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### The Black Surrogate Mother

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# THE BLACK SURROGATE MOTHER

Anita L. Allen\*

In earlier essays, I considered two aspects of the practice of surrogate parenting.<sup>1</sup> In the first article, I examined the *Baby M* case and argued in favor of an inalienable constitutional right of the surrogate mother to a post-natal opportunity to change her mind about relinquishing parental rights.<sup>2</sup> The second essay, considered—and rejected—the “slavery equation argument” against surrogate motherhood.<sup>3</sup> This third article contemplates another facet of surrogacy—gestational surrogacy.<sup>4</sup> I will comment on *Johnson v. Calvert*,<sup>5</sup> a case involving a Black surrogate mother, and on whether gestational surrogacy by Black women simply puts a new face on an old problem: whites owning Black women’s wombs.<sup>6</sup>

The American slave experience, while not equivalent to surrogacy, can help illuminate why many people find the practice of commercial surrogacy disturbing. Before the American Civil War, virtually all south-

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1. “Surrogate parenting” can be described as a practice by which a woman (“surrogate mother”) bears a child for another woman, man or couple. As the major legal cases of the past decade have noted, before conception and for a fee, a surrogate mother agrees to be artificially inseminated and later to terminate parental rights and surrender custody of the resulting child.
2. See Anita Allen, *Privacy, Surrogacy and the Baby M Case*, 76 GEO. L.J. 1759 (1988) [hereinafter *Privacy, Surrogacy*] (rejecting privacy case for specific enforcement of surrogacy agreements and defending plausibility of inalienable constitutional right to post-natal opportunity to change mind about relinquishing parental rights).
3. See Anita Allen, *Surrogacy, Slavery, and Ownership of Life*, 13 HARV. J.L. & PUB. POL’Y 139 (Winter 1990) [hereinafter *Surrogacy, Slavery*] (rejecting argument that slavery and surrogacy are morally equivalent on the ground that the equation ignores the virtually total control of the slave owner over the slave that is absent from surrogacy arrangements).
4. Gestational surrogacy is a process whereby a preembryo is created from the egg of a woman and the gametes of a man (spouse or donor) through *in vitro* fertilization. The preembryo is implanted into the uterus of a second woman who becomes pregnant and carries the child to term. As will be discussed later, this practice has currently been used only in cases where the woman who supplied the egg was medically unable to become pregnant. There are, however, no rules that require a preexisting medical condition before making use of a gestational surrogate.
5. Reporter’s Transcript, *Johnson v. Calvert* (No. X 63 31 90 consolidated with AD 57638) (Cal. Super. Ct. Oct. 22, 1990) [hereinafter Transcript]. No opinion has been published in the case.
6. Alice Walker, *What Can the White Man . . . Say to the Black Woman*, 248(20) THE NATION 691 (1989) (noted Black novelist depicting current reproductive policy as continuation of white male ownership and control of Black women).

ern Black mothers were, in a sense, surrogate mothers. Slave women knowingly gave birth to children with the understanding that those children would be owned by others.<sup>7</sup> Occasionally, however, a Black woman was able to get back her child. In *Surrogacy, Slavery, and the Ownership of Life*,<sup>8</sup> I related the true story of Polly, a Black woman who was kidnapped from her home in Illinois and sold into slavery in Missouri.<sup>9</sup> Polly brought and prevailed in two remarkable lawsuits, one for her own freedom and a second to obtain custody of her teenage daughter, Lucy. Polly's successful custody battle against her child's white owners is reminiscent of Mary Beth Whitehead Gould's battle against the Sterns in the *Baby M* case.<sup>10</sup>

*Johnson v. Calvert*<sup>11</sup> has sparked a new wave of concern that surrogate motherhood turns women into "commercial slaves 24 hours a day for 270 days."<sup>12</sup> The *Johnson* case highlights a troubling truth underlying the rhetoric that contemporary surrogacy is slavery. Affluent white women's infertility, sterility, preferences and power threaten to turn poor Black women, already understood to be a servant class,<sup>13</sup> into a "surrogate class."

There are risks inherent in surrogacy arrangements. These risks centrally include the emotional devastation experienced by surrogates who are compelled to give up the children that they have agreed to bear for others. Parental rights deemed inalienable prior to childbirth could perhaps reduce the emotional risk of commercial surrogacy to white genetic and gestational surrogates.<sup>14</sup> But in light of widespread prejudice, racism and racial segregation, such a right would be of doubtful

7. In some aspects, American slavery was analogous to a *de facto* system of surrogacy. Slave owners were recognized not only as the owners of the slaves but they were also owners of the natural children to which the slaves gave birth. These ownership rights allowed the children to be bought or sold to third parties, regardless of the wishes of the natural mother. See *infra* note 9. Cf. Walker, *supra* note 6.
8. 13 HARV. J.L. & PUB. POL'Y 139 (Winter 1990).
9. Lucy Delaney, *Struggles for Freedom*, in SIX WOMEN'S SLAVE NARRATIVES 9 (1988) (woman held wrongly in slavery later sues for her own release and "the right to own her own child").
10. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *aff'd in part, rev'd in part, remanded*, 109 N.J. 396, 537 A.2d 1227 (1988). See generally PHYLLIS CHESLER, SACRED BOND: THE LEGACY OF BABY M. (1988).
11. Transcript, *supra* note 5.
12. Jeremy Rifkin & Andrew Kimbrell, *Put A Stop To Surrogate Parenting Now*, USA Today, Aug. 20, 1990, § A, at 8 (final ed.).
13. According to figures published by the U.S. Department of Labor, Bureau of Labor Statistics, in 1989, a typical, recent year:

Black females were underrepresented in the high-paid, largely female occupations of sales, professionals, managerial and administrative support. They were overrepresented in the low-paid less prestigious occupations of service workers, operators, and household works.

David Swinton, *The Economic Status of African Americans: "Permanent" Poverty and Inequality* 63 in THE STATE OF BLACK AMERICA 1991 (J. Dewart ed. 1991).

In addition, 43.2% of all Black women with children under 18 lived in poverty in 1989. *Id.* at 43. It is predicted that if current trends continue "we can expect to see an increasing inequality gap between [B]lack and white women." *Id.* at 53.

14. See Allen, *Privacy, Surrogacy*, *supra* note 2.

practical value to Black gestators who bear white children. Under *Johnson*, the chances of the Black woman successfully gaining custody of the child she bears appear to be slim. Indeed, Polly had a better chance. Without a *per se* ban on commercial surrogacy, it is not clear that poor and Black women can be protected from the risks of surrogacy arrangements.<sup>15</sup>

## I. ANNA HAD A BABY

On September 19, 1990, in Orange County, California, a twenty-nine-year-old Black woman named Anna L. Johnson gave birth to a six-pound, ten-ounce baby boy.<sup>16</sup> A casual observer visiting the maternity ward at St. Joseph's Hospital would have found nothing unusual in the sight of Anna Johnson breastfeeding the tiny newborn. However, as the journalists who swarmed into the hospital to report the birth knew, Johnson and the infant she delivered had an unusual relationship. They were not genetically related. They were not even of the same race. For the first time in history, an African-American woman had given birth to a child exclusively of European and Philippine ancestry.<sup>17</sup>

Anna Johnson's pregnancy was the result of *in vitro* fertilization and preembryo transplant.<sup>18</sup> Physicians had surgically implanted into Johnson's uterus a preembryo formed *in vitro* from donated gametes. Already the single mother of a preschool-aged daughter named Erica, Johnson underwent the procedure as a service to Mark and Crispina Calvert.<sup>19</sup> Mark Calvert was a thirty-four-year-old insurance adjuster<sup>20</sup> and Crispina Calvert, who had lost her uterus to cancer, was a thirty-six-year-old registered nurse.<sup>21</sup> Crispina Calvert worked at the hospital where Anna Johnson worked as a licensed vocational nurse.<sup>22</sup> The Calverts promised to pay Johnson \$10,000 for her trouble.<sup>23</sup>

15. At least 11 states have banned surrogate parenting. See Rifkin & Kimbrell, *supra* note 12.

16. *Custody Battle Begins Over Surrogate's Baby*, L.A. Times, Sept. 21, 1990, § A, at 1, col. 3 (Orange Cty ed., Metro Desk) [hereinafter *Custody Battle*].

17. This is the first case in which a surrogate mother without genetic links to the child sought custody of the child. See Martin Kasindorf, *Birth Mother is True Parent, Doctor Testifies*, Newsday, Oct. 10, 1990, at 15 (News) [hereinafter *Birth Mother*]. Anna Johnson, described in the media as Black or as an African-American, described herself at the evidentiary hearing in the case as "half-white." See Martin Kasindorf, *Overwhelming Maternal Instincts; Surrogate Mom Explains Decision*, Newsday, Oct. 11, 1990, at 15 (News) [hereinafter *Overwhelming Maternal Instincts*]. Mark Calvert, the father, was described as Caucasian. Crispina Calvert, the genetic mother, was described in news reports both as a "Filipina" and as of "mixed Asian ancestry." See Charles Bremner, *Surrogate Mother Loses Claim to Baby*, The Times, Oct. 23, 1990, at 11, col. 4 (Overseas).

18. See Ethics Committee of the American Fertility Society, 46(3) *Ethical Considerations of the New Reproductive Technologies* 585 (supp. 1, 1986) [hereinafter *Ethical Considerations*].

19. Some women who are not parties to surrogacy contracts undergo these expensive, time-consuming procedures hoping to deliver a child they will parent as their own. A woman whose ovaries have been surgically removed or whose fallopian tubes are obstructed, for example, may undergo these procedures. See generally *id.*

20. See Kasindorf, *Overwhelming Maternal Instincts*, *supra* note 17.

21. *Id.* See also Kasindorf, *Birth Mother*, *supra* note 17.

22. *Id.*

23. *Id.*

Anna Johnson was a new kind of "surrogate mother," a surrogate gestational mother. But the human interest in Anna Johnson's miracle was not just that she was a surrogate gestational mother;<sup>24</sup> Anna Johnson was, in addition, a surrogate gestator who had changed her mind about giving up a child to whom she was not genetically related. Commercial surrogate mothers had been known to change their minds before,<sup>25</sup> but this was the first publicized instance in which a "surrogate carrier, gestator, womb mother, or placental mother"<sup>26</sup> had done so.

Johnson filed a lawsuit on August 13, 1990, when she was seven and a half months pregnant. Alleging that the Calverts had neglected her during the pregnancy and failed to make payments, and that she had developed a bond with the unborn child, Johnson sued for parental rights and child custody.<sup>27</sup>

The Calverts answered that the baby was theirs alone: "He looks like an oriental baby with my husband's nose," Crispina Calvert said.<sup>28</sup> Although Johnson was willing to accept a court-ordered joint-custody arrangement, the Calverts were not. They announced to the news media that they would rather see the baby they would name "Christopher" in a foster home than to share parenting with their hand-picked gestator.<sup>29</sup> Johnson's lawyer, Richard C. Gilbert, countered that he could not comprehend the Calverts' belief that it would be "in the baby's best interest to be taken from the breasts of its birth mother."<sup>30</sup>

In September 1990, Orange County Superior Court Judge Richard N. Parslow, Jr. awarded temporary custody to the Calverts and granted Johnson visitation rights.<sup>31</sup> In an October hearing, the court heard legal argument and expert testimony on the question of permanent custody. Some expert testimony favored the Calverts. However, medical and psychological experts testified on behalf of Anna Johnson's claim to be the "true" mother.<sup>32</sup> Johnson also had other authority on her side. A California statute expressly provided that birth mothers are the natural and legal parents of their offspring.<sup>33</sup> In addition, a 1989 Supreme Court

24. The first reported childbirth by a surrogate gestational mother occurred in April 1986 in Cleveland, Ohio. The genetic mother, like Crispina Calvert, had had a hysterectomy. Physicians at the Mt. Sinai Clinic created a preembryo *in vitro*, using an egg harvested from the genetic mother's ovaries and her husband's sperm. The preembryo was implanted into the uterus of a second woman. The second woman, like Anna Johnson, became pregnant and carried the child to term. See *Ethical Considerations*, *supra* note 18, at 58S.

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

26. See *Ethical Considerations*, *supra* note 18 at 58S.

27. See Kasindorf, *Birth Mother*, *supra* note 17.

28. *Custody Battle*, *supra* note 16.

29. *Id.*

30. *Id.*

31. See *Who's Mommy? Without a Law It's Hard to Know*, *Newsday*, Sept. 24, 1990, at 48 (Viewpoints) (Nassau and Suffolk ed.). See also *Genetic Parents Given Sole Custody of Child*, *L.A. Times*, Oct. 23, 1990, § A, at 1, col. 2 (Metro) [hereinafter *Genetic Parents*].

32. Kasindorf, *Birth Mother*, *supra* note 17.

33. CALIF. CIVIL CODE § 7003 (1983) reads in part:

§ 7003. Method of establishment

The parent and child relationship may be established as follows:

case had denied parental rights to a sperm donor claiming only a genetic link to a child.<sup>34</sup>

Anna Johnson testified at the October hearing that she did not initially plan to keep the child.<sup>35</sup> Johnson said that she first changed her mind when Mark Calvert refused to take her to the hospital. She was forced to take a cab for what proved to be false labor pains. While Johnson was a patient, Crispina Calvert, who worked in the same hospital, refused to visit. Even after she began to want the child, Johnson said that she was "in a state of denial" and she kept "trying to tell myself that I am not supposed to have any emotion toward my child, but there is no way that you can prevent those emotions from taking over, and those instincts came out naturally."<sup>36</sup> Describing her state of mind at the time as confused, anxious and desperate, Johnson admitted sending the Calverts a letter on July 23, 1990, threatening to withhold the baby unless they paid her \$5,000 immediately. She also acknowledged that the Calverts had sent her two periodic payments early.<sup>37</sup>

After her testimony, Johnson told reporters she was confident of obtaining at least joint custody and visitation rights: "I know he's there . . . I know he won't forget me."<sup>38</sup> However, on October 22, 1990, Judge Parslow ruled that Anna Johnson had no parental rights whatsoever in the child she bore.<sup>2</sup> By way of consolation, the judge offered that Crispina Calvert *might* elect to provide Anna Johnson with "a picture now and then, a note as to how this child is doing in life."<sup>40</sup>

## II. ANNA'S "MISTAKES AND WEAKNESSES"

### A. She Could Not Win

Public reaction to the final decision in the *Johnson* case was mixed.<sup>41</sup> It is unclear that the outcome of Anna Johnson's case was a bad outcome on the merits. There was too little information in the court transcript

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(1) Between a child and the natural mother it may be established by proof of her giving birth to the child, or under this part . . .

See also CALIF. CIVIL CODE § 7001 (1983):

§ 7001. Parent and child relationship; defined

As used in this part, "parent and child relationship" means the legal relationship between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

34. Michael H. and Victoria D. v. Gerald D., 491 U.S. 110 (1989).

35. Kasindorf, *Overwhelming Maternal Instincts*, *supra* note 17.

36. *Id.*

37. *Id.* But see Chesler, *supra* note 10, at 5-7. In the transcript of a tape recorded conversation between Mary Beth Whitehead Gould and William Stern, Gould threatened to kill herself and Baby M. Nonetheless, she was eventually awarded parental rights.

38. Kasindorf, *Birth Mother*, *supra* note 17.

39. See *Genetic Parents*, *supra* note 31. Judge Parslow terminated the temporary custody and visitation order he had imposed in September. *Id.*

40. See Transcript, *supra* note 5, at 20.

41. Sonni Efron & Kevin Johnson, *Decision Hailed as Proper, Criticized as Outrageous*, L.A. Times, Oct. 23, 1990, § A, at 1, col. 5 (Orange Cty ed., Metro Desk). See also *Voices*, L.A. Times, Oct. 23, 1990, § A, at 12, col. 1 (Orange Cty ed., Foreign).

and in newspaper accounts to meaningfully assess the relative strengths of the parties and various alternate child custody options. However, one can argue that presiding Judge Parslow's attempt to rationalize his decision fell short.

Judge Parslow delivered a thirty-five-minute oral statement from the bench<sup>42</sup> to a packed courtroom.<sup>43</sup> He did not announce his decision right away, nor did he need to. Judge Parslow's opening remarks made obvious his ultimate ruling. He declared that the case before him was "not an adoption relinquishment case, . . . not a baby selling case, . . . not a *Baby M* type case where we had natural parents on two sides of a situation competing."<sup>44</sup> To say that the *Johnson* case was unlike *Baby M* was already to conclude that a surrogate gestator who received a donated preembryo is not a "natural" mother on par with a surrogate gestator who supplies her own ovum. Yet any gestator's relationship to the child she delivers is undeniably biological; in that sense it is also "natural."

As soon as Johnson's suit became public, legal policy analysts discussed *Johnson v. Calvert* as the next chapter in the history of a reproductive revolution of which *Baby M* was but a dramatic early scene.<sup>45</sup> Many observers viewed the cases as closely analogous. In both cases women became pregnant for a cash payment of \$10,000 and a desire to help a childless married couple have a child of their own. In both cases the surrogate said she had developed a bond during pregnancy that made it difficult to part with the newborn as agreed. In both cases the contract to exchange reproductive services for cash raised concerns about gender inequality and "baby selling." In both cases the presumption that a woman who gives birth to a child is its legal mother seemed to implicate adoption policies. Yet, contrary to these views, Judge Parslow tried to rapidly distinguish the case before him from *Baby M*. Judge Parslow's sense of the case was that neither adoption laws, proscriptions against commercial trafficking in human beings, gender inequality, nor the developing law of genetic surrogate motherhood was relevant to his decision.<sup>46</sup>

Judge Parslow asserted in his opening statement that awarding the child to two mothers—three parents—was not in the boy's emotional best interest.<sup>47</sup> Therefore, he would award only one of the two female parties custody over the child. Once the judge refused to view the case as involving a surrogate mother or adoption agreement, his rejection of a "three parent/two mother" model could have meant only one thing: he would select Crispina Calvert, not Anna Johnson as the child's sole, rightful mother. Theoretically, Judge Parslow might have rejected both Johnson and the Calverts in favor of a neutral third-party caregiver, such as a foster mother. But Judge Parslow ruled out third-party alternatives.

42. No formal opinion was issued in *Johnson v. Calvert* at the time of the ruling against Anna Johnson. The court reporter's official transcript memorialized the judge's, at times, awkward explanation of his difficult decision. See Transcript, *supra* note 5.

43. See *Genetic Parents*, *supra* note 31.

44. Transcript, *supra* note 5, at 3.

45. See *California Surrogacy Case Raises New Questions About Parenthood*, *Christian Science Monitor*, Sept. 25, 1990, at 1, col. 1 (U.S.).

46. Transcript, *supra* note 5, at 3.

47. *Id.*



He understood his role as Solomonic: unable to divide the baby in half, the judge would choose between the genetic and gestational mothers.<sup>48</sup>

The race issue, Anna Johnson's race, also made Judge Parslow's ultimate decision predictable.<sup>49</sup> Throughout history, Black women and mulatto women have been hired or enslaved to play a number of important *de facto* "mothering" roles in American families.<sup>50</sup> Moreover, Black women who marry white men have sometimes wound up "mothering" white step-children. However, I suspect that few regard Black women as the appropriate legal mothers of children who are not at least part Black. Blacks are not supposed to have white children. Blacks are not supposed to want to have white children of their own—not in the adoption context<sup>51</sup> and not, therefore, in the surrogacy context.

For better or for worse, race is a factor in adoption, and it will also be a factor in surrogate gestation. Against this background, it was unimaginable that Anna Johnson would win custody of the child she bore from the Calverts' genetic material. Arguably, a lawsuit against the Calverts brought by a white or Asian surrogate gestator would have the same outcome. A judge deciding such a case would foresee the possibility that a Black or brown or yellow gestator might someday wind up with a white couple's genetic child unless it set a firm precedent favoring genetic parents.

## B. Rationalizing Her Loss

Judge Parslow very briefly recited the facts of the case as follows.<sup>52</sup> The parties met and discussed a gestation arrangement in the winter of 1989-90. They entered into a formal agreement on January 15, 1990. Against the scientific odds, a successful preembryo transplant took place just four days later on January 19, 1990. Johnson agreed orally and in writing to "relinquish the child to the Calvert's and make no claim for parental rights."<sup>53</sup>

The court had little to say about Anna Johnson's pregnancy. Judge Parslow spoke of Johnson's role in the passive voice: "a baby boy was delivered from Anna Johnson on September 19, 1990."<sup>54</sup> Test results

48. *Id.*

49. The Calverts' attorney raised the issue of race in what one reporter described as an "emotional" courtroom, asking Johnson whether she had ever told anyone she had always wanted a white baby. Johnson said no, "considering I'm half-white myself." See Kasindorf, *Overwhelming Maternal Instincts*, *supra* note 17.

50. See Walker, *supra* note 6.

51. Official bans on transracial adoptions have been held unconstitutional. See, e.g., *Compos v. McKeithen*, 341 F.Supp. 264 (E.D. La. 1972) (three-judge court) (invalidating Louisiana statute prohibiting interracial adoption as a violation of the Equal Protection Clause). However, while whites are sometimes permitted to adopt Black or bi-racial children, it is virtually unheard of for an adoption agency to offer a healthy, able-bodied white child to Black parents for adoption. Cf. Patricia Ballard, *Racial Matching and the Adoption Dilemma*, 17 J. FAM. LAW 333 (1978-79); Susan Grossman, *A Child of a Different Color*, 17 BUFFALO L. REV. 303 (1968); Shari O'Brien, *Race in Adoption Proceedings*, 21 TULSA L.J. 485 (1986). Cf. Richard Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59 (1987).

52. Transcript, *supra* note 5, at 3-4.

53. *Id.*

54. *Id.* at 4.



"showed that Anna has no genetic relationship to the child, and that there is a 99.999% probability that the Calverts are the genetic parents of the child."<sup>55</sup> On the basis of the *genetic* tests, the judge found "beyond a reasonable doubt that Crispina Calvert is the genetic, biological and natural mother . . . and that Mark Calvert is the genetic, biological and natural father of the child."<sup>56</sup> If future courts follow Judge Parslow, genes alone will establish natural and biological motherhood.

Judge Parslow resorted to two analogies which are indicative of how courts may come to characterize the unique role of the surrogate gestator. He analogized Johnson to a "foster parent providing care, protection and nurture during the period of time that the natural mother, Crispina Calvert, was unable to care for the child."<sup>57</sup> Judge Parslow admitted that "there is [sic] a lot of differences" between a gestator and foster parent, but concluded that "there is [sic] a lot of similarities."<sup>58</sup>

His second analogy compared surrogate gestators to "wet-nurses."<sup>59</sup> As recently as the last century it was common for affluent European and American families to pay women to breast-feed and tend their infants and small children. Judge Parslow thought it was plain enough that wet-nurses lack parental rights: "I'm not sure anyone would argue that the person that nursed the child . . . from seven pounds to thirty pounds got parental rights and became the mother."<sup>60</sup> In the judge's view, surrogate gestators are just as plainly without parental rights. One might have expected the court to resist an analogy to the medically and socially discredited practice of wet-nursing. If surrogate gestation is like wet-nursing, perhaps it, too, should be relegated to history.

To counter the impression that he endorsed the use of surrogacy by women who are neither infertile nor sterile, Judge Parslow underscored the Calverts' medical need. "This is not a vanity situation, somebody looking to avoid stretch marks," he said.<sup>61</sup> For medical reasons, Crispina Calvert "has no place to carry the child."<sup>62</sup> The question of vanity versus medical need may be a different, deeper matter for the courts to consider in the future. It is for "medical" reasons that couples often cannot reproduce on their own. But, it was not for medical reasons alone that Crispina Calvert possessed a preembryo in need of a gestator. It was also for psychological and social reasons. Crispina Calvert wanted a child and she valued genetic parentage over other options such as adoption. It was not for medical reasons alone that researchers learned to create preembryos in petri dishes and test tubes. It was also for the sake of satisfying the public preference for genetic parentage.<sup>63</sup> What courts must confront is whether satisfaction of the strong desire to have one's own genetically-related children is worth the social price of surrogacy arrangements.

These rationales raise serious questions. Why does a person who is

55. *Id.*

56. *Id.* at 4-5.

57. *Id.* at 5.

58. *Id.* at 6.

59. *Id.* at 17.

60. *Id.*

61. *Id.* at 6.

62. *Id.*

63. See *California Surrogacy Case Raises New Questions About Parenthood*, *supra* note 45.

like a foster mother or a wet-nurse have no parental rights? Why does a surrogate gestator have no parental rights against those who seek out her services for "medical" reasons? To answer these questions Judge Parslow focussed on what gestators and genetic parents provide their offspring. The genes we get from our genetic parents determine "who we are, what we become."<sup>64</sup> By comparison to what we get through our genes, we get little in the uterine environment, not even a clear-cut reciprocal bond with our gestators.<sup>65</sup> The limited comparative impact of the gestator on the child's future self, and Judge Parslow's doubt of the reality of a mother-child bond during pregnancy, were the core of a larger set of arguments he offered against parental rights for gestators.

Writing about the *Baby M* case, I stressed the importance of the genetic ties that Mary Beth Whitehead Gould had to her child.<sup>66</sup> I argued that the parity of the surrogate's genetic ties with the biological father's was one reason to accord her equal parental rights.<sup>67</sup> But to say that genetic heritage is a factor to consider in surrogate mother cases involving disputes between genetic parents, is not to say that in a battle between genetic and gestational parents, genetic parents should always win out. Like the knowledge of genetic linkage, the experiences of pregnancy and childbirth can also have an important role in shaping women's sense of their identities and responsibilities.

Introducing additional concerns, Judge Parslow argued that both the emotional well-being of the child and policies against custody disputes or extortion militate against awarding parental rights to a "gestational carrier." Interestingly, the judge did not mention the race issue in his decision on the case. The closest he came was to allude to the potential "identity problems" a child raised by two mothers might have. Racial identity is one kind of identity individuals in our society normally develop, along with their gender, ethnic, religious, regional and other forms of identity. Also weighing against the gestator, in Judge Parslow's view, is the desirability of a judicial policy favoring "surrogacy contracts in the *in vitro* fertilization cases."<sup>68</sup> There is, he said, "a tremendous demand longing [sic] out there for genetic children of people that are not able to have children."<sup>69</sup> Surrogacy contracts are neither "void nor against public policy," ruled Judge Parslow, and are "enforceable by . . . specific performance, [or] arguably even by habeas corpus, if necessary."<sup>70</sup> This is precisely contrary to the ruling of New Jersey Supreme Court Chief Judge Wilenz in the *Baby M* case, who held that surrogacy contracts are void, against public policy and not specifically enforceable.<sup>71</sup>

### C. Finding Fault

The main thrust of Judge Parslow's argument for enforcement of the surrogacy contract was that opportunistic, dishonest Anna Johnson had

64. Transcript, *supra* note 5, at 8.

65. *Id.*

66. See Allen, *Privacy, Surrogacy*, *supra* note 2, at 1790.

67. *Id.* at 1764.

68. Transcript, *supra* note 5, at 11.

69. *Id.*

70. *Id.*

71. 109 N.J. 396, 537 A.2d 1227 (1988).

signed the contract voluntarily. The judge doubted the sincerity of Johnson's statements that she believed the child was hers and that she had bonded with the child. He intimated that Anna Johnson's lawsuit was opportunistic since such statements were first made shortly before the lawsuit was filed.<sup>72</sup> Yet, Johnson cannot fairly be blamed for the timing of her action. It would have been in the later stages of pregnancy that she would have been likely to experience the keenest maternal feelings. Bringing a lawsuit promptly at that point to clarify her legal rights and duties was a responsible course.

Judge Parslow also intimated that Anna Johnson was dishonest. He said she omitted unspecified facts about the difficulty of her first pregnancy and misrepresented her feelings and intentions in this case.<sup>73</sup> As for the contract itself, Judge Parslow concluded that Anna Johnson knew what she was doing. Johnson was "29 years old, educated, a licensed professional, . . . [who had spent two or three years] in the marine corp[s]."<sup>74</sup> She "sounded . . . articulate and intelligent."<sup>75</sup> Judge Parslow said he couldn't "remember having seen a cooler witness testifying in court."<sup>76</sup> His words hinted that Anna Johnson was perhaps too cool for the occasion. Although "[s]ometimes there is a problem there where a flat affect . . . is presented by a witness," he said, "I don't think she had any problems with the lawyers at all."<sup>77</sup>

The large constitutional questions of family and reproductive privacy that occupied the trial and state supreme court in *Baby M* barely surfaced in the *Johnson* case. Judge Parslow seemingly danced over the whole tapestry of constitutional concerns in a sentence.<sup>78</sup> He was sure that the "genetic" mother, and not the "carrying person," has whatever procreative rights the Supreme Court has established as fundamental.<sup>79</sup> It is far from clear that he was right about this. After all, in this context, the surrogate undergoes the greatest physical burdens of procreation—embryo transplant and pregnancy. Moreover, the thrust of the fundamental privacy rights established in *Roe v. Wade* would seem to be that a range of contractual limitations on pregnancy termination and prenatal conduct would be void, notwithstanding the procreative interests of infertile couples.<sup>80</sup> The extensive literature in the field makes plain that these matters of constitutionally protected rights are much more complicated than even the questions suggested in light of *Roe v. Wade*.<sup>81</sup>

72. Transcript, *supra* note 5, at 11. See also *Genetic Parents*, *supra* note 31.

73. Transcript, *supra* note 5, at 12–13.

74. *Id.* at 13.

75. *Id.*

76. *Id.*

77. *Id.*

78. Transcript, *supra* note 5, at 15 ("I think, probably, as I see it, there are some constitutional problems with trying to outlaw them [i.e., surrogacy agreements] all together.").

79. *Id.* at 15–16.

80. Court enforcement of any abortion or other prenatal conduct constraints which parties may incorporate into surrogacy contracts appear to be in tension with the spirit of *Roe v. Wade*, which prohibits state diminution of the right to procreative choice in the absence of a compelling state interest. See *Roe v. Wade*, 410 U.S. 113 (1973).

81. See, e.g., Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate*

The judge was more attentive when stating recommendations for state law. Judge Parslow's central recommendation was that the California legislature enact a surrogate gestator statute. His ruling effectively brushed off as irrelevant California Civil Code Section 7003.<sup>82</sup> He nonetheless called for legislation clarifying the statute "given the technology that we can have a different natural mother than the person from whom the child emerges."<sup>83</sup>

Given his remarks about Johnson's competence and voluntary action, the tenor of the judge's specific recommendations for legislative policy are puzzling. Although he emphasized that Johnson acted intentionally and intelligently, he recommended strenuous surrogate screening procedures by disinterested agencies to determine "how they [potential surrogates] feel about various aspects in these situations."<sup>84</sup>

Judge Parslow mentioned that enforcing surrogacy agreements was a way to avoid patronizing women,<sup>85</sup> yet several of his recommendations appear to contradict this intent. As institutionalized support for backsliders, he recommended a twenty-four-hour "hotline" to reinforce surrogates' resolve to give up the children they carry.<sup>86</sup> This recommendation seemed to imply that surrogates will not, on the whole, be fully committed to their undertaking and that second thoughts about surrogacy are a predictable "crisis" requiring intervention measures. Further, he recommended a requirement that only women unable to bear children for "medical" reasons be permitted to employ surrogates. No vanity uses of surrogacy would be allowed. Finally, Judge Parslow recommended a legal requirement that surrogates be experienced natural mothers: "I think they know what its like, they know what their feelings

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*Motherhood*, 5 J. CONTEMP. HEALTH LAW & POLICY 1 (1989); Walter J. Wadlington, *Baby M: Catalyst for Reform?*, 5 J. CONTEMP. HEALTH LAW & POLICY 1 (1989); Allen, *Privacy, Surrogacy*, *supra* note 2; Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); James Flaherty, *Enforcement of Surrogate Mother Contracts: Case Law, the Uniform Acts and State and Federal Legislation*, 36 CLEV. ST. L. REV. 223 (1988); Thomas W. Mayo, *Medical Decision Making During a Surrogate Pregnancy*, 25 Hous. L. REV. 599 (1988); Steven Miller, *Surrogate Parenthood and Adoption Statutes: Can a Square Peg Fit in a Round Hole?*, 22 FAM. L.Q. 199 (1988); E. De Marco, *The Conflict Between Reason and Will in the Legislation of Surrogate Motherhood*, 1987 AM. J. JURIS. 23 (1987); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1950 (1986); Note, *Surrogate Motherhood: The Outer Limits of Protected Conduct*, 4 DET. C.L. REV. 1131, 1141 (1986); Lizabeth Bitner, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 236-37 (1985); Barbara Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J.L. & MED. 243, 256 (1985); Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1284 n.5 (1985); George Smith and Roberto Iraola, *Sexuality, Privacy and the New Biology*, 67 MARQ. L. REV. 263, 285 (1984); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 420 (1983); Phyllis Coleman, *Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions*, 50 TENN. L. REV. 71, 82 (1982). See generally MARTHA FIELD, *SURROGATE MOTHERHOOD* (1988).

82. See CALIF. CIVIL CODE § 7003, *supra* note 33. The statute defines birth mothers as natural, legal parents.

83. Transcript, *supra* note 5, at 18.

84. *Id.* at 16-17.

85. *Id.* at 15.

86. *Id.* at 19.

are, and it would assist them in their decision making process."<sup>87</sup> The value of this recommendation is questionable given that the two most famous surrogate mothers in the United States to date, Anna Johnson and Mary Beth Whitehead Gould, already had one or more children when they reneged on their surrogacy agreements.

The baby boy Anna Johnson carried in her womb and delivered was awarded categorically to the Calverts. The court denied the request of Johnson's attorney for a continuation of visitation rights pending appeal.<sup>88</sup> His reason was simple. At the age of five weeks "things [such as bonding] are happening psychologically."<sup>89</sup> To Anna Johnson the court awarded a philosophy of self-blame attributed to the Greek philosopher Democritus: "Everywhere man blames nature and fate, yet his fate is mostly but the echo of his character and passions, his mistakes and weaknesses."<sup>90</sup> *Her fate too.*

### III. BEYOND ANNA'S STORY

#### A. Rejecting Intent Rule

What norms should govern modern procreative arrangements and parental status? In a recent article Professor Marjorie Shultz defended a principle of intent as the optimal norm.<sup>91</sup> She urged that the inevitable disputes that arise in the context of collaborative procreation made increasingly possible through new reproductive technologies should be resolved, in the first instance, by reference to the intentions of the parties. The standard of intent presumably respects the autonomous plans and expectations created through voluntary exchanges. It assumes women's competence. It avoids judicial paternalism by giving effect to women's efforts to make choices concerning the use of their reproductive capacities. It assures men secure, responsible roles in procreation. The norm of intent entails legal respect for individual autonomy, including female autonomy, and legal minimalization of the impact of knowing or purposeful harm.<sup>92</sup> Yet the norm of intent is problematic. It is inconsistently applied and it is based on an assumption of greater equality of opportunity than actually exists.

On the surface, the standard of intent appears morally well-founded. Its "morality" justifies the pain it causes those who change their minds and renege on prior agreements. Courts that enforce surrogacy agreements of the sort at issue in *Baby M* and *Johnson* inflict pain on the losing surrogate. A losing surrogate not only suffers grievous emotional loss, but she must also confront a fate she once chose in ignorance of its true character but no longer chooses. From the point of view embraced when the standard of intent is accepted, the evils that the losing surrogate

87. *Id.*

88. See *Custody Battle*, *supra* note 16.

89. Transcript, *supra* note 5, at 24.

90. *Id.*

91. Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302 (1990) [hereinafter *Reproductive Technology and Intent-Based Parenthood*].

92. Shultz, *Reproductive Technology and Intent-Based Parenthood*, *supra* note 91.



suffers are not evils at all; they are voluntary choices. Or, if they are evils, they are justly imposed.

One problem with the standard of intent is that it is and would be inconsistently applied. Already it is not applied across the board in cases involving non-traditional parenting arrangements, such as homosexual relationships.<sup>93</sup> Moreover, if courts can justify enforcing surrogacy contracts by appeal to intent, they can, by the same token, justify enforcing betrothals, marital vows and other personal undertakings. Yet, the latter contracts are no longer enforced. I believe surrogacy arrangements should be treated in the same manner as other personal agreements, that is, as unenforceable commitments, rather than as enforceable commercial contracts.<sup>94</sup> In those instances where custody battles arise out of failed surrogacy agreements, courts should be ready to intervene in the "best interest of the child," just as they currently intervene when custody battles arise out of failed marriages or love affairs.

In practice, the "best interest of the child" interventions might still turn out to favor genetic parents more often than gestators. But the explicit reason would not be the backward-looking reason that parties once intended that result. It would be the forward-looking reason that the court is persuaded of the genetic parents' superior abilities to provide a home for the child. Conceivably, genetic parents would always win under a "best interest of the child" analysis when they were white and more affluent than the child's minority gestator.

Another problem with the standard of intent is that it presupposes a backdrop of greater equality of opportunity than presently exists. *Ceteris paribus*, a woman with practical nursing skills has more opportunity and a wider foundation for self-determination than a woman without skills and no high school diploma. Yet, opportunity is a matter of degree. The United States has a recent history of legally enforced race and gender inequality. Economic and social pressures over which individuals have little control significantly dictate their "voluntary" choices. A 1989 study showed that 43.2% of all Black women with children under the age of eighteen in the United States lived below the poverty level.<sup>95</sup> Habitually low social expectations concerning appropriate vocations for white women and certain minority groups limit the horizons of individuals in these groups faced with "free" choices. Moreover, some forms of liberty and contractual voluntarism impinge upon other, equally important values. If liberty must be tempered by fairness, equality and dignity, it is doubtful that the standard of intent can do all of the normative work that must be done in the wide field of procreative arrangements and parental status.

93. In a recent case involving a lesbian couple who had intentionally utilized artificial insemination to become the parents of two children, the court refused to endorse either woman's proposed child-custody plan, and denied parental and visitation rights. The court deemed the intentions of the lesbian parents irrelevant. See *Lesbian Is Denied Custody After Breakup*, N.Y. Times, Mar. 24, 1991, at 22, col. 1.

94. See Allen, *Surrogacy, Slavery*, *supra* note 3, at 147. ("Surrogacy arrangements are best viewed as unenforceable personal commitments or vows between unmarried individuals."). Cf. Allen, *Privacy, Surrogacy and the Baby M Case*, *supra* note 2 (accord).

95. See U.S. Department of Labor, Bureau of Labor Statistics, *supra* note 13 and accompanying text.

## B. New Face, Old Problem

What can the white man say to the Black woman? For four hundred years he ruled over the Black woman's womb. . . . It was he who placed our children on the auction block. . . . We see him . . . make the Black mother, who must sell her body to feed her children, go down on her knees to him.<sup>96</sup>

Minority women increasingly will be sought to serve as "mother machines" for embryos of middle and upper-class clients. It's a new, virulent form of racial and class discrimination. Within a decade, thousands of poor and minority women will likely be used as a "breeder class" for those who can afford \$30,000 to \$40,000 to avoid the inconvenience and danger of pregnancy.<sup>97</sup>

It has been said many times before, but it bears repeating: tolerating practices that convert women's wombs and children into valuable market commodities threatens to deny them respect as equals. Commercial surrogacy encourages society to think of economically and socially vulnerable women as at its disposal for a price. Segments of the public will draw the obvious parallels to slavery and prostitution.<sup>98</sup> Their reaction may seem melodramatic. But it is a telling reminder of social attitudes and history. Genetic heritage, while a factor, should not be dispositive in a battle between genetic and gestational parents. The experience of pregnancy and childbirth, like the knowledge of genetic linkage, can play an important role in shaping women's sense of themselves and their responsibilities.

I believe that policymakers should discourage surrogacy, chiefly by (1) refusing to legally enforce commercial surrogacy agreements; (2) ascribing to surrogates parental rights that they may voluntarily relinquish only after the birth of a child they are paid to carry;<sup>99</sup> and by (3) making no distinction between genetic and gestational surrogates when it comes to the assignment of parental rights. Legislation shaped around points (1) and (3) would increase the risks of entering into surrogacy arrangements for the economically more powerful parties (the consumers and brokers of surrogacy) and decrease the risk of surrogacy arrangements for the less economically powerful (the surrogates).

Black gestators would remain vulnerable to emotional devastation even if surrogacy policies were in line with points (1), (2) and (3), and if race were not a factor for the court in awarding child custody under the "best interest" standard. A Black gestator who wanted to keep her white offspring, as Anna Johnson did, would likely be pressured by family, friends, and experts to do otherwise. She would know that racism

96. Walker, *supra*, note 6.

97. Rifkin & Kimbrell, *supra* note 12.

98. Ruth Baum, *Letter to the Editor*, The San Francisco Chronicle, Nov. 6, 1990, § A, at 20. ("I've got just one question concerning the Anna Johnson surrogate mother case: If a woman can legally rent her uterus for nine months, why should the law prevent her from renting her vagina for an hour or two? . . . [Prostitution and surrogacy involve] . . . commercial use of one's body for someone else's convenience or pleasure.")

99. See Allen, *Privacy, Surrogacy*, *supra* note 2.



could add special stresses on individual members of her multiracial family, leading to acrimony and rejection.<sup>100</sup>

Limitations on the alienability of parental rights, point (2) above, can greatly benefit some surrogate mothers. Inalienable post-delivery parental rights as limitations on surrogacy would clearly benefit white surrogates who, like Mary Beth Whitehead Gould, want to keep their genetically-related children. The benefit of point (2) to gestational surrogates, especially Black gestational surrogates, is less clear. First, genetic ties have special meaning in American culture. In deciding child custody under the "best interest of the child" standard, I predict courts would be reluctant to award children to gestational, as opposed to similarly situated genetic, parents. Second, since genetic parents will probably be better educated and more affluent than gestational surrogates, courts are likely to view them as better equipped to provide good homes. Third, most consumers of surrogacy are whites who want white children. Although Black women's infertility and sterility rate is higher than white women's,<sup>101</sup> few Black women utilize surrogate mothers.<sup>102</sup> It follows that most Blacks who are surrogates will be surrogate gestators for whites. The children born to Black gestational surrogates will be of another race. Racial difference between mother and child may incline courts against awarding custody to the Black surrogate gestator.

The number of Black gestators who could master their rational fears and overcome judicial resistance to go with their hearts would likely be small compared to the number who, with tragic emotional consequences, would feel compelled to give up their offspring. We can only imagine what Anna Johnson's life would have been like had she prevailed in her custody bid. Perhaps her own bi-racial heritage steeled her for the battles she would have faced as head of a multiracial family. Her willingness to fight to parent her gestational child was virtually as remarkable as the biotechnology that made it possible. Like Polly, the slave who sued for her own freedom and then for the right to own her own child, Anna Johnson was exceptionally courageous.

## CONCLUSION

According to my analysis, few Black surrogates who desire to keep their gestational children could easily decide to do so. Surrogacy laws, even surrogacy laws that equally favor genetic and gestational surrogates over genetic parents, offer Black gestational surrogates little protection. As an ironic consequence, Black gestators could be the safest surrogate mothers for white women who want white children.<sup>103</sup> In light of these inequities, the *Johnson* case may force the conclusion on behalf of Black women that a *per se* ban on commercial surrogacy is the safest—the wisest—course.

100. For example, a Black gestator could foresee that her multiracial family could attract curiosity and prejudice.

101. Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women in* REPRODUCTIVE LAWS FOR THE 1990's 23 (N. Taub & S. Cohen eds. 1989).

102. *Id.*

103. Cf. *California Surrogacy Case Raises New Questions About Parenthood*, *supra* note 45 (potential for racial discrimination since "couple may be more inclined to hire minority woman to carry the child, either for financial or other reasons").