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Outlaw Mothers

Jenny Wald*

"Motherhood [is] a colonized concept—an event physically practiced and experienced by women, but occupied and defined, given content and value, by the core concepts of patriarchal ideology."¹

"No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ."²

I. INTRODUCTION

When the law recognizes lesbian mothers, it explicitly accepts the possibility of alternative families. These families threaten the structure of the patriarchal family which has been the basis for the political framework of our society. In essence, a lesbian mother represents a direct challenge to the very foundation of patriarchal power. She creates an image of a woman choosing the experience of motherhood but reproducing without the subordination imposed by the institution of motherhood.

The general negative response to lesbian motherhood can be understood as a reaction to the violation of traditional gender norms, rather than simple disapproval for the sexual practices of gay men and lesbian women.³ Conventional gender ideology relies on the conflation of sex and gender, that biology and psychology predetermine one's role in society. The institution of heterosexuality depends on a rigid distinction between male and female gender roles which are equated with traditional notions of masculinity and

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1. Martha A. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 289-90.

2. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

3. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (arguing that contemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender); see also *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that the state's denial of same-sex marriage violates equal protection on the basis of sex).

femininity.⁴ Thus, one's biological sex supposedly corresponds to a fixed gender category. These gender categories are then justified as natural. In reality, this gender scheme creates and perpetuates male supremacy. It is necessary to understand how the legal and cultural prohibitions of lesbian motherhood operate to preserve the dichotomy of immutable gender categories on which rests the subordination of women. A court's refusal to grant lesbian adoptions or its determination that a lesbian mother is an unfit parent must be understood as something beyond homophobia. The denial of lesbian parenthood reflects the operation of patriarchal power to relegate all women to a particular position of powerlessness.

Despite the obvious connections between the disapproval of lesbian mothers and the social construction of gender categories, the feminist critique of motherhood has failed generally to consider the lesbian perspective. This Note will argue that cultural and radical feminists essentialize the experience of women in the institution of motherhood.⁵ In so doing, they perpetuate the patriarchal idea that there can be some universal and common female experience constituting one's identity as a mother. Thus, both Western cultural assumptions about motherhood and mainstream feminism can be challenged because they deny and erase the lesbian possibility. By including the lesbian experience, it becomes possible to further deconstruct and denaturalize the traditional definition of the term "mother."

The first section of this Note will focus on the social creation of motherhood. In order to analyze the response of the legal system to the concept of lesbian motherhood, it is important to reveal historical cultural assumptions about women's role in reproduction.⁶ I will briefly examine the relevant ideas of Plato and Aristotle and then turn to the images of Eve and the Virgin Mary in an attempt to illustrate how certain beliefs about motherhood and their connection to a "female essence" are deeply embedded in Western culture. In the second section of this Note, I will discuss the essentialism of the feminist response to motherhood and demonstrate the similarities to the

4. Note, *Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1976 (1995) [hereinafter *Patriarchy is Such a Drag*].

5. DIANA FUSS, *ESSENTIALLY SPEAKING* 2 (1989) (stating that essentialism is classically defined as "a belief in true essence—that which is most irreducible, unchanging, and therefore constitutive of a given person or thing").

6. See Lucinda J. Peach, *From Spiritual Descriptions to Legal Prescriptions: Woman as "Fetal Container" in the Law*, 10 J. L. & RELIGION 73 (1993-94). Peach states:

In law, as elsewhere, the role of symbolism is of more than symbolic importance. Religious symbols of women help to reinforce prevailing gender ideologies about the proper place of men and women and women's appropriate roles and status in society. In American society, religious symbols of women and the feminine have functioned to shape legal views of women. These views essentialize women's role and status to that of reproductive vessels

Id.

conventional ideology. Next, I will turn to the lesbian experience as a means to stretch the boundaries of what our culture defines motherhood to be.

In the final section of this Note, I will examine the connection of these ideas to the context of surrogacy. The predominantly negative reaction to surrogacy by feminists can be criticized as essentialist for failing to account for the beneficial effects on lesbian mothers. Surrogacy and reproductive technology provide further opportunity to question the rigid meaning of motherhood in Western culture.

II. WESTERN CIVILIZATION AND THE MYSTIQUE OF MOTHERHOOD

In Western culture, motherhood is presented as the natural destiny of all women. Thus, the social category of mother is viewed as a direct result of biology and psychology. Gender hierarchy in society is justified as an imitation of the natural order.

Traditional and ancient perceptions of a woman's inferior role in reproduction reveals the importance of the institution of motherhood to the maintenance of male power. Of the two sexes, the woman appears closer to her nature and has been associated with the reproductive functions of her body. She menstruates once a month, she becomes pregnant, and she is the source of nourishment for the young child. Her ability to reproduce is visible. It connects and virtually chains her to the family. Men, on the other hand, have been liberated by their physiology to take up the artificial challenges of their culture, to develop their minds and to pursue reason. The woman has been strictly equated with the womb and reproduction, whereas the man has been directly identified with the mind and knowledge. This duality becomes a determining factor in Western culture, where patriarchy, hierarchy and domination are inherent.⁷

The institution of motherhood is supported by the division of men and women into separate spheres, the public and private. Assumptions about the effects of pregnancy and motherhood has led to the idea that it is natural to separate women into the private realm of the family and home.⁸ Furthermore, the public and private dichotomy has been a fundamental feature of our political and social structures.⁹ Male control of both spheres has been accomplished through the creation of laws which perpetuate male dominance and female subservience.¹⁰

7. See generally SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

8. Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *FEMINIST LEGAL THEORY FOUNDATIONS* 9, 9-10 (D. Kelly Weisberg ed., 1993).

9. OKIN, *supra* note 7, at 110-33. "The perception of a sharp dichotomy between [the public and the private] depends on the view of society from a traditional male perspective that tacitly assumes different natures and roles for men and women." *Id.*

10. Taub & Schneider, *supra* note 8.

A. WESTERN POLITICAL PHILOSOPHY

Ancient Western political philosophers divide gender into rigid bipolar categories of man and woman. This dichotomy is justified by an appeal to the natural differences between the sexes with respect to their roles in reproduction. Thus, a woman's subordinated position in society is predetermined by her biology and potential to become a mother.

1. Plato

Plato presents a utopian vision of the ideal state in his *Republic*.¹¹ He emphasizes truth, morality, and the importance of intellect. These virtues are directly identified with men who are naturally suited to the governance of the state. In contrast, women are associated with the private sphere of the family. In order to become rulers of this ideal state, women must be removed from their role as mothers. Thus, there is no room for the private interests of the family in the public realm of governing—mothering and intellectual pursuits are not mutually coexistent.¹² For the ruling class, then, Plato attacks and abolishes the institution of the family.¹³ He creates a unified ruling class made up of individuals who are not distracted by the private interests of the family, as all children are held in common. Women can participate equally in the intellectual pursuits of the state, but only if they are separated from their biology and role as mothers.

By rejecting the natural experience of women as mothers, Plato expresses a fear of the body and of difference. In his *Republic*, Plato destroys both of these and subordinates the body to the mind. Metaphorically, he subordinates female to male, mother to father, and, by extension, nature to culture.¹⁴ Furthermore, Plato's description of reproduction demonstrates his belief in the inferiority of the female role: "[T]he only difference appears to be that the male begets and the female brings forth"¹⁵ Thus, the male "begets" through his soul, whereas the woman "brings forth" through her body.

2. Aristotle

Likewise, Aristotle expresses the idea that women are associated with nature whereas men are identified with culture. Aristotle's philosophy is governed by his belief in a natural order of the universe.¹⁶ To determine the ultimate role of the female in society, Aristotle connects her to the function of her body. Specifically, he examines the nature and importance of her role in reproduction. While the male, through his semen, always provides the

11. PLATO, *THE REPUBLIC OF PLATO* (Francis M. Cornford trans., 1941).

12. *Id.* at 156.

13. *Id.*

14. See SUSAN M. OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT 1-50* (1979).

15. *Id.* at 152.

16. ARISTOTLE, *THE POLITICS 2* (William Ellis trans., 1986).

form or soul of the offspring, the female, through her menstrual discharge, provides the matter.¹⁷ Furthermore, Aristotle insists that the form is better and more divine than the matter, and so must the male be better than the female.

In his *Politics*, Aristotle's view of the woman's inferior role in reproduction permeates everything he has to say about a woman's role as mother in society. His proposals for the regulation of marriage and reproduction reflect his perception of women as instruments for breeding men.¹⁸ Essentially, the major role of the female sex is to produce the "matter" for the state. Women are tied to the family and home in order to preserve the political order of society. Confined to the private role of mother, women are kept out of the public sphere, and they are placed in a subservient position to men.¹⁹ Both Plato and Aristotle adhere to the idea that gender is determined by biology, and that the essence of being a woman in society is a mere reflection of the natural inferiority of the female sex in reproduction.

B. WESTERN RELIGION AND MOTHERHOOD

1. *Eve*

Early Christian beliefs essentially established women's subordination by ideologically adding strong penalties to their role in reproduction.²⁰ In the battle between the flesh and the spirit, Christian thought placed the female sex firmly on the side of the flesh. Eve was looked to as the cause of the fall from Paradise, the wicked temptress, and the accomplice of Satan in the destruction of mankind.²¹ The idea of women's subjection is bound up in Christian thought with her role as mother and as temptress.²² Childbirth was portrayed as a woman's special function, and its hardships were the penalty decreed by God after the fall.²³ Moreover, the child a woman bore was stained with sin from the moment of conception.²⁴ Thus, the evils of sex were literally contained in the female and directly identified with her. The woman was viewed as the womb, and the womb was evil. As punishment for Eve's crime, women were made to suffer the hardships of child-

17. ARISTOTLE, *ON THE GENERATION OF ANIMALS* book I (A. L. Peck trans., 1943).

18. ARISTOTLE, *supra* note 16, 7-9.

19. *Id.* at 8 ("The soul governs the body as the master governs his slave; the mind governs the appetite with a political or kingly power, which shows that it is both natural and advantageous that the body should be governed by the soul . . . so is it naturally with the male and the female; one is superior, the other inferior; the one governs, the other is governed.").

20. Annette B. Weiner, *Reassessing Reproduction in Social Theory*, in *CONCEIVING THE NEW WORLD ORDER* 407, 408 (Faye D. Ginsburg & Rayna Rapp eds., 1995).

21. MARINA WARNER, *ALONE OF ALL HER SEX* 58 (1976).

22. *Id.*

23. *Id.* at 57.

24. *Id.*

birth.²⁵

Elaine Pagels discusses how the view of Eve's punishment was interpreted to justify the natural subordination of woman to man: "Recognizing that Adam and Eve originally were created to live together in a harmonious order of authority and obedience, superiority and subordination, like soul and body, 'we must conclude,' says Augustine, 'that a husband is meant to rule over his wife as the spirit rules the flesh.'"²⁶ According to Christian thought, a woman's contribution to reproduction is used to establish her inferiority to men as she is equated with the evils of the body. Thus, her nature justifies her subjection to male authority.

2. *The Virgin Mary*

The glorified role of women as mothers is best illustrated by the Cult of the Virgin Mary. In the Catholic Church, the Virgin Mary represents motherhood in its fullness and perfection as Mary's purity and innocence separated her from Eve.²⁷ Literally, Mary derives importance only through her connection to her son and to God—this is her unique virtue.²⁸ Thus, Mary was passive and humble when confronted with the news of her pregnancy. She is an icon of submissiveness, a quality which became quintessential motherliness.²⁹

The image of Mary establishes the destiny of women as mothers—she is presented by the Catholic Church as an ideal for all women to strive towards. However, Mary escaped the sexual intercourse necessary for all other women to fulfill this destiny.³⁰ Symbolically, Mary's virginity demonstrates the reduction of woman to the status of a sanitized container. Ironically, the virgin birth also represents a woman's power to bear a child without any male assistance whatsoever. This creates a strong matriarchal image that is reminiscent of ancient mythologies celebrating the mother's procreative power through worship of the Goddess.³¹ These images of Mary are reflected in surrogacy where the surrogate mother can be seen as a vessel for breeding children, but she can also be viewed as powerful and independent as the male role in reproduction appears invisible and less important.

25. See ELAINE PAGELS, ADAM, EVE, AND THE SERPENT 68 (1988).

26. *Id.* at 113-14 (citation omitted).

27. Peach, *supra* note 6, at 76 ("In contrast with Eve, Mary . . . has represented such qualities as purity, celibacy, chastity, asexuality, passivity, receptivity, and submissiveness.").

28. *Id.* ("[I]t is Mary's status as a virgin and mother of Jesus, not as an individual woman revered in her own right, which creates her sacred status.").

29. WARNER, *supra* note 21, at 185.

30. *Id.* at 336.

31. JOSEPH CAMPBELL & BILL MOYERS, THE POWER OF MYTH 214 (Betty S. Flowers ed., 1988).

3. *The Duality of Female Nature*

In sum, the images of Eve and Mary create a dual perception of women as both evil and sacred.³² Through the dogma of the Immaculate Conception, the Virgin Mary affirms Christian ideas about the dangers of the flesh and their unique connection to women.³³ Mary is valued for her obedience as a mother, and she is praised for her complete rejection of female sexuality. The image of Mary reveals patriarchal control of the female contributions to pregnancy. Created for the propagation of the male spirit, the Cult of Mary confirms the idea of male supremacy through reproduction. The notion that Mary is impregnated by the operation of the Holy Spirit can be analogized to Aristotlean biological ideas about human reproduction. That is, the woman provides the matter while the man provides the form—her role as mother is essential, but it is necessarily inferior. The message from Christianity is clear: female sexuality without motherhood (Eve) is corrupt, whereas motherhood separated from the evils of the female flesh (Mary) is ideal. Nancy Ehrenreich notes that these dual characteristics are attributed to women in order to maintain female subordination to male authority: "Analyses of cultural expectations for women also have often noted the presence of a virgin/whore dynamic, in which a woman is perceived either as the virtuous homemaker . . . or as a promiscuous, irresponsible slut, undeserving of social benefits or personal respect."³⁴ Whether characterized as virgin or whore, mothers are placed in an inferior position by Christian myths and Western political thought.

III. THE FEMINIST RESPONSE TO MOTHERHOOD

The previously discussed cultural assumptions can be attacked for creating an immutable definition of motherhood. But feminist theory can be similarly criticized for becoming as attached to the rigid gender categories as the conventionalism it seeks to discount.³⁵ In the context of motherhood, radical feminists focus on the difference of power that oppresses women as a

32. See ADRIENNE RICH, *OF WOMAN BORN* 34 (2d ed. 1986):

Throughout patriarchal mythology, dream-symbolism, theology, language, two ideas flow side by side: one, that the female body is impure, corrupt, the site of discharges, bleedings, dangerous to masculinity, a source of moral and physical contamination. . . . On the other hand, as mother the woman is beneficent, sacred, pure, asexual, nourishing; and the physical potential for motherhood—that same body with its bleeding and mystery—is her single destiny and justification in life.

Id.

33. WARNER, *supra* note 21, at 67.

34. See Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 510 (1993).

35. *Patriarchy is Such a Drag*, *supra* note 4, at 1974.

class, and cultural feminists only emphasize the importance of celebrating women's unique values stemming from motherhood. Both models perpetuate the idea that all women experience motherhood in exactly the same way. In effect, the essentializing branches of feminism achieve their claims of universality by repressing differences among women; the interests of certain women are privileged while the interests of other women are ignored.³⁶ Of course, essentialism has been an important factor in the political movement of feminism to dismantle the oppression created by our culture's definition of womanhood. Although essentialism may be helpful to the formation of theory and effectuating social change, it is necessary to recognize its limitations and dangers—"[t]he challenge . . . is to demonstrate that a postmodern feminism avoids essentialism and yet presents practical approaches to improving women's lives."³⁷

Radical and cultural feminists highlight certain aspects of the patriarchal definition of motherhood that oppress and subordinate many women. However, they fail to acknowledge the differing experiences of mothers, and thus affirm the conventional notion that there can be one universal class of mothers. As a result, the experiences of many women are ignored, and it becomes difficult to deconstruct and denaturalize the patriarchal term "mother."

A. RADICAL FEMINISM

Many feminist legal theorists, specifically radical feminists, reject the assumption of the role of mother because it embodies the sexual subordination of women. Biological differences are viewed as a means to enforce male supremacy in the structure of the family and in the legal and political structures of the state. In the *Dialectic of Sex*,³⁸ for example, Shulamith Firestone denounces the actual biological differences between men and women as the ultimate source of female oppression. Thus, the division of gender roles in society merely reflects the larger division created by nature. According to Firestone, the only means to achieve women's liberation is through the technological separation of reproduction from the female body.³⁹

Radical feminists also emphasize the harm women experience because of sexual hierarchy and the humiliation inherent in being a woman in our world today. Robin West describes the proposals of radical feminists to free women from their material connection to the other:

According to radical feminism, women's connection with the 'other'

36. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 834-35 (1990).

37. *Patriarchy is Such a Drag*, *supra* note 4, at 2000.

38. SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970).

39. *Id.*

is above all else invasive and intrusive: women's potential for material 'connection' invites invasion into the physical integrity of our bodies, and intrusion into the existential integrity of our lives. . . . The invasion of the self by the other emerges as a source of oppression. . . . Women . . . long for an independent, individualized, *separate* identity.⁴⁰

For radical feminists, motherhood manifests this idea of female connection.

According to radical feminist Catharine MacKinnon, the most important difference between men and women is one of power. She argues that women, as a class, have been subordinated by men because of the male-defined differences between the sexes. MacKinnon criticizes feminists who argue for either equal or special treatment under the law. The sameness standard measures women's similarity to men, whereas the difference standard simply measures women's lack of correspondence to men: "Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness is the referent for both."⁴¹

MacKinnon goes on to present her dominance approach as a challenge to the foundation of male supremacy: "Gender is a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy."⁴² Thus, the dominance approach questions the female subordination that is at the core of patriarchal gender roles.

Because the institution of motherhood draws on these gender roles, radical feminists reject it as innately oppressive. In this view, women's celebration of their difference through the experience of mothering is simply an acceptance of female subservience. MacKinnon emphasizes this idea in her criticism of cultural feminism: "By establishing that women reason differently from men on moral questions, [Carol Gilligan] revalues that which has accurately distinguished women from men by making it seem as though women's moral reasoning is somehow women's, rather than what male supremacy has attributed to women for its own use."⁴³ Radical feminists dismiss the "connection" central to motherhood as a value produced by and contributing to women's subordination.

B. CULTURAL FEMINISM

In contrast to radical feminists, cultural feminists embrace and celebrate

40. Robin West, *Jurisprudence and Gender*, in FEMINIST LEGAL THEORY FOUNDATIONS, *supra* note 8, at 75, 78, 84, 85.

41. Catharine A. MacKinnon, *Difference and Dominance*, in FEMINIST LEGAL THEORY FOUNDATIONS, *supra* note 8, at 276, 278.

42. *Id.* at 281-82.

43. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 51 (1989).

women's differences from men. Carol Gilligan argues that women speak in a "different voice" which emphasizes connection, personal relationships and nurturance.⁴⁴ Cultural feminists claim that, "the category 'woman' has not been so much misdefined by men, as it has been ignored and undervalued."⁴⁵ Since the law is masculine, it emphasizes autonomy rather than connection and caring. The experience of mothering results in certain social and psychological gender differences. Women give birth and nurture. Consequently, they are more connected and caring than men. Cultural feminists thus conclude that the law should adopt these specifically female values, especially in the legal treatment of motherhood.

After arguing for the abolition of the traditional family, Martha Fineman proposes a new model based on nurturance and caregiving. These values, she asserts, must be given special protection in the public institution of the state.⁴⁶

I have concluded that what is necessary in order to confront the hegemony of the sexual-natural family is an equally powerful cultural symbol. The most vivid and shared image of connection is the Mother/Child dyad. . . . Mother is a metaphor with power to make the private visible. . . . Motherhood has unrealized power—the power to challenge the hold of sexuality on our thinking about intimacy; the power to redefine our concept of the family, which may be why men have tried for so long to control its meaning. The Mother/Child metaphor represents a specific practice of social and emotional responsibility. The strength of the image is in its redistributive potential, grounded on empirical evidence ('reality') about the need for and assumption of caretaking.⁴⁷

Fineman's approach to public notions of justice is based in her affirmation of the values of nurturance and dependence. She envisions an ideal state that embraces physical caretaking, a concept embodied in the natural relationship of mother and child.⁴⁸ In the pursuit of gender equality, cultural feminists encourage the legal system to incorporate the values of mothering.

44. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

45. Patricia A. Cain, *Feminism and the Limits of Equality*, in FEMINIST LEGAL THEORY FOUNDATIONS, *supra* note 8, at 237, 241.

46. MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 23 (1995).

47. *Id.* at 233-34.

48. *Id.* at 235.

C. LESBIAN FEMINISM

1. *Lesbian Experience and the Critique of Essentialism*

Patricia Cain criticizes the "dominant" feminist legal theory for its general ignorance of the lesbian experience.⁴⁹ Specifically, she analyzes the development of two opposing theories in feminist jurisprudence: the "woman as mother" theory and the "woman as sexual subordinate" theory.⁵⁰ While cultural feminists ignore the relevant values of lesbian relationships, radical feminists claim that the positive aspects of caring and connection originate in the negative aspects of subordination.⁵¹ Cain focuses on the ultimately narrow account of the woman's experience by both cultural and radical feminists:

I can find no major "theory piece" by a legal scholar that focuses on the experience of adult women loving each other as the core experience for building a legal theory premised on caring and connection. And although "women as sexual subordinate" theorists are more likely to acknowledge the fact of lesbian existence, they focus on a critique of male dominance rather than on lesbian bonding as a positive alternative to male dominance.⁵²

Both philosophies reek of an essentialism assuming women are heterosexual: cultural feminists only discuss a woman's "different voice" of connection through her unique experience of mothering, and radical feminists view women's experiences through the lens of subordination to male power.

The lesbian experience illustrates the possibility of both separation and connection. That is, lesbians may value the positive aspects of nurturance and connection while simultaneously developing themselves as autonomous and free from patriarchal restraints. Patricia Cain suggests that the lesbian experience of "a woman-identified private sphere," where women experience "significant periods of nonsubordination," allows women to develop a sense of self that is their own, "not a mere construct of patriarchy."⁵³

Thus, lesbian experience not only enriches cultural and radical feminism, but it also reconciles the opposition between the two theories by presenting the values of connection and caring alongside a resistance to male power and dominance. Of course, this message is relevant to the liberation of all women. "The struggle is to make nonsubordination a reality for all women, and the reality of nonsubordination in some women's lives is rele-

49. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, in FEMINIST LEGAL THEORY FOUNDATIONS, *supra* note 8, at 359.

50. *Id.* at 362.

51. *Id.* at 361.

52. *Id.* at 362.

53. *Id.* at 367.

vant to this struggle."⁵⁴

Remaining silent on lesbian issues, feminist legal theorists may also disregard the role heterosexuality plays in female oppression. Cain notes: "[I]f feminist legal theory is to provide meaningful guidance for the abolition of patriarchy, feminist theorists must understand heterosexuality as an institution and not merely as the dominant form of sexuality."⁵⁵

Adrienne Rich critiques the institution of compulsory heterosexuality as a source of oppression for all women.⁵⁶ She redefines lesbian existence and offers a new concept, the lesbian continuum, which encompasses all women who bond with other women and resist male tyranny.

I mean the term lesbian continuum to include a range of woman-identified experience; not simply the fact that a woman has had or consciously desired genital sexual experience with another woman. If we expand it to embrace many forms of primary intensity between and among women, including the sharing of a rich inner life, the bonding against male tyranny, the giving and receiving of practical and political support; we begin to grasp breadths of female history and psychology that have lain out of reach as a consequence of limited, mostly clinical, definitions of "lesbianism."⁵⁷

Recognizing the exclusion of lesbians from feminist legal discourse exposes the essentialism of the dominant theories; perceiving heterosexuality as an institution will help feminists to understand the far-reaching extent of male oppression. As Cain and Rich illustrate, feminist legal theory will benefit from the insights of a lesbian perspective.

2. *Lesbian Mothers*

The concept of a lesbian mother is an oxymoron. Initially, lesbians rejected motherhood and the concomitant institution of heterosexuality as fundamentally oppressive—motherhood symbolizes the denial of lesbian existence. Ellen Lewin notes:

Just as motherhood is viewed as the most natural expression of women's essential being, lesbianism is associated with violations of the natural order in the popular imagination. Lesbian sexuality is transgressive both because it seems to make lesbians independent of men and because it is, by definition, nonprocreative.⁵⁸

54. *Id.*

55. *Id.* at 366.

56. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *LESBIANS, GAY MEN AND THE LAW* 32 (William B. Rubenstein ed., 1993).

57. *Id.* at 33.

58. Ellen Lewin, *On the Outside Looking In: The Politics of Lesbian Motherhood*, in *CONCEIVING THE NEW WORLD ORDER*, *supra* note 20, at 106.

However, a community of lesbian mothers has recently begun to emerge.⁵⁹ The previously discussed Western cultural assumptions about motherhood rely on a definition of female reproduction as natural but necessarily inferior. As outsiders to the patriarchal invention of the term "mother," lesbians provide a valuable critique of the institution while reflecting an alternative model to the traditional family. Choosing motherhood but rejecting the historically subordinated position of the female role, lesbian parents can best be characterized as a culture of outlaw mothers.

As mentioned earlier, the feminist theoretical perception of motherhood is split into two opposing camps. While radical feminists reject motherhood as inherently oppressive, cultural feminists emphasize the important values of a woman's psychological experience as a mother. The lesbian perspective generally challenges the essentialism of feminist legal theory. Likewise, the model of lesbian parenting is central to broadening the perception of motherhood and gender roles.

Lesbian parenting reconciles the opposing feminist views of motherhood; it creates a new paradigm wherein women literally resist the patriarchal institution while they embrace the experience of being a mother. Adrienne Rich, in *Of Woman Born*, distinguishes the powerful experience of motherhood from the oppressive institution: "[T]he *potential relationship* of any woman to her powers of reproduction and to children; and the *institution*, which aims at ensuring that that potential—and all women—shall remain under male control. . . . [M]otherhood as an institution has ghettoized and degraded female potentialities."⁶⁰

The image of a lesbian mother is one that challenges the very foundation of the male claim to power. Aristotle, for example, confines the woman to her biological role in reproduction. Her inferior status in the heterosexual family corresponds to the maintenance of the hierarchical state. Similarly, the Cult of the Virgin Mary presents the ultimate goal of motherhood for all women. However, her importance as a mother depends on her connection and obedience to men—her purpose is to reproduce the male line. Motherhood has been a key concept because it enforces women's inferior position to men. Thus, a woman's subordinated role as mother in the family has been justified as natural. Adrienne Rich notes further, "Patriarchy could not survive without motherhood and heterosexuality in their institutional forms; therefore they have to be treated as axioms, as 'nature itself'. . . ."⁶¹

Motherhood has traditionally been perceived as something that happens to women because of their relationship to men, not because a woman decides that being a mother will meet her own personal goals or desires. For a lesbian, becoming a mother represents an explicit rejection of the traditional

59. LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS* 290 (1991).

60. RICH, *supra* note 32, at 13.

61. *Id.* at 43.

female role. Ellen Lewin discusses this idea:

Motherhood (coded in recent political discourse "family") provides evidence that the gender system is working as it should. While it hardly constitutes a rebellion for a heterosexual married woman to become a mother (indeed, her rebellion would consist of childlessness), for lesbians to embark upon a maternal career means defying the expectations that motherhood and heterosexual marriage must be linked.⁶²

Essentially, lesbian mothers threaten the traditional structure of the family as the male role is deleted and childrearing becomes the result of a purely female choice. Including lesbian experiences expands the meaning of motherhood and challenges the assumption that a woman's biology predetermines her subordinate role in the traditional family and in society generally. Lesbian motherhood exposes the social creation of gender; it illustrates the possibilities of self-definition and of organizing alternative family structures that are removed from the traditional one-mother/one-father model.

Judith Butler discusses the destabilizing effect of insisting that the meaning of "male" and "female" is not fixed, opening up spaces for alternative gender possibilities.⁶³ Thus, deployments of gender categories that violate the heterosexual matrix will eventually denaturalize the conventional definitions.⁶⁴ By essentializing the female experience of mothering, cultural and radical feminists have erased the lesbian possibilities, and thus denied the potential for all women to be liberated from the traditional construction of the category of mother.

IV. LEGAL TREATMENT OF LESBIAN MOTHERS

The legal system perpetuates the conventional gender ideology by naturalizing the term "mother."⁶⁵ Two theories underlie the legal definition of parenthood: (1) that every child should have only one mother and one father; and (2) that those two persons identified as mother and father have all the rights and responsibilities of parenthood, whereas nonparents should have none.⁶⁶ The state's reduction of all families to the one-mother/one-father model is illustrated by the presumption that the husband of a married woman is always the father of the child.⁶⁷ In *Michael H. v. Gerald D.*,⁶⁸

62. Lewin, *supra* note 58, at 117.

63. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

64. *Patriarchy is Such a Drag*, *supra* note 4, at 1999.

65. *Id.*

66. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459, 468 (1990).

67. *Id.* at 477.

for example, the Court refused to recognize the paternity claim by the biological father, holding that the wife's husband was the only legal father of her child.⁶⁹ Thus, the claim of the biological father is subverted to the interest of benefitting the marital relationship which in turn supports the structure of the traditional family. Parenthood is defined narrowly to uphold a public policy that preserves the heterosexual, nuclear family.

Gay and lesbian relationships pose a direct threat to the establishment of the family. In *Bowers v. Hardwick*,⁷⁰ the Court held that there is no fundamental right to consensual homosexual sodomy.⁷¹ The Court reflected cultural biases about the traditional family and presented homosexual behavior as its antithesis: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ."⁷² The strict definition of parenthood and the perceived deviance of homosexuality are features of the legal system which serve to generally exclude lesbians from recognition as mothers.

A. JUDICIAL BIASES

Judicial opinions express many reasons to justify the disparate treatment of lesbian versus heterosexual parents. Some courts base their decisions about lesbian families on an assumption that lesbians are mentally unstable and therefore unfit to care for their children.⁷³ Furthermore, it is assumed that lesbian women are less maternal, that they are "poor" mothers.⁷⁴ "Some judges make decisions concerning lesbian families based on the belief that homosexual relationships are abnormal and unsatisfying, and, thus, ultimately detrimental to the child."⁷⁵ Other courts refuse to recognize lesbian families because they believe that the community at large rejects homosexual relationships.⁷⁶ Child development is yet another justification used to deny parental rights. Judges voice concerns that the children of lesbian mothers will have psychological difficulties, a confused sense of proper gender roles, or that they will be socially stigmatized.⁷⁷ They often fear that the child of lesbian parents will become gay if they grow up in a certain environment.⁷⁸

B. PARENTAL UNFITNESS

Courts deny parental rights to biological mothers by deciding that such

68. *Michael H. v. Gerald H.*, 491 U.S. 110 (1989).

69. *Id.*

70. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

71. *Id.*

72. *Id.* at 191.

73. David F. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 347 (1994).

74. *Id.* at 349.

75. *Id.* at 351.

76. *Id.* at 353.

77. *Id.* at 362-65.

78. *Id.* at 368.

mothers are unfit. In *Bottoms v. Bottoms*,⁷⁹ the Virginia Supreme Court affirmed a grant of custody of a child to her maternal grandmother based on the fact that the mother was a lesbian. The court reasoned that it was in the best interests of the child to be removed from its mother, who engaged in illegal conduct. Thus, Sharon Bottoms' lesbianism was sufficient to meet the stringent clear and convincing standard necessary to rebut the presumption favoring a natural parent.⁸⁰ *Bottoms* illustrates how a lesbian is perceived by the law. She is not primarily considered as a mother, but rather as a woman with a corrupted sexuality. The court explicitly describes her sexual habits, suggesting that her conduct is inseparable from her ability to be a nurturing, responsible parent.⁸¹

C. CUSTODY AND VISITATION

Homosexuality has been used as a basis for denying lesbian parents custody and visitation rights. Most courts refuse to acknowledge the existence of more than one mother in a family. In *Nancy S. v. Michele G.*,⁸² for example, the court addressed the issue of whether a lesbian partner who was neither biologically nor adoptively connected to a child could be considered a parent of that child. The court held that the status of the lesbian partner as a parent-like figure did not entitle her to a grant of custody.⁸³ The court refused to expand the definition of parent beyond its traditional meaning. It stated that it did not agree that courts should adopt this novel theory by which a nonparent can acquire the rights of a parent, and then face years of unraveling the complex practical, social, and constitutional ramifications of this expansion of the definition of parent.⁸⁴

In *Sporleder v. Hermes (In re Z.J.H.)*,⁸⁵ the Wisconsin Supreme Court held that a lesbian co-parent did not have standing to acquire custody or assert visitation rights. In reaching its decision, the court ignored the fact that the co-parent was the primary caretaker of the child and that the couple entered a co-parenting contract to determine custody through mediation in the event of their separation.⁸⁶

These examples illustrate the tendency of courts to treat lesbians who have assumed a parent-like relationship with a child as nonparents, third parties, or legal strangers.⁸⁷ In *re Z.J.H.*, the court stated, "[T]he dissent basically asks that we confer the legal status of 'parent' on both companions

79. 457 S.E.2d 102 (Va. 1995).

80. *Id.*

81. *Id.*

82. 228 Cal. App. 3d 831 (1991).

83. *Id.* at 836.

84. *Id.* at 841.

85. *Sporleder v. Hermes*, 471 N.W.2d 202, 204 (Wis. 1991).

86. *Id.*

87. See generally Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377 (1994).

in the 'non-traditional' relationship. We refuse to do so. . . . Z.J.H. is not the 'victim of parental warfare,' because Sporleder is not a 'parent.'"⁸⁸ Nancy Polikoff comments on the rhetorical power of being considered "parent" in the arena of custody and visitation:

The significance of parental status in custody and visitation proceedings is profound. In a custody dispute, parents stand on equal footing with respect to one another. . . . When the dispute is between a parent and nonparent, not only is the parent considered the preferred custodian, but the nonparent may even be found without standing to challenge parental custody.⁸⁹

In denying a lesbian mother the label "parent," courts enforce the one-mother/one-father model and preserve the underlying values of the patriarchal family. Thus, the concept of two mothers challenges the historical source of male power; the homophobic justifications used for denying lesbian families must be viewed in this larger social context, not simply as the result of mere prejudice. A particular court's homophobia is a means to make nontraditional families invisible and thus maintain the basis for male supremacy.

Despite the general hostility towards lesbian families, some courts have begun to recognize the existence of two legal mothers. Several states, for example, now allow lesbian second parent adoptions.⁹⁰ This year, in *Holtzman v. Knott*,⁹¹ the Wisconsin Supreme Court held that a nonbiological, nonadoptive lesbian "parent" could have standing to seek visitation rights if there exists a parent-like relationship with the child.⁹² In its dicta, the *Holtzman* court specifically validated the existence of an alternative family:

The court sees this as a case where a family member ought to have the right to visit and keep an eye on the welfare of a minor child with whom she has developed a parent-like relationship. . . . There are an increasing number of children in this society for whom the mother is the only known biological parent. Frequently that mother forms a lengthy relationship living with another person, be they man or woman, who assumes a parental role in the child's life for many years.⁹³

88. *Id.* at 210, n.14.

89. Polikoff, *supra* note 66, at 471.

90. See *In re Jacob*, 1995 N.Y. LEXIS 3579; *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sup. Ct. 1992); *In re Adoption of J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. 1993); *In re Adoption of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

91. 533 N.W.2d 419 (Wis. 1995).

92. *Id.*

93. *Id.*

The continued acceptance of lesbian motherhood is an important legal concern for all feminists. A court's rejection of the status of "parent" in the context of a lesbian relationship reflects a general desire to relegate all women to a particular position of powerlessness. The lesbian possibility symbolizes a woman choosing the experience of motherhood while simultaneously rejecting the oppression associated with the institution.

V. THE SURROGACY CONNECTION

The issue of surrogacy is a microcosm for the previously discussed ideas concerning motherhood. Once again, surrogacy depicts the female role in reproduction and corresponding role in society. Moreover, the predominantly negative reaction to surrogacy by feminists can be criticized as essentialist for failing to account for the beneficial effects on lesbian mothers. But surrogacy can also challenge the traditional definition of motherhood since the genetic, gestational and intentional mother could all be different people. As society and the legal system are confronted with several mothers claiming parental rights to the same child, the definition of motherhood will continue to expand.

A. THE FEMINIST RESPONSE TO SURROGACY

1. *The Pro-Surrogacy Argument*

Some feminists argue in favor of enforcing surrogacy contracts as a means to empowering women. In her article on market-inalienability, Margaret Radin raises an idea that many feminists espouse in favor of enforcing surrogacy contracts—that women will be empowered if they are allowed to enter the market.⁹⁴ Carmel Shalev insists that the enforcement of surrogacy contracts would allow women to take advantage of the economic potential of their reproductive abilities—to gain entrance to the market. She firmly believes that leaving surrogate mothers legally incapable is paternalistic and ultimately leads to the disempowerment of women.⁹⁵

94. Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1916-17 (1987). Radin discusses the "double bind" of trying to decide whether or not to allow commodification of women's gestational services:

If we now permit commodification, we may exacerbate the oppression of women—the suppliers. If we now disallow commodification—without what I have called the welfare-rights corollary, or large-scale redistribution of social wealth and power—we force women to remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers.

Id.

95. Carmel Shalev, *Birth Power: The Case for Surrogacy*, 90 COLUM. L. REV. 1177 (1990). *But see* Surrogate Parenting Assocs. v. Com. ex rel. Armstrong, 704 S.W.2d 209, 21 (Ky. 1986) (Wintersheimer, J., dissenting) ("In my view the consequences which could arise from the opening of the human uterus to commercial medical technology does not contribute to the emancipation of women.").

In one sense, surrogacy allows a woman to escape the confines of her nature, and to enter the "man's world" of culture and contract.⁹⁶ Specifically, women could use what is unique to them in the private realm—the family—to gain entrance into the public realm. Lori Andrews argues for the allowance of surrogacy contracts as a means to achieve equal treatment for women: "In many ways, the very existence of surrogacy is a predictable outgrowth of the feminist movement. Feminist gains allowed women to pursue educational and career opportunities once reserved for men. . . . Feminism also made it more likely for other women to feel comfortable being surrogates."⁹⁷

2. Most Feminists Argue Against Surrogacy

In general, commercial surrogacy has been almost universally attacked by feminists. The one major objection is that surrogacy commodifies women and babies:⁹⁸ it devalues personhood by placing a monetary value on women and babies and potentially on various personal attributes such as race and health.⁹⁹ Essentially, surrogacy contracts could lead to a dehumanizing view of women and babies as property. Alexander Capron and Margaret Radin note that "[w]hat is probably most remarkable about the debate over surrogate motherhood is that it has necessitated defending a claim that

96. Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Debate*, 38 BUFF. L. REV. 515, 526 (1990) ("Fathers represent culture, whereas mothers represent nature. Fathers stand for contract—for the right to negotiate reality, including relationships; mothers stand for status—for the inevitability of relationships and their structure. But, in the context of surrogacy arrangements, mothers can be opposed to other kinds of mothers rather than to fathers. In this opposition, certain mothers represent culture or contract; whereas others represent status or nature.").

97. Lori Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGACY 3 (D. Kelly Weisberg ed., 1995).

98. See, e.g., Radin, *supra* note 94, at 1925 (1987) (arguing that permitting babies to be sold leads to the commodification of mothers and infants); Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127 (1986) (arguing that commercial surrogacy creates a perception of children as commodities and contributes to the exploitation of surrogate mothers); see also Tamar Frankel & Frances H. Miller, *Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99 (1987) (arguing that the market model shifts the emphasis away from the needs and desires of the producers to meet the demands of others for a product); see also Jane Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105 (1987) (arguing against the market approach to adoption with a primary concern for the politics of treating babies as commodities); see also *Com. ex rel. Children's Aid Society v. Gard Pa.*, 66 A.2d 300, 304 (1949) ("That a child cannot be made the subject of a contract with the same force and effect as if it were a mere chattel has long been established by law."); *Willey v. Lawton*, 9 Ill. App. 2d 344, 347 (1956) (stating that "allowing parents to be free to transfer a child for money would [tend to destroy] of one of the finest relations of human life").

99. See Radin, *supra* note 94, at 1926 ("When the baby becomes a commodity, all of its personal attributes—sex, eye color, predicted I.Q., predicted height, and the like—become commodified as well. . . . Moreover, to conceive of infants in market rhetoric is likewise to conceive of the people they will become in market rhetoric, and to create in those people a commodified self conception.").

was previously taken as self-evident: namely, that society has an interest in people being regarded as intrinsically valuable, not as monetized units in a marketplace."¹⁰⁰

The feminist critique that surrogacy oppresses and commodifies women is a perfect illustration of the radical feminist claim that men, in general, use female sexuality to control and subordinate women.¹⁰¹ Surrogacy is an exaggeration of the misogynist notion that equates woman with womb. This idea is most pronounced in *Johnson v. Calvert*,¹⁰² where the surrogate mother only contributed the use of her womb, creating the vivid image of a human incubator.

Feminists are concerned about the degradation of women through the commercial abuse of their reproductive capacities. Gena Corea describes surrogacy as a crime against women: "Selling women as breeders, setting up a class of breeder women, violates human dignity. When no one objects [to this violation of human dignity] then we are living in a society in which a woman's life is held in utter contempt."¹⁰³ Moreover, commercial surrogacy has been analogized to slavery.¹⁰⁴ Anita Allen fears that a class of powerless, minority women will be exploited: "The *Johnson* case highlights a troubling truth underlying the rhetoric that contemporary surrogacy is slavery. Affluent white women's infertility, sterility, preferences and power threaten to turn poor black women, already understood to be a servant class, into a 'surrogate class.'"¹⁰⁵ In sum, feminists have strongly denounced the surrogacy arrangement, especially in the context of a market relationship.

B. IMAGES OF THE SURROGATE MOTHER: A REFLECTION OF ANCIENT IDEAS

1. *Subordination of Female Through Reproduction: A Means of Establishing Male Supremacy*

The overwhelmingly negative response by feminists to surrogacy can be understood as a rejection of essential historical ideas concerning reproduction. Symbolically, surrogacy presents "breeding" as a woman's ultimate destiny. However, defining a woman's function in society as limited by her

100. Alexander Capron & Margaret J. Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, in SURROGATE MOTHERHOOD 63 (Larry Gostin ed., 1988).

101. See MACKINNON, *supra* note 43, at 246-48 (arguing that enforceable surrogacy contracts demonstrate another instance of male control of women's bodies. Such contracts are analogous to prostitution in that women's bodies are taken and purchased, for use by men.).

102. 5 Cal. 4th 84 (1993) (stating that in relying purely on contract law, the court refused to accept the many public policy arguments that oppose surrogacy arrangements).

103. Gena Corea, *Junk Liberty*, in SURROGACY, *supra* note 97, at 53.

104. Anita L. Allen, *The Socio-Economic Struggle for Equality, The Black Surrogate Mother*, in SURROGACY, *supra* note 97, at 58.

105. *Id.* at 58-59.

ability to reproduce is nothing new. The image of a surrogate mother is a modern example which exaggerates ancient myths about female sexuality.

The surrogacy contract emphasizes the conclusions from Aristotlean biology and Platonic philosophy, that the man contributes the form and the woman provides the matter, that the man "begets" whereas the woman "brings forth." Richard Posner confirms these ancient assumptions about human generation; he describes surrogacy as a means to satisfy the man's desire to reproduce his form: "Even if there were no shortage of babies for adoption, there would be a demand for surrogate motherhood. People (a biologist would say their genes) desire genetic continuity, and surrogacy enables the man (although not his wife) to satisfy this desire."¹⁰⁶

Perhaps surrogacy is most disturbing because it represents man's repeated attempts to usurp woman's procreative power. Surrogacy echoes the underlying function of Aristotlean science and the myth of the Virgin Mary to justify male supremacy. Downplaying the female role in reproduction has been essential to the creation of male dominance; the underlying view of women's inferior role in reproduction extends to her disempowered position in society.

In surrogate motherhood, the woman is again seen merely as "the vessel for the man's seed. . . ."¹⁰⁷ This notion is analogous to the vision of Mary as a passive receptacle for God's spirit. Here, instead of the Holy Ghost, male technology operates to "overshadow" the surrogate mother. In essence, the male procreative power is embodied in science rather than in God. Gena Corea explains the patriarchal development of presenting procreation as the result of single male parenthood:

In prehistory, as we have seen, woman was revered as the life-bearer. But in recorded history, men claimed the major credit, relegating woman to the role of vessel or field for their seed. . . . As soon as a man understood that he was not, in fact, the sole real parent of the child, he began recreating the myth of single parenthood by the male, not this time through religious or scientific theory, but through technology.¹⁰⁸

Placing surrogacy in this larger historical context, the issue becomes inseparable from the fact that women's subordination has been traditionally justified by emphasizing her close connection to nature. By focusing on surro-

106. Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, in *SURROGACY*, *supra* note 97.

107. GENA COREA, *THE MOTHER MACHINE* 222 (1979) ("That the surrogate is viewed as a vessel for the man's seed is evident from the language consistently used to describe her. The women are referred to as inanimate objects—incubators, receptacles, rented property, plumbing.").

108. *Id.* at 309-10.

gacy's reduction of women to "baby machines" or "incubators," feminists expose actual views about a woman's role in society that have always existed.

2. *Maternal Status and Female Nature*

Surrogacy is also controversial because it raises the issue of what exactly constitutes motherhood. Until recently, the genetic mother and gestational mother were the same person—the identity of the mother was clear. Surrogacy and reproductive technologies in general divide motherhood into its various components (i.e. genetics, gestation, intention). In *Johnson v. Calvert*,¹⁰⁹ for example, the Supreme Court of California addressed the issue of gestational surrogacy. The court held that the Calverts were the genetic, biological, and natural parents, but Anna Johnson, the surrogate mother, had no parental rights to the child.¹¹⁰ The result in *Johnson* illustrates the negative aspect of a surrogacy arrangement in which the gestational connection of a mother and child is completely devalued.

The determination of maternal status in a gestational surrogacy arrangement reflects the patriarchal perception that female nature is inferior. Specifically, feminists suggest that a failure to recognize the gestational relationship as equal to or greater than the genetic or contractual relationship devalues pregnant women and the experience of pregnancy.¹¹¹ Some claim that the reason genes are so highly valued is because men's contribution to procreation is entirely genetic, and, therefore, men can identify with a woman's assertion of a parental rights claim based on genetics.¹¹² Gestation is discounted and ignored because it lies outside the experience of men.¹¹³ Maternal status seems grounded in the same misogynist assumptions which underlie Aristotlean biology and the Cult of the Virgin Mary, that the spirit is superior to the body just as the male is superior to the female.

Furthermore, the surrogacy arrangement contributes to the notion that some mothers are "good" and absolutely entitled to parental rights, whereas other mothers are "bad" and deserve nothing. A "good" mother is the infertile married woman who wants to fulfill her biological destiny of procreation or to aid her husband in the perpetuation of his genetic line. In contrast, the "bad" mother is the single woman of lower socio-economic status who acts as surrogate mother in exchange for a sum of money. One commentator

109. *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).

110. *Id.* at 93.

111. Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521, 549-53 (1988).

112. Barbara K. Rothman, *Recreating Motherhood: Ideology and Technology in American Society*, in BEYOND BABY M: ETHICAL ISSUES IN NEW REPRODUCTIVE TECHNIQUES 9, 11 (Dianne M. Bartels et al. eds., 1990).

113. *Id.*

criticizes the stigmatization of the surrogate mother:

It has been suggested that society knowingly employs a double standard: we see it as much worse to sell a child than to buy one. This may be because we view any woman who is willing to sell her child (even if she later changes her mind) as suspect and a poor risk to raise the child. It may also be because of the common class difference between purchasers and sellers: the middle class approves of their members buying babies from poor women. [Johnson] may have seemed especially easy for many because the gestational mother was black, although the judge himself carefully refrained from even mentioning race in his opinion.¹¹⁴

This dual perception of women is similar to the previously discussed virgin/whore dichotomy. In essence, *Johnson* is yet another example of the legal incorporation of Western ideas surrounding the institution of motherhood. By rejecting surrogacy's division of maternal status, feminists are also reacting to deeply embedded notions about the qualities of the "good" mother, and to the male claim of genetic superiority.

C. LESBIAN SURROGACY ARRANGEMENTS PRODUCE TWO NATURAL AND POTENTIALLY LEGAL MOTHERS

Dismissing surrogacy as oppressive to all women is essentialist since it again erases the lesbian possibility. One very positive aspect to surrogacy arrangements and reproductive technology is that they allow for the creation of alternative families.¹¹⁵ Lesbians could use a surrogacy arrangement to ensure that both mothers will have legal rights to their baby. The egg of one woman would be fertilized by the sperm of a donor. Then, the fertilized egg would be placed in her partner's womb for gestation. Ultimately, this could be an alternative to lesbian second parent adoptions or joint adoptions. Both mothers could be considered as equal, intentional, and biological parents. This strengthens the evolution of the nontraditional family and furthers the challenge to the one-mother/one-father definition of parenthood.

Moreover, a lesbian surrogacy arrangement furthers the separation between heterosexual sex and procreation.¹¹⁶ In effect, it dilutes the assertion that heterosexual sex is a prerequisite to a claim of natural parenthood. This

114. George J. Annas, *Crazy Making: Embryos and Gestational Mothers*, 21 HASTINGS CENTER REP. 36 (1991).

115. O'Brien, *supra* note 98, at 131 (commenting on the various forms of parenting arrangements that the surrogacy transaction can represent).

116. See Marjorie M. Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 396 (1990) ("The separation of procreation from sex—the depersonalization of reproduction—allows individuals who have been unable to procreate because of choice or circumstance [single persons, homosexuals] to do so."); *Johnson v. Calvert*, 5 Cal. 4th 84 (1993) (holding that motherhood was ultimately determined by the intention to care for the child).

arrangement defies the conclusion from *Bowers* that "[n]o connection between family, marriage, and procreation on the one hand and homosexual activity on the other has been demonstrated."¹¹⁷ Echoing the conclusions of Plato in his *Republic*, Shulamith Firestone argued that the only way to achieve equality between the sexes is if women could be separated from their biological role in reproduction. To this end, she advocated the use of reproductive technologies to separate women from their nature. Ironically, the reproductive technology involved in the lesbian surrogacy arrangement liberates lesbian women by connecting them to their nature.

Feminist legal theory must include lesbian issues in the debate over surrogacy. The potential benefits for lesbian mothers through surrogacy expose the essentialism of the predominantly negative feminist response. Acknowledging the difference of lesbian surrogacy arrangements reflects the overall importance of recognizing the alternative meaning of motherhood in the context of a lesbian relationship.

Finally, just as lesbian motherhood stretches the boundaries of the social definition of motherhood, surrogacy literally deconstructs the meaning of motherhood into its parts—genetics, gestation, and intent. Symbolically, surrogacy also defies the traditional one-mother/one-father model of parenthood.

V. CONCLUSION

The institution of motherhood is firmly grounded in the beliefs of Western political thought and Christian mythology. Pursuant to this ideology, a mother's subordinate status in society is justified through perceptions of male and female reproduction—the female role is essential but necessarily inferior. The law perpetuates these fixed stereotypes by reflecting a woman's destiny in motherhood and relegating her to the private sphere.

The feminist theoretical perception of motherhood is split into two opposing camps. Radical feminists reject motherhood as inherently oppressive; cultural feminists emphasize the important values of a woman's psychological experience as a mother. The lesbian perspective must be included in this discourse. It reconciles the opposition between the two theories by presenting the values of connection and caring alongside a resistance to male power and dominance. This message is relevant to the liberation of all women; the reality of nonsubordination in some women's lives is relevant to the goal of making nonsubordination a reality for every woman. Moreover, the lesbian possibility expands the meaning of motherhood and exposes the artificiality of gender categories.

Legal recognition of lesbian families, then, is a feminist issue. Practical decisions of courts concerning lesbian families affect the legal rights of

117. 478 U.S. 186, 191 (1986).

women generally. When the law reacts negatively to lesbian mothers, it symbolically rejects the freedom of all women to make independent choices about childrearing. Furthermore, the disparate legal treatment of lesbian mothers conveys the message to all women that they may not resist male-defined gender roles.

As lesbian parenthood transforms the institution of motherhood, through second parent adoptions and surrogacy, it expands the legal definition of "family." This presents the possibility of creating diverse families for all people. In this way, the general legal acceptance of lesbian mothers could have a profound impact on the landscape of society.