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Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood

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Articles

NURTURING IN THE SERVICE OF WHITE CULTURE: RACIAL SUBORDINATION, GESTATIONAL SURROGACY, AND THE IDEOLOGY OF MOTHERHOOD

April L. Cherry*

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An Introduction in Narrative:

The topic of women of color nurturing in the service of White¹ culture is important to the ways we understand mothering, the cultural burdens placed on women of color who mother White children, and the reciprocal relationships of nurture between White children and their mothers of color that deserve some respect in the law.² To help the reader better understand my thesis and appreciate why this topic is important to me personally, I begin this paper with a narrative. So, with you, dear reader, I share a bit of my family history.

It might help to know that I am African-American.³ As with many African-Americans, I come from a close, extended family of people related by blood and marriage as well as affection and struggle. As a young adult, I overheard one of my "great-aunts,"⁴ who is also African-American, talking with pride about the successes of "her boys." This conversation struck me as odd. I had known this woman all of my life, and there was one thing I was sure about: she did not have any children. If she had had children, I

1. I have chosen to capitalize the words "White" and "Black" when they refer to a person's race in order to reflect the political and social significance of race in this country. Cf. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331, 1331-32 n.2 (1988) (stating that Blacks, like Asians, Latinos, and other "minorities," constitute a specific cultural group and thus require denotation as a proper noun); Victor F. Caldwell, Book Review, 96 COLUM. L. REV. 1363, 1369-70 (1996) (reviewing the critical race theory: the key writings that formed the view on race acknowledge past and continuing racial subordination and oppression and do not treat race as merely reflecting skin color or ancestral origins). I have also chosen to use the terms "Black" and "African-American" interchangeably.

2. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2322-24 (1989) (regarding the importance of narratives in transforming law); Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017, 1029-30 (1992) (same).

3. Given the rate of miscegenation in the American South, being African-American in this culture means almost definitionally that one is multi-racial. Nevertheless, I primarily claim those African roots.

4. In fact, blood or marriage did not relate this woman to me. Rather she was my grandmother's life-long best friend and the informally adopted daughter of my great-grandmother.

would have known them. They would be part of my extended family. Despite this glaring contradiction, my great-aunt continued to talk not only about the success of her boys but also about the pride she had that they took care of her in her old age. They made sure that all of her needs were met during her years of retirement. My interest was piqued, so I continued to listen. "Her boys" were White men she had cared for as children while she served as a domestic worker for a White family. I was not surprised to discover that she had been a domestic servant in her younger days.⁵ Nor was I really surprised that she held some degree of affection for these children she had raised. The depth of her affection for "her boys" and the apparent reciprocity of those feelings *did* surprise me. But what surprised me the most was that she understood her experience with these children as one of mothering and that the children, at least as adults, seemed to understand this as well.

I had long known that women formally and informally mothered children whom they had not borne and with whom they shared no traditional family relationship. African-American women, like other women in the African Diaspora, have always participated in these types of mothering patterns—patterns that are outside of and unacknowledged by White, American, and Western norms.⁶ I had also known for a very long time that Black women mothered White children and that their contributions to these children are unacknowledged by our culture⁷ and by the children themselves as a result of racism. But my aunt and these boys of hers made me believe that a paradigm shift might be possible.

An Introduction in Law:

During my first year of teaching a course in reproductive technologies and rights, I came across a case that seemed to go beyond the "traditional" mothering experience of my great-aunt and the experiences of other wo-

5. Historically, poor women of color have been over-represented in domestic service. See TERESA L. AMOTT & JULIE A. MAYTHAEI, *RACE, GENDER & WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES* 160 (1991).

6. See generally PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* (1990); CAROL B. STACK, *ALL OUR KIN* (1974).

7. During my college years, one very stark example of this lack of acknowledgement was made clear to me while going to playgrounds and parks on the Upper East Side of New York City with White friends. The parks were always filled with White children and women of color, who were charged with the children's care. I rarely saw a White woman with White children in those parks, and, indeed, I was often the only woman of color in the parks not caring for a White child.

men of color as domestic servants raising White children. It was the case of Anna Johnson and Mark and Crispina Calvert.⁸

On January 15, 1990, Mark and Crispina Calvert, identified by the press as a White married couple,⁹ entered into a contract with Anna Johnson, an African-American single mother. Ms. Johnson promised to gestate an embryo that had been created with Mark Calvert's sperm and Crispina Calvert's ovum. Ms. Johnson promised to nurture the fetus through pregnancy and deliver a healthy baby to the Calverts. In this contract for gestational surrogacy, Ms. Johnson further promised to relinquish "all parental rights" to the resulting child to Mark and Crispina Calvert.¹⁰ For these services, the Calverts promised to pay Ms. Johnson a sum of ten thousand dollars.¹¹

Towards the end of the pregnancy, Ms. Johnson indicated that she might refuse to give up the child. The Calverts responded by seeking a declaratory judgment that they were the legal, and hence only, parents of any child resulting from the contract. Ms. Johnson in turn sought a declaratory judgment that she was the legal mother of the child to whom she was about to give birth.¹² The trial court found, and the California Court of Appeals affirmed, that because Mark and Crispina Calvert were the genetic parents of the resulting child, they were the "natural" and legal parents. The court held that Ms. Johnson, the birth mother, was a stranger to the child and, as a result, not entitled to any legal relationship with the resulting child.¹³ By concentrating their analysis on the genetics or "blood"¹⁴ of

8. *Johnson v. Calvert*, No. X-63-31-90, slip op. at 2 (Cal. App. Dep't Super. Ct. filed Nov. 21, 1990), *aff'd sub nom. Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Ct. App. 1991), *aff'd sub nom. Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert. denied sub nom. Baby Boy J. v. Johnson*, 510 U.S. 938 (1993); see also *Calif. Judge Speaks on Issue of Surrogacy*, NAT'L L.J., Nov. 5, 1990, at 36.

9. Lisa C. Ikemoto, *The Infertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1024 (1996).

10. Anne Reichmann Schiff offers a good working definition of gestational surrogacy:

[A]n egg is extracted from the man's wife or partner, or possibly from an egg donor, and fertilized with the man's sperm [or donor sperm] *in vitro*. The resulting embryo is transferred and implanted into the uterus of the birth mother who, after carrying the fetus and giving birth, transfers the child to the man and his wife or partner, relinquishing her parental rights.

Anne Reichmann Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 272 n.36 (1995).

11. *Johnson*, 851 P.2d at 778; Sherrie Lynne Russell-Brown, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard*, 23 COLUM. HUM. RTS. L. REV. 525, 541 n.62 (1992) (discussing the fact that a ten thousand-dollar salary for a nine-month pregnancy is equivalent to compensation of \$1.54 per hour given that pregnancy is a twenty-four hour per day "job").

12. *Johnson*, 851 P.2d at 778.

13. See *id.*

the parties and of the child, the court found it inconceivable for a woman who is genetically unrelated to a child to have parental rights to that child. Using genetics as the focus of its analysis, the court found it impossible to acknowledge or to even consider that a Black woman could legally mother a White child.¹⁵ Consequently, *Johnson v. Calvert*¹⁶ demonstrates that, by and large, Black women who participate in surrogate parenting arrangements will not be recognized as having any relationship to the children they bear. Thus, their experiences will differ sharply from the experience of White surrogates.

Since the initiation of this technology, feminist activists and scholars have expressed concern and criticism regarding these contracts because of the social, political, and economic inequalities that these contracts evidence.¹⁷ For example, these contracts most often involve working-class women who agree to act as surrogates because of their limited economic means¹⁸ and intended parents with large amounts of disposable income.¹⁹ In fact, striking similarities exist between surrogacy contracts and contracts

14. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1709, 1737-40 (1993).

15. I focus my analysis on the institution of motherhood as it relates only to Black and White women. I do this not to make invisible the impact of the institution on other women of color, but rather I focus here on Black and White women because in our culture, due in part to the institution of slavery, Black people are viewed as being in direct opposition to White people. I also focus my analysis on Black women because in U.S. culture, race (meaning non-White) is pejorative and firmly associated with Blackness. This phenomenon, I believe, is also a result of the "peculiar" institution of slavery in the United States. See, e.g., *id.* at 1737-40.

16. 851 P.2d 776 (Cal. 1993).

17. E.g., GINA COREA, *THE MOTHER MACHINE* 228-29 (1985); see also PHYLLIS CHESLER, *SACRED BOND* 113 (1988) (comparing surrogacy to slavery); Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369, 1379-80 (1992) (book review) (criticizing defenders of surrogacy for ignoring the issue of economic exploitation). But see, e.g., LORI B. ANDREWS, *BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES* (1989) (including accounts of women using surrogacy as a way to help other women).

18. Women who act as surrogates often give other, often altruistic, reasons for their decision. But because surrogate brokers report that they refuse to hire women for whom the money is important, I remain suspicious of the altruistic motives usually articulated, as they may be connected with both the need for the money and the brokers' expectations. See Russell-Brown, *supra* note 11, at 543 n.69 (citing Philip Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117, 117-18 (1983) (noting that 89% of those studied indicated that a fee was necessary in order to consider acting as a surrogate)).

19. The fees paid by the contracting couple for surrogacy routinely range between fifty and sixty thousand dollars. For example, one surrogate broker reportedly pays the surrogates she hires between fifteen and twenty thousand dollars. The remainder of the fee includes the cost of medical expenses, health insurance, attorney's fees, and the agent's fee. Elinor Burkett, *Meet the Baby Broker*, GLAMOUR, Jan. 1999, at 156, 158.

for sexual prostitution.²⁰ In both instances, poor women sell what is usually defined as a necessity for one's self-ownership. Professor Carole Pateman has argued:

In the controversy over "surrogate" motherhood, the comparison with prostitution is often made. . . . Most of the arguments used to defend or condemn prostitution have reappeared in the controversy over "surrogate" motherhood. Obviously, surrogacy contracts raise questions about the conditions of entry into the contract and economic coercion. The sexual division of labour in patriarchal capitalism and the "feminization of poverty" ensure that a surrogacy contract will appear financially attractive to working-class women, although the payment is very meagre for the time involved and the nature of the service. Class questions are also clearly raised. . . . However, emphasis on class inequality and economic coercion to enter the contract, draws attention away from the question of what exactly is being contracted for and how the surrogacy contract resembles or differs from other contracts about property in the person.²¹

In the case of sexual prostitution as well as surrogate motherhood, one of the primary issues is whether the "work" involved in these contracts shares much in common with the work involved in other types of paid labor. Many feminist scholars argue that it does not. Unlike other forms of paid labor, the work of prostitution and gestation "entails a very high degree of self-alienation" because it requires women to invest their "emotional, physical, and sexual experiences and understandings of themselves as women."²² Author Gena Corea has also noted the potential for the operation of racism in creating a breed of women of color prostituted in surrogacy.²³ In addition, other scholars and commentators have noted that Black women are ripe for exploitation where gestational surrogacy is possible because

20. COREA, *supra* note 17, at 275-76 (asserting that sexual prostitutes sell vagina, rectum, and mouth, while reproductive prostitutes sell other body parts: womb, ovaries, eggs); CAROLE PATEMAN, *THE SEXUAL CONTRACT* 211-12 (1988).

21. PATEMAN, *supra* note 20, at 211-12 (citations omitted).

22. Mary Lyndon Shanley, "Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction, 18 *SIGNS* 618, 627 (1993) (citing Carole Pateman's critique of contract pregnancy that the alienation involved in selling gestational services is "so extreme as to make it illegitimate"); see also Dorothy E. Roberts, *The Genetic Tie*, 62 *U. CHI. L. REV.* 209, 249 (1995) ("Unlike most paid laborers, the surrogate mother cannot separate herself from the service she performs.").

23. COREA, *supra* note 17, at 276 ("Certainly women of color would be labeled 'nonvalued' and used as breeders for the embryos of 'valuable' women.").

they are poor and because their claims to the White children they gestate will be seen by courts as less valid.²⁴

Indeed, this fear may be justified. In cases involving traditional surrogacy, the surrogates as well as the contracting fathers tend to be White.²⁵ In these cases, when there is a dispute regarding legal parentage, courts have recognized the surrogate as the child's legal mother.²⁶ For example, in *In re Baby M*,²⁷ the New Jersey Supreme Court held that surrogate

24. Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKELEY WOMEN'S L.J. 29, 48 (1993); Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACK LETTER J. 17, 30-31 (1991); Katha Pollit, *When is a Mother Not a Mother?*, THE NATION, Dec. 31, 1990, at 825, 842.

25. Itabari Njeri, *The Pain of Infertility, One Couple's Choice*, L.A. TIMES, Mar. 22, 1987, § 6, at 12 (stating that the average surrogate mother is White, has attended two years of college, and is married). White women as surrogates are essential in traditional surrogacy, because in traditional surrogacy the surrogate is inseminated with the sperm of the contracting man. The surrogate provides both her body for gestation and her ova for the other half of the needed genetic material. She is both the birth mother and the genetic mother of the child. Hence, if the contracting couples, whom are most often White, want White children, they must use White women as surrogates. The race of the surrogate is less important in gestational surrogacy, because in gestational surrogacy the surrogate provides only her body for gestation. The surrogate provides no genetic material to the resulting child.

26. See *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (involving a White surrogate who was the child's genetic and birth mother and holding that surrogate contract unenforceable). Notably, in *Baby M*, the wife of the contracting man was not part of the contract because of her fear that the transaction would be viewed as baby-selling. Even in states that enforce surrogacy contracts, birth mothers generally are required to relinquish their parental rights in favor of the intending couple. This process generally supports the analysis that even in these jurisdictions the birth mother is the original, legal mother.

Statutes in Arizona, the District of Columbia, Indiana, New York, North Dakota, and Utah deny enforcement of all surrogacy contracts. ARIZ. REV. STAT. ANN. §25-218 (West 2000); D.C. CODE ANN. §16-402 (1997); IND. CODE ANN. § 31-20-1-1 (West 1999); N.Y. DOM. REL. §122 (McKinney 1999); N.D. CENT. CODE § 14-18-05 (1997); UTAH CODE ANN. § 76-7-204 (1999).

Nevertheless, states are increasingly enforcing surrogacy contracts. For example, statutes in Kentucky, Louisiana, Nebraska, and Washington deny enforcement of surrogacy contracts only if the surrogate is compensated. KY. REV. STAT. ANN. § 199.590(4) (Michie 1998); LA. REV. STAT. ANN. § 9:2713 (West 1991); NEB. REV. STAT. § 25-21,200 (1995); WASH. REV. CODE ANN. 26.26.2300 (West 1997).

In Florida, Nevada, New Hampshire, and Virginia, statutes provide that some uncompensated surrogacy contracts are enforceable. FLA. STAT. ANN. § 63.212 (West 1997 & Supp. 2001); NEV. REV. STAT. § 126.045 (2000); N.H. REV. STAT. ANN. § 168-B:16 (1994); VA. CODE ANN. § 20.159 (Michie 2000). Furthermore, New Hampshire and Virginia also require judicial approval of the surrogacy agreement prior to insemination. N.H. REV. STAT. ANN. § 168-B:16 (1994); VA. CODE ANN. § 20.159 (Michie 2000). And in Florida and Arkansas, statutes provide that the intended mother is the legal mother of the child born as a result of surrogacy. FLA. STAT. § 742.11 (West 2001) (excepting gestational surrogacy); ARK. CODE ANN. § 9-10-201 (Michie 1998).

27. 537 A.2d 1227 (N.J. 1988).

mothering contracts were invalid and against public policy and that the birth mother of a child was its natural and legal mother.²⁸ In contrast, where Black women serve as surrogates in gestational surrogacy, *Johnson v. Calvert* instructs us that courts are unwilling to recognize African-American women as legal mothers, because these surrogates lack a genetic tie to the children. Thus, *Johnson v. Calvert* offers a window into the future and forces us to ask why the claims of Black women to the White children they mother have never been, and probably never will be, recognized.

I approach this last question, involving race, motherhood, and gestational surrogacy, by looking at courts' opinions in the case of *Johnson v. Calvert* and the racialized institution of motherhood. In the next section, I discuss motherhood as a social institution. I contrast some of the radical feminist critiques of motherhood, which recognize motherhood as institutionalized and compulsory, with Black feminist criticism, which understands motherhood as a site of power for African-American women. In Section III, I discuss the current popular understanding of the cultural and legal dictates of institutionalized motherhood from a historical perspective, focusing on the late eighteenth and early nineteenth centuries' cult of domesticity as a way of understanding the present social requirements of motherhood. In addition, I discuss the ways in which the ideology of racism alters the standards for judging Black women as mothers. In Section IV, I tackle the case of *Johnson v. Calvert* in greater detail and address the lack of recognition, by the dominant culture, of African-American women's ties to White children. Finally, in Section V, I conclude that the oppressive use of White power provides the answer to whether law can and will give legal recognition to the mothering relationships between Black women and the White children they mother.

II. Motherhood as an Institution

*It was as Mother that woman was fearsome;
it is in maternity that she must be transfigured and enslaved.*²⁹

A. Radical Feminist Critiques

The institution of motherhood has played and continues to play a vital role in the construction of gender and, as a result, in the maintenance of

28. *Id.* at 1246-50. Nevertheless, the New Jersey Supreme Court affirmed the trial court's order awarding custody to the child's biological father, on the grounds that the father's custody was in the child's best interest. *Id.* at 1258.

29. SIMONE DE BEAUVOIR, *THE SECOND SEX* 193 (H.M. Parshley ed. & trans., Vintage Books 1974) (1949).

social, economic, and political power in the hands of White men.³⁰ Because motherhood has been shaped and commodified by the prevailing patriarchal norms, women do not own motherhood. The meaning of motherhood for women has been created largely in response to having the institution forced upon them. As a result, motherhood as an institution includes more than biological motherhood. It has political and social dimensions as well.³¹

Biological motherhood consists of all activities necessary to bring life to a fetus and physically sustain a newborn infant. Hence, biological motherhood traditionally has included pregnancy, childbirth, and suckling.³² It is the actual or presumed ability to become pregnant and gestate a fetus that has been used in the law to heavily restrict women's economic activity.³³ In the political arena, women are controlled as mothers by the state or by other male-controlled institutions, such as medicine and law.³⁴ It has been noted that the political institution of motherhood "is visible in the male dispensation of birth control and abortion; the guardianship of men

30. NANCY J. CHODOROW, *THE REPRODUCTION OF MOTHERING* 9 (1978); ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 64 (1976); Iris Marian Young, *Is Male Gender Identity the Cause of Male Domination?*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 129, 134 (Joyce Trebilcock ed., 1983); see also Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 3 (1993) (arguing that racism and patriarchy are interrelated in the social construction of motherhood).

31. LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT* 10-11 (1976) (identifying the components of motherhood as biological, social, and ideological). I believe that the ideological component Gordon describes is a fundamental part of the social and political institutions of motherhood. See RICH, *supra* note 30, at 13 (proposing that motherhood has two components: biological and social).

32. GORDON, *supra* note 31, at 10; RICH, *supra* note 30, at 12-13. Perhaps suckling is no longer a necessary biological activity, given the widespread availability of commercial infant formula, notwithstanding the documented health benefits of breastfeeding to infants.

33. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (justifying the refusal of a woman's right to practice law because the "harmony . . . of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband"); *Muller v. Oregon*, 208 U.S. 412, 421-23 (1908) (holding that statutory limitations placed on a woman are for the benefit of all because "the physical well-being of woman [is] an object of public interest and care in order to preserve the strength and vigor of the race").

Shulamith Firestone argues that gender inequality is the first class antagonism and that it arises from the biological fact of women's capacity to reproduce. Taking a biological deterministic view, she argues that women's reproductive capabilities "led directly to the first division of labor based on sex." SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 9 (1970).

34. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 162 (1989) ("The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender-through its legitimating norms, forms, relation to society, and substantive policies.").

over children in the courts and the educational systems . . . the economic dominance of the father over the family; [and] the usurpation of the birth process by the male medical establishment."³⁵

The social institution of motherhood is significant in understanding how women are disempowered and confined in their role as mothers. Social motherhood is usually understood as the work that women are culturally required to perform as childrears.³⁶ For example, in both Black and White communities, the "socialization of children and the cleaning, cooking and nurturing functions" are all work that disproportionately falls on women under the rubric of social motherhood.³⁷ But, in fact, social motherhood is a multifaceted patchwork of ideology and symbolism.

In her critical work on the social institution of motherhood, Adrienne Rich expands the definition of social motherhood. She describes it as an institution that includes the ideology that the separation of childbirth and childrearing is immoral; the symbolism of lactation, which views women as the natural nurturers and nourishers of all children and men;³⁸ and the ideology of femininity, which requires suppression of women's sexuality.³⁹ Hence, the social institution of motherhood objectifies women as mothers. Philosopher Jeffner Allen suggests that this objectification of women in motherhood is dangerous, because it reduces women to body parts and social roles.⁴⁰ It robs women of their subjectivity. Allen notes:

Motherhood is not a matter of women's psychological or moral character. As an ideology by which men mark females as women, motherhood has nothing to do with a woman's selfishness or sacrifice, nurturance or non-violence. Motherhood has everything to do with a history in which women remain powerless by reproducing the world of men and with a present in which women are expected to do the same.⁴¹

35. ADRIENNE RICH, *Motherhood in Bondage*, in *ON LIES, SECRETS, AND SILENCE: SELECTED PROSE* 196 (1979); see RICH, *supra* note 30, at 57.

36. See, e.g., GORDON, *supra* note 31, at 10.

37. Rose M. Brewer, *Theorizing Race, Class and Gender: The New Scholarship of Black Feminist Intellectuals and Black Women's Labor*, in *THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN* 13, 24 (Stanlie M. James & Abena P.A. Busia eds., 1993) (noting also that the women upon whom this work falls disproportionately are Black).

38. See RICH, *supra* note 30, at 13; GORDON, *supra* note 31, at 10.

39. RICH, *supra* note 30, at 41-55.

40. Jeffner Allen, *Motherhood: The Annihilation of Women*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 315, 315-16, 320-25 (Joyce Trebilcock ed., 1983); FIRESTONE, *supra* note 33, at 1-15.

41. Allen, *supra* note 40, at 316; see also *id.* at 321 (regarding representational thinking).

Moreover, many feminist theorists have convincingly argued that the traditional view of motherhood is detrimental to women because it is, in fact, compulsory under patriarchy and as such contributes to women's oppression.⁴²

At its core are both structures and an ideology that require motherhood as a prerequisite for all socially acceptable female adult roles.⁴³ For example, psychoanalysts and psychologists have long believed that women have a maternal instinct.⁴⁴ As a result, they have argued that women must mother in order to lead fulfilling lives, because the ability to nurture is natural or instinctual.⁴⁵ To choose not to mother, then, is evidence of some deviation from the norm—a psychological disorder of sorts.⁴⁶ In fact, in 1963, noted childcare expert Dr. Benjamin Spock wrote that “any woman who finds full-time motherhood unfulfilling is showing ‘a residue of difficult relationships in her own childhood.’”⁴⁷ One result of this pronatalist ideology is that women are prevented from achieving their individual potential. Adrienne Rich maintains: “Institutionalized motherhood demands

42. RICH, *supra* note 30, at 43. Adrienne Rich defines patriarchy as “the power of the fathers: a familial-social, ideological, political system in which men—by force, direct pressure, or through ritual, tradition, law, and language, customs, etiquette, education, and the division of labor, determine what part women shall or shall not play, and in which the female is everywhere subsumed under the male.” *Id.* at 57.

43. Martha E. Gimenez, *Feminism, Pronatalism, and Motherhood*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 287, 289-90 (Joyce Trebilcot ed., 1983) (agreeing with the argument developed by sociologist Judith Blake).

44. CHODOROW, *supra* note 30, 21-22.

45. *Id.* at 22. So Chodorow would suggest a solution to the continually reinforced sexual division of labor: have both men and women “mother” or raise children. *Id.* at 178. But as Pauline Bart notes, the “requiring of both genders to raise children reinforces heterosexuality and the nuclear family.” Pauline Bart, *Review of Chodorow's The Reproduction of Mothering*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 147, 150 (Joyce Trebilcot ed., 1984). When Bart asked Chodorow “if her theory implied that children raised by two lesbians should be removed and put into a situation where there was a man present, [Chodorow] replied that the man did not have to be there all the time or be the biological father. But her theory does not suggest it could be the mailman.” *Id.*

46. See RICH, *supra* note 30, at 265-66 (discussing the false pathology of non-mothers); see also ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS* 129 (1995) (discussing the post-World War II environment that focused upon the nuclear family with children as the ultimate achievement of happiness and fulfillment that marginalized men and women who were childless).

47. Benjamin Spock, *Should Mothers Work?*, *LADIES' HOME J.*, Feb. 1963, quoted in Sandra L. Bem & Daryl J. Bem, *Homogenizing the American Woman: The Power of an Unconscious Ideology*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF RELATIONS BETWEEN WOMEN & MEN* 6, 20 (Alison Jaggar & Paula Rothenberg eds., 1978). *Ladies' Home Journal* has changed a bit with the times. In an article in its June 1996 issue, it acknowledged that “maternal employment had no uniform effect on child development, because work is only one variable in a woman's life.” Rosalind Barnett & Cary Rivers, *Good News for Families*, *LADIES' HOME J.*, Jun. 1996, at 102, 102.

of women maternal 'instinct' rather than intelligence, selflessness rather than self-realization, relation to others rather than creation of self."⁴⁸ Similarly, others have noted this pronatalist ideology renders equality unattainable.⁴⁹ Sociologist Martha Gimenez notes:

To be childless becomes synonymous with failure, and those feelings are reinforced by cultural and social pressure which condemn childlessness. The equation of motherhood with self-realization, in conjunction with the lack of desirable [or socially acceptable] alternatives . . . make women's attainment of reproductive freedom structurally impossible. "Self-determination cannot exist if none of the options is attractive."⁵⁰

Hence, under these conditions, motherhood is not freely chosen. As compulsory and institutionalized, motherhood is designed to serve the interests of men and is a "burdensome condition that stifles [women's] creativity, exploits their labor, and makes them partners in their own oppression."⁵¹

48. RICH, *supra* note 30, at 42. I do not believe that Rich argues here that mothers don't need intelligence to raise bright, well-adjusted children; rather, Rich asserts that in the socio-political institution of motherhood, women's intelligence is not what is valued. See also FIRESTONE *supra* note 33, at 232 (arguing that the "men and women developed only half of themselves, at the expense of the other half" because of the regulation of women to the domestic/maternal sphere); Roberts, *supra* note 30, at 5 (asserting that motherhood subordinates women by utilizing the woman's status as childbearer to determine identity and valuing that only in relation to the father).

49. Gimenez, *supra* note 43, at 290 ("In contemporary society, pronatalism is structurally and ideologically dominant at the societal and the personality structure levels of analysis. In this context, statements which do not *explicitly* challenge pronatalism become *implicitly* supportive of it . . ."). Gimenez defines pronatalism as "the existence of structural and ideological pressures resulting in socially prescribed parenthood as a precondition for all adult roles." *Id.* (emphasis omitted).

50. *Id.* at 297 (quoting GORDON, *supra* note 31, at 408). Shulamith Firestone also asserts that pronatalism is dangerous to women. She argues that a woman can choose not to mother "only if she adds that she is neurotic, abnormal, childhating and therefore 'unfit.' . . . [U]ntil the decision not to have children is at least as legitimate as traditional childbearing, women are being forced into their female role [as mothers]." FIRESTONE, *supra* note 33, at 228.

51. COLLINS, *supra* note 6, at 118. Sociologist Martha Gimenez echoes this observation: "The notion that *all* women *should* be and *desire* to be mothers has always been used to keep women in a subordinate position while paying lip service to the social importance of their role." Gimenez, *supra* note 43, at 287.

The radical feminist critique of motherhood and the Black feminist position are in substantial opposition to the liberal feminist position that de-centers and de-genders the experience of motherhood in order to avoid the further marginalization of women. See Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation, or Separation from the Existing Social Structure?*, 37 *RUTGERS L. REV.* 825, 827 (1985) (noting that early feminist litigators used the strategy of insisting that gender differences are not inherent and physical sex differences are not absolute, as a way of removing gendered stereotypes from the law); see also June Carbone & Margaret F. Bring,

The gendered division of labor in which men's labor is viewed as productive and women's labor is viewed as nonproductive and the resulting economic dominance of men in families is another essential ingredient of the social institution of motherhood. Economist Heidi Hartmann argues that job segregation by gender is the primary means by which the state maintains male gender hierarchy. She maintains that gender-based job segregation

enforces lower wages for women in the labor market. Low wages keep women dependent on men because they encourage women to marry. Married women must perform domestic chores for their husbands. Men benefit, then, from both higher wages and the domestic division of labor. The domestic division of labor, in turn, acts to weaken women's position in the labor market. Thus, the hierarchical domestic division of labor is perpetuated by the labor market, and vice versa.⁵²

Hence, the gendered division of labor is part and parcel of a system that encourages women to mother. It is integral in maintaining an institutionalized social motherhood and in maintaining women's dependence in families.

B. Black Feminist Critiques of Motherhood

Some feminists of color have rejected the radical feminist critique of motherhood and have instead adopted a pronatalist and maternalist position, which views the institution of motherhood as both conveying adult status and empowering to women.⁵³ Perhaps because African-American women often perform motherhood outside of marriage, African-American feminists generally have not discredited motherhood as an experience

Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform, 65 TUL. L. REV. 953, 983 (1991) (mentioning that liberal feminism encouraged women to devalue their domestic roles); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 46 (1991) (noting that some feminists have tried to de-center motherhood from women's identity).

52. Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, in THE SIGNS READER: WOMEN, GENDER & SCHOLARSHIP 193, 195 (Elizabeth Abel & Emily K. Abel eds., 1983); see also FIRESTONE, *supra* note 33.

53. Historian Molly Ladd-Taylor defines maternalism in part as a specific ideology whose adherents hold (1) that there is a uniquely feminine value system based in care and nurturance; (2) that mothers perform a service to the state by raising citizen-workers; [and] (3) that women are united across class, race, and nation by their common capacity for motherhood and therefore share a responsibility for all the world's children[.]

MOLLY LADD-TAYLOR, *MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890-1930* 3 (1994).

shaped almost exclusively by patriarchal or male requirements.⁵⁴ Indeed, African-American scholar bell hooks has argued:

Some white middle class, college-educated women argued that motherhood was a serious obstacle to women's liberation . . . Had black women voiced their views on motherhood, it would have not been named a serious obstacle to our freedom as women. Racism, availability of jobs, lack of skills or education and a number of other issues would have been at the top of the list—but not motherhood.⁵⁵

In addition, sociologist Patricia Hill Collins has asserted that the institution of motherhood is not demeaning or dangerous to African-American women due to the differences in the cultures of Black and White Americans.⁵⁶ The mothering patterns of African-American women were passed down from West African foremothers as well as from the forced patterns of mothering under slavery wherein elderly women (othermothers and fictive kin)⁵⁷ cared for slave children who were too young to work in the fields.⁵⁸ In the context of slavery, Black mothering was in many ways a subversive activity. Angela Davis argues that by mothering their own children, as well as the children of other slave women, slave women performed "the *only* labor of the slave community which could not be directly and immediately claimed by the oppressor."⁵⁹ Moreover, Collins argues that contemporary African-American culture has in large part rejected the cultural normalcy of the nuclear family in favor of a familial structure that includes and promotes othermothering and kinship networks that thereby provide mothers with the social support necessary to mother their children without

54. According to the 1990 Census, Black "female householders with no husband present" who had children under eighteen years of age headed 26.95% of all Black families counted by the Census. By comparison, White "female householders with no husband present" who had children under eighteen years of age headed 6.40% of all White families counted. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES 41 (1993) [hereinafter 1990 CENSUS].

55. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 133 (1984).

56. See COLLINS, *supra* note 6, at 119-23.

57. Collins describes othermothers as "women who assist blood mothers by sharing mothering responsibilities." *Id.* at 119.

58. JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY FROM SLAVERY TO THE PRESENT* 29 (1985); see also Stanlie M. James, *Mothering: A possible Black feminist link to social transformation?*, in *THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN* 44, 46 (Stanlie M. James & Abern P.A. Busia eds., 1993) (noting the West African patterns of shared childcare in polygynous households and the high incidence of fostering children in West African culture).

59. Angela Y. Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, reprinted in *THE ANGELA Y. DAVIS READER* 111, 116 (Joy James ed., 1998).

detriment to their social, economic, or political selves.⁶⁰ Furthermore, Collins states:

[M]otherhood can serve as a site where Black women express and learn the power of self-definition, the importance of valuing and respecting ourselves, the necessity of self-reliance and independence, and the belief in Black women's empowerment. . . . Others see motherhood as providing a base for self-actualization, status in the Black community, and a catalyst for social activism.⁶¹

To be sure, African-American women have used their position as mothers, othermothers, and community mothers to work toward racial equality, the eradication of drugs in Black communities, and community development.⁶²

Notwithstanding Collins' analysis, other African-American feminists have noted that pronatalism and maternalism in the Black community is a response to the impoverished conditions under which Black women often live. They have argued that the lack of access to educational and employ-

60. Collins does not completely ignore the costs of pronatal ideology to Black women, see COLLINS, *supra* note 6, at 133-37, but she does not explore this in detail. See also Sylvia Sims Gray & Lynn M. Nybell, *Issues in African-American Family Preservation*, 69 CHILD WELFARE 513, 515-17 (1990) (noting the importance of extended family networks in the African-American community); Barbara Omolade, *The Unbroken Circle: A Historical Study of Black Single Mothers and Their Families*, in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 171, 179 (Martha A. Fineman & Nancy Sweet Thomadsen eds., 1991) (explaining that the extended family structure permitted Black survival and resistance during slavery).

61. COLLINS, *supra* note 6, at 118; see also JOYCE LADNER, *TOMORROW'S TOMORROW: THE BLACK WOMAN* 215-39 (1971) (noting that in the African-American community, motherhood is central in or out of wedlock, and single mothers are supported rather than viewed as immoral).

62. "Lifting as We Climb," the motto of the National Association of Colored Women, can be understood as women seeking to lift the African-American community out of despair while bettering themselves and is but one example of othermothering and community mothering at work. See BLACK WOMEN IN WHITE AMERICA 433-36 (Gerda Lerner ed., 1973); see also Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political,"* 2 YALE J. L. & FEMINISM 25, 41 (1989) ("Local [Black women's] clubs practiced a larger social motherhood that provided necessary services to the community. They established kindergartens, old age homes, working girls' lodgings, social purity projects, female protective leagues, orphanages and settlements."). For a contemporary use of African-American mothering as a model for political action, see Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994); Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing about Motherhood*, in REPRESENTATIONS OF MOTHERHOOD 56, 59 (Donna Bassin et al. eds., 1994) (noting that motherwork goes beyond family survival and recognizing that individual survival requires group survival). See also ELIZABETH V. SPELMAN, *IN ESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 132 (1988) (stating that "for Blacks in America the family has been a source of resistance against white oppression"); STACK, *supra* note 6, at 124-29 (suggesting extended family networks as a source of resistance against White oppression).

ment advancement that has plagued the African-American community has shaped Black women's perspectives on motherhood. Children are valued because they are the only things a Black woman can call her own and because motherhood is viewed as one of few goals that she can achieve that signifies maturity.⁶³

III. The Requirements of Institutionalized Motherhood

The primary role of women is in the home and family . . . men still need a good mother to come to with their little troubles. Women should provide a place of refuge where the husband and children can return from a busy, confused and complex world.

—Belle Spafford, President, Women's Auxiliary, Church of Jesus Christ of Latter-day Saints⁶⁴

The legal responsibilities of a wife are to live in the home established by her husband; to perform the domestic chores (cleaning, cooking, washing, etc.) necessary to help maintain that home; to care for her husband and children.

*The legal responsibilities of a husband are to provide a home for his wife and children; to support, protect and maintain his wife and children.*⁶⁵

A. The Popular Institution of Motherhood: Nineteenth Century Roots

We are inundated with the popular view of motherhood, which is part of the cultural paradigm of the nuclear family. In the popular view, the best mothers are those who are White, heterosexual, well-educated, well-

63. See LADNER, *supra* note 61, at 217; Ann Chandler Howell, Book Review, 34 J. MARRIAGE & FAM. 561 (1972) (reviewing JOYCE LADNER, TOMORROW'S TOMORROW: THE BLACK WOMAN (1971)); see also RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE 81 (1992).

Maya Angelou has written of this cultural understanding surrounding motherhood, even teenage motherhood, as signifying adult status. She writes that when leaving home at the age of seventeen with her infant child, her mother stated: "Alright, you're a woman. You don't have a husband, but you've got a three-month old baby. I just want you to remember one thing. From the moment you leave this house, don't let anybody raise you. . . . You've been raised." Maya Angelou, *Forward* to DOUBLE STITCH: BLACK WOMEN WRITE ABOUT MOTHERS AND DAUGHTERS, at xi (Patricia Bell-Scott et al. eds., 1991).

64. Quoted in FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN 292 (Alison M. Jaggar & Paula S. Rothenberg eds., 1978).

65. RICHARD T. GALLAN, WIVES' LEGAL RIGHTS 4-5 (1967) (quoted in Sheila Cronan, *Marriage*, in FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN 329, 331 (Alison M. Jaggar & Paula S. Rothenberg eds., 1978)).

off, and married.⁶⁶ "The archetypal white, middle-class nuclear family divides family life into two oppositional spheres: the 'male' sphere of economic providing and the 'female' sphere of affective nurturing."⁶⁷ Women in this paradigm are expected to mother.⁶⁸ In fact, images of female self-fulfillment through mothering are everywhere. On television, in magazines, and in popular discourse we see the joys of motherhood: nursing to satiate an infant, watching the toddler's first steps, guiding children through the first experiences of independence, attending graduations, and the teary but ultimately satisfying guidance of children into marriage and childrearing. Under this popular view, motherhood is the central component of the female sphere: it is the sphere where women are expected and encouraged to exert influence.⁶⁹

Our current conception of motherhood and the importance of the nuclear family has its origins in the industrial revolution and the urbanization of the nineteenth century. Indeed the institution of motherhood was dramatically transformed during this period.⁷⁰ Nineteenth-century technology made it possible for goods to be produced in greater quantities outside of the household, where men, women, and children formerly worked together in the household to produce goods.⁷¹ In the more affluent classes, men followed production, working for money outside of the home, while women were left at home to care for the needs of the men and children.⁷² By the late nineteenth and early twentieth centuries, capitalism and industrialization created male workers and male-dominated labor unions. These institutions ultimately fashioned paid labor as "men's work" and housework as "women's work," forcing all but the poorest women out of the paid

66. See, e.g., Lawrence H. Ganong & Marilyn Coleman, *The Content of Mother Stereotypes*, 32 *SEX ROLES* 495, 496 (1995) ("North American culture defines the 'most appropriate' mothers as heterosexual, stay-at-home mothers in first marriage, nuclear families.").

67. COLLINS, *supra* note 6, at 46.

68. CHODOROW, *supra* note 30, at 38-39.

69. We, of course, also see this view of woman as mothers in the law. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421 (1908); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J. concurring).

70. ALICE KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED: A HISTORICAL OVERVIEW* 33 (1981).

71. *Id.*

72. This is not to say that many women did not work for money. Poor women worked as domestics in the homes of the affluent, in factories, at home doing piece work, as farm workers, and as prostitutes, and in the antebellum South, Black women worked as slaves. See ROSALYN BAXANDALL ET AL., *AMERICA'S WORKING WOMEN: A DOCUMENTARY HISTORY 1600 TO THE PRESENT* 94 (1995) (stating that the family wage system was a myth because only a minority of men earned enough money to enable their wives and children to refrain from paid labor). On the transformation of childhood, see Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 *NEW ENG. L. REV.* 1113, 1149 (1997).

labor market. The development of protective legislation, child labor laws, intensified segregation of the labor force, and the creation of the family wage solidified the exclusion of women as acceptable competitors in the labor market.⁷³ According to Heidi Hartmann, capitalists and American-born White male labor unions collaborated in creating the family wage, which was integral in protecting men's patriarchal position in the family and in providing capitalists with the unpaid labor of housewives, which produced and maintained healthier workers.⁷⁴ As a result, the family wage "performed two functions for patriarchal control: it cut competition from women wage workers, and it allowed men to keep their wives at home to provide personal services, services that are not so easily forthcoming when women have to deal with the problems of the second shift."⁷⁵

Nevertheless, the new economic system grew to depend heavily on poor women's paid labor in the market. The emerging industrialists needed cheap labor to keep their operations profitable. These early industrialists filled their need for cheap labor by hiring young, single women from farming communities, housing them in supervised dormitories and boarding houses, protecting the women's reputations for virtue, and by proxy protecting the working women's marriageability.⁷⁶ By 1840, women comprised approximately one half of all workers in manufacturing jobs and ninety percent of all workers in shoe factories, textile mills, and milling shops.⁷⁷ Later, nineteenth century capitalists, led by market forces, eliminated the prior supervision of women workers, reduced wages for women, lengthened the women's working hours, and increased the pace of women's industrial work.⁷⁸ These changed conditions decreased the status of factory work, making the work socially unacceptable for middle-class White women and other women "of good moral character."⁷⁹ Manufactur-

73. Natalie J. Sokoloff, *Motherwork and Working Mothers*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 259, 259 (Alison M. Jaggar & Paula S. Rothenberg eds., 2nd ed. 1984).

74. Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, in *WOMEN AND REVOLUTION: A DISCUSSION OF THE UNHAPPY MARRIAGE OF MARXISM AND FEMINISM* 1, 20-23 (Lydia Sargent ed., 1981).

75. Ann Ferguson, *On Conceiving Motherhood and Sexuality: A Feminist Materialist Approach*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 153, 171 (Joyce Trebilcot ed., 1983).

76. MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 109 (1988); see also NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* 35-39 (1977).

77. ABRAMOVITZ, *supra* note 76, at 122.

78. See KESSLER-HARRIS, *supra* note 70, at 59.

79. See *id.* at 60-62; Gerda Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson*, in *OUR AMERICAN SISTERS: WOMEN IN AMERICAN LIFE AND THOUGHT* 82, 89-90 (Jean E. Friedman & William G. Shade eds., 1973) (noting that indus-

ing work became the work of the lower-class, poor native-born, and immigrant workers.⁸⁰

It was in this economic milieu that the culturally accepted role of women both as women and as mothers dramatically changed. The new role that emerged at this time was shaped by what historians call the "cult of domesticity" or the "cult of true womanhood."⁸¹ The ideological foundation for this new role lay in the belief that motherhood was women's natural role in the family.⁸² "This new ideology emphasized her biological features—womb and breast—and allegedly innate maternal instincts for the social role of mothering."⁸³ In this new role, each woman was charged with sustaining a happy and orderly household and with giving her husband the "services he needed to sustain his work life."⁸⁴ As historian Alice Kessler-Harris notes:

The moral imperative that confined women to their homes served many purposes. . . . It kept most married women and many unmarried women out of the labor force, restricting them to supportive roles in relation to the male work force. It offered industry the services of an unpaid labor force at home whose primary task was to stretch male wages. It helped to ensure that those women who did earn wages would stay in the labor force only briefly, remaining primarily committed to their families and satisfied with low-paid jobs.⁸⁵

Perhaps more importantly, the greatest—if not the only—calling of women under the cult of domesticity was raising children with good moral

trialization increased differences between women of different social classes and that the image of the lady was accepted as the ideal of femininity—an ideal which poor women could not achieve).

80. ABRAMOVITZ, *supra* note 76, at 110.

81. E.g., KESSLER-HARRIS, *supra* note 70, at 67.

82. One important proponent of this social order was author and educator Catharine Beecher. Although Beecher was unlike many of her contemporaries in that she did not believe that women were naturally subordinate, she believed that women should embrace the subordinate role because women's subordination and exclusion from the public sphere promoted the general good of society. See KATHRYN KISH SKLAR, CATHARINE BEECHER: A STUDY IN AMERICAN DOMESTICITY 158 (1973).

83. Sokoloff, *supra* note 73, at 260.

84. KESSLER-HARRIS, *supra* note 70, at 35.

85. *Id.* at 67. Natalie Sokoloff also notes:

The elements of this new ideology that had to be asserted as "natural" were (1) children require full-time, undivided adult attention, (2) women are specially endowed to provide this care, and care for the homes their husbands need to ensure the reproduction of their labor power; and (3) domesticity not only shields women from the evils of the outside world, but also brings them certain rewards of status which are mediated through their families.

Sokoloff, *supra* note 73, at 260.

values.⁸⁶ As Kessler-Harris states: "Meek and passive, modest and silent, women were expected to submerge their wills into those of their husbands and fathers. Piety, purity and submissiveness became the ideals. Women could fulfill these precepts only within the home."⁸⁷ Indeed, in 1872, Justice Bradley stated in a concurring opinion to *Bradwell v. Illinois*,⁸⁸ a case that denied Myra Bradwell the opportunity to practice law in the state of Illinois: "The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator."⁸⁹

The values of the cult of domesticity were first articulated by women and men of the middle class and received essentially universal acceptance by White women and men of the working class. However, these values could never be realized among women of the working class.⁹⁰ The standards of the cult of domesticity taught that only women who stayed home (and who were not wage laborers) could instill the values of sexual and moral purity in their husbands and children. Because poverty prevented working-class women from giving up their paid labor, they could never become women of high moral character or acceptable mothers by the social standards.⁹¹

86. The author of an 1842 domestic education treatise stated, "To American mothers is then committed, in a special manner, the solemn responsibility of watching over the hearts and minds of our youthful citizens who are soon to take their places in the public arena . . .," quoted in ABRAMOVITZ, *supra* note 76, at 117.

87. KESSLER-HARRIS, *supra* note 70, at 38; see also ABRAMOVITZ, *supra* note 76, at 112. As a writer expressed in 1886:

For motherhood is the crown and glory of a woman's life. It comes sometimes as a thorny crown, but it is worth all it costs. The blessing of motherhood, which is like nothing on earth, is placed in compensation over against all the pain and care which so often seem to be woman's peculiar burden. And it compensates.

L.W. PALMER, *The Coming Guest, BABYHOOD* 2, 313 (1886), quoted in Rima D. Apple, *Constructing Mothers: Scientific Motherhood in the Nineteenth and Twentieth Centuries*, 8 SOC. HIST. MED. 161, 165 (1995).

88. 83 U.S. (16 Wall.) 130 (1872).

89. *Id.* at 141 (Bradley, J., concurring).

90. Ferguson, *supra* note 75, at 170-76; see also Apple, *supra* note 87, at 165) (emphasizing that despite the labors and successes of women in various fields, women should not lose sight of the central focuses of womanhood and motherhood).

91. See Ferguson, *supra* note 75, at 170.

In the eighteenth century, women and children were expected to earn enough money to subsist, and men's wages were adjusted in accordance with this presumption. Laura J. Owen, *The Welfare of Women in Laboring Families: England, 1860-1950*, 1 FEMINIST STUD. 107, 108 (1973). But with the implementation of the family wage, whereby some men could earn enough to support a non-wage earning wife and non-wage earning children, and protective legislation, some married working-class women who could stay home with their children gained power as mothers. Simultaneously, these women lost power by their economic dependence on men. Ferguson, *supra* note 75, at 171. As for those women who

Paradoxically, the cult of true womanhood depended on the waged labor of poor women who produced the goods consumed by the middle and upper classes. A contradiction also existed in the way poor working women were treated by the factory owners and members of the middle and upper classes. The female biology and the corresponding needs of working women, such as menstruation, childbirth, nursing, and childrearing, were entirely disregarded by those who employed these women.⁹² Consequently, the cult of domesticity glorified the nuclear family and women's position in it while leaving women in the lower classes, who were responsible for supporting themselves and their families, outside the definitions of respectable women and good mothers.

B. *Contemporary Rhetoric of True Womanhood*

The nineteenth century construction of motherhood continues to influence our current understanding of the proper role of women in society. For example, in one study, sociologists found that survey subjects viewed married mothers as having the most positive personality traits when compared to women in general, divorced mothers, step-mothers, and never-married mothers.⁹³ Married mothers were viewed as more forgiving, caring, warm, generous, and protective than were women generally.⁹⁴ And when compared with other mothers, married mothers were seen as better parents who always put their children's needs first. Never-married mothers were characterized as "unpleasant people who possess many negative and few positive personal traits."⁹⁵ In addition, never-married mothers were stereotyped as unhappy, deviant, and with poor childrearing abilities.⁹⁶ These women were more likely than married, divorced, or step-mothers to be characterized as irresponsible, stupid, drug abusers, or unsuccessful parents.⁹⁷ Additionally, conservative social commentators have gone so far as to blame crime, drugs, poverty, illiteracy, welfare, and homelessness on

were forced to work outside their homes, the cult of domesticity left them vulnerable to the consequences of being outside the acceptance of society, including legitimized sexual violence. *Id.* at 170.

92. Sokoloff, *supra* note 73, at 261.

93. Ganong & Coleman, *supra* note 66, at 501-08.

94. *Id.* at 507.

95. *Id.* at 508.

96. *Id.* This attitude can be seen daily in the rhetoric surrounding women who receive public assistance and their children. For a fuller discussion, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 106-18 (1995).

97. Ganong & Coleman, *supra* note 66, at 510.

single mothers.⁹⁸ Hence, the stereotypes defining both married motherhood and never-married motherhood reinforce the notion that women's proper role is that of married mother, or motherhood within patriarchal norms.⁹⁹

In addition to establishing a rigid hierarchy of status among mothers, proponents of the traditional nuclear family continue to promote the nineteenth-century ideology favoring women's primary role in the home. Advocates assert that there exist biological or important social grounds for the traditional division of labor between men and women, wherein women are responsible for all household chores, including childcare, while men are responsible for earning a family wage and providing physical protection for the family.¹⁰⁰ This traditional view of women's proper role posits that the mother-child bond—and only the mother can make this bond—is important for the proper emotional development of children.¹⁰¹ Indeed, some popular books have even suggested that mothers should stay home with their children in order to ensure the children's healthy emotional development.¹⁰² And although more married men currently help with household chores and childcare than at any other time in our history, male assistance is viewed as just that—assisting women with their household responsibilities.¹⁰³

98. Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14 (contending that illegitimacy is a new trend among Whites that threatens the United States).

99. See Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339, 346 (1996) ("The single mother defies ideas of traditional sexual morality . . . because she is a mother outside of marriage."); see generally Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995).

100. Alison M. Jaggar & Paula S. Rothenberg, *Applying the Frameworks: Family, in FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 292, 293-94 (Alison M. Jaggar & Paula S. Rothenberg eds., 2nd ed. 1984).

101. Lionel Tiger & Robin Fox, *Mother-Child Bonding, in FEMINIST FRAMEWORKS* 226 (Alison M. Jaggar & Paula S. Rothenberg eds., 2nd ed. 1984).

102. See, e.g., PENELOPE LEACH, *CHILDREN FIRST* (1994). But see Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2131 (1996) (amending 42 U.S.C. § 601 et seq.) (mandating that women receiving public assistance under this federal program return to work within two years of the child's birth). The continued influence of nineteenth-century ideology on our contemporary thinking about motherhood is evident in the persistence of "mother-guilt" and "mother-blaming" in both popular and scientific literature. For example, one study analyzing mother-blaming in major medical journals found that during 1970, 1976, and 1982, seventy-two different types of psychopathology in children had been attributed to their mothers. Paula J. Caplan & Ian Hall-McCorquodale, *Mother-Blaming in Major Clinical Journals*, 55 AMER. J. ORTHOPSYCHIAT. 345, 347-49 (1985) (noting the pathologies attributed to poor mothering, including absence of genitality, delusions, transsexualism, and ulcerative colitis).

103. Jerry Adler, *Building a Better Dad*, NEWSWEEK, Jun. 17, 1996, at 58, 61 (citing studies that indicate that American fathers spend an average of forty-five minutes per day

Contemporary relational feminist theorists, such as Carol Gilligan, have continued the discourse of women as nurturing by describing women as speaking and behaving, psychologically, with "a different voice."¹⁰⁴ According to this theory, women really are different from men. Women are marked as nurturers because they define themselves through their relationships with others.¹⁰⁵ Conversely, men are marked as conceptual or theoretical thinkers, who define themselves individually rather than through their relation to others.¹⁰⁶ Although Gilligan's purpose was to "reverse the previous practice of ignoring women altogether, or treating any differences between men and women as reflecting women's inadequacy,"¹⁰⁷ the relational feminists' understanding of women fits into traditional stereotypes of women and their proper role as mothers and caretakers. As Professor Joan Williams notes, these relational feminists "reclaim the compliments of Victorian gender ideology while rejecting its insults."¹⁰⁸ Hence, like the proponents of the cult of domesticity, relational feminists assert that women are more nurturing than men, "less tied to the questionable virtues of capitalism, and ultimately more moral than men."¹⁰⁹ Unlike the cult of domes-

caring for their children by themselves while American mothers spend more than ten hours per day caring for their children); Abby Margolis Newman, *Chore Wars*, *WORKING MOTHER*, Sept. 2000, at 84, 86 (citing the National Study of the Changing Workforce, Families and Work Institute, which indicates that married working mothers spend approximately one hour a day more on parenting and household chores than married working fathers).

104. See CAROL GILLIGAN, *IN A DIFFERENCE VOICE* 24-63 (1982). Although Gilligan seems to suggest that the differences in the moral development of women and men are biological, she states:

No claims are made about the origins of the differences described or their distribution in a wider population, across cultures, or through time. Clearly, these differences arise in a social context where factors of social status and power combine with reproductive biology to shape the experience of males and females and relations between the sexes.

Id. at 2.

105. *Id.* at 159-60 (stating that women describe themselves in reference to relationships, such as wife and mother); see also CHODOROW, *supra* note 30, at 178 (stating that women in our society are defined in relation to others, whereas men are defined in occupational terms).

106. GILLIGAN, *supra* note 104, at 160-63 (claiming that men describe themselves in terms of personal achievement); see also Nancy Chodorow, *Gender Personality and the Sexual Sociology of Adult Life*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 358 (Alison Jaggar & Paula Rothenberg eds., 2nd ed. 1984) (stating that sexually differentiated personality types that result from exclusive female parenting are well adapted for the perpetuation of capitalism and patriarchy).

107. Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802 n.12 (1989).

108. *Id.* at 807; see also Nel Noddings, *Ethics from the Standpoint of Women*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 160 (Deborah L. Rhode ed., 1990) (defending the construction of female ethics based on women's traditional role as nurturers).

109. Williams, *supra* note 107, at 807.

ticity proponents, however, modern relational feminists do not perceive women as more passive, less competent, and more timid than men.¹¹⁰

Nevertheless, relational feminists, like their predecessors, often support maternalism as a political strategy.¹¹¹ As Professor Lisa Brush notes:

The argument is that mother-work involves meeting children's needs for protection, nurturance, and moral training. To protect, nurture, and train children, mothers must have access to the conditions that will allow them to flourish as persons: bodily integrity, moral autonomy, material security, relational integrity, and political efficacy.¹¹²

In fact the institution of motherhood continues to be an acceptable platform from which women may be politically active.¹¹³

C. *Black Mothers Are "De Mules Uh De World": Motherhood and Work; Racism and Ideology*

*De nigger woman is de mule uh de world so fur as Ah can see.*¹¹⁴

110. *Id.*

111. Lisa D. Brush, *Love, Toil, and Trouble: Motherhood and Feminist Politics*, 21 SIGNS 429, 430 (1996) ("Maternalists claim entitlements to citizenship rights and benefits on the basis of mother-work as a source of women's political personhood.").

112. *Id.*; cf. Sara Ruddick, *Maternal Thinking*, in MOTHERING: ESSAYS IN FEMINIST THEORY 213, 226 (Joyce Trebilcock ed., 1983) ("[W]e must work to bring . . . maternal thought in the public realm, to make the preservation and growth of all children a work of public conscience and legislation.").

113. See, e.g., Linda Schott, *The Women's Peace Party and The Moral Basis of Women's Pacifism*, 8 FRONTIERS 22-24 (1985) (discussing how the World War I-era Women's Peace Party, founded in 1915, used maternal rhetoric to protest and perhaps stall the United States' entrance into World War I); Jean Bethke Elshtain, *The Mothers of the Disappeared: Passion and Protest in Maternal Action*, in REPRESENTATIONS OF MOTHERHOOD 75 (Donna Bassin et al. eds., 1994) (discussing the activism of mothers, many of whose children had been "disappeared," murdered, or tortured by the Argentine military or government); Julia Wells, *Maternal Politics in Organizing Black South African Women: The Historical Lessons*, in SISTERHOOD, FEMINISMS AND POWER: FROM AFRICA TO THE DIASPORA 251 (Obioma Nnaemeka ed., 1998) (observing that in South Africa, Black mothers organized anti-pass campaigns that were understood as grounded in women's role as mothers and protectors of their children).

114. ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* (Perennial Classics 1998) (1937). In this work depicting the harsh life of African-Americans in the South, the grandmother explains to her young granddaughter the social position of African-American women in the United States:

Honey, de white man is de ruler of everything as fur as Ah been able tuh find out. Maybe it's some place way off in de ocean where de black man is in power, but we don't know nothin' but what we see. So de white man throw down de load and tell de nigger man tuh pick it up. He pick it up because he have to, but he don't tote it. He hand it to his womenfolks. De nigger woman is de mule uh de

1. African-American Women and the Cult of True Womanhood

Although the cult of true womanhood normalized the experiences and aspirations of White middle-class women and men, Black middle-class women and men also aspired to live by the dogma of the cult of domesticity.¹¹⁵ For example, a Black newspaper editorial defined the primary role of Black women as caretakers of Black men:

Women are not formed for the great cares themselves, but to soften ours. Their tenderness is the proper reward for the dangers we undergo for their preservation. They are confined within the narrow limits of domestic assiduity, and when they stray beyond them, they move out of their proper sphere and consequently without grace.¹¹⁶

Professor Peggy Cooper Davis has noted that Black abolitionists who embraced the cult of domesticity for African-American women did so in part to "relieve black women of the drudgery of manual labor outside their homes and 'elevate' them."¹¹⁷ And indeed, after emancipation, some Black women retired from field labor and devoted their energies to their domestic chores. Undoubtedly, these women were severely criticized by Whites for "aspiring to a model of womanhood that was considered inappropriate for them."¹¹⁸ Nevertheless, early African-American activist Maria Stewart encouraged Black women to use their special abilities as women/mothers to influence the public sphere:

O ye mothers, what a responsibility rests on you! You have souls committed to your charge It is you that must create in the minds of your little girls and boys a thirst for knowledge, the love of virtue . . . and the cultivation of a pure heart.¹¹⁹

In the late nineteenth century, Black middle-class clubwomen created mothers' organizations to assist working-class African-American women. The philosophy of the cult of domesticity was the philosophy of the club movement. These clubwomen counseled Black women to assume the re-

world so fur as Ah can see. Ah been prayin' fur it tuh be different wid you.
Lawd, Lawd, Lawd!

Id. at 14.

115. DOROTHY STERLING, *WE ARE YOUR SISTERS: BLACK WOMEN IN THE NINETEENTH CENTURY* 220 (1984).

116. *Id.* (citation omitted).

117. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 24 (1997).

118. Bonnie Thorton Dill, *Our Mother's Grief: Racial Ethnic Women and the Maintenance of Families*, 13 J. FAM. HIST. 415, 422 (1988).

119. MARIA W. STEWART, *AMERICA'S FIRST BLACK WOMAN POLITICAL WRITER: ESSAYS AND SPEECHES* 35 (Marilyn Richardson ed., 1987).

sponsibility for the moral, religious, and social development of their children. Black women were "to train their children for God, teach them values rather than good dress, and make a happy, clean, comfortable but not luxurious home."¹²⁰

Paradoxically, these Black activists who supported the dictates of domesticity also recognized that the cult of domesticity was rooted in the racist subordination of African-American people, including the conditions of Black women under slavery and the stereotypes those conditions helped to create. Therefore, these women consciously included themselves in the cult of domesticity as a subversive form of protest to these oppressive stereotypes. As Professor Eileen Boris explains:

Because black women stood outside the boundaries of "true womanhood," as defined by the dominant culture, by being black and descended from slaves . . . , black activists' references to "highest womanhood," to "true motherhood," appeared to subvert a social script written for them by the larger culture that sought to deny them the possibility of nurturing, motherhood, and family maintenance. That is, words that seemed to reflect the hegemonic culture, that seemed to suggest a consciousness steeped in a limited domesticity, in fact challenged that dominant culture.¹²¹

Motherhood under the cult of domesticity also required chastity and sexual modesty, two traits that White culture had not afforded to African-American women.¹²² Nevertheless, the institution of motherhood has within it a specific definition of African-American motherhood. This definition is enforced through particular social constraints and constructs, such as the devaluation of Black women's sexuality and the othermothering of White people.

One facet of racist domination supported by the cult of domesticity vis-à-vis Black women was the exoticization and devaluation of African-American female sexuality. Black women were thought of as lacking sexual morality.¹²³ As a result of these stereotypes regarding Black female

120. Boris, *supra* note 62, at 37-38.

121. *Id.* at 30.

122. In fact, the dominant culture little afforded Black slave women the "alleged benefits of the ideology of the family." Davis, *supra* note 59, at 116. "In order to function as slave, the black woman had to be annulled as woman, that is, as woman in her historical stance of wardship under the entire male hierarchy." *Id.* This attitude extended even in the realm of Black motherhood. *Id.* at 117.

123. See, e.g., BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN & FEMINISM* 54 (1981) (suggesting that the stereotype of Black womanhood is based on a belief that "all black women were immoral and sexually loose").

sexuality, the rape of a Black woman was not considered criminal.¹²⁴ Moreover, the rape of Black women under slavery is a history that has since been intentionally retold by the larger community as a story of Black female sexual promiscuity.¹²⁵ The common view of Black female sexuality is illustrated in the court's opinion in *Dallas v. State*¹²⁶ in 1918:

What has been said by some of our courts about an unchaste female in our country being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race, but we would be blind ourselves to actual conditions if we adopted this rule where another race that is largely unmoral constitutes an appreciable part of the population.¹²⁷

And, as Angela Davis has noted, the myth of Black male sexual violence towards White women, the myth of the Black rapist, has always been complemented by

its inseparable companion: the image of the Black woman as chronically promiscuous. For once the notion is accepted that Black men harbor irresistible and animal-like sexual urges, the

124. See *id.*; Jennifer Wriggins, *Rape, Racism and the Law*, 6 HARV. WOMEN'S L.J. 103, 118 (1983); see also Davis, *supra* note 59, at 123-25; Roberts, *supra* note 30, at 8 (contending that slave women were compelled to replenish their master's supply of slaves with their children). As Barbara Omolade notes:

To [the White slave owner, the Black female slave] was a fragmented commodity whose feelings and choices were rarely considered. . . . Her vagina, used for his sexual pleasure, was the gateway to the womb, which was his place of capital investment—the capital investment being the sex act and the resulting child the accumulated surplus, worth money on the slave market.

Barbara Omolade, *Hearts of Darkness*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 350, 354 (Ann Snitow et al. eds., 1983). Additionally, the rape of a Black female slave by a Black male was not criminal either. In 1859, in *George v. State*, 37 Miss. 316 (1859), a Mississippi appellate court overturned the conviction of a Black man who had raped a ten year-old girl slave, concluding that "there is no act which embraces either the attempted or actual commission of a rape by a slave on a female slave." *Id.* at 320; see also A. Leon Higginbotham, Jr., *The Hill-Thomas Hearings. What Took Place and What Happened: White Male Domination, Black Male Domination, and the Denigration of Black Women*, in RACE, GENDER, AND POWER IN AMERICA 26, 31 (Anita Faye Hill & Emma Coleman Jordan eds., 1995) (commenting on *George v. State*).

125. Even after emancipation, Black women were not protected against rape, because they were considered, by nature, promiscuous. For example, in 1873 the Virginia Supreme Court reversed the conviction of a Black man for the rape of a Black woman, noting that while the perpetrator's behavior was "extremely reprehensible, and deserving of punishment, [it] does not involve him in the crime which this statute was designed to punish." *Christian v. Commonwealth*, 64 Va. (23 Gratt.) 954, 959 (1873); see also A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM* 102-04 (1996) (explaining that Black women were never considered "ladies" because of their race).

126. 79 So. 690 (Fla. 1918).

127. *Id.* at 691.

entire race is invested with bestiality. If Black men have their eyes on white women as sexual objects, then Black women must certainly welcome the sexual attentions of white men.¹²⁸

This stereotype regarding Black women's sexual availability and sexual deviance prevented African-American women from being mothers in terms that the proponents of domesticity understood; they could never be moral authorities to their children.

Although Black women could never be righteous mothers to their own children, they could be used to mother others, as long as those mothering relationships were constrained or supervised by Whites. Under this conception of Black womanhood, Black women could be called on to care for the children of "real" women as servants, wet nurses, and the like.¹²⁹ Ann Ferguson notes that this phenomenon created the "second part of the stereotype of black women as mothers . . . as servants caring for (white) children" under the strict moral supervision of White women.¹³⁰ The current discourse of the welfare reform debates also reflects a belief in the failure of Black women to meet the dictates of the cult of domesticity. This discourse describes African-American women as mothering poorly; they are matriarchs who are responsible for the demasculinization of Black men and for the social and emotional destruction of Black children.¹³¹ As a result, African-American women still cannot meet society's requirements for the "good mother."

In addition, under the confines of the cult of domesticity, Black women could never attain the ideal image of motherhood, no matter how much they conformed to its middle-class conventions, because, under this ideology, motherhood is defined as White. The maternal standards created to confine women are not merely sex-based norms that Black women just happen to fail. As Professor Barbara Omolade argues, it becomes apparent that one must be White to be a "woman" in this grand institution of motherhood: "Under racism and bondage, Black women lose recognition and status as 'women.' The only 'women' are those whose men have ultimate control and domination over people of color. Thus, it becomes understood

128. ANGELA Y. DAVIS, *WOMEN, RACE, & CLASS* 182 (1981).

129. See JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 37 (1985).

130. Ferguson, *supra* note 75, at 171.

131. See, e.g., ABRAM KARDINER & LIONEL OVESEY, *THE MARK OF OPPRESSION* 59-60 (1951); OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 29-34 (1965) (linking Black family problems with the matriarchal structure).

and axiomatic—to be white and female is to be ‘woman’¹³² Additionally, Professor Ann Ferguson notes:

Motherhood for [Black women] was not, like that for “full” (white) humans, a chosen career, but a natural, involuntary process as it is for all beasts of burden. The image is created of black people mating like dogs. Under this stereotype, black women could not be expected to be moral authorities like white mothers.¹³³

Hence, African-American women, under this regime, could never be viewed as appropriate mothers. They were regarded as lacking both sexual purity and whiteness, essential components of proper women and mothers.

2. Motherhood, Race, and Work

The broad-based employment discrimination, and subsequent abject poverty, faced by African-American people is a second facet of the racist domination that is supported by the cult of domesticity and faced by Black women. Married African-American women of the late eighteenth and early nineteenth centuries did not benefit from the advent of the family wage because Black male workers were not afforded a family wage. The family wage was given only to male workers in unionized occupations, into which African-American workers were denied entry.¹³⁴ Cognizant of this dichotomy between the “proper” place for women, which was outside of the paid labor market, and the reality of employment discrimination faced by Black men, Black middle-class leaders of the nineteenth and early twentieth century did not view African-American working mothers as inherently deviant. Instead, these Black activists supported both the precepts of the cult of domesticity and the Black labor agendas, particularly those that sought family wages for Black men.¹³⁵ Therefore, Black women were left with the double goal of satisfying White society’s view of womanhood and meeting the material needs of Black communities.

Nevertheless, as a result of the widespread employment discrimination faced by the African-American community, Black women have always participated in the production of wealth, even during and directly following pregnancy. During the period of legalized slavery, Black women slaves were used as breeders¹³⁶ and were often required to work in the fields until

132. Omolade, *supra* note 60, at 175; see also Roberts, *supra* note 30, at 15-16.

133. Ferguson, *supra* note 75, at 170-71.

134. PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 63 (1984).

135. See Boris, *supra* note 62, at 40.

136. See DAVIS, *supra* note 128, at 7; JONES, *supra* note 58, at 12.

they went into labor.¹³⁷ As historian Jacqueline Jones notes, many slave owners "forced women to work in the fields during and after their 'confinement'—a period of time that might last as long as four or six weeks, or might be considerably shortened by masters who had women deliver their children between the cotton rows."¹³⁸ Because the culture defined real women as weak and timid, the difficult physical labor that slave women were required to perform also demonstrated to a "cult"-driven society that Black women were not "real" women.¹³⁹

Until recently, African-American women worked in the paid labor market at much higher rates than White women.¹⁴⁰ For example, by 1880, fifty percent of Black women were in the paid labor force, compared with fifteen percent of White women.¹⁴¹ In addition to performing domestic labor in their own homes, the vast majority of Black women labored for very little compensation in order to ensure their families' economic survival.¹⁴²

Black women have always worked disproportionately as domestic laborers and in other occupations requiring affective labor.¹⁴³ For example, in 1890, 52% of African-American women in the paid labor force worked as domestic servants,¹⁴⁴ and by 1930, 27.2% of African-American women in the paid labor force worked as domestic servants or laundresses, compared to only 2.5% of White women.¹⁴⁵ White women were more likely to be found in clerical, manufacturing, and professional positions,¹⁴⁶ such as retail sales, nursing, social work, and teaching. Although fewer women currently are employed in household labor, Black women continue to be found disproportionately in household labor and service occupations, including traditional household/affective labor, such as cleaning-service workers, food-service workers, personal-service workers, and childcare

137. JONES, *supra* note 58, at 19.

138. *Id.*

139. Angela Davis argues: "In order to function as slave, the black woman had to be annulled as woman, that is, a woman in her historical stance of wardship under the entire male hierarchy." Davis, *supra* note 59, at 116.

140. JONES, *supra* note 58, at 8.

141. Roberts, *supra* note 30, at 19.

142. See Omolade, *supra* note 60, at 182-83.

143. Affective labor is work that meets human needs for nurturing. This includes the work of sex, housecleaning, food preparation, childbearing, childcare, and eldercare. For further analysis, see ANN FERGUSON, BLOOD AT THE ROOT: MOTHERHOOD, SEXUALITY AND MALE DOMINANCE 77-99 (1989).

144. AMOTT & MATTHAEI, *supra* note 5, at 160.

145. Evelyn Nakano Glenn, *Racial Ethnic Women's Labor: The Intersection of Race, Gender, and Class Oppression*, in HIDDEN ASPECTS OF WOMEN'S WORK 46, 56 (Christine Bose et al. eds., 1987).

146. *Id.*

workers.¹⁴⁷ In 1970, 17.8% of Black women in the paid labor force worked as domestic servants while 25.5% worked in these types of service industries.¹⁴⁸ By contrast, in 1990, 1.1% of all Americans in the paid labor force worked in private households as domestic workers and 22.3% worked in service industries;¹⁴⁹ less than one percent of White people working did so as private household workers and only 11.8% worked in service occupations.¹⁵⁰ Hence, the nature of the work that Black women were expected to perform did not change after slavery. African-American women have continued to perform affective labor under the constant supervision of White people, including the rearing of White children as mammas, nannies, and daycare providers.¹⁵¹

Ironically, at the same time that African-American women have been called into service for the mothering of White children, these women have been labeled deviant in the raising of their own children.¹⁵² It is well documented that this domestic labor in the service of White families undermined Black women in their positions as mothers.¹⁵³ As Professor Dorothy Roberts notes, "Black domestics . . . were unable to attend to their children during the day. They returned home late in the evening (if not on weekends) and had to entrust their children to the care of a neighbor, relative or older sibling, or leave them to wander in the neighborhood."¹⁵⁴

Black women continued to work as washerwomen, domestics, and seamstresses throughout the reign of the cult of domesticity¹⁵⁵ and never gained any socially recognized power as mothers as a result of the cult's dogma.¹⁵⁶ Even those Black women of the middle class, who were not part

147. AMOTT & MATTHAEI, *supra* note 5, at 401.

148. Glenn, *supra* note 145, at 63. I utilize the definition of service provided by Amott and Matthaei in drawing this inference.

149. 1990 CENSUS, *supra* note 54, at 82 tbl. 82.

150. *Id.* at 81 tbl. 81.

151. See NAT'L COMM. ON PAY EQUITY, PAY EQUITY: AN ISSUE OF RACE, ETHNICITY AND SEX 21-22 (1987) (presenting statistical evidence that Black women are concentrated in service occupations, an example of which is the childcare provider); see also JONES, *supra* note 58, at 164-68. In addition, in these traditional domestic service jobs, isolated in the homes of White people, African-American women are uniquely vulnerable to sexual violence by White men. See *id.* at 150.

152. See JONES, *supra* note 58, at 184-85.

153. *Id.*

154. Roberts, *supra* note 30, at 19; see also JONES, *supra* note 58, at 129 (detailing variations of servants' daily routines with their own children); "I live a Treadmill Life," in BLACK WOMEN IN WHITE AMERICA 227, 227, 228 (Gerda Lerner ed., 1973) ("I am allowed to go home to my children . . . only once in two weeks, every other Sunday afternoon—even then I'm not permitted to stay all night.").

155. See ABRAMOVITZ, *supra* note 76, at 121 (discussing work situations of poor Black women).

156. See *supra* Section III.C.1 and accompanying notes.

of the paid labor force, nevertheless were subjected to prevailing notions concerning their sexuality, morality, and maternal fitness.

To the extent that all working mothers continue to be chastised and deemed deviant as mothers because they work and because that work garners them no respect, African-American mothers continue to suffer social censure. Notably, Black mothers are also deemed deviant when they do not participate in the waged labor market. This is particularly the case with single Black mothers.¹⁵⁷ Their motherhood, which is outside of the institution of marriage, is taken as evidence of immorality and irresponsibility: these women are immoral for having sexual intercourse outside of marriage, and they are irresponsible for having children that they may not be able to financially support.¹⁵⁸ Poor, single Black mothers suffer direct attacks on their mothering patterns through coerced contraception,¹⁵⁹ the removal of their children from their homes,¹⁶⁰ and the conditioning of subsistence cash and in-kind welfare benefits on participation in "welfare to work" programs.¹⁶¹ Yet these attacks on non-wage-earning mothers stand in stark contrast to the long-held cultural belief in the importance of children, especially infants, receiving care from their primary parent.¹⁶²

Regardless of any stereotypes that confine White women as a result of their status of mother or potential mother, White society has always expected Black women to perform paid work, which in turn denigrates them in their roles as mothers.¹⁶³ Under the current ethos of welfare reform,

157. Roberts, *supra* note 30, at 25.

158. McClain, *supra* note 99, at 346.

159. In the recent past, Black mothers were also subjected to forced sterilization. DAVIS, *supra* note 128, at 208-21. Other women of color also have been subjected to this reproductive abuse. See Carlos Velez-I, *Se me Acabo la Cancion: An Ethnography of Non-consenting Sterilizations among Mexican Women in Los Angeles*, in MEXICAN WOMEN IN THE UNITED STATES 76-78 (Magdalena Mora & Adelaide R. Del Castillo eds., 1980) (detailing non-consensual sterilizations of Mexican-American women in Los Angeles between 1971 and 1974).

160. Gray & Nybell, *supra* note 60, at 513 (noting that approximately one half of children in foster care are Black).

161. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112-13 (1996) (amending 42 U.S.C. § 601 et seq.) (stating that the purpose of statute is to end dependence of needy parents by promoting work).

162. Cf. LEACH, *supra* note 102, at 83-84 (describing the importance for infants of care by parents or by others with parent-like commitments and stating that outside caregivers have little incentive to provide for infants' emotional needs).

163. Sojourner Truth recognized the impossible paradox of Black womanhood in America when she said to a group of White feminists:

Look at my arm! . . . I have plowed, and planted, and gathered into barns and no man could head me—and ar'n't I a woman? I could work as much and eat as much as a man (when I could get it), and bear de lash as well—and ar'n't I a

poor Black mothers of very young children are expected to work in the paid labor market, while middle-class women, "real women," are encouraged to stay at home with their children.¹⁶⁴ Poor women of color are denigrated as bad mothers, while middle-class mothers are praised for juggling well their varied responsibilities.

Attacks on Black mothers result, in part, from society's belief that Black motherhood is at best flawed and that poor Black mothers are a danger to their children.¹⁶⁵ Accordingly, Black motherhood is viewed as abnormal, and Black children are not benefited by it.¹⁶⁶ Indeed, African-American mothers have been found guilty of disciplining their children too harshly,¹⁶⁷ emasculating their sons,¹⁶⁸ defeminizing their daughters,¹⁶⁹ and

woman? I have borne thirteen chilern and seen 'em mos' all sold off into slavery, and when I cried out with a mother's grief, none but Jesus heard--and ar'n't I a woman?

OLIVE GILBERT, NARRATIVE OF SOJOURNER TRUTH: A BONDSWOMAN OF OLDEN TIME, WITH A HISTORY OF HER LABORS AND CORRESPONDENCE DRAWN FROM HER "BOOK OF LIFE" 134 (Henry Louis Gates, Jr. ed., Oxford University Press 1991) (1878) (quoting a speech given in 1851 at a women's rights convention in Akron, Ohio).

These practices of forced labor by African-American mothers continued well into the contemporary period. For example, under the New Deal, the income support program for poor, unmarried women with children, Aid to Dependent Children, allowed states to employ eligibility practices that excluded poor Black single mothers. JONES, *supra* note 58, at 263; see ABRAMOVITZ, *supra* note 76, at 318.

164. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No 104-193, 110 Stat. 2105 (1996) (codified as amended in various sections of 7, 8, 21, 25 and 42 U.S.C.).

165. Marian Wright Edelman, founder and president of the Children's Defense Fund, has asserted that welfare reform is being used as a proxy for race discrimination: "While it is no longer acceptable in most polite circles to race-bait explicitly, bashing welfare has become the next best resort for politicians." Robin Toner, *New Politics of Welfare Focuses on Its Flaws*, N.Y. TIMES, Jul. 5, 1992 at A1, A16; see also OFFICE OF POLICY PLANNING & RESEARCH, *supra* note 131, at 29-34 (warning that most Black youth are in danger of becoming trapped by the matriarchal pathology); Charles Murray, *And Now for the Bad News*, 37 SOCIETY 13 (Nov. 1999) (blaming unmarried Black mothers for the character of poor Black neighborhoods and negative socialization of Black children).

166. In fact, Black children are not deemed worthy of mothering. See Roberts, *supra* note 62, at 873-74 (noting that welfare reform devalues Black women's work in their homes, because society views African-American children as inherently useless); SOLINGER, *supra* note 63, at 29 (arguing that Black unmarried mothers are said to offer bad value (Black babies) at a high price (taxpayer-supported welfare grants)).

167. See Gray & Nybell, *supra* note 60, at 518-19; ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND ADOPTION ALTERNATIVE 63, 235 (1999) (reporting that Black children are abused and neglected at a disproportionate rate and suggesting that Black parents are victims of racism whereby the state is more likely to remove children and terminate parental rights after abuse has been identified).

168. See, e.g., OFFICE OF POLICY PLANNING & RESEARCH, *supra* note 131, at 29-34.

169. *Id.*

retarding their children's educational attainments.¹⁷⁰ All in all, "contemporary poverty rhetoric blames Black single mothers for perpetuating poverty by transmitting a deviant lifestyle to their children."¹⁷¹

The African-American community's seeming acceptance of single motherhood and single mothers is also perceived as deviant.¹⁷² It is true that the treatment of single pregnant women has differed in the Black and White communities. Historically, White single mothers have been shunned by their families.¹⁷³ Before legalized abortion, single White pregnant women were either married off or sent to maternity homes until delivery and until the baby was adopted by an outside family.¹⁷⁴ The White unmarried mother, by relinquishing her child for adoption, was seen as repentant, and her family's response to her pregnancy was seen as normal. As historian Rickie Solinger notes, "White illegitimacy was generally not perceived as a 'cultural' or racial defect, or as a public expense, so the stigma suffered by the white unwed mother was individual and familial."¹⁷⁵

The response of White families to the pregnancies of their single daughters is antithetical to the values of African-American families. In the Black community, single motherhood traditionally has been accepted as an unfortunate part of life. Single pregnant women are not married off, sent away to have their babies, or forced to place their babies for adoption. Black families often believe that it is better for their children not to make marriages based solely on pregnancy,¹⁷⁶ and they find adoption unacceptable.¹⁷⁷ Single mothers are integrated into the community with the support

170. This is especially true when African-Americans are compared to model minorities such as Asian-Americans. Cf. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (claiming that Blacks are, on average, less intelligent than Whites and that the low intelligence of the group explains its social problems, including low educational achievement).

171. Roberts, *supra* note 62, at 874; see also Martha A. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 285-93 (1991) (contending that poverty discourses label single motherhood as deviant and responsible for the perpetuation of poverty).

172. OFFICE OF POLICY PLANNING & RESEARCH, *supra* note 131, at 5-12.

173. SOLINGER, *supra* note 63, at 5-6 (detailing the circumstances that faced White single mothers in the 1950s and 1960s and contrasting those conditions with those faced by single Black mothers of the time).

174. *Id.*

175. *Id.* at 25.

176. *Id.* at 78.

177. *Id.* at 6 ("As one Chicago mother of a single black pregnant teenager said . . . , 'It would be immoral to place the baby [for adoption]. That would be throwing away your own flesh and blood.'"); see also Joyce E. Everett, *Introduction: Children in Crisis, in CHILD WELFARE: AN AFROCENTRIC PERSPECTIVE* 1, 3-4 (Joyce E. Everett et al. eds., 1991) (noting that Black children as compared with White children remain in foster care for longer periods of time, experience multiple placements, and are less likely to be adopted); Zanita E. Fenton, *In a World Not Their Own: The Adoption of Children*, 10 HARV. BLACKLETTER

of their families and others in the community. The support of Black single mothers by Black families has been used as evidence that the Black community and Black mothers are pathological and sexually deviant.¹⁷⁸

IV. Race and Gestational Surrogacy: Why Can't a Black Woman Mother a White Child?

Even though African-American women are viewed as deviant mothers by the dominant culture, they nevertheless are called upon to perform affective labor¹⁷⁹ for White families. Black women traditionally have performed the affective labor of caring for White families' homes and children in disproportionate numbers.¹⁸⁰ As Professor Barbara Katz Rothman maintains:

People in our society have been substituting for aspects of mothering for a long time, always along the same patterns. Upper-class women have bought the services of lower-class women to provide one or another mothering service for their children. Or, it might more accurately be said in some circumstances, upper-class men have bought the services of lower-class women to supplement the services of their wives. Some societies have let men have mistresses while their wives mothered; some have let men hire servants to do the mothering so that their wives could be reserved for their sexual and social uses.¹⁸¹

While African-American women are devalued in their roles of providing affective labor to their own children, they have been, and continue to be, valued for the affective labor they perform for White people—so long as such service is performed under the moral supervision of White adults who can act as rational, moralizing, and controlling influences over the “natural” excesses of Black female sexuality and irresponsibility.¹⁸²

Gestational surrogacy is another instance where Black women are valued for their affective labor in the service of White people. This is especially evident when the gestational surrogate's relationship to the child she

J. 39, 41 (1993) (asserting that the adoption system in America was not originally designed to meet the needs of Black couples or to benefit Black children).

178. See, e.g., SOLINGER, *supra* note 63, at 195-96 (using the example of Annie Lee Davis, who worked to gain access to social services for Black unmarried mothers equal to that of their White counterparts by first trying to show that Black unwed mothers were psychological and moral equivalents of Whites).

179. FERGUSON, *supra* note 143, at 83 (discussing affective labor as labor that meets human needs for sexuality, nurturance, and children).

180. See *supra* pp. 112-13.

181. Barbara Katz Rothman, *Women as Fathers: Motherhood and Child Care Under a Modified Patriarchy*, 3 GENDER & SOC'Y 89, 95 (1989).

182. See *supra* notes 123-25 regarding Black women's perceived sexual aberrance.

bears goes unrecognized or devalued by the law. *Johnson v. Calvert*¹⁸³ demonstrates that maternity determinations, whether by genetic relationships or contract law, rely on criteria that preferentially devalue Black motherhood and value the affective labor of Black women only when performed for the benefit of White families.

A. Motherhood and Fatherhood: Legal and Cultural Definitions

Before the invention of newer reproductive technologies, such as in vitro fertilization, embryo transfer, and surrogate/contract pregnancy, "natural" maternity was governed by the Latin maxim *mater est quam demonstrat* or "by gestation, the mother is demonstrated."¹⁸⁴ Motherhood necessarily was based on the woman's obvious biological ties to the baby to whom she had given birth, but motherhood was also based on social ties of nurture and care existing between women and children. In fact, custody preference for mothers, such as the "tender-years" presumption of the late nineteenth and early twentieth centuries, was based on stereotypical, but socially required, notions of women's "natural" functions of nurturing children.¹⁸⁵ Even though maternity has been defined by the biological terms of pregnancy, women's social relationships to their children also have been recognized by reference to the social ties of nurture.

Conversely, fatherhood traditionally has been defined not by nurturing relationships between children and men but rather by men's actual or presumed genetic contribution to children and their social relationships with the children's mothers.¹⁸⁶ At common law, a married man had complete

183. 851 P.2d 776 (Cal. 1993).

184. *Id.* at 781.

185. See, e.g., Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 342-45 (1982).

186. At common law, legal fatherhood could only exist inside of legal marriage. Men who "fathered" children outside of marriage were not legal fathers, and as a result those children born outside of marriage had no legal father. For a fuller analysis, see Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 67-69 (1995).

Since the 1970s, the United States Supreme Court has significantly changed the legal relationship between fathers and children born outside of marriage. In a series of cases, the Court recognized legal paternity only where the biological father had maintained a social relationship with the mother that was akin to a traditional nuclear family. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 648-49 (1972) (awarding custody to the biological unwed father after the mother's death because the father and mother had lived together for eighteen years and the biological father had acted as a parent); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (denying the right of the unwed father to block the adoption of his biological child by the child's step-father when the unwed father had not participated in the rearing of the child). Compare *Quilloin v. Walcott*, 434 U.S. 246, 254 (1978) (holding that the rights of the unwed father were not violated by the court's refusal to allow him to block adoption by the step-father of an eleven year-old child, where the unwed father had not previously par-

control over children born of his wife during marriage, because the children were presumably made from his "seed,"¹⁸⁷ a presumption furthered by the tight controls on women's sexuality.¹⁸⁸ Throughout much of the eighteenth century, a father's control over children was so complete as to permit the conveyance of parental rights to a third party without the mother's consent.¹⁸⁹ Although feminist activism during the nineteenth century brought about statutes that granted mothers equal rights to their children and replaced the common law preference for paternal control,¹⁹⁰ fatherhood nevertheless continues to be defined largely in biological terms, and where possible, in such a way as to protect the patriarchal family.¹⁹¹ Even with the availability of DNA testing, the legal presumptions regarding biological paternity have changed little. The law continues to protect fatherhood in such a way as to protect the traditional, patriarchal family.¹⁹²

participated in the child's life); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (noting that the mere existence of a biological link to a child is insufficient to give the unwed father protection under due process if he has not demonstrated a parental relationship); and *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (denying legal paternity where father's relationship with mother did not resemble marriage). Janet Dolgin and others have noted that the recognition of parental rights of unwed fathers has depended more on the fathers' social relationship with the mothers than their genetic ties with their children. Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. REV. 637, 649 (1993); Roberts, *supra* note 22, at 253; FINEMAN, *supra* note 96, at 84-87.

187. Under the common law, the legal presumption of paternity could be rebutted only by evidence that the husband was physically incapable of procreation due to impotence or lack of physical access to his wife. 1 WILLIAM BLACKSTONE, COMMENTARIES *457; *Miscovich v. Miscovich*, 688 A.2d 726, 728-29 (Pa. Super. Ct. 1997) (reviewing the common law); see also D. KELLY WEISBERG & SUSAN FRELICH APPELTON, MODERN FAMILY LAW 512 (1998).

188. Cf. Shanley, *supra* note 186, at 68-69 ("[F]or without marriage, who would know for certain who the father of a child might be?").

189. *Id.* at 68; see Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUD. 235, 238-39 (1983).

190. Shanley, *supra* note 186, at 69.

191. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that the state has a valid interest in preserving "unitary family" and that neither Michael H. nor his genetic daughter had a constitutionally protected liberty interest in maintaining a relationship when the mother's husband asserted a paternity right).

192. As Janet Dolgin argues:

In cases in which evidence of a man's biological paternity does not harmonize with the law's preference as to legal paternity, evidence of biological paternity has been suppressed, rather than openly acknowledged and then discounted.

Janet L. Dolgin, *Choice, Tradition and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 529 (2000) (citing *Miscovich v. Miscovich*, 688 A.2d 726, 729-30 (Pa. Super. Ct. 1997) (refusing to consider DNA evidence that would refute legal paternity of child born during the marriage)).

B. *Johnson v. Calvert: The Trial Court and the Court of Appeals*

In *Johnson v. Calvert*, Anna Johnson, an African-American woman, made an extraordinary biological claim. She claimed that she was the biological mother of a child to whom she had given birth but whose genetic make-up was that of a White child. Relying on the Uniform Parentage Act (UPA),¹⁹³ which provides in part that "natural" maternity "may be established by proof of her having given birth to the child," Johnson claimed she was the child's legal mother because she was the birth mother.¹⁹⁴ In evaluating her claim and the claim of the child's genetic parents, the trial court and the California Court of Appeals both denied Johnson's biological claims and held that the Calverts were both the natural and legal parents of the child. Anna Johnson was denied any and all rights to the child she had carried for nine months and to whom she had given birth. She was deemed a legal stranger to the child.

In his opinion, the trial court judge, Judge Parslow, stated that "a three parent family is contrary to public policy, [and] the weight of the evidence, and logic [is that such a family] is not in the child's best interests."¹⁹⁵ He also found that there was substantial evidence to indicate that Johnson, the birth mother, had never bonded with the child.¹⁹⁶ He described Johnson as "a host in a sense" to the child.¹⁹⁷ Parslow characterized Johnson's relationship as a business transaction¹⁹⁸ and as a foster care relationship.¹⁹⁹ He also described the relationship as a "wet-nursing" relationship.²⁰⁰ These descriptions of Johnson's relationship to the child to whom she had given birth are instructive. They support a legal and social order that allows and encourages gestational surrogates to sell their affective labor. These descriptions reject a regime that recognizes any appreciable legal recognition of a relationship growing out of that labor.

The California Court of Appeals affirmed the trial court's holding that Crispina Calvert was the child's natural and legal mother but relied on a different analysis. The appellate court's analysis attached to Crispina Calvert the stereotypical attributes of motherhood while describing Johnson's

193. CAL. CIV. CODE §§ 7000-7021 (West 1975) (repealed 1992).

194. *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 377 (Ct. App. 1991).

195. *Johnson v. Calvert*, No. X-63-31-90, slip op. at 2, 4 (Cal. App. Dep't Super. Ct. filed Nov. 21, 1990).

196. *Id.*

197. *Calif. Judge Speaks on Issue of Surrogacy*, NAT'L L.J., Nov. 5, 1990, at 36.

198. *Id.*; see also Dolgin, *supra* note 186, at 686.

199. No. X-63-31-90, slip op. at 3; Allen, *supra* note 24, at 24 (quoting the trial transcript).

200. Allen, *supra* note 24, at 24.

relationship with the child in commercial terms.²⁰¹ Relying on a strained reading of the UPA, the Court of Appeals found that the statute required that maternity attach to the genetic mother of the child. The UPA, however, was enacted into California law decades before gestational surrogacy was possible. Thus, at the time of the UPA's passage in California, legislators rightly assumed that the woman who gave birth to a child was the child's only natural mother, because the genetic and gestational functions could not at that time be separated. Nevertheless, the court reasoned that although birth or blood tests could establish natural motherhood, the statute preferred blood evidence. By reading, in gender-neutral terms, a provision of the UPA intended to determine paternity when denied by a husband,²⁰² the appellate court held that the preferred method of determining both motherhood and fatherhood, according to statute, was by the use of blood evidence.²⁰³ The court stated, "We must 'resolve' the question of Anna's claim to maternity as we would resolve the question of a man's claim to (or liability for) paternity when blood tests positively exclude him as a candidate."²⁰⁴

Although the Court of Appeals described Johnson's contribution to the child as "profound," the court nevertheless held that the contribution did not entitle Johnson to a constitutionally protected relationship with the child, in part because she was outside the "protected family unit."²⁰⁵ The appellate court in *Johnson* valued the genetic contribution of the Calverts over the gestational, nurturing contribution of Johnson and, as others have noted, in so doing "dismantl[ed] female claims based on nurturance" in favor of "a patriarchal model of genetic entitlement."²⁰⁶ Indeed, the court stated, "As evidence at trial showed, the whole process of human development is 'set in motion by the genes.' There is not a single organic system of the human body not influenced by an individual's underlying genetic makeup."²⁰⁷ The court did not value all of the contributions equally but rather selected to bifurcate them absolutely. The court venerated the genetic contribution of the egg and sperm while ignoring the contribution of gestation, a uniquely female contribution. As Barbara Katz Rothman notes, "When we accept the patriarchal valuing of the seed, there is no

201. *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 372-74 (Ct. App. 1991).

202. *Id.* at 375.

203. *Id.* at 376.

204. *Id.*

205. *Id.* at 378-80.

206. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1778 (1993); see also Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 176 (1994).

207. 286 Cal. Rptr. at 380.

doubt—the real mother, like the real father, is the genetic parent.”²⁰⁸ As a result of elevating the contribution of the White parents to the exclusion of any contribution made by Anna Johnson, the court in *Johnson* completely devalued the contribution of the African-American woman in this case and devalued the gestational surrogacy experience, which is perhaps uniquely African-American.²⁰⁹

By framing the conflict solely in terms of genetics, both courts made invisible the depth of Johnson's claim. Johnson's claim was not solely based on her biological contribution to the child. Johnson's claim was also based on the nurturing relationship that she had already established with the child through the nine months of gestation. As ethicist Ruth Macklin notes, scientific evidence exists that emotional attachments develop between a woman and the fetus she carries, regardless of whether the woman and fetus are genetically related: “Mothers develop good feelings toward their unborn children because of fetal movements, which have ‘a major effect on mother's thoughts or feelings about the baby. The mother often begins to feel the baby is hers.’”²¹⁰ Macklin also notes that evidence suggests that a newborn has the ability to recognize its birth mother's voice.²¹¹ Judge Parslow found these emotional ties unimportant and unpersuasive:

There is some disagreement on . . . uterine bonding from child to mother amongst the authorities. . . . I found most persuasive that there really isn't clear evidence of emotional bonding between child and mother in the uterine environment. There is certainly attachment . . . and there may be and usually is and often is a bonding between a person carrying the child and the child. . . .²¹²

The Court of Appeals seemed to consider Johnson's emotional contribution to the child more seriously but nevertheless concluded that her emotional contribution did not entitle her to a legal relationship to the child.²¹³

208. Rothman, *supra* note 181, at 96.

209. See *supra* note 24 and accompanying text.

210. RUTH MACKLIN, *SURROGATES & OTHER MOTHERS* 224 (1994).

211. *Id.*

212. *Calif. Judge Speaks on Issue of Surrogacy*, NAT'L L.J., Nov. 5, 1990, at 36.

213. *Anna J. v. Mark C.*, 286 Cal. Rptr. at 378, 379-80. In arguing why a birth mother's wishes regarding custody of a newborn should be weighed more heavily than the wishes of a biological father, Professor Mary Shanley urges:

At the time of birth the relationship of biological father and mother to the child is neither biologically nor socially symmetrical. The biological mother has carried the child for nine months, an activity for which there is no precise male analog; indeed no one else can perform functions analogous to those of gestation. Her “expectant” state has affected both the biological mother's own physiological experience and the ways in which others view and interact with her. . . . To what extent should asymmetry of biological function during gestation affect the right to make custodial decisions concerning a newborn?

In some ways, the Court of Appeals' reaction makes perfect sense. How can we reliably trust affection when we know that affection without more is highly unreliable? This is thought to be especially true of women's affection.²¹⁴ Anyone who has been involved in a romantic relationship knows that affection is a fickle thing, subject to change. Affection, then, is perceived as shifting sand, an unsafe place to lay responsibility for the care of children. Genes are different. Genetics feels more like ownership than does affection, and in some ways, genetics functions as a proxy for ownership. If we own our genes, then maybe we also own the children who are the products of our genetic reproduction. And we are expected to take responsibility for the things that we own. Thus, in contrast to affection, genetics is a more stable place to situate legal parenthood.

Moreover, the science of genetics functions much like the science of rationality in traditional liberal thought. In classic liberal thought, rationality is seen as a natural gift from which rights should flow.²¹⁵ Traditionally, race and gender have been used as proxies for rationality. That is, White men have it, and other folks don't. In discussing rationality as the basis for rights in antebellum America and the exclusion of Blacks from rights, Professor Cheryl Harris maintains:

The inherent contradiction between the bondage of Blacks and republican rhetoric that championed the freedom of all men was resolved by positing that Blacks were different. The laws did not mandate that Blacks be accorded equality under the law because

Shanley, *supra* note 186, at 82-83; see also BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND THEOLOGY IN A PATRIARCHAL SOCIETY 35-36 (1989) (claiming that, under current procreative thinking, at birth, babies belong to their mothers because of the unique nurturant relationship that had existed until that point, thus making pregnancy a social as well as a physical relationship); Nancy S. Erickson, *The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority*, 2 LAW & INEQ. 447, 461-62 (1984) (basing the rights of the birth mother on the fact that she is not only the primary caretaking parent but also the only caretaking parent); Kim M. Blankenship et al., *Reproductive Technologies and the U.S. Courts*, 7 GENDER & SOC'y 8, 29 (Mar. 1993) (arguing for greater rights for birth mothers and for recognition of their contributions, because gestation involves a social relationship as well as a biological one); PHYLLIS CHESLER, SCARED BOND: THE LEGACY OF BABY M 23 (1988) (acknowledging the bond between mothers and their children developed in utero).

214. See, e.g., CHRISTINE DE PIZAN, THE BOOK OF THE CITY OF LADIES 164-66 (Earl Jeffrey Richards trans., Persea Books, Inc. 1982) (refuting the fragility and inconstancy of women).

215. I have asserted elsewhere that social contract theorist Jean-Jacques Rousseau argued that women are naturally subjugated because they lack both autonomy and rationality. April L. Cherry, *Social Contract Theory, Welfare Reform, Race and the Male Sex-Right*, 75 OR. L. REV. 1037, 1065 (1996) (citing JEAN-JACQUES ROUSSEAU, EMILE; OR, ON EDUCATION 358 (Allan Bloom trans., Basic Books 1979) (1778)).

nature—not man, not power, not violence—had determined their degraded status.²¹⁶

Here, it is nature, verified by science—not man, not power, and certainly not violence—that determines a woman's parental rights to the child born as a result of gestational surrogacy. Nature, not the violence of law, disconnects the gestational surrogate from the child she bears. Similarly, declarations of the importance of contract law in this area operate in an analogous fashion by injecting old-fashioned gendered claims of rationality into formulations of justice.

C. *Gestational Parentage: Contract Claims and the California Supreme Court*

The California Supreme Court superseded the appellate court's decision and held that the Calverts were the child's natural and legal parents. It looked to the intent of the parties as evidenced by the contract rather than looking to biology or genetics.²¹⁷ The court first noted that the factual basis of each woman's claim was "obvious."²¹⁸ Anna Johnson was the undisputed birth mother, and Crispina Calvert was the undisputed genetic mother.²¹⁹ The court also noted that the UPA offered no help in deciding the question of parentage between Ms. Johnson and Mrs. Calvert.²²⁰ Because there was no legislative preference between genetic and gestational evidence, the court stated that it could look only to the contract signed by the parties in order to determine the parties' intentions.²²¹ Looking to the contract, the court held that Mrs. Calvert, the woman who intended to be the child's social mother at the time the contract was signed and the insemination performed, was the true mother of the child. Justice Panelli reasoned,

Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without inquiring into the parties' intentions as manifested in the surrogacy agreement. . . .

We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she

216. Harris, *supra* note 14, at 1745.

217. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

218. *Id.* at 781.

219. *Id.*

220. *Id.*

221. *Id.*

who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.²²²

Furthermore, relying on arguments made by Professor Marjorie Shultz, the state supreme court reasoned that by locating parentage in the intending parents and not in the gestating woman, the court was acting in the best interests of the child.²²³ The interests of children, particularly at the outset of their lives, are “[un]likely to run contrary to those of adults who chose to bring them into being.” Thus, “[h]onoring the plans and expectations of adults who will be responsible for a child’s welfare is likely to correlate significantly with positive outcomes for parents and children alike.”²²⁴ In addition, the court reasoned that Johnson’s original intent not to act as the child’s social mother demonstrated her maternal unfitness or incompetence and was also determinative of the court’s rejection of her claim to legal maternal status.²²⁵ The court concluded that “it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interest of the child is not with her.”²²⁶ Accordingly, as has been noted, “the majority assumed a best-interest analysis as part of its reconstruction of parentage through reliance on the notion of intent.”²²⁷

In this instance, intent acts like rationality in classic liberal thought. Only those possessed of or capable of rationality are viewed as deserving of rights. In the gestational surrogacy context, the White couple is viewed as rational. The woman’s “natural” irrationality is resolved by her submission to her husband.²²⁸ The rationality is evidenced by the act of contracting. Hence, contracting is evidence not only of good intentions but also of rational thought. In contrast, the gestational surrogate’s desire to breach the contract is viewed as a confirmation of her lack of rationality. Her deficiency in this regard makes her an inappropriate repository of parental rights. Furthermore, her lack of rationality in this contractual trans-

222. *Id.* at 782.

223. *Id.* at 782-83; see also Marjorie Maguire Shultz, *Reproductive Technologies and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WISC. L. REV. 297, 397 (1990); Schiff, *supra* note 10, at 277-90 (arguing that initial intention of the parties should determine the issue of legal maternity).

224. *Johnson*, 851 P.2d at 783 (citations omitted).

225. See Janet L. Dolgin, *Suffer the Children: Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 537 (1996).

226. *Johnson*, 851 P.2d at 782 n.10.

227. Dolgin, *supra* note 225, at 537. But note that the intent analysis has not been convincing when asserted by lesbian mothers. For a full analysis, see Nicole Berner, *Intent-Based Parenthood Held Inapplicable in Case of Lesbian Mothers*, 9 BERKELEY WOMEN’S L.J. 213 (1994).

228. Under common law, a married woman’s identity was subsumed under that of her husband. See BLACKSTONE, *supra* note 187, at *442.

action, when added to the stereotypes surrounding the parental fitness of African-American women, makes clear the inappropriateness of legal motherhood for her in this context. The stakes are too high. The life and the moral well-being of a White child are at stake.

Moreover, the intent analysis of the court also serves to strengthen the gendered hierarchy between rationality and affection. While affection may seem well and good, maternal affection is sometimes viewed as dangerous to children.²²⁹ Hence, female affection can be trusted only when paired with male rationality, and, in this case, rationality is equated with contract compliance. This dynamic serves to reinforce the subordination of affection to rationality. In effect, then, affection only engenders rights when coupled with rationality.

V. Conclusion: Race and Gestational Parentage

Race has long played a part in the determination of parentage. As others have noted, even seemingly race-neutral legal rules have been used to ensure racial purity and White supremacy.²³⁰ Historically, both race-conscious and race-neutral laws also have been used to assure White control over Black children. For example, race-conscious slave laws mandated that the children born to Black slaves were not the property of their mothers (one definition of maternity) but rather the property of the White slave owners, thereby guaranteeing White control over Black children.²³¹

A more contemporaneous example of a race-neutral law working to assure White control over Black children is the federal adoption statute that forbids federally funded agencies from using race as a factor in foster and adoption placement and decision-making.²³² The intent or function of this statute is not to encourage or allow African-Americans to adopt White children. Instead, this statute is designed to allow White people to adopt Black

229. Caplan & Hall-McCorquodale, *supra* note 102, at 547-59 (stating that in psychological literature, mothers are blamed for the emotional problems of their children).

230. See, e.g., Roberts, *supra* note 22, at 211; Loving v. Virginia, 388 U.S. 1 (1967) (holding that marriage and anti-miscegenation laws were being used to promote and reinforce White supremacy); see also Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495 (1993) (asserting that the marital presumption and evidentiary rules regarding paternity of children of married women transfer procreative power to White men while denying procreative power to Black women).

231. Ikemoto, *supra* note 9, at 1024; Fellows, *supra* note 230, at 504; Roberts, *supra* note 22, at 225-27 (stating that under slavery, White wives "bore white children to continue the master's legacy" while Black women bore children "who were legally slaves and thus replenished the master's capital assets").

232. Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-554, 108 Stat. 4056 (1994), amended by 42 U.S.C § 671 (1996).

and other children of color.²³³ In fact, it is generally viewed as not in the best interests of White children to be raised by Black people. In cases involving the custody of White children by the Black husbands of their White mothers, trial courts have somewhat consistently held that race can be used as a factor, although not the sole factor, in the denial of custody to the child's mother.²³⁴

The holding of the California Supreme Court in *Johnson v. Calvert* offers another example of a race-neutral rule that ensures that White children will be controlled by White people. It also serves as yet another example of the ways that Black women are allowed to serve White people: only in ways supporting White power.

The *Johnson* decision typifies the position of African-American women vis-à-vis White children in the employment context. African-American women are expected to care for and love White children without any expectation of legal or social recognition of these relationships. In *Johnson*, the Black woman was allowed (and expected) to love and "mother" the White child as long as she claimed no real power over the child. In the gestational surrogacy context, the Black woman has the responsibility to care for the fetus as long as the Black woman is ultimately supervised by the White genetic parents. Social commentator Katha Pollit has also made this connection:

It's not just that blacks are disproportionately poor and desperate, more likely to be single mothers and more likely to lack the resources to sue. It's that their visible lack of genetic connection with the baby will argue powerfully against them in court. . . . [I]t is safe to say that few American judges are going to take seriously the claims of a black woman to a nonblack child. Black women have, after all, always raised white children without acquiring any rights to them.²³⁵

233. See Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 REV. LAW & SOC. CHANGE 33, 41, 103-04 (1993-94) (contending that advocates for transracial adoption are not in favor of a color-blind system but one where choosing across racial lines is reserved for Whites); Roberts, *supra* note 22, at 265 (stating that the "thought of Black family adopting a White child, however, appears to be beyond our cultural imagination").

234. See, e.g., *J.H.H. v. O'Hara*, 878 F.2d 240, 245 (8th Cir. 1989) (holding that race may be considered in determining best interest of child in foster placement decisions in order to provide for child's racial and cultural needs); cf. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (holding that the effects of racial prejudice alone cannot justify removing an infant from the custody of its natural mother where a child had been removed because her White mother married a Black man); *Holt v. Chenault*, 722 S.W.2d 897, 898 (Ky. 1987) (referring to *Palmore v. Sidoti*).

235. Pollit, *supra* note 24, at 842.

By asking who is the "real" or natural or legal mother in the gestational surrogacy cases, the courts mask the use of White power over the maternity of Black women, further devaluing the affectional ties Black women have not only with White children but with Black children as well. One example of the devaluation of Black women's affectional ties to Black children can be found in the welfare reform debate and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).²³⁶ The PRWORA is based in part on the notion that young single Black women are raising children alone.²³⁷ In fact, the 1990 census showed that 10,381,654 women (of all races) were the sole heads of families.²³⁸ What the rhetoric and the numbers fail to note is that many of these women are not raising their children alone. As Patricia Hill Collins has noted, African-American women continue to raise their children with the help of familial and community networks (othermothers).²³⁹ White power serves to erase these networks and retell Black single motherhood as a solitary venture that destroys Black youth.²⁴⁰ To the extent that these networks are acknowledged by the White power structure, they are deemed deviant.²⁴¹

Consequently, in the end, the only mothering patterns in which Black women participate are those endorsed and supported by the White establishment (or the State) and are the very ones in which Black women have no power or children and no validation as mothers.

236. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

237. *Cf. id.* § 103(a)(1), 110 Stat. 2136 (mandating that teenage mothers live in supervised settings in order to receive public assistance). This suggests that Congress believed that poor young mothers were raising their children alone, without the assistance of their families.

238. 1990 CENSUS, *supra* note 54, at 41 tbl. 41.

239. *See supra* pp. 96-97 and accompanying notes.

240. *See, e.g.,* OFFICE OF POLICY PLANNING & RESEARCH, *supra* note 131, at 29-34; MURRAY, *supra* note 131.

241. *See Gray & Nybell, supra* note 60, at 515-17 (detailing a project wherein child welfare workers were trained about the kinship networks of African-American families and noting that prior to the project many of the workers had been struggling to assert their own vision of the family system upon their clients).



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Mon Oct 21 10:50:35 2019

Citations:

Bluebook 20th ed.

April L. Cherry, Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood, 10 Tex. J. Women & L. 83 (2001).

ALWD 6th ed.

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APA 6th ed.

Cherry, A. L. (2001). Nurturing in the service of white culture: Racial subordination, gestational surrogacy, and the ideology of motherhood. Texas Journal of Women and the Law, 10(2), 83-128.

Chicago 7th ed.

April L. Cherry, "Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood," Texas Journal of Women and the Law 10, no. 2 (Spring 2001): 83-128

McGill Guide 9th ed.

April L Cherry, "Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood" (2001) 10:2 Tex J Women & L 83.

MLA 8th ed.

Cherry, April L. "Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood." Texas Journal of Women and the Law, vol. 10, no. 2, Spring 2001, p. 83-128. HeinOnline.

OSCOLA 4th ed.

April L Cherry, 'Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood' (2001) 10 Tex J Women & L 83

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