INTRODUCTION

NEGOTIATING "MOTHER" IN THE
TWENTY-FIRST CENTURY

Between Choice and Constraint

YASMINE ERGAS, JANE JENSON, AND SONYA MICHEL

"Mother" as an identity and a role is undergoing rapid change. There long have been multiple avenues to motherhood, including adoption and fostering, yet conventionally a "mother" has been understood to be a woman who both bears and cares for a child. Today, however, the status of mother may be conferred on a person who fulfills only one or even neither of these roles. Changing social norms, reproductive technologies, including assisted reproductive technologies (ARTs), and the possibilities offered by globalized personal services all have led to the creation and expansion of markets in both procreation and care. As a result, women who previously could not bear children may now do so, and those who cannot or do not wish to physically reproduce may foster, adopt, or engage a surrogate mother who will bear a child on their behalf. Men, too, may access the markets in procreation and advance claims to being "mothers" rather than simply parents.\(^1\) In addition, global as well as local labor markets now provide childcare workers, without the women who hire such workers ceding any of their status as their children's mothers.

In other words, as increasing numbers of women who are not going to be considered mothers give birth and care for children, and as women who claim the status of mothers perform only one or neither function, neither parturition nor care is either necessary or sufficient to define a mother. Instead, large social processes are at work, creating chains of
procreation and chains of care. ARTs are redefining who may procreate, whether by direct gestation or through surrogacy, and with what or whose genetic material, while states struggle to define which of the new pathways to procreation should legitimately endow a woman with the status of “mother.” At the same time, paid care workers are assuming a major presence in the lives of children, while public policy shapes the means and ends of care.

Changes in social norms and public policy as well as in legal rights and technologies, and the development of markets in both procreation and care, mean that motherhood has become a choice for more women. In this sense, there is what we might think of as a “liberalization” of motherhood. But the new panoply of choice is not, of course, available everywhere and to everyone. Motherhood has not been fully “democratized.” The possibility of choosing how to mother is not equally available to everyone, either within any one society or across different countries. Compulsion and coercion, exclusion and privilege persist; the opportunity to decide to bear children (or not) or how to organize the care of those children is unevenly distributed. Restrictive policies, socioeconomic disadvantage, cultural mores, and discrimination founded on multiple bases force some women into motherhood while preventing others from either bearing or caring for their children. The chapters in this volume examine the inequalities that affect the distribution of choice as well as the ways in which more choice has been generated within the two chains of procreation and of care.

**DISMANTLING BARRIERS, EXPANDING CHOICE**

There is no denying that many barriers to motherhood are being dismantled. While geographic, socioeconomic, and racial or ethnic variations continue, more individual women can choose motherhood and more categories of women can do so. As medical advances render female bodies more reproductively malleable, the groups previously included among the “medically infertile” are being whittled down. Women without viable oocytes, women approaching or in menopause, and women without wombs, among others, need no longer be classified among those who cannot bear children. As with women whose partners have low sperm counts, these women may choose assisted reproductive technologies or surrogacy as well as adoption.

At the same time, the legality as well as the legitimacy of exclusions based on discriminatory criteria are being challenged nationally and internationally. Forced sterilization of indigenous women in the 1990s in Peru, for example, provoked outrage, leading to the end of the practice (Boesten 2014). Collective mobilizations and legal proceedings have contested and at times halted forced removals of the children of indigenous, Roma, or African American women as well as those with disabilities or nonconforming sexual orientations and gender identities and political dissidents. In numerous jurisdictions, restrictions on adoption have been loosened. Some permit single women, whether heterosexual, lesbian, or transgendered, to adopt. Some permit adoption by LGBT couples. And some jurisdictions allow women to effect second-parent adoptions of nonmarital partners’ children to whom they are not biologically related. As all of these examples illustrate, access to motherhood has broadened.

At the same time, women also have been empowered to limit their childbearing and child-rearing or to forgo these options altogether. The ability to engage in heterosexual relations without risking undesired pregnancy has increased as a result of improved availability of contraception and abortion (Alkema et al. 2013). The unmet need for contraception has declined, and over the past two decades abortion has also been legalized in more than two dozen countries. The Center for Reproductive Rights reports that more than 60 percent of the world’s population now lives in a jurisdiction with liberal abortion laws. Indeed, social norms legitimating women’s decisions not to reproduce have been strengthened and, with them, voluntary childlessness.

**INEQUALITIES IN ACCESS TO MOTHERHOOD**

Despite the reality of expanded choice, long-standing barriers and forms of coercion endure while new ones emerge, creating as well as maintaining inequalities in patterns of mothering. The obligation to bear and
raise children has long been a marker of “good” womanhood. The value-laden conjunction of femininity and maternity that Katherine Franke (2001) terms “repro-normativity” persists in the continuing stigma attached to (perceived) infertility and voluntary childlessness (see also Jansen and Saint Onge 2015). Infertility and childlessness can lead to consequences ranging from matrimonial dissolution to insecurity in old age.6

Factors such as stigma, marital insecurity, and economic and social vulnerability reflect and reinforce strong and widespread norms equating women’s identities with childbearing and child-rearing in ways that may overshadow other dimensions of their lives. As Jane Jenson documents in this volume, a “new maternalism” prevalent among international and domestic policy makers casts women as mothers and “writes out” women as independent subjects, along with their equality claims.

Coercion also follows from the fact that in many countries contraception or abortion are still prohibited or severely restricted, despite the improved access described above. In a seeming paradox, the restrictive abortion and contraception regulations that are legitimated as promoting the right to life contribute to the most significant exclusion from motherhood that persists today: maternal mortality. Illegal and botched abortions are a leading cause of the high rates at which women continue to die in pregnancy and childbirth (World Health Organization 2011). To be sure, such rates have declined significantly in the past two decades, but there remains a significant gap between the objective of a 75 percent reduction by 2015, set by the United Nations Millennium Development Goals in 1990, and the 45 percent decrease actually achieved (United Nations 2015a).

As many of the essays in this volume attest, long-standing legal forms of exclusion from motherhood also persist. These include discriminatory application of parental fitness standards and termination of maternal rights, as Dorothy Roberts documents, and induced and even coerced renunciations of maternal rights in the context of adoption, as the chapters by Pien Bos and Carol Sanger describe. New examples of exclusions from motherhood come from the contracts that transfer to others the child a woman has borne. Claire Achmad and Yasmine Ergas document this exclusion via commercial reproductive surrogacy, while Letizia Palumbo assesses restrictions that limit access to assisted reproductive technologies, such as occurs where adequate medical facilities are lacking or obstructive legal and administrative norms apply.

Difficulties in reconciling work and family obligations also erect barriers to motherhood, barriers that women of means can negotiate more easily than those with fewer resources. When the pursuit of careers has led to the postponement of childbearing, better-off women can afford to access ARTs, to take significant breaks from paid employment, and to purchase high-quality nonparental care. But for poor and low-income women, especially those from developing countries, the opposite is true. As Helma Lutz and Sonya Michel and Gabrielle Oliveira document in their chapters, many of those women must commute or migrate to find paid employment, often caring for the children of others while leaving their own children behind.

From maternal mortality to maternal expropriation to unwilling renunciation and migration, social inequalities shape patterns of access to motherhood and the two chains of procreation and care. Although chains of procreation and care cater to different needs, they are both based on the segmentation and commodification of functions once associated with “mother.” Fetuses, for example, are viewed as separate from the bodies of the mothers who bear them, as Anne Higonnet’s chapter illustrates, and that separation, Yasmine Ergas contends, informs a view of childbearing as a marketable function. Care may become a form of work, a set of tasks performed by members of a specialized labor force, who may even acquire the requisite competencies through specific training, as Sonya Michel and Gabrielle Oliveira discuss. And yet, as all the chapters in this volume show, to the extent to which chains of procreation and care, and the processes of segmentation and commodification associated with them, tend to redefine “motherhood,” they also give rise to intense contestation. Such contestation reflects ongoing tensions over who may be a mother and who must or must not.

**PROCREATION AND CARE: MULTIPLE ISSUES**

While motherhood is denied to some women, it is imposed on others. This difference often follows from the relation between embodiment and
procreation: women are simultaneously regarded as embodied subjects and yet disembodied bearers of fetuses and then children. How can this be? The foundation of Western political and civil rights lies in the embodied self and in the notion that the rights of personhood are, in the first instance, grounded in the indissoluble nexus between the person and her physical being. The right to contraception constitutes women's habeas corpus claim to self-possession, as Geneviève Fraisse (2013) argues. But what are the boundaries of the self when it comes to pregnant women? Does the process of multiplication entailed in gestation—the physical process through which one person becomes two (or more)—call into question the notion of a unitary physical self? Anne Higonnet recounts how imaging techniques such as ultrasound may be utilized to sever the representation of the fetus from the maternal body. This capacity to delink the pregnant woman from the fetus she is carrying is reflected in the relative paucity of attention paid to the consequences of assisted reproductive technologies. As Linda Kahn and Wendy Chavkin show in their chapter, concentration on the production of children overshadows concern for the women who bear them.

The issue of embodiment also pervades the practices of surrogacy. Yasmine Ergas examines notions about where the pregnant woman ends and the possession/child of others begins. The “straight-line” assumption implicit in surrogacy discourse posits that the ownership of gametes seamlessly translates into being the parent of a child that another woman bears. This assumption is necessary to enable a contractual relationship with the surrogate and the marketization of childbearing. The chapter also argues that assigning rights in the fetus to someone other than the woman bearing it opens a door to rethinking the jurisprudence under which abortion has been legalized thus far, to the extent to which it has been based on the notion that the fetus is not only in a woman but of her.

The matter of embodiment also permeates debates on men’s rights to childbearing, raising issues such as whether motherhood is exclusively an attribute of women or might pertain also to men. As Nara Milanich’s chapter tells us, the assignment of parenthood—fatherhood as well as motherhood—is based on understandings of reproductive physiology that have proven highly labile over time and have become further complicated in recent decades with the emergence of ever more sophisticated and powerful ARTs. (This is also discussed in Kahn and Chavkin’s chapter in this volume, and in Thompson 2005).

Motherhood is, of course, also closely associated with nurturance and care, but this pairing has been historically easier to disassemble than motherhood and procreation. Over time and across social boundaries, as Alice Kessler-Harris’s afterword reminds us, the practices of nurturing and caring have frequently been assigned to persons other than the biological mother, mostly women such as wet nurses and nannies. In some countries, the tasks have gone to men as well. Such practices open up a number of areas of instability in the representation of social relations. For example, caring for children counts as "work" when it is paid but not when it is unremunerated. If care involves an emotional connection as well as a custodial one, might not the law recognize a paid care worker’s right to visitation when her employment comes to an end?

The distribution of care also raises issues about women’s roles and rights more generally. As Jane Jenson’s chapter documents, social policies in several regions of the world have been altered since the mid-1990s, shifting from ensuring the rights and capabilities of all adults, including women, to framing women’s needs as being based primarily on their functions in childbearing and child-rearing. This resurgent maternalism echoes the traditional gendered division of labor. But as Martha Fineman argues in her chapter, both the traditional devaluation of care as “not work” and the social ideal of autonomous, self-sufficient citizens obscures the reality of dependence as a constitutive rather than exceptional characteristic of social relations. We are all, she says, “vulnerable,” and it is this vulnerability that ought to ground social policy.

Such shifts all have profound implications for the definition of motherhood. Renegotiations of motherhood are being provoked by tensions around embodiment as well as around care, which touch on matters as diverse as the “value” of women as individuals and as bearers of children, the framing of “mothering” as work or family (and the relationship between these two) and ultimately the claims of women to, simultaneously, be able to choose to mother and to not be reduced to mothering.
RENegotiating Motherhood

At times, one woman's ability to mother depends on another woman's inability to do so: adoption, surrogacy, and nonfamilial caring might all be cast in zero-sum terms. But a broader view suggests that constriction and choice can interact in ways that produce new practices and patterns. When emigration leads a woman to leave her children behind in order to care for those of others, her mothering is constrained. This situation has led analysts to identify "care deficits" that are created by the pull of care workers from the Global South to the Global North and from east to west in Europe. Such migration patterns have sometimes, as Helma Lutz recounts in her chapter, generated public debates about the social consequences of maternal absence and have even led to "mother blaming." Numerous studies have shown, however, that women who migrate do not neglect their children but rather rearrange the structure of caring. Often this entails delegating children's care to migrants' female relatives or to other (even less well-paid) women. Each "mothers" in the other's stead (Hochschild 2000).

As the work of care is redistributed, contests over motherhood may arise. In their chapter, Michel and Oliveira provide an example of a nanny challenging her employer's claim to motherhood: she herself is, she contends, her charge's "real" mother. But viewed from the perspective of employers—in a context in which women's income is ever more central to household economies—fulfilling their responsibilities as mothers may entail providing children with the benefits derived from employment, including good substitute care. Indeed, as women, whatever their position in the care chain, reconcile paid work with family obligations, they are likely, as Lutz and Michel and Oliveira describe, to reformulate their understandings of what motherhood entails, shifting from direct caring to the overall coordination of child-rearing, providing financial support, ensuring long-distance supervision and, for those who migrate, working to realize the promise of immigration rights to family reunification.10

Adoption and surrogacy also are prompting renegotiations of motherhood. In her chapter, Carol Sanger analyzes legal cases involving women who, faced with the risk of having their maternal rights terminated, sought to bargain over the terms on which they would give up their children for adoption. These women signed contracts that promised continued connection with the children, having been persuaded to give up their children by the prospect that they would be able to hold on to a piece of motherhood. For the most part, however, especially where the birth mother could be represented in terms of racialized social disadvantage, the contracts were not upheld.

The process of "de-kinning" that birth mothers undergo during adoption can leave searing traces. In her chapter, Pien Bos describes birth mothers who, years after giving up children for adoption, still consider themselves to be the mothers of those children and await their return (see also Volkman 2005).11 Amrita Pande (2014) has detailed the hopes of continued connection that surrogate mothers nurture despite having been repeatedly instructed that they are not the mothers of the children they will bear. Moreover, even as they cling to hope, they too are redefining the terms of motherhood—for instance, earmarking the compensation they will earn for their other children's education and care. Producing children on behalf of others may be a way to mother one's own.

BEYOND PRIVATE NEGOTIATIONS: MARKETS, STATES, AND GLOBAL GOVERNANCE

The meanings of motherhood are not individually negotiated only by birth mothers and adoptive parents, surrogates and intended parents, care workers and employers, and their reference groups, families, and communities. Rather, private and public institutions also play a crucial role. In the Indian state of Tamil Nadu, Pien Bos researched an adoption agency-cum-home for pregnant women that simultaneously provided accommodations for pregnant women in difficulty and coaxed them to yield their children for adoption. When pregnant women and women who had just given birth proved ambivalent, the institution worked assiduously to reassure them, seeking to convince them that keeping the child was not in the child's best interests or their own. The situation of the women on whom Carol Sanger focuses are also catalyzed by adoption agencies: birth mothers are persuaded to give up their children in exchange for promises of postadoption visitation.
Chains of care and procreation also are shaped by state action. The rights and duties of motherhood have long been organized by states. Conventionally considered to fall within the domestic jurisdiction of states (and sometimes their subnational jurisdictions) and thus to be free from external interference, designations of who may and who must become or remain a mother, the value assigned to “mothering” and its constituent aspects, how and by whom is it to be recognized and supported and, ultimately, who is to make the relevant determinations have all been the purview of national decision makers. In recent years, however, this relative autonomy of national states has been undermined by the diffusion of authority over practices and policies about motherhood and the involvement of institutions of international and supranational governance, including courts (see Ergas 2013 and the chapter by Palumbo, for example).

Perhaps even more consequential has been the emergence in recent decades of markets that structure the global chains of procreation and care. Markets in procreation involve selling gametes and selling the gestation and delivery of children, addressing the needs of women and men who cannot or do not wish to bear their own children. Markets in the chains of care involve payment for the performance of tasks such as nurturing, feeding, cleaning, safeguarding, accompanying, or supervising the education of children, catering to those who either cannot or do not wish to perform these functions themselves. Workers’ and suppliers’ entry into these markets is often controlled by agents and vendors of varying reliability and beneficence.

Both chains share some general characteristics. First, they are based on the disaggregation of “motherhood” into discrete elements that can be demarcated, commodified, and outsourced. Second, they promote a view of each of these elements—and, indeed, of the status of mother herself—as legitimately subject to marketization and hence to regulation as part of systems of commerce and contractual exchanges. If nonparental care has been recognized and regulated for many years, the disaggregation of procreation and its rules are less well established.12

Segmentation or disaggregation translates naturalistic views of “mothering” into specific and commodified goods, such as oocytes, and into services, such as homework supervision. Separately packaged and brought to market, these elements can be reassembled by their purchasers, who can source them on a worldwide basis. Such markets require material and legal organization of the processes by which the purveyors of the various goods and services transfer them to consumers. Specialized information disseminators (such as websites), brokers, transportation and hospitality operators, financial agencies, “handlers” and “fixers” adept at smoothing transitions between legal and illegal, familiar and foreign markets, connect potential parents to the suppliers of the goods and services that they require (Thompson 2005, as well as chapters by Achmad, Michel and Oliveira, and Palumbo).

These characteristics of chains of procreation, in particular, call into question the legal and policy framework within which the regulation of motherhood has conventionally been situated for centuries (Ergas 2013). Despite significant variations across countries and regions, it is possible to say that these frameworks generally have treated “motherhood” as a status, not subject to contract. Moreover, the functions and physiological elements associated with it have been treated as familial obligation, not as services and goods traded in markets. In keeping with this framework and with a general stance against human commodification, women, children, and body parts have been shielded from the regulations of commercial transactions. Moreover, to the extent to which they have been constituted as objects of exchange—via slavery, human trafficking, and so on—decommodification and removal from market processes have been a primary objective of international as well as national regulation. Nonetheless, with respect to procreation, these strictures have proven hard to apply: the lines demarcating that which may be bought and sold from that which may not, that which pertains to status from that which is grounded in contract, are not only contested but persistently circumvented. Along with other markets for human beings, including brides, sex workers, and indentured workers, a thriving “business in babies” has emerged (Spar 2006).

To a significant extent this market in babies and children is frankly illegal. Child traffickers worldwide notoriously organize and profit from a prohibited albeit flourishing trade in children. But these markets also operate in a gray zone, one in which the lines between de jure prohibitions and de facto acceptance blur. The international convention on adoption, for example, bars any “improper gain,” incorporating a resolutely anticommmercial stance to the transfer of children. But it also
allows for "costs and expenses" (Hague Conference on Private International Law 1993, articles 8, 32). Uncertainty about the term "reasonable expenses" raises issues about whether women may be legally paid to provide children to adoptive parents. Tellingly, the U.S. courts that Carol Sanger discusses in her chapter do not generally enforce contracts for postadoption rights between birth mothers and prospective adoptive parents, on the grounds that gifts may not be contracted. And for the same reason, U.S. courts are also often reluctant to order a birth mother who changes her mind to repay amounts that she has received from prospective adoptive parents while pregnant. Nonetheless, some courts have enforced these contracts, as Sanger also recounts, and some have allowed for payments in exchange for future concessions of adoptive babies to be recovered.

Care is also marketized. As Alice Kessler-Harris documents in her afterword, nonparental and paid childcare is far from new. Employed women have historically engaged other women to care for their children, while even non-employed mothers with substantial means have long engaged nannies and governesses. Did these employees see themselves, and did their employers cast them, as "workers"? It seems reasonable to suppose so. Yet the intense struggles employees have had to wage to gain recognition as workers suggest that their labor has been imbued with a naturalizing aura that prevents its recognition as a form of work requiring adequate compensation (see, for example, Boris and Nadasen 2015).

In recent years, such struggles have catalyzed the emergence of global as well as national civil society organizations of domestic workers that have included childcare providers, and international labor federations have also begun to organize the representation of such workers (Boris and Fish 2014). As a result, the national governments of some "sending countries" of domestic workers have sought to improve the treatment of their citizens in "receiving" states. And such movements have prompted international action: in 2013, the International Labor Organization's (2011) Domestic Workers Convention came into force. While the convention found early supporters among governments who "export" such workers, some "importing" states have also acceded to it. This convention marks the success with which domestic care workers—and domestic workers more generally—have been able to define themselves and organize as workers entitled to bargain over the terms of the services they provide, including compensation and working conditions. This means that nonparental childcare, when provided within households, increasingly will be recognized as a form of work and will be sufficiently compensated and subject to regulation as such. Indeed, there is now an international conversation about "unpaid work" in general; the recently approved United Nations Sustainable Development Goals (United Nations 2015b) include "recognize and value unpaid care and domestic work" among their targets.

In all of these ways, it is clear that "motherhood" is in transformation: more accessible, yet still restrictive; more subject to choice, yet still also a locus of coercion. This collection highlights sites of contestation that have emerged as chains of procreation and care have simultaneously generated greater liberty and new forms of constraint, promoted market relations and prompted new intersections among institutions of global governance, national governments, and civil society. While most of these issues are far from being resolved, the chapters here lay the groundwork for further thought and deliberation.

NOTES

1. Opening up the possibility that "mother" may be a quality of "men," such claims call into question conventional uses of "mother" as a signifier of "female" and highlight perspectives that view the maternal—and the feminine—as purely performative.
2. See, for example, the reports of forced removal of indigenous children in Australia (Commonwealth of Australia 1997) and in Canada (Truth and Reconciliation Commission of Canada 2015).
3. Nonetheless, provisions for mothers to safely give up their children are still necessary (Sanger 2006; Oaks 2015).
5. Significant differences still exist, however (Eicher et al. 2015). Franke (2001) describes persisting stigma attached to perceived involuntary childlessness.
6. On childlessness as a cause for matrimonial dissolution, see Rosenblum (2013). For a review of risks entailed by childlessness in relation to old-age dependency and the solutions to which it may give rise, see De Vos (2014).
7. In practice, however, this process is not seamless; it requires a complex "ontological choreography" on the part of biomedical personnel and clinics, among others (Thompson 2005).
8. In colonial India, for example, male servants frequently looked after children (Banerjee 2016).

9. This contradicts states’ obligation to ensure that maternity does not constitute a basis for discrimination against women. See the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, UN 1979), articles 4 and 5.

10. The term “global care chain” was formulated by Hochschild (2000). For an early recognition of the idea that mothering includes financial support, see Segura (1994).

11. For a cinematic representation of birth mothers who continue to identify as mothers, see the 2013 film Philomena (Fears 2013), based on a book of the same name by Martin Sixsmith (2013).

12. France, for example, legislated around wet-nursing at the end of the nineteenth century (Jenson 1986). For the regulatory story of childcare in the United States, see Michel (1999, chap. 7).

13. Nonparental care outside the home has been paid and recognized as work, perhaps not sufficiently, but protected nonetheless (see Michel 1999, chap. 7; Jenson and Sineau 2001).

REFERENCES


PREGNANT BODIES AND THE SUBJECTS OF RIGHTS

The Surrogacy-Abortion Nexus

YASMINE ERGAS

Commercial reproductive surrogacy is often seen as an expansion of reproductive freedom. In particular, women’s ability to engage in contractual gestation and thus the ability of men and (other) women to purchase their services appear seamlessly connected to the women’s right to terminate their pregnancies; both are cast as variants of reproductive “choice.” This chapter argues the contrary case: rather than existing along a continuum of reproductive autonomy, abortion rights and the rights implicated in commercial surrogacy in fact reflect very different understandings of women and their pregnancies. When these understandings are taken into account, it is far from evident that commercial surrogacy represents an expansion of the reproductive “choice” embedded in abortion rights. To the contrary, current theories of commercial surrogacy rest on a view of pregnancy as a “service” and of the embryo and fetus as always already the property and “child” of the commissioning parents. Severing the pregnant woman from the fetus itself, such a view of commercial reproductive surrogacy thereby jeopardizes the theories of a pregnant woman’s embodiment and personhood on which abortion rights rest.

Women’s abortion rights are not grounded in “choice” in and of itself. Rather, that “choice” is based in the essential unity of women’s personhood and embodiment and in the inherent enmeshment of the evolving embryo and fetus with the pregnant woman’s body.
It is sometimes suggested that the embryo and fetus embody other people as well—at the very least, the sperm provider and, in gestational surrogacy, the ovum provider. This, of course, is true; but for the sperm, there would be no embryo, no fetus, no child. The same applies to the ovum. But the sperm and the ovum merge in the embryo, and the embryo merges into the body of the pregnant woman. There is no good analogy for the transformations undergone following the implantation within a woman of an embryo that has been produced externally to her, but one might invoke transplanted organs: they become elements of the person into whose body they have been incorporated, even as they reconfigure and profoundly alter that person’s physiology. Analogously, the embryo becomes part of the pregnant woman’s body, that is, of her “self.”

Gestation is not simply encasement; if it were, a petri dish would suffice to change gametes into children. Instead, gestation entails a complex, transformative merging of the embryo into the mother’s other organs, reconstituting her as a corporeal being. This is what, in the jurisprudence of the United States, authorizes a woman to choose whether to have an abortion; it is why the state may not delegate to any private individual a veto power over a pregnant woman’s right to choose; and it is why, no matter how strong the state’s interest may be in seeing that pregnancies are carried to term, the state’s “interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns. . . . In countenance is the woman’s constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one’s person” (Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 [1992], Stevens, J., concurring and dissenting opinion, para. 2).

Indeed, under the jurisprudence of the U.S. Supreme Court, at viabil-ity, the state’s interest in ensuring that a pregnancy is carried to term may be so strong as to legitimate the imposition of significant regulatory constraints on a woman’s right to abort. Nonetheless, that moment marks only an accentuation of the state’s interests (and correlative regulatory rights) in a potential human life; it neither endows the fetus with personhood nor transforms it into an object, external to the gestating woman. In line with that jurisprudence, neither parental rights nor property rights can be assigned to third parties over fetuses, for that would amount to assigning rights in a woman’s body, and, hence, in her person.

Yet, in the United States as elsewhere, courts, legislators, and advocates have sought to ground the legality of commercial reproductive surrogacy in precisely such assignments of rights. Viewing the commissioning parents as always already the owners and then the parents of the gametes/embryo/fetus/evolving child has served at least three interrelated purposes. First, it has obviated the charge that commercial reproductive surrogacy constitutes a form of the market in babies, a prohibited exchange of children for compensation. Second, and relatively, it has grounded legal certainty regarding the parentage of the child in contract—assigning it to the commissioning parents while simultaneously negating any claims that either “external” gamete providers (that is, external to the commissioning parents) or the woman who gives birth might have. Finally, it has appeared to promote a gender equality agenda.

If gestation can be purchased, as can ova and sperm, then the major element that differentiates the reproductive capacities of men and women becomes a subject of contract. Unlike ova or sperm, however, which are sold as property (albeit of a particular kind), a pregnant woman who sells the result of her gestation is selling a child. Only if one posits that the implanted embryo, the evolving fetus, and the resulting child were never “of” the pregnant woman but merely “in” her, and that the relevant property and/or parental rights always pertained to the commissioning parents, can this conclusion be avoided. While this ensures certainty of the commissioners’ parentage displacing traditional legal rules that allocated maternity to the woman who gave birth, it also implies disjoining the implanted embryo and fetus from the pregnant woman. The biology of reproduction that underwrites abortion jurisprudence is recast: rather than part of the pregnant woman, the embryo and fetus assume a quasi-autonomous status; they are housed within, not integral to, her body. Legalized under this set of assumptions, commercial surrogacy is on a collision course with women’s right to abortion. Perhaps it is best to take a step back and ask what alternative frameworks might be available. To do this, however, it is necessary to understand the arguments being put forth now.
GENES, EQUALITY, AND THE REDEFINITION OF BIOLOGY

"So she was actually the mother!" Brian Lehrer, a well-known New York talk show host, exclaimed on television, in November 2014. Lehrer was referring to Mary Beth Whitehead, the protagonist of the Baby M case, a 1988 legal battle over who could claim parental, and hence custodial, rights to a child Whitehead had borne on behalf of a commissioning couple (In re Baby M, 537 A.2d 1227, 109 N.J. 396 [1988]).

"She was the traditional surrogate," came the firm response of Lehrer's interlocutor, Nathan Schaefer, the executive director of the Empire State Pride Agenda. "And that's very different from what is commonly practiced now, which is gestational surrogacy." As a traditional surrogate, Schaefer explained, Whitehead had provided "her egg, and so she had a biological connection to the baby that she was having... for this family from Manhattan." But in gestational surrogacy, "you identify an egg donor and then a separate gestational carrier who, in turn, has no biological connection to the child" (Lehrer 2014). It is a surprising understanding of pregnancy and/or biology: the ovum is biological, but pregnancy and childbirth are not.

The segment of Lehrer's show on which Schaefer appeared focused on the campaign to liberalize New York State's surrogacy law. Approved in 1993 in a climate marked by the Baby M case to which Schaefer referred, New York law prohibits contracts that entail compensating a woman to carry a pregnancy and give birth to a child on behalf of third parties (New York Code, Domestic Relations, article 8, § 121-24). Criminal penalties may be imposed in such cases, although donor—that is, unrenumerated—arrangements are permitted. More than two decades after passage of the New York statute, as Schaefer argued for a bill before the state legislature that would strongly favor the commissioning parents, he insisted on the distinction between the processes entailed in traditional and gestational surrogacy. A new technology, he contended, demanded a new legal approach. The advent of gestational surrogacy has indeed seemed to calm the polemic surrounding surrogacy itself, at least in the United States (Scott 2009). A legislative laggard, New York State, Schaefer maintained, was "losing an opportunity" to allow third-party reproduction.

Yet the issue was not just one of technological modernity. That would not have elicited Schaefer's astonishing negation of the biology of pregnancy and childbirth. Rather, his words resonate with the high-stakes re-visioning of motherhood that is under way today. "Mother" is a legal status; it carries rights to child custody and companionship, to support and, at times, to citizenship, as well as obligations. It is legally difficult to shed and difficult to negate—although, as Dorothy Roberts's essay in the present volume demonstrates, the law itself may be applied discriminatorily, thus eroding the right of disadvantaged women to their status as mothers. Generally, as a legal matter, motherhood cannot be exclusively determined by agreement among private parties; states are centrally involved (Ergas 2013). Thus, legal definitions of motherhood cast a long shadow over surrogacy arrangements; they determine the framework within which any particular bargain occurs.

The traditional legal rule attributes motherhood to a woman who gives birth. That childbirth makes the mother is a principle that has been largely underwritten in both common and civil law systems (Hague Conference on Private International Law 2004). But paternity has been circumscribed by institutional relationships. William Blackstone (1765-69, book 1, chap. 16) cited the Roman maxim "Pater est quem nuptiae demonstrant" (the father is he whom marriage indicates) in his Commentaries on the Laws of England. Conventionally, then, motherhood is grounded in bodily facticity, paternity in the relationship between a man and a specific woman—the one who gave birth. In this view, the converse does not hold; the mother is such because of her direct, physical connection to the child to whom she gives birth, not because of her relationship to any particular man.

Although other pathways to parenthood, including adoption, have long been recognized in many countries, these traditional presumptions still generally apply. Recent surveys show that, in most instances, "by operation of law" (Hague Conference 2014, 9), the mother is she who has given birth and "pater est quem nuptiae demonstrant." Nonetheless, as other contributors to the present volume note, sociological trends and technological factors in recent decades have converged to cast doubt on traditional definitions of parenthood. In numerous states today, biological, sociological, and institutional factors may now be considered in adjudicating claims to fatherhood. DNA testing may be used to rebut
and, at times, to prove paternity. Likewise, paternity may be proven by conduct, such as when a man "openly hold[s] the child out as his natural child," voluntary acknowledges parenthood (following legally prescribed procedures), or fails to contest judicial or administrative proceedings (Hague Conference 2014, 11).

Moreover, assisted reproductive technologies have allowed the separation of the various elements of the corporeal nexus between mother and child that once appeared indissoluble. The provision of ova, on one side, and the functions of gestation and childbirth, on the other, can now be delinked—as occurs, Schaefer rightly noted in talking with Brian Lehrer, in gestational surrogacy. The question that arises then is whether all, some, or none of the elements of corporeality involved in pregnancy and childbirth can support a claim to motherhood. In substantiating such a claim, is having provided an ovum (or a part thereof, as one would have with a mitochondrial transfer) the same as having gestated? Can a contract override either, neither, or both?

In the past decade, some courts have insisted on the primacy of gestation as a biological determinant of motherhood (as in, for example, Judgment of April 6, 2011, Cassation Civile Ire. Arrêt n. 370 [10-19.053]). This stance resonates with the view enshrined in the 1993 "Adoption Convention" (Hague Conference on Private International Law 1993). Although the convention never specifically defines "mother," it consistently distinguishes between the "mother" (or the "father") and the "prospective adoptive parents." The default rule for the Adoption Convention, then, is that the mother is she who gives birth. Implicitly establishing an analogy between adoption and surrogacy, Whitehead's contract in the Baby M case required her to renounce her right to being a mother so as to enable the commissioning mother to adopt the child. (The identity of the father was not an issue). But, backed by key judicial decisions, many surrogacy advocates eschew this approach, for it entails accepting the basic premise of adoption law—that the birth mother is, in the first instance, the mother of the child, and that just as she may choose to renounce her maternity, she may also choose not to do so. Even where the prospective adoptive parents have paid her "reasonable expenses," a woman who gives birth cannot be compelled to give up her child.

In contrast to adoption's reliance on gestation and delivery as the determinants of maternity at birth, the claim that only genetics provides a biological link between a child and its parents negates the biologically based claim that a gestational surrogate may have to motherhood. At the same time, it places male and female claims to parenthood on par with each other. The physiological processes of reproduction may be divided into several moments—the provision of sperm, the provision of ova, fertilization and the formation of an embryo, the implantation of the embryo, gestation, and childbirth—each associated with a specific actor. A woman provides the ovum, a man provides the sperm; the ovum is fertilized either by the man and woman acting together (generally through sexual relations) or through assisted reproductive technologies. Transfer is effected into the body of a woman and it either does or does not result in implantation and pregnancy. If it does so, and there is no miscarriage or abortion, childbirth marks the termination of the process. At present, only a person who is physiologically female can give birth.

As table 5.1 illustrates, female and male roles parallel each other only at the very beginning of the process, and only in reference to the provision of reproductive cells. Fertilization can take place within the woman who will carry the pregnancy or separately from both the man and any woman (whether ovum provider or gestator) involved in the reproductive process. In either case, it is entirely situated outside the male body.

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<th>Phase</th>
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*In gestational surrogacy, two women are involved: the provider of the ovum and the woman who is implanted with the embryo, becomes pregnant, and ultimately gives birth.

(++) In gestational surrogacy, fertilization occurs outside the body of either woman involved in the reproductive process.
and no longer entails the sperm provider's direct physical engagement. To suggest that the provider of the ovum is the only woman who is biologically implicated in the various stages that lead from the provision of egg and sperm to a child is, then, to attribute the status of "biology" only to those aspects of the reproductive process for which a direct parallel between male and female roles can be established.

In the genetic view of parenthood, sexual difference disappears. As if to correct the misalignment of women's claims to motherhood and men's to fatherhood inherent in conventional rules that ground motherhood in the physiological attachment of mother and child and fatherhood in the institutional relationship of the 'father to the mother, this re- visioning of reproductive biology coheres with an antiessentialist deracination of maternity and paternal qualities from the female body and with a formally gender-equalitarian stance. Here, mothers and fathers share the same corporeal nexus to the child. And if the corporeal nexus on which only the identity of the mother could once be grounded no longer differentiates her from the father—for he has the same biological connection to the child as she does—either "biology" grounds both their parental claims or it grounds neither. Moreover, because, in an egalitarian perspective, men and women are equal, a father need no longer be institutionally (or otherwise) connected to the mother to assert his paternal claims.

In 1993, in a pivotal case regarding the legality and enforceability of surrogacy contracts, which ensured that California would become a national and international center for reproductive surrogacy, the Supreme Court of California adopted such an "egalitarian" perspective. Johnson v. Calvert (5 Cal. 4th 84, 1993) pitted Crispina and Mark Calvert, commissioning parents who had supplied their personal gametes, against Anna Johnson, the surrogate mother who had borne the child, who each side now claimed as its own. Anna Johnson based her claim to motherhood on childbirth; Crispina Calvert based hers on the fact that she had provided the ovum and on the contract that obligated Anna to give up her parental status.

The court first considered the competing biologically based claims of the two women. In the court's reading, childbirth, while the only marker of motherhood explicitly recognized by the California civil code, was nonetheless only one among several possibilities. That interpretation was supported by the code, which allowed genetic testing to be used to disclaim paternity and also declared "that, insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother-child relationship." Hence, "by parity of reasoning," blood tests could also be "dispositive of the question of maternity" (Johnson v. Calvert, 92).13

Although the law that the court invoked allowed a genetic test to disprove maternity, in its application to the facts at hand it served, rather, as an element of proof of maternity. Genetics, in the court's analysis, enabled Crispina Calvert to assert a viable claim to motherhood. "Both women have thus adduced evidence of a mother and child relationship as contemplated [by California law]" (Johnson v. Calvert, discussion 1c). Applying the genetic rule of paternity to maternity, and extrapolating from it, the court found that Crispina Calvert met California's requirements for motherhood—there was no evidence of a "clear legislative preference . . . as between blood testing and having given birth" (92). But the law allowed for only one mother; a rule the court did not see fit to disturb. As a result, "because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parents' intentions as manifested in the surrogacy agreement" (93).

Biology did not suffice to establish maternity, for, as functional equivalents, genetics and gestation canceled each other out. Citing scholarship that advocated an intent-based approach to determinations of parentage, the court turned to the contract to resolve the contest between Crispina Calvert and Anna Johnson. And since the intent of the contract had been to ensure that the Calverts would be the parents of the child once it was born—as would be the case with any surrogacy contract—the court definitively concluded that Anna had no parental rights to the child.14 Anna, in other words, having only biology in her favor, had no claim to maternity.

That view resonates today in popular discussions of surrogacy. "Actually, there is no biological mother," Melanie Ternstrom (2010) took to saying, in reference to her children. Born less than a week apart to two separate surrogate mothers, the children posed a conundrum to well-meaning strangers: neither twins nor adopted, how could children born so few—yet so many—days one from the other be siblings? And so Ternstrom coined a new term: they were "twiblings," she declared.
“You see, both the donor and the carrier contributed biologically to each child, so the term cannot encompass this situation.” And, reflecting on the hard-to-name relationship between her children and the carriers’ children, she noted, “Third-party reproduction creates all kinds of relationships for which there are not yet terms.” But for one term there still seemed to be certainty. “I’m the only mother; I’d correct people brightly, again and again” (Ternstrom 2010). The twiblings may have had female biological progenitors but, while there was no name for them in Thernstrom’s lexicon, they were definitely not “mothers.” Like the Supreme Court of California in Johnson v. Calvert, Thernstrom de facto limited maternity in the context of surrogacy to the woman who had commissioned the children who would be borne.

Because anyone can become party to a contract—indeed, without the adoption of intent-based approaches to maternity may be portrayed as a triumph for gender egalitarianism and its corollary transformation of notions associated with “mothering” and “fathering” into the all-encompassing concept of “parenting.” That transformation has undoubtedly promoted greater equality among mothers and fathers, enabled the recognition of the parenting capacity of same-sex couples, and served to discredit the idea that two parents (of opposite sexes, contributing different capacities) are required for good parenting to occur. But when an egalitarian framework is mechanistically applied to the biology of human reproduction, the physiological capacities required for gestation that are uniquely associated with female bodies disappear. The asymmetry that is actually inscribed in reproduction becomes legally—as well as “biologically”—irrelevant. The implications of this erasure directly undermine women’s reproductive rights, in particular with respect to abortion.

for a better representation of its position. The Calverts’ contract had required Anna Johnson’s renunciation of her parental rights. Characterizing Anna’s obligation as one of renunciation, however, raised the problem of illegally commercializing children and placed the Calverts in the position of having violated the laws regulating adoption, which prohibited compensation for the transfer of children. Under the Penal Code of California, quoted at length by the court in Johnson v. Calvert (n. 11):

Every person who . . . assumes or attempts to assume, right of ownership over any person, or who sells or attempts to sell, any person to another, or receives money or anything of value, in consideration of placing any person in the custody, or under the power or control of another, or who buys or attempts to buy, any person, or pays money, or delivers anything of value, to another, in consideration of having any person placed in his custody, or under his power or control, or who knowingly aids or assists in any manner any one thus offending, is punishable by imprisonment in the state prison for two, three or four years.

This is not an issue only under California law. Similar prohibitions against selling children (among others) have been widely adopted throughout the United States and abroad. The Convention on the Rights of the Child—ratified by every state other than the United States and Somalia—explicitly obligates state parties to the convention to “take all appropriate national, bilateral and multilateral measures to prevent . . . the sale of . . . children for any purpose in any form” (Convention on the Rights of the Child 1990, article 35). And the Adoption Convention, which allows only for “reasonable expenses” to be paid, aimed to eliminate the exchange of children for compensation.12

Some have called for an explicit recognition of the market for children, and the development of regulation built upon that acknowledgment. In the words of Debora Spar (2006, xix), “It is far better to concede the commerce [of the sale of children] . . . than to insist it does not exist.” But, whatever the merits of this stance as a political and regulatory matter, at the time of Johnson v. Calvert it was equally untenable and largely remains so today.

In Johnson v. Calvert, the court solved the conundrum of commercialization by determining that Anna Johnson had never had any parental claims at all. Never having been the child’s mother, she could not have

THE BABY,” “ITS” “MOTHER,” AND 
THE NATURE OF THE EXCHANGE

“I tell them, ‘You will take care of the baby for nine months and then give it to its mother. And for that you will be paid,’” a supervisor of gestational surrogates at an Indian clinic recounted to anthropologist Amrita Pande (2014, 70). The Supreme Court of California could not have asked
relinquished her rights to the child, she could not have sold the child to the
Calverts, and they, therefore, could not have bought him. In the
court’s words: “At the time when Anna entered into the contract . . . she
was not vulnerable to financial inducements to part with her own
expected offspring. . . . Anna was not the genetic mother of the child. The
payments to Anna under contract were meant to compensate her for her
service in gestating the fetus and undergoing labor, rather than for giving
up ‘parental’ rights to the child” (Johnson v. Calvert, 96, para. 4). Anna, in
sum, was a hired service provider.

The same perspective reverberates in the words of the Indian supervisor
quoted by Pande as she inserts a radical disjuncture between the “you”
being addressed—that is, the gestational carrier—and “its [the child’s]
mother,” to whom “you” will give the child (Pande 2014, 70). Throughout
the process of gestation, Pande tells us, the clinic insists to the gestators
that they are not mothers but service workers—providers of a service that
consists in gestation.6

This framework rests on two closely related premises. The first is that
the surrogate is engaged solely to provide a service of gestation that cul-
minates in childbirth. The second is that the embryo, the fetus, and thus
the child who issues from the gestator have never been “of” “the” gestator
but merely “in” the gestator. From conception to birth, the commission-
ing parents have had distinct and exclusive proprietary and/or parental
rights relating to that embryo, fetus, and (ultimately) child. This, in turn,
taunts the idea that the evolving being has been the “subject” of a set of
rights that are distinctly its own and that relate it to the intending par-
ents rather than to the woman who gives birth—the right, for example,
to become the child of its commissioning parents and thus to be counted
as a potential child of these parents for inheritance purposes (and, at the
moment of birth, for such purposes as protection from abandonment,
except in specified circumstances, and legal recognition of parentage).17
Can these premises survive scrutiny?

Imagine a scenario in which gestation per se is the object of a service
contract. That scenario might look like this: a group bound by ethnic ties
believes that its well-being requires ensuring that as many children shar-
ing its ethnicity are born as possible. The group therefore procures gam-
etes that satisfy its criteria for membership, engages a woman who also
meets its criteria, and establishes a gestational service agreement with

that woman. She is implanted with an embryo formed by the ethically
suitable gametes, carries the pregnancy to term, and ultimately gives
birth to a child. She has performed her obligations under the gestational
service contract; there is now one more member of that ethnic group in
the world. And here our story ends. A service contract to gestate is per-
formed through gestation.

But, as the supervisor of Pande’s (2014, 70) account so clearly instructs
her trainees in the phrase quoted above, this is not how surrogacy works.
"And for that you will be paid," she says, referring to a “that” with two
components. First: “You will take care of the baby for nine months.”
Second: “And then give it to its mother.” Without the second part—the
giving of the child to “its mother”—the surrogacy contract is mean-
less. The interest of the commissioning parents is not simply in bringing
one more child into the world; it is in having a child of their own. From
their perspective, the contract they have entered into is not fulfilled until
the child has been handed over to them. This is not simply a contract for
a gestational service but a contract for the gestation and delivery of a
child into a specific set of hands. The exchange of a child for compen-
sation, in other words, is an essential part of the bargain. How can such an
exchange not qualify as a form of human commerce?

The Calvert court’s solution to this conundrum was to find that the
baby had been that of the commissioning parents from its very concep-
tion. Inter alia, the court grounded its analysis in but-for causation, find-
ing that “the child would not have come into being but for the efforts of
the intending parents” (94). But, as dissenting Judge Kennard forcefully
pointed out, it is hard to imagine the child coming into being but for
Anna’s gestation, so that such causation—canceling itself out as an argu-
ment that could be validly sustained by the opposing parties—could not
be dispositive. The court also based its decision on the notion that the
“mental concept of the child is a controlling factor in its creation, and the
originators of the concept deserve full credit as creators.” This idea’s
vagueness and potential overreach as a test of parenthood are breathtaking
(one need only think of how many grandparents have initiated the mental
concepts of subsequent children), but it highlights the analogy
that the court implicitly drew between ownership and parenthood. As
Judge Kennard notes, “the ‘originators of the concept’ rationale seems
comfortingly familiar. . . . [It] is frequently advanced as justifying the
law's protection of intellectual property. However, "the problem with this argument, of course, is that children are not property" (Johnson v. Calvert, Kennard, J., dissenting 114, § 7).\

In response, the Calvert court might have argued that the owners of the "genetic material" are parents from the start. From this perspective, although children are not property, gametes (and embryos) are, and a straight line leads from the property rights they embody to the parental rights associated with children. As we shall see, this argument would support legislation and jurisprudence that regard the commissioning parties' ownership of the gametes as sufficient to make them parents of the child, thus bolstering theories that lie in direct contradiction to abortion rights.

FROM OWNERSHIP TO PARENTHOOD:
THE "STRAIGHT-LINE" HYPOTHESIS
AND WOMEN'S RIGHT TO ABORTION

According to the "straight-line" hypothesis, if the parents are the owners of the gametes and the embryo from which it is formed, they become the parents of the child. But no analogous transformation affects the status of the woman as she goes through the various phases that lead from pre-implantation to impregnation, gestation, and childbirth. Skipping over the transformation of matter that is external to the nonpregnant woman into matter that is internal to, and part of, her pregnant body, this argument resonates with the view that gestation is biologically irrelevant and suggests that it also is legally irrelevant. The woman begins as a vessel (waiting to be filled) and ends as a vessel (whose contents have been removed).

From this perspective, the embryo and fetus can never be seen as an inherent part of the gestating woman's body. The gradualist scheme based on the progressive evolution of an embryo into a nonviable and then into a viable fetus, which is enshrined in so much reproductive rights jurisprudence, is jettisoned, along with that which ties reproductive rights to a woman's liberty—rights, physiological security and, generally, her habeas corpus protections. An extensive analysis of the relevant legislation and jurisprudence in an international and comparative perspective is beyond the scope of this essay, but a brief discussion focused on a few major U.S. cases can highlight the issues entailed.

In Roe v. Wade (410 U.S. 959 [1973], 153), the landmark decision sanctioning abortion rights, the U.S. Supreme Court held that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the district court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." With these words, the court declined to ground the right to privacy conclusively in either the Fourteenth or the Ninth amendment to the U.S. Constitution. But, echoing its previously held view that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (Eisenstadt v. Baird, 405 U.S. 438 ([1972]), it also expressed a clear preference for the Fourteenth Amendment and the linkage of abortion rights to personal liberty. Almost two decades later, in Planned Parenthood of Southeastern Pennsylvania v. Casey (844) a plurality of the Supreme Court confirmed this view: "Constitutional protection of the woman's right to terminate her pregnancy derives from the . . . Fourteenth Amendment . . . The controlling word in the case before us is 'liberty.'" Moreover, Roe "may be seen . . . as a rule . . . of personal autonomy and bodily integrity" (857).\

Despite the fact that Planned Parenthood v. Casey imposed significant limitations on the court's previous abortion-related jurisprudence, including Roe, the right of a woman who has "begotten" a child to decide whether to "bear" it (i.e., her right to have an abortion) remained—and remains—inextricably bound to her personhood and its attendant liberties.

For the Roe court, it followed from this basic premise that, although a "woman cannot be isolated in her privacy," the state's right to interfere cannot amount to "unwarranted governmental intrusion" (as specified in Eisenstadt v. Baird); to the contrary, it must be informed by a "compelling" interest (Roe v. Wade, 163).\n
Roe devised a trimester framework, situating the first "compelling point" at the end of the first trimester and the second at the beginning of the third trimester. During the initial
three months of pregnancy, the woman's personal liberty interest (and that of her physician) ensured that the decision whether or not to abort was unfettered. At the end of his period, the first "compelling point" authorized regulation. But such regulation was not linked to the state's interest in the fetus. Rather, it turned on "the preservation and protection of maternal health." Abortion could therefore be regulated from the third to the sixth month not because the fetus was distinct from the woman's body but because, as a part of her body, it needed to be removed in such a way as to safeguard her health. Only at the second "compelling point," identified as "viability," could the state's "important and legitimate interest in potential life" per se justify intervention.

Legitimizing subsequent jurisprudence that has weakened abortion rights, the plurality that decided Planned Parenthood v. Casey (886) rejected Roe's trimester framework. It emphasized, instead, that the state's interest in the "potential life" embodied in the fetus (sometimes referred to as "fetal life") extends throughout a pregnancy and, on that basis, authorized regulatory measures before viability "even if those measures do not further a health interest." Nonetheless, the opinion retained several fundamental elements of Roe's holding. First, the fetus is a part of the pregnant woman and any protective regulation must be balanced against her liberty interests and right to bodily integrity. Second, the interest that justifies regulation is specifically that of the state.

Concern for—or even an interest in—"potential life" does not entitle any person or entity other than the state to restrict a woman's right to terminate a pregnancy; it grants no one else a claim over her body or over the evolving fetus within it. Third, viability remains a significant legal turning point with respect to the balancing of women's rights and those of the state's interest but does not indicate that a fetus has legal personhood. Parenthood, in consequence, cannot begin before birth, nor can property rights be asserted by third parties over a woman's body. Taken together, these three elements undermine the straight-line hypothesis, which separates the fetus from the pregnant woman and directly connects the property rights that inhere in gametes to the parental rights that are associated with children. Conversely, accepting the straight-line hypothesis—precisely because it is based on the separation of the pregnant woman from the embryo/fetus and on the attribution of rights to the embryo/fetus and consequent child to third parties—subverts those abortion rights that Roe established and Planned Parenthood v. Casey reaffirmed.

While noting that "a husband has a 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying'" (Planned Parenthood v. Casey, 895) the court explicitly rejected the suggestion that such an interest was sufficient to justify regulation mandating that a woman notify the future father of the child she was gestating of her intention to abort. A mother might reasonably be required to notify the father of a "living child raised by both" of a decision regarding that child, for under such circumstances—that is, of a living child, raised jointly—"as a general matter . . . the father's interest in the welfare of the child and the mother's interest are equal" (896). But "before birth . . . the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's." Moreover, "the husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife" (898). Recognizing the husband's potential claim to be informed, then, would amount to a grant of "authority over" his wife and over her body. Indeed, the court noted, with some irony, that "if the husband's interest in the fetus's safety is a sufficient predicate for state regulation . . . perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs." As the analogy illustrates, for the court, the fetus is not separable from the body (and, thus, the person) of the woman of which it is a part. Consequently, the attribution of rights with respect to the fetus to any other party necessarily implicates (and curtails) her constitutionally protected rights in her own physical integrity and personal liberty.

In counterposition to the pregnant woman's constitutionally protected interests, the state may seek to further its own interests in potential human life. Such interests, as Justice Stevens noted, are generally not detailed in the legislation of abortion. He surmised that they could entail a concern to minimize social conflict over abortion itself, or an interest in demographic growth that might produce geniuses like "the occasional Mozart or Curie" (Planned Parenthood v. Casey, 915). But these are
"indirect," supported by "humanitarian and pragmatic" considerations, and not of a constitutional nature. The different weight of these two sets of interests can only be explained by reference to the status of the fetus: the fetus is not a "person" entitled to constitutional protections, and hence the state's interests in it cannot be of a constitutional nature.27 Indeed, as Justice Stevens stressed, Planned Parenthood v. Casey did not disturb Roe's recognition of only "narrowly defined" rights to the unborn or its parents, and it related these rights directly to live birth.28 U.S. states' subsequently enacted legislation (and attendant jurisprudence) has ridden roughshod over this limit, but the Supreme Court's jurisprudence does not support the position that fetuses are persons and hence neither recognizes their own entitlement to the protections of such rights nor provides support for whatever derivative rights others parties may claim (Paltrow and Flavin 2013). By necessary implication, the would-be parents of a potential child cannot claim the rights attributable to the actual parents of an actual child.

BEYOND CALVERT: FROM VESSEL TO MOTHER (AGAIN?)

Unsurprisingly, the Calvert court denied the validity of the federal and state constitutional arguments that Johnson put forth relating to privacy and reproductive rights. Referring to a brief filed by the American Civil Liberties Union, Johnson v. Calvert (100) noted:

Amicus curiae fails to articulate persuasively how Anna's claim falls within even the broad parameters of the state right of privacy. Amicus curiae appears to assume that the choice to gestate and deliver a baby for its genetic parents pursuant to a surrogacy agreement is the equivalent, in constitutional weight, of the decision to bear a child of one's own. We disagree. A woman who enters into a gestational surrogacy agreement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own.

And, eliding the specific issues that would be raised were Roe v. Wade (or other, related constitutional decisions) taken into account, the court specified: "We note that although at one point the contract purports to give Mark and Cristina the sole right to determine whether to abort the pregnancy," at another point it acknowledges that "all parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable" (96). That the acknowledged unenforceability of the clause granting the Calverts the ability to determine an abortion might be related to the nature of pregnancy termination rights was simply excluded from consideration.

Perhaps seeking to inure its ruling against further challenge, the court thus unmoored from its constitutional grounding Anna's right to abort: Anna does not have rights of "equivalent constitutional weight" to those of the genetic parents because she is "is not exercising her own right to make procreative choices" (100). Johnson instead appears to be an element of the "novel medical procedures" through which the Calverts can "exercise their right to procreate in order to form a family of their own" (99). Why, then, should she have a right to abort (or to refuse to do so), thereby endangering the rights of the Calverts?29

The simple answer is that if the Calvert court's analysis is followed to its logical conclusion, she should not. In the court's view, the Calverts always had parental rights over the implanted embryo and developing fetus, that is, over that part of Anna's body that under Roe would have been not only in her but of her, an indistinguishable aspect of her personhood. The corollary of this view is either that it is possible to have rights to other people's bodies (and, hence, selves) or that those parts to which others can have rights are not actually parts of the first person's body at all (and can thus be the object of other people's rights). From this perspective, the clause of the Calverts' contract that assigned them exclusive rights to determine an abortion is logically correct. To avoid this conclusion, the assumption of the status of the woman who is pregnant and gives birth—the conventional "mother"—needs to be reconsidered.

One possible way forward is simply to prohibit commercial reproductive surrogacy. Another, however, might be based on affording the woman who gives birth the protections that are currently embedded in adoption law. This would require significant legislative creativity;
surrogacy is not adoption. Adoption law recognizes that a woman who gives birth may renounce her parental rights. But, in the first instance, she is the mother of the child. Understandably, surrogacy advocates dislike this view. It creates moral hazards. Commissioning parents may be held hostage to further payments, suffer the imposition of vexatious conditions on their family life, or even risk not being given the child they have expected. Moreover, it embeds surrogacy in a family law context rather than in that proper to contract law.

Surrogacy skeptics also dislike this view. It sanctions the commodification of human beings (specifically, of both the mothers and the children they bear), imports contract law into the regulation of family matters, and continues a trade in which surrogates may be exploited. But the market in baby making is a reality; illegality has not expunged it, nor is it likely to do so. Moreover, as has been demonstrated in a plethora of cases, courts faced with actually existing children often find that considering the best interests of the child—the internationally mandated standard applicable in all legal and administrative matters regarding children—requires recognizing the parenthood of the commissioning parents, even when the child was born of locally prohibited commercial surrogacy arrangements (Menneson v. France, App. no. 65192/1 Eur. Ct. H.R. [2014]; Labassee v. France, App. no. 65941/11 Eur. Ct. H.R. [2014]; Paradisi and Campanelli v. Italy, App no. 25358/12 Eur. Ct. H.R. [2015]). Such ex post facto legalization resonates with humanitarian concerns. But precisely because judicial deliberation must be guided by the best interests of the child, attention is funneled to the status of the child; other considerations are inevitably elided. Among those considerations are the implications of different approaches to surrogacy for women’s reproductive rights, which are based on the principle that a fetus is an evolving part of a woman’s body, of her self, and not extraneous to it. It is time to put these rights back on the agenda. Legal imagination will be required to craft solutions simultaneously capable of recognizing that women are not vessels, that fetuses are not children, and that children are now being born of a new confluence of contractual and familial relationships. That is a challenge worth accepting.

NOTES

1. As Claire Achmad discusses in the present volume, reproductive surrogacy has evolved from its “traditional” (or “complete”) form, in which one woman provided the ovum and the womb, to its “gestational” form, in which separate women provide the ovum and the womb. Further splitting of the ovum is now also possible.

2. Arguably, under Roe v. Wade (410 U.S. 959 [1973]), the woman’s physician shares in her decision-making ability. But recall, in the context of the rest of the Supreme Court’s opinion, the relevant passages may be interpreted as assigning the physician a role with regard to the feasibility and modalities of the performance of the abortion rather than a more substantial veto power over the woman’s choice per se. As discussed in this essay, subsequent Supreme Court jurisprudence makes it very clear that the abortion decision is that of the pregnant woman or of the state, not that of any private party.

3. I use the terms “man” and “woman” here and throughout this essay to denote physiologically male and female individuals, recognizing that the issue of identifying the characteristics that define a person as belonging to either category (or situating them on a spectrum of possibilities) is highly complex and subject to historical and cultural re-visioning.

4. For an analysis of visual representations that similarly separate the pregnant woman from the fetus, see Anne Higonnet, present volume.

5. Here and throughout this essay, emphasis in quotations has been added unless explicitly noted.

6. Under this framework, certain expenses related to gestation and childbirth may be payable, but compensation for the transfer of the child itself is prohibited.

7. For the proposed revision of New York State’s surrogacy law, see Child-Parent Security Act, S02765, New York Senate (2016).

8. As Nora Milani shows in the present volume, other definitions of maternity also could prevail. Despite the fact that the French civil code requires women to acknowledge their maternity in order for a relationship with the child to be established, the Cour de Cassation (2011) remarked that “in effect, it is a matter of principle in French law, that the mother of the child is she who gives birth.”

9. Biological impossibility could also serve to disprove paternity, such as, for example, in the case of a husband’s absence or death.

10. Mitochondrial transfers, recently approved in the United Kingdom for use in mitochondrial DNA replacement therapy, further segment the process of conception, adding another woman with a corporal nexus to the embryo/fetus/child (Vogel and Stokstad 2015).

11. In U.S. jurisprudence, the role of biology as a determinant of motherhood is intensely disputed. For two decisions espousing different views, see In the Matter of the Parentage of a Child by T.J.S. and A.L.S., 419 N.J. 46 (2011); and Bani Chatterjee v. Taya King, 2012-NMSC-019 (2012). Many courts, both in the United States and elsewhere, have
also found nonbiological determinants of motherhood in adoption procedures, de facto parenting arrangements, and surrogacy contracts.

12. The Calvert court had originally sued for a declaration of legal parentage, prior to the birth of the child; by the time the case reached the Supreme Court of California, the child was already born.

13. The court stressed the point, noting, "Farther, there is a rebuttable presumption of paternity (hence, maternity as well) on the finding of certain genetic markers" (Johnson v. Calvert 5 Cal. 4th 84 [1999], 92).

14. In the court's words, when both "genetic consanguinity and giving birth... do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother" (Johnson v. Calvert, 93). The court asserted that only one distinction among "mothers" could be valid under California law—that between "natural" and "adoptive" mothers. That distinction had been enshrined by California's adoption of the Uniform Parentage Act in 1975, a time at which—the court recognized—the biological fragmentation produced by assisted reproductive technologies was far from lawmakers' contemplation. Changes in the technologies of reproduction, the court noted, need not motivate changes in statutory interpretation and, in this case, there was no cause for doing so.

15. The Adoption Convention (Hague Conference on Private International Law 1993) specifically prohibits "improper gain." Despite debates over the definition of "reasonable expenses"—which the convention is generally understood as allowing—and the limits of propriety, the convention's travaux préparatoires demonstrate the intent to eliminate commercialization as a factor in adoption (Parra-Aranguren 1993, 3).

16. Interestingly, as Pande (2014) points out, at the same time that the gestators are being instructed to think of themselves as workers whose work consists in providing "wombs," they are also being required to exhibit "maternal" characteristics—specifically, not endangering the pregnancy and not negotiating for additional compensation.

17. If at birth the child is automatically the child of the commissioning parents, then the commissioning parents must be automatically the parents of the born child. If this were not the case, the parents could refuse to recognize the child as "theirs" upon birth, but the woman who gives birth could also do so (since she is viewed as never having had any parental rights to the child), thus leaving the child at risk of being parentless.

18. Judge Kennard also discussed the two remaining rationales upon which the majority in Johnson v. Calvert based its decision: the primacy of the bargained-for expectations embodied in the contract, and the best interest of the child. With respect to the predominant weight to be assigned to the primacy of contractual obligations, Kennard noted that U.S. courts do not usually compel specific performance of contractual obligations and that the "unsuitability" of applying that concept is particularly evident in reference to a child because "children are not the intellectual property of their parents, nor are they the personal property of anyone, and their delivery cannot be ordered as a contract remedy on the same terms that a court would, for example, order a breach- ing party to deliver a truckload of nuts and bolts" (Johnson v. Calvert, 28). Kennard further argued that automatically identifying the best interests of the child with that of the commissioning parents suppressed the very inquiry to which it purported to respond: Which "mother" did the best interest indicate?

19. Enumerating possible approaches to the doctrinal interpretation of Roe, the court noted that "the destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society... it was this dimension of personal liberty that Roe sought to protect" (Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 [U.S. 1992], 853).

20. In Planned Parenthood of Southeastern Pennsylvania v. Casey, a plurality of the court weakened the standard of review applicable to states' regulation of abortion, exchanging the more exacting "strict scrutiny" standard with a prohibition against regulations that entail an "undue burden" on a woman's right to terminate her pregnancy. The court characterized the "undue burden" standard as "a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" (877). Even so, the court explicitly noted, "Before viability, the State's interests are not strong enough to support a prohibition of abortion; or the imposition of a substantial obstacle to the woman's effective right to the elective procedure" (846).

21. "This means... that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State" (Roe v. Wade, 163).

22. And "We conclude that the line [demarcating the woman's liberty to determine whether to carry the pregnancy to full term] should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy" (Planned Parenthood v. Casey, 870).

23. "The State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child" (Planned Parenthood v. Casey, 932).

24. The court upheld a parental notification requirement for minors but distinguished their situation from that of adult women. As has been repeatedly stressed, the parental notification requirement imposes substantial burdens on minors. But the relevant point here is that no third party can limit an adult woman's decision about whether to terminate her pregnancy, not even her husband (or, by extension, an unmarried, putative father).

25. The Uniform Parentage Act, for example, allows a proceeding to determine parenthood to be commenced before the birth of the child but precludes it from being concluded until after the birth of the child (National Conference of Commissioners on Uniform State Laws 2000).
26. In a paragraph remarkable for its tone, the court (Planned Parenthood v. Casey 1992, 898) explicated its views on the predicates for state regulation:

A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. If a husband’s interest in the potential life of the child outweighs a wife’s liberty, the State could require a married woman to notify her husband before she uses a post-fertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband’s interest in the fetus’ safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking. Perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband’s interest in his wife’s reproductive organs. And if a husband’s interest justifies notice in any of these cases, one might reasonably argue that it justifies as exactly what the Danforth Court held it did not justify—a requirement of the husband’s consent as well. A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

27. Justice Stevens dissented in part and concurred in part. Underlining his concurrence with the plurality opinion of the court on the issue of fetal personhood, Stevens noted:

I also accept what is implicit in the Court’s analysis, namely, a reaffirmation of Roe’s explanation of why the State’s obligation to protect the life or health of the mother must take precedence over any duty to the unborn. The Court in Roe carefully considered, and rejected, the State’s argument “that the fetus is a person within the language and meaning of the Fourteenth Amendment.” … After analyzing the usage of “person” in the Constitution, the Court concluded that that word “has application only postnatally.” … Commenting on the contempt property interests of the unborn that are generally represented by guardians ad litem, the Court noted: “Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the sense.” … Accordingly, an abortion is not “the termination of life entitled to Fourteenth Amendment protection.” … From this holding, there was no dissent, see id., at 173; indeed, no member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a “person” does not have what is sometimes described as a “right to life.” This has been and, by the Court’s holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy. (Planned Parenthood v. Casey, internal references omitted)

28. The court explicitly limited personhood to live birth. “The Constitution does not define ‘person’ in so many words... The use of the word is such that it only has application post-natally” (Planned Parenthood v. Casey). A child—being, undeniably, a person—is not therefore such prenatally.

29. Paradoxically, the court reaffirms Anna’s right over the abortion decision (which, it should be noted, was moot by the time the case was heard, because the child had already been born), despite finding that she cannot raise a constitutional argument regarding her right to the companionship of the child (an issue rendered salient, not moot, by the birth of the child) because that “would necessarily detract from or impair the parental bond enjoyed by Mark and Cristina” (Johnson v. Calvert, 100).

30. See also the judgment of Justice Hodges in X & Y (Foreign Surrogacy), EWHC 3030 (Fam. 2008).

REFERENCES


THE MOTHERLESS FETUS

Ultrasound Pictures and Their Magic
Disappearing Trick

Anne Hiconnet

When does life begin? Religion, philosophy, and law have all given different answers to this fundamental question. In 2017, the most popular answer is given by fetal ultrasound pictures. Life begins when we see a person in a fetal ultrasound. Yet ultrasound pictures do as much to conceal life as to reveal it. They eliminate the body on which the life of the fetus depends. No more mother.

Our own voluntary use of fetal ultrasound pictures has achieved what law and politics could not command. This triumph of the ordinary picture is all the more remarkable because, for two decades, law and politics included an attempt to control ultrasounds. On June 15, 2015, a chapter in the history of abortion rights seemed to have ended. The Supreme Court effectively overturned a North Carolina state law forcing women who sought abortions to look at an ultrasound image of the fetus inside them and to listen to a description of the image. Similar laws in twenty-two other states are unlikely to survive the North Carolina decision. Already, however, the power of ultrasound images to decide the fundamental legal issue at stake—the issue of when life begins—was beyond the control of law.

Ultrasound images of the fetus exist, of course, regardless of abortion debates. The technology predates its mandated use, doctors suggest ultrasounds for many reasons, and women voluntarily seek ultrasounds, more often out of curiosity or sentiment than for medical reasons. Most