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Mediating Intimacy: Black Surrogate Mothers and the Law

Deborah R. Grayson

In January 1990, Mark and Crispina Calvert, a middle-class couple of white and Filipina ancestry, hired Anna Johnson, a working-class woman of African American and European descent, to serve as their gestational surrogate. In their arrangement, the Calverts were to pay Johnson $10,000 plus medical fees not covered by insurance. They also agreed to purchase a $200,000 life insurance policy for Johnson, who had a daughter who was four years old at the time, and pledged to provide her with emotional support. For her part, Johnson agreed to allow herself to be implanted with the zygote formed from Mark Calvert's sperm and Crispina Calvert's egg. Pursuant to the terms of the contract, she agreed to carry the resulting fetus to term and, upon its birth, to relinquish the baby and "all parental rights" to the Calverts.[1] During the time of the contract and before the child was born, relations between Johnson and the Calverts began to break down. By August 1990, when she was eight months pregnant, Johnson announced that she would file suit against the Calverts. In her lawsuit, Johnson sought to terminate her contract and to be declared the baby's legal parent. This lawsuit marked the first time that a surrogate mother without a genetic link to the child she had car-

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1. *Anna J.* v. *Mark C. et al.*, 286 Cal. Rptr., 372 (Cal.App.4 Dist. 1991).

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ried fought for custody of that child.[2] In September 1990, Johnson gave birth to a baby boy. The next month, Judge Richard Parslow ruled that she had no rights whatsoever to the child she had delivered. Comparing Johnson's role in the birth of baby Christopher to those of a foster mother and a wet nurse, Parslow stated that the surrogate contract that Johnson had signed was enforceable, terminated her temporary visitation rights, and awarded full custody of baby Christopher to the Calverts.[3] Both the court of appeal and the California Supreme Court upheld Judge Parslow's ruling, arguing that Johnson had neither a legal claim nor maternal rights to the infant. In October 1993, the Supreme Court refused to hear the case, a move that assured the Calverts full custody of the baby.[4]

Can a woman be the mother of a child with whom she has no genetic connection—as was the case for Johnson? Or does the genetic material provided by the egg and the sperm donated to create the child determine who its natural parent or parents are? When does a woman become a mother—while she is pregnant or after she has delivered a baby? What of the bodily experience of pregnancy? Does a woman's participation in pregnancy—her carrying the fetus in her uterus—have any bearing on determining who the "true" or "natural" mother is? In light of the choices made available by new reproductive technologies, can we sensibly argue, as was done in *Anna J.* v. *Mark C.*, that genes and genes alone should be the determining factor in defining parental rights and relationships, or that custody disputes should be decided solely on the basis of the parental intent of the persons who supplied the genetic material? Who and what

2. See Anita Allen, "The Black Surrogate Mother," *Harvard Blackletter Journal* 8 (1991): 17–31.

3. The Calverts named the baby Christopher. Johnson had given him the name Matthew.

4. For various accounts of the events in the case as they were reported in the media, see, for example, Andrea Sachs, "And Baby Makes Four: A New Custody Battle Intensifies the Debate over Surrogacy," *Time,* 27 Aug. 1990, p. 53; Susan Tifft, "It's All in the (Parental) Genes: A California Court Rules That Bearing a Child Is Not Motherhood," *Time,* 5 Nov. 1990, p. 77; Scott Armstrong, "California Surrogacy Case Raises New Questions about Parenthood: Mother Seeks Custody, but Has No Genetic Link to the Child," *Christian Science Monitor,* 25 Sept. 1990, p. 1; Dan Chu, Nancy Matsumoto, and Lorenzo Benet, "A Judge Ends a Wrenching Surrogacy Dispute, Ruling That Three Parents for One Baby Is One Too Many," *People,* 5 Nov. 1990, pp. 143–44; and Mark Kasindorf, "And Baby Makes Four: *Johnson v. Calvert* Illustrates Just about Everything That Can Go Wrong in Surrogate Births," *Los Angeles Times Magazine,* 20 Jan. 1991, pp. 10–34.

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is a mother? Can a child, as Justice Joyce Kennard asked during the California Supreme Court hearing of *Johnson* v. *Calvert,* have two biological mothers?[5]

Since the 1970s, medical technologies have changed the reproductive body and our relationship to it, in particular altering the process of reproductive decision making. With assisted reproductive technology (whose acronym, ironically, is ART), it is possible for a child to have at least two biological mothers.[6] Through the use of assisted reproductive technology, biological motherhood has been separated into competing components of genetics and gestation, a separation that has given rise to disputes over motherhood and its meanings. As a growing number of couples elect to hire gestational mothers to have their children, more and more people are finding themselves involved in legal battles over what used to be considered the definitive "fact" of maternal identity.[7] In *Johnson* v. *Calvert* the parties disputed this very question. Both sides wanted the courts to decide whether the "natural" mother of the baby was Anna Johnson, the woman who carried the child in her womb and gave birth to it, or Crispina Calvert, the woman who, though unable to give birth, intended for the child to be born, supplied the ova, and made the necessary arrangements for the child to be (re)produced.

In this essay I argue that what happened in *Johnson* v. *Calvert* is symptomatic of a general crisis in American culture over what constitutes a family. Section 1 addresses the ways in which the law tries to regulate familial property and the norms of what makes a family and explores the incoherence of the logic of courts and the law in making these determinations. Surrogacy extends the boundaries of intimacy and of traditional notions of familial kinship patterns by dispersing what was once thought of as a unified entity—mother—and making it into something without a definitive aspect or dimension. No longer belonging simply to the realm of the private acts and decision making of couples, the procreative process has also become a collaborative process that takes place in the public spaces of the lab and the clinic. Within these public spaces, assisted reproductive technologies such as artificial insemination, in vitro fertilization, embryo transfer, and surrogacy allow a multitude of individuals to participate in a couple's attempts to conceive. For many couples, procreation now includes the participation of additional parties such as health profes-

5. See Kennard's dissenting comments in *Johnson* v. *Calvert,* 19 Cal. Rptr.2d, 506–18 (Cal. 1993); cert. denied, 114 S.Ct 206 (1993).

6. On this subject, see 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," *Georgia Law Review* 78 (1990): 468–73.

7. On this issue, see, for example, Andrea E. Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies," *Yale Law Journal* 96 (Nov. 1986): 187–208; Katha Pollitt, "When Is a Mother Not a Mother?" *The Nation,* 31 Dec. 1990, p. 825; and Lisa Sowle Cahill, "The Ethics of Surrogate Motherhood: Biology, Freedom, and Moral Obligation," *Law, Medicine, and Health Care* 16 (Spring 1988): 65–71.

sionals; surrogates; donors; and, increasingly, the state. Now not only is birth a process mediated by the intervention of physicians but the process of conception has become a more complex, drastically mediated process as well. The "private act of love, intimacy, and secrecy" of creating a child, as Sarah Franklin argues, has become a "public act, a commercial transaction, and a professionally managed procedure."[8] Nevertheless, despite the increasingly public and collaborative process of procreation, the courts in *Johnson* v. *Calvert* and other such cases have attempted to maintain the priority of the metanotion of a private, genetic family.

Section 2 addresses the complicated and never fully articulated relations among gender, economics, and race and the ways they get expressed in the family form. I delineate the euphemized quality of repro-discourse that enables the family form to take such discursive priority that race, gender, and class hierarchies are ignored. Although these hierarchies are central, their stories aren't being told at all because the family is perceived as an interlocked unit—an intimate, guarded entity that serves as a stand-in for the issues that don't get worked out. Facilitating the lack of resolution of matters of family in *Johnson* v. *Calvert* is the iconicity of Johnson's pregnant black body as a signifier for a set of sublimated meanings about family and race. Johnson's body is at once too much body—a body that is laden with multiple meanings—and too little body—a body that is reduced to meaning very little at all. She enters the public discourse, as Valerie Hartouni notes, as a "densely scripted figure" that is "occupying and occupied by the category 'black woman.'"[9] Indeed, during and after the various trials, Johnson was depicted as everything from a welfare queen and con artist to an extortionist. Her body is, then, both a site of explanation and a body that creates, in a new way, a problem of meaning.

Predictably, Anna Johnson's body is the only body that is explicitly raced in what is presented as merely a story of two mothers. The racial identity of Crispina Calvert, a Filipina American and the other mother of

8. Sarah Franklin, "Postmodern Procreation: A Cultural Account of Assisted Reproduction," in *Conceiving the New World Order: The Global Politics of Reproduction,* ed. Faye D. Ginsburg and Rayna Rapp (Berkeley, 1995), p. 336. See also part 1 of a four-part series on infertility published in the *New York Times.* This article on high-tech pregnancies and the fertility market focuses on clinics and hospitals with specialties in in vitro fertilizations (IVF). This branch of medicine is reported to be part of a "virtually free-market branch of medicine" that is a "$350 million-a-year business." The article describes mostly affluent couples paying upwards of $25,000 or more for procedures, usually IVF, to assist them in conception. Very few insurance companies cover IVF, making most of the financial burden fall on the couples themselves. Prices for the procedure described in the article include a $2,000 to $3,000 fee for egg donors for those women who are unable to produce their own eggs to a median cost of $7,800 for one procedure of IVF that lasts about the length of a menstrual cycle. Since most couples are not successful on the first try, many couples end up trying three to four more times before giving up. See Trip Gabriel, "High-Tech Pregnancies Test Hope's Limit," *New York Times,* 7 Jan. 1996, p. A1.

9. Valerie Hartouni, "Breached Birth: Reflections on Race, Gender, and Reproductive Discourse in the 1980s," *Configurations* 1 (1994): 73–88; hereafter abbreviated "BB."

baby Christopher, is never acknowledged. In the eyes of the court and in the public debate surrounding the case, she becomes white.[10] Mark Calvert, the white father, is not negatively defined by race. The signs of race, specifically the signs of black race, operate as an often silent but nevertheless powerful narrative motive within the trial and in its surrounding publicity. Race, specifically black race, is pre-scripted in this case by existing narratives in current and historical memory in the United States that define mothers and motherhood as bearers of social, cultural, and racial identity.[11] Motherhood, in *Johnson* v. *Calvert,* is a tightly policed border where racial, class, and sexual hierarchies are defined and maintained in the name of familial affiliation.

Finally, in section 3 I suggest ways to move beyond the limited definitions of who and what is a mother. At issue is the question of whether or not the national public can imagine a public family. What does family stand for in American culture? More specifically, how does surrogacy raise questions about tacit knowledge of race and familial kinship? I argue that more diverse definitions of mother and, by extension, of father and of family are both possible and necessary to accommodate the different methods used to (re)produce and introduce babies into families. Drawing on Patricia Hill Collins's concept of shifting centers in her analysis of motherhood and reproduction, I argue that practices of assisted conception such as surrogacy require that we find ways to acknowledge rather than diminish or ignore the participation of all parents in these processes even if the effect is to destabilize previously held notions of the family.

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> I am not a slave. *Semper Fi.*
>
> —ANNA JOHNSON, letter to Geraldo Rivera

Many elements in *Johnson* v. *Calvert* are neither new nor historically unique. For centuries, a fundamental concern of black women has been the struggle over reproduction. As Darlene Clark Hine has argued, the "productive and reproductive capacities" of black women have been central to determining which women can be gendered through motherhood.[12] Johnson's decision to enter into the surrogate agreement and her

10. Crispina Calvert's honorary white status, no doubt, can be attributed to the racist stereotype of Asian Americans as members of a "model minority."

11. On this point, see Laura Doyle, *Bordering on the Body: The Racial Matrix of Modern Fiction and Culture* (New York, 1994), pp. 10–34.

12. Darlene Clark Hine, "Rape and the Inner Lives of Black Women in the Middle West: Preliminary Thoughts on the Culture of Dissemblance," *Signs* 14 (Summer 1989): 915.

subsequent struggle to win custody of the child she bore as a result of this arrangement bring to the forefront once again the issues Hine raises in her historical analysis. This is to say that Johnson's contemporary situation represents a centuries-old struggle in which black women attempt to gain personal autonomy in the face of hegemonic social degradation. For a black woman to enter into a surrogate contract reanimates issues that, at least in some ways, have been juridically resolved.

The disputes over surrogacy and maternity in *Johnson* v. *Calvert* make clear some of the negative consequences of dividing biological motherhood into competing components of gestational and genetic motherhood, consequences that, as critics have noted, include the degradation of pregnancy and the exacerbation of class differences and racial inequality.[13] In addition, however, disputes over surrogacy and maternity render more visible already existing fractures in current cultural constructions of pregnancy as a disembodied experience.[14] With the development of techniques in medical imaging that make fetal life visible, the growth of areas of medical specialty such as neonatology, and the increasing arguments for fetal and father's rights the experience of pregnancy is slowly being divested of its physical and emotional significance.[15] In surrogate arrangements, for instance, pregnancy is presented as a form of alienated labor where women's reproductive capacities are viewed as "services" that can be separated from their material bodies. Women who agree to be gestational mothers are expected to transform their bodies—or, rather, their body parts—into empty vessels distinct from their physiological and emotional selves. This notion of woman as fetal container is a growing phenomenon in current cultural discourse on pregnancy.

Johnson decided that she could not simply be a carrier or a container for the Calverts. Citing the California Uniform Parentage Act, she and

13. George Annas notes, for instance, that the women who bear the children in surrogate arrangements are often "lower-middle-class and lower-class" women (George Annas, "Fairy Tales Surrogate Mothers Tell," *Law, Medicine, and Health Care* 16 [Spring 1988]: 27). Statistics from the congressional Office of Technology Assessment survey, *Infertility: Medical and Social Choices,* in fact demonstrate that surrogate mothers tend to be less educated and less financially secure than those who hire them. Only a small percentage of the women waiting to be hired as surrogates have ever attended college, and a large percentage of these women earn less than $30,000 annually. See Office of Technology Assessment, *Infertility: Medical and Social Choices* (Washington, D.C., 1988).

14. Emily Martin, for example, makes clear in her analysis how frequently women see themselves as separate from their bodies. Among the women she interviewed Martin describes a "fair amount of fragmentation and alienation in women's general conceptions of body and self" of which they "do not seem aware" (Emily Martin, *The Woman in the Body: A Cultural Analysis of Reproduction* [Boston, 1992], p. 89).

15. See, for instance, Susan Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body* (Berkeley, 1993); Karen Newman, *Fetal Positions: Individualism, Science, Visuality* (Stanford, Calif., 1996); Barbara Duden, *Disembodying Women: Perspectives on Pregnancy and the Unborn* (Cambridge, Mass., 1993); and Hartouni, "Fetal Exposures: Abortion Politics and the Optics of Allusion," *Camera Obscura* 29 (1992): 130–49.

her attorneys claimed that a legal precedent had been set that established her right to be a mother to the child she carried even though she was not genetically related to it.[16] Section 7003 of the act states that "the parent and child relationship may be established . . . between a child and a natural mother. . . . by proof of her having given birth to the child."[17] While providing drastically different reasons for their findings, the rulings given by the trial court, the appellate court, and the California Supreme Court majority denied Johnson's claim that she was the natural mother of the baby.

Rejecting Johnson's interpretation of the California Uniform Parentage Act, Judge Parslow, the presiding judge in the trial court, held that the statute does not say that a woman who gives birth to a child is its natural mother. According to him, the act merely states that, in addition to blood testing, *one* way to establish a parent-child relationship is by giving birth. Characterizing Johnson as a foster mother and a wet nurse rather than as a natural mother, Judge Parslow unequivocally stated that he was not going to find that the infant had two mothers—a situation he described as "ripe for crazy-making."[18] Instead, noting that blood tests of the Calverts demonstrated that there was a 99.999 percent probability that the Calverts were Christopher's parents and that Johnson offered no evidence that the blood tests were inaccurate, Parslow held that Mark and Crispina Calvert were the natural parents of the baby because blood tests proved they were his genetic parents. For Judge Parslow, genetic maternity was the definitive form of motherhood. Or, to put it another way, for the judge, total ownership of the fetus depended on the condition of genetic ancestry.

Like the trial court, the California Court of Appeal held that baby Christopher could have only one natural mother and that the basis for determining his natural parentage should be genetics.[19] In their interpretation of the California Uniform Parentage Act the appellate court ruled

16. The California version of the Uniform Parentage Act was introduced in 1975. The purpose of the act was to eliminate legal distinctions between legitimate and illegitimate children. It came about as a result of rulings by the United States Supreme Court that mandated equality between legitimate and illegitimate children. The Uniform Parentage Act "bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents" (*Johnson* v. *Calvert,* p. 497). Though the act obviously predates the situations assisted reproductive technology brings about, Johnson cited the act in an attempt to establish her parental rights.

17. Quoted in *Anna J.* v. *Mark C.,* p. 377.

18. "California Judge Speaks on Issue of Surrogacy," *National Law Journal,* 5 Nov. 1990, p. 37.

19. Legal scholar Randy Frances Kandel argues that in the first two rulings on *Johnson* v. *Calvert* by the superior court and the court of appeal, the judges "put the cart before the horse" (Randy Frances Kandel, "Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy," *Rutgers Law Review* 47 [Fall 1994]: 174; hereafter abbreviated "WC"). Kandel argues that in both rulings the courts attempted to resolve the prior issue of whether Crispina Calvert or Anna Johnson or both women could be the natural

that genes were incontestable evidence of parentage. Providing a more detailed analysis of the Uniform Parentage Act in their ruling, the appellate court argued that its specialized provision authorizing biological evidence such as blood as proof of parentage allowed them to conclude that the genetic relationship was conclusively more persuasive than the gestational relationship. As Randy Frances Kandel demonstrates, when viewed in this way, disputes arising from surrogate arrangements will always inevitably favor the genetic mother as natural parent over the gestational mother. By focusing solely on biological markers such as blood to determine parentage, Kandel points out, the courts suggest that it is possible that "'natural' parenthood" can be "reduced to a single simple biological principle" ("WC," p. 176).

Kandel, as well as others, points to the kind of reasoning both the trial court and the appellate court used in their rulings on *Johnson* v. *Calvert* as examples of genetic essentialism, a mode that has been described by Dorothy Nelkin and M. Susan Lindee as "a way to talk about the boundaries of personhood, the nature of immortality, and the sacred meaning of life."[20] According to Nelkin and Lindee, genetic essentialism "promises to resolve uncomfortable ambiguities and uncertainties" brought about by existing boundaries of class, race, gender, and, I would add, family.[21] Increasingly, the courts are using biological concepts to settle custody disputes involving infants born to gestational mothers, controversies over adoptions, and situations where babies have been switched at birth.[22] Whereas previously the "best interests of the child" theory was used in child custody suits, genetic evidence is now more often favored by the courts.[23]

In the trial court, Judge Parslow described Johnson as a "genetic

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mothers by first resolving the second issue of whether it was in the best interests of the child for both mothers (assuming the child had two mothers) to have custody rights.

20. Dorothy Nelkin and M. Susan Lindee, *The DNA Mystique: The Gene as a Cultural Icon* (New York, 1995), p. 41.

21. Ibid., p. 43.

22. See Nelkin, "After Daubert: The Relevance and Reliability of Genetic Information," *Cardozo Law Review* 15 (1994): 2119–28. In this article, Nelkin questions the reliability of court testimony that utilizes genetic evidence. She argues that testimony in the area of genetics should be more closely examined because of its growing appeal in court cases and its impact on legal decision making.

23. In fact, as Kandel, Nelkin, and Rochelle Cooper Dreyfus have pointed out, the courts could have used the "best interests of the child" theory to settle the custody dispute in *Johnson* v. *Calvert*. This ruling would have been in line with the court's attempts to maintain the traditional nuclear family that Crispina and Mark Calvert seemed to be able to provide. The courts could have also determined that Johnson had waived all parental rights to the child when she signed the surrogate contract. The question, as Kandel so aptly puts it, is, "Why, then, did the courts feel compelled to resolve the 'natural' parent issue using the [Uniform Parentage] Act?" ("WC," p. 178). See also Rochelle Cooper Dreyfus and Nelkin, "The Jurisprudence of Genetics," *Vanderbilt Law Review* 45 (Mar. 1992): 313–48.

hereditary stranger" to baby Christopher, a descriptive category that has since been used in at least one other custody case.[24] According to him,

> Who we are and what we are and identity problems particularly with young children and teenagers are extremely important. We know that there is a combination of genetic factors. We know more and more about traits now, how you walk, talk and everything else, all sorts of things that develop out of your genes. . . . They have even upped the intelligence ratio of genetics up to 70 percent now.[25]

Similarly, the appellate court argued that

> There is not a single organic system of the human body not influenced by an individual's underlying genetic makeup. Genes determine the way physiological components of the human body, such as the heart, liver, or blood vessels operate. Also, . . . it is now thought that genes influence tastes, preferences, personality styles, manners of speech and mannerisms.[26]

Issues related to the significance of biological predisposition that are contested within scientific communities are being presented in the courts as if they were accepted fact. But, as anthropologist Marilyn Strathern notes, the "simple idea that one person passe[s] on a characteristic to another, like a piece of property" has been changed by a "sense of the complex way in which elements combine," as our "primitive knowledge of the inheritance of characteristics is being displaced by knowledge about genetic mapping" and other scientific manipulations.[27] Relying on genetics as the only basis for determining parental status rather than as one component in a larger social, cultural, and legal context is problematic because, despite the appeal of using scientific evidence to resolve complex legal, cultural, and social issues related to reproduction and family, questions still remain about the facticity of this evidence. Scientific com-

24. See Nelkin, "After Daubert," p. 2121.

25. Quoted in Janet L. Dolgin, "Just a Gene: Judicial Assumptions about Parenthood," *UCLA Law Review* 40 (Feb. 1993): 685.

26. *Anna J.* v. *Mark C.*, p. 380.

27. Marilyn Strathern, "Displacing Knowledge: Technology and the Consequences for Kinship," in *Conceiving the New World Order*, p. 356; hereafter abbreviated "DK." See also Strathern, *Reproducing the Future: Essays on Anthropology, Kinship, and the New Reproductive Technologies* (New York, 1992). In tension with the emphasis on genes as indicators of parenthood is the language in many surrogate contracts that stipulates that gestational mothers must refrain from smoking, drinking, or engaging in any other activities that might endanger the fetus. Gestational mothers are also frequently required to agree to follow all doctors' orders, including those that force them to submit to invasive procedures or to curtail their normal physical activities. All of these strictures seem to suggest an awareness of how the environment of the birth mother's body is interconnected with the fetus.

munities and the public are still debating whether genetic knowledge constitutes knowledge at all.

Shifting away from the biological reasoning of the two lower courts, the California Supreme Court argued that the Uniform Parentage Act did not indicate a preference for blood test results over giving birth as evidence of natural parenthood. For this court, in instances where genetic consanguinity and childbearing do not coincide in the body of one woman, the woman who intended to procreate the child and to raise it as her own is the natural mother.[28] In the California Supreme Court hearing of the case, a distinction was made between the "ruling 'head' and the laboring 'body.'"[29] In this court's estimate, the Calverts' decision to have a child takes precedence over the work of Johnson's laboring body, since the intended parents' initial decision to have a child was the reason that the child was brought into being. The California Supreme Court believed that Johnson's entry into a surrogate agreement was not equivalent to exercising her own right to make procreative choices. Instead, according to this court, she was agreeing to provide a service to Mark and Crispina Calvert, the intended parents, and should have had no expectation that she would be able to raise the child she carried as her own.[30]

In a strongly worded dissent, Justice Kennard, the lone woman on the bench, disagreed with the majority that the woman who intends to have a child and contributes the ovum should automatically be considered its natural mother and found fault with its reliance on the rule of intent to resolve *Johnson* v. *Calvert,* stating that in its justification for the intent test, the majority equated children or the right to children with intellectual property.[31] For Justice Kennard, both the genetic and gesta-

28. For a more detailed analysis of the rule of intent, see Marjorie Maguire Shultz, "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality," *Wisconsin Law Review,* no. 2 (1990): 297–398. For a discussion of the rule of intent as it pertains specifically to *Johnson* v. *Calvert,* see *Johnson* v. *Calvert.*

29. Doyle, *Bordering on the Body,* p. 21.

30. On this issue, Elizabeth Spelman's discussion of people of color and white women as "mere body" comes to mind. According to Spelman, those individuals defined by these categories are typically closely associated with the body and basic bodily functions—"sex, reproduction, appetite, secretions, and excretions"—and as "given over to attending to the bodily functions of others (feeding, washing, cleaning, doing the 'dirty work')" (Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* [Boston, 1988], p. 127). In Johnson's case, the work of her body includes the "dirty work" of gestation and birthing. For discussions of reproductive freedoms, specifically as they refer to the right to procreate, see Larry Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements," *Law, Medicine, and Health Care* 16 (Spring 1988): 7–17; Cristyne Neff, "Woman, Womb, and Bodily Integrity," *Yale Journal of Law and Feminism* 3 (1991): 327–53; and Charlotte Rutherford, "Reproductive Freedom and African American Women," *Yale Journal of Law and Feminism* 4 (1992): 255–84.

31. For an excellent analysis of the representation of procreation as analogous to authorship, see Mark Rose, "Mothers and Authors: *Johnson v. Calvert* and the New Children of Our Imaginations," *Critical Inquiry* 22 (Summer 1996): 613–33.

tional mothers have substantial claims to legal motherhood. And yet, as she points out, California law bestows the "rights and responsibilities of parenthood to only one 'natural mother,'" with no provision for what to do when a situation indicates that a child has more than one.

The "originator of the concept" or rule of intent argument, an argument Kennard describes as comfortingly familiar to the courts in instances where they are called to justify the law's protection of intellectual property, is, in her view, wrong for determining parenthood and parental rights because it suggests that children and the right to children can be viewed as property comparable to a book, a software program, or any other invention. In addition, she argued, using the rule of intent to "break the tie" between the genetic and gestational mother of the child also suggests that "property transactions governed by contracts . . . ought presumptively to be enforced and, when one party seeks to escape performance, the court may order specific performance."[32]

In addition to the objections Justice Kennard outlines in her dissenting arguments, the rule of intent raises several other issues that need to be considered. What about Johnson's parental intentions as gestational mother? One could argue that, like the Calverts, she also intended to procreate, demonstrating this intention when she allowed herself to be implanted with the Calverts' zygote, carried it to full development at some risk to herself, and then changed her mind about relinquishing the baby once she had delivered it.[33] The courts, as I have mentioned, felt that Johnson should have had no expectation that she would be able to keep and raise the child. After all that Johnson had invested in the pregnancy, the courts decided somehow that her desire to be a mother to the child was "unnatural." And, while the Calverts obviously wanted Christopher and fought long and hard to keep him, there have been instances when genetic parents have reneged on contractual agreements with gestational mothers and refused to take their intended child once it had been delivered.[34] Finally, the rule of intent, as Anita Allen persuasively

32. *Johnson* v. *Calvert*, p. 514. Legal scholar Anita Allen suggests that one way to respond to this issue is to view surrogate arrangements as unenforceable personal commitments. See Allen, "Privacy, Surrogacy and the Baby M Case," *Georgetown Law Journal* 76 (1988): 1759–92.

33. Johnson had had a history of problem pregnancies—two miscarriages and two stillbirths before and after her own daughter was born—a fact she failed to reveal to the Calverts when she entered into the agreement with them. Furthermore, some have argued that because the fetus and the gestational mother are unrelated, the gestational mother is at higher risk for severe complications during pregnancy such as ectopic pregnancy, preeclampsia, and diabetes. On this point, see "WC," p. 189.

34. In one situation a gestational mother gave birth to twins, a boy and a girl. The family, however, was only interested in the girl and left the boy behind. The gestational mother sued and won the right to retain custody of both children. She later ended up on drugs and lost both children. The children were then placed in foster care. In another example, a child was born HIV-positive. Upon learning of the child's HIV status, the contracting parents refused to accept the baby. In this situation, it is clear that thorough pre-

argues, is often inconsistently applied because it assumes an equality between individuals that does not yet exist. Gestational mothers who renege on their contracts—poor mothers, lesbian mothers, black mothers, and other mothers thought to be functioning outside middle-class, father-centered families—often find themselves without support or legal recourse in child custody disputes. Courts consistently rule against these groups of women, favoring instead configurations of the family that fit the nuclear family model of white, middle- to upper-middle-class heterosexual couples.[35]

At least for now, fetuses do develop inside and pass through the bodies of women.[36] While the fetus that the gestational surrogate carries is not genetically related to her, it is also not wholly other to her. Instead, the bodies of both are interconnected in complex and contradictory ways

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conception medical and psychological screening did not take place. See also R. Alta Charo, "Legislative Approaches to Surrogate Motherhood," *Law, Medicine, and Health Care* 16 (Spring 1988): 96–112, and Kasindorf, "And Baby Makes Four."

35. To highlight a few recent examples: Through the intentional use of artificial insemination, a lesbian couple became the parents of two children. After the dissolution of their relationship and, ultimately, a custody battle for the children, a court ruled that both women should be denied parental and visitation rights. See "Lesbians Denied Custody after Break-Up," *New York Times,* 24 Mar. 1991, p. A22, and Bettina Boxall, "Laws Mean Lesbian Custody Battles Often Are One-Sided: Under Rigid Definition of Parenthood, Partner Who Didn't Bear Child Usually Has Little Recourse," *Los Angeles Times,* 27 Jan. 1997, p. A1. In another instance, Mary Frank Ward, a mother of three, went to court to attempt to get additional child support from her ex-husband for their youngest child. The ex-husband, a convicted felon who had battered and eventually murdered his first wife, sued for custody of the child and won. The court argued that because Ward and her oldest daughter were both lesbians and had live-in lovers, her home was a bad influence for her youngest child. A Florida court of appeal upheld the decision by the lower court. Ward, who eventually gave up her fight for custody of her youngest child, recently died of a heart attack. See Mireyz Navarro, "Appeals Court Rebuffs Lesbian in Custody Bid: Child Will Stay with Father Who Killed," *New York Times,* 31 Aug. 1996, p. A7; Robert Scheer, "Warped View of What's Fit as Family Life," *Los Angeles Times,* 10 Dec. 1996, p. B7; and "Lesbian Who Sought Custody Dies," *New York Times,* 23 Jan. 1997, p. A19.

36. While scientists are currently able to construct artificial wombs, so far they have only managed it for animals, not humans. Scientists in Japan have developed a technique called extrauterine fetal incubation (EUFI). Using goat fetuses, the scientists have "threaded catheters through the large vessels in the umbilical cord and supplied the fetuses with oxygenated blood while suspending them in incubators that contain artificial amniotic fluid heated to body temperature." The goat fetuses were able to survive in this environment for three weeks, although team physicians had difficulty with circulatory failure in the experiments, as well as encountering other technological problems. While scientists are quoted as saying that the "ideal situation for the immature fetus is growth within the normal environment of the maternal organisms," they continue to pursue the technology for constructing artificial wombs for humans. Arthur Caplan, the director of the Center for Bioethics at the University of Pennsylvania predicts that "sixty years down the line . . ., the total artificial womb will be here," arguing that this procedure is "technologically inevitable" (Perri Klass, "The Artificial Womb Is Born," *New York Times Magazine,* 29 Sept. 1996, p. 117).

that the rulings rendered by the courts in *Johnson* v. *Calvert* do not begin to address.[37] For the most part, the courts have only superficially begun to tackle the issues that reproductive technologies raise for how families are constructed and defined in American culture.

The rulings of courts deal not only with the material world but also with the socialization of citizens and the development and maintenance of traditions. In their decisions, the courts have tended to "promote traditional views about marriage, procreation, and family relationships" that may dissuade individuals from entering into situations where traditional views will not be upheld.[38] Surrogacy and other assisted reproductive practices call into question much of what we, as a society, have come to believe about personal identity, intimate relationships, and the beginning and ending of life. The larger problem for the legal system in *Johnson* v. *Calvert* and other similar cases, then, is how to maintain traditional two-parent, heterosexual families in the face of the ways assisted reproductive technology is changing this privileged family. Arguments about genetic relation or rules of intent in custody battles serve essentially as a means to contain the proliferation of meanings made possible by medical technology and its ways of constantly altering knowledge about intimate relations.

2

> Our blackest nightmare.
>
> —MARK CALVERT, as quoted in a tabloid

Race served as both a pre- and subtext in the debate surrounding *Johnson* v. *Calvert*. The court decisions, the media coverage, and the public's response to the case were all predictably informed by race, despite arguments by parties involved that race "'played no discernible role'" ("BB," p. 83). Following the laws of racial designation and naming set in place in American culture long before such things as surrogacy were possible, the fact that having a black ancestor, let alone a black mother, makes one black is reason enough to assume that race informed the courts' and the public's perceptions in the outcome of the case. To find that Johnson

37. In the context of a discussion about surrogacy, to make the link between gender and the body, as Carol Bigwood suggests, need not lead to the determination of the category "woman" or "mother" as a fixed or closed biological identity. Instead, the female body in this instance is a body that is "open, sensate, procreative"—a body not forced into a pseudomale body(lessness) (Rosalind Pollack Petchesky, "The Body as Property: A Feminist Revision" in *Conceiving the New World Order*, p. 396). See also Carol Bigwood, "Renaturalizing the Body (With a Little Help from Merleau-Ponty)," *Hypatia* 6 (Fall 1991): 54–73.

38. Kenneth L. Karst, "The Freedom of Intimate Association," *Yale Law Journal* 89 (1990): 628.

could be a legal and natural mother to Christopher would have meant that the court would have had to make Christopher black. Surrogacy, like race, demonstrates yet another example of the ongoing crisis of representation where "legal definitions contradict physical signs and social codes."[39]

Ironically, in the discourse surrounding the case, Johnson is the only person who is described as having a problem with race. Attorneys for the Calverts painted her as so captivated by whiteness that she wanted to have a white baby (see "BB," pp. 83–84). Johnson, of course, does have a problem with race, but it is not a problem of fetishizing whiteness. Instead, her problem has to do with the fact that as a black woman she is defined by and is thought to embody race. But what does race mean here? Hartouni describes Johnson as "enter[ing] the public discourse an already densely scripted figure whose deviance, whatever its particular form, was etched in flesh" ("BB," p. 75). Indeed, the portrayal of Johnson in the courts and in the media as a fraudulent welfare mother, con artist, and extortionist plays on beliefs long held by the public that black women are "less fit mothers, less caring mothers, and less hurt by separation from their children" than nonblack women.[40]

In representing Johnson as a welfare cheat, the media and the Calverts' attorneys employed a form of shorthand not only for her blackness but also for the kind of person, and particularly the kind of mother, she would be. The unsubstantiated charges that Johnson had defrauded the government by receiving welfare payments she was not entitled to made it easier for some to make the point that she was untrustworthy, dishonest, and therefore an unfit parent. By identifying Johnson as a welfare recipient, a point that was repeatedly mentioned in press coverage throughout the trial, no one had to make explicit the racial grounds for their objections to considering Johnson a mother, in any sense, to Christopher. The welfare mother, as Wahneema Lubiano notes, "can be seen as exemplifying the pathology of the category 'black women.'"[41] The representation of "black woman" and "welfare mother" as the same that constructs evidence of the pathological nature of both operates in *Johnson* v. *Calvert* as a narrative means to shape public opinion regarding the intersection of race, motherhood, and surrogacy. Race, in *Johnson* v. *Calvert,* signifies not only blackness but blackness as difference and deviance.

39. Eva Saks, "Representing Miscegenation Law," *Raritan* 8 (Fall 1988): 40.

40. Even the one so-called ideal black mother figure, the mammy, a selfless nurturer of white children (under the supervision of the white mistress), has been portrayed as "careless and unable to care properly for her own children" (Dorothy E. Roberts, "The Value of Black Mothers' Work," in *Critical Race Feminism: A Reader,* ed. Adrien Katherine Wing [New York, 1997], p. 313).

41. Wahneema Lubiano, "Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means," in *Race-ing Justice, Engendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality,* ed. Toni Morrison (New York, 1992), p. 339.

The strongest images of black women circulating in American culture center on black women's motherhood. Figures such as the mammy, the matriarch, and the welfare mother or welfare queen, all of which have their roots in nineteenth-century cultural discourse, continue to dominate current discussions of black women's motherhood.[42] As a legal and economic construct, slavery conferred a "breeder" status on black women and their reproductive capacities.[43] By reversing English law, which determined an individual's legal status through the father, a peculiar system of racial specification and naming was designed under slavery that forced children to follow the condition of their mothers. Establishing the child's legal status through the mother allowed slave owners to classify their biracial offspring as blacks and as slaves. In this way, slave owners ensured that their slave labor force would be increased and that there would be no legal consequences for them regarding the biracial children that they fathered.

The promotion of a breeder status for black women also served to sever their biological motherhood from their social and cultural functions as mothers. Black women were expected to perform the physical tasks of motherhood as nannies or wet nurses, for example, but were not entrusted with the "moral duty" of providing children, their own or anyone else's, with "proper values."[44] As mothers, black women were only valued in terms of their biological capacity to reproduce. Their biological motherhood was conflated with their roles as workers. How ironic, then, that Judge Parslow in the first hearing of the case referred to Johnson as a "wet nurse." In addition to having demeaning racial undertones, by employing the available language of servitude, the phrase also works to resituate Johnson in her place as laboring black body. In so doing, the history of conflating African American women's reproductive labor with their labor as workers is recalled.[45]

Current practices and perspectives on black women, fertility, and re-

42. See, for instance, Lisa Ikemoto, "The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of the Law," in *Critical Race Theory: The Cutting Edge,* ed. Richard Delgado (Philadelphia, 1995), pp. 478–97; Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Boston, 1990); Barbara Omolade, *The Rising Song of African American Women* (New York, 1994); and Deborah Gray White, *Ar'n't I a Woman? Female Slaves in the Plantation South* (New York, 1985).

43. Angela Davis notes, for example, that "in the eyes of the slaveholders" black women were "'breeders'—animals, whose monetary value could be precisely calculated in terms of their ability to multiply their numbers." In addition, according to Davis, since slave women were classified as "breeders" rather than mothers, "their infant children could be sold away from them like calves from cows" (Angela Y. Davis, *Women, Race, and Class* [New York, 1983], p. 7).

44. Ikemoto, "The Code of Perfect Pregnancy," p. 483.

45. Allen provides a very careful analysis of why slavery and surrogacy are not the same thing. See Allen, "Surrogacy, Slavery, and the Ownership of Life," *Harvard Journal of Law and Public Policy* 13 (Winter 1990): 139–49.

production parallel earlier events in black women's reproductive history. Advances in reproductive technology, including new methods of birth control, are frequently used by the state as a means of legal and social control of black and, often, poor women's reproduction.[46] While all women are increasingly subject to regulatory incursions with respect to reproductive technologies, black women, other women of color, and poor women are disproportionately affected by this type of intervention in the form of hospital and prison detention, forced sterilization (both temporary and permanent), and court-ordered medical procedures such as cesarean sections.[47] Gestational surrogacy invites the singling out of black women for exploitation not only because a disproportionate number of black women are poor and might possibly turn to leasing their wombs as a means of income, but also because it is incorrectly assumed that black women's skin color can be read as a visual sign of their lack of genetic relation to the children they would bear for the white couples who seek to hire them.[48] Black women have long been asked to raise white children without having any parental rights to them. Now, it would seem, they can

46. Norplant, for instance, has been used as a criminal penalty against women of childbearing age who have been convicted of child or drug abuse. In addition, legislation has been proposed in Louisiana and Kentucky, to name just two states, that would offer financial incentives to women on welfare who "voluntarily" agree to use Norplant. Ironically, while access to publicly funded abortions is limited in most states, all but two states, California and Massachusetts, fund Norplant through Medicaid. See, for instance, Deborah Krauss, "Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color," *Harvard Civil Rights–Civil Liberties Law Review* 26 (1991): 523–48; Martha A. Field, "Controlling the Woman to Protect the Fetus," *Law, Medicine, and Health Care* 17 (Summer 1989): 115–29; Lawrence J. Nelson, Brian Buggy, and Carol Weil, "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest,'" *Hastings Law Journal* 37 (May 1986): 703–63; Veronika E. B. Kolder et al., "Court-Ordered Obstetrical Interventions," *New England Journal of Medicine,* 7 May 1987, pp. 1192–96; and Nancy K. Rhoden, "The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans," *California Law Review* 74 (1986): 1951–2030.

47. Attorney Deborah Krauss notes that in instances where the pregnant women is a "member of a racial minority or disadvantaged economic group," physicians are more likely to obtain court-ordered obstetrical interventions (Krauss, "Regulating Women's Bodies," p. 531). Eighty percent of the patients who were forced to undergo court-ordered cesarean sections were members of minority groups. Teaching hospitals play a critical role in this situation. Every documented request for a court-ordered intervention involved women who were patients at teaching hospitals or who received public assistance. See Krauss, "Regulating Women's Bodies," p. 531.

48. Critics of the Calverts have argued that this is exactly the reason why they chose Johnson to be their surrogate. To be fair, reports on the events of how Johnson and the Calverts came together have Johnson herself approaching the Calverts and offering to be their surrogate. Reading skin color as a sign of genetic claim, we should all know, is not a sign of anything. The activity of passing should have taught us this. Passing is successful because so many people continue to rely on skin color as a visual sign of race. In many instances, when attempting to make a visual identification of blackness using this scheme, people would be wrong in their assumptions.

be asked to birth white children and have no claim to them.[49] This is to say that from the point of view of white reproductive contract law, black women's surrogacy is the most alienated of labor. An expectation of black female maternal labor is that it has no value except, of course, that given to it contractually in surrogate arrangements. In situations where black women's maternity occurs for themselves and not for the benefit of others, it is deemed socially harmful.[50]

3

It looks just like us.

—CRISPINA CALVERT

The issues being contested in *Johnson* v. *Calvert* highlight the increasingly public struggle over assisted reproduction and its effects on the family. Both the public and the courts continue to grapple with whether surrogacy should be legal, who should be able to gain from the process, and what its ramifications are for the construction of the family. Other questions that the case raises include determining what is fair and right for children in considerations of child custody disputes. What are the ultimate consequences for a culture that views its children as property—as "things" that people can barter, sell, or have "rights" to? What does it mean for the court to decide what is in the "best interests of the child," especially when the child's interests appear to serve as a cover for the ideological and political interests of individuals and institutions seeking to model specific behaviors and relationships? In California, the National Conference of Commissioners on Uniform State Laws did attempt to re-

49. The now (in)famous *Baby M* case demonstrated to the mostly white couples who seek gestational surrogates that if they choose healthy white women who are unrelated to them to be their surrogate, they run the risk of the surrogate contract being voided. Unlike Johnson, in the *Baby M* case Mary Beth Whitehead was actually the genetic *and* gestational mother of Baby M. Undergoing what is now referred to as "traditional surrogacy," Whitehead was artificially inseminated with Stern's sperm. Whitehead was denied custody, but she was granted visitation rights based on her genetic tie with the child. Still, the possibility remains that a surrogate mother under these circumstances would be granted full custody as well.

50. Ironically, while black women have an infertility rate that is one-and-a-half times higher than white women, they are the least likely to benefit from assisted reproductive technology or other infertility "treatments." Cost tends to be a prohibitive factor in many instances. Rather than being supported in their desire to reproduce, black women's attempts at reproduction are most often perceived as dangerous, something that should be controlled. But, as I will demonstrate in the next section, another reason why black women make up a small percentage of the women who utilize assisted reproductive technology could also be their reliance on alternative models of mothering. In these models, as I will discuss, genetic relation is not considered imperative to establishing kinship ties.

spond to these questions by proposing the Uniform Status of Children of Assisted Conception Act (USCACA), a piece of legislation that addressed most of the issues involved in *Johnson* v. *Calvert.* The legislation was never enacted. The failure to do so, I suspect, has a lot to do with the reluctance of the legislature to go on record as taking a position on an issue that is considered to present such complex moral problems. As bioethicist James Nelson has said, politicians "run the other way" when legislation on surrogacy comes before them because, on one hand, to make surrogate contracts unenforceable would be to limit the options of infertile couples attempting to have children and, on the other hand, to support surrogacy would mean that they might be seen as facilitating the "exploitation of women [and the cheapening] of the family."[51]

What was once described as the "biologically rooted, racially closed, heterosexual, middle-class" family has been disrupted by the new knowledge that assisted reproductive technology has made available ("BB," p. 87). With assisted conception, as Strathern notes, there increasingly "exists a field of procreators whose relationship to one another and to the product of conception is contained in the act of conception itself and not in the family as such" ("DK," p. 352). In a discussion of the manner in which reproductive technologies are "displacing knowledge" about familial kinship, Strathern argues that "making visible the detachment of the procreative act from the way the family produces a child adds new possibilities to the conceptualization of intimacy in relationships" ("DK," p. 353). In so doing, these technologies displace our sense of what we have come to know about health, life, and death. Still, the legal system has been slow to address how this expansion in knowledge and the resulting proliferation of meanings put people in the position of having to make new choices—to make different kinds of decisions based on this transformed information (see "DK," p. 347).

The belief held by the courts in *Johnson* v. *Calvert* that a child may have only one mother is inconsistent both with the new facts of life that technology has made possible and with some of the courts' own models for reconfiguring the family in light of this technology. In fact, models of family that are different from the nuclear family model were already available for the courts to choose from. These existing models would have allowed the courts to acknowledge the parental rights of the Calverts and Johnson without diminishing the role of either. Courts have acknowledged the division of procreative mothering from social mothering in decisions on adoption and stepparenting, for example. In both instances maternal status is extended to at least one other woman. In addition, in

51. Quoted in Kasindorf, "And Baby Makes Four," p. 13. In this article Kasindorf also reveals that the United States Congress has ignored antisurrogacy legislation placed before it.

cases of egg donorship the courts have held that the woman who gestates and gives birth to a child formed from the egg of another woman and who intends to raise that child as her own is considered the natural mother of that child.

Various cultural models of mothering and communal parenting were also available for the courts to employ in developing their response to the case. Sociologist Patricia Hill Collins presents one such model in her account of the more inclusive, more collaborative parenting effort that takes place within African American communities. For Collins, the concept motherwork delineates a category that "soften[s] the dichotomies in feminist theorizing about motherhood that posit rigid distinctions between private and public, family and work, the individual and the collective."[52] This notion of motherwork draws upon traditions in African American communities where multiple models of mothering relationships exist. While European American models of mothers and mothering are often limited to blood relationships, within many African American communities mothering is conceptualized as a form of cultural work that incorporates the mothering relationships of non–blood relations as well.[53] In addition to blood mothers, mothering roles such as "othermother" or "community othermother" may be assumed by those who, in addition to blood relatives, take on the responsibilities of kin in black communities.[54] In this configuration of family Johnson's claim to motherhood would not have been viewed as unreasonable or unnatural. This particular model of motherhood allows for both Anna Johnson and Crispina Calvert to be viewed as mothers to Christopher without diminishing the role of either.

In *Johnson* v. *Calvert* the California Supreme Court did acknowledge that there was undisputed evidence that both women could be mothers to baby Christopher. But the court then went to great lengths to describe why both could *not* be considered mothers to the child and why Crispina Calvert, rather than Anna Johnson, must be considered the natural mother. The model of motherhood that Collins describes is one that is "communal and extended rather than individualized and privatized."[55] In this particular model of motherhood, the weight of biological or genetic ties and their significance for defining familial relationships is

52. Collins, "Shifting the Center: Race, Class, and Feminist Theorizing about Motherhood," in *Representations of Motherhood*, ed. Donna Bassin, Margaret Honey, and Meryle Mahrer Kaplan (New Haven, Conn., 1994), p. 59.

53. See Stanlie M. James, "Mothering: A Possible Black Feminist Link to Social Transformation?" *Theorizing Black Feminisms: The Visionary Pragmatism of Black Women*, ed. Stanlie M. James and Abena P. A. Busia (New York, 1993), p. 44. See also Collins, "Shifting the Center" and *Black Feminist Thought*, and M. Rivka Polatnick, "Diversity in Women's Liberation Ideology: How a Black and a White Group of the 1960s Viewed Motherhood," *Signs* 21 (Spring 1996): 679–706.

54. James, "Mothering," pp. 44, 47. See also Carol Stack, *All Our Kin* (New York, 1974).

55. Petchesky, "The Body as Property," p. 398.

shifted. Within African American communities, "those who tend, care for, [or] carry [children] are by definition those with authentic claims to be named owner of the things or people whose growth they nurture."[56]

Because black women's gender has never included privacy, they are always forced to move on, to make irrelevant, the distinction between public and private.[57] As Collins's example demonstrates, black women's maternity and kinship have already found multiple definitions. Instead of making biology or blood ties the definitive form of motherhood (or of fatherhood, for that matter), biology or blood ties represent simply one way of establishing familial relationships and bonds. Heredity is not given privileged status in this configuration of family. However, the alternative models of maternity and kin that have been constructed by black women have been pathologized. Instead of being viewed as a useful example of the ways extended family can work, communal parenting in black communities is viewed by the national public as aberrant behavior, charged, for example, with being a form of neglect, or with enabling and promoting family forms that are not father-centered. The negative reception of Johnson's attempts to retain her parental rights to baby Christopher in *Johnson* v. *Calvert,* as well as the negative reception of forms of communal parenting within African American communities, point to the refusal of the courts and the general public to allow a strong challenge to the closed model of the nuclear family.

4

The emergence of assisted reproductive technology that is both "conflated with" and that "displaces . . . nature" has disrupted naturalizing assumptions made about the categories of "mother," of "family," and of "nature" itself.[58] As new conception narratives have arisen, the previously protected realm of categories such as these is, through technology, suddenly made visible and available for (re)interpretation and (re)inscription. The suppositions of the Calverts along with other parties involved in the case—the judges, the lawyers, the press, and the public—is that the Calverts should get to keep Christopher because he is "like" them and that their desire for "likeness" in their child is a "natural" desire.[59] "Likeness" for the courts, for the Calverts, and, no doubt, for other con-

56. Ibid., p. 397.

57. On this point, see Hortense J. Spillers, "Mama's Baby, Papa's Maybe: An American Grammar Book," *Diacritics* 17 (Summer 1987): 65–81. Clearly, this old adage as it is described in Spiller's title has been reversed in *Johnson* v. *Calvert,* which seems to be a case of "Papa's Baby, Mama's Maybe."

58. Franklin, "Postmodern Procreation," p. 334.

59. Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, Mass., 1991), p. 226.

tracting couples, serves as a visual metaphor for kinship and the right to ownership of children.

Crispina Calvert's comment that baby Christopher looks just like her and her husband, a comment that was repeated like a mantra in the press, is both a statement about belonging and a statement about exclusion. It is a comment about belonging because it represents a claim that Christopher, because of how he looks, is a part of both her and her husband. Christopher's likeness to the Calverts is believed to demonstrate his "blood," his genetic and racial heritage, and therefore to reflect his link to the Calverts. Her comment is also about exclusion because Christopher's likeness serves not only as a (meta)physical and conceptual link indicating rights to his parentage but also because likeness operates as a sign for blood—for the closed, racialized membership of family and race.[60]

In addition to skin color, which has not always been a reliable sign of racial demarcation, the practice of using blood as a pseudoscientific explanation for race has existed for centuries in the United States.[61] Political and social movements and now medical technologies have complicated and redefined theories of blood and its value for determining identity. The continuing legacy of miscegenation laws that used, among other things, the trope of blood, specifically the "one drop rule," to maintain distinctions and separations among groups of people place a high value on white skin—white blood—because those who can have it are strictly limited and monitored. As is also evident in the history of designating blood as a racial and therefore familial marker, the boundaries of these rules shift and can be contradictory based on the needs and desires of the ruling class.

To say that Johnson could be a mother to baby Christopher would be to indicate a willingness on the part of the courts and the public to relinquish or, at minimum, to blur, racial-familial boundaries. As Laura Doyle has argued, in a "race-bounded economy the mother is a marker of boundaries, a generator of liminality"; in giving birth, mothers reproduce both children and, through the lives of their children, the life of the racial divide.[62] The notion of reproducing children "like" oneself, then, reproduces the specific rights and privileges of particular cultural groups. These rights and privileges are connected to systems of value.

60. See, for instance, Brackette F. Williams, "Classification Systems Revisited: Kinship, Caste, Race, and Nationality as the Flow of Blood and the Spread of Rights," *Naturalizing Power: Essays in Feminist Cultural Analysis,* ed. Sylvia Yanagisako and Carol Delaney (New York, 1994), pp. 201–36. See also Donna J. Haraway, "Universal Donors in a Vampire Culture: It's All in the Family. Biological Kinship Categories in the Twentieth-Century United States," *Modest_Witness@Second_Millennium.FemaleMan©_Meets_OncoMouse™: Feminism and Technoscience* (New York, 1997), pp. 213–66.

61. See, for instance, Winthrop D. Jordan, *White over Black: American Attitudes Toward the Negro, 1550–1812* (Chapel Hill, N.C., 1968).

62. Doyle, *Bordering on the Body,* p. 27.

White mothers and white children are considered valuable in a marketplace where white skin is valued; for black mothers and black children, the converse is true. Much of the legal and popular discussion of *Johnson* v. *Calvert* draws on the historical devaluation of black women as mothers. Black women are frequently blamed for the effects of poverty on their children. They also serve as scapegoats in public policy for legal decisions related to issues of family, custody, and reproduction. The image of black women as drug-using, child-abusing welfare recipients who live to breed at taxpayer expense is illustrative of this phenomenon.

In *Johnson* v. *Calvert* we find a shift in the definitions and valuing of maternity, bodily integrity, and family. The courts are willing to reaffirm the primacy of a closed, privatized, and homogenous family and all of its attendant qualities even if this means that they make inconsistent and contradictory decisions. Like it or not, reproductive technologies have destabilized this notion of family. The fact that what constitutes a family is now variable poses a problem for the efforts of the courts to limit and hierarchically arrange bounded, private families. Even in their contortions to maintain this version of family the courts have themselves in their rulings helped to open the door to different forms.

In *Johnson* v. *Calvert* the tension between what constitutes a family versus what constitutes a mother is linked by the question of race. Even in light of the new reproductive technologies and other medical and scientific technologies that seem to make the assumption of a link more difficult, race is still the one remnant from the past that remains animated. What we are left with is a highly entrenched, racialized image of the family. As a culture we continue to trip over the notion of reproduction as a racial act. That this is true is demonstrated in the dogged reliance on pseudonatural forms of social categories of the body that seem most available to maintain intelligibility in the face of dramatic social and cultural change. Indeed, the improvisations that persons in the law and the medical sciences have to go through to keep renaming and reconfiguring the so-called nuclear family form despite the changes reproductive technology has brought about are connected to the intelligibility of that form. The bodies of women who are poor, who are of color, or who reproduce outside of this family form are explained by the rhetoric of degeneracy, considered markers of the "not proper" whose social positions cannot be destabilized by technology even while everything else around them changes. New reproductive technologies have simply made possible the development of a new vocabulary that can continue to utilize these familiar representations.