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Jewish Women, Black Women: 
Guarding Against the Oppression of Surrogacy

Beverly Horsburgh†

INTRODUCTION

When I was eleven, I was finally admitted to the Albany Academy For Girls. As a Jew in that all-white, all-female Christian world, I learned a great many lessons. I was taught ladies cross their ankles, not their knees. And so I never crossed my knees. Every morning I sang loudly from the Episcopal hymnal as we marched, two by two, into chapel. I conscientiously memorized important dates in English history as integral to the Episcopal litany as morning prayers.

Landing of Caesar, 55 B.C.
Romans Come, 44 A.D.
Romans Go, 410 A.D.
Coming of St. Augustine, 597 A.D.

I remember Miss Decker, that formidable and awe-inspiring teacher of eighth-grade adolescents. Before the official lessons began, Miss Decker without comment would erase the board where some unknown child had written into history:

William of Normandy, 1066.
Conquering of Wales, 1282.
Beverly Drapkin is a Jew.

The child’s amendment was the descant—the dark note—of the litany.

The most important event of the school year was the annual Christmas Pageant, an enthusiastic outpouring of ethnocentricity comprised of

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wassail bowls, St. George and the Dragon, mummers and minstrels. More than anything I longed to play Mary in the nativity play. To prove my worth to Miss Decker, I worked harder than anyone else in the class. Miss Decker took me aside before she handed out the parts and told me a Jew could not be Mary. I was to be the innkeeper, a very nice part with lots of lines to memorize. At the time, the obvious response I should have made never occurred to me. I agreed with her! How fitting to be the innkeeper! I had learned all that was taught at Girls Academy, especially the bitter taste of self-hatred.

In retrospect, what I also gained from my schooling was an insight on racism and self-identity. I realized that if I were Black, I would similarly have been disqualified from portraying Mary. When I read Alan Freeman many years later, I understood his insistence that rights cannot effectively redress the problems of a racist society. While rights eliminate some external constraints on choices and opportunities imposed by the state or others, they continue to ignore the power structure built into social relationships and the ugly pervasiveness of prejudice. Power is not just the visible actions of a well-publicized tyrant concretized on the six o'clock news. It is also the amorphous, invisible hand of structural, systemic restraints embedded in ordinary social life. Power is exerted through decision-makers in various social institutions and administrative bureaucracies acting out of bias and ignorance, on unconscious assumptions and unquestioned rules.

Furthermore, assimilation into the dominant culture cannot eradicate racial hatred or discrimination. The minority person who is in an economic position to assimilate and who learns the grammar of the dominant language also internalizes that culture's hierarchy and prejudice. The referent is outside the self, leading to alienation, lack of confidence, and self-abasement. I believe it is impossible to talk of constructing an authentic self without recognizing the degree to which identity is con-

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OPPRESSION OF SURROGACY

ceived and shaped by the power of Others. We must first resist and deconstruct false selves before we can determine who we really are.

I have also become sensitive to issues of race and identity because of the personal experiences of my family. My brother is married to a woman of color and they, along with their two children, encounter a series of daily indignities and microaggressions not actionable at law. I suffer with my two nieces, learning to function in a world that stereotypes them as Black Jewish females. Although the girls could be considered Catholic (the religion of their mother) and white (an attribute of their father), all methods of differentiation compare them with the normative standard of a white Christian male. I have learned through my family that the racism of the private sphere is as insidious as that found in public, in the network of social practices unrecognized by law that perpetuate class-, gender-, and racially-based hierarchies of power.

Furthermore, because many of my relatives were victims of the Holocaust and Stalinist totalitarianism, I empathize with Black feminists who, with great sensitivity, convey the emotional experience of the civil rights struggle. Problems of assimilation plague Jewish women, who are victims of anti-Semitism, as well as Black women, who are victims of white oppression. Both Jewish women and Black women struggle to obtain equality and respect in American society. For these women, as for all minorities, rights are symbolic: the majority, in conferring rights upon the minority, acknowledge the minority’s existence as a part of history and implicitly apologize for past injustice. Although securing rights is a limited remedy and not an end in itself, rights afford some measure of

4 My sister-in-law, Ranee, is from Sri Lanka and is not of African descent. Nevertheless, as a colonized Third World woman, she could be considered Black because of the color barriers she encounters in her life. Persons of African-American, Asian, Native American, and Hispanic descent have at times been called Black. The word has become to some extent a generic term for many feminists, attempting to articulate the felt experience of discrimination.

In addition, commentators use different forms of "black" depending on how they define what it means to be black. Angela Harris prefers "black" because some people of color who are of neither African nor African-American descent identify themselves as black. She emphasizes culture rather than nationality and does not capitalize the word "black" so as not to privilege race over gender. Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 586 n.20 (1990). Patricia Williams also favors the word “black” in order to convey color as a social factor that determines a person’s emotions, thoughts, and treatment by others. Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987). Kimberlé Crenshaw uses “Black” and “African-American” interchangeably, and capitalizes “B” to point out Blacks are a specific cultural group, grammatically entitled to a proper noun, just like the French or the English. Kimberlé Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1332 n.2 (1988). I prefer to capitalize “Black” as a gesture of respect and to signify dignity.

legal protection to minorities who are otherwise outside the bounds of civilization and humanity.

These rights, and at times personhood itself, are often bestowed by papers. For Jews, papers have often been a matter of life or death. I keep my father’s exit visa signed by the American Consulate at Danzig in my bedroom desk. It states: Itshak Drabkin, a citizen of Russia, occupation scholar, is granted permission to remain indefinitely in the United States for the purpose of joining his brother in Albany, New York. My father was able to acquire his papers, escape extermination, and so I exist.

However, formal equality, such as that bestowed by papers, is only the first step towards attaining full status in society. The fight for civil rights represents to oppressed persons not only a desire for protection, but also a self-affirming religious experience, an expression of group solidarity and strength. It is a quest for self-identity.

Self-identity involves defining oneself along both race and gender lines. Black feminists, for example, claim racial identity cannot be distilled from gender, that race plays a role equal to, if not more important than, gender in forging their identity. For white Jewish women such as

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6 See Williams, supra note 4, at 414-17. See also Crenshaw, supra note 4, at 1367-68, 1382 (noting that rights analysis strategically and effectively challenges state-supported white supremacy by exposing the contradictions between what was espoused in a democratic society and what was experienced by a minority).

Rights analysis is one aspect of the dominant discourse of liberal legalism, which assumes that justice is dispensed by an impartial state through lawmakers who stand apart from their own social context and objectively apply a body of predetermined neutral principles. These lawmakers not only treat people alike, but also believe individuals are free agents who cause their respective social circumstances. This view contradicts the notion that members of various socioeconomic groups are at times more acted upon by social forces than in control of their fates. For an explanation of liberal legalism and its tie to the modernist movement in philosophy, see Dennis Patterson, Postmodernism/Feminism/Law, 77 CORNELL L. REV. 254, 286-89 (1992). See generally ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975) for an in-depth critique of liberalism.

7 Angela Harris speaks of a self “tangled” in a “web” of race and gender. Only white women have “the luxury” of “no color.” Harris, supra note 4, at 604. At a 1988 meeting of “femcrits,” Pat Cain asked the women to describe themselves. The white women referred to themselves by gender and did not mention their color, but all of the Black women included their race. Id.; See also Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 161 n.59; Patricia Cain, Feminist Jurisprudence: Grounding the Theories, 4 BERKELEY WOMEN’S L.J. 191, 208 (1990). Crenshaw suggests this exercise demonstrates that one’s sense of identity stems from the sources of opposition experienced in one’s life. Crenshaw, supra, at 161 n.59. Barbara and Beverly Smith point out a significant difference in the politics of Black feminism. Unlike white women, Black women are never surprised by oppression and do not need to be jolted into realizing the nature of their condition. Barbara Smith & Beverly Smith, Across the Kitchen Table: A Sister-to-Sister Dialogue, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 131, 114 (Cherrie Moraga & Gloria Anzaldúa eds., 1983) [hereinafter THIS BRIDGE CALLED MY BACK]. Audre Lorde eloquently compared the two world views:

Some problems we share as women, some we do not. You fear your children will grow up to join the patriarchy and testify against you, we fear our children will be dragged from a car and shot down in the street, and you will turn your backs upon the reasons they are dying.
myself, who normally are unaware of our color, religion substitutes for race in this analysis: we are defined by others by our religion much like Black women are defined by their race. In my childhood, I was not concerned with being female because I was at a school where everyone was female. Instead, I became aware of my Jewishness, the one trait which set me apart from everyone else and stigmatized me as the Other.

Alas and oy vey, Jewish women and Black women deal with many complex identity issues. Like all other women, we have been overdetermined. Unlike other women, Black women have been stamped as amoral Jezebels, emasculating Sapphires, lazy welfare mothers, and Aunt Jemimas. Jewish women have been abjected into stereotypical overbearing mothers and overly privileged JAPs. Non-Jewish men and non-Black men tend to view Jewish women and Black women as sexually exotic objects. However, our own men view us as incestuous reminders of their own second-class status.


Some Black feminists have defined themselves by their history of oppression, understanding the ways in which a sexist and racist society has shaped their identity. They have then used this understanding to develop a political stance. Identity politics infuses what it means to be a woman with historical specificity, accounting for the multi-faceted experiences of discrimination:

This focussing upon our own oppression is embodied in the concept of identity politics . . . . We believe that sexual politics under patriarchy is as pervasive in Black women's lives as are the politics of class and race. We also often find it difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously . . . . We struggle together with Black men against racism, while we also struggle with Black men about sexism . . . .


Katharine Bartlett notes that women’s knowledge has been “overdetermined” by male culture, adding that, according to poststructuralism, it is impossible for anyone to escape from the social theories and cultural practices in which we are situated. Katharine Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 872, 872 n.176 (1990). Similarly, Sartre defines the Jew as “over-determined,” more confined by social constructs than by the majority, whose identity is a reflection of the prevailing culture. Overdetermining is a “doubling of the fundamental relationship with the Other.” JEAN-PAUL SARTRE, ANTI-SEMITE AND JEW 79 (George J. Becker trans., 1965). Black women and Jewish women are thus “overly overdetermined.” No wonder we find it necessary to uncover the layers of meanings under which we have been buried.

See, e.g., Regina Austin, Sapphire Bound!, 1989 WIS. L. REV. 539, 539-40, 569-71; BELL HOOKS, Ain’t I A WOMAN: BLACK WOMEN AND FEMINISM 83-86 (1981); Patricia Scott, Debunking Sapphire: Toward a Non-Racist and Non-Sexist Social Science, in ALL THE WOMEN ARE WHITE, supra note 7, at 85.

See, e.g., SARTRE, supra note 8, at 48-49, discussing the inclination in western literature to depict Jewish women as symbols of exotic sexuality; Austin, supra note 9, at 569-70.

See SUSAN WEIDMAN SCHNEIDER, JEWISH AND FEMALE: CHOICES AND CHANGES IN OUR LIVES TODAY 288-89, 297-98 (1984) (discussing the Jewish male’s lack of sexual attraction to a Jewish female). See also Riv-Ellen Prell, Jewish Gender Stereotypes in American Culture, in UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE 248, 262 (Faye Ginsburg & Anna Lowenhaupt Tsing eds., 1990) (theorizing that Jewish women represent to Jewish men the assumption of adult responsibility and the absence of erotic desire, whereas non-Jewish women signify freedom to pursue one’s destiny unfettered by a traditional lifestyle based on one’s parents’ expectations). See also LETTY COTTIN POGREBIN, DEBORAH, GOLDA, AND ME: BEING JEWISH AND FEMALE IN AMERICA 279-80 (1991) (commenting...
Although I do not equate the discrimination I personally suffer as a member of the Jewish minority with the severe deprivations inflicted on Black women, I believe it is possible to surmount differences and achieve understanding. I write this Article to work towards healing the rift between black and white. In this Article, I discuss the Jewish-Black interaction in the context of the surrogacy debate. As a Jewish

12 I do not mean that the differences between women are insignificant. Rather, I emphasize sameness to build connections between us. See Elizabeth Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought 3 (1988) (noting the tendency in feminist writings to minimize differences, effectively “burying” them by insisting they are not important).

Analogy helps each of us to understand the problems that other people encounter. However, we should not so slip into a feeling of security based on false similarities. See Trina Grillo & Stephanie Wildman, Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other -isms), 1991 Duke L.J. 397, 410-11 (explaining that, although analogies are helpful, they can also obscure as well as reinforce differences; the legal discourse should grant “recognition time” to focus on one minority group’s oppression at a time).

13 I begin with an apology for not realizing all of the various ways in which Black women have been excluded from the feminist discourse. Many scholars have chronicled the history of racism in the women’s movement from its inception to the present time. See, e.g., Angela Davis, Women, Race & Class 70-56, 110-26 (1983); Hooks, supra note 9, at 124-58.

Feminist theory tends to become what Adrienne Rich called “white solipsism.” Adrienne Rich, Disloyal to Civilization: Feminism, Racism, Gynephobia, in On Lies, Secrets, and Silence 275, 299 (1979). White feminists see the world through a white lens, without understanding the significance of race. Angela Harris argues that the writings of Robin West and Catharine MacKinnon privilege the cultural experiences of white women and ignore the centrality of race, class, and sexual orientation. See Harris, supra note 4, at 585.

Elizabeth Spelman criticizes the writings of Simone de Beauvoir and Nancy Chodorow for creating an ahistorical, noncontextual description of women’s identity, devoid of color or socioeconomic background. Spelman finds offensive the idea that a "goddess somewhere... made lots of little identical 'woman' units..." and "put some... in black bodies, some in white bodies, some in the bodies of kitchen maids in seventeenth-century France, some in the bodies of English, Israeli, and Indian prime ministers." Spelman, supra note 12, at 158. She argues that the essentialist perspective makes women inessential, for once you know one woman, there is no reason to know any others. Id.

Linda Alcoff resolves the dilemma of expressing a feminist theory in postmodernist terms by turning to what she calls positionality. She avoids overbroad conceptualizations and ensures that minority women’s perspectives are included, yet retains gender as a politic of identity:

[T]he concept of positionality includes two points: first, ... the concept of woman is a relational term identifiable only within a (constantly moving) context; ... [second,] the position that women find themselves in can be actively utilized (rather than transcended) as a location for the construction of meaning, a place from where meaning is constructed, rather than simply the place where a meaning can be “discovered” (the meaning of femaleness).

Linda Alcoff, Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory, 13 Signs 405, 434 (1988).

See also Bartlett, supra note 8, at 880 (characterizing her approach as positionality which recognizes the limited nature of truth, which is contingent on one’s social context). Similarly, Margaret Radin advocates pragmatism, which she sees as choosing the lesser evil in an imperfect world. To Radin, the lesser evil is the one that will further the empowerment of an oppressed group. The pragmatist constantly revises solutions in light of the particular situation confronted. Margaret Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1529, 1704 (1990). Mari Matsuda refers to multiple consciousness, a shifting self at times capable of contradictory perspectives, that enables lawyers not “to see all points of view, but to see the world from the standpoint of the oppressed.” Mari Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 Women’s Rts. L. Rep. 7, 7-9 (1989).
feminist, I am concerned with more than surrogacy's obvious racist and sexist origins. Surrogacy also brings out the worst aspects of identity politics. It could lead to an even greater preoccupation with the reproductive functions of minority women, contributing to the problem of patriarchy and instrumentalism within minority groups as well as in the world at large. Its overemphasis on ancestry and ethnic continuity can bring about a misuse of identity power, solidifying hegemonic social structures instead of encouraging genuine relationships between minority groups. Surrogacy perverts minority identity itself into a vulgar numbers count, constructing social barriers at a time when we should be building transracial/ethnic bridges.

In Part A of this Article, I discuss the case of Anna Johnson, a Black gestational surrogate who fought for custody of the child she carried. I criticize the court for holding that genetics alone determine motherhood and maternal rights, since this limited analysis systematically denies custody to gestational surrogates. Because Black women are used primarily for gestational rather than genetic surrogacy, a genetic definition deprives Black women of their right to equal protection.

In Part B, I critique feminist approaches to surrogacy, arguing that theorists tend to assume the surrogate is white and is the biological mother. By equating women's identities with their biologies, or by assuming mother and child are genetically related, some feminist perspectives have racist implications and inadvertently support genetic definitions of motherhood. These arguments could promote the use of surrogacy to further genetic parenting.

In Part C, I recognize surrogacy as a sexist practice and a dangerous form of racism. I argue that those who would uphold surrogacy contracts as voluntary fail to consider that many minority women are unable to engage in free and meaningful bargaining. I also suggest paid surrogacy should be prohibited because it threatens the lives of poor women of color whose health needs are neglected in a racist society.

In Part D, I express my concern that laws facilitating surrogacy and discouraging abortion are aimed at increasing the white birth rate, while we ignore socioeconomic conditions decreasing the Black population. As a Jewish feminist, I believe surrogacy enmeshes us in eugenics. In addition, I argue that surrogacy's overemphasis on the reproductive functions of women reinforces and exacerbates sexism within minority groups, as well as the tendency to confine minority women to a subordinate role. I also point out that surrogacy encourages the Jewish minority, which sees itself as an endangered species because of its low birth rate and the Holocaust, to secure its survival by exploiting poor Black women. Both Jew-

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14 In gestational surrogacy, the birth mother is genetically unrelated to the child, while in genetic surrogacy, the birth mother contributes the egg.
ish and Black women have reasons to be concerned with the oppressive potential of surrogacy.

In conclusion, I suggest we develop a more self-critical positionality theory as we search for women's multiple identities. I believe it is important to discuss the many forms of oppression and prejudice between and within minority groups. Hopefully, airing our own intolerances will yield solutions to women's issues applicable to all yet uniquely our own.

A. The Case of Anna and the Failure of Rights Analysis

In 1990, Anna Johnson contracted with Mark and Crispina Calvert to be their gestational surrogate. In 1990, Anna Johnson contracted with Mark and Crispina Calvert to be their gestational surrogate.15 The Calverts donated the egg and the sperm, agreeing to pay Anna, who is Black, $10,000 to carry the child in her womb for nine months. They also agreed to purchase a $200,000 life insurance policy on Anna's life. Anna, in return, agreed to relinquish parental rights to the child.

When Anna was seven months pregnant, the owner of the house she rented decided to sell it, forcing Anna and her five-year-old daughter to find a new place to live. She wrote to the Calverts and asked them to pay her the remaining $5,000 on the contract. Her pregnancy complications had compelled her to leave work and to live on disability benefits, which were insufficient to cover deposits for rent and utilities. Moreover, Anna was upset that the Calverts did not do enough to purchase the life insurance policy. At this time, she indicated that she might seek custody of the child. One month later, the Calverts sought a declaration that they were the legal parents of the unborn child. Anna then filed her own action to be declared the mother of the child.17

Anna couched her claim to motherhood in constitutional terms, arguing as birth mother that she had a fundamental right to her child and that awarding custody to the father denied her equal protection. An amicus on her behalf claimed that surrogacy contracts allow white males

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16 Anna's ancestry is in fact a mixture of many races and ethnic groups. She is part African-American, Native American and Irish. See Martin Kasindorf, And Baby Makes Four, L.A. TIMES, Jan. 20, 1991, (Magazine), at 11. Although Mark Calvert is white, Crispina Calvert is Filipino.
17 Id. at 377. Anna argued that the California Parentage Act considers giving birth to a child to be proof of motherhood. See CAL. CIV. CODE § 7003(1)(West 1983) (stating "The parent and child relationship may be established as follows: (1) Between a child and the natural mother ... by proof of her having given birth to the child ...."). She insisted as a matter of constitutional law that the Parentage Act be interpreted to provide her with parental rights. Id. at 378 n.22.
18 Id. at 376. She claimed that the Supreme Court has held genetics do not decide parental rights, citing to Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding a state may constitutionally presume a husband is the legal father of his wife's child and deny a biological father's claim of paternity).
to obtain genetically related children only by exploiting poor women.\textsuperscript{20} Anna was defeated by the overwhelming combination of racism, sexism, and class bias inherently structuring the practice of surrogacy.

Despite Anna's hardships, the California Appellate Court denied her all parental rights of custody and visitation, and declared Crispina Calvert to be the biological, "natural" and legal mother of the child.\textsuperscript{21} However, the conflation of terms—biological/natural/legal—is meaningless in this context. Once technology intervenes, no "natural" mother exists. The court confused biological and "natural" with each other and with the separate question of legal motherhood.

The court determined legal motherhood according to blood tests, a procedure derived from paternity claims.\textsuperscript{22} Ironically, this procedure was both irrelevant and unnecessary in Anna's case, since she did not claim to be the genetic mother. Moreover, the blood test rule, designed to enable men to deny fatherhood, is inappropriate in the gestational surrogate motherhood context: both women are necessary participants in the creation, and each has a viable claim to motherhood. However, according to the court's blood test analysis, gestational surrogates who want custody will always lose because they have no genetic tie to the baby. The implications of the court's analysis for Black women are clear. Since Black women are more likely to be gestational surrogates than genetic surrogates,\textsuperscript{23} they have little if any chance of winning a custody battle.

The court interpreted the scope of substantive due process as limited to those interests traditionally protected by society,\textsuperscript{24} and determined

\textsuperscript{20} \textit{Id.} at 380 n.28.
\textsuperscript{21} \textit{Id.} at 373 (stating the trial court found Mark and Crispina to be the "genetic, biological and natural" parents. The appellate court agreed with the trial court's ruling that Anna had no parental rights, and with its termination of the order granting visitation.). "[B]ecause of the blood tests excluding Anna from being the natural mother, there is no reason not to uphold the trial court's determination that Crispina is the natural mother. She is the only other candidate." \textit{Id.} at 376. "Mark and Crispina are the natural and legal parents of the child. The judgment of the trial court is therefore correct, and accordingly affirmed." \textit{Id.} at 382.

\textsuperscript{22} "Anna was excluded, as clearly shown by the report of the director of the parentage testing laboratory . . . . That report flatly excluded Anna as 'not the mother' of the baby boy . . . . 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." \textit{Id.} at 376.

\textsuperscript{23} The typical genetic surrogate is a non-Hispanic Protestant white who is twenty-six to twenty-eight years old. Most surrogates are married and have previously been pregnant. Alta Charo, \textit{Legislative Approaches to Surrogate Motherhood, in Surrogate Motherhood: Politics and Privacy} 88, 89 (Larry Gostin ed., 1990) [hereinafter \textit{Surrogate Motherhood}]. In Charo's study of surrogate mothers, less than 35% attended college, 66% earned below $30,000 a year, and 30% earned between $30-50,000 a year. \textit{Id.}


\textsuperscript{24} Anna J., 286 Cal. Rptr. at 379 (citing Michael H. v. Gerald D., 491 U.S. 110, 122 (1989)).
that a gestational surrogate's interest in the child she carries was hardly a traditional societal concern. Only the "natural" parents could claim a constitutionally protected liberty interest in their relationship with the child.

Moreover, in response to Anna's equal protection claim, the court found that defining motherhood along genetic lines was not gender discriminatory. It dismissed the argument that surrogacy exploits women as a class, asserting that, in gestational surrogacy, a woman as well as a man obtains a genetically related child. As a result, the court failed to acknowledge that women as well as men discriminate against Black women. In Anna's case, the court insisted that recognizing a Black surrogate's maternal rights would discriminate against the biological mother. It essentialized all women, assuming that equal protection requires all members of a class to be affected before a court can recognize an injury to some. Rights become contingent on genetics, leaving Black women outside the ambit of Fourteenth Amendment guarantees.

The court's constitutional analysis is problematic in several other respects as well. First, in assuming that genetically based distinctions do not discriminate because they are "natural" or "biological," the court ignores the link between race and genetics. In doing so, the court perpetuates the practice of subjugating Blacks based on supposedly "natural" differences. Obviously, any claim by a Black to be the parent of a

25 Id.
26 Id. at 379-80.
27 Id. at 380-81.
28 Id. at 380 n.28.
29 See Harris, supra note 4.
30 The economic system of slavery was bolstered by biodeterminism. See, e.g., Erlene Stetson, *Studying Slavery: Some Literary and Pedagogical Considerations on the Black Female Slave, in All the Women Are White*, supra note 7, at 61, 73. During Reconstruction, the struggles of Blacks to free themselves from negative myths and stereotypes were hindered by journalists who mocked their efforts at improvement and perpetuated the notion that Black women in particular were innately sexually immoral. These journalists sought to maintain a segregated society and to curtail intermarriage. *Hooks, supra* note 9, at 55-56.

Blacks fought desperately for education following emancipation, but they were continually haunted by the irrational racism that judged them incapable of acquiring intellectual skills. *Davis, supra* note 13, at 101. During the post-Civil War period, the two hundred institutions of higher learning created for Blacks relied exclusively on philanthropists and missionaries for funding; they received little state or federal support. *Allen Ballard, The Education of Black Folk: The Afro-American Struggle for Knowledge in White America* 13 (1973). The southern fear that a quality education would lead to an overthrow of white hegemony resulted in these schools offering little more than a strictly vocational curriculum. *Id.* at 13-17. By 1900, the 9,000 students enrolled in Black colleges were receiving the equivalent of a high school education. *Id.* at 22. Few were allowed to attend white schools. In 1954, only 4,080 out of 480,000 college freshmen were Black. *Id.* at 52.

The intellectual community also contributed to the myth of Black inferiority. Allan Nevins of Columbia University and Henry Steele Commager of Amherst College described the Reconstruction period in their text on American history as a time in which slaves "who could not read a line of print" created a government "probably the worst ever known in any English-speaking land." The authors called the period between 1850-1877 an avoidable "tragedy," lamenting that it would have been far better if slaves had been gradually emancipated. *Bal-
white child will involve issues of race.\textsuperscript{31} Since the couples who choose surrogacy tend to be relatively affluent\textsuperscript{32} whites,\textsuperscript{33} they rarely contract with non-whites to be genetic surrogates. Rather, they are more likely to hire non-whites as gestational surrogates only. Although Black women have, since slavery, raised and mothered the children of whites,\textsuperscript{34} what slavery could not accomplish has been legitimated by modern technol-

\textsuperscript{31} See Martha Field, Surrogate Motherhood: The Legal and Human Issues 25-26 (1990); Charo, supra note 23, at 88-89. There is a significant socioeconomic disparity between the parties in the typical surrogate arrangement. Nadine Taub, Surrogacy: Sorting Through the Alternatives, 4 BERKELEY WOMEN'S L.J. 285, 288 (1990); Charo, supra note 23, at 89. For example, the Calverts are a college-educated, middle-class couple, while Anna Johnson is a single mother and part-time vocational nurse who occasionally has been on welfare. See Kasindorf, supra note 16, at 11, 14, 16.

Field estimates the costs of hiring a surrogate to be $25,000 at a minimum ($10,000 paid to the surrogate, $10,000 to the agency that matched the surrogate with the couple, and the rest for medical bills). This figure does not include the additional costs of traveling to a jurisdiction that allows surrogacy agencies to function, establishing residency in a state to conform to its adoption requirements, taking time off from work, etc. Field, supra. For more on the costs of fertility procedures, see infra note 36.

\textsuperscript{32} In fact, the shortage of healthy white newborns is one of the reasons childless couples have turned to surrogacy instead of adoption. See Field, supra note 32, at 56. Nearly 4,000 children have been born through surrogacy. California has become the surrogate "world center," responsible for 40 surrogate births. Infertile couples from Venezuela, Japan, Britain, and Cyprus have come to California to avail themselves of a surrogate broker's services. There are thirteen brokerages in California including the largest, the Beverly Hills Center for Surrogate Parenting, headed by William Handel. See Kasindorf, supra note 16, at 13.

\textsuperscript{33} Black women slaves were both field workers and domestic servants. See Davis, supra note 13, at 5; Hooks, supra note 9, at 23-24. They were used for their reproductive functions and terrorized into breeding children to increase the labor population, the main source of wealth of the plantation system. Hooks, supra note 9, at 39-42. See also Giddings, supra note 30, at 45-46. Advertisements for the sale of Black women depicted them as "breeding slaves" or as "child-bearing women." Hooks, supra note 9, at 39.

Following emancipation, many found work in urban areas as domestics. Judy Scales-Trent, Black Women and the Constitution: Finding Our Place, Asserting Our Rights, 24 HARV. C.R.-C.L. L. REV. 9, 28 (1989); Davis, supra note 13, at 90. In 1905, 90% of all Black women working in New York City were maids. Scales-Trent, supra, at 28. By 1920, nearly one million of the two million employed Black women were in personal service. Giddings, supra, at 145.
ogy. Surrogacy presents itself as a racist practice by catering to the procreative concerns of whites while ignoring the minority exploitation involved.

Next, by focusing on heredity, the court insulates itself from responsibility to shape policy. The genetic/racist rhetoric clouds the real issue in Anna J.: defining motherhood. Motherhood is a social construct, influenced by moral concerns and social policies. Societal values are implicated in any decision that deems genetic procreation as so important that we disregard the means by which such procreation is accomplished. Also, we ignore the desperation of low-income women who turn to bearing children as their sole means of survival. By neglecting to address Anna's claim, the court adhered to a traditional definition of motherhood without recognizing the changing social landscape and its potential impact on that definition.

Finally, assuming biological distinctions are natural and nondiscriminatory is dangerous for all women. Surrogacy reinforces the ideology that a woman's body is her destiny by emphasizing female biological functions to the exclusion of other needs and goals outside the reproductive sphere. It contributes to the many social pressures on all women to become mothers, while emphasizing overly romantic and idealized notions of motherhood. The importance that society places on genetic motherhood inevitably influences women's procreative choices, career decisions, and sense of self. It can force some women to go to great lengths to bear a child. A woman could come to believe she is inferior, less than a real woman, if she is unable to conceive. Another woman


36 See Martha Fineman, Images of Mothers in Poverty Discourses, 1991 Duke L.J. 274, 276 (claiming that motherhood is a patriarchal construct and that cultural assumptions implicit to its meaning influence and shape the lives of even childless women); Corea, supra note 23, at 3, 169, 220 (arguing women are unable to voluntarily choose to become mothers inasmuch as autonomous decision-making is curtailed by a sexist society exalting motherhood as women's primary purpose); Adrienne Rich, Of Woman Born (1976) (viewing motherhood as determining women's identity under patriarchy). The exaggerated and media-hyped concern over infertility problems among white professional women is one of the many ways that motherhood is reinforced as the only self-defining experience for women.

37 Taub, supra note 32, at 292, argues that legislation prohibiting surrogacy can backfire on women by emphasizing that pregnancy is too important to be subjected to remuneration. This increases the pressures on childless women to undergo highly invasive fertility procedures. Although men and women both suffer infertility problems, women incur the medical risks of hormone stimulation and surgical laparoscopy. Men at most are required to donate a sperm sample. Lori Andrews & Lisa Douglas, Alternative Reproduction, 65 S. Cal. L. Rev. 623, 634 (1991).

38 See Taub, supra note 32, at 292 (contending that the focus on pregnancy causes women to be viewed and to view themselves "primarily as babymakers"). Of course, men are influenced by cultural pressures as well. One study suggests men view their infertility problems as connected to their sexual performance, a reflection of their masculinity, while women see it as related to their identity as mothers, an aspect of their femininity. Alice Domar & Machelle Seibel, Emotional Aspects of Infertility, in Infertility: A Comprehensive Text 25 (Machelle Seibel ed., 1990). Nonetheless, I think motherhood more than fatherhood tends to
might opt for surrogacy only to indulge her husband's interest in siring a child.\textsuperscript{39}

Furthermore, although surrogacy appears to be an attractive means to earn money,\textsuperscript{40} it often seduces women with limited opportunities to define themselves solely in terms of motherhood.\textsuperscript{41} Moreover, it distracts us from resolving the more important gender-related social problems which result in the lack of opportunities for poor women. These issues include the need for vocational training, higher-paying jobs, childcare

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39 See Margaret Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1931 (1987) (stating that infertile women could believe “it to be their duty to raise their partners’ genetic children”); Linda Hirshman, The Book of ’A’, 70 Tex. L. Rev. 971, 999 (1992) (noting that, in gestational surrogacy, two women are enlisted to reproduce a child for a man). The notion that all women “naturally” desire motherhood has been refuted by studies that show women harbor inconsistent attitudes about maternity and that the decision is influenced by adult experiences and a husband’s interest in having children. Cynthia Epstein, Deceptive Distinctions: Sex, Gender, and the Social Order 199 (1988).

40 Surrogates justify their decision to bear a child in many ways, exhibiting a mix of altruistic and self-interested motives. They claim they empathize with the pain of childless couples and that a previous experience of pregnancy was enjoyable, one worth repeating. Andrews & Douglas, supra note 37, at 674. Nevertheless, remuneration is important. See Darrell Franks, Psychiatric Evaluation of Women in a Surrogate Mother Program, 138 Am. J. Psychiatry 1378, 1379 (1981) (citing an early study of 10 surrogates, in which surrogates expressed a financial need “to stabilize their personal lives and provide for their own children’s needs”). Anna, for example, wanted a “nest egg” for her daughter’s college education and the opportunity to purchase a car so that she need not take the bus to work. Kasindorf, supra note 16, at 16. One proponent of surrogacy claims that applicants feel that surrogacy will help them master unresolved feelings about a previous abortion or adoption proceeding. See Philip Parker, Motivation of Surrogate Mothers: Initial Findings, 140 Am. J. Psychiatry 117, 118 (1983).

Surrogates have accused brokers of appealing to their need to feel that they act out of love, not for the sake of a monetary reward. See Field, supra note 32, at 21. Margaret Radin observed that although surrogates may subjectively feel they are altruists, in reality they participate in gender oppression. Radin, supra note 39, at 1930.

41 See, e.g., Maurice Suh, Surrogate Motherhood: An Argument for Denial of Specific Performance, 22 Colum. J. Law & Soc. Problems 357, 367-68, 368 n.61 (1989) (theorizing that women from lower socioeconomic groups are more likely to associate self-esteem with motherhood and that surrogates would be highly susceptible to maternal bonding).

Nonetheless, I question whether women from lower socioeconomic groups place a higher value than other women on motherhood due to their socioeconomic status alone. Admittedly, the high rate of pregnancy among Black unmarried teenage girls is frequently attributed to their inability to achieve success in life in other ways. See, e.g., Austin, supra note 9, at 558-60 (remarking that pregnancy has become a mark of status for Black teenagers as a counter cultural reaction to an environment they cannot control). However, other factors, such as the shortage of employed, eligible Black males, explain the many Black female-headed families. See id. at 560-67; see also Ruth Colker, An Equal Protection Analysis of United States Health Policy: Gender, Race, Age, and Class, 1991 Duke L.J. 324, 340-44 (arguing that unintended adolescent pregnancy among African-Americans is the result of the legislative failure to provide effective sex education, contraceptives, and abortion services). Moreover, the efforts and sacrifices of affluent, infertile women, see Corea, supra note 23, at 174-76, suggest that they too have learned to consider the mothering role significant.

See George Annas, Fairy Tales Surrogate Mothers Tell, in Surrogate Motherhood, supra note 23, at 43, 52 (arguing that we should irrefutably presume the gestational mother to be the legal mother, in order to prevent the “gross exploitation of poor women”); Alexander Capron & Margaret Radin, Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood, in Surrogate Motherhood, supra note 23, at 59, 62 (arguing surrogacy heightens social pressures on poor women to create children for others in order to support their own families).
facilities, and mandated family leave policies.\footnote{Today, Black women remain the lowest paid workers and suffer the most unemployment. \textit{Id.} at 29. A Black live-in maid in New York is usually paid $150 per week. Hispanic women are paid $200 because they are considered white. Patricia Williams, \textit{The Alchemy of Race and Rights} 20 (1991) (quoting Theresa Laurina, \textit{I'm Nobody's Girl}, \textit{Village Voice}, Oct. 14, 1986, at 18). While some Black women have moved into clerical jobs, 44% work as maids, in manufacturing, and in service (chambermaids, welfare service aides, cleaners, and nurse's aides). In contrast, white women tend to be more upwardly mobile, moving into professional occupations. Julianne Malveaux, \textit{Gender Difference and Beyond: An Economic Perspective on Diversity and Commonality Among Women, in Theoretical Perspectives on Sexual Difference} 226, 231 (Deborah Rhode ed., 1990). Between 1955 and 1984, white males had the highest weekly earnings, nonwhite males the second, and white women the third, while women of color earned the least amount per week. Juanita Lott, \textit{The New Demographics and Its Impact on Policy Development for Women of Color, in Women, Work & School: Occupational Segregation and the Role of Education} 9, 16 (Leslie Wolfe ed., 1991). Although women comprise over 40% of the labor force, only recently has national legislation required employers to grant parental leave or maternity benefits. The Family and Medical Leave Act of 1993 will entitle employees to family-related leave (12 work weeks during a 12-month period) to, \textit{inter alia}, give birth to, adopt, or care for a child who "has a serious health condition." Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 102(a)(1), 107 Stat. 6, 9 (1993) (to be codified at 29 U.S.C. § 2612). Unfortunately, the passage of legislation is not a panacea for women. First of all, the bill does not require that the leave be paid, \textit{id.} §§ 102 (c)(d), 107 Stat. at 10, and it excludes those employers with fewer than fifty employees. \textit{Id.} § 101(4), 107 Stat. at 8. Furthermore, despite legislation, social pressures on the job play a role. A woman could hesitate to use the entitlement, worrying that her time off from work will be used against her in many amorphous ways and that she will be seen as a less committed worker than her male counterpart. Women often unofficially compete to see who can be the most "macho" mother, resuming a full workload as soon as possible after having given birth to a child. See Martha Minow, \textit{Speaking of Silence}, 43 U. Miami L. Rev. 493, 500-01 (1988) (reviewing Kristin Bumiller, \textit{The Civil Rights Society: The Social Construction of Victims} (1988) and commenting that some women do not want to claim maternity benefits because of stigmatizing consequences). See also Linda Finley, \textit{Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate}, 36 Colum. L. Rev. 1118, 1125-27 (1986). Moreover, legislation could backfire, causing employers to hire fewer women. The problem will not be resolved by simply passing a few laws.} In the end, constitutional rights fail to protect Anna or to provide her with legal relief. Why are the rights of the genetic mother paramount to those of the mother who carries and delivers the child? Why isn't it deemed racially discriminatory to deny maternal rights to gestational surrogates, the only role Black surrogates are typically allowed to play? Constitutional rights afford no protection to the gestational mother because the doctrine does not address Black women's problems or the racism and gender bias implicit in the practice of surrogacy.

### B. Anna and Feminism

Many feminist theories also fall short of meeting Anna's needs. For example, some feminist commentators who oppose specific enforcement of the surrogacy contract argue that, because the surrogate emotionally

\footnote{Rights analysis has proved to be ineffective in understanding the special situation of Black women. Kimberlé Crenshaw has exposed the ways Black women who claim discrimination in the workplace are marginalized by the existing legal discourse. In race discrimination cases, the court's referent is male, while in gender discrimination suits, white women are the standard. Crenshaw, \textit{supra} note 7, at 140-50.}
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bonds with the child, she should be considered its mother. These maternal feelings, created by the nine-month biological connection, are largely unforeseeable at the time she agreed to relinquish the infant. The concept of prenatal bonding assumes that becoming a mother and bringing a child into being are one and the same process, controlled unilaterally by women's reproductive organs. The notion that a woman's identity can be located in her biology is central to the feminism of Robin West. West emphasizes the uniquely female experience of pregnancy, whereby a woman experiences an intimate connection with her child. This connection to the child during pregnancy affects the mother's emotions and her very identity. Hence, because the child is "naturally" and biologically connected to the mother after the nine-month gestation, the law should regulate surrogacy agreements in order to allow the surrogate a period of time after birth to decide if she really wants to give away her child.

Relational feminists, who argue that women reason differently than men and maintain a gender-specific value system centered in caring and responsibility, also suggest that the surrogate should be given the right to change her mind. One proponent insists that the relationship between

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44 Deborah Rhode favors regulating surrogacy agreements to permit the mother to reconsider her decision and to allow her to void the contract, return the fee, and keep her child. DEBORAH RHODE, JUSTICE AND GENDER 224-25 (1989). She argues that there should be recognition of the "significance of maternal bonds." Id. at 229. She also claims that "[u]ntil the experience of birth, a mother cannot make an informed judgment about the psychological costs of severing [maternal] bonds." Id. at 227. Similarly, Marie Ashe argues there is a fusion of identity between the gestational mother and the child. See Marie Ashe, Law-Language of Maternity: Discourse Holding Nature in Contempt, 22 NEW ENG. L. REV. 521, 551 (1988).

Other commentators who emphasize maternal bonding include Wendy Chavkin, et al., Alternative Modes of Reproduction: Other Views and Questions, in REPRODUCTIVE LAWS FOR THE 1990s 406-07 (Sherrill Cohen & Nadine Taub eds., 1989) (postulating that a surrogate mother enters into a social relationship with her fetus); FIELD, supra note 32, at 73-74 (quoting Phyllis Silverman, a professor and social worker, who stated the grieving process of the mother "will continue every day for the rest of the mother's life"); Audrey Wolfson Latourrette, The Surrogate Mother Contract: In the Best Interests of Society?, 25 U. RICH. L. REV. 53, 86 (1990) (arguing that surrogates grieve just like mothers who give up their children for adoption and that the contract should be voidable by the birth mother); Suh, supra note 41, at 367-73 (advocating that the birth mother be allowed to change her mind because her bond with her baby is stronger than the father's biology). Charlotte Rutherford does not speak of bonding, but in discussing the case of Anna J., she criticizes the court for failing to acknowledge the emotional relationship between birth mother and child. She argues that the physical connection between an in-utero child and its mother is more significant than the genetic connection between the father and child. Charlotte Rutherford, Reproductive Freedoms and African American Women, 4 YALE J.L. & FEMINISM 255, 271 (1992). The Royal College of Obstetricians and Gynecologists' Ethics Committee on in vitro Fertilization and Embryo Replacement recommended surrogacy be prohibited because of the psychological harm the surrogate mother will endure in losing her child. See Suh, supra note 41, at 372 n.86.

45 Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 3 (1988). Katharine Bartlett classifies Robin West and Catharine MacKinnon as theorists who concentrate on discovering woman's authentic and essential self, which is stifled by patriarchy (MacKinnon) and fearful of male violence (West). Bartlett, supra note 8, at 873-74.

46 See generally CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL (Carol Gilligan et al. eds., 1990); MARY BELENKY, ET AL., WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND (1986); Carrie Menkel-Meadow, Portia in a Dif-
mother and child cannot be relegated to the status of a contractual obligation. The regulations regarding surrogacy should promote responsibility and commitment to all the parties, including the surrogate. According to relational feminists, if both the surrogate and the father seek custody, the surrogate should not be legally presumed entitled to keep the child; such a presumption could discourage the father and his wife from both forming a relationship with the surrogate and feeling responsible for her welfare. However, the possibility of a custody dispute would motivate the intended parents to become better acquainted with the surrogate and to ensure that she fully comprehends and has come to terms with her situation. Even if not able to obtain custody, the surrogate as the biological mother should be entitled to visit and to maintain a relationship with the child.

Another approach, highly reminiscent of the Catharine MacKinnon school of thought, tends to present surrogacy as an outgrowth of a totally male power structure. Margaret Radin would prohibit paid surrogacy altogether because it could exacerbate women’s subordination to men. Radin warns that women’s personal attributes, including height, intelligence, and race, will become commercially commodified and ranked according to male genetic preferences.

Many feminists also advocate a halfway solution to surrogacy, favoring neither an outright prohibition nor the laissez-faire approach. These feminists are concerned with the disparity in bargaining power

\textit{Different Voice: Speculations on a Women’s Lawyering Process, 1 BERKELEY WOMEN’S L.J. 39 (1985).}

47 Nadine Taub believes there should be a time period after the child’s birth in which the surrogate may reevaluate her decision. She argues that considering a contractual “promise . . . more important than caring relations . . . seems misguided.” Taub, supra note 32, at 289.

48 Taub remarks that a “[l]oving and responsible involvement with others is much of what life is about.” Id.

49 Id. at 298.

50 Id. at 297.

51 Id. at 298.

52 See, e.g., CATHARINE MACKINNON, FEMINISM UNMODIFIED 25 (1987) (maintaining that male domination of existing social relationships is the essence of women’s commonality). See also CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 114 (1989) (contending that “the male standpoint enforces woman’s definition, encircles her body, circumlocutes her speech, and describes her life. The male perspective is systemic and hegemonic.”).

53 Radin, supra note 39, at 1932-33, 1935. She further argues that “paid surrogacy within the current gender structure may symbolize that women are fungible babymakers for men whose seed must be carried on.” Id. at 1935. See also Mary Ruth Mellown, Recent Developments, An Incomplete Picture: The Debate About Surrogate Motherhood, 8 HARV. WOMEN’S L.J. 231, 235 (1985) (commenting that surrogacy appraises women, giving some a “Saks Fifth Avenue” rating and others no more than a “K-Mart price tag”).

Radin also points out that prohibiting payment (beyond expenses) for surrogacy services may deprive poor women of one of the few options they now have to better themselves financially. We are caught in a double bind, with all legal solutions failing to alleviate women’s situation. Radin, supra note 39, at 1915-16, 1933. She suggests that we legalize surrogacy and allow the woman to be paid, but provide a reasonable period of time after the child is born for her to reconsider and to keep her child. Id. at 1934. See infra note 56, for other feminists who advocate a model similar to adoption.
between the parties and fear that totally private ordering would lead to
unfair exploitation. Yet they hesitate to completely restrict the liberty
of childless individuals to seek ways to procreate children of their own
lineage. Some advocate modeling surrogacy on existing adoption
regimes which do not permit the mother to agree to surrender her child
before birth.

The feminist arguments concerning surrogacy all share a common
assumption: the surrogate is the genetic mother and the same race as the
child. In other words, they were tailored to fit the surrogate who is both
white and the only biological mother. Although these theories have
provided valuable insights, they ignore crucial differences among women
and the various factors besides gender which oppress women.

For example, bonding evokes an image of mother and infant inextricably
bound together, torn apart by the other parties whose relationship
to the child is contractual rather than natural. This image dissolves if
gestational surrogates are involved. The bonding argument loses much
of its force when applied to Black gestational surrogates, who are not
literally the same flesh and blood as the child. Despite the bonds that

54 See, e.g., Chavkin, supra note 44, at 406; Rutherford, supra note 44, at 272-73; Taub, supra
note 32, at 296, 298.

55 Although Deborah Rhode would not ban surrogacy altogether, she believes an ideal world
would not “privilege genetic connections.” RHODE, supra note 44, at 225. She prefers to
acknowledge existing cultural norms which emphasize a strong desire to procreate as well as
self-fulfillment through parenting. Id. Martha Field would not oppose an outright prohibi-
tion, despite the needs of the childless. She believes, however, that criminalizing surrogacy
would lead it to continue underground, causing even more harm. FIELD, supra note 32, at 10;
see also RHODE, supra note 44, at 226 (predicting that an unregulated black market will
develop if surrogacy is prohibited).

Nadine Taub portrays surrogacy as a needed technology that enables nontraditional fami-
lies such as same-sex couples to raise their own children. Taub, supra note 32, at 288. She
also suggests it could help minority couples and those with nontraditional lifestyles who do
not qualify for adoption. Id. at 287.

Nevertheless, given surrogacy’s high costs, I wonder if it is a realistic option in many
cases. As it stands, many medical clinics only accept married, heterosexual, affluent women
for in vitro procedures. See Laurie Naish-Jefferson, Reproductive Laws. Women of Color, and
applicants to paint a picture of middle-class respectability, in hopes the public will accept the
practice and favor legalization.

56 See, e.g., Field, supra note 32, at 84-85; Taub, supra note 32, at 296. See also Barbara Stark,
(theorizing that the surrogate’s fundamental liberty interest in her child continues until after
the child’s birth and that, like the biological mother in adoption, her parental rights cannot be
alienated against her will).

57 Charlotte Rutherford urges women’s advocates to protect Black surrogates from exploitation
and to ensure that their maternal interests in the children they carry are taken into account.
Rutherford, supra note 44, at 272-73. She recommends that surrogacy be made available to all
needy women but warns that it should be carefully regulated. She believes, however, payment
for services should be prohibited. Id. at 273; see also Chavkin, supra note 44, at 408.

58 Rhode speaks of a mother “forced to relinquish a child of her own flesh.” RHODE, supra note
44, at 22. However, this claim cannot apply to Anna since the child does not contain her
genesis. See supra note 22. Yet she asserted that she emotionally bonded with her child. See
Catherine Gewertz, Postscript, L.A. TIMES, Apr. 17, 1992, at B1, B12 (stating that 18 months
after giving birth, Anna still longs to see the little boy she thinks of as her son). This claim
was not taken seriously by the court. See Johnson v. Calvert, NAT’L L.J., Nov. 5, 1990, at 36
form during gestation, the gestational surrogate appears to be the contractual stranger interfering with the "natural" relationship between the (white) child and the sponsoring (white) family. Race separates mother and infant more than the bonding can bring them together. Even worse, due to negative stereotyping of Black women, a Black surrogate is likely to be perceived as manipulative, only feigning attachment to extort money from the white family. The bonding argument not only promotes the tendency to define women in terms of their reproductive systems, but also privileges biological parenthood. It thereby harms Black gestational surrogates and contributes to the devaluation of Black women as mothers.

The relational feminists' emphasis on third-party responsibility for the surrogate also poses problems when the practice involves Black gestational mothers. Permitting the genetic surrogate to change her mind and to claim custody will not help the Annas of this world who, due to their gestational surrogate status, are not considered mothers and thus are not entitled to custody or visitation. Because of the absent genetic link, the other parties are likely to be less concerned for a gestational surrogate than for a genetic surrogate. Instead of becoming personally involved with each other, the participants become even more separated by race and socioeconomic class barriers, as occurred in Anna's case.

Relational feminism also fails because it ignores the racial issues involved in a black/white custody dispute. Even if a Black gestational


60 See infra note 76, commenting on the media's negative portrayal of Anna Johnson.


I, on the other hand, believe that encouraging surrogacy and limiting abortion are illogical positions if one values a flourishing life for all human beings. Besides, a woman who decides to have an abortion is not denying her maternal connection. Abortion is the "Sophie's Choice" of women who have few options in a society that largely ignores their needs. For a comparative study discussing the lower abortion rates in European countries in which the state guarantees child support, paid maternity and childcare leave, and access to health care, see MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 13-62 (1987).

62 According to the opinion in Anna J., "relations deteriorated between the two sides." 286 Cal. Rptr. at 372. The intended parents were upset over Anna's failure to disclose her prior history of stillbirths and miscarriages. Id. On the other hand, Mark and Crispina did not obtain the $200,000 insurance policy on Anna's life as promised in the contract. They refused to help her when she suffered premature contractions. Anna complained that the Calverts showed a "lack of interest unless it came to an ultrasound." Id. at 372 n.11. The surrogate felt abandoned. Id. at 372. Anna's threat to keep the baby, id. at 372 n.11, could have been a cry for help. Her carrying of the Calverts' child led to severe health problems, which prevented her from working and thereby left her in a financial crisis. Instead of responding to her plea for support, the Calverts filed a lawsuit to establish their parental status.
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surrogate should be granted standing to claim the child, race could be a factor in a transracial custody dispute. Moreover, considering the negative stereotyping of low-income Black women as lazy, irresponsible mothers, a court is likely to decide it is in the best interests of the child to be raised by the financially secure white family.

The MacKinnon/Radin approach to surrogacy is also flawed. There is little danger that a Black woman’s personal attributes will be commodified by surrogacy. In a color-conscious society, a Black surrogate is used strictly for her reproductive abilities, not for her genes. Black women are judged by Blacks and non-Blacks alike against the standard of the dominant culture’s physical features. Because the salient Black features are evaluated as worthless, in surrogacy Black women are situated outside the market. Arguments that surrogacy should be banned because it commodifies women’s personal assets apply if the surrogates are exclusively white women; however, they ignore the host of issues engendered by the sale of Black women’s services. For Black surrogates such as Anna, who are exploited by both genders, the problem

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63 See supra note 31, discussing transracial custody disputes.

64 In fact, surrogate brokers have predicted that screening women on the basis of their IQ and skin color would become immaterial in the gestational surrogacy context. See COREA, supra note 23, at 215.

65 Skin color discrimination is deeply embedded. Patricia Williams discusses a lawsuit in which a white woman, who had been artificially inseminated, unexpectedly found herself to be the mother of a Black daughter. WILLIAMS, supra note 42, at 186. The mother sued for emotional distress, claiming she loved her daughter but suffered in seeing her child victimized by racial prejudice. Williams wants to know if her own mother could state such a claim. Id. She cries:

[S]uch a child would be hard to love, even when one’s very own. How profound the hatred, how deep the bigotry that lives beneath the skin, that wakens this image of black life blooming within white . . . . It is an image that squeezes racism out from the pores of people who deny they are racist, or who say it’s not racism that makes them fear blacks but the high crime rate or some such.

Id. at 189.

66 See, e.g., TONI MORRISON, THE BLUEST EYE 40, 52-66 (1970) (sensitively depicting the ways young Black girls learn to associate whiteness with beauty and blackness with ugliness). See also Paulette Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365, 383 (discussing reactions to a Black woman’s hair as representing the interlocking power structure of sexism and racism, and proposing a Black woman’s choice of hairstyle can determine her ability to enter the white world of success); Harris, supra note 4, at 597-98 (stating that beauty has become whiteness itself, breeding self-hatred and despair in Black women).

67 Despite their position of gender inferiority, privileged white women have often been the perpetrators of racism. See, e.g., CRENSHAW, supra note 7, at 154 n.35 (noting white women obtained their entry into the male world largely by relegating their domestic work to minority women); SPELLMAN, supra note 12, at 106 (stating white women abused Black women slaves); HOOKS, supra note 9, at 123, 153-55 (explaining that white women have benefitted by exploiting Black women and that white men have benefitted by exploiting both). She eloquently calls on all feminists to work together to eradicate various forms of domination and violence and to recognize the degree to which women as well as men are socialized to exercise coercive authority over powerless groups. BELL HOOKS, FEMINIST THEORY FROM MARGIN TO CENTER 118-19 (1984).

In the same vein, Audre Lorde asks us to do more than admit to our differences and merely tolerate them. Women must learn to become interdependent and to nurture each other to be truly free:

Interdependency between women is the way to a freedom which allows the I to be, not
is color discrimination and negative stereotyping, not market commodification. They struggle to free themselves from the oppression imposed by white supremacy.

Finally, because the courts continue to define motherhood along genetic lines, the adoption model works only if the other parties are adopting parents, not the "natural" family. It is unclear if a gestational mother could claim the protections adoption regulations provide to the genetic mother. Even if genetics were overlooked and the birth mother were permitted to change her mind and to claim the child, the race-matching policies of adoption would favor the white parents in a custody dispute with a Black gestational surrogate.68

Ultimately, these feminist arguments rest on the genetic connection between mother and child. By emphasizing that motherhood is tied to biology, or by presupposing a genetic relationship between surrogate and child, feminist arguments inadvertently support racially biased policies and genetic definitions of motherhood. Under these analyses, a Black surrogate's claim to motherhood is bound to be seen as less valid. Hence, using a Black gestational surrogate might become more attractive to childless couples69 who fear protracted custody battles. As a result, more and more women of color may be used to carry white children. And why not? They make perfect surrogates.

C. Surrogacy as Both a Racist and a Sexist Practice

Other arguments employed in the surrogacy debate also tend to underestimate or ignore the pervasiveness of racism. For Black women, legal doctrines such as freedom of contract (justifying specific enforcement of the contract) and freedom to procreate (justifying the legalization of surrogacy arrangements) reveal only another aspect of the racial bias permeating the entire conceptual framework. Traditional freedom of choice analysis, cabined by the existing system of white supremacy, amounts to no more than the head of the snake biting its tail. The severe oppression Black women endure requires us to attack surrogacy head-on as a racist practice.

in order to be used, but in order to be creative. This is the difference between the passive be and the active being . . . .

. . . Difference must be not merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialectic . . . .

AUDRE LORDE, The Master's Tools Will Never Dismantle the Master's House, in SISTER OUTSIDER, supra note 7, at 111.

68 See infra note 74.

69 Gestational surrogacy is typically used when the intended mother 1) has no health problems or genetic diseases which interfere with her ability to ovulate, but 2) is unable to, or has been medically advised not to, carry and deliver a child. In the future, though, gestational surrogates could serve women with other conditions as well, such as diabetics or women who have had hysterectomies but whose ovaries are intact. The latter was Crispina Calvert's situation. See Anna J., 286 Cal. Rptr. at 372.
I confess that, compared to some feminists, I am less sympathetic to the plight of the infertile because I see infertility as a class-based interest in the surrogacy context. If as a society we believe we should prioritize genetic parenting, we need to acknowledge that infertility is also a problem for racial minorities, to eliminate occupational and environmental conditions harmful to Black women's health, and to allocate resources to provide better access to reproductive health care. In addition,

70 See, e.g., Andrews & Douglas, supra note 37, at 626 (estimating infertility affects 8.5% of the population). Childless adults spend in the aggregate more than $1 billion a year on diagnostic evaluations and fertility procedures. Id. at 626. Because insurance coverage is an unsettled issue and federal monies are unavailable, the costs are privately born. Id. at 635. The average medical bill for a diagnostic work-up and in vitro fertilization is $22,217. Id. at 635. One study of couples who pursued in vitro fertilization profiled them as highly educated, and in the middle- to upper-class economic bracket. All had undergone infertility treatment for four years or more. Id. at 646.

In vitro fertilization, an embryo transfer in which a fertilized ovum is transferred into the uterus of the gestational mother, is less expensive. See Joan Hollinger, From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction, 18 U. Mich. J.L. Ref. 865, 872 (1985). Those who pursue surrogacy are not necessarily wealthy individuals, although they tend to be better educated and more financially secure than the surrogate. See Feld, supra note 32, at 25. Surrogacy is also class-based because it is beyond the financial reach of poor, infertile couples.

71 Blacks are one and a half times more likely than whites to suffer from infertility. See Nadine Taub, Surrogacy: A Preferred Treatment for Infertility?, in Surrogate Motherhood, supra note 23, at 221, 222. Many Black women are vulnerable to sickle cell anemia, pelvic inflammatory disease, and other infections that can lead to infertility. Their lack of access to medical treatment exacerbates these conditions. When treated, they are at times subjected to unnecessary surgery and medical experiments. Nsiah-Jefferson, supra note 55, at 26, 32. In vitro fertilization procedures are not publicly funded and consequently not offered in health clinics. Id. at 33.

Worst of all, minority women are often coerced into sterilization. One clinic reported 45% of its Black mothers "chose" tubal ligation after their first child was born. Id. at 31. I question whether this "choice" was meaningful. Although most states do not provide abortion services in their Medicaid packages, sterilization is almost fully funded. Id. Financial pressures induce understaffed medical facilities to urge sterilization, instead of providing contraceptives or dealing with expensive and burdensome obstetric care. Id. Some women hesitate to question medical treatment and assume a tubal ligation is a reversible procedure. Id. at 26, 30. The highest rates of hysterectomy and tubal ligation occur in southern Black areas. Id. at 31. As of 1983, 25% of women of color had been sterilized as compared with only 16% of white women. Nancy Gertner, Interference with Reproductive Choice, in Reproductive Laws for the 1990s, supra note 44, at 237, 239.

72 One of the factors explaining the higher incidence of infertility in the Black population is their greater exposure to environmental toxins. Gertner, supra note 71, at 227. Also, many women of color in jobs which expose them to potential reproductive hazards and offer few health-related benefits. See Nsiah-Jefferson, supra note 55, at 28. For example, jobs in hospitals, housekeeping, laundry, and food services expose women to damage from x-rays, drugs, anesthetic gases, and sterilizing gases. Id. In the textile industry, in which more than 20% of the employees are Black, women work in high-dust environments, where they are exposed to chemicals, dyes, arsenic, and inadequate ventilation. Id.

Some women have been forced to choose between undergoing sterilization or keeping their jobs. See Joan Bertin, Reproductive Hazards in the Workplace, in Reproductive Laws for the 1990s, supra note 44, at 207-09. Instead of regulating the workplace and insisting it be free of environmental hazards, women have been granted the "right" to risk infertility on the job. See UAW v. Johnson Controls, 111 S. Ct. 1196, 1207-08 (1991) (holding an employer's fetal protection policy that excludes women with childbearing capacity from lead-exposed jobs is facially discriminatory in violation of Title VII).

73 Although 73% of women between 15 and 44 years of age have some kind of private insurance, over 80% of policies, as of 1985, do not cover routine office visits or services for preventive pregnancy care (contraception). Rutherford, supra note 44, at 258 n.11. Moreover, 17% of
parenting needs can be gratified through adoption. If agency rules are unsympathetic to nontraditional and racially-mixed families, our energies are better channeled in the direction of adoption reform.

While I recognize that an underground market might develop if surrogate brokering is criminalized and paid surrogacy is prohibited, I do not think this is a likely result. If enough pressure is exerted to eradicate the broker's profit, I think it unlikely that surrogacy will become a widespread clandestine enterprise. Practically speaking, private contracting becomes more difficult without the convenience of matching clinics with their ready-made pool of women and their barrage of advertisements. For surrogate contracts formed underground, I would advocate a presumption that the birth mother is the legal mother. This presumption would discourage infertile men and women from pursuing surrogacy and would handicap the parties with greater bargaining strength. As I see it, in regulating surrogacy, we inevitably encourage its usage. We make it respectable.

In addition, banning surrogacy is not the same as criminalizing drug

all women are without any coverage. Id. Close to one out of 10 Black babies and eight out of 10 Latino babies are born to mothers who received no care or only late third trimester prenatal care. Id. at 260 n.15. Only 46% of obstetricians accept Medicaid patients; prenatal care, delivery, and postpartum follow-up are seldom a part of a state's Medicaid program. Colker, supra note 41, at 346. Medicaid is available to less than half of those with incomes below the federal poverty level. Mary Anne Bobinski, Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured, 24 U.C. DAVIS L. REV. 255, 263 n.26 (1990). Medicaid fails to reach these women because many states insist on an extremely low income level in order to qualify for Aid to Families with Dependent Children (AFDC), which is directly linked to eligibility for Medicaid. Id. at 272 n.59. Congress has taken some steps to encourage states to increase the coverage of low income pregnant women and children. See 42 U.S.C.A. § 1396a(a)(10)(A)(i)(IV) (1990).

The Black maternal and infant mortality rates are disproportionately high due to lack of adequate health care. See Rutherford, supra note 44, at 259. Women of color are 3.3 times more likely than white women to die from pregnancy complications. Id. at 260. Black mothers are two to three times more likely to give birth to infants with very low birth weights. Colker, supra note 41, at 338. After birth, even if the Black infant is thriving and of average birth weight, his or her chance of surviving is lower than that of a white infant. Id. at 339. In 1987 the infant mortality rate for Blacks was 17.9 per thousand live births. The white mortality rate was 8.6 per thousand. Rutherford, supra note 44, at 259 n.14.

Most public adoption agencies use race-matching policies in their placement decisions. Elizabeth Bartholet, Where Do Black Children Belong? The Politics of Race Matching in Adoption, 139 U. PA. L. REV. 1163, 1184 (1991). Children are even typed by their degree of skin color, with light-skinned children available only to light-skinned couples and dark-skinned children reserved for dark-skinned families. Id. at 1187. Some states have codified racial preference adoption. See, e.g., MINN. STAT. ANN. §§ 259.255, 259.28 (West Supp. 1991); ARK. STAT. ANN. § 9-9-102 (1987). Such racial policies have been advocated by the National Association of Black Social Workers, which fears racial genocide and the loss by Black children of their cultural heritage if raised in white families. Bartholet, supra, at 1180. Studies on transracial adoptions indicate, however, that Black children are not harmed if raised in white families. Indeed, they are significantly better off than if left in temporary care. Moreover, a greater number of whites seek adoption, due to their higher numbers and relative wealth. Id. at 1187 n.4, 1175. Thus, for these reasons, race-restrictive policies hurt rather than help Black children.

Racial matching may not necessarily play a role in independent private adoptions, which do not involve a state-licensed agency. Id. at 1184 n.54.
use, alcohol, or gambling, in which illicit sales are the inevitable result of the government's attempt to suppress highly addictive, uncontrollable behavior. Unlike these other behaviors, surrogacy is neither addictive nor uncontrollable, and it has not been universally condemned or curbed. In fact, the media helps to publicize surrogacy services, heightening pressures on women who are unable to reproduce. Media attention manipulates the public into believing the state should legalize and regulate the practice, inventing a need and marketing a product at the same time.

I am more troubled by the double bind problem referred to by Margaret Radin. Prohibiting surrogacy unfortunately deprives poor women of color of one of the few options available in a racist/sexist society to improve their lives. However, once Black gestational surrogacy becomes a relatively commonplace business practice, the Black surrogate is likely to receive a smaller fee. Moreover, decreased compensation for Black surrogates will only widen the gap between the values attributed to Black versus white surrogacy services. Thus, as surrogacy gains social respectability, it perpetuates discriminatory treatment without resolving the economic problems of low-income women of color.

I also disagree with autonomy-based arguments which posit that women are free to contract to rent their wombs, if they so choose. Susan Faludi claims that the media and the medical establishment launched a campaign that blamed feminism and careerism for an "epidemic" in infertility affecting professional women. One study, indicating that women who postpone childbirth past the age of 30 risk a nearly 40% chance of infertility, was widely reported in The New England Journal of Medicine, The New York Times, and dozens of other newspapers and television news programs. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 27-29 (1991). In fact, the study was sponsored by 11 artificial insemination centers that stood to profit by intensifying women's fears of infertility. Id. at 28. Moreover, all of the women in the study were married to impotent males. Id. Three years later more comprehensive research revealed there is only a 3% higher risk of infertility past the age of twenty. Id. at 29. Overall, infertility has actually decreased since 1965 among women in their thirties and forties. Id.

Moreover, brokers depend on television talk show programs to locate potential surrogates. See COREA, supra note 23, at 214. Surrogacy has been publicized by Oprah Winfrey, Phil Donahue, and the news program 48 Hours. These programs pretend to be neutral, but in reality they romanticize and sensationalize procreative needs. They ignore the sexism and exploitation inherent in surrogacy.

Furthermore, very often only the needs of the intended parents are treated with respect and compassion by the press, swaying public opinion in their favor. In the case of Anna J., the press portrayed Crispina Calvert as an innocent, non-assertive, and non-threatening female. She is the ultimate mother/madonna figure. On the other hand, Anna is painted as an unde-serving, demanding, and manipulative Black Sapphire who is really only interested in extorting money. See, e.g., Kasindorf, supra note 16, at 11, 14.

For this reason, I am not necessarily proposing a definitive outcome on the debate regarding the legalization of surrogacy. Rather, I add more concerns, specifically racism, for feminists to think about.

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See COREA, supra note 23, at 214-15 (quoting the president of the Bionetics Foundation, who has stated that once embryo transfer techniques are perfected, gestational surrogates could be found in poverty-stricken areas of the world. He predicts that Third World women will accept far less payment than American surrogates, as little as $1,000.).

Lori Andrews does not believe the exploitation of poor women is the underlying issue at stake in surrogacy. Lori Andrews, Alternative Modes of Reproduction, in REPRODUCTIVE LAWS
While I agree that society should not restrict women's employment choices, this assertion oversimplifies the meaning of choice. I do not mean to suggest that women are incapable or incompetent decisionmakers or that they uncritically accept an oppressive ideology. Rather, despite their resistance to sexist or racist pressures, very often their choices are frustrated in many complex ways.

Bargaining power is largely contingent on socioeconomic circumstances. Since most people would agree that Black women in our society exercise little if any power in the public sphere, it is difficult to justify enforcing a surrogacy contract on grounds that the Black surrogate has made a meaningful choice. In any case, there is no consensus regarding the point at which a person's inability to control the market so circumscribes her autonomy that her choice can no longer be considered meaningful. The lack of consensus on this issue suggests that we justify surrogacy on grounds other than voluntariness.

The freedom of contract issue in surrogacy mirrors the issues raised in the prostitution and pornography debates. Even though an individual woman may choose to pose nude, to sell her sexual services, or to rent her womb, the abuses and exploitation inherent in these practices suggest that the decision is hardly one of choice. That women choose to be vulnerable to risks such as AIDS, degradation, rape, and the health risks associated with pregnancy (in order to bear another couple's child) proves that many women are desperate, not that they are free to choose. Given the number of Black women involved in some of these social practices, it seems especially callous to disregard the racial prejudice which also limits their choices.

Similarly, the freedom to procreate argument only considers the sponsoring parents' freedom. In a custody dispute, the surrogate's procreative interests are subjugated to another's freedom to parent. Enforcing the surrogacy contract as the product of free choice legitimates the

For the 1990s, supra note 44, at 257, 271. She dismisses the financial considerations that motivated women to become surrogates. Mary Beth Whitehead's concern with her children's education, Kim Cotton's interest in redecorating her home, and another surrogate's desire to purchase a car are not "basic needs" that "society has an obligation to provide." Id. at 372. She argues that specific enforcement of the contract to avoid lengthy custody litigation is in the best interests of the child. Id. at 386.

Marjorie Shultz also thinks the surrogacy contract should be enforceable to enhance procreative freedom and to respect the autonomy and expressed intent of all the parties. Marjorie Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 302-03.

However, equal bargaining is an illusion, given that we live in an imperfect world in which surrogate and childless couple negotiate against the background of power structures that unfairly advantage one side and curtail the opportunities of the other. By rendering autonomy or voluntariness suspect, this contract invites exploitation. Surely, a woman must be desperate to contract for nine month's work, entailing possible serious health risks, at approximately $1.50 per hour. Anna's situation, see text at 13-14, note 62, illustrates the dangers of surrogacy and the ways it exploits poor women, who are compelled to find ways to support their family.

81 See Ehrenreich, supra note 35, at 1384-85.
power the sponsoring parents exert over the surrogate. Their procreative desires can only be gratified by pressuring surrogates to stifle their maternal feelings.  

If freedom is to be more than rhetoric, we should take into account the social context from which personal decision-making originates. The notion of unfettered agency or total control over decisions seems too simplistic and insensitive in light of the complexity of causal factors influencing women's decisions. 

Furthermore, we ignore the big picture regarding the plight of women if we accept short-sighted arguments such as "You shouldn't stop technology" or "Everyone deserves self-fulfillment through parenthood." These short-term arguments fail to address the extent to which racism and patriarchy control reproductive policies. If feminists succumb to myopic concerns, we acquiesce in these exploitative practices and risk being misunderstood in the struggle for procreative autonomy and adequate prenatal health care.  

As it stands, in light of governmental regulation, inadequate health care, and workplace abuses, disadvantaged women do not determine the circumstances under which they will have a child. The very same inability to meaningfully control their lives, brought on by their lack of economic opportunity, could cause these women to resort to becoming surrogate mothers. What in the future constitutes an "undue burden" on a woman's right to control her reproduction is bound to be misunderstood if we do not continue to chip away at the notion of free agency. 

The decisions of many women concerning both abortion and surrogacy could be affected by a variety of factors. First, some women could internalize cultural assumptions underlying abortion and surrogacy laws (i.e., women's rightful role as mother and homemaker). Other

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82 William Handel, head of the largest surrogate agency in California, emphasizes in his marketing that none of the surrogates he uses has ever refused to turn over a child. He has been quoted as saying, "I scare the hell out of them." See Kasindorf, supra note 16, at 16.
83 See Kathryn Abrams, Ideology and Women's Choices, 24 GA. L. REV. 761, 795-96 (1990) (suggesting that feminist arguments based on ideological determinism cause resentment and that decisionmaking is influenced by cultural norms, personal relationships, and institutional obstructions on the job).
84 See RHODE, supra note 44, at 225.
85 See Ehrenreich, supra note 35, at 1372 (reviewing CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989)) (arguing that assuming surrogacy contracts and abortion decisions are the product of free choice legitimizes decisions that in fact are the result of limited economic options and governmental regulations). See also Rachael Pine & Sylvia Law, Envisioning A Future for Reproductive Liberty: Strategies for Making the Rights Real, 27 HARV. C.R.-C.L. L. REV. 407, 422 (1992) (arguing many women receive medical services that undermine, rather than support, reproductive choices by promoting sterilization, discouraging abortion, and placing more value on fetal life than on the woman’s decision).
87 For example, Casey held that it was not an undue burden to require a woman to wait 24 hours before having an abortion. Id. In finding that the waiting period was not unduly burdensome, the Court incorrectly assumed that all women have easy access to abortion clinics. It also assumed that women need the extra 24 hours to make their decision an informed one.
88 See Abrams, supra note 83.
factors include the patriarchal outlook of a woman's husband, the views of other family members, and ineffective contraception. Free choice arguments alienate our audience by conjuring up images of women as more powerful than we really are, rather than educating lawmakers and the public on the depth and breadth of our powerlessness. We must convince society that a woman’s exercise of her procreative freedom often amounts to nothing more than succumbing to sexist pressures and racist practices.

Lastly, I oppose surrogacy because of the health risks to the surrogate mothers. The history of neglect of Black women's reproductive health suggests they may receive only cursory medical screening, prenatal monitoring, and delivery services by health care professionals. Although as surrogate mothers Black women might receive better care (because by contract the intended parents foot the bills and have a stake in the child's health), there is something intrinsically wrong with a legal/medical practice that enables a poor Black woman to receive health care to protect a white infant, but effectively denies her that benefit if the infant is Black.

Actually, I doubt that gestational surrogates, who are typically Black, will receive the same care as genetic surrogates, who are typically non-Black. One well-known surrogate broker has publicly stated that the health of a gestational surrogate does not matter as long as "her diet is good and other aspects of her life are o.k." She could even have a serious health condition. In short, less of the woman matters once her genes are not transmitted to the infant. Anna, for one, was not asked for her medical history before she was impregnated. As a result of her pregnancy complications, she has permanent heart damage. In an imperfect world riddled with unchecked discretion, surrogacy strikes me as too dangerous to be permitted.

D. A Jewish Feminist’s Perspective on Surrogacy

In expressing what I think of as my Jewish distaste for surrogacy, I find I am faced with defining myself. I should explain what I mean by

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89 See, e.g., Kasindorf, supra note 16, at 14 (quoting Mark Calvert, the intended father in Anna J., as stating that it was important for Crispina to be the genetic mother because "we really wanted a child that had her innocence, her sweetness, her demeanor").
90 See supra note 73. For a discussion of neglect caused by barriers in communication between non-Black doctors and Black female patients, see Nsiah-Jefferson, supra note 55, at 26.
91 I am assuming that the contracting couple is white and the surrogate is Black.
92 See COREA, supra note 23, at 215.
93 Id.
94 Telephone conversation with Anna's attorney, Richard Gilbert (Mar. 6, 1992).
95 There is the unknown risk of carrying an embryo whose genes are totally foreign to the mother's body. COREA, supra note 23, at 89. A pregnant woman also risks fatigue, nausea, weight gain, skin stretching, loss of sleep, miscarriage, labor, cesarean surgery, postoperative complications, postpartum infections, and even death. Id. at 243.
OPPRESSION OF SURROGACY

96 I like Letty Cottin Pogrebin’s description of Jewish values:

We start with Judaism’s core mandate to do tzedakah - the Hebrew word meaning charity, caring, and ‘right action’ whose linguistic root, tzedek, means justice.

. . . . We are commanded: ‘In every generation you must regard yourself as if you personally came forth from Egypt.’ You must reexperience the sins of subjugation in order to better appreciate freedom.

This immanent ‘you’ appears in verse 23:9 with the immediacy of the present tense: ‘You shall not oppress a stranger, for you know the feelings of the stranger. . . .’

I think of this as God’s commandment to empathize.

POGREBIN, supra note 11, at 237, 309. For me, Jewish feminism is a personal commitment to identify with the oppressed and the doing of right action, not rights analysis. In the enactment, we define ourselves.

97 It is beyond the scope of this Article to explain the various positions in depth. See Edward Norden, Counting The Jews, COMMENTARY, Oct. 1991, at 36 (discussing ways of defining Jewish identity). Traditionally, anyone born to a Jewish mother, converted according to Jewish law, or born of a woman who converted is considered Jewish. See id. The Law of Return in Israel employs a somewhat broader definition, allowing entry not just to traditional Jews, but also to anyone married to a Jew and to the child or grandchild of a Jew. Id. at 38. Reform Judaism presumes the child of a Jewish parent is Jewish but further requires that the identification be affirmed through Bar or Bat Mitzvah and study of the Torah. SCHNEIDER, supra note 11, at 344.

98 Feminist writings and conversations also influence my sense of self. Pat Cain has observed that discussing self-definition engages us in the process of defining ourselves. Patricia Cain, Feminism and the Limits of Equality, 24 GA. L. REV. 803, 843-44 (1990).

99 For both groups, liberation from slavery, historical attempts to control our numbers, and the knowledge that others have believed it is morally necessary to murder us all, including our children, affect the ways we define ourselves.
son, I oppose surrogacy because I believe, as a Jewish feminist, it facilitates eugenics and gender domination within minorities. Furthermore, it provides Jewish men and women with the potential to exploit Black women.

Surrogacy has all the earmarks of becoming part of an overall policy of eugenics. If we encourage the practice of Black women having white babies, while gradually increasing the burdens on access to abortion for all women, we increase the white birth rate. Meanwhile, if we continue to neglect the reproductive health of Black mothers and infants, the increasing rates of unemployment, crime and incarceration for Black males, the escalating death rate of young Black males, the higher incidence of AIDS in minority women, and the conditions causing drug abuse among the poor in our inner cities, there could be a

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100 Eugenics attempts to control human reproduction by limiting the procreation of those judged to be inferior by the dominant group because of race, national origin, class, and physical and mental condition. The early birth control movement headed by Margaret Sanger was influenced by theories of eugenics, and for this reason Black women were suspicious of abortion rights activists in the 1970s. See DAVIS, supra note 13, at 213-15.

101 Although the rapid economic growth in this country following World War II and civil rights legislation benefited middle-class Blacks, the position of the Black underclass "actually deteriorated during the very period in which the most sweeping antidiscrimination legislation and programs have been enacted . . . ." WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 134 (1987). More recently, plant closings in the automobile, rubber, and steel industries have caused many Blacks to lose their jobs because Blacks are concentrated in these industries. Id. at 135. In addition, one state study showed that the relocation of many industries from inner city sites to the suburbs caused Black employment to decrease by 24.3%, compared to a drop of 9.8% in white employment. Id.

As the economic picture becomes even more bleak in this country, Blacks are more likely to suffer the consequences in devastating ways. The middle-class has not been able to secure enough savings and assets to tide them over during hard times. See Rutherford, supra note 44, at 257-58.

102 Young Black males comprise half the total inmate population (approximately 455,000) in the United States, although they constitute only about 5% of the country's population. Close to 80-90% of those prosecuted for drug offenses are African-American males. See John Powell & Eileen Hershenov, Hostage to the Drug War: The National Purse, the Constitution, and the Black Community, 24 U.C. DAVIS L. REV. 555, 568-69 (1991).

103 Every year, 85 young Black males out of a population of 100,000 are killed. The drug trade and the aggressive tactics of law enforcement are contributing factors. Id. at 609. For Black men aged 15-24, the homicide rate is seven times higher than the national rate. Louis Sullivan, M.D., From the Secretary of Health and Human Services, JAMA, June 5, 1991, at 2778.

104 AIDS is estimated to become the fifth leading cause of death for all American women. Nine times as many minority women between the ages of 15 and 44 die of AIDS-related causes than do white women of the same age group. Although Black and Hispanic women are but 19% of the population, they comprise 72% of the women with AIDS. See Powell & Hershenov, supra note 102, at 602. Drug use and sex with intravenous drug users are the major causes. Id. Compounding the problem, most drug treatment centers refuse to provide care to pregnant women, increasing minority infant mortality rates and the number of children in foster care. Id. See also Roberts, supra note 59, at 1448.

105 Despite the fact that most of the poor do not use drugs, drug abuse is largely concentrated in the inner cities. See Michael Massing, What Ever Happened to the "War on Drugs"? in THE N.Y. REVIEW OF BOOKS, June 11, 1992, at 46. Urban hospitals receive twice as many drug-related emergencies as suburban facilities. Id. Turning to law enforcement for solutions that target minority youths and pregnant women of color only increases the prison population, and fails to recognize that drug abuse is a public health problem. See Powell & Hershenov, supra note 102, at 611-13.
serious decline in the Black population. We seem immersed in a degree of population control that to me as a Jew is truly frightening. Surrogacy advances the population of the dominant racial group at the possible direct expense of Black women's health, and of the Black population overall, enlisting Black women to participate in their own potential demise.

The practice of surrogacy harms Jewish women as well as Black women. Procreation has come to represent something beyond the continuity of personal bloodlines to Jews. When a child is born, Jews celebrate the preservation of their own special heritage. However, the celebration of the group can be at the expense of the Jewish woman's identity. Jewish women tend to be cast in the role of breeders for the group, the functional receptacles of ethnic identity, whose purpose is to secure the group's survival. Surrogacy's emphasis on genetic reproduction and on women as babymakers reinforces the power relationship between Jewish men and Jewish women as well as in the population in general.

Surrogacy also encourages clannishness and domination, instead of fostering a group pride which values respect for others as human beings. I understand and sympathize with Dr. Stern, the intended father in the Baby M case, who lost his relatives in the Holocaust and felt a special need and obligation to sire a child. As a post-Holocaust victim responding to anti-Semitism and the annihilation of the Jews, he could have been motivated to perpetuate the Jewish people as well as his own genes. Fear of genocide, and the possibility that there will be no Jews left in the world to practice Judaism and to pass on cultural traditions, are particularly Jewish concerns. These concerns could lead the Jewish popu-

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106 See Schneider, supra note 11, at 256-58, 371-81 (discussing the special implications of childbearing for many Jewish women who, because of the dwindling number of Jews, are under significant pressure to become mothers and feel guilty if they choose not to conceive). With the exception of Orthodox Jews, the Jewish birthrate is lower than that of any other religious group. Id. at 374. Rabbis, community leaders, and family members respond by urging Jewish women to remember their Jewish responsibility to produce offspring. Id. at 372. In addition, Jewish women are expected to impress a Jewish way of life upon the children. Id. at 334.

107 See In re Baby M., 537 A.2d 1227, 1235. More on the background of the parties can be found in Bonnie Steinbock, Surrogate Motherhood as Prenatal Adoption, in Surrogate Motherhood, supra note 23, at 123-35.

108 In fighting for custody, Dr. Stern's interest in raising the child took a Jewish form of patriarchy. In discussing the Baby M case, Linda Hirshman asserts that Dr. Stern's interest in not just seeing the child but also assuming custody and control over the raising of the child was patriarchal. See Hirshman, supra note 39, at 999. However, I see his patriarchal interest as colored by his Judaism. He may have wanted to ensure that the child would learn to consider herself a Jew. The child would be lost to the Jewish people as well as to Dr. Stern if raised as a Christian in a Christian family. This does not mean custody would have been unimportant if Mary Beth Whitehead had been Jewish. However, I suspect the Jewish factor intensified the custody issue.

109 See Guyora Binder, Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie.
lation to turn to surrogacy to maintain its identity and to stave off extinction. Gestational surrogacy, in which the Jewish woman is the genetic mother of the child, is particularly appealing because according to halachic tradition (Jewish law), the mother's lineage determines whether the child is a Jew.

Nonetheless, if Jews subordinate women and secure Judaism's survival through their bodies, they annihilate the ethical foundation of Judaism itself, and confuse Jewish patriarchy with Jewish cosmology. Jewish philosophy speaks of experiencing Others as living beings with whom one enters into relationships, not using individuals as objects and not categorizing them according to their capacities. If the Holocaust is to have meaning, it should lead to heightened sensitivity to any policy or practice privileging racial/genetic traits. Exploiting another as a means to sustain one's own group's identity is an oppressive form of identity politics.

The desire to procreate children of one's own heritage should not be accomplished through a dangerous practice that dehumanizes others. The current legal discourse, which requires us to overlook race and gender unless there is intentional discrimination, permits surrogacy to strip Black women of their womanhood and reduces them to nothing but their color and their reproductive functions.

E. Conclusion

I recognize that I have focused on Jewish women and Black women in this article, and I agree that hearing the victim's story sensitizes the discourse and broadens what feminists mean by "asking the woman's question." However, I worry that a philosophy of positionality which dwells on individual social experiences could separate us at a time when women's health issues are at the forefront. Today, as the economic fabric of this country wears thin and greater numbers feel the pinch of hard

98 YALE L.J. 1321, 1348-50 (1989) (commenting that many Jews fear that the Holocaust and Jewish assimilation into western culture have totally destroyed Judaism as well as most Jews).

My research was unable to reveal any other white minority concerned with group survival to the same extent as Jews. Many Jews continue to feel threatened because they feel they are discriminated against more than other white minorities. SCHNEIDER, supra note 11, at 258 (quoting JUDITH RABKIN & ELMER STRUENING, ETHNICITY, SOCIAL CLASS AND MENTAL ILLNESS (1976)).

A Jewish theologian has stated:

The I of the primary word I-It makes its appearance as individuality and becomes conscious of itself as subject (of experiencing and using). The I of the primary word I-Thou makes its appearance as person and becomes conscious of itself as subjectivity (without a dependent genitive).

A person makes his appearance by entering into relation with other persons.

The aim of relation is relation's own being, that is, contact with the Thou. For through contact with every Thou we are stirred with a breath of the Thou, that is, of eternal life. MARTIN BUBER, I AND THOU 62-63 (Ronald G. Smith trans., 2d ed. 1958).

111 See Bartlett, supra note 8, at 837-49 for a discussion of feminist methodology.
times, the tendency to seek scapegoats could divide us further and magnify all women’s problems.\textsuperscript{112} We need unity more than ever.

My response is to propose a more self-critical positionality, to unearth the bias and oppressive practices within and between minorities. We need to not only air but eliminate the prejudices separating Blacks and Jews.\textsuperscript{113} We must talk about Israeli patriarchy, racism, and elitism.\textsuperscript{114} I believe it is important for Jewish feminists in particular to unite

\textsuperscript{112} For example, a gang of Blacks murdered Yankel Rosenbaum, an Hasidic Jew, because they were angry that a Jewish motorist killed a Black child in an accident. See Philip Gourevitch, \textit{The Jeffries Affair, Commentary}, Mar. 1992, at 34, 35 (recounting the incident and criticizing Leonard Jeffries, Chairman of Black Studies at the City College of New York, for his anti-Semitic Black supremacy theories). Cornel West condemns the murder, caused by Black anti-Semitism, as destroying the moral imperative of the civil rights struggle. Black anti-Semitism is also strategically misguided because, historically, Jews have been the strongest allies of Blacks. Cornel West, \textit{Black Anti-Semitism and the Rhetoric of Resentment}, \textit{Tikkun}, Jan.-Feb. 1992, at 15.

For a history of the relationship between Blacks and Jews, discussing the Jewish commitment to civil rights and the rupture of the longstanding affiliation between these groups over issues such as affirmative action, and other conflicts, see Jonathan Kaufman, \textit{Broken Alliance: The Turbulent Times Between Blacks and Jews in America} (1988). See also Stephen L. Carter, \textit{Loving the Messenger}, \textit{Yale J.L. & Human} 317, 318-19 (1989) (recounting the experiences of Julius Lester, a Jewish African-American who was forced to leave the Afro-American Studies Department at the University of Massachusetts because of his Jewish writings. He found a welcome haven in Judaic studies.).

\textsuperscript{113} See, e.g., Melanie Kaye/Kantrowitz, \textit{Class, Women, and \textquotedblleft The Black-Jewish Question\textquotedblright, Tikkun}, July-Aug. 1989, at 97, 99 (documenting specific incidents of Jewish racism and Black anti-Semitism as well as highlighting the \textquotedblleft aversive Jewish landlord\textquotedblright and the \textquoteleft violent Black rapist\textquoteright as representative examples). For an article on Jesse Jackson and his ambivalent relationship with the Jewish community, see Marshall Frady, \textit{Outsider: Part III, Without Portfolio}, \textit{The New Yorker}, Feb. 17, 1992, at 39, 45-50. See also Barbara Smith, \textit{Between a Rock and a Hard Place: Relationships Between Black and Jewish Women, in Yours in Struggle: Three Feminist Perspectives on Anti-Semitism and Racism} 67, 69 (Elly Bulkin et al. eds., 1984) [hereinafter \textit{Yours in Struggle}]. As a Black woman living in Christian-American society, the author admits to her own anti-Semitism. Elly Bulkin is equally candid concerning Jewish intolerance. Elly Bulkin, \textit{Hard Ground: Jewish Identity, Racism, and Anti-Semitism, in Yours in Struggle}, \textit{supra}, at 91, 92 (discussing the tensions between Blacks and Jews in New York that occasionally erupted into violence).

A particularly vivid criticism of Jewish racism is made by Art Spiegelman. Spiegelman attempts to retain the reality and horror of his father's concentration camp experience, but rejects his father's racism and insensitivity. His father's response to picking up a Black hitchhiker is the following: \textquoteleft It's a colored guy, a shvartser! ... I had the whole time to watch out that this shvartser doesn't steal us the groceries from the back seat\textquoteright. He is criticized: \textquoteleft That's outrageous! How can you, of all people, be such a racist! You talk about Blacks the way the Nazis talked about the Jews!\textquoteright Art Spiegelman, \textit{Maus: A Survivor's Tale, II: And Here My Troubles Began} 98-99 (1991).

Jewish history encourages Jews to react to insults and to demand instant apologies, whereas the Black experience of slavery has taught Blacks to ignore insults for the sake of survival. Pogrebin, \textit{supra} note 11, at 288-89. The difference in response mechanisms might mean not all minorities believe they are strong enough to withstand self-criticism. However, if a minority lacks strength, there is an even greater need to build coalitions and to condemn those within the community that rock the boat by alienating outside support.

\textsuperscript{114} See Jenny Bourne, \textit{Homelands of the Mind: Jewish Feminism and Identity Politics}, \textit{29 Race & Class} 1, 17, 20 (1987) (stating that anti-Zionist Israelis label as "Holocaust blackmail" the tendency to justify the persecution of the Palestinians as essential to Jewish survival). She argues that Israel relies on anti-abortion and exclusionary measures to ensure Jewish control of Israel. \textit{Id.} at 6-7. See also Bulkin, \textit{supra} note 113, at 154, 156-57 (discussing Israeli discrimination against Arabs and Oriental Jews and pointing out that the Sephardim have the worst schools, the highest mortality rates, and the most people on welfare in Israel). Marilyn French comprehensively depicts the ways in which Israel is dominated by a minority of vocal
with Blacks in their struggles to combat racism. We must do so, not just as women, but also as Jews. Those in academia must identify their Jewishness so that their efforts to end the oppression of other minorities can be valued as a counterbalance to the charge of Jewish racism.

We should also discuss the sexism, homophobia, and color-based hierarchies within the Black community. Many Black males pursue a limited vision of liberation, intended to provide Black men with the pre-


Unfortunately, Jewish identity has become associated with the Israeli politics of the far right. See Bourne, *supra* at 21 (arguing Israel has "appropriated" Jewish history and "nationalized" it). Many minority women in the feminist movement sympathize with the plight of the Palestinians and feel alienated from Jewish feminists because of Israel's domestic and foreign policies. *Id.* at 4-5.

We need to reclaim Jewishness and to remind others that many Jews, including myself, disagree with the exclusionary, colonizing, and sexist policies of Israel. *See, e.g.*, Binder, *supra* note 109, at 1353; Bourne, *supra* at 5. See also Bulkin, *supra* note 113, at 156, ruefully noting that, as a lesbian, she is ineligible for automatic citizenship in Israel, supposedly guaranteed to all Jews; Letty Cottin Pogrebin, *Our Enemies Ourselves: A Palestinian-Jewish Sisterhood?*, Ms., July/Aug. 1991, at 77, 81. Pogrebin believes it is in the best interests of Israel to recognize Palestinian self-determination. She is a part of a group of Jewish and Palestinian women who have been meeting together since 1989 to find ways to understand each other, to resolve conflicts, and to build relationships.

I find it necessary, for instance, to reclaim Portia as the first Jewish woman lawyer. For many feminists, Portia represents a woman's values. See Carrie Menkel-Meadow, *supra* note 46. However, it is seldom mentioned that Portia was also Jewish. For me, Portia's care-based ethic comes from her history of oppression as both a Jew and a woman.

Although some may disagree with my position, I sense Jewish academics, unlike Blacks, Asians, or other minorities, are less likely to refer to their own background. Because Jews do not deal with the obstacles of immutable characteristics, which constrain the ability of other minorities to forget who they are, they may tend to ignore their Jewishness. Perhaps there is a remnant of shame in acknowledging that one is a Jew.


*See, e.g.*, Prina Lahar, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. REV. 555, 562 (1992) (noting the failure of Jewish law school professors to identify themselves as such in their writings which opposed the prosecution of Eichmann in Israel).

*See, e.g.*, Lorde, *supra* note 7, at 119-21 (noting the reluctance of the Black community to deal with Black men raping Black women, with the woman-hating of Black males, and with the fear of lesbians); Crenshaw, *supra* note 7, at 163 (commenting that the reality of domestic violence against Black women and the gender oppression they face was shunted aside in the controversy surrounding the film *The Color Purple*; instead, the debate focused on the wisdom of portraying Black males in a negative light); Harris, *supra* note 4, at 597 (attributing Black color-consciousness to the influence of a white beauty standard). *See also* Hooks, *supra* note 9, at 181-84 (indicating that male leaders of the Black liberation movement absorbed a white sexist ideology and sought to impose a patriarchal social structure on the Black community, consequently preventing the true liberation of either Black men or Black women).
OPPRESSION OF SURROGACY

rogatives of middle-class white men. Black men attack Black feminists for sapping the strength of the civil rights struggle. Jewish women can identify with this hierarchy, because the Jewish halachic tradition disables Jewish women from participating in the very rituals which define one as a Jew. Jewish women and Black women should work together to end gender discrimination in their respective communities, in order to prevent minority women’s alienation from their own cultures and their loss of group identification.

Anti-Semitism, racism, homophobia, and sexism are interrelated forms of hatred. Minorities, who need to find ways to build group pride, are vulnerable to xenophobia as well as to outside prejudice. Fear of extinction often leads minority groups to close ranks and insulate themselves. For instance, a large number of Jews and Blacks oppose intermarriage. Some Blacks are against transracial adoptions. Thus, both Blacks and Jews inadvertently feed the practice of surrogacy, by

119 See, e.g., HAROLD CRUSE, PLURAL BUT EQUAL 364-65, 369 (1987) (arguing that the fight for gender equality weakens the political and economic rights of African-Americans and denies a Black man the role of "man of the household"). Cruse favorably cites to the infamous Moynihan Report of 1965 that blamed Black women, specifically the many female-headed families, and the absence of male role models, for the socioeconomic problems in the Black community. Id. at 369.

Cruse is equally outspoken regarding Jews, discounting Jewish support for civil rights as serving Jewish self-interest. See, e.g., id. at 147. I believe he seriously misunderstands and underestimates the Jewish ethical imperative, which has always stressed a commitment to social justice.

120 See SCHNEIDER, supra note 11, at 35-36, discussing the exclusion of Jewish women as witnesses in religious courts, and the inability of Jewish women to initiate Jewish divorce proceedings or to count in the quorum needed for communal prayer. Women are disqualified from reciting some of the daily prayers. Id. at 35. In his morning prayer a Jewish male thanks a merciful creator for not having made him a woman. Id. Pogrebin recounts the pain she and other Jewish women have suffered in not being able to properly mourn and recite the Kaddish, the prayer for the dead, when her mother died. POGREBIN, supra note 11, at 42-43, 50-53.

121 See NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT 163-64 (1963). See also Fran Schumer, Star-Crossed, NEW YORK, April 2, 1990, at 35 (stating organized Judaism views intermarriage as a "blight on the tribe"). No Conservative or Orthodox rabbi will officiate at an intermarriage. Id. In 1991 various Jewish community leaders and scholars met in Los Angeles to discuss policies aimed at stemming the tide of assimilation and intermarriage. The Intermarrying Kind, NEWSWEEK, July 22, 1991, at 48. Golda Meir has also expressed her views on the subject: "It is intolerable that precisely now, when a Jewish state exists, the number of mixed marriages increases, meaning the number of Jews in the world decreases." Bourne, supra note 114, at 18 (quoting AKIVA ORR, THE UN-JEWISH STATE (1983)).

Even though more than twice as many Jewish men as Jewish women intermarry, Jewish women suffer from the negative attitudes about intermarriage more severely than men. SCHNEIDER, supra note 106, at 335. In addition, the mother is blamed if a child marries "out," because it was her responsibility to instill Jewish values in the children. Id. at 334.

However, marrying out represents a threat to survival for Blacks, particularly women. As of 1977, of the 125,000 intermarriages, three-quarters involved a Black husband and a white wife. DERRICK BELL, AND WE ARE NOT SAVED 208 (1987). The marital opportunities for Black professional women are also limited because a substantial number of successful Black men marry white women. Id. at 200. Moreover, because a high percentage of Black males are either in prison or addicted to drugs, and a relatively small number attend college or graduate schools, there are few Black males eligible for marriage. Id. Predictably, one study has suggested that Black women feel more threatened by interracial marriage than white women. See, e.g., Pamela Paset & Ronald Taylor, Black and White Women's Attitudes Toward Interracial Marriage, in PSYCHOLOGICAL REPORTS, Dec. 1991, at 753-54. For a thor-
Celebrating patriarchy and the continuity of racial/ethnic bloodlines out of a fear of genocide. Surrogacy is made possible because more privileged women oppress less fortunate women and one minority exploits another. We are all at times oppressors and capable of being victimized by false consciousness. But a discriminating ideology will not yield authentic minority empowerment.

We need to commit ourselves to an understanding of parenthood beyond genetics so that we can turn our backs on surrogacy and work together to improve the lives and to increase the choices of all people. Only if we admit to and go past our own prejudices will we be able to know each other and to effectuate change.

122 Through analysis of the declining proportion of married Black women, see Wilson, supra note 101, at 68.

One problem between Black and Jewish women is the high number of Black/Jewish intermarriages. More than 50% of the interracial marriages surveyed in New York involved a Jewish partner, most of whom were women. Schneider, supra note 11, at 339 (citing Black Jews in America: A Documentary with Commentary 122 (1978)).

Many Black men also disapprove of interracial marriages. Russell Adams, Chairman of Howard University's Department of Afro-American studies, stated that Justice Clarence Thomas's marriage to a white woman "is a sign of his rejection of the black community." See Laura Blumenfeld, The Nominee's Soul Mate, Wash. Post, Sept. 10, 1991, at F1. Marrying a white is seen as selling out to the white establishment. See Mark Mathabane, Mixed Couples Break Down Barriers: But Interracial Marriages Still Provoke Strong Opposition, Newsday, Feb. 24, 1992, at 35 (NEXIS). Morris F. X. Jeff, Jr., the former President of the National Association of Black Social Workers, has been an outspoken opponent of interracial marriage. See, e.g., Newsweek, June 10, 1991, at 46 (quoting Jeff as stating that a Black will be ridiculed by his own people for relating to his adversary).

123 At times we internalize oppression and assume the legitimacy of the existing power structures. See Freeman, supra note 1, at 322-23.