"O Wind, Remind Him That I Have No Child": Infertility and Feminist Jurisprudence

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"O WIND, REMIND HIM THAT I HAVE NO CHILD": INFERTILITY AND FEMINIST JURISPRUDENCE

Linda J. Lacey*

INTRODUCTION • 163
I. THE FEMINIST STORY OF PATRIARCHY AND REPRODUCTIVE TECHNOLOGY • 166
   A. Patriarchal Wish for Reproduction • 166
   B. The Brainwashed Mothers Theory • 171
II. THE FOCUS ON ALTERNATIVES • 174
   A. Adoption • 174
   B. Remedies for Causes of Infertility • 182
III. THE SUPERIORITY OF THE GESTATIONAL MOTHER THEORY • 184
IV. ARGUMENTS ABOUT SURROGACY • 188
V. THE COMMODIFICATION OF CHILDREN THEORY • 195
VI. RACISM AND ALTERNATIVE MEANS OF FORMING A FAMILY • 197
CONCLUSION • 203

INTRODUCTION

O wind of Tizoula, O Wind of Amsoud!
Blow over the plains and over the sea,
Carry, oh, carry my thoughts
To him who is so far, so far,
And who has left me without a little child
O wind! Remind him that I have no child.1

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1. Berber woman’s song, in Germaine Greer, SEX AND DESTINY 50 n.1 (1984) (citing Elizabeth Warnock Fernea & Basima Qattan Bezigan, MIDDLE EASTERN MUSLIM WOMEN SPEAK (1977)). Greer’s discussion of fertility concerns of women in the Middle East, Africa, and India refutes the perception that infertility is a predominantly Western, white, middle class concern. Greer, supra at 51 (commenting that “[t]he misery of the childless women in most preindustrial societies can hardly be exaggerated”). See also Martha Albertson Fineman, The Neutered Mother, The Sexual Family and other Twentieth Century Tragedies 218 n.38 (1995) (criticizing the perception of infertility as “a primarily white concern”); Barbara Omolade, Looking Toward the Future: Feminism and Reproductive Technologies, James McCormick Mitchell Lecture (Mar.
It is hard for me to imagine sadder words than the cry of the Berber woman. I am infertile and for a long period of my life, I believed that I was destined to remain childless. Like most infertile women, I spent countless hours trying to conceive, culminating in a painful operation after which I was told by my nurse that since I was 40, I was "too old to have children" anyway. When I began to try to adopt, I ran into new obstacles. There were so many things wrong with me: I wasn't Christian, I was too old and too feminist. Every aspect of my personal life was subject to intense scrutiny. As Patricia Williams describes the process: "I was unprepared for the fact that I too would be shopped for, by birth mothers as well as social workers, looked over for my age, marital and economic status, and race. All that was missing was to have my tires kicked."

My story has a happy ending. I finally found an independent lawyer and an adoption agency who accepted me as a prospective parent, and after several birthmothers changed their minds about relinquishing their babies, I was able to adopt two wonderful children who enrich my life in ways I cannot begin to describe.

I am writing this Article because as a feminist I am constantly surprised, and often angered, at the treatment of infertility in feminist jurisprudence. There is almost no discussion of infertility as a

17, 1987), in 37 BUFFALO L. REV. 203, 220 (1988/89) [hereinafter Mitchell Lecture] (stating that "the underdevelopment of the black working class is tied directly to the reproduction and development of the white middle class through reproductive technologies").


3. As open adoption, which permits birthmothers to select the adopting parents, becomes more common, the preference for younger parents becomes more pronounced, because most birthmothers are young and view 40-year-old women as old enough to be their own mother or grandmothers. See Nancy Gibbs, The Baby Chase, TIME, Oct. 9, 1989, at 86.

4. I was told by one attorney that he would not represent me because I had not changed my name when I got married. Many other attorneys and agencies demanded that I stay at home full time to take care of the child. When I told one attorney that my husband planned to be the stay-at-home parent, I was told that was unacceptable.

5. Patricia Williams, Spare Parts, Family Values, Old Children, Cheap, 28 NEW ENG. L. REV. 913, 915 (1994) [hereinafter Williams, Spare Parts].

6. The topics of alternative reproductive technology and surrogate parenthood have generated a great deal of literature in a variety of academic fields. Rather than attempting to summarize all of this literature, I will focus my analysis on works of authors who either self-identify as feminists or whose work embodies feminist methodology or ideology.
disability or as a painful experience for women. Instead, infertility only appears as a part of extensive feminist analyses of new reproductive technologies.7 Feminists have constructed a “grand theory”8 of infertility and new reproductive techniques that has little to do with reality. Much of the discussion of reproductive technology is written in highly abstract, philosophical terms,9 rather than in the more experiential, narrative style which characterizes much of feminist jurisprudence.10 The infertile woman is generally voiceless and invisible in the telling of this story; when she does appear she is dismissed or criticized. This Article is an attempt to begin dialogue which incorporates her perspective into the discussion.11

Throughout this Article I refer to specific schools of feminist thought, such as cultural feminism or radical feminism, when the ideas I discuss can be attributed primarily to that discrete group of feminists. On the other hand, I use the broader term “feminists” without a descriptive qualifier when the ideas I am discussing are shared by feminists from different groups.


11. As I discuss infertility in this Article, I will use the term to include women who are “socially infertile.” The phrase comes from Marjorie Schultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 314. This category includes women who are biologically able to conceive a child, but who lack a fertile male partner.
I. The Feminist Story of Patriarchy and Reproductive Technology

A. Patriarchal Wish for Reproduction

The majority of feminist authors who discuss artificial reproductive technologies argue that these procedures are bad for women. According to their analysis, the technologies reduce women to "mother machines," breeders for the convenience of men's patriarchal desire to reproduce themselves. As one typical author puts it, "In classic patriarchalism, the father is the parent . . . . Men have denied significance to women's unique bodily capacity, have appropriated it and transmuted it into masculine political genesis." Radical feminists argue that women are marginalized and used as guinea pigs by the male medical establishment. They believe that modern technology


14. Corea, supra note 7, at 312. Corea writes, "When reproductive engineers manipulate the bodies of female animals today, they are clear, blunt and unapologetic about why they are doing it. They want to turn the females into machines for producing 'superior' animals or into incubators for the embryos of more 'valuable females.'" Corea, supra note 7, at 312.


16. Many feminists premise this discussion on the assumption that the medical profession is dominated by men. See Corea, supra note 7, at 12–30. They also provide convincing discussions of outrageously sexist attitudes on the part of many men involved in reproductive technology. See, e.g., Corea, supra note 7, at 12–30; Ikemoto, The In/Fertile, supra note 9. Among her other examples, Corea describes an instance in which a doctor told a fertile woman with an infertile partner that he wanted to examine her. Without her consent or knowledge, he anesthetized her and injected her
has created a reproductive brothel, in which women's reproductive capacity is commodified and women's body parts are bought and sold. Ultimately, according to Andrea Dworkin, "[t]he new means will enable men—at last—to have women for sex and women for reproduction, both controlled with sadistic precision by men."

This picture of reproductive technology as the ultimate tool of patriarchy relies on inaccurate assumptions which permeate the discourse and make all the corollary arguments questionable. The initial problem with feminist theory in this area is the uniform usage of the term "reproduction" as the subject of the debate. Use of this term defines the exclusive goal of modern technology as an urge to duplicate oneself, an urge which may indeed have patriarchal and racial implications. The dialogue would sound markedly different if we redefined the goal as "having children." The urge to have children is very complex and not limited to a desire to see one's genetic makeup reflected in a child. People want children for a variety of reasons, selfish and not so selfish; "reproduction" is only one of those reasons.

If we begin to think in terms of "having children," instead of "reproducing," it is easier to see the basic error in the dominant feminist analysis: the explicit or implicit assumption that only men wish to

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17. See, e.g., Correa, supra note 7; Dworkin, supra note 13, at 181–88; Ruth Hubbard, in Mitchell Lecture, supra note 1, at 210.

18. Dworkin, supra note 13, at 188.

19. The feminist view of reproductive technologies has also been criticized by nonfeminists who do not share some of the fundamental feminist concepts of the nature of patriarchy. See Robertson, supra note 12, at 220–35. My goal in this Article is to offer a feminist counterstory, written from the viewpoint of one who begins at the same starting point as most of the authors I discuss.

20. For a discussion of the arguments regarding race and alternative conception methods, see infra Part V.

21. As a prospective adoptive parent, I had to constantly articulate my reasons for wanting children. Like many adoptive parents, I found it difficult to explain my desire to have children, even though the desire was very strong. The pressure to impress a third party made this task even more difficult. For a discussion of the argument that women's interest in having children is socially constructed, see infra Part I.B.

utilize assisted reproductive techniques.23 Barbára Omolade’s statement is typical: “Every patriarch wants to reproduce the son.”24

Despite the uniformity of this assumption, none of the literature cites any authority for the proposition that men desire children more than women do, and no significant studies exist to support this contention. In fact, I believe that the opposite is true; women constitute the majority of infertile people trying to conceive or adopt a child. Evidence indicates that women generally have a stronger desire for children than men, and infertile women are therefore more likely to pursue having children through new technologies or adoption.

A study performed with several hundred infertile men and women led the researcher to conclude that “infertility affects women’s lives to a larger extent than men’s.”25 Much of the extensive literature about infertility is aimed at a female audience.26 Stories about the pain of infertility usually are written from the woman’s perspective.27 There are also indications that men and women experience infertility differently: men are concerned that something is “wrong” with them, while women mourn their lost children.28

Additionally, far more single women than single men adopt children.29 While there may be several reasons for this phenomenon,

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23. See, e.g., Corea, supra note 7; Hubbard, supra note 17, at 237. Only a few feminists raise the possibility that women may be the primary people wanting to use the new technologies, and even they dismiss this possibility with the “brainwashed mother” argument. See infra Part I.B.


Additionally, there is a publishing house, Perspectives Press, which publishes books about infertility, new reproductive techniques, and adoption. The sales literature appears to be directed toward women. See the brochure on file at the Michigan Journal of Gender & Law.


28. One infertile woman writes, “It’s Thanksgiving and I cry again. Mourning my unborn child, not knowing if he would have had my husband’s curly hair or my big round eyes.” Harkness, supra note 25, at 18. See also Johnston, supra note 27.

29. According to the web site of the National Adoption Information Clearinghouse, only one out of every ten members of the Committee for Single Adoptive Parents, a na-
including obstacles to adoption faced exclusively by single men, this statistic suggests that women may generally want children more than men. In the context of foreign adoption (generally the only type of adoption in which prospective parents are allowed to choose the sex of their adoptive child) girls are in much greater demand than boys. While no one knows exactly why this is true, one of the most popular theories is that women are primarily the parties who want to adopt and women want daughters.

I have participated in adoption “workshops” in which prospective parents are required to discuss their reasons for wanting children, and it was clear to me that it was usually the woman who was most committed to the adoption. The adoption professionals I have spoken with agree that generally the prospective mother is the driving force behind an adoption.

The conclusion that having children is more important to women than to men is also supported by the strand of feminist theory that recognizes that women are more emotionally connected to their children than men are. Women spend much more time taking care of

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30. One information provider states, “Single men face even tougher scrutiny as they are asked intimate questions about their sexuality, motives, friends, and living arrangements. They may be qualified to parent and still be turned down.” Adoption Clearinghouse, supra note 29.


32. Interview with Ms. Beuerlee Einsing, Director of Education, Dillon International Adoption Agency, in Tulsa, Okla. It could be argued that I am right about adoption, but wrong about reproductive technologies. Adoption does not permit men to reproduce themselves, therefore it is not surprising that they are less interested in this process.

33. The connection between women and children has been extensively discussed in feminist theory. See, e.g., Fineman, supra note 1; Mary Becker, Maternal Feelings, Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN’S STUD. 133 (1992); Linda J. Lacey, As American As Parenthood and Apple Pie: Neutered Mothers, Breadwinning Fathers and Welfare Rhetoric, 82 CORNELL L. REV. 79 (1996) [hereinafter Lacey, As American As Parenthood]; Robin L. West, The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 WIS. WOMEN’S L.J. 81, 140 (1987). If existing children are more important to most women than to most men, it seems only logical that having a child would be more important to childless women than to childless men.

My belief that women are more connected to their children than men may seem to conflict with my rejection of the “biological feminist” emphasis on gestational motherhood. But my assertion is based on the undisputed fact that women are
their children than men34 and are more likely than men to want custody of their children after a divorce.35 Women are socialized to become mothers,36 while men are rarely socialized to become fathers.37

While I agree with mainstream feminists that many men do try to control women through the reproductive process,38 it is these men that pose the real threat to women’s autonomy, not reproductive technologies themselves. The technologies actually increase women’s autonomy because they permit women to have children without male partners.39 Artificial methods of conception offer lesbian women (and gay men) a previously unheard of opportunity to have children;40 an opportunity socialized from birth to be mothers and men are not. I have not yet decided whether I am convinced that women have biological differences that make them inherently more nurturing.

34. This is true regardless of whether women stay home with their children or work outside the home. See NANCY E. DowD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997) (demonstrating that in traditional families, women are, in essence, “single parent” caretakers of the children); ARLE HochSChILD & ANNE MACHUNG, THE SECOND Shift: Working Parents and the Revolution at Home (1989).


37. The traditional role of father has little to do with nurturing of children and everything to do with “breadwinning.” See Lacey, AS American AS Parenthood, supra note 33, at 99–100.

38. See Lacey, AS American AS Parenthood, supra note 33, at 106–08. I have argued elsewhere that the rhetoric of the so-called “Father’s Movement” masks a desire to force women into traditional subservient roles.

39. Feminists who argue for more regulation in the area of artificial conception might want to think very carefully about who will be actually making the desired regulations. Legislatures will likely be influenced by the current political insistence that the traditional nuclear family is the only desirable institution. For example, the state of Oregon is currently considering a law which would prohibit single women from using artificial insemination by donors (A.I.D.). See Lacey, AS American AS Parenthood, supra note 33, at 81. For an argument that restrictions on single women’s access to reproductive techniques are unconstitutional, see Linda J. Lacey, THE Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate, 22 TULSA L.J. 281 (1987) [hereinafter Lacey, Law of Artificial Insemination].

40. Lisa Ikemoto contends that “within the dominant parts of in/fertility discourses, lesbians and gay men are virtually invisible.” Ikemoto, The In/Fertile, supra note 9, at 1053. She does not discuss the possibility that many lesbian and gay parents who have used artificial insemination may prefer this invisibility, given the current homophobia affecting state legislatures. If it were widely known that lesbians use A.I.D. to conceive, for example, it might prompt moves to prohibit their access to the procedure.
they are taking in increasing numbers. As one commentator notes, "assisted reproductive technology possesses the potential to radically destabilize and disrupt the traditional conception of the family . . . ." This resulting disruption can only benefit women's autonomy.

B. The Brainwashed Mothers Theory

In the rare instances in which they discuss infertile women, feminists argue that the wish to have children is created by patriarchy and is essentially forced on women. Women are stigmatized by infertility, the theory goes, and made to feel worthless if they are childless. These feminists believe that the overemphasis on reproductive technology places a disproportionately high value on having children, and that women, barraged by messages urging them to reproduce, ultimately have no real choice in the matter. In a typical argument, Elizabeth Bartholet writes, "The current pursuit of IVF [In Vitro Fertilization] is largely the product of social conditioning that makes women think of themselves in terms of fertility and think of parenting in terms of biological parenthood." Other commentators contend

41. See, e.g., April Martin, The Lesbian and Gay Parenting Handbook: Creating and Raising Our Families (1993); Jill S. Pollack, Lesbian and Gay Families: Redefining Parenthood in America (1995); Ikemoto, The In/Fertile, supra note 9, at 1055 (noting that the current popular literature contains some references to a "lesbian baby-boom").


43. See, e.g., Corea, supra note 7; Dworkin, supra note 13; Pateman, supra note 15.

44. See Linda S. Williams, Biology or Society? Parenthood Motivation in a Sample of Canadian Women Seeking In Vitro Fertilization, in Issues, supra note 7, at 267 ("The fact that infertile women often do experience feelings of guilt or inadequacy over their supposed failure to fulfill this role expectation has been observed by many writers.").

45. See Lene Koch, The Fairy Tale As Model for Women's Experience of In Vitro Fertilization, in Issues, supra note 7, at 275.

46. For a critique of this approach, see Barbara Berg, Listening to the Voices of the Infertile, in Conflicts in Feminism, supra note 13. A related argument is that women are not told of the actual odds and expense of reproductive technology. See Elizabeth Bartholet, In Vitro Fertilization: The Construction of Infertility and of Parenting, in Issues, supra note 7, at 258 [hereinafter Bartholet, In Vitro Fertilization]. I completely agree with this criticism and with calls for regulations that would require more disclosure.

47. Bartholet, In Vitro Fertilization, supra note 46, at 254. This is not to deny the indisputable fact that messages about the joys of motherhood are dominant our culture. Bartholet gives a convincing example of an advertisement for an infertility clinic, which states, "Before you let go of the dream, talk to us . . . . There's no other perfume like it, the smell of a newborn . . . . Tender, soft, totally trusting, a joy all your
that “there are positive aspects of childlessness which are rarely mentioned, or are glossed over as selfishness.” Implicit in this type of statement is a suggestion that the infertile woman is fortunate to have escaped the trap of motherhood. As a result, infertile women are often dismissively told they should forget about having children. For example, feminist Ruth Hubbard suggests, “Some strong, deep, feminist consciousness raising might end up being far more therapeutic in the long run than broadening the scope of the technological fix.”

The question of whether women raised in a predominantly patriarchal society can ever act with true “free will” has generated a great deal of philosophical debate. Catharine MacKinnon argues that patriarchal culture is so universal and dominant that we cannot even imagine what our lives would be like without its influence. But just because the desire for children may be shaped by patriarchy does not make it unreal or unimportant. Regardless of the source of their wish for children, most women find having children is an extremely positive experience.

When infertile women speak about their experience, they focus on the children they want, not their failure to meet society’s expectations. One woman writes, “Infertility is a silent tragedy. How do you explain to someone that you had a rough night because there was no baby to keep you awake, that your house is too clean and there are no toys cluttering the floor? Would anyone understand that you cried over Pampers commercials?” Of course it is true that some women who are ambivalent about having children are pressured into maternity. However the mainstream feminist commentators’ focus on infertile women suggests that infertile women are more likely than fertile women to be brainwashed into having children against their own.” Bartholet, In Vitro Fertilization, supra note 46, at 255 (citing a fertility center advertisement in the Boston Globe).

49. In contrast, Elizabeth Bartholet takes issue with the pressure for women to have biological children, not the desire to parent in general. See Bartholet, In Vitro Fertilization, supra note 46.
52. HARKNESS, supra note 25, at 17.
Infertility provides a reluctant parent with a perfect excuse for childlessness. Women who persevere with artificial conception methods or adoptions are questioned and cross-examined about their desire to become parents and are necessarily highly motivated.

Some feminists argue that even if a subset of women thinks the new technologies will be beneficial to them, development of these procedures must nevertheless be restricted because their use harms the interests of women as a group. This argument relies on the premise that, in addition to serving the patriarchal wish for reproduction, alternative conception technology and adoption reinforce the stereotypical image of women as mothers. This argument is part of a continuing feminist debate about the desirability of emphasizing women’s unique role as mothers. While it is true that gender stereotypes can be harmful, the fear of an essentialized “Earth Mother” image seems unwarranted. Today, the image of the strident “feminazi” is more popular among antifeminists than the “Mommy” stereotype.

53. Most adoption agencies require prospective parents to discuss at length their reasons for wanting to become parents, a surprisingly difficult task fertile people can avoid. See Elizabeth Bartholet, Family Bonds: Adoption and the Politics of Parenting 65–69 (1993) [hereinafter Bartholet, Family Bonds].

54. One commentator notes, “Feminists critical of the new conception technology and certain surrogacy and adoption arrangements suggest misguided violation on the part of infertile women, a failure of will associated not with causing infertility, but with seeking solutions for it deemed hazardous to other women.” Margarete J. Sandelowski, Failures of Volition: Female Agency and Infertility in Historical Perspective, 15 Signs 58 (1990).


57. See Linda J. Lacey, We Have Nothing To Fear But Gender Stereotypes: Of Katie and Amy and “Babe Feminism”, 80 Cornell L. Rev. 612 (1995) (book review) [hereinafter Lacey, Nothing to Fear].

58. Lacey, Nothing to Fear, supra note 57, at 640. Leslie Bender states:

If stereotypes are going to be used against us, as they have been in the past, they will be so used regardless of what we say or do. Those who want to exercise their power by disadvantaging women based on stereotypes did so long before we celebrated women’s cultures and will do so long after, no matter which strategy we select in our struggle for justice for women.
II. The Focus on Alternatives

Another common theme of feminist criticism of reproductive technology is the argument that instead of concentrating on improving reproductive technology or making it more accessible to prospective parents, we should be concentrating on alternatives such as adoption or eradication of the causes of infertility.

A. Adoption

Many feminist authors argue that the emphasis on reproductive technologies detracts from the possibility of adoption. Ruth Colker’s statement is typical: “I wonder why people engage in IVF at all . . . . There are always children available to be adopted. . . . Does the use of IVF express a disrespect for the lives of poor, disabled, and often minority children who are available for adoption?” Although I agree with Elizabeth Bartholet that adoption is too often presented as a “choice of last resort for infertile . . . women,” I am concerned that advocates of adoption gloss over the reality of its difficulties. Each year in the United States there are approximately fifty thousand infants available for adoption, but over two million prospective parents waiting to adopt. I would certainly advise infertile women who have the chance to adopt healthy infants to do so, rather than suffer through painful infertility treatments that are likely to be unsuccessful. But that is not a realistic option for many infertile women; not everyone is as lucky as I was. I was able to find the lawyer who placed my first child because I was a “fellow” professional. In adopting my second child, I was fortunate to live in a city with an agency that would accept clients over forty. Most adoption

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59. The most prominent advocate of this viewpoint is Elizabeth Bartholet. See, e.g., Bartholet, Family Bonds, supra note 53, at 24–38.

60. Ruth Colker, Pregnant Men Revisited or Sperm is Cheap, Eggs Are Not, 47 Hastings L.J. 1063, 1080 (1996).


63. The success rate of infertility treatments is very low. One authority puts it as less than 15%. See Naomi Cahn, Family Issue(s), 61 U. Chi. L. Rev. 325, 341 (1994).
agencies and lawyers are looking for a “Leave It To Beaver” family.⁶⁴

⁶⁴ See Kleiman, supra note 2, at 344. Most adoption professionals state that they are looking for relatively young, financially secure, well-educated, married couples. See Kleiman, supra note 2, at 344. In addition, many adoptive parents must now meet the ideal criteria of birth parents as well as agencies, since the increasing practice of open adoption permits birth parents to select prospective adoptive parents. See Lois Melina & Sharon Kaplan Roszia, THE OPEN ADOPTION EXPERIENCE 50–51 (1993).

Even “ideal” couples face agonizing waits for a healthy infant. The following poem describes the process from the perspective of a social worker:

THE INTAKE INTERVIEW

A closet size interviewing room, windowless and gray. A middle-aged couple steps in and sits down. They both look at me, silent, expectant, hopeful. They want a baby.

The room is warm. Little beads of sweat are forming on the man’s forehead. He would like to comfort his wife. After a minute he puts his hand over hers in her lap.

The woman is slight and looks even smaller as she shrinks in toward her husband. She begins to shred a Kleenex with her fingers. The ghost of her unconceived child stares out at me from behind her eyes.

They have waited to see me for over two years. I feel weary for these people. I know their story already. Still, we move through the desperate routine like three haggard dancers.

They unravel the most private threads of their lives to me, quivering with the importance of this hour. It is almost noon. I am hungry. I am thinking that I know enough of these people. I am ashamed at not having more feeling for them.

The room seems warmer. The man unbuttons his jacket. They now offer their professional jobs, their cultured hobbies, their gardened suburban home. “Just look,” they are saying, “See how worthy we are, how deserving.”
Women who are single, or divorced, or who have had psychological problems in their past, find it difficult or impossible to adopt. Openly lesbian women or gay men also find adoption unlikely and in some states even illegal.

Many commentators acknowledge the difficulty of adopting healthy infants, but contend that it is necessary to restrict access to

"See how long we have waited."
"Look," I say back (in so many words)
"I would give you a dozen babies if I could."

But I have little to offer.
There are no babies now,
I tell them.

I tell them that I will see them again in another year. We will have some more interviews.
They will fill out some more forms.
Maybe there will be a baby for them then.

The man's hair recedes a little further.
The woman feels another line sink into her forehead. For a moment they are silent, staring past me at patterns on the wall.

When they leave
the door clangs behind them
Like an echo in a cavern.

Marilee Richards, The Intake Interview, in Perspectives on a Grafted Tree 27-29 (Patricia Irwin Johnston ed., 1983) [hereinafter Perspectives].

65. Although state laws generally permit adoption by single parents, individual agencies often make marriage a requirement for placement. See supra note 64. Currently, California's Department of Social Services is considering a proposed regulation, which, if adopted, would effectively bar unwed couples from adopting. See Melisa C. George, Tossed Salad: Diversity Considerations in Adoptions, 21 Law & Psych. Rev. 197, 215 (1997).

66. See Trembly, supra note 62, at 372 n.7.

67. Florida and New Hampshire explicitly bar any adoptions by gay men or lesbians. See Kleiman, supra note 2, at 344–45. The Florida statute has survived a challenge in Cox v. Florida Department of Health & Rehabilitative Services, 656 So. 2d 902 (Fla. 1995). Additionally, in states where agency policy requires that adopting couples be married, gays and lesbians are effectively eliminated from the process. See George, supra note 65, at 215.

68. See, e.g., BARTHOLEY, FAMILY BONDS, supra note 53, at 73–74; Colker, supra note 60, at 1080.
reproductive technologies, such as IVF and surrogacy, in order to encourage people to adopt hard-to-place children.\(^6\) Martha Field argues, "Children once considered to be unadoptable in this country are finding adoptive homes these days, and the surrogacy system threatens to reverse that trend. This would be a real social cost of promoting surrogacy."\(^7\) These commentators seldom discuss the fact that most unadoptable children are either children with extremely serious, usually fatal illnesses such as AIDS, or older children who generally have serious emotional problems.\(^8\) While adopting these children can be enormously rewarding, it requires a tremendous amount of emotional and financial commitment.\(^9\) Commentators never fully explain why only infertile people should be forced to make that commitment in order to have children.

Imagine a country in which a small percentage of the citizens who are blind perform a task which no one else wants to do. When the means to cure blindness appears, the sighted citizens argue that the cure should not be given to blind people, for then there would be no one left to perform the difficult task. Such an argument seems unthinkable, but it is disturbingly similar to the arguments for restricting access to cures for infertility.

Forcing infertile people to adopt hard-to-place children by removing alternatives is not only unfair to the parents, it is also unfair to the children.\(^10\) Some experts challenge the presumption that adoption is the best alternative for hard-to-place children, especially when it results in separating siblings from each other.\(^11\) In addition, numerous studies show

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10. See, e.g., Adoption Law and Practice (Joan Hollinger ed., 1990) [hereinafter Adoption Law]; Blair, supra note 72; Farmer, supra note 71.

that adoptions of these children are often disrupted when "reluctant" parents realize they are not equipped to handle the serious emotional problems of older children. These interruptions take an additional toll on the children. Unless there is careful screening of the prospective parents, hard-to-place children are at greater risk for child abuse.

The goal must be not only to find homes for hard-to-place children, but to place them with families that want them. This goal can be better met by adjusting existing policies which provide financial and other types of aid to adopting parents, rather than restricting reproductive technologies and leaving infertile parents with no other options.

For some feminist commentators, even adoption is not a desirable alternative for infertile women. While most feminists ignore the subject, the perspectives of those who do write about adoption range from approval to ambivalence to outright hostility. Our Bodies, a classic feminist sourcebook on women's health, presents a hostile image of adoption from the perspectives of both infertile women and birth mothers. In its section on infertility, the book disproportionately stresses the negative aspects of adoption, giving the benefits of adoption for infertile women only cursory treatment.
The book's discussion of options for women facing unwanted pregnancies presents adoption in an even less favorable light, describing it as an alternative to abortion\(^4\) pushed by right-wing fundamentalists.\(^5\) The book presents the view that birth mothers coerced into giving up babies for adoption suffer a "'cruel, but regrettably usual, punishment that can last a lifetime,' while adoptive mothers attempt to keep birthmothers in the role of brood mares."\(^6\)

*Our Bodies* is not alone in its unsympathetic treatment of adoptive parents. Phyllis Chesler presents an even nastier picture of adoptive parents, portraying them as spoiled, selfish people,\(^7\) many of whom "have lost their moral bearings in their pursuit of a child."\(^8\)
It is understandable and commendable for feminists to focus on the suffering of birthmothers in the adoption process. Birthmothers are often poor, young, and single, women who are indeed vulnerable to exploitation. But a true feminist analysis should also incorporate the perspectives of adopted children, many of whom experience adoption as a chance to belong to a loving family, and of adoptive

89. For a moving description of the experience of birthmothers written by a birthmother herself, see Maureen A. Sweeney, *Between Sorrow and Happy Endings: A New Paradigm of Adoption*, 2 Yale J.L. & Feminism 329 (1990). Ironically Sweeney is not nearly as critical of adoption as some non-birthmother feminists; the primary thrust of her article is toward reforming adoption, not abolishing it.

90. Some feminist commentators view encouragement of adoption as an attack on single mothers. While I agree that our society is outrageously hostile to single mothers, I think the primary goal of conservatives is to force single mothers into marrying, not into relinquishing their children for adoption. See Lacey, *As American As Parenthood*, supra note 33, at 91–108.

91. An example of this perspective is the work of Mary Anne Cohen, a birthmother who is active in CUB. She writes:

I was afraid
Because I swallowed lies—their bitter taste
Remains, taints the years, poisons silence . . .

Because
I was only Following Orders, only
Being what was wanted,
A nice, sweet, Catholic, obedient, passive
Female Fool—

I was afraid
To trust my heart, my guts, love-bond
To say No.
To defy, refuse to comply
with what my beaten soul knew to be
Unnatural Crime—
Denial of Feeling, of Blood, of Truth
Severance
Of sacred tie.

Mary Anne Cohen, *Confession, in Perspectives*, supra note 64, at 36–37. But see Sweeney, supra note 89 (presenting the perspective of a birthmother who believes the decision to relinquish her child was the right choice for her).

92. This poem by an adopted child exemplifies that perspective:

You chose me to be your child
And took me when others could not care for me
You cherished the life I had been given
By someone unable to nurture me
You were willing to feed me, clothe me, shelter me
Most of all you gave me someone to belong to
parents, who are not exploitative monsters. As open adoption becomes more common, many adoptive parents remain in touch with

You sought me out and became my parent
You wanted me—you needed me—and I needed you
You talked to me, read to me, hugged me
Kissed me goodnight and let me dream with you.

You helped me to grow
You were the tooth fairy, Santa Claus, the Easter Bunny
You were there with band aids and medicine too
At birthday parties, picnics and holidays
Trips to the park, the library, the zoo
You were at school plays, at camporees and graduation
I had you to walk and talk with
Sometimes you went without to give to me
You always shared—you always cared
You chose me and gave me identity, pride and family
You gave me your name—you are my parent.

Virginia Cain, *The Chosen One*, in *PERSPECTIVES*, supra note 64, at 133.

I know many adoptive parents who think constantly about our children’s birthmothers and recognize the enormity of the sacrifices they have made. The following poem captures this perspective:

It's my child's birthday today
He just went dashing by me
His eyes are sparkling with the excitement
only meant for today
Presents, kisses, hugs, cake, ice cream—
It all seems so natural
It's a day for looking back and looking forward.

It's my child's birthday today
But there's something very different
happening inside of me
This should be a day of complete joy
A day for thanksgiving
But I'm stopped in the midst of all
this excitement
I'm stopped because my thoughts are with
“someone” else for a time.

It's my child's birthday today
I have no memories of his life growing
inside of me and fighting to be released
I have no memories from the beginning months
of his life.
Another “someone” was there
Another "someone" suffered for my joy
the child’s birthparents and send pictures and reports of the child to the birthmother. Many adoptive parents actively support their children’s search for their biological parents. As one expert writes, “Adoption can be a life-enhancing experience for all triad members; or it can be a negative and embittering choice. There are no absolutes in adoption, no guaranteed reactions, no universality of needs and feelings.”

B. Remedies for Causes of Infertility

Other feminist commentators argue that infertility has social causes which can be remedied and that addressing infertility in conjunction with broad societal treatment of women and people of color

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It’s my child’s birthday today
But “someone” somewhere is feeling emptiness inside
I wonder if she is wondering—
Wondering who he looks like
Wondering how big—how small
Wondering if he laughs much
Wondering if he will wonder someday, too.

It’s my child’s birthday today
And in the midst of this blessed day
that was given to me
I have a prayer
Oh, God that I may never forget that “someone”
suffered so much to give life to my child.
That “someone” loved my child so very much in that she gave him the right to live. May I never forget for a moment and especially now, today, to offer a prayer of thanks for that “someone”, and that you, dear God, can always be there by that “someone” to help her through the hurts she will have when she stops to think that today is “my child’s birthday.” Amen

Sue Westrum, A Birthday, in PERSPECTIVES, supra note 64, at 92–93.

94. If the adoption is an open adoption, all parties may know of each other’s identities, and in some situations the birthmother may remain in contact with the child. Even in more traditional adoptions, birthmothers generally are given profiles of information about adoptive parents and select the parents they want for their child. See, e.g., MELINA & ROSZIA, supra note 64, at 223–30.

95. See Linda Babb, Divided We Fall, ADOPTIVE FAMILIES, Mar./Apr. 1995, at 56–57.

should be our primary focus.97 These commentators contend that since techniques such as IVF are primarily available to middle class white women,98 we should concentrate on nonclassist remedies that will help everyone, such as providing better care after childbirth and abortion and removing environmental and occupational conditions which may cause sterility.99 Laura Purdy argues “[d]e-emphasizing IVF to concentrate instead on those social factors is therefore not to abandon infertile women, but rather to take a different approach to the problem. Already infertile women may lose out, but those who would have become infertile due to social factors will benefit.”100

I completely agree that programs to help reduce the root causes of infertility are desirable. But the argument that our society must choose between alternatives creates a false dichotomy. Purdy states we must choose between helping people who currently suffer from infertility, and developing programs to prevent it, but she never explains why.101

Most of the money to develop and use artificial conception comes from private sources;102 the money to remedy social causes of infertility will need to come from the government.

Infertility is not limited to the wealthy, but affects people of all classes and races.103 The head of a Planned Parenthood clinic writes:

97. See, e.g., Pateman, supra note 15 (discussing patriarchal use of female reproductive capacity together with prostitution and sexual slavery); Omolade, supra note 1, at 249–55 ( situating infertility in the social context of racism and sexism); Nadine Taub, Surrogacy: A Preferred Treatment for Infertility, 16 Law Med. & Health Care 89 (1988).

98. See Dorothy E. Roberts, Race and the New Reproduction, 47 Hastings L.J. 935 (1996) [hereinafter Roberts, Race]. After documenting her contention that very few black women use alternative conception methods, Roberts concludes that “Black women in particular would be better served by a focus on the basic improvement of conditions that lead to infertility, such as occupational and environmental hazards, diseases, and complications following childbirth and abortion.” Roberts, Race, supra at 948. For a response to Roberts, see Rao, supra note 42, at 952–56 (calling for a constitutional analysis of reproductive technology).

99. See, e.g., Taub, supra note 97.


101. See Purdy, supra note 100, at 223–24.

102. Most medical experiments in the area of artificial conception are funded by private foundations. The actual use of the methods themselves is, of course, funded by the patients, usually without insurance compensation.

103. Infertility increases with age, which should be of particular concern to feminists, since women who pursue careers are more likely to postpone childbearing until they are older. Some right-wing commentators portray infertility as the cost women have paid for feminism. Carol Sanger describes this attitude as saying, “serves you right” to
There is a widespread belief that only upper-middle class, professional people have fertility problems. This is simply not true. Many low-income people who do not have medical insurance come to our clinic seeking treatment. They desperately want to have a child, but are without financial resources. I think this segment of the infertility population is largely ignored and forgotten.¹⁰⁴

Restricting reproductive technologies in favor of hypothetical, long-run solutions, would effectively mean turning our backs on the people who need help the most. If insurance companies were required to provide coverage for infertility treatments such as IVF,¹⁰⁵ then poor women would be able to use the techniques.¹⁰⁶

III. The Superiority of the Gestational Mother Theory

Certain aspects of cultural feminism have been described as “biological feminism,” a theory which emphasizes women’s capacity to bear children as part of their essential nature.¹⁰⁷ A few proponents of this genre seem to suggest that a child must be biologically connected to its mother for the mother-child bond to be real or


¹⁰⁴. HARKNESS, supra note 25, at 42.

¹⁰⁵. Many medical companies exclude any form of assisted reproduction from their coverage. See HARKNESS, supra note 25, at 39. At least ten states have passed legislation regarding insurance coverage for infertility treatments, but insurance companies continue to resist extending their coverage, despite an estimate that infertility expenditures account for less than one percent of total health care costs. See HARKNESS, supra note 25, at 41.

¹⁰⁶. Elizabeth Bartholet argues strenuously that we should oppose state laws which would require insurance companies to cover infertility treatments, since such coverage would “subsidize” infertility techniques at the expense of adoption. See BARTHOLET, FAMILY BONDS, supra note 53, at 211–17. This argument appears to be at odds with her professed concern for lower-class women, who will be disproportionally affected by lack of insurance coverage.

¹⁰⁷. See, e.g., Patricia Cain, Feminism and the Limits of Equality, 24 GA. L. REV. 803, 837 n.128 (1990). This description is often applied to the works of Robin West. See, e.g., Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1 (1988). In contrasting men’s and women’s experience of autonomy, West gives as her primary example women’s experience during pregnancy. This has led to criticism that she has created an “essential” earth-mother woman.
meaningful. The argument of "biological feminists," that the gestational mother's claim of motherhood is superior to anyone else's, supports a general conclusion that contested surrogacy situations should be resolved in favor of gestational mothers. In the adoption context, this approach favors the rights of the biological mother.

Naomi Cahn suggests that the feminist jurisprudence sameness/difference debate can be played out in the context of adoption and child custody. She suggests that since "difference theorists celebrate women's capacity for intimacy and bonding as distinct from those of men," difference feminists will support the rights of biological parents; sameness feminists, on the other hand, "emphasize the capacity of all parents for nurturing," and therefore are more sympathetic to nonbiological parents. Cahn's analysis provides an accurate overview of the current feminist literature. However, there is a third possibility: the recognition that mothers are generally closer than fathers to their children applies to all mothers, not only gestational mothers.

A classic example of the biological feminist approach is the work of Marie Ashe. In her article about surrogacy, Ashe states that dialogue about surrogacy has been dominated by "legal discourse that fails to recognize certain experiences that, for many women, are constitutive of knowledge—perhaps of truth—and of personhood." She

108. See, e.g., Ashe, Law-Language, supra note 9, at 547–57; Barbara Katz Rothman, Daddy Plants a Seed: Personhood Under Patriarchy, 47 Hastings L.J. 1241, 1247 (1996) [hereinafter Rothman, Daddy Plants a Seed]; West, supra note 33, at 140.
109. See, e.g., Ashe, Law-Language, supra note 9, at 547–57; Field, Reproductive Technologies, supra note 70, at 1594–96; Rothman, Daddy Plants a Seed, supra note 108, at 1244–46. This argument is made even when the gestational mother is not the genetic mother. Sociologist Barbara Rothman states that the genetic tie is associated with patriarchy, while in a mother-based system "the blood tie is the mingled blood of mothers and their children." Rothman, Daddy Plants a Seed, supra note 108, at 1245.
110. See Cahn, supra note 63, at 334–35. Cahn provides a sophisticated analysis of different feminist perspectives on adoption.
111. See Cahn, supra note 63. For an overview of this debate, see, for example, Joan C. Williams, Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory, 1991 Duke L.J. 296.
112. See Cahn, supra note 63.
113. Cahn, supra note 63, at 333.
114. See, e.g., Becker, supra note 33, at 135–42.
115. Ashe, Law-Language, supra note 9, at 525. More specifically, she asserts that medical, contractual, and law and economics discourse has dominated the discussion. Ashe's article was written in 1988; she might not make the same statement today with the rise of feminist discussion of the issues.
calls for narratives from women, a call I would normally applaud. However, her idea of dialogue is limited to "women who have, in [their] own bodies, experienced maternity." These apparently are the only women whose voices count, who might have anything to contribute.

Although she dismisses infertile women as participants in the discussion she envisions, Ashe does purport to address their situation. She divides women into two groups—those who have experienced "equilibrium" by bearing children through their bodies and those who have not. Women who cannot have children through the traditional biological process, according to Ashe, "establish relationships with children through acts of cultural structuring." Although they can never be real mothers because they have not experienced pregnancy, they can, through a "cultural construct" became sort of inferior, second-class parents who "participate in the continual process of bonding and separation that defines all parent-child relationships." Later, in discussing non-gestational mothers, Ashe states "[w]hile such 'parenthoods' never rise—separately or in conjunction with each other—to the level of maternity asserted by a woman whose body has actually constituted the child's developmental process, each may—to the degree it does not contradict the child's well-being—deserve some respect." The relationship of the non-biological mother to the child is compared to that of "adult lovers—being characterized predominantly by desire," while the superior "intimacy of the child and mother—in which the maternal body wholly surrounds, contains and nourishes the child's whole being . . . can be characterized as exceeding the intimacies of adult loves."

Every time I try to summarize this theoretical nonsense, I feel an almost overwhelming sense of rage. The suggestion that I and other

116. Ashe, Law-Language, supra note 9, at 526.
117. Similarly, Ashe writes, "The self-accounts of mothers and of all women—pregnant, birthing, aborting, suffering violations or growing in power—constitute utterances closer to the reality of women's experiences than does any formulation of law or of medicine." Ashe, Zig-Zag Stitching, supra note 9, at 382. Apparently, the accounts of infertile women do not constitute "reality" in Ashe's world.
118. See Ashe, Law-Language, supra note 9, at 545.
119. Ashe, Law-Language, supra note 9, at 545.
120. Ashe, Law-Language, supra note 9, at 545.
121. Ashe, Law-Language, supra note 9, at 558.
122. Ashe, Law-Language, supra note 9, at 551.
123. Ashe, Law-Language, supra note 9, at 551.
non-gestational mothers have only constructed ourselves as mothers is both absurd and insulting. \textsuperscript{124} Since the birth of my children, I have engaged in the same activities as any other mother. I have changed their diapers, cared for them when they were sick, sung them lullabies, driven them to soccer and voice lessons, shared their triumphs and defeats, and loved them with a love I cannot even begin to describe. I do not just imagine that I am Elisabeth and Michael’s mother, I AM their mother.

I do not deny that pregnancy provides the first instance of intense bonding with a child. \textsuperscript{125} However, there are many experiences that contribute to this bonding, most of which are not unique to gestational mothers. I am also aware that the relationship between adoptive parents and children can pose unique problems, and that many adult adoptees describe themselves as “incomplete” or “unfulfilled” because of lack of contact with their birthmothers. \textsuperscript{126} However, the adoption literature I have read indicates that it is most often the genetic parental ties the child seeks, not the birthing ties. \textsuperscript{127} Adoptees speak of the need to find someone “who has my eyes, my love of basketball,” not the one who bore them in her womb. \textsuperscript{128} If these accounts are representative, then it is the genetic mother who has the strongest claim to the real bonding relationship. Yet Ashe is equally dismissive of genetic mothers who are not gestational mothers, describing their contribution as “minimal.” \textsuperscript{129}

\textsuperscript{124} It might be argued that Ashe’s article, which is about surrogacy, does not apply to adoptive mothers like myself. However, her emphasis on the supremacy of the gestational mother’s bond with the child clearly applies to adoptive parents as well. \textit{See, e.g.}, Ashe, \textit{Law-Language}, \textit{supra} note 9, at 544–59.

\textsuperscript{125} Many of my friends who have experienced pregnancy disagree with Ashe’s idealized account of the pleasures of the condition.

\textsuperscript{126} \textit{See, e.g.}, Lois Russek Melina, RAISING ADOPTED CHILDREN (1986).

\textsuperscript{127} \textit{See, e.g.}, PERSPECTIVES, \textit{supra} note 64; John Triselliotis, IN SEARCH OF ORIGINS 92–108 (1973).

\textsuperscript{128} One adoptee writes in a poem to her birthmother:

\begin{quote}
And now do you ever wonder like I do...
If my eyes are like yours?
Nearsighted? Lapis blue?
Are you thin like me?
And is the little finger on both your hands
Just a bit crooked like mine?
\end{quote}

Sue Walker, \textit{To Mama}, in PERSPECTIVES, \textit{supra} note 64, at 118.

\textsuperscript{129} Ashe, \textit{Law-Language}, \textit{supra}, note 9, at 548. Ashe views the contribution of the genetic mother as even less significant than that of the contractual mother. \textit{See Ashe, Law-Language, supra} note 9, at 548.
If Ashe’s analysis were correct, then anyone who does not experience life through the traditional biological processes can only construct an experience. For example, Ashe’s logic suggests that lesbians who do not make love the traditional biological way have only constructed themselves as lovers.\footnote{130}

The privileging of the relationship of the mother and child in the womb is also problematic for pro-choice feminists.\footnote{131} An emphasis on the strength of the bonds formed between unborn children and the gestational mother could be used to make the point that pro-life advocates have been making all along—that from the moment of conception, fetuses are equally capable of thought and emotion as born babies. Pro-choice feminists generally contest this argument,\footnote{132} and often contend that it is the live, born child who is most deserving of society’s protection. Yet, the cavalier dismissal by biological feminists of the ties children form with their non-gestational mothers after birth belies this assertion.

IV. ARGUMENTS ABOUT SURROGACY

Consistent with biological feminists’ focus on gestational mothers, much of feminist literature on surrogacy focuses primarily on the exploitation and autonomy of the surrogate, gestational mother, ignoring and even condemning the needs of the infertile.

Many feminists argue additionally, that the emphasis on a genetic tie is simply another example of patriarchal domination. As Barbara Rothman puts it:

In a patriarchal system, when people talk about blood ties, they are talking about a genetic tie, a connection by seed. In a mother-based system, the blood tie is the mingled blood of mothers and their children: children grow out of the blood of their mothers, of their bodies and being... The maternal tie is based on the growing of children; the patriarchal tie is based on genetics, the act of impregnating.

\textit{Rothman, Recreating, supra note 7, at 34; see also Ikemoto, The In/Fertile, supra note 9, at 1025–27.}

\footnote{130} I am not suggesting that Ashe would make this argument; in fact, I am sure she would strongly disagree with it. However, her natural/unnatural parenthood dichotomy is disturbingly reminiscent of the homophobic statement that gay lovemaking is “unnatural.”

\footnote{131} The vast majority of women who self-identify as feminists are pro-choice, including most of the authors I have discussed. \textit{See, e.g., Corea, supra note 7, at 238; Ashe, Zig-Zag Stitching, supra note 9, at 383.}

\footnote{132} \textit{See, e.g., Colker, supra note 60, at 1067; Williams, Gender Wars, supra note 55, at 1595–1623.}
woman. The traditional form of surrogate motherhood, exemplified in the Baby M case, is a situation where a man artificially inseminates a woman, who becomes pregnant and bears a child. Thus she is both the gestational and genetic mother of the child.

As technology has advanced, surrogacy relationships have become more complex. For example, in a California case a genetic mother was unable to carry a child to term. Her eggs were implanted in the womb of another woman, who was the child's gestational mother. It is also possible to have scenarios where three separate mothers are involved—intentional, genetic, and gestational.

Surrogate parenting may appear at first glance to be a classic example of patriarchal domination of women. Even commentators who might acknowledge that women are more eager than men to use A.I.D. or IVF, point to surrogacy contracts as clear cases of men wishing to reproduce themselves. Much of the relevant literature reduces the complexity of surrogate relationships to a dyad—the man wishing to duplicate his genes versus the gestational mother, who is used as a vessel for his desires. The third party—the woman whose

133. Most feminists object to the term "surrogate mother," arguing that it implies the gestational mother is not the child's real mother. See, e.g., Chesler, supra note 81, at 8–9, 51–54; Ashe, Law-Language, supra note 9, at 546–47, 559.

134. In re Baby M, 537 A.2d 1227 (N.J. 1988). The court in the Baby M case held that the surrogate contract was invalid, because it was a form of baby-selling and generally violated public policy. However, the court eventually awarded custody of the child to the biological father, rather than the surrogate mother. See In re Baby M, 537 A.2d at 1234.


136. See Johnson, 851 P.2d at 778. After the gestational mother refused to relinquish her claim to parental rights, the court was forced to determine which woman should be considered the child's legal mother—the genetic mother or the gestational mother; the court ultimately awarded custody to the genetic parents. It stated that the woman who intended for the child to be conceived was the appropriate person to be considered the mother. This case has been the focus of many feminist critical race theorists, because the surrogate mother in the case was black. See infra notes 195–201 and accompanying text.

137. For a thorough discussion of the possibilities of reproductive technology, see Robert- son, supra note 12, at 97–145.

138. See, e.g., Corea, supra note 7, at 3–4, 288–317; Field, Surrogacy Contracts, supra note 69, at 7–8, 16–17.
infertility made it necessary for her partner to turn to a surrogate—is generally invisible.¹³⁰

Both of the underlying assumptions regarding non-gestational parents are too simplistic to be accurate. Many infertile women, far from being mute bystanders, may see surrogate motherhood as a chance to have the children they desire. Moreover, if men were really singularly obsessed with reproducing themselves, they could simply take the Henry VIII approach, replacing their infertile partners with new women able to give them heirs.¹⁴²

Literature about surrogacy focuses almost exclusively on the surrogate mother. Her perspective is the center of the feminist debate about the desirability of enforceable surrogate contracts. Many feminists argue strongly that surrogacy is classist and racist, because of their belief that surrogacy arrangements allow poor women to be exploited by financially secure women and men.¹⁴₃ They also argue that a woman cannot possibly make a decision about whether to give up her baby until after the child is born.¹⁴⁴

Not all feminists agree with these theories. A well-developed counterargument among liberal feminists states that women are in fact empowered by the freedom to make contracts.¹⁴⁵ These feminists see

¹³⁹ Of course, every surrogate parenting case may not have a third party. A "socially infertile" man without a partner, especially a gay man, may want to use the procedure. But to date, the most common cases of surrogacy involve married couples where the wife is infertile.

¹⁴⁰ When the intending mother is discussed at all, it is usually in connection with the biological father. For example, Marjorie Schulz writes, "It is less frequently noted . . . that if specific performance is denied where a surrogate refuses to surrender the child, an analogous loss is sustained by the father and indeed, by the adoptive couple." Schulz, supra note 11, at 366. Ironically, the only work I have found which discusses invisibility refers to the surrogate mother. Review, The Invisible Woman, 108 Harv. L. Rev. 953 (1995) (reviewing John A. Robertson, Children of Choice: Freedom and the New Reproductive Technologies (1994)).

¹⁴¹ True, beheading is no longer an option, but unilateral, no fault divorce is nearly universally available.

¹⁴² Some people might argue that this is exactly what a biological father is doing with a surrogate mother, but it is the prospective father's desire to stay with the woman he married that precipitates the need for the surrogate mother.

¹⁴³ See, e.g., Field, Surrogate Motherhood, supra note 69, at 25–32; Ikemoto, The Infertile, supra note 9, at 1037–41.

¹⁴⁴ See, e.g., Chesler, supra note 81, at 109–14; Field, Surrogate Motherhood, supra note 69, at 69–70; Ashe, Law-Language, supra note 9, at 545–46.

attempts to "protect" surrogate mothers as paternalistic, reinforcing stereotypes of women as overly emotional and unable to make rational business decisions. Additionally, this argument criticizes the emphasis on the mother-child connection as one that "reifies a woman's role as biological mother, treating it as the one role that is of the essence."

Each approach is incomplete. The liberal theory is flawed by its failure to understand the strength of the bond the gestational mother may feel toward the child she has borne, but the "surrogate as the only victim" approach is also flawed, by its failure to understand the strength of the bond the intentional mother feels toward "her" child. Elizabeth Kane, one of the first surrogate mothers, provides a more complete view of the complex situation: "[S]urrogate motherhood is nothing more than the transference of pain from one woman to another. One woman is in anguish because she cannot become a mother, and another woman may suffer for the rest of her life because she cannot know the child she bore for someone else."

While studies seem to repudiate Kane's assumption that every surrogate mother feels the kind of pain she describes, her statement at least recognizes the anguish of the infertile prospective mother. In contrast, most surrogacy discussions that mention the infertile woman depict her in an extremely negative light. For example, I have yet to see a sympathetic portrayal of Elizabeth Stern, the prospective adoptive mother in the infamous Baby M case. She is

146. See Andrews, supra note 145, at 11-94; Shaley, supra note 145, at 120-23.
147. Schultz, supra note 11, at 384.
148. Elizabeth Kane, Birth Mother: The Story of America's First Legal Surrogate Mother 275 (1988).
149. According to Lori Andrews, only one percent of surrogate mothers regret their decision. See Jean M. Sera, Surrogacy and Prostitution: A Comparative Analysis, 5 Am. J. Gender & L. 315, 324 (1997) (citing Lori B. Andrews, Surrogate Motherhood: The Challenge for Feminists, 16 Law Med. & Health Care 76 (1988)); see also Daniel Goleman, Motivation for Surrogate Moms Ranges from Guilt to Gratitude, St. Petersburg Times, Jan. 25, 1987, at 1F (noting that fewer than one in one hundred surrogate mothers are believed to refuse to have given up their babies and that only one out of ten surrogate mothers requires therapeutic counseling after relinquishment).
151. In contrast, much of the feminist literature on the subject of the Baby M case is devoted to defending Mary Beth Whitehead. I do not mean to suggest that this
consistently pictured as cold, unfeeling, and completely selfish.\textsuperscript{152} Her anxiety that a pregnancy might be dangerous because she had multiple sclerosis,\textsuperscript{153} an extremely serious disease, is dismissed as a mere excuse. I have no first-hand knowledge of any of the parties in the Baby M case, so I have no evidence that this portrait is wholly inaccurate. But I doubt that many of the commentators on the case actually knew Elizabeth Stern.\textsuperscript{154} Much of their hostility seems to stem from the fact that she was a successful doctor.\textsuperscript{155} When this same phenomenon—condemnation of a woman for her professional success—occurred in the Anita Hill case,\textsuperscript{156} feminists justifiably reacted with outrage.\textsuperscript{157}

In addition to being viewed as the ultimate example of a patriarch's urge to duplicate himself and maintain power over women, surrogacy is criticized as exploitative of poor women.\textsuperscript{158} There is un-

sympathy is misplaced. In fact, I have argued elsewhere that surrogate contracts should provide an opportunity for the surrogate mother to change her mind. See Lacey, \textit{Law of Artificial Insemination}, supra note 39, at 281.

152. See Chesler, supra note 81, at 24 (questioning Elizabeth Stern's "self-diagnosed" multiple sclerosis; ignoring the fact that Stern, like Whitehead, was a woman in pain; portraying her as an androgynous, emotionless figure, not really a woman like Mary Beth Whitehead; and describing Stern as "pale, gaunt, accomplished, incredibly narrow at the wrist, waist, pelvis, and ankle, the most 'masculine' (i.e. the least emotionally expressive) of Baby M's four parents ... "); Katha Pollitt, \textit{The Strange Case of Baby M}, \textit{The Nation}, May 23, 1987, at 667, 682.


154. Chesler relied on hearsay evidence of unidentified neighbors to describe the Sterns as aloof, nasty, and supercilious. See Chesler, supra note 81, at 28.

155. In deploiring the fact that some women took the side of Betsy Stern instead of Mary Beth Whitehead, Chesler quotes a commentator's portrayal of the two women as "two sides of the same coin. ... Whitehead is blood, tissue, guts, need, sex. Stern is intellect, control and alienation. Whitehead is mother, Stern is career." Chesler, supra note 81, at 23. Women preferring Stern are described as "male-identified ... mother-hating." Chesler, supra note 81, at 24.

156. For a comprehensive discussion of the issues in the Hill-Thomas hearings, see \textit{Race, Gender, and Power in America} (Anita Faye Hill & Emma Coleman Jordan eds., 1995) [hereinafter \textit{Race, Gender}].

157. One commentator noted, "Anita Hill was suspect on so many levels. Had she been too successful in her own career, possibly at the expense of black men? ... She had no children either, and so had failed to fulfill her 'proper' role as a mother." Adele Logan Alexander, "\textit{She's No Lady, She's a Nigger}": Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and \textit{Anita}) Hill, in \textit{Race, Gender}, supra note 156, at 3, 17. Note the parallels to Chesler's implied criticism of Elizabeth Stern for being a career-only woman and not a mother. See Chesler, supra note 81, at 23.

158. See Mary Ruth Mellowen, \textit{An Incomplete Picture: The Debate About Surrogate Motherhood}, 8 \textit{Harv. Women's L.J.} 231 (1985). The issue of exploitation is often linked with the issue of racism. However, the exploitation issue is limited to surrogacy, while

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doubtedly a great deal of truth in this argument. As many feminists have acknowledged, white middle-class women exploit poor women of color in many ways, primarily to perform domestic duties for them. The more relevant question may not be “Does this practice exploit poor women?” since arguably most aspects of our capitalist, patriarchal society exploit poor women, but rather “Does this practice constitute an unusually cruel exploitation of poor women?”

At this time, our data on surrogate mothers is too limited to provide a definitive answer to that question. But interviews with many surrogate mothers indicate that they feel genuine satisfaction from bearing a child for someone else. Only one out of one hundred surrogate mothers refuses to relinquish her child, which suggests that while relinquishment is a heart-wrenching experience for some mothers, many find that the rewards of relinquishment outweigh the pain. Additionally, the available data on surrogate mothers indicate that the income gap between gestational mothers and prospective adoptive parents is not as great as might be imagined; one study shows the average adoptive couple’s income is $55,000 and the average surrogate mother’s family income is $32,000. In addition, the majority of surrogate mothers are married and have been pregnant before. These data suggest that the question of exploitation is complex. Some women may prefer to earn money through a surrogacy arrangement which allows them to stay home with their children, rather than working at low-income jobs outside the home that may damage their health and well-being.

Race issues permeate discussions of other alternative means of forming a family, such as IVF and adoption. Therefore, I will discuss racism issues in a separate section of this Article. See infra Part VI.

159. For a comprehensive treatment of many aspects of exploitation, including a thorough discussion of surrogacy, see John Lawrence Hill, Exploitation, 79 Cornell L. Rev. 631 (1994).


163. See Hill, supra note 159, at 695.

164. See Kane, supra note 148, at 218–19.

165. See Schultz, supra note 11, at 389 n.309.

166. See Beverly Horsburgh, Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy, 8 Berkeley Women’s L.J. 29, 37 n.23 (1993).

Another possible answer to the concerns about surrogate parenthood is that the practice of surrogacy is so limited that it cannot have the massive effect people envision. While the grand theories of racism and classism might have some validity if surrogate contracts were pursued on a widespread basis, this is simply not the reality. Surrogate cases are numbered in the hundreds, not the millions. Surrogacy is generally the last option infertile people consider, with its use limited to people who cannot or do not want to adopt, or who cannot conceive through some other method.

The argument that surrogacy is far too limited to produce huge numbers of lower-class “breeders” is generally met by the assertion that if surrogacy were universally legalized, we would see an onslaught of upper-class white women able to conceive and bear healthy children instead hiring poor women to have their babies for them. This is an argument that I frankly find astonishing—a classic example of theory run amuck. Martha Field declares, “Others, however, may choose surrogacy out of mere predilection or convenience—fear of pregnancy, a desire to stay thin, a desire to pursue career choices that seem incompatible with pregnancy, for example.”

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168. By the end of 1986 there were only 500 recorded cases of surrogate arrangements. See Field, Surrogate Motherhood, supra note 69, at 5. Between 1980 and 1987, fewer than 25,000 women contacted surrogate agencies to inquire about the process. See Hill, supra note 159, at 694 n.334.

169. Noel Keane, a well-known “broker” for surrogate arrangements, has predicted that surrogacy will replace adoption. See Field, Reproductive Technologies, supra note 70, at 1592. However, there is no evidence that this prediction is accurate.

170. As reproductive technology becomes more sophisticated, this number will undoubtedly decline.

171. Gena Corea envisions a “reproductive brothel” in which most women would “be defined as ‘nonvaluable’ and sterilized and in this way, their progeny culled. . . . Certainly women of color would be labeled “nonvaluable” and used as breeders for the embryos of ‘valuable women.’” Corea, supra note 7, at 276. For a discussion of embryonic transfer in cows, see Corea, supra note 7, at 69–79. Corea later suggests that women will be treated the same way. Corea, supra note 7, at 272–82.


173. See, e.g., Field, Surrogate Motherhood, supra note 69; Omolade, supra note 1.

174. Field, Surrogate Motherhood, supra note 69, at 61.
women implicit in this statement parallels the anti-abortion rhetoric depicting women as having abortions "for convenience." But just as very few women choose to have abortions for purely frivolous, cosmetic reasons, very few, if any, women will hire others to have their children for them. I cannot picture a rational, healthy woman, capable of having a normal healthy pregnancy, who is willing to commit herself to 18 years of childraising, but unwilling to undergo 9 months of pregnancy. The specter of millions of frivolous, selfish middle-class women hiring lower-class women to bear their children is unrealistic and deeply insulting to women. It is hard to believe this picture comes from women who consider themselves feminists.

My primary argument about surrogacy is that the experience of the infertile woman must be factored into the equation. She should not be invisible or depicted as simply a tool of her husband. It must be recognized that she is not a monster, deliberately setting out to exploit poor women of color. I do not contend that adding the infertile woman's voice to the dialogue will provide easier answers to complex problems. Surrogacy can be a painful experience for everyone concerned and ideally should be viewed as a "last resort" for the childless woman, used only when attempts to conceive or adopt a child have failed.

V. The Commodification of Children Theory

Opponents of the use of assisted reproductive techniques, especially in the context of surrogacy, also rely upon the commodification theory. Although this concept is often linked to the "technology as patriarchal tool" argument, it has an identity of its own. Basically, the theory centers around the fact that techniques such as IVF are extremely

175. Kristen Luker notes that "pro-life women believe that other women are 'casual' about abortion and have them 'for convenience.'" Kristen Luker, Abortion and the Politics of Motherhood 203 (1994).

176. Of course, there will be women who mistakenly exaggerate the health hazards of pregnancy. However, an unrealistic fear of pregnancy is not the same thing as refusing to become pregnant for convenience.

177. It can be argued that middle-class white women hire black women to take care of their children, so hiring black women to act as surrogates would just be an extension of "childraising" duties. This ignores the obvious difference between hiring a temporary caretaker and conceiving and bearing a child.

178. See infra Part VI.

179. See supra Part I.A.
expensive and that money is generally exchanged for surrogate arrangements. Thus both children and women are turned into marketplace commodities to be bought and sold, robbed of their essential humanity.

The idea of children being compared to televisions, and being classified as "first quality" or "second quality," as in Richard Posner's infamous article advocating baby-selling, is indeed troubling. The flaw in this analysis is that it focuses on the way children are perceived by the outside world, not the way they are perceived by their parents. Real people do not behave the way Richard Posner says they do, and real parents do not regard their children as objects simply because money was expended to bring them into their lives. Children become a part of a family, and few people think of a family member as a commodity. Nontraditional parents may not love their children any more than traditional biological parents, but they certainly do not love them any less.

180. A study in the New England Journal of Medicine estimated that the actual cost of a successful IVF treatment ranges from $67,000 to $114,000. See Roberts, Race, supra note 98, at 948.
181. There are a few instances in which a woman, who is usually a relative of the prospective mother, will agree to bear a child for free, but it is generally acknowledged that most surrogates require money. See Hill, supra note 159, at 692.
182. See Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849 (1987); see also Jeanne Lorraine Schroeder, Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body, 79 Minn. L. Rev. 55 (1994).
184. Patricia Williams castigates Posner's approach, yet nevertheless argues that the market, permeated with racism, indeed controls the adoption process. See Williams, Spare Parts, supra note 5, at 913–21.
186. Having a child by the traditional biological method can also be costly, especially if there are complications in the birth.
187. A recent example of the condemnation people express when a child is treated as a commodity can be seen in the uproar over Jon-Benet Ramsey's work in beauty pageants. Ann Scales says about the murdered child beauty queen, "That little blond white girl was made into a consumable object when just a baby. . . . That child was pimped by her parents, by the pageant industry, and now pervasively by the media." Ann Scales, Disappearing Medusa: The Fate of Feminist Legal Theory, 20 Harv. Women's L.J. 34, 44–45 (1977). It is important to note that Jon-Benet's mother was her biological mother.
VI. Racism and Alternative Means of Forming a Family

Many feminists of color are concerned about the racist assumptions and dynamics involved in the availability of reproductive technologies and other alternative methods for forming a family.\(^{188}\) Their primary argument is that use of IVF and other technologies by white parents is motivated by a racist desire for "perfect" white babies.\(^{189}\) In contrast, as Lisa Ikemoto points out, our society treats women of color as "too fertile" and attempts to limit their childbearing.\(^{189}\) As a result, Dorothy Roberts argues "[T]rading the genetic tie on the market lays bare the high value placed on whiteness and the worthlessness accorded blackness."\(^{190}\) This theory is compelling, but while we may indict a society that values whiteness above blackness, we should not forget the individual pain suffered by childless women regardless of race. Motives for wanting a genetically-related child cannot be neatly categorized as racism.

Consider the following scenarios: A woman sits in a boat in the middle of a small lake. She is aware that the shoreline of the lake is a steep dropoff, potentially life threatening to children who cannot swim. She sees a white child on the north side of the lake approaching the shoreline, obviously intending to enter the water, and she sees three black children on the south shore in the same position. It will be possible for her to reach one, but not both shorelines, in time to prevent the child or children from drowning. All other things being equal, we would expect the woman to save the three children at the

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188. See, e.g., Lisa C. Ikemoto, Destabilizing Thoughts on Surrogacy Legislation, 28 U.S.F. L. Rev. 633 (1994) [hereinafter Ikemoto, Destabilizing Thoughts]; Omolade, supra note 1; Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209 (1995); [hereinafter Roberts, Genetic Tie]; Roberts, Race, supra note 98; Williams, Spare Parts, supra note 5.  

189. See, e.g., Omolade, supra note 1; Roberts, Genetic Tie, supra note 188; Williams, Spare Parts, supra note 5. The concerns about racism are especially complex, and I approach them with trepidation. I am aware that as a white, middle-class woman, my perspective is limited.  

190. See Ikemoto, The In/Fertile, supra note 9, at 1045–53. The racism inherent in the attack on welfare mothers has been well documented. See, e.g., Fineman, supra note 1, at 101–18; Dorothy E. Roberts, Racism and Patriarchy in the Meaning of Motherhood, 1 Am. U. J. Gender & L. 1 (1993).  

191. Roberts, Genetic Tie, supra note 188, at 210. Most of the discussion in this Article, and in much of the literature on racism and reproductive technology, focuses on black women. Obviously other minority women can also be exploited through racist practices.
expense of the one. If she chooses to save one white child at the expense of three black children, we would almost certainly be justified in describing her actions as racist.

However, the scenario changes dramatically if the child on the north shore is the woman's daughter and the three children on the south shore are strangers. Although we may still think that "objectively" the woman should have saved the three children, most of us will understand the decision to save her own child's life. Indeed any other decision would be thought unnatural. This analysis remains valid regardless of the skin color of the children on the south shore. The instinct to protect and nurture one's own child is the predominant emotion and motivating force.¹⁹²

The picture changes again if the woman knows that her child on the north shore is a strong swimmer and her motive for preventing the child from entering the water is to prevent an expensive outfit from being ruined. In that situation, a decision to leave the three children on the south shore to drown would be viewed as unspeakably reprehensible, even evil, and certainly racist if the south shore children are black.

Many theorists writing about race and reproduction implicitly consider the infertile woman as more like the third mother than the second. She is viewed as trying to satisfy a frivolous whim, relatively unimportant in contrast to larger concerns about racism. I believe that an infertile woman attempting to have children is similar to the woman trying to save her own child. She is acting out of a deep-seated emotional need, making all other considerations unimportant. While there may be valid arguments as to why this need should not always be satisfied,¹⁹³ it should be treated with compassion and respect and not dismissed as just another example of our racist society.

Analyses of racism and assisted reproduction often focus on the unique situation of surrogacy.¹⁹⁴ Many feminists fear that, since women of color are disproportionately poor, legalized surrogacy would create a sub-class of women of color bearing children for white

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¹⁹². When I refer to an instinct to nurture one's child, I am not suggesting that this instinct is only present in biological parents. I strongly disagree with the biological feminist analysis which privileges gestational mothers.

¹⁹³. These arguments are especially strong in the context of surrogacy, where the pain of the childless woman must be balanced against the pain of the gestational mother.

¹⁹⁴. See supra Part IV.
A great deal of discussion has centered around *Johnson v. Calvert,*\(^{166}\) in which a black woman was hired to bear a child for a woman who was unable to carry a child to term. The egg of the genetic mother was combined with the sperm of the genetic father. The resulting zygote was then placed in the womb of Anna Johnson, the black surrogate.\(^{197}\) After the birth of the child, Johnson refused to relinquish her parental rights. The court eventually granted custody to the genetic parents; the surrogate mother was denied even visitation rights.\(^{198}\)

Because the genetic father was white, the case is usually analyzed as a racist privileging of a white patriarch. Lisa Ikemoto describes the case as “selectively applying the parental status laws to maintain white fatherhood”\(^{199}\) and as “eras[ing] black woman’s status as wife and mother.”\(^{200}\)

The standard analysis of *Johnson* has powerful symbolic appeal, but it ignores a crucial element: the genetic mother, like the surrogate, was not white. The fact that Crispina Calvert is Filipina is glossed over or even omitted in most discussions of *Johnson.*\(^{201}\) Once again, the woman expecting to raise the child, and who, in this case, is also the genetic mother, is virtually invisible. Surely the then-childless Crispina Calvert, who contributed her egg in an expensive and painful process, had interests worth discussing as well. If a court had awarded custody to Johnson and denied Calvert’s interest in the child, could the court not be said to have “erased Filipina women’s status as a wife and mother,” just as critics now contend that the court erased black women’s status?

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197. See *Johnson,* 851 P.2d at 778.

198. See *Johnson,* 851 P.2d at 778, 787.

199. Ikemoto, *The In/Fertile,* supra note 9, at 1025.

200. Ikemoto, *The In/Fertile,* supra note 9, at 1026.

201. See, e.g., Horsburgh, supra note 166. One of the few discussions of Crispina Calvert is basically negative. Lisa Ikemoto suggests that stereotypes about Asian women may have made Crispina the “good” mother as opposed to the black Johnson, the “bad” mother. Ikemoto describes stereotypical Asian women as “subservient for the sake of men and their children. They serve white men particularly well.” Ikemoto, *Destabi-lizing Thoughts,* supra note 188, at 643. Ikemoto implies that Crispina fits this stereotype because she agreed to her husband’s demand for a baby. This assumption completely ignores the possibility that Crispina strongly desired a child and her husband acted in accordance with this goal.
Even if Johnson can correctly be viewed as an exercise in judicial and societal racism, there is no evidence that it is a representative case, or that its results will be predominant in the future. In addition, there is no statistical evidence that surrogate mothers are disproportionately black. In fact, studies show that the average surrogate mother is non-Hispanic white.\footnote{202}

Theorists also describe adoption as an institution permeated by racism.\footnote{203} Adoption is viewed by some as a method to satisfy the desire of middle-class white parents for white babies, while black parents and children are shoved aside.\footnote{204} The basic proposition— that racism is present in adoption, as it is in society at large—is hard to refute. But again the reality of the situation is far more complicated than the theorists who make broad accusations of racism acknowledge. Contrary to the argument that adoption is only for white families, studies indicate that African-Americans have the “highest rate of adoption among all ethnic groups” in the United States.\footnote{205} According to a minority adoption recruiter at a private adoption agency in the Washington, D.C. area, the common assertion that there are countless numbers of healthy black infants waiting for adoption is a myth. She states, “The fact is, there aren’t many healthy black infants available; we have more families than healthy babies.”\footnote{206} It is unquestionably true that a disproportionate number of nonwhite American children

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\footnote{203}{See, e.g., Twila Perry, Race and Child Placement: The Best Interest Test and the Cost of Placement, 29 J. Fam. L. 51, 112 (1990); Roberts, Genetic Tie, supra note 188; Williams, Spare Parts, supra note 5, at 916–18.}

\footnote{204}{See, e.g., Colker, supra note 60; Omolade, supra note 1, at 222. Patricia Williams, in discussing her experiences in adopting her son, deplores the fee system for adoption, which places black children in a special, half-price category. See Williams, Spare Parts, supra note 5, at 918.}

\footnote{205}{Sherry Davis Molock, Adoption Barriers for African-American Families, Adoptive Families, Mar./Apr. 1995, at 14, 14. Molock also describes a number of the substantial obstacles that black families face in formally adopting children. Molock, supra at 14–15.}

\footnote{206}{Molock, supra note 205, at 15. Since there are only estimates, and no precise national statistics on adoptable children, this statement may not be accurate in other areas of the country. It is impossible to get a definitive number of how many healthy infants of color are available for adoption, or how many would be adopted if all obstacles were removed. See infra notes 213–16 and accompanying text.}
are in the child welfare system, but many of those children are special needs children, and reluctance to adopt special needs children is not necessarily attributable to racism. Studies done of prospective adoptive families indicate that for most parents, healthy black infants are preferred over older or handicapped white children. Significantly, white parents are actually more willing than black families to adopt older and disabled black children. The growing popularity of international adoptions, most of which are transracial, also attests to the willingness of adoptive parents to adopt nonwhite children.

The primary obstacle to adoption of minority children is not racism on the part of adoptive parents, but policies which discourage or prohibit interracial adoption. The National Association of Black Social Workers has taken the position that black children should never be placed with white families, even if the alternative is foster care.

207. See Molock, supra note 205, at 14. The author states: "Although exact numbers are difficult to obtain, estimates indicate that 42 percent of children in the system are minorities." Molock, supra note 205, at 14.

208. I use the term special needs in a broad sense, to encompass children with physical or psychological handicaps. Adoption professionals use the term to describe any child or child who is hard-to-place.

209. See supra notes 68–77 and accompanying text.


211. See Varan, supra note 210, at 609 (citing All in the Family, NEW REPUBLIC, Jan. 24, 1994, at 7).

212. In 1994, there were over 800 intercountry adoptions, an 11% increase from the previous year. Intercountry Adoptions Up 11 Percent in 1994, ADOPTIVE FAMILIES, Mar./Apr. 1995, at 7. See generally Richard R. Carlson, Transnational Adoption of Children, 23 TULSA L.J. 317 (1988), for a thorough discussion of the legal issues posed by international adoptions.


214. See Rosettenstein, supra note 210, at 139–40. The organization’s statement against interracial adoption reads in part: “Black children belong physically, psychologically, and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. . . . Black children in white homes are cut off from their healthy development of themselves as Black people.” JOYCE LANDES, MIXED FAMILIES 75 (1977).
Congress has passed legislation prohibiting agencies from using race to prohibit adoption placements, but individual social workers and adoption professionals may continue to discourage these adoptions.

It seems prospective adoptive parents can do no right in the eyes of some commentators. They are depicted as racist if they do not adopt minority children, and find their motivations impugned if they do adopt transracially. For example, Dorothy Roberts writes:

Although it may produce significant connections between parents and their adopted children, the possibility of transracial placement may—

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215. Section 1808 of the Small Business Job Protection Act of 1996 states:

[N]either the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—

(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or child, involved.


216. One advocate of interracial adoption states, "[I]t is easy for the adoption professionals to hide race among the array of factors they allegedly used in their highly subjective and discretionary assessment of what placement was in the 'best interest of the child.'" Bartholet, Politics of Race Matching, supra note 213, at 1192 n.73.


There are strong arguments on both sides of the debate. After reading most of the arguments, my conclusion is that race should be considered as a factor in adoption placement, but race matching should not prohibit a timely placement of an adoptable child.

adoptions within a racial caste system nevertheless reminds me of bell hooks's [sic] description of whites' appropriation of pieces of Black culture. hooks examines the ways in which whites incorporate certain elements of blackness into their own lives in order to assuage their guilt for past injustices or to add a new element of excitement to their lives.\textsuperscript{218}

Roberts seems to suggest that white adoptive parents regard their black children as simply live versions of African masks which trendy liberals use to decorate their living room walls. The intense love most adoptive parents feel for their children is dismissed as a second-class “significant connection.”

\textbf{CONCLUSION}

This has been the most difficult Article I have ever written. I have enormous respect for most of the authors I have discussed and I was initially reluctant to criticize them. But when I read their work on assisted reproductive issues, I am reminded of Sojourner Truth’s cry “Ain’t I a Woman?” I want to shout “Ain’t I a Mother?” My children did not grow inside my body, but I could not love them any more if they had. Infertile women deserve empathy, not scorn or dismissal. Those of us who finally become parents through nontraditional means are not imposters who only “construct” ourselves as mothers.

The dominant feminist “story” about artificial reproduction is the story of the dominant patriarchal male, who uses technology to both reproduce himself and control women. My story is written from the perspective of the childless woman who uses technology to fulfill her wish to bring children into her life. There is undoubtedly truth in both stories. Feminists who lack understanding of the infertile woman and her need for children should acquaint themselves with the previously unheard voices of the childless. Without these voices, any analysis of assisted reproduction and adoption is incomplete. §

\textsuperscript{218} Roberts, \textit{Genetic Tie}, supra note 188, at 266–67 (citations omitted).