENDERED APPROACHES

This section will explore three different approaches to surrogate motherhood that deal with the issue of gender more or less directly. These gendered approaches present a different starting point from which to begin thinking about surrogate motherhood, but are not necessarily exclusive of other legal approaches.

The first approach focuses on the potential exploitation of the surrogate mother. The second approach considers determining motherhood itself by the intent of the contract. I admit that these two approaches can be separated from gendered approaches, but I think that doing so misses the heart of these arguments. In general, as I have stated above, we can only capture the subtleties of surrogate motherhood through a gender-specific analysis. In addition, both the exploitation argument and the intent model of parenthood consider explicitly or implicitly the contract as a woman's contract. The exploitation approach considers the particular vulnerability of a woman engaged in a surrogate contract. The intent approach seeks to cultivate a more gender-neutral vision of parenthood. The third approach directly confronts the difference that gender makes in surrogate motherhood, and considers the unique situation that a surrogate mother faces.

We can align the three different gendered approaches to surrogate motherhood with three different phases of the law relating to women. The first is protectionism. This stage of legal history recognized women as fundamentally different from men; therefore, they could be denied certain rights, such as suffrage, and be given extra protection, such as protective labor laws. The second stage is liberal feminism, the advocacy of identical treatment of men and women. This feminist approach developed into the equal protection clause jurisprudence on the basis of sex.⁷⁹ The third stage began in the 1980's and bespoke a very different view of women's rights. Rather than identical treatment, women began to fight for accommodation and acceptance by arguing that treating women identically to men does not necessarily mean equal treatment for women.⁸⁰ I will argue that only a

79. See Christine Littleton, *Restructuring Sexual Equality*, 75 CAL. L. REV. 1279, 1304-08 (1987). See, e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971) (deciding a sex discrimination case on equal protection grounds based on the concept that men and women should be treated the same in the absence of an overriding interest); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949) (arguing that the equal protection clause requires that those similarly situated be similarly treated).

80. See, e.g., Krieger & Cooney, *supra* note 78, at 513; Littleton, *supra* note 79, at 1295-1301.

gendered approach that directly recognizes the difference between men and women can fully appreciate the complexity of the surrogate motherhood arrangement, both in terms of evaluating the validity of the contract and developing an understanding of equality that is not phallocentric.

A. Difference—Exploitation

One argument against surrogacy is that it creates a breeder class of poor women. The fear is that the need for money induces women to perform an inappropriately invasive, dangerous and emotional job.⁸¹ The combination of desperate infertile couples willing to pay a high fee for “a child of their own,” and middlemen with varying degrees of moral scruples, exacerbates the possibilities for abuse.

Ruth Macklin is particularly concerned with poor women participating in surrogacy contracts.⁸² Macklin explains, “A fee of \$10,000 paid to a woman of low income may well be an offer she cannot refuse.”⁸³ She finds the problem of voluntariness enough to discredit the entire process. However, Macklin does not make clear why surrogate motherhood presents a contract that is particularly troublesome as compared to any other offer made to a poor woman for \$10,000. Should a poor woman not be allowed to contract to receive money for her services? Unless the contract itself is problematic because of commodification concerns, the fact that she is poor cannot make a qualitative difference in the permissibility of the contract. Macklin recognizes that people in lower socio-economic classes provide other services for better off members of society, such as housekeeping services, custodial work, and domestic service, and concedes that one can not readily distinguish between these services and surrogacy.⁸⁴ However, she argues that such an argument does not morally permit us to add to these types of problematic services.⁸⁵

This argument is either closely linked to the commodification argument that Radin articulates,⁸⁶ or it is patronizing to women. An offer of \$10,000 may unduly induce a woman to sell her womb, but this only seems troubling if selling the womb itself is problematic, in the same way selling an organ is

81. See, e.g., Janice G. Raymond, *Reproductive Gifts and Gift Giving: The Altruistic Woman*, 20 HASTINGS CENTER REPORT 11 (1990); CHRISTINE OVERALL, ETHICS AND REPRODUCTION: A FEMINIST ANALYSIS 118, 124-26 (1987).

82. Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood?* in SURROGATE MOTHERHOOD, *supra* note 10, at 136.

83. *Id.* at 143.

84. *Id.* at 147.

85. *Id.*

86. See *supra* notes 36-42 and accompanying text.

problematic. Otherwise, inducement alone is not enough to make the transaction problematic. Given mainstream capitalist mentality, there is nothing wrong with hiring people to do custodial work, sanitation work, or other blue-collar jobs that only those in lower socio-economic classes are hired to perform. However, coupled with the commodification argument, the fear of exploitation is a powerful concern. If the contract itself is problematic and people in lower socio-economic classes are the only ones who engage in these contracts, the lower classes are being exploited. The contracts, though, are problematic in their substance, which the socio-economic realities exacerbate; these realities do not cause the problem.

Another possible means of arguing that surrogate motherhood is exploitative is by stating that it is risky. However, as Bonnie Steinbock argues, "The mere fact that pregnancy is risky does not make surrogate agreements exploitive, and therefore morally wrong. People often do risky things for money; why should the line be drawn at undergoing pregnancy?"⁸⁷ Pregnancy is not inherently more risky than race car driving or being a stuntman, and therefore should not be prohibited on these grounds.

The argument that surrogate mothers are incapable of consenting is similar to the economic exploitation argument against surrogate motherhood. Some have argued that no one is capable of granting truly informed consent to be a surrogate mother. Macklin states, "Even if a woman has already borne children, she cannot know what it is like to have to give them up after birth."⁸⁸ If such an argument holds for surrogate motherhood, it would seem to apply to a wide variety of other biomedical treatments and research maneuvers that people have never before experienced. Macklin cites such treatments as breast removal due to breast cancer, organ donations, etc.⁸⁹ Such treatments may be more likely to be life-saving and therefore more permissible. However, we certainly permit life-changing and difficult medical treatments, such as plastic surgery, IVF, sperm donation, tubal ligations, experimental treatments, etc., that are not necessarily life saving but may have profound and life altering consequences. Prohibiting women from entering such contracts because they are uninformed or incapable of making such contracts smacks of patriarchal and protectionist attitudes toward women.⁹⁰

It is true that we do not allow women to give up their children for adoption prior to giving birth. However, the reasons behind such regulations

87. Bonnie Steinbock, *Surrogate Motherhood as Prenatal Adoption*, in *SURROGATE MOTHERHOOD*, *supra* note 10, at 123, 129.

88. Macklin, *supra* note 82, at 142.

89. *See id.* at 143.

90. *See, e.g.*, LORI ANDREWS, *BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS AND BRAVE NEW BABIES* 369-70 (1989).

are not necessarily to protect women's frailty and incapacity, but rather to protect the status of parenthood itself.⁹¹ Fathers also cannot surrender their children before birth.⁹² Women are more likely to be in the situation of surrendering their children, which is a reflection of the real differences between motherhood and fatherhood—women cannot run away from the babies that are growing inside them, or ignore the children to whom they give birth. Parenthood is a unique status and responsibility, and the state has an interest in assuring that such status and responsibility is not waived at least until it has been initiated. People agree to do all sorts of things that change their lives significantly, but none implicate the fixture of family—parenthood—so revered in our legal system through the provisions of family law.⁹³

Making a general argument that women, poor or wealthy, should not be able to engage in these contracts because they are uninformed or incompetent, when divorced from the argument of commodification, implies that women are unable to make their own decisions and need the state's protection. Surrogate motherhood is not like selling yourself into slavery, an action even the libertarian Mill would prohibit, because surrogate motherhood does not inhibit future autonomy.⁹⁴ Therefore, limiting such contracts on the grounds of exploitation is protectionist. Respect for individual freedom requires us to permit people to make choices they may later regret.⁹⁵

The approach of those who argue for the prohibition of surrogate motherhood contracts because of their particular potential for exploitation evokes a legal understanding that is long gone; old laws that protectively limit the autonomy of women because they are women. Contracts with analogous potential for exploitation are available to men of lower socio-economic classes, men who are risk-seeking, or men who want to experience the unknown. Therefore, any attempt to regulate surrogate motherhood as

91. See *supra* Part II.C.

92. This is certainly the case for fathers who are married to the child's mother. However, most adoptions occur in the case of unwed parents. While traditionally the consent of an unwed father to the proposed adoption was not required, 2 C.J.S. *Adoption of Persons* § 58 (1974), more recently, significant attempts must be made to contact and get consent from unwed fathers as well. See, Joan Heifetz Hollinger, *Consent to Adoption*, in 1 ADOPTION LAW AND PRACTICE § 2.04[2] (Joan Heifetz Hollinger et al. eds., 2000). See also *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that the Due Process Clause of the Fourteenth Amendment requires hearing on the unwed father's fitness before the State could take his children away); *Caban v. Mohammed*, 441 U.S. 380, 389-91 (1979) (establishing a right for unwed fathers to establish a relationship with a child that may then be protected).

93. For a full explanation of this theory of adoption and surrogate motherhood, see *infra*, Part III.C.1.

94. *C.f.*, Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* (Richard A. Wasserstrom ed., 1971).

95. See Steinbock, *supra* note 87, at 129.

peculiarly exploitive to women *under such reasoning alone*, would be a violation of the Equal Protection Clause.

In *Craig v. Boren*, the Supreme Court held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."⁹⁶ Even when sex classifications are defended as benign aids to women, the Court applies exactly the same level of scrutiny as it does to disadvantaging classifications.⁹⁷ While the beginnings of equal protection law in *Reed v. Reed*⁹⁸ and *Kahn v. Shevin*⁹⁹ were based on what seemed like a rational basis standard (with more bite in *Reed*), by the time of *Orr v. Orr*,¹⁰⁰ intermediate scrutiny was firmly established. In *Orr*, the Court held that in the case of alimony, protective legislation that proscribed alimony for men and not women violated the Equal Protection Clause.¹⁰¹ The asymmetrical nature of such legislation, in which women were perceived as being more fragile and in need of protection than men, is reflected in the argument for legislating against surrogate motherhood because it is exploitive. The argument that women are in need of more protection than men was used to justify the different outcomes in *Lochner v. New York* and *Muller v. Oregon*.¹⁰² In *Lochner* the Court held a maximum hours regulation to be a substantive due process violation for men, but in *Muller* the Court permitted hours regulation for women under the state's police powers.¹⁰³ Barring other factors, prohibiting contracts solely on the basis of women's diminished capacities and heightened potential to be exploited will no longer withstand constitutional scrutiny.¹⁰⁴

96. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

97. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (sustaining a widower's challenge to a social security benefits provision applicable in a different manner to men and women when a covered wage earner dies). "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.* at 648.

98. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that a preference for men over women in the appointment of administrators of estates was not rationally related to a legitimate government purpose).

99. *Kahn v. Shevin*, 416 U.S. 351, 355 (1971) (holding that a state property exemption for widows (but not widowers) was easily sustainable because it rested on a ground of difference having a fair and substantial relation to the subject to the legislation).

100. *Orr v. Orr*, 440 U.S. 268, 278-83 (1979) (holding that laws which authorized the imposition of alimony on men but not on women violated the Equal Protection Clause).

101. *Id.*

102. *Muller v. Oregon*, 208 U.S. 412 (1908). In *Muller*, the Court upheld maximum hour legislation for women similar to that rejected by *Lochner v. New York*, 198 U.S. 45 (1905), because of the perceived incapacity and thus need for protection inherent to women. Judge Brewer explained that a "woman's physical structure" placed her "at a disadvantage in the struggle for subsistence," and that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest. . . ." *Muller*, 208 U.S. at 421.

103. *See id.*

104. *See Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1227 (9th Cir. 1971) (holding that a policy denying employment opportunities on the basis of physical capabilities was not excusable under Title VII of the Civil Rights Act of 1964).

In reality the Court is not likely to find such legislation to be unconstitutional on these grounds because the legislative intent would not be as clear as in the above mentioned cases, and other factors including commodification and laws forbidding prenatal adoption would be relevant. However, it is important to point out that the argument that women need protection from their own choices reflects a view of women no longer accepted.¹⁰⁵

The argument against protective legislation for women should not be taken too far. Protective legislation that restricts women's activity because of supposed weakness is impermissible. In addition, some beneficial legislation also violates equal protection laws.¹⁰⁶ However, acknowledging women's differences by providing for different treatment, or even special treatment, to accommodate pregnancy and other biological differences—or cultural differences that are closely tied to a biological reality—is not necessarily protectionist. Rather, such legislation should be considered a just means of affording women equal opportunity in employment situations.¹⁰⁷ Legislation is accommodating as opposed to protective when it is based on men's and women's different needs. The two sections below consider the benefits and drawbacks of treating women differently from or identically to men.

B. Contract—Liberal Feminism.

The intent based approach to surrogate motherhood became popular in the 1980's as a criticism of *Baby M*. This approach could be considered from a non-gendered perspective as simply another argument for upholding the intent of the contract.¹⁰⁸ However, intent based arguments are distinguishable on a number of levels. Intent based arguments rely on the assumption that surrogate motherhood involves the purchase of gestational services and not the purchase of children. In addition, intent based arguments make claims not only about the permissibility of surrogate motherhood, but also about the

105. See Lori Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD, *supra* note 10, at 167, 178; Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 330 & n.17 (1985).

106. See Williams, *supra* note 105, at 332.

107. See Krieger & Cooney, *supra* note 78, at 531-33. Krieger makes a distinction between protective legislation that limits employment opportunities of women by excluding them from certain job functions or working conditions, and laws like the Montana Maternity Leave Act, MON. CODE ANN. § 49-2-310(3) (2000) that statutorily require that women receive paid maternity leave, which facilitates women's employment. For a full discussion of what I term "accommodationist" as opposed to protectionist legislation, see *infra*, Parts III.B, III.C.

108. Marsha Garrison classifies this approach along with Posner's and Epstein's commercialization approach. See Garrison, *supra* note 24, at 859-66. She terms all such approaches contract-based approaches.

meaning of parenthood, i.e., who should be defined as the mother of the child. Professor Marjorie Shultz, Dr. Carmel Shalev, Professor John Hill and Professor Lori Andrews, four intent based approach advocates, all claim that the intended mother should be considered the legal mother of the child.¹⁰⁹

The thrust of intent based arguments is to analogize surrogate motherhood with artificial insemination by a donor (AID).¹¹⁰ Section 5 of the Uniform Parentage Act provides:

(a) If . . . with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

(b) The donor of semen provided . . . for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.¹¹¹

Intent, as opposed to biology, determines parentage in artificial insemination. Marjorie Shultz claims that intention and not biology should determine legal parentage in the realm of reproductive and collaborative technologies.¹¹² Shultz argues: "[T]echnological conception dramatically extends affirmative intentionality by eliminating uncertainty regarding procreative intention."¹¹³ She distinguishes reproductive technologies from coital reproduction by asserting that coital reproduction poses greater difficulties in severing the intent to procreate from other motivations.¹¹⁴ Shultz's claim is profound; she states that parenthood should mold itself to the new culture of assisted reproduction, rather than the other way around. Shultz argues that this is the best result not only for the intended parents, but also for the children and society at large: "people perform major and responsible tasks better when they feel a desire, exercise a choice, and make a commitment."¹¹⁵ What she terms "private ordering" is her vision of a new family structure based on intent and contract as opposed to biology and status.¹¹⁶

109. Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 309 (1990); Shalev, *supra* note 2, at 10-11; John Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 383 (1991); ANDREWS, *supra* note 2, at 252-72.

110. See e.g., Shultz, *supra* note 109, at 309-10.

111. UNIF. PARENTAGE ACT § 5.

112. Shultz, *supra* note 109, at 323.

113. Garrison, *supra* note 24, at 859 (quoting Shultz, *supra* note 109, at 309).

114. *Id.* at 324.

115. *Id.* at 323.

116. *Id.* at 325-29.

A strong assertion that surrogate motherhood is payment for reproductive services and not for the child itself accompanies the intent based claim.¹¹⁷ Shalev explains that, “[i]t must be clear from the outset that the transaction under consideration is not for the sale of a baby but for the sale of reproductive services.”¹¹⁸ This argument is the natural counterpart to the argument for intent based parenthood because if motherhood is determined by intent, then the father and his wife are not paying for the child that effectively already belongs to them—they are paying for gestational services.

The intent argument is particularly persuasive with regard to gestational surrogate motherhood. Since traditional notions of biological motherhood are unclear from the start in gestational surrogacy, replacing biology with intent is appealing. There are really two layers of biological connection—gestation and genetics. Because the surrogate mother is not the genetic mother, it is easier for many to overlook her gestational connection to the child. Similarly, the intended mother is more easily labeled the natural mother since she has a biological connection to the child.

A line of cases has developed in the realm of gestational surrogacy, in which the courts adopted intent based reasoning, even though such reasoning has been rejected in the context of traditional surrogacy.¹¹⁹ In *Johnson v. Calvert*, Mrs. Calvert’s ovum was fertilized with the sperm of her husband using *in vitro* fertilization.¹²⁰ The fertilized ovum was then implanted in the uterus of Ms. Johnson, the surrogate mother, pursuant to a surrogacy contract in which Johnson agreed to relinquish “all parental rights” in the child in favor of the Calverts who were to take the baby into their home “as their child.”¹²¹ After the birth, Ms. Johnson refused to relinquish the child to the intended parents and sought custody of the child.¹²² The trial court, in a bench ruling, held that the Calverts were the natural parents because they were the genetic parents.¹²³ The trial court emphasized that the case was not comparable to

117. SHALEV, *supra* note 2, at 156-60.

118. *Id.* at 157.

119. *Johnson v. Calvert*, 286 Cal. Rptr. 369, 372 (Cal. Ct. App. 1991); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 288-91 (Cal. Ct. App. 1998) (declaring that when a child is conceived by implanting anonymously donated sperm and egg, the intended mother as expressed in the surrogacy contract—not the surrogate or the unknown egg donor—is the lawful mother); *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994) (deciding that the gestational surrogate was the parent since she received the egg from an anonymous donor and was the woman who intended to raise the child). Under the *Johnson* test, either the gestational surrogate or the genetic parents could be recognized as the natural and legal parents, depending on which party intended to procreate and raise the child. For the rejection of such reasoning in the context of traditional surrogacy see *In re Baby M*, 537 A.2d 1227 (1988), discussed *supra* notes 70-76 and accompanying text.

120. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

121. *Johnson*, 286 Cal. Rptr. at 372.

122. *Id.*

123. *Calif. Judge Speaks on Issue of Surrogacy*, 13 NAT’L L. J. 36-37 (1990).

traditional surrogacy, and characterized Ms. Johnson as more of a caretaker, similar to a babysitter, wet nurse, or temporary foster mother.¹²⁴ The California Court of Appeals affirmed the holding that the natural and thus legal mother is the genetic mother.¹²⁵ Through a narrow, and arguably contorted, reading of the Uniform Parentage Act,¹²⁶ the court reasoned that genetics was the deciding factor in determining parentage.¹²⁷

The California Supreme Court affirmed the appellate court's decision but on different grounds.¹²⁸ The court stated, "for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible."¹²⁹ The court held that the statute relied upon by the lower court did not resolve the question of which woman was the natural mother.¹³⁰ Rather, the court decided that contractual intent should determine natural parentage, even though it did not make the decision on the basis of the surrogacy contract itself.¹³¹ Therefore, the court held that the intended mother was the natural mother¹³² and that the gestational mother had no rights at all.¹³³

One underlying premise behind the intent based approach is that women should be in control of their own bodies. Linda Bowker, the head of the National Organization of Women's New Jersey chapter, explains: "We do believe that women ought to control their own bodies, and we don't want to play big brother or big sister and tell them what to do."¹³⁴ Lori Andrews

124. *Id.* at 37.

125. *Johnson*, 286 Cal. Rptr. at 382.

126. CAL. FAM. CODE § 7610 (West 1994). The Act authorizes the admission of certain biological evidence as sufficient proof of parentage. § 7610(a). Pursuant to the Act, parentage can be established by blood test evidence, and maternity "may" be established "by proof of . . . having given birth to the child. *Id.* The court read the Act as establishing a scheme in which blood test evidence, which establishes the genetic relationship, is more persuasive than childbirth evidence, which establishes a gestational relationship. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 897 (Ct. App. 1994) (attacking the appellate court's use of the statute); Randy F. Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 173-78 (1994) (arguing that choosing kinship provides a better model of maternity via dual mothers in the case of surrogacy, than traditional two-parent assumptions).

127. *Johnson*, 286 Cal. Rptr. at 374 n.14 (discussing the purpose of the Act's enactment in California).

128. *Johnson*, 851 P.2d at 787.

129. *Id.* at 781.

130. *Id.* at 781-82.

131. *Id.* at 782-84.

132. *Id.* at 782.

133. *Id.* at 786. For a discussion of why intent cannot be a basis for determining "natural" motherhood see Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. REV. 637, 673 (1993); Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother": Johnson v. Calvert*, 17 HARV. J.L. & PUB. POL'Y 907, 913-14 (1994).

134. Iver Peterson, *Baby M Custody Trial Splits Ranks of Feminists*, N.Y. TIMES, Feb. 24, 1987 at B1 (quoting Linda Bowker).

argues that surrogate motherhood is a predictable outgrowth of the feminist movement—both because it allows for professional women to have the children they desire and because it teaches that not all women relate to pregnancy in the same way: “A woman could choose not to be a rearing mother at all.”¹³⁵ Shalev argues that a free market in reproductive services would allow “a new source of productive activity for women who presently have limited income-earning opportunities.”¹³⁶ Shalev adds, “The idea of wages for reproduction poses an essential challenge to the public-private/market-family division that is the patriarchal foundation of our postindustrial economy.”¹³⁷ She believes that women as competent, social beings, who are no longer relegated to the realm of private life, should not be forced to separate their biological functions from their economic existence.¹³⁸ Pregnancy need not only result from emotional relations with men, but can be a service that women provide. Shalev concludes, “But the failure to acknowledge the economic value of female reproductive labor is blind folly for those who wish for equity in women’s social situation.”¹³⁹

Employing a slightly different perception of the intent based approach, Shultz asserts that the failure to enforce surrogate motherhood contracts misses an opportunity for gender neutrality in the realm of non-coital reproduction.¹⁴⁰ This view captures the motivating factor of the intent based approach explained above. It is not *just* that women want control over their bodies; advocates are not arguing that women have the right to do anything with their bodies. Certain limits to the notion of bodily integrity do apply: prohibitions on late term abortions, suicide, and prostitution are but a few. Rather, intent based advocates argue that women should be free to use their bodies to sell reproductive services in the same way that men are so permitted, and that such uses should be evaluated by the same standards. In addition, these feminists want parenthood determined in the same way for men and women. Shultz argues that determination of parental status on the basis of expressed and bargained-for intentions would create gender equity in access to child-nurturing roles.¹⁴¹ She further argues that the Baby M decision “reinforced a division of the world into gendered roles, creating a de facto rule that children are within a realm rightly dominated by women.”¹⁴² Shultz argues that we should no longer classify child-bearing/rearing as particular to

135. Andrews, *supra* note 105, at 167, 168.

136. SHALEV, *supra* note 2, at 158.

137. *Id.* at 159-60.

138. *Id.*

139. *Id.* at 160.

140. Shultz, *supra* note 109, at 378-96.

141. *Id.* at 378.

142. *Id.* at 384.

women, but should look to handle parenthood in the most gender-neutral ways possible. By abandoning biology and instead allowing parenthood to be determined by intent, we create a non-biological, non-gender based means of creating parenthood and its responsibilities.

Some theorists view the argument for an intent based approach to surrogate motherhood as a feminist response to the protective reasoning that justified discriminatory legislation.¹⁴³ Feminist legal theory in the 1970s and 1980s, which began by analogizing gender to race in equal protection arguments,¹⁴⁴ focused on attempts to equate legal treatment of sex with that of race, and deny that there are any significant natural differences between women and men.¹⁴⁵ Christine Littleton terms this the “symmetrical” approach to equality.¹⁴⁶ Marjorie Shultz and Carmel Shalev incorporate this symmetry into arguments promoting the practice of surrogate motherhood.

According to Littleton, symmetrical approaches take two forms, the assimilationist approach and the androgynous approach.¹⁴⁷ The assimilation model of equal protection contends that, given the chance, women really are just like men and should therefore be treated the same.¹⁴⁸ The androgynous model holds that men and women are, or could be, very much like each other, and that equality requires institutions to pick some standard and treat both sexes as androgynous persons would be treated.¹⁴⁹ The Supreme Court adopted the symmetrical approach in instituting an intermediate scrutiny category that requires the law to treat men and women similarly unless there is an important reason to do otherwise.¹⁵⁰ The Supreme Court’s approach places the focus of the law and of feminist legal endeavors on assuring that men and women are treated identically, just as people of different races are to be treated identically.

143. See *supra* Part III.A.

144. See Catharine MacKinnon, *Feminism, Marxism, Methods and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982).

145. See Littleton, *supra* note 79, at 1291. This focus on equality has in fact led to the rather counterintuitive reality that most of the initial major constitutional sex discrimination cases have male plaintiffs. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

146. Littleton, *supra* note 79, at 1291.

147. *Id.* at 1292.

148. *Id.* See also Harriet Taylor Mill, *Enfranchisement of Women*, in *ESSAYS ON SEX EQUALITY* 91, 104 (1970).

149. Cf. Wendy Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 363-68 (1985) (arguing that the equal treatment approach permits challenges to “‘neutral’ rules based on a male prototype”). Williams further notes that the vision is based on “a redefinition of what a typical employee is that encompasses both sexes.” *Id.* at 368.

150. *Craig v. Boren*, 429 U.S. 190, 190 (1976).

In light of this view of equality, pregnancy poses a difficult challenge to the courts and to legal commentators. This issue came to the legal forefront in *Geduldig v. Aiello*.¹⁵¹ California had a disability insurance system for private employees temporarily prevented from working by an injury or illness not covered by worker's compensation. The issue was whether the disability plan violated the Equal Protection Clause because it provided that pregnancy was not to be considered a disability. Justice Stewart, writing for the majority, held that the policies excluding pregnancy provided

an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not.¹⁵²

What is remarkable about the opinion is the majority's argument that because the issue is pregnancy, something that is in fact a difference between men and women, excluding pregnancy is not a violation of equal protection because no invidious discrimination occurs.¹⁵³ The law does not consider pregnancy a disability for men or women. The court fails to identify pregnancy as a "woman's" issue, because if it did, it could be the source of disparate treatment.

Geduldig's vision of the Equal Protection Clause is deeply rooted in identical treatment. The Equal Protection Clause and liberal views of equality demand that the law treat men and women symmetrically; where men and women are different equality cannot apply. The intent based vision of surrogate motherhood captures the mood of the seventies and eighties in the realm of equal protection. Fighting against the havoc that perceived differences have played on the rights and standing of women, feminist activists fought for sameness and symmetrical treatment. Therefore, the argument that men and women should be subject to the same terms in determining parenthood—intent or genetics—and the same opportunities to commercialize their reproductive capabilities, is a logical offspring of equal

151. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

152. *Id.*

153. *See id.* at 496 n.20 ("The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, . . . [et al.], involving discrimination based on gender as such Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy. . . ." (citations omitted)).

protection jurisprudence. That motherhood and fatherhood should both be determined through genetic testing, thus allowing surrogate motherhood to be given the same permissiveness as AID, is embodied in what is termed the liberal view of equal protection analysis—identical treatment. Shultz's hope is to create a system that considers fathers and mothers on an equal footing in parenthood by changing definitions away from biological determinism. The fight against the labeling of "biology is destiny" is a major theme of liberal feminist jurisprudence.¹⁵⁴

C. Difference Revisited

Liberal feminism, which fought for the equal treatment of women in reaction to protective and paternalistic attitudes, came under attack in the 1980s. Prodded and enraged by claims that equality had been achieved and that sex discrimination was a thing of the past, feminists began digging deeper to uncover the roots of sexual inequality and began to articulate a feminist vision that went beyond identical treatment to men.¹⁵⁵ In response to *Geduldig*, described above, feminists began to attack equal protection analysis because they felt it was based on male definitions and therefore was unresponsive to women's needs. They began to look at the difference between men and women as something to be promoted and protected rather than neutralized.

Wendy Williams harshly criticized the *Geduldig* decision for treating pregnancy as a deviant condition, an "extra, an add-on to the basic male model for humanity."¹⁵⁶ She argued that the law should consider pregnancy a disability and treat it the same as any other disability. However, she did not promote more aggressive cries for special treatment for reasons including the view that backlash might occur if pregnant workers received better treatment than disabled male workers.¹⁵⁷

Others, notably Linda Krieger and Christine Littleton, moved away from liberal feminism and viewed the result in *Geduldig* as the ultimate testament to what is wrong with current equal protection and liberal feminist analysis.¹⁵⁸ They argued that *Geduldig's* use of the male norm to determine benefit eligibility makes gender-specific injury, such as pregnancy discrimination, invisible as legal injury. They stressed that fighting for equality on the basis

154. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 39-41 (1999).

155. See *id.* at 47-53.

156. Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 345-46 (1984).

157. See *id.* at 371.

158. Littleton, *supra* note 79, at 1291; Krieger & Cooney, *supra* note 78, at 533-39.

of identical treatment was particularly harmful to those women whose lives diverged most sharply from the male model. Liberal feminism used male norms to determine how to treat women, and thereby did not treat women and men equally; it treated women like men. Moving beyond the fear that treating women differently would result in paternalistic protective legislation that subordinated women, these “difference” feminists attacked the male legal structure that was born of male understandings and categories and argued for a legal system that would not treat the male model as the goal to be achieved. Asymmetrical approaches to sexual equality, born of the recognition of difference, “take the position that difference should not be ignored or eradicated.”¹⁵⁹ A woman’s differences should not be neutralized nor her biology ignored. Rather, legislation should be tailored with both sexes in mind. Society must learn to deal with difference without subordinating women.

The goal of this section is to develop an approach to surrogate motherhood based on an asymmetrical notion of equality. In surrogate motherhood contracts, in which a woman’s role as gestator is fundamentally different from the male role in reproduction (seed/sperm contribution), ignoring differences ignores that which is essentially female. In evaluating surrogate motherhood, treating male and female interests identically cannot take into account the unique and weighty contribution of carrying a fetus for nine months. Therefore, the need to consider differences is particularly cogent in the context of surrogate motherhood because the gestational act being considered does not even exist by male standards of parenthood. For this reason, an approach to surrogate motherhood that acknowledges the difference between men and women is most appropriate.

The focus on difference as a means of analyzing surrogate motherhood will be on two levels. The first is based on status, which I describe as the recognition of the difference between parties, and therefore the undermining of contract. I will argue that status plays an important role in our legal system, particularly in family law, and that surrogate motherhood contracts are problematic because they alienate status.

The second level of analysis is critical. While family law has recognized the difference between men and women that should be applied in the realm of surrogate motherhood, equal protection law does not recognize difference. I will demonstrate how the failure to recognize differences between men and women creates profound confusion in equal protection doctrine.

159. *Id.* at 1295.

Differences between men and women may be cultural,¹⁶⁰ such as childrearing roles, or based in biology, such as pregnancy. Some difference feminists argue for accommodation of difference in the realm of biology only, claiming that accommodations to cultural differences are too susceptible to abuse and reversion to rigid sex roles.¹⁶¹ Others argue that all differences must be recognized and the legal system thereby modified.¹⁶² Surrogate motherhood implicates real biological difference, so the first approach will suffice as a description of the type of difference that I address. To a certain extent both cultural and biological difference should be addressed; however, it is the biological differences, and cultural differences deeply rooted in biological differences, which demand special treatment in a fundamental rather than a corrective capacity.¹⁶³ Therefore, I would support legislation that seeks to address cultural concerns, and I would argue that it should not violate the Equal Protection Clause for the same reasons affirmative action should not. However, a different fundamental approach to the notion of equality in equal protection law should be adopted to address biological differences between men and women.

1. The Difference Between Persons—Status

In *The Sexual Contract*, Carole Pateman, a “difference” feminist, offers an understanding of why certain ‘gendered’ contracts are illegitimate.¹⁶⁴ I use Pateman’s understanding to emphasize and to help develop the notion of status that underscores the first level of difference in surrogate motherhood contracts. Pateman criticizes what she terms “sexual contracts,” or contracts

160. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* 2 (1982).

161. Examples of what Christine Littleton calls the accommodation model, in that it accommodates biological and not cultural differences, are Sylvia Law’s and Hanna Hill Kay’s approach to issues of reproductive biology. See Sylvia Law, *Rethinking Sex and the Constitution*, 132 U.P.A.L. REV. 955, 1007-13 (1984) (calling for equal treatment in all areas *except* reproduction, where an analysis based on an empowerment approach should be adopted); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L. J. 1, 27-37 (1985) (arguing that sex differences should be ignored for equal protection purposes, except when the female is actually pregnant).

162. See ELIZABETH H. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980) (arguing that women cannot be men’s equals because equality by definition requires sameness). For legal approaches, see Littleton, *supra* note 79, at 1297, 1312-14 (arguing for an acceptance theory for all differences in which consequences of gendered difference, and not its sources, are addressed by the equal protection clause); Cathrine MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence of the State*, 8 SIGNS 635 (1983) (arguing for an empowerment approach which rejects difference altogether as a relevant subject of inquiry); Krieger & Cooney, *supra* note 78, at 513.

163. In other words, biological differences necessitate a change in the way we apply equal protection and sex discrimination laws. Cultural differences might justify corrective legislation, similar to affirmative action legislation, but would not necessitate a new constitutional outlook.

164. PATEMAN, *supra* note 8, at 154.

that enlist the services of women.¹⁶⁵ She notes the move from rigid status-like categories to more autonomy-centered contract notions in many areas of the law.¹⁶⁶ However, she dismisses a contract's ability to legitimize otherwise problematic relationships colored by the previous categorization of women into certain roles.¹⁶⁷

Furthermore, Pateman argues that making male-female relations into contracts as opposed to addressing the real differences between the parties undermines womanhood.¹⁶⁸ With regard to the possibility of making marriage contractual, Pateman notes: "If marriage is to be truly contractual, sexual difference must become irrelevant to the marriage contract; 'husband' and 'wife' must no longer be sexually determined. Indeed, from the standpoint of contract, 'men' and 'women' disappear."¹⁶⁹ She adds: "When contract and the individual hold full sway under the flag of civil freedom, women are left with no alternative but to (try to) become replicas of men."¹⁷⁰ Pateman explains that a contract neutralizes the parties and pays no attention to their difference, except as is made explicit by the terms of a contract. Pateman acknowledges that at first sight, "the complete elimination of status and its replacement by contract [in gendered relationships] appears to signal the final defeat of patriarchy and the law of male sex-right."¹⁷¹ However, she retorts, "Odd things happen to women when the assumption is made that the only alternative to the patriarchal construction of sexual difference is the ostensibly sex-neutral 'individual.'"¹⁷²

The problem with the neutrality of contracts is that it hides in free market language the underlying inappropriateness of the transaction. In discussing prostitution, Pateman claims that calling a contract for sexual services neutral is preposterous. Rather, the "sex act itself provides acknowledgement of a patriarchal right."¹⁷³ She argues that placing a relationship under the form of contract does not neutralize all problematic relationships; it only subsumes them under a new form, a male form, and then treats such commitments as liberal and binding.¹⁷⁴ But form does not change the substance of the act of procuring a woman's sexual services for a man's use even if it is compen-

165. *Id.*

166. *Id.* at 167. See also Janet L. Dolgin, *Status and Contract In Feminist Legal Theory of the Family: A Reply to Bar Hett*, 12 WOMEN'S RTS L. REP. 103 (1990) (arguing that family law should be based on contract principles).

167. PATEMAN, *supra* note 8, at 153.

168. *Id.* at 167.

169. *Id.*

170. *Id.* at 187.

171. *Id.*

172. *Id.*

173. *Id.* at 208.

174. *Id.*

sated; the act itself is problematic and is an offshoot of an era in which men felt entitled to use a woman's body for their own needs. Pateman protests: "When women's bodies are on sale as commodities in the capitalist market, the terms of the original contract cannot be forgotten; the law of male sex-right is publicly affirmed, and men gain public acknowledgment as women's sexual masters—that is what is wrong with prostitution."¹⁷⁵ According to this analysis, contract has simply transformed classic patriarchy into modern patriarchy. A contract cannot rid us of inherent problems in social dynamics—these problems must be attacked substantively and differences must be acknowledged.

Essentially, Pateman makes two arguments about contracts: 1) contracts are neutral in form only and cannot change the substance of a fundamentally patriarchal transaction; and 2) contracts eliminate women's special needs and status by washing over difference through formal neutrality.¹⁷⁶

This line of reasoning is readily applied to surrogate motherhood. The view of surrogacy as contracts for gestational services, which is the view promoters of surrogate motherhood usually hold, reflects the reality that the genetic father is more closely involved in the surrogacy transaction than in a standard adoption. However, it also reflects some understanding that the child is not the surrogate's; rather, the surrogate is performing the service of harboring the child for someone else.¹⁷⁷ As opposed to adoption, in which if money is exchanged then the baby is considered to have been sold, in surrogacy only a service is said to be on sale because "the baby is already someone else's property—the father's."¹⁷⁸ As the trial judge in *Baby M* remarked, "At birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his."¹⁷⁹

What is forgotten, or simply contracted away, is motherhood. But motherhood is not something we traditionally feel can be contracted away unless the rules of adoption are followed. Rather, because the father is involved, surrogacy laws permit the contractual alienation of motherhood for the sake of men, and their wives, who want their own genetic children. While it may be contractual in form, the substance of the contract is truly patriarchal. The contract allows for the alienation of motherhood and a woman's

175. *Id.*

176. *See id.* at 154-85.

177. *See* RADIN, *supra* note 37, at 141.

178. *Id.* Margaret Radin mentions another possible reason why surrogate motherhood might be perceived as a contract for gestational services. "This way of thinking could reflect a commitment that a baby cannot be property at all . . . cannot even be thought of or spoken of as property." But she argues that if this were the case we would not refer to paid adoption as baby-selling. *Id.*

179. *In re Baby M*, 525 A.2d 1128, 1157 (N.J. Super. Ct. Ch. Div. 1987).

reproductive capacities because it assists the realization of a man's goals. A woman's reproductivity, her gestational capacities, her bodily acts (not eggs or semen which can be removed) are sold. In Pateman's words: "Men have denied significance to women's unique bodily capacity, have appropriated it and transmuted it into masculine political genesis."¹⁸⁰ A woman's reproductive capacity/motherhood should not be subject to contract because it is an attribute, such as gender itself, which should be considered inalienable. Allowing such contracts enables gender to be subordinated to contract. Surrogate motherhood contracts put into neutral form contracts that usurp motherhood and neutralize women's difference in the process. Therefore, such contracts are paradigms of Pateman's critique of sexual contracts.¹⁸¹

The general principle is that there are certain relationships that should not be alienable, and should remain in the realm of status as opposed to contract. There are different attributes of men and women, or children and adults, that should not be ignored or subsumed by contract. As applied to surrogate motherhood, the theory is that pregnancy/motherhood should not be co-opted for the use of others, just as women should not be co-opted for the use of men. If womanhood is to be preserved and not neutralized into male categories, there must be limits to contracts and a place where status remains dominant.¹⁸²

This principle underlies much of family law in the United States. In family law, interactions between men and women, and parents and children, are not subject to the free market. Adoption laws prohibit transactions involving parenthood unless state regulations make the process more complicated than simple contract and concern issues other than free will.¹⁸³ State laws providing for alimony and discretionary property distribution (among other devices for welfare distribution upon divorce) as well as

180. Pateman, *supra* note 8, at 216.

181. Pateman proclaims, "The 'surrogate' mother contracts out [her] right over the unique physiological, emotional and creative capacity of her body, that is to say, of herself as a woman." *Id.* at 215. The argument about status and gender difference must be distinguished from an argument that reverts to proclaiming that the main thing about women is their reproductive capacities; therefore, I believe this statement of Pateman's goes too far. I agree that reproductive capacities should not be contracted for because they are too caught up in the status of womanhood, but I do not believe that reproducing constitutes the essence of womanhood. A woman's reproductive and gestational capacities should be acknowledged and given different treatment. However such statements about difference need not mean that the entirety of a woman is caught up in that difference—she is much more than a gestator, but even so she is still a gestator.

182. My intent is not to characterize women as solely biological, but to recognize explicitly the difference biology makes between men and women. The need for this recognition, even its elevation, is the fear that without emphasizing difference, women will be subordinated to male defined norms and categories—to contracts which assume maleness as the ideal. In that light, surrogate motherhood is about subordination; it is about creating a world in which women live in accordance with male norms and gender-neutral contracts, which fail to give sufficient credence to that which makes a woman unique.

183. See Somit, *supra* note 57, at § 5.02.

regulations concerning marital privacy and marital immunities, maintain marriage as a protected institution very different from contract.¹⁸⁴ Prenuptial agreements that attempt to alter the default rules of the marital union are more carefully scrutinized than other contracts.¹⁸⁵ As an emotional relationship and a major institution of society, marriage is relegated to a protected status.

Even considering the recent permissiveness with regard to prenuptial agreements, and other moves toward permitting contract into family law, the default rules have much weight in family law. Despite recent trends in family law that move from status to contract, adoptions and marriages are not just contracts; they imbue status and officially solidify personal relations and are separated from free market rules.¹⁸⁶ Along the same lines, prostitution is not entitled to free market protection since it is the commercialization of what is considered an intimate relationship. Familial relations are not subject to free contract but are treated as specialized relationships between particular individuals as opposed to faceless market actors. As a result, certain relations are inalienable by the market. These relations create a deeper mark than can be alienated by contract—they create status, the status of parents, of wives, and of sexual partners. A logical extension of the legal rules of marriage, adoption, and the prohibition of prostitution is the protection of the status of motherhood in surrogacy. Status can be created in different ways. In marriage, it is created by a ceremony and commitment in sexual relations by the act. In motherhood, status can be created by various means—by care in adoption, and by birth and care in natural reproduction. The act of gestating a baby for nine months and the deep physiological relationship entails in and

184. There are numerous examples of common law and statutory regulations that apply specifically to husbands and wives only. In the matter of family privacy, *see, e.g.,* *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (holding that the living standards of the home are a matter for the family, not for the courts to determine); *Wright v. Wright*, 1990 WL 255821 (Del. Fam. Ct. 1990) (holding that a wife who is not contemplating divorce does not have a cause of action for support against her husband). With regards to spousal testimonial immunity, *see, e.g.,* *Trammel v. United States*, 445 U.S. 40, 53 (1979) (holding that a witness spouse may neither be compelled nor foreclosed from testifying adversely against spouse). *See also* *Singh v. Singh*, 569 A.2d 1112, 1116 (Conn. 1990) (holding marriage between certain relations void as incestuous); *In re State in Interest of Black*, 283 P.2d 887, 908 (Utah 1995) (holding that the state did not improperly deny custody rights to parents in a polygamous marriage).

185. *See, e.g.,* *Edwardson v. Edwardson*, 798 S.W.2d 941, 944-46 (Ky. 1990) (holding that prenuptial agreements may be upheld but that their modification or invalidation is left to the discretion of the courts). *But see* *Simeone v. Simeone*, 581 A.2d 162, 167 (Pa. 1990) (holding that regular contract rules should apply to prenuptial agreements).

186. The fact that much of family law, and especially marriage, is becoming more flexible/contractual is a reflection of the changing nature of relationships. It is true that the introduction of irretrievable breakdown provisions of divorce, the permissibility of prenuptial agreements, and the increasing use of separation agreements to determine the terms of divorce, make family law look more contractual than ever. While I acknowledge this trend, I submit that family law is still highly regulated, and contracts in that field are still under judicial discretion or subject to statutory limitations. For a thorough description of the move in family from status to contract, *see* Dolgin, *supra* note 166.

of itself a mothering relationship that is sufficient, though not necessary, to imbue a protected relationship of motherhood.¹⁸⁷ Just as a woman who fully intends to give up her child at birth is considered the child's mother and her full consent is required after the child's birth and financial compensation prohibited, so the birth mother in surrogacy has the status of mother and this status cannot be forsaken for money. The fact of the father's marriage to another woman is not enough to eradicate that status. Therefore, a surrogate mother possesses the status of "mother" and any contract to alienate this status should be void.

2. Difference Between the Genders

The second level of analysis concerns the equal protection doctrine. So far in this analysis, I have urged the relevance of status to the inalienability of certain relationships in general. It is not the difference between people in contracts but the difference between men and women specifically, which differentiates the status of fatherhood and motherhood. Because I believe that equality does not entail identical treatment, but must acknowledge and incorporate the differences between men and women, the next part of the analysis will examine how motherhood and fatherhood differ.

The question of how to distinguish surrogate motherhood from artificial insemination by donor (AID) is a practical means of considering how to conceptually differentiate between fatherhood and motherhood. I am deeply troubled by surrogate motherhood; however, I do not feel the same level of discomfort with artificial insemination. How can it be claimed that alienating gestation (in gestational surrogacy) or motherhood (traditional surrogacy) is patriarchal while AID, essentially alienating fatherhood, is reproductive innovation? The answer can be divided into two parts. The first concerns only gestational surrogate motherhood and the second concerns all surrogate motherhood.

In gestational surrogate motherhood, genes or the intent to reproduce genetically related children are considered operative in determining motherhood in most states and in all judicial decisions on this matter.¹⁸⁸ Intent or genetics allows motherhood and fatherhood to be established by identical

187. See e.g., L. W. Sontag, *Parental Determinants of Postnatal Behavior*, in *FETAL GROWTH AND DEVELOPMENT* (1970); B. R. H. Van den Bergh, *The Influence of Maternal Emotions During Pregnancy on Fetal and Neonatal Behavior*, 5 *PRE-AND PERI-NATAL PSYCHOL.*, 119, 127-28 (1990); D. H. Scott, *Follow-up Study from Birth of the Effects of Prenatal Stresses*, 15 *DEVELOPMENTAL MED. AND CHILD NEUROLOGY* 770-87 (1973). In addition, genetic contribution may be sufficient to imbue the status of mother. What I say about gestation does not mean that in gestational surrogacy the fact of genetic contribution might not lead to both women having a motherly status relationship.

188. See *supra* notes 119-33 and accompanying text.

means. However, maternity and paternity are not the same; they are vastly different. Paternity is founded in genes. Maternity is based on genes *and* on gestating a child for nine months. The assumption that the gene is the sole deciding factor in determining motherhood is deeply patriarchal. Reliance on intent or genetic make-up to determine parenthood may be the best way around a sticky problem for liberal feminists who rely on identical treatment to assure equal protection, but it fundamentally ignores the uniqueness of woman and co-opts it into male categorization. Focusing *only* on genes is an example of the subordination of the female as a social category because the femaleness of motherhood is subordinated to the male elements.¹⁸⁹ Contract truly becomes a new tool for patriarchal definitions.

The problem of categorization using male norms is encountered when classifying pregnancy. In *California Fed. Sav. & Loan Ass'n v. Guerra*, a female employee tried to return to her job after the birth of her child.¹⁹⁰ After being denied her job, she sued under the California Fair Employment and Housing Act (FEHA), which requires that employees temporarily disabled by pregnancy be given an unpaid leave of up to four months, with a qualified right to reinstatement so long as the position is not unavailable due to a business necessity.¹⁹¹ The bank in turn sued in federal court arguing that Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act (PDA) preempted FEHA.¹⁹² The PDA requires that employers treat pregnancy like any other disability.¹⁹³ The national ACLU filed an amicus brief in the tradition of liberal feminists remarkably arguing that FEHA be struck down. They argued that all workers should be treated the same.¹⁹⁴ But is this not using male definitions of 'disability' to deal with pregnancy? Indeed, the ACLU's argument labels the life-creating force of pregnancy a disability because in the male world that is the only category in which it fits.

189. Cf. Littleton, *supra* note 79, at 1314-17.

190. *Cal. Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 278 (1987).

191. *Id.* at 277-79.

192. *Id.* at 278-79; Pregnancy Discrimination Act of 1978, 12 U.S.C. §2000e(k). The PDA was enacted in 1978 to prevent the then common practice of excluding pregnancy from employee health and disability insurance plans and other employment benefits. *Id.*

193. *Guerra*, 479 U.S. at 277.

194. Despite the fact that, as the dissent notes, "California law requires every employer to have a disability leave policy for pregnancy even if it has none for any other disability" and that California allows special treatment for women who are pregnant, the court explicitly acknowledges that difference matters. *Id.* at 298. "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs." *Id.* The court decides through a somewhat contorted construction of the California and PDA statutes, that the PDA intended to create a "floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *Id.* at 285. To me this reasoning is strange but the result is right. Pregnancy is not a disability but it does require time off from work and employers should be required to provide for maternity leave.

In *Soos v. Soos*, the Arizona Court of Appeals held that an Arizona statute violated the Equal Protection Clause by allowing the biological father in gestational surrogacy to prove paternity but granting the surrogate mother the status of legal mother by default.¹⁹⁵ The court held that there was no compelling reason not to allow the genetic mother to prove her maternity genetically, just as the father did.¹⁹⁶ This case was decided in the context of a custody battle between the genetic father and the genetic mother.¹⁹⁷ The surrogate mother surrendered her legal status as mother leaving at stake the important interest of the child to have a mother.¹⁹⁸ The court stated explicitly that the case was not a custody battle between the surrogate and the genetic mother, but that the court was deciding only the constitutionality of prohibiting the mother to undergo a maternity test to prove her right to custody of the child.¹⁹⁹ However, the court determined that it was unconstitutional on equal protection grounds to allow maternity to be determined solely on gestation.²⁰⁰ It seems awkward and wrong to demand on equal protection grounds that courts determine maternity in the same manner as paternity when they are established differently.

Simply put, male categories do not work for women in all respects. Such categories should be modified to reflect reality, a reality in which women refuse to live by male standards. Equal protection jurisprudence has not yet come to the point where courts adequately acknowledge differences between men and women, although many observers are pushing for it.²⁰¹ While current equal treatment jurisprudence may work for many if not most issues, it can never deal with the biological differences between men and women, nor provide women with a neutral playing field when the fall-back position is male.

195. *Soos v. Soos*, 897 P.2d 1356, 1358-59 (Ariz. Ct. App. 1994).

196. *Id.*

197. *Id.* at 1359.

198. *Id.* at 1356-57. ARIZ. REV. STAT. § 25-218 (1991). The Arizona statute that the genetic mother challenged on equal protection grounds states in pertinent part:

A. No person may enter into, induce, arrange procure or otherwise assist in the formation of a surrogate parentage contract.

B. A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.

C. If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. This presumption is rebuttable.

This statute was fashioned after the Michigan statute and enacted for the purpose of prohibiting surrogate parentage contracts. *Id.* at 1359.

199. *Soos*, 897 P.2d. at 1359.

200. *Id.* at 1361.

201. See, e.g., Krieger & Cooney, *supra* note 78; Littleton, *supra* note 79.

In practical terms, the consequence of this view of equality is a refusal to entirely distinguish gestational surrogate motherhood from traditional surrogate motherhood. In both scenarios the surrogate mother has a status relationship with the child. If intent or genes alone cannot determine motherhood, then the surrogate in gestational surrogate motherhood cannot be fully marginalized as a womb for rent and must be afforded some rights as a woman with "motherly" claims.²⁰² I need not argue here that gestation should be the sole criteria of motherhood.²⁰³ I would argue that both gestation and genetic input create motherhood status.²⁰⁴ I argue only that gestation is a significant factor in the status of motherhood because of the nine months of labor entailed.

As for surrogate motherhood in general, the equal protection problem is deeper and harder to articulate than in gestational surrogacy. The difference between surrogate motherhood and AID is that pregnancy is just different from contributing genes—it involves nine months of care-taking and an immense physical commitment.²⁰⁵ In addition, to sell such services is to allow the biology of women to be sold for the sake of man's genetic continuity, which resurfaces old patriarchal concepts that must be eradicated.

However, these differences do not fully capture the distinction between surrogate motherhood and AID. Basically, it can just as easily be argued that for the sake of children, fatherhood should be an inalienable status. However, in practical terms, surrogacy is different because motherhood is *known*. The same unenforceable contract might ensue if in AID the father tried to contract away his rights. But in reality, in almost all AID situations the father is donating his sperm anonymously and loses the ability to know whom he has fathered.²⁰⁶ This reality ensues exactly because pregnancy is different and a surrogate cannot give away the ability to know her child; rather, she must carry and care for it for nine months and then must labor to give it life. There

202. See *Johnson v. Calvert*, 851 P.2d 776, 786 (Cal. 1993) (distinguishing gestational surrogate motherhood from traditional surrogacy along these lines).

203. See generally, BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* (1989) (arguing that care alone and not seed should determine parenthood).

204. Cf. Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy* 47 RUTGERS L. REV. 165, 239 (1994) (arguing for multiple mothers from the perspective of a kinship relationship).

205. See MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 48, 123-25 (expanded ed. 1990) (discussing differences between gestation and AID, and the legal and practical differences between mothers and fathers "at the moment when a child is born").

206. While I have tried to distinguish AID, and I do think it is distinguishable, this same analysis should apply to AID. If the donor knows about his child (the donor is not anonymous) he should also be entitled to argue for custody or visitation rights. Fatherhood cannot be contracted away, but it can be forfeited irretrievably if the donor does not know the identity of his child.

is so much more entailed in pregnancy than in sperm donation that the categories in parenthood simply mean different things. This is *the* crucial difference between AID and surrogate motherhood and *the* crucial difference between men and women that must be taken into account in these contracts. Because the birth mother will have already mothered the child and will know her child, that status cannot be co-opted.

3. Integration with the Other Approaches

The two-tiered application of the difference approach that I have described is the most comprehensive and befitting means of analyzing surrogate motherhood. This analysis is not meant to usurp the other approaches I have discussed; rather, it is intended to act as the guiding principle. For example, it is certainly the case that commodification is a large part of what is wrong with surrogate motherhood. I would argue that status is the antithesis of commodification. Status is so important due in part to fear of the commodification inherent in allowing determination of personal issues by neutral contracts. The recognition of gender difference via status is a means of recognizing the difference between persons, thereby avoiding the commodification of persons. However, what a gendered approach provides that the commodification approach does not, is a more stream-lined analysis of different types of reproductive innovations. The gender specific approach pays closer attention to the identities of the individual participants and the difference gestation makes.

While I have been more critical of the rights-based approach and what I have termed the exploitation approach, both these approaches are in some ways embodied in the gendered approach. Part of what motivates family law's reliance on status and feminist critics' promotion of difference recognition in equal protection and civil rights law, is a belief in the need to adequately protect women from exploitation. However, the distinction I have made is that such protectionist impulses in the law should be considered legitimate only when meant to redress real biological differences between men and women or cultural differences that are deeply rooted in biology. By this terminology, I mean to be narrow. I would point to pregnancy (and leave from employment related to pregnancy), childcare responsibilities (although this can certainly be extended to men), breast-feeding needs and responsibilities, and gestation.²⁰⁷

The right to procreate will always underlie any discussion of regulating reproduction—coital or non-coital. Such rights, however, should be a base

207. This list is not meant to be exhaustive.

line. I do not believe that all forms of reproduction should be entirely free from state regulation or entitled to full enforcement by the courts. The varying degrees of privacy in coital and non-coital reproduction justify different levels of judicial scrutiny of regulation.

4. Practical Implications of the Analysis

This theory results in the following diagnosis for surrogate motherhood. A woman cannot be forcefully alienated from her child because she signed a contract. If a surrogate arrangement is made and a child born, there are two resulting parents in traditional surrogacy and three in gestational surrogacy. At that point, if the surrogate is interested in custody, the court must determine who is to raise the child according to the best interests of the child, in the same manner as a custody hearing upon divorce that provides visitation to the non-custodial parent.²⁰⁸ In gestational surrogacy, all three contributors can assert their status and claim parental rights.

If couples, knowing this reality, still want to engage in surrogate motherhood, they should be allowed.²⁰⁹ However, such arrangements would have to comply with adoption regulations.²¹⁰ Since the contract extinguishing the surrogate's parental rights should be considered invalid, adoption laws would regulate the alienation of the surrogate's motherhood. Therefore, compensation could only be provided for medical expenses and costs as provided under adoption law.²¹¹ If those who want to use surrogates find women who are willing to engage in surrogacy for such limited pay, and as long as upon the child's birth the gestating mother relinquishes custody rights, the intended parents will get their wish. However, since prenatal adoption is prohibited in every state, such an arrangement is highly dependent on the surrogate voluntarily relinquishing custody of the child after the child's birth.²¹²

Incentives to be a surrogate will be extremely limited by the regulation of payment. Such regulations should greatly affect the incentives of infertile

208. Although beyond the scope of this paper, I would argue for a best interests of the child standard that is different from the decision in *Baby M*. If the court uses the fact that the intended parents were the ones who really wanted and were prepared for the child, this de facto legitimizes the contract. Rather, in surrogacy, the primary caretaker assumption should apply in favor of the surrogate mother, and the fact that she has been physically nurturing the child for nine months should be taken into consideration.

209. See FIELD, *supra* note 205, at 76-77 ("Another option in contract law, however, is to adopt a position midway between illegality and enforceability—that the contracts are unenforceable over the surrogate mother's objection.")

210. FIELD, *supra* note 205, at 88-89.

211. See *supra* notes 36-44 and accompanying text.

212. See *supra* notes 42-44 and accompanying text.

couples since the arrangement is risky and *cannot* be legally guaranteed. The delivery of the child to the intended parents and payment of the surrogate would be unenforceable by a court. This legal consequence should result in far fewer arrangements and mainly with surrogates that genetic donors can trust and to whom money is not an incentive, such as altruistic commitments from family members. To me, this seems like the right result. Procreative collaboration can occur, but motherhood *cannot* be relinquished by contract.

CONCLUSION

Surrogate motherhood is a complex transaction that touches on fundamental legal doctrines as well as acutely sensitive moral sensibilities. Fears of exploitation of women and of patriarchal dominance over women and child-rearing reflected in such novels as *The Handmaid's Tale*²¹³ and *A Brave New World*,²¹⁴ seem to have some resemblance to the tragic scenario in *Baby M*.²¹⁵ Mary Beth Whitehead was in a lower socioeconomic class than the Sterns.²¹⁶ The judge in the custody hearing berated her for her less respected mothering practices.²¹⁷ Mary Beth Whitehead did feel that her child was being taken away from her.²¹⁸ She was co-opted by economic pressure to create a child for a man and his wife and deeply regretted giving up her child. Of course, Mary Beth Whitehead's experience is a worst-case scenario; others do have more positive experiences.²¹⁹ However, what the worst-case scenario demonstrates is the deeply problematic nature of the agreement. Stripped to its essence, the agreement is a contract arranging for a transaction between a mother, a father and a baby. An unregulated contract cannot give appropriate credence to such important relations.

The gender specific theory I have developed is meant to deal both with the protected status of parenthood and with the specific nature of gestation in motherhood. Parenthood in general, as it has been in adoption, should be protected from the free market. The relationship of parent to child is not a subject for arms-length bargaining. Furthermore, the nature of motherhood as a women-specific process must be more closely considered and integrated

213. See generally, MARGARET ATWOOD, *A HANDMAIDEN'S TALE* (1986).

214. See generally, ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

215. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

216. *Id.* at 1249 (explaining that although the Whiteheads and Sterns are not at the extremes of rich and poor, the Sterns were both professionals and had considerably more assets than the Whiteheads, who at the time of the trial were in debt).

217. *Id.* at 1168-70.

218. See MARY BETH WHITEHEAD WITH LORETTA SCHWARTZ-NOBEL, *A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M CASE 25-27* (1989).

219. See e.g., ANDREWS, *supra* note 90, at 11-24.

into the law. Gestation is different from egg or sperm donation and the psychological and physiological connection a woman develops with the baby in her womb during the nine months of pregnancy should not be legally neutralized. Therefore, surrogacy contracts should not be enforced and any such arrangement should comply with adoption regulations.

