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MOTHERHOOD AND CONTRACT: ALWAYS CRASHING IN THE SAME CAR¹

ELISE BRUHL²

The paradigms of contract and mother are undoubtedly at odds.³ Contract, in its most elemental legal guise, is at once a legally enforceable agreement and the product of a negotiated transaction. Put another way, the parties involved in a given contract are "arm's-length transactors," understood to have bargained for whatever object or service a given contract will provide.⁴ By standing at arm's length, the transactors are able to reach some optimal, mutually satisfactory result. This paradigm is, of course, an ideal within the law; nevertheless, it forms the basis for contractual interaction and analysis.⁵ Still, the ideal's pervasiveness has shown most clearly in the ways it has been reproduced outside of legal discourse. It appears not only in fundamental economic textbooks, but also in guides to negotiating

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³ As Adrienne Rich and others have noted, a woman's experience of motherhood diverges from the institution of motherhood. *See, e.g.*, ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION*, (1976); *see also* ANNE FINGER, *PAST DUE: A STORY OF DISABILITY, PREGNANCY, AND BIRTH 169-72* (The Women's Press Ltd. 1990). However, the paradigm of motherhood is always embodied in the mother. Even the gender neutral "parenting" or the gestures made by various authors that nurturing can be done by both sexes often imply (or use) the word "mother." *See, e.g.*, JULIA GRANT, *RAISING BABY BY THE BOOK: THE EDUCATION OF AMERICAN MOTHERS 3-10* (1998); ALICE MILLER, *THE DRAMA OF BEING A CHILD* at 34-39, 54-56, 74-75, 125-27 (1995).

⁴ *See* FARNSWORTH ON CONTRACTS, §1.2, 5. (3d ed. 1997) 7; ANDERSON ON THE UCC, §1-102:286, 192-93. (3d ed. 1981-90).

⁵ *See, e.g.*, Farnsworth, *supra* note 4, at §1.2; *see also* CORBIN ON CONTRACTS, §1.

and even in works that focus on education, diet, and sadomasochism.⁶

However ubiquitous it may be in its current manifestations, however, this ideal of the arm's-length transactor finds itself fundamentally at odds with the equally pervasive ideal of a "mother," the ultimate caretaker who never renounces the obligations that motherhood brings.⁷ Part of this opposition arises out of the various dichotomies that demarcate a mother's identity and domain, the irony here being that what is presented as fundamentally natural and historically transcendent has itself been radically transformed over the past two and half centuries. As Thomas Lacqueur and others have demonstrated convincingly, late eighteenth-century idealizations of motherhood brought with them a number of accompanying assumptions about the nature of domesticity, defining it as a resolutely private space free from the economic concerns of its public counterpart.⁸ Such an elegant partitioning of gendered space suggests as much about the mutual dependence of motherhood and modern economic theory as it does about Enlightenment ideals of symmetry. Placed squarely within

⁶ See, e.g., PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 3-5, 80-85, 265-68 (1998); CAMPBELL R. MCCONNELL & STANLEY R. BRUE, *ECONOMICS* 10-11 (1996); ROGER B. MYERSON, *GAME THEORY: ANALYSIS OF CONFLICT* 2-5 (1991); see also PAT CALIFIA, *MACHO SLUTS* 10-27 (Alyson Publications 1988); ELLEN FEIN & SHERRIE SCHNEIDER, *THE RULES: TIME TESTED SECRETS FOR CAPTURING THE HEART OF MR. RIGHT* (1995); BARRY SEARS, *ENTER THE ZONE: A DIETARY ROAD MAP* 1-8, 35-85 (1995); THEODORE R. SIZER & NANCY F. SIZER, *THE STUDENTS ARE WATCHING: SCHOOLS AND THE MORAL CONTRACT*, (1999). For an idiosyncratic vision of contract, see KATHY O'DELL, *CONTRACT WITH THE SKIN: MASOCHISM, PERFORMANCE ART, AND THE 1970s* 3-17 (1995).

⁷ See, e.g., Karen Czapanskiy, *Volunteers and Draftees: The Struggle For Parental Equality*, 38 *UCLA L. REV.* 1415, 1416, 1451-63 (1991).

⁸ See LEONORE DAVIDOFF & CATHERINE HALL, *FAMILY FORTUNES: MEN & WOMEN OF THE ENGLISH MIDDLE CLASS 1780-1850* 149-92 (1987); THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 194-207 (1990); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1-3 (2000); CAROL SHINER WILSON, *LOST NEEDLES, AND THE ARTISTIC ENTERPRISE IN BARBAULD; EDGEWORTH, TAYLOR, & LAMB, IN RE-VISIONING ROMANTICISM: BRITISH WOMEN WRITERS, 1776-1837* 167-90 (1994).

this domestic space--and at a time when American and Scottish political economists were redefining a public sphere characterized by the contradictions of individual self-interest producing public good--mothers became defined by their innate *lack* of self-interest. Motherly selflessness, furthermore, derived much of its force from the biology of childbirth, breast-feeding, and early childcare, rendering it all but inaccessible to men and childless women.⁹ The paradoxes attending its formulation, when opposed to those of the equally "natural" arm's length contractor, are worth noting, since motherly selflessness in the public world would prove as "unnatural" as selfish negotiation in the private. Even more striking, however, are the assumptions at work in contractual and motherly ideals concerning "distance"--since arms-length transactors, by definition, must remain distant from the other person bargaining, while representations of motherly experience often idealize the closeness and connection between mother and child.¹⁰

Yet, despite these paradigmatic differences, the concepts of arm's length transactor and mother are far from exclusive in practice. Modern households are strikingly economic entities, and it is no accident that the word "domestic" emerges in the eighteenth century usually attached to the word "economy."¹¹ However rarely

⁹ See LAQUEUR, *supra* note 8, at 200-207; JOAN WILLIAMS, *supra* note 8, at 1-3. For a discussion of a more recent evocation of these distinctions and the tensions that they can produce, see SARA RUDDICK, *MATERNAL THINKING: TOWARDS A POLITICS OF PEACE* 28-30 (1989)..

¹⁰ See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2-3, 20-26 (1988); see also PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 225-27 (1991). The arm's length transactor and the rational "economic man" have met with ample criticism for not being sufficiently contextualized. See, e.g., NANCY FOLBRE, *WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT* 1-10, 16-28 (1994); NANCY C.M. HARTSOCK, *MONEY, SEX, AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM* 39-41 (1983); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 1-15, 164-72 (1996). For further discussion, see Ian R. MacNeil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 948-52 (1982); Ian R. MacNeil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U. L. REV. 1018, 1019-27 (1981).

¹¹ See, e.g., *THE LADIES' LIBRARY; OR, ENCYCLOPEDIA OF FEMALE KNOWLEDGE, IN EVERY BRANCH OF DOMESTIC ECONOMY: COMPREHENDING, IN*

we might see "motherly" and "economy" coupled either then or now, women still regularly contract for services usually designated as tasks for mothers to perform.¹² Women contract to take care of

ALPHABETICAL ARRANGEMENT, DISTINCT TREATISES ON EVERY PRACTICAL SUBJECT, NECESSARY FOR SERVANTS AND MISTRESSES OF FAMILIES. I. A MOST EXTENSIVE SYSTEM OF COOKERY. II. A COMPLETE BODY OF DOMESTIC MEDICINE. III. THE PRESERVATION OF BEAUTY, AND PREVENTION OF DEFORMITY, IN WHICH IS INCLUDED A VAST FUND OF MISCELLANEOUS INFORMATION, OF THE HIGHEST IMPORTANCE IN DOMESTIC LIFE, IN TWO VOLUMES, (London, Printed for J. Ridgway, No, 1, York Street, St. James Square. 1790). This genre continued into the nineteenth century, through a series of works that were intended to help a woman manage her household: kitchen, servants, accounts, and health and education of children. *See, e.g.*, DOMESTIC ECONOMY, AND COOKERY, FOR RICH AND POOR; CONTAINING AN ACCOUNT OF THE BEST ENGLISH, SCOTCH, FRENCH, ORIENTAL, AND OTHER FOREIGN DISHES, PREPARATIONS OF BROTHS AND MILKS FOR CONSUMPTION; RECEIPTS FOR SEAFARING MEN, TRAVELLERS, AND CHILDREN'S FOOD, TOGETHER WITH ESTIMATES AND COMPARISONS OF DINNERS AND DISHES, THE WHOLE COMPOSED WITH THE UTMOST ATTENTION TO HEALTH, ECONOMY, AND ELEGANCE, BY A LADY. 1-10, 60-101 (London, Printed for Longman, Rees, Orme, Brown, and Green, Paternoster-Row, 1827); JOHN EDWARD WATSON, THE HOUSEWIFE'S DIRECTORY: BEING THE MOST COMPLETE SYSTEM OF DOMESTIC ECONOMY EVER SUBMITTED TO PUBLIC NOTICE v-vi (London, Printed for William Cole, No 10, Newgate Street, 1825). Attempts to develop domestic "economy" as a field of academic study continued throughout the nineteenth century as well, occasionally as a recuperative attempt at achieving women's equality without the vote. *See, e.g.*, CATHARINE E. BEECHER, A TREATISE ON DOMESTIC ECONOMY, FOR THE USE OF YOUNG LADIES AT HOME AND AT SCHOOL, 5-7, 49-68 (revised ed., Harper & Bros., New York, 1846); CATHARINE E. BEECHER, HARRIET BEECHER STOWE, THE AMERICAN WOMEN'S HOME, OR PRINCIPLES OF DOMESTIC SCIENCE, BEING A GUIDE TO THE FORMATION AND MAINTENANCE OF ECONOMICAL, BEAUTIFUL, HEALTHFUL, AND CHRISTIAN HOMES, 15, 17, 20-21, 463-67 (J.R. Ford & Co., New York, 1869); CATHARINE E. BEECHER, THE TRUE REMEDY FOR THE WRONGS OF WOMAN, WITH A HISTORY OF AN ENTERPRISE HAVING THAT FOR ITS OBJECT 5-29, 39-40 (Phillips, Sampson, & Co., Boston, 1851); CATHARINE E. BEECHER, WOMAN'S PROFESSION AS MOTHER AND EDUCATOR, WITH VIEWS IN OPPOSITION TO WOMAN SUFFRAGE i-ii (Dedication), 5-6 (New York, Maclean, Gibson, & Co., 1872). Although Beecher recommends her approach to domestic economy and training (and remunerative employ for women) as a means for women to achieve a greater measure of economic security and a more stable home life, she also recommends that boys be taught some domestic skills as a means of aiding their wives and families, if not supplanting them. *See* REMEDY at 51-60; DOMESTIC ECONOMY at 163-64.

¹² In making this statement, I also recognize that men are capable of performing

other women's children and to do the household tasks designated as another "mother's" responsibilities.¹³ They even act as surrogates, bearing children in other women's stead.¹⁴ These "maternal

these same services; that primary male caretakers exist; and that men also have nurturing capacities. However, the fact that such tasks are done by men intermittently, or rarely, does not negate the fact that these tasks are nevertheless designated women's, particularly a mother's, responsibilities. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK*, 38-44, 115-33 (1997); Barbara Ehrenreich, *Maid to Order: The Politics of Other Women's Work*, HARPERS, April 2000, at 59-60. Czapanskiy's metaphor of "volunteers" and "draftees" is useful as a conceptual starting point for an understanding of the contrast between a woman's and a man's experience of contracting to perform these tasks. See Czapanskiy *supra* note 7. A man can perform these services, if he in fact chooses to do so; he can choose to deviate from an assigned status as a father to engage in caretaking, but that same sense of choosing to do so rather than having to do so makes the quality of this process somewhat different. To use the language of contract once again, a man can walk away from the transaction or up the ante of the bargain; a woman may transfer responsibility to another caretaker but cannot, as it were, move away from the table. A woman contracts to shift some of the burden imposed upon her at all times, a man chooses time, place, and setting.

¹³ See, e.g., ARLIE HOCHSCHILD, *THE SECOND SHIFT* 6-7 (1989). Some scholars have referred to the work that women do, whether for their own families or for others, as "motherwork." See Patricia Hill Collins, *Shifting the Center: Race, Class and Feminist Theorizing about Motherhood*, in DONNA BASSIN, MARGARET HONEY, AND MERYL MAHRER KAPLAN, *REPRESENTATIONS OF MOTHERHOOD* 59-62, 72-73 (1994); Sarah Ruddick, *Thinking Mothers/Conceiving Birth*, in *REPRESENTATIONS OF MOTHERHOOD*, at 33-35. Cf. Julia A. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 374 (1995) (utilizing term). Ruddick does draw a distinction between "birthgiving" and "motherwork" as a means of envisioning a range of familial arrangements and possibilities for caretaking. See Ruddick, *Thinking Mothers*, at 36-39. For some recent discussions of questions of reinventing familial arrangements and subsidy of caretaking, see e.g., Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13 (2000); Twila L. Perry, *Caretakers, Entitlement, and Diversity*, 8 AM. U. J. GENDER, SOC., POL'Y & L. 153 (2000); Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U. J. GENDER SOC. POL'Y & L. 55 (2000); see also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

¹⁴ Of course, surrogacy and adoption contracts have been and continue to be contested. See *infra* notes 59-71 and accompanying text.

contracts" occur frequently and have a lengthy history.¹⁵ As might be suspected, they also inevitably come with vocal detractors, who insist that motherhood must remain separate from the experience of contracting for such services or, indeed, from any sort of contract at all.¹⁶

One concern often raised, for example, is the threat of overreaching and coercion, particularly for women who become surrogates. Confronting the issue of whether surrogacy contracts are enforceable, Martha Field and Elizabeth Anderson have argued that these contracts cannot be anything other than unconscionable,

¹⁵ The same treatises that involve "domestic economy" also involve, in large part, the management of the various contracts that the lady of the house would enter into, as employer of servants, housekeeper, and amateur physician. See *supra* note 11. The discussions of childrearing would also involve discussions about how best to avoid nursery maids who would drug or otherwise mistreat children. See *id.* The histories of women who have been hired for domestic labor, particular women of color, have also been widely discussed. See, e.g., W.E.B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY, WITH A NEW INTRODUCTION BY ELIJAH ANDERSON, TOGETHER WITH A SPECIAL REPORT ON DOMESTIC SERVICE BY ISABEL EATON* (1996); ELIZABETH R. HAYNES, *UNsung HEROES, THE BLACK BOY OF ATLANTA, NEGROES IN DOMESTIC SERVICE IN THE UNITED STATES* (1997); HOCHSCHILD, *SECOND SHIFT*, *supra* note 13, at 4-5, 232-35, 239-47; NICKY GREGSON AND MICHELLE LOWE, *SERVICING THE MIDDLE CLASSES: CLASS, GENDER AND WAGED DOMESTIC LABOUR IN CONTEMPORARY BRITAIN* (1994); PHYLLIS PALMER, *DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-45* (1989); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J. L. & FEMINISM* 51 (1997); Ehrenreich, *supra* note 12 at 60-70.

¹⁶ Women who contract out their maternal labor find themselves facing a variety of hostile responses as well as contradictory messages about the appropriateness of their work both inside and outside of the home. See FAYE D. GINSBURG & RAYNA RAPP, *CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF PRODUCTION* 78-79 (1995); JOAN WILLIAMS, *supra* note 8, at 31-50; see also Nancy Duff Campbell & Judith C. Applebaum, *Here's What U.S. Parents Really Need*, *SAN DIEGO TRIBUNE*, Feb. 18, 1999, at B-11, B-9; Cathleen Decker, *Mothers Agree on Many Childcare Issues, Fathers See Things Differently*, *LOS ANGELES TIMES*, June 13, 1999, at A32; Marilyn Gardner, *Search for a Truce in the Mommy Wars*, *THE CHRISTIAN SCIENCE MONITOR*, Mar. 5, 1999, at 2; Iris Krasnow, *It's Time to End the 'Mommy Wars'*, *WASHINGTON POST*, May 7, 1999, at C5; see also Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 *N.Y.U. L. REV.* 1559, 1624-32 (1991).

since they can constitute offers that women simply cannot refuse.¹⁷ Similarly, contracts for egg donation, child care, and other forms of household labor have met with criticism from both ends of the political spectrum. While social conservatives have usually attacked such contracts by claiming that women who do so have selfishly deviated from their true role as mothers, liberal and progressive thinkers have pointed to the ways in which these contracts have enabled wealthier women to exploit their poorer counterparts in the name of achieving greater household equity.¹⁸ These same criticisms often accompany arguments attacking transacted labor more generally, so that maternal contracts serve as emblematic cases of the ways in which contract perpetuates inequality.¹⁹

Implicit in these positions, of course, are assumptions about women's special fitness for providing child care; coupled to these are even more determined beliefs concerning motherhood. If attackers of maternal contracts express certainty about anything, it is that the best child care is provided by the mother herself.²⁰ Even in the face of these criticisms, however, women continue to contract for child care and other forms of domestic service, whether as purchasers or providers, and they continue to struggle with the problems that these contracts bring, emotionally,

¹⁷ See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); Martha Field, *Surrogacy Contracts--Gestational and Traditional: The Argument for Nonenforcement*, 31 WASH. L. J. 1, 5-8 (1991); Gena Corea, *The Reproductive Brothel* in GENA COREA ET AL., *MAN-MADE WOMEN: HOW NEW REPRODUCTIVE TECHNOLOGIES AFFECT WOMEN* 38-43 (1987) (discussing the prospect of reproductive brothels, where impoverished and third world women are made to bear children for little to no money); see also DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 224-25 (1989).

¹⁸ See Decker, *supra* note 16; Ehrenreich, *supra* note 12; Gardner, *supra* note 16; Joan Williams, *Gender Wars*, *supra* note 16.

¹⁹ See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 41-43 (Basic Books 1989); PATRICIA WILLIAMS, *THE ROOSTER'S EGG: ON THE PERSISTENCE OF PREJUDICE* 170-74 (1995).

²⁰ See Margaret K. Nelson, *Family Day Care Providers: Dilemmas of Daily Practice* in EVELYN NAKANO GLENN, GRACE CHANG, LINDA RENNIE-FORCEY, *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY* (1994); GINSBURG & RAPP, *supra* note 16; Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 376-400 (1996).

monetarily, and otherwise.²¹ This essay, then, seeks most fundamentally to explore the competing ideological demands made upon women--and the negotiations that result--as they encounter motherhood and the institutions associated with it: marriage, pregnancy, childrearing, and domestic labor. In looking to the nature of these negotiations, I wish to expose how women's experience of motherhood is marked both by a series of legal contracts and by agreements that have the cultural force of contracts, if not their legal effect. I do so to demonstrate the ways in which women, when subjected to the competing demands of contract and motherhood, act as they simultaneously are acted upon, particularly when they attempt not to mother, or not to be mothers, even for a brief amount of time. Much of my interest in the relationship between motherhood and contract stems from a desire to analyze motherhood's power as an ideological construct and to expose the often contradictory assumptions that characterize it. In other words, I seek to explore the extent to which contract as an analytical approach can be brought to bear upon motherhood--to demonstrate not only motherhood's ideological contradictions but also the decisions women make when confronted with them.²²

I. The Marriage Contract Revisited

I begin with the marriage contract because it is the primary contract women negotiate with regard to motherhood and the legitimacy of her motherhood. Referring to issues of legitimacy may at first appear archaic. Having a child out of wedlock, after all, no longer results in equal protection violations for the child or

²¹ See HOCHSCHILD, *TIME BIND*, *supra* note 12, at 1-50.

²² See AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); PATRICIA WILLIAMS, *ALCHEMY OF RACE AND RIGHTS*, *supra* note 10, at 15-50, 219-25, for discussions of how contract exacerbates inequality. A number of the contracts that will be discussed in this essay have not always been enforced in the courts, such as surrogacy contracts, or are illegal, such as contracts for sex. However, I wish to examine these contracts (or contract-like arrangements) as a means by which to examine how women negotiate their relationship to motherhood, but also what the failure of these agreements entails for them as well.

inevitable social ostracism for both mother and child; yet recent debates over welfare reform and abortion have confirmed that unwed mothers and their children still experience profound discrimination and social stigma.²³ In such a political and moral climate, marriage still functions as a powerful legitimizing tool, and so my aim in beginning here is not only to examine how a woman legitimates herself through the marriage contract, but also to interrogate what that contract ultimately entails.

Coverture is no more, and the marriage contract obviously is not what it used to be. Certainly women are not generally betrothed as infants through contractual arrangements between families, nor can dissolution of a marriage be considered as a broken contract between two men.²⁴ Even the most cursory examination of courtship and marriage rituals, however, shows the degree to which marriage is still characterized by a series of agreements, some of which are overtly contractual. The most notorious of these agreements, the prenuptial contract, echoes an earlier form of negotiation, but here, the paradigm is not one of two men contracting for a transfer of property but rather of a man and a

²³ See Linda C. McClain, *Irresponsible Reproduction*, 47 HASTINGS L.J. 339 (1996); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931 (1995); Carla M. da Luz & Pamela C. Weckerly, *Recent Developments: Will the New Republican Majority in Congress Wage Old Battles Against Women?*, 5 UCLA WOMEN'S L.J. 501 (1995); see also WILLIAMS, ROOSTER'S EGG, *supra* note 19, at 2-14 (discussing the media phenomenon of the "welfare mother").

²⁴ To be sure, adherents and critics of arranged marriage, same-sex marriage, and marriage itself, are legion. See, e.g., Linda S. Eckols, *The Personal and Social Implications of Same Gender Matrimony*, 5 MICH. J. GENDER & L. 353 (1999); Laurel Remers Parde, *The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?*, 13 ARIZ. J. INT'L & COMP. L. 491 (1996); Jeffrey Evans Stake & Michael Grossberg, *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L. J. 535 (1998); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997); see also Christine S.Y. Chun, Comment, *The Mail Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes*, 17 U. PA. J. INT'L ECON. L. 1155 (1996). However, the paradigm of "marriage" as a chosen relationship between two people, a man and a woman, is the paradigm at issue in this essay, and indeed, in other contexts as well. See, e.g., Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996).

woman setting forth, either verbally with one another or in writing, the terms of their agreement. Such contracts are entered into, of course, with the knowledge that both parties can end that relationship, and that the division of assets is set forth prior to divorce.

These commonplaces mean that dissolving a marriage contract does not always result in compensation for women. Although courts will enforce prenuptial agreements, they have been reluctant to acknowledge contracts for domestic labor or affection, not only for the overtly contractual rationale of lack of consideration, but also in the name of such contracts "debas[ing] marriage."²⁵ Idealizing marriage in this way produces counter-intuitive results, since such exclusions result in traditional women's labor receiving no compensation in the event of dissolution of the marriage agreement. Such judicial language demonstrates two further tendencies at work here. First, it shows that when contractual analogies are placed onto the marital contract, women's labor and their accustomed contribution to a marriage are excluded from monetary compensation. Second, it strongly suggests through this exclusion that if women are remunerated for their labor, their compensation takes forms other than money.²⁶

Even in situations apart from the formal prenuptial contract, marriage does not occur without a series of other gestures and agreements that have legal force. Matters such as licensing, blood tests, and ceremonies combine to create a marriage. Taking up this sense of social ritual and linguistic gesture as ultimately legal, Carole Pateman thus defines the marriage contract as both the ceremony of marriage and the act of consummation of the marriage.²⁷ She also notes that marriage is a monolithic and inescapable contract: married couples cannot choose between

²⁵ See Katharine Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 78-88 (1998); see also Brian Bix, *Bargaining in the Shadow of Love, The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 147-162 (1998) (providing history of enforcement of premarital agreements).

²⁶ See Silbaugh, *supra* note 25; see also Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

²⁷ CAROLE PATEMAN, *THE SEXUAL CONTRACT*, 162 (1988).

several contracts when they marry; they can only elect to enter the marriage contract.²⁸ Beyond its historical function as an expression of male sex-right, commentators have argued at length at what the marriage contract entails, and what its components -- moral, legal, and ideological -- are, but there appears at least to be a consensus that the marriage contract is almost wholly unlike other contracts, and must be analyzed as such.²⁹

Bearing these views in mind, a marriage at first may appear to be a volitional decision between two people too close at hand to be at arm's length from one another; nevertheless, two people must agree to get married and, once married, must create their own "marriage" as they see fit. As any married couple knows, however, other conventions also are at work here. Signing a marriage license and performing other necessary rituals might make one's marriage legal, but the social conventions surrounding one may very well enforce, either contractually or seemingly so, a model of marriage very different from that originally envisioned by the two participants. These social conventions, in Pateman's sense, are as central to a "marriage" between two people as the vows they have made or the documents they have signed.³⁰

In other words, the marriage contract is both an individual and a social contract, since, in asking a community to recognize its commitment, a pair becomes an embodiment of that community's idea of what a married couple is. Deviating from such a norm means threatening to break this agreement to abide by the boundaries that marriage prescribes. A small amount of manipulation of these contours might be possible providing both contractors agree to it (a woman may not agree to "obey" during the marriage ceremony, for example); and divorce is, at least at this point in time, a possibility for married couples. Yet, the

²⁸ *Id.* at 163. For useful overviews of the meanings of marriage, see Bix, *supra* note 25, at 162-74; see also Silbaugh, *supra* note 25, at 111-117.

²⁹ See, e.g., Bix, *supra* note 25, at 206-07; Amy L. Wax, *Bargaining in the Shadow of the Market: Is there a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 565-593 (1998). But see Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 737-747 (rejecting contractual approach).

³⁰ PATEMAN, *supra* note 27, at 162-65.

opportunity to maneuver does not lessen the fact that, especially for women, getting married and being married is to be subjected to an array of competing (and contradictory) social conventions in exchange for certain legal and moral protections. That is the "deal" that a woman makes, or, in retrospect, finds herself to have made.

Considerable criticism in the last decade has been directed at modern marriages for their supposed overemphasis on individuality and contract. These arguments claim that current marriages are concerned less with commitment than with selfish individuality, and, as such, harm children and threaten the social fabric.³¹ What these representations show more than anything is just how odd a social and legal animal marriage is. At once a linchpin of social mores and of punditry, its status shifts uneasily between both status and contract. Women may get married for a variety of reasons, from the personal and emotional to the economic and social, but once they are married, they achieve the status of marriage. From this point onward, the law reflects this status and concerns itself primarily with the nature of the relationships formed and the maintenance of the commitments formed if those relationships are severed, i.e., the contractual underpinnings of marital status once again become apparent with marriage's dissolution.³² In other words, marriage is status law, but contract shapes and informs it.

The contracts resulting in the status of marriage provide obvious social benefits to women, since, along with the legitimization of the children born in marriage, the act of sex itself is given legitimacy.³³ As a result, to become a mother without the

³¹ See MILTON C. REGAN JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY*, 176-83 (1993); see also MARGARET BRINIG, *FROM CONTRACT TO COVENANT, BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 1-14, 18-25, 83-109 (2000); JOHN J. WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN WESTERN CULTURE* (1997). For another set of viewpoints rejecting a contractual model of marriage on conservative Christian grounds, see, e.g., Gary L. Bauer, *End No-Fault Divorce*, USA TODAY, Dec. 29, 1995, at 10A.

³² See, e.g., Bix, *supra* note 25, at 162-68, 250-51.

³³ Mary Joe Frug links anti-prostitution laws with the "maternalization" of the female body and claims that the legitimization of children within the context of marriage is part of that process of maternalization. In drawing this connection,

sanction of the marriage contract is to cut against the model of social interaction and male sexual ownership. Motherhood may be constituted through a variety of social interactions and constraints, but actually becoming a mother requires the rather unrelenting and unexceptional fact of sexual conduct.³⁴ My concern here is not in spelling out biological niceties, but to note that marriage's legitimization of the act of sex also means something for women who have children outside of marriage, since these women who have children outside of marriage are fulfilling their maternal function, but they have not contracted to do so.

Acknowledging the presence of contract in marriage, I contend, makes *other* contracts become more apparent as well, both in their form and in their function. This is particularly true of those contracts that relate to motherhood and the duties that motherhood imposes. In so stating, I now turn to what a woman bargains for when she chooses to become pregnant, assuming at the outset that such a decision is a choice.³⁵ Given that contract is superimposed on both marriage and sex (both precursors to "legitimate" motherhood,³⁶) I find motherhood in its most socially

Frug questions the conduct of a legal system that reduces women's sexual identities to paradigms of "the mother" or "the prostitute": "[A]nti-prostitution rules maternalize the female body. They not only interrogate women with the question of whether they are for or against prostitution; they also raise the question of whether a woman is for illegal sex or whether she is for legal, maternalized sex." Mary Joe Frug, *A Postmodern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045, 1055 (1992).

³⁴ Even allowing for the use of new reproductive technologies by some individuals, what might be called the "old fashioned way" still predominates.

³⁵ "Choosing" to become pregnant is a best case scenario. However, if "choosing" to become pregnant includes a variety of "choices" that one does not elect to choose, the experience of an unwanted pregnancy only increases the number of conditions that are placed upon a woman who is also a mother.

³⁶ Cf. RHODE, *supra* note 17 at 134-40. Their choice, as such, has been to contract for legally legitimate sex that results in pregnancy (marriage), rather than to contract with men for sex that may or may not result in pregnancy, a contract for sex that may have some degree of social acceptance or legal tolerance but is not legally legitimated (being sexually active), or criminalized sex (prostitution). The fact that women can enter into "domestic partnerships" with other women, have sex with other women, or become pregnant through artificial insemination does not undo the analysis here.

acceptable form to embody a kind of contradiction in terms--a noncontractual status that one should contract to enter. This same status places women in the equally contradictory state of becoming either "failed" or nontransacting transactors: women must at once negotiate the duties and expectations motherhood imposes without appearing to do so, since the woman who bargains over the "terms" of motherhood is perceived to be an affront to the institution of which she is a part. Even the process of becoming pregnant by choice demands that a woman negotiate her way through a number of agreements and non-negotiable conditions. Should these choices result in marriage, they include the presupposed conditions of becoming a mother. A woman can try to resist this maternal status that is part of the marital status, but her resistance nevertheless is defined by the role of motherhood imposed upon her, even if she chooses not to have children and that role is never realized.³⁷ In other words, a woman who is married is *presumed* to be a mother regardless of whether she becomes one--a presumption that, in turn, forces her to assume a status supposedly free from the logistics of contract and contractual choice.

II. Sexual Contract and Maternal Status

Of course, many women want to be mothers even outside of the love, affection, and social approval they receive for having children.³⁸ They find motherhood, its promises, and its attendant

³⁷ In embracing a contractual, volitional model of sexual activity, the figure of the prostitute, for some scholars, has been posited as a means by which women can reject a maternal role. See, e.g., Frug, *supra* note 33 at 1058-59; see also CALIFIA, *supra* note 6, at 19-20; Aline, *Good Girls Go to Heaven, Bad Girls Go Everywhere*, 131-34; Phyllis Luman Metal, *One for Ripley's*, 119-21 in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* (Frederique Delacoste & Priscilla Alexander eds., 2d ed. 1998). The manner in which a prostitute is perceived and valued, and how those perceptions relate to perceptions of women, are other matters altogether, and beyond the scope of this essay. Compare PATEMAN, *supra* note 27, at 190-218, with Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 530-42, 586-600 (2000).

³⁸ Perhaps not surprisingly, the amount of social approval one receives often corresponds with what kind of woman one is. See Lisa Ikemoto, *The Code of*

duties attractive and fulfilling, so much so that they would make considerable sacrifices at any negotiating table to gain them. Often, the degree to which a woman values motherhood only becomes visible during divorce proceedings--divorce being that instance not only when fraught financial and parental negotiation occupy the same arena, but also when women become aware of the financial value of the maternal agreements they made while married.³⁹

But what of women who decide not to have children? Into what negotiations must they enter, and with what risks and what repercussions? Looking back to the negotiating ideals espoused in contract law, we know that the process of negotiating any contract entails the possibility of rejection: that a party at any time may walk away from the bargaining table either permanently or to gain better terms. Applying this paradigm to the negotiating process women face in becoming mothers, we might consider the mother/contractor (or perhaps "maternal transactor") to be similarly free, with all attendant risks, to walk away from the prospect of motherhood by deciding to defer pregnancy or by determining not to have children at all. Such a negotiating model would appear to apply most readily to women who choose to abort a pregnancy, since ideally they have weighed the pros and cons of motherhood and have rejected its prospects and promises. In such situations especially, a woman can be perceived as being akin to contract law's idealized arms-length transactor that empowered agent who, however profound her maternal feelings, can take or leave a deal depending on the terms offered.

Yet women who abort, however counterintuitively, reject precisely these characterizations and views when representing themselves and their reproductive choices. With a stunning regularity and sameness, women who have chosen to abort their pregnancies point not to a revolutionary sense of negotiating power

Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law, 53 OHIO ST. L.J. 1205 (1992); McClain, *supra* note 23.

³⁹ See Silbaugh, *supra* note 25, at 76-87. For an in-depth proposal for valuing household labor in the event of divorce, see Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work through Premarital Security Agreements*, 72 TEX. L. REV. 17 (1998).

but to the anxieties, personal anguish, and moral quandaries attending the decision.⁴⁰ Furthermore, their testimonies raise other associated issues. For example, married women who have abortions after genetic screening often compare themselves favorably to teenagers who have abortions as a result of "immature" sexual activity.⁴¹ As such, a number of these women either describe their decision exclusively within the context of their desire *to be mothers* or by utilizing a language of maternal failure--i.e., that as a mother they are not "good" or self-sacrificing enough to raise a disabled child.⁴² Such lamentations indicate that for some women there exist children not worth motherhood's selflessness and sacrifice. In addition, however, they suggest a complex awareness of the social contradictions attending abortion, issues arising from the association of female selfishness with maternal decision-making. Most women therefore explain their decisions to abort by mourning both the child they would have had and the selfless ideal of motherhood they would have valued. Both rhetorically and psychologically, such an approach appears to be largely successful; women who abort disabled fetuses perceive themselves (and are perceived) as deserving sympathy. Their line of argumentation further suggests just how difficult it is for women to reject the maternal role and the anti-contractual and anti-market rhetoric that accompanies it.⁴³

⁴⁰ BARBARA KATZ ROTHMAN, *THE TENTATIVE PREGNANCY*, 200-40 (1994); Joan Williams, *Gender Wars*, *supra* note 16, at 1560; Mark O'Keefe, *Abortion Story Comes out of the Confessional*, COLUMBUS DISPATCH, March 12, 1999, at 02F; *see also* http://www.naral.org/issues/issues_stories3.html.

⁴¹ RAYNA RAPP, *TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA* 236-38 (1999).

⁴² *Id.* at 136-63, 245-48; ROTHMAN, *supra* note 40, at 5-11, 239-43.

⁴³ These shifts can be seen both in the utilization of anti-market rhetoric by "pro-life" activists. *See* FAYE GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* (1998). A similar rejection of the market can also be seen by the utilization of maternal rhetoric by the pro-choice movement from moving from "abortion on demand" to "pro-family, pro-child, pro-choice." *See* Joan Williams, *Gender Wars*, *supra* note 16, at 1592-95. In so stating, I do not wish to intimate that all women who have abortions somehow want to have callous, facile views of themselves and their bodies, or that the pro-choice movement has given up all claim to women asserting control over their reproductive capacities. Rather, I want to emphasize that it is so difficult for

Such situations are accompanied by other forms of contractual reckoning as well, forms that, not surprisingly, differ across ethnic groups. In a recent study of women contemplating abortions after amniocentesis, white women usually described their decisions in terms of selfishness and selflessness. Latina women, meanwhile, spoke most often about avoiding fetal suffering, while African-American women most often pointed to the views and needs of other relatives and the availability of childcare. That women who face differing pressures and social perceptions would describe their predicaments differently is perhaps to be expected. Even more striking, however, is their common perception of obligation--their shared sense that a vast range of responsibilities will result from their pregnancies; that these responsibilities are "female"; and that the duties of motherhood, even in the case of abortion, cannot be wholly rejected. Even among women who have chosen to have abortions, the concepts of selfless motherhood and maternal obligation play a central role in self-definition and self-perception, even though a range of vocabularies might be used to delineate what those obligations might be.⁴⁴

These prevailing criticisms about women's maternal selfishness, though, hardly preclude the imposition of a transactor role being placed upon women's sexual activity. Above nearly all other things, women are to be rational actors when they have sex, especially in regard to whether a particular sex act results in pregnancy. Even women who are presumed to be unthinking and oversexed are held in line with this transactor ideal-- they engaged in sex, knowing the consequences, and must be made to pay for that activity. Regardless of her age and in spite of prevailing assumptions about sex as a "natural," uninhibited, unlearned, and hedonistic activity, a woman (or girl) who has sex is presumed to be a kind of natural contractor, an innately rational transactor fully

women to reject motherhood in any form, even the most self-destructive form imaginable to a particular woman, that motherhood itself becomes one of the few acceptable justifications for refusing it.

⁴⁴ See RAPP, *supra* note 41.

aware of "what she's getting into" by virtue of her essential sexual agency.⁴⁵

Yet once she has supposedly negotiated her role as a sexual actor, a woman must then leave that role behind to become a mother. It is in this transition from sexual contract to maternal status, moreover, that the contradictions attending women's decisions *not* to have children become most marked. A woman who aborts may be perceived as an icon of sexual agency, but she also is seen to be flying in the face of maternal presumptions and duties, particularly those of endless responsibility and of limited fertility.⁴⁶ In other words, a woman can perhaps be too pregnant, or pregnant too often; she cannot, however safely decide *never to be pregnant*, but rather only to delay being pregnant in an appropriate and limited way. Saying no to motherhood, then, is at best a process of proper deferral--with ensuing punishment if motherhood is not ultimately accepted, or if the mother herself proves not ultimately acceptable.

III. On Not Having Children

For many people, choosing not to have children--or even explaining their uncertainties about having them--is not possible.⁴⁷ Ideologically speaking, a woman is never entirely infertile, nor can she choose permanently to be infertile. This is not to say that no women are infertile--on the contrary--but that women are never entirely perceived as such. Rather, a woman is seen always as *potentially fertile*, or as needing to become fertile. Such assumptions operate most strikingly in the cases of infertile women

⁴⁵ See Martha C. Nussbaum, "Whether for Reason or From Prejudice?, Taking Money for Bodily Services, 27 J. LEGAL STUD. 693, 717-18 (1998); GINSBURG & RAPP, *supra* note 16, at 147-49; see also FEIN & SCHNEIDER, *supra* note 6.

⁴⁶ Calls for personal and sexual responsibility presuppose limited fertility even when sex is considered a legitimate activity. In an era in which women can be considered too fertile, the fact that women *can* control their fertility does not erase an unspoken premise of *limited* fertility. See ROTHMAN, *supra* note 40, at 13.

⁴⁷ See JANE BARTLETT, WILL YOU BE MOTHER? WOMEN WHO CHOOSE TO SAY NO xi-xiii (1994); CAROLYN M. MORRELL, UNWOMANLY CONDUCT: THE CHALLENGE OF INTENTIONAL CHILDLESSNESS xiv-xvi, 2-10 (1994).

who want to have children, since even these women encounter an emblematic combination of sympathy and thinly disguised anger. On one hand, they receive copious advice, commentary, and (if possessing adequate funds) the most advanced medical aid to treat the malady.⁴⁸ On the other, they receive a fairly striking apportionment of blame, particularly in an age in which infertility has been postulated in the public imagination as an epidemic experienced by careerist women.⁴⁹ Selfish in their sexual transactions or in their decisions to delay marriage and to advance their careers, infertile women are presumed to be punished for their selfishness by their infertility. Even amid the omnipresent force of reproductive technology, their potential for atonement is limited at best.⁵⁰ An infertile woman might be able to become pregnant with the help of such technology, but she is not free of social sanction in putting herself through such a process. Having presumed to contract for marriage with a measure of equity, women who have achieved market success now find themselves told that they are not only inferior women (unable to be mothers) but also *would be* inferior mothers, since the same selfishness that has produced their infertility would, in turn, produce potentially inferior offspring.⁵¹

As might be expected, this same brew of advice and animosity, with even greater potency, greets a woman who does not want to have children. Choosing to question what is above question, this woman may be said to occupy a more radical

⁴⁸ See ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS* 231-41 (1995).

⁴⁹ See MARGARET MARCH & WANDA RONNER, *THE EMPTY CRADLE: INFERTILITY IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 244-47, 254-55 (1996); MAY, *supra* note 48, at 213-17. In some ways, this phenomenon is not all that new: women have been at other times that too much education would render them infertile or insane. See, e.g., GRANT, *supra* note 3, at 212-13.

⁵⁰ The publicity surrounding infertility and reproductive technology indicates, among other things, that children are the ultimate entitlement and marker of success, and that failure is not without its costs, emotional as well as monetary. See MAY, *supra* note 48; see also Carol Sanger, *M is for the Many Things*, 15 S. CAL REV. L. & WOMEN'S STUD., 15, 53 (1992).

⁵¹ See MAY, *supra* note 48, at 217-23; see also DIANA RAAB, *GETTING PREGNANT AND STAYING PREGNANT: OVERCOMING FERTILITY AND MANAGING YOUR HIGH-RISK PREGNANCY* (1991); GALE A. SLOAN, *POSTPONING PARENTHOOD: THE EFFECT OF AGE ON REPRODUCTIVE POTENTIAL* (1993).

position than the selfish aborter, who may still recuperate her abortion via deferred, "chosen" motherhood. Unlike the selfish infertile woman, she is also beyond atonement, since she suffers neither from her inability to have a child nor from painful fertility treatments. If married, she moves entirely beyond the pale, since she cannot even function (like unhappily unmarried and childless heterosexual women) as an object of pity.⁵² Possessing no such means of self-justification or self-abnegation, she becomes an affront to marriage itself, since her rejection of the maternal role becomes an attempt to elude the terms under which she entered the contract and status of marriage in the first place.⁵³

These negative judgments regarding women who do not have children, moreover, are not confined exclusively to men. Women who decide not to become mothers can provoke anger in other women, who sense a value judgment of their own choices and the duties that have come with them.⁵⁴ In addition, women

⁵² MAY, *supra* note 48, at 182-99; *see also* SUSAN FALUDI, BACKLASH 3-46, 82-111 (1991).

⁵³ Women who decide not to have children are told repeatedly that they will regret their decision or are warned they will be seized with relentless maternal longings. Childless women, if they are married, also find that their marriage will not be treated as a "real" marriage without children. *See* MORELL, *supra* note 47, MAY, *supra* note 48, at 131-32; ELAINE CAMPBELL, THE CHILDLESS MARRIAGE - AN EXPLORATORY STUDY OF COUPLES WHO DO NOT WANT CHILDREN 94-113 (1985); *see also* MAUREEN MILLER, DOUBLE INCOME, NO KIDS . . . YET: HOW TO RESOLVE THE MOTHERHOOD/CAREER DILEMMA AND HAVE IT ALL 20 (1989). ("Even though you may be confident about your negative views on children *now*, it is important to be at least aware of the way the desire to be a mother may creep up on you unexpectedly, releasing emotions and psychological pressures which will surprise you by their power.") Ironically enough, intentionally childless women also sometimes receive criticism for not deciding to "balance" work in the market and motherhood, and their decision is denigrated for having been made without first-hand knowledge of childrearing -- which would moot the childlessness problem. These criticisms, however, also insinuate that the only true knowledge of mothering is available to women who parent their "own" children. *See* KATHLEEN GERSON, HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD 140-53 (University of California Press 1985); *see also* GRANT, *supra* note 3, at viii-ix.

⁵⁴ Ironically, for women who do have children and who are middle class, a decision to stay at home and mother is defended in part on the grounds that doing so is a "career," whereas women who are not middle class do not have a

who do not have children are viewed as unthinking and unfeeling towards women who do. Apparently unable to imagine the burdens associated with having children, they are perceived as less emotionally and spiritually evolved.⁵⁵ Yet ironically, these supposed incapacities of childless women in no way free them from domestic and maternal responsibilities. Indeed, these are women who are pressed into becoming caretakers of other family members and other women's children.⁵⁶ Thus, even while she is considered less worthy because she is not a mother, the childless woman nonetheless finds herself assuming her "share" of maternal and familial responsibilities, since, by virtue of her being a woman, she must utilize her time doing the work that mothers do.

As with the criticisms faced by women who have abortions, those faced by women who choose not to have children differ depending on age and group identification. A white and middle class woman, for example, might be blamed for helping to create differential rates of reproduction among racial groups. In such a situation, she is told she is the kind of woman who is entitled to be a mother, who should be a mother, and who will be, by shirking her maternal duty, causing harm to social stability and progress. By contrast, a woman who belongs to a minority group or who is

"career" when they are in the home, perhaps because their work does not deserve such a title. This particular dichotomy has resurfaced as of late in the popular press, but also was noticeable in the debate over welfare reform. See ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 87-109, 236-74 (2001); CHRISTINA BAGVLI TINGLOF, *THE STAY AT HOME PARENT SURVIVAL GUIDE: REAL LIFE ADVICE FROM MOMS, DADS, AND OTHER EXPERTS* 1-6, 62-79, 147-52, 234-240 (2000); WILLIAMS, *ROOSTER'S EGG* *supra* note 19.

⁵⁵ See BARTLETT, *supra* note 47; MORRELL, *supra* note 47.

⁵⁶ In keeping with the charged atmosphere surrounding maternal labor or "motherwork," these obligations receive a variety of responses from women themselves. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT*, 42-47, 122-123 (Unwin Hyman, Inc. ed., 1990); MORELL, *supra* note 47, at 117-150; Barbara Katz Rothman, *Beyond Mothers and Fathers: Ideology in a Patriarchal Society*, in *MOTHERING: IDEOLOGY, EXPERIENCE AND AGENCY* 155-56 (1994); Carol B. Stack & Linda M. Burton, *Kinscripts: Reflections on Family, Generation, and Culture*, in *MOTHERING: IDEOLOGY, EXPERIENCE AND AGENCY* 31-42 (Routledge ed., 1994).

working class faces censure for having too many children or for simply having them at the wrong time. While such criticisms are fueled in part by a desire to reduce reproduction in stigmatized groups, they are also driven by equally powerful assumptions about fertility and sexual agency, particularly in regard to minority women.⁵⁷ The result is an almost untenable set of contradictions, since minority women face both the larger societal prejudice that they should not reproduce even as they are assumed to be incapable of managing their own fecundity.⁵⁸ A woman of a minority group deciding not to have children *altogether*, then, is apparently unthinkable. Put another way, where legislative and popular views of personal and sexual responsibility demand fertility be selective, women neither can become too fertile nor decide for all time not to be fertile.

IV. On Having Other People's Children

Given the pervasiveness with which concepts of contract are inscribed into ideas of legitimate motherhood and sexual activity, we might expect reproductive agreements that rely upon legal contracts to be greeted with either relief or indifference. A culture that already idealizes sex, marriage, and reproduction as the

⁵⁷ These assumptions have been put into practice via sterilization abuse, either through forced sterilization regimes in the United States for the "feeble minded," or through sterilization of women of color without their consent. See MAY, *supra* note 48, at 95-125; see also DANIEL KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 96-112 (1985).

⁵⁸ This presumption of rampant fertility is perhaps most telling for African American women, who have been stigmatized as being always available for sex and reproduction, or for reproducing too often and irresponsibly. See McClain, *supra* note 23 at 340. Yet an African American woman deciding not to have children altogether would not be behaving as her overly fertile self, nor, from another vantage point, would she be a woman resisting racism by having children. See COLLINS, *supra* note 56 at 122; Roberts, *Housework*, *supra* note 15, at 68-70. And where a prevailing viewpoint is that African American women are unable to refuse sex, it is not difficult to understand how a woman may not be seen to possess the power to refuse reproduction. Similar concerns present themselves with Latina or Native American women, who have also been subject to sterilization abuse by doctors. See MAY, *supra* note 48 at 191-94; see PATRICIA WILLIAMS, ALCHEMY OF RACE AND RIGHTS, *supra* note 10, at 217-19.

products of mutual agreement between equals might well embrace contract as a tool to formalize such agreements. As the controversies surrounding surrogacy and adoption contracts demonstrate, however, contracting for motherhood--or for the duties that traditionally accompany it-- usually produces the opposite cultural response.

Nowhere is the ideological gap between bearing another's child and bearing one's own child more apparent than in the controversies surrounding surrogacy. Calling surrogacy, aptly enough, "contract motherhood," a number of scholars have expressed concern over the fairness of the legal agreements attending it.⁵⁹ Often compellingly, they have questioned the capacity of women to make such contracts, citing the disparities in bargaining power that exist between women who are surrogates and the couples who contract with them.⁶⁰ Such disparities, in

⁵⁹ See, e.g., Leslie Bender, *Teaching Feminist Perspectives on Health Care & Law: A Review Essay*, 61 U. CIN. L. REV. 1251, 1269-70 (1993) (summarizing different approaches); Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Legal Theory*, 84 KY. L.J. 1197 (1996); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 273 (1995); Sherylynn Fiandaca, *Comment: In Vitro Fertilization and Embryos: The Need for International Guidelines*, 8 ALB. L. J. SCI. & TECH. 337, 366 (1998). For a discussion of racial issues and ideas of genetic ownership, see Roberts, *Genetic Tie*, *supra* at 209-13; Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935 (1996) (discussing racial differences in the manner in which one values one's own genetic legacy and the surrogacy question in general). For a good discussion of different doctrinal approaches to surrogacy and proposed solutions to the problems it poses, see Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995).

⁶⁰ See PATEMAN, *supra* note 27, at 210-13. There is a small library of scholarship on the question of surrogacy and new reproductive technologies. See, e.g., Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In-Vitro Fertilization*, 7 AM. U. J. GENDER SOC. L. & POLY 431 (1999); Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996); Judith F. Darr, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J. L. & MED. 455 (1999); Judith F. Darr, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609 (1997); Martha Field, *Surrogacy Contracts--Gestational and Traditional: The Argument for*

more radical critiques, have led commentators even to compare the situations of surrogate transactors to those of prostitutes.⁶¹

Given that surrogacy appears to be more often discussed and debated than practiced, surrogacy itself exposes anxieties over any connection between contract and motherhood. I find the relentless debate over surrogacy interesting in part because it serves as an indicator of the anxieties people feel over motherhood, both as an entitlement that women have and as a practice in which they must engage. While expressing valid and, indeed, vital concerns about exploitation and commodification, critiques of surrogacy nevertheless often ignore the troubling contractual aspects inherent in "real" motherhood itself. Most frequently, they presume that mothers perform their labor (reproductive and otherwise) for free, and, in so doing, achieve their due measure of legal and social legitimacy. This presumption is understandable and perhaps unavoidable, yet it relies upon an inference that deserves interrogation. Critiques of surrogacy contracts may claim that such contracts change the function of a woman's uterus from

Nonenforcement, 31 WASH. L. J. 1 (1991); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000); E. Ann Kaplan, *The Politics of Surrogacy Narratives*, in FEMINISM, MEDIA, & THE LAW 193-202 (Martha A. Fineman & Martha T. McCluskey, eds.) (1997); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79 (1998); Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U. L. REV. 1215 (1997); Mary Lynne Birck, Comment, *Modern Reproductive Technology and Motherhood: The Search for Common Ground and the Recognition of Difference*, 62 U. CIN. L. REV. 1623 (1994); Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221 (1997). Similar questions have presented themselves in the area of egg donation for infertile couples. See, e.g., Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733 (1994); Ann Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265 (1995).

⁶¹ See Corea, *supra* note 17, at 38-39, 44-45; see PATEMAN, *supra* note 27, at 212-13; ANDREA DWORKIN, RIGHT WING WOMEN 181-88 (1983). Other studies have linked prostitution and surrogacy as forms of commodification of women, without necessarily stating their equivalence. See, e.g., RADIN, *supra*, note 10, at 131-53.

"motherhood" to that of "service," but the fact that women have contracted to provide such a service does not mean that women have necessarily *not* contracted for motherhood either. As I have demonstrated in the first two sections of this essay, the marriage contract is accompanied by a series of other intimate contracts--over sexual activity, pregnancy, childbirth, and child-rearing--that are as culturally pervasive as they are binding. The responsibilities bestowed by such agreements, for most women, constitute the duties of "real" motherhood, which are further sanctified by the selflessness definitive of that status.

Real mothers are not paid for their labor, then, not because it is valueless but because it is supposedly priceless. Yet, when that labor is contracted out to others--as it is every day to nannies, daycare workers, and domestic laborers--it becomes transformed into low-paid (and often unskilled) work. It is a transformation worth considering, especially for the ways in which it allows us to locate, with precision, the source of laboring mothers' "real," inestimable value. Maternal labor, however it may be priced on the open market when done by others, apparently increases exponentially in (ideological) worth when done by the mother herself.⁶² This radical compounding of value can be said to underwrite the bulk of the demands that face women when they enter into the marriage contract. Given the high value of such work when done by wives and mothers, it is assumed that women entering marriage will of course avail themselves of the opportunity to maximize their own worth. As might be expected, women who contract to have their labor done for them face questions and criticisms similar to those attending any act of outsourcing. Considering the magnitude of difference existing between the value of her own labor and that of the person she pays, it is difficult for her to defend such a cheapening of her duties even if her own labor proves more profitable in the marketplace than in the home.

That such assumptions inform even radical feminist critiques of surrogacy is a testimony to their pervasiveness and power. Arguing that surrogacy is inherently harmful, theorists like

⁶² See Roberts, *Housework*, *supra* note 15; Silbaugh, *supra* note 25.

Carol Pateman presume the move from motherhood to surrogacy to be one of desecration. Their representation of surrogacy as just another contract for service, however, does not adequately describe the cultural forces at work within it--forces that only become apparent when the surrogacy contract goes awry.⁶³ Simply put, were surrogacy merely a contract for service, a surrogate refusing to give up a baby would have no legal case in court. Paid to nurture a fetus and perhaps to provide half of its genetic material, the surrogate in a strict contractual scenario has negotiated to exchange her parental right to that fetus for a fixed sum. That courts have found surrogacy cases more complex than other kinds of contract disputes suggests that surrogacy agreements obviously involve more than just a contract for service. What is being bought is not the ability to bear children but motherhood itself. Such a purchase involves much more than simply acquiring the right to claim a child as one's own. With it one also acquires the full cultural heft of motherhood: the right to claim maternal status with all its accompanying privileges and duties; and the right to value that status and those duties as priceless.

Where surrogacy contracts have come under dispute, the surrogate's ability to claim this status of motherhood usually comprises the strongest part of her case. Here, she argues that her own ignorance of the value of motherhood must render the contract void; having contracted to provide a "service," she discovers that

⁶³ While Pateman states that the surrogate mother is selling herself in a more fundamental way than the prostitute is, she also claims that the surrogacy contract itself "reveals little about the *institution* of marriage, prostitution, or 'surrogate' motherhood. The surrogacy contract is another means by which patriarchal subordination is secured." PATEMAN, *supra* note 27, at 215. I would argue that the surrogacy contract, whether it is breached or honored, reveals a great deal about how these particular institutions are valued within the legal system and within a broader social context. What I have found striking in the context of surrogacy cases is that a woman who has (depending on whom we believe) sold her body has been found to have some sort of a claim at all, even if that claim may not prove successful. I think the fact that these cases even make it into court indicates the way, in which the status of motherhood is difficult to ignore, even if the fact of that recognition is insufficient to prove that woman's case. For perhaps *the* paradigmatic, if not inescapable, examples in law and scholarship on surrogacy, see *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

she is in fact imbued with the full status of motherhood. When considering such cases, therefore, courts must determine what constitutes parentage, and confront this question by weighing the competing claims of the ownership of genetic material, the acts of carrying and giving birth to a child, and the best interests of the child produced.

At least two inferences can be made from the cases and commentary surrounding surrogacy. Most immediately, both suggest that "real" motherhood is as much a matter of property and ownership as of embodied experience. More broadly, they make plain that unreal mothers--those unable to claim both genetic tie and embodied experience--have a much more difficult time attaining the status of motherhood. Or, put another way, "real mothers" are the women most likely to retain their high moral status if forced to contract to have some of their duties done by other women.⁶⁴

The question of surrogacy becomes further complicated by the possibility of adoption, often posited as an acceptable and less exploitative alternative to surrogacy.⁶⁵ (While the politics of adoption themselves also have raised considerable debate,⁶⁶ adoptive couples are rarely if ever criticized for *not* using a surrogate.)⁶⁷ Women trying to become adoptive parents, however,

⁶⁴ See, e.g., Linda Lacey, *O Wind, Remind Him I Have No Child: Infertility and Feminist Jurisprudence*, 5 MICH. J. GENDER & LAW 163 (1998); Roberts, *Housework*, *supra* note 15, at 56-63.

⁶⁵ See, e.g., Field, *supra* note 17, at 6-11 (claiming that the surrogacy market may harm the adoption "market" and lessen the likelihood of adoption of children with disabilities).

⁶⁶ See, e.g., Susan Frelich Appelton, *"Planned Parenthood": Adoption, Assisted Reproduction, and the New Ideal Family*, 1 WASH. U. J. L. & POL. 85 (1999); Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 DUKE GENDER J. L. & POL'Y 5 (1995); Hawley Fogg-Davis, *A Race-Conscious Argument for Transracial Adoption*, 6 B.U. PUB. INT. L.J. 385 (1997); Jacinda T. Townsend, *Reclaiming Self-Determination: A Call for Intra-racial Adoption*, 2 DUKE GENDER J. L. & POL'Y 173 (1995); Comment, *The Best Interests of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U.L. REV. 167 (1997).

⁶⁷ The opposite, however, is far from the case; in the face of exploding world population and with so many children not having "good" homes, the decision to

sometimes find themselves criticized for commodifying babies or confronted with the task of conforming to adoption agencies' highly restrictive notions of what a "mother" should be.⁶⁸ They also confront many of the same cultural assumptions that come with contracting with a surrogate. Sympathy for the birth mother and suspicion of the adoptive mother are implicit in the transaction,⁶⁹ and evaporate only when the child to be adopted is somehow disabled, damaged, or otherwise (economically or literally) abandoned. In such cases, maternal selflessness and self-sacrifice--mothering a child no real mother would want--lets a maternal transactor off the contractual hook. Where the selflessness of the mother has the power to remove the taint of contract, one can safely adopt children only who have been refused by their "real" mothers.

If adoption contracts have gained more rapid social acceptance than surrogacy contracts, part of this relative ease stems from the degree to which the pregnant female body figures in each transaction. When she "gives" her child up for adoption or places it on what has been called the "grey" adoption market, her pregnant

use a surrogate rather than to adopt is to be selfish once again, justifiably or not. *See, e.g., Lacey, supra note 64, at 175-80.*

⁶⁸ *See RAPP, supra note 41; Lacey, supra note 64, at 164.* What is not often questioned, however, is what is being expected of women who might potentially adopt or contract with a surrogate, or how they are being perceived as a result of their negotiations. Given the inequities that often result in a woman's giving up a baby, it is difficult to separate that situation from other forms of exploitation, unless we are willing to accept the fact that some of the women involved do not want to be mothers. *See, e.g., Lacey, supra note 64; Sanger, supra note 20, at 490-99.*

⁶⁹ Conversely, women who do not give up their babies for adoption are considered to be selfish for not giving babies (or transacting for them) with women and men who do want them. Particularly for unmarried white women, this particular experience of anger and recrimination occurs because they are not providing a needed commodity to women who want and deserve to be mothers. It is therefore that women are walking away from a particular agreement that is supposed to further their prospects and expectations, such as giving up their white baby to a white family, so that they may pursue, perhaps, market-based success or more appropriate motherhood. *See, e.g. Martha C. Ward, Early Childbearing: What is the Problem and Who Owns it? in GINSBURG & RAPP, supra note 16, at 142-56.*

body is less central to the transaction than that of the surrogate mother.⁷⁰ Her body, after all, has not been controlled during the course of the transaction. A woman contracting to adopt a child, therefore, finds herself involved in a less debased negotiation than when she contracts with a surrogate. Whereas the centrality of the latter's pregnant body (and its attendant claims) make this transactor's "right" to the child more tenuous, she can contract for motherhood in an adoptive context without any form of "mother" present.⁷¹

Such distinctions suggest more about the prevailing anxieties attending women's bodies than about the exploitation of women's bodily integrity. But most striking in commentaries on adoption and surrogacy--and many can be found--is the predominance of statements about the fragility of motherhood and the potential for debasing it. Within these discussions, motherhood stands as a transcendent construct, ahistorical, monolithic, and impervious to cultural change. While such notions may be useful in the heat of a litigation battle, they become roadblocks to understanding why some pregnancies are real and others are not. Looking to the history of motherhood and the contractors surrounding it, from wet-nurses to governesses, we find neither consistency nor stasis in dominant notions of mother or child.⁷² The fact that other women have contracted for motherhood (and have done so across centuries and national boundaries) does not

⁷⁰ See, e.g., Garrison, *supra* note 60, at 860-65 (discussing adoption "market" and repercussions).

⁷¹ Granted, at this point in time, we can postulate a variety of approaches to adoption, including open adoption, but I am interested in the way in which the "birth mother's" body can be under erasure in the context of an adoption, such that the adopted baby itself is postulated as a gift, or, at least that the child is not as actively "bought" as in a surrogacy situation. See Sanger, *supra* note 20, at 490-99 (discussing this conflict); Lucy S. McGough & Annette Peitier-Falahahwazi, *Secrets & Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13 (1999); but see MAGGIE AND LINDA KIRKMAN, *MY SISTER'S CHILD* (1983) (depicting sisters' surrogacy agreement and advocating for gift surrogacy).

⁷² See DAVIDOFF & HALL, *supra* note 8, at 353-41; ALAN RICHARDSON, *LITERATURE, EDUCATION, & ROMANTICISM: READING AS SOCIAL PRACTICE 1780-1832*, 25-40, 167-252; (1994); Sanger, *supra* note 20 at 391-409.

mean, of course, that surrogacy is somehow free of exploitation. However, bearing in mind how other women have contracted for motherhood promises to make our discussions of surrogacy and adoption more nuanced--particularly in explaining how the issues attending the ideological desire for selective reproduction transform so quickly into questions concerning the morality of a market-based approach to reproduction. In the final section of this essay, I take up this issue of the market, and explore what happens when motherhood itself is commodified, and mothers, perhaps not surprisingly, come cheap.

V. Bad Mothers as Transactors

Much as a woman who chooses not to have children occupies an irredeemable position within reproductive ideologies, a mother either unable or unwilling to be selfless is perhaps the greatest affront to motherhood of all. This woman is unable to meet social standards of care for her children or else harms them by commission or omission.⁷³ Even in the course of examining motherhood as a positive experience for women--one that can be unique, fulfilling, and indeed worthy of celebration--the figure of the bad mother stands as an ever-present attendant on that experience. Bad mothers (depending on whom you ask) are abusive and neglectful, surrogate and adoptive. They work because they can't stand to stay at home and they stay at home because they can't stand to work. As signs of moral decay, such women embody selfishness and insane autonomy. The bad mother is a useful device; she stands as a model of self-reproach and as a means of policing other mothers. She also is a marvelous assurance for one's own behavior. Through her women must confront themselves as

⁷³ See Marie Ashe, "Bad Mothers" and Welfare Reform in Massachusetts: The Case of Claribel Ventura, in *FEMINISM, MEDIA, & THE LAW* 203-16 (1998); Marie Ashe & Naomi R. Cahn, *Child Abuse, a Problem for Feminist Theory*, 2 *TEX. J. WOMEN & L.* 75-76 (1993).

mothers and as women who at some point might wish to abandon motherhood itself.⁷⁴

Her specter perhaps looms largest over the issue of childcare, and registers most distinctly where child care workers harm or kill their charges. In such cases, the mother of the child will find herself criticized for leaving her child or exposing that child to harm. The fact that children are more likely to come to harm at the hands of parents and relatives than under the care of a stranger is beside the point; what is condemned is her decision to walk away from the child.⁷⁵ Such criticisms are particularly strident in the case of mothers who do not "have" to work. Women who separate from their children on the basis of economic necessity can at least claim to prefer the home to the marketplace. These processes of differentiation and self-determination reveal the associated beliefs that what is best for children is a mother's continual presence, and that anything less will harm them.⁷⁶ The fact that attacks on women in the market have been most virulent towards elite women--those most able to contract and most able, in a sense, to submit to the private subsidy of mothering--indicates

⁷⁴ See HOCHSCHILD, TIME BIND *supra* note 12, at 224-39. For a dramatic evocation of these possibilities, see ANDREA PEYSER, MOTHER LOVE, DEADLY LOVE: THE SUSAN SMITH MURDERS (1995).

⁷⁵ The hostility directed toward Deborah Eappen during the Louise Woodward trial is a case in point. See, e.g., Christy Bacque, *Babies Need Their Own Mothers*, OTTAWA CITIZEN, Nov. 26, 1997, at A16; David Sapsted, *Hate Mail for Eappens as au Pair Awaits Fate*, DAILY TELEGRAPH, Nov. 10, 1997, at 7; Ed Hayward, *Backers of Nanny, Eappens, Wage War on Web*, BOSTON HERALD, March 9, 1998, at 1; Ed Vuillamy & Mark Tran, *Lifestyle of a 'Yuppie' Put to Trial: British nanny Louise Woodward May not be the Defendant in the Boston Baby Trial*, THE OBSERVER, Oct. 19, 1997, at 19; see generally Ashe & Cahn, *supra* note 73.

⁷⁶ These criticisms do not apply for all mothers. Women who stay at home with their children while on public assistance face considerable revilement of all by virtue of their social status. See FOLBRE, *supra* note 10, at 117-20, 200-04 (comparing numbers of women on AFDC with women receiving private subsidy from husbands); WILLIAMS, THE ROOSTER'S EGG, *supra* note 19. This approach, oddly enough, contrasts with other forms of blaming of mothers (particularly overbearing and omnipresent mothers) for disabilities and mental illness. See GRANT, *supra* note 3; MILLER, *supra* note 3; RICHARD POLLAK, THE CREATION OF DR. B: A BIOGRAPHY OF BRUNO BETTELHEIM (1998).

that the prospect of a mother outside of the home becomes most threatening when she does not have to be there for her own economic survival. She is most likely *not* to care, to be a bad mother abandoning her duty of selflessness, when seduced by her own market power.⁷⁷

Even in cases where all of the maternal labor in a household is contracted to outside laborers, the contractual relationships that result are nevertheless gendered. The manner in which women perceive the relationship between themselves and the caretaker indicates that they view this work as "their" responsibility. In terms of who interviews and takes care of the logistics of childcare, women do the bulk of this work. Married women who are mothers, moreover, often consider that their salaries (not their husbands') pay for domestic assistance, suggesting that even their transacting market-based selves assume responsibility for childrearing and domestic labor. The model produced here is one of mother as reduced market actor and as potentially bad mother, regulating and providing for the private sphere and having, at best, limited involvement in the public sphere.

The contradictory status of the maternal transactor is further supported by the fact that the most frequent maternal contracts are those least likely to be acknowledged as such. Our unwillingness to associate motherhood with nannying and other forms of childcare

⁷⁷ Mothers in the market, however, do not necessarily fare all that much better. Contrasted with these visions of the bad mother is the bad worker who lets her personal commitments get in the way of her experience in the market. In such a way, the 'strength' that has been expected by mothers, indeed superhuman strength, has been co-opted into a particular model of the ideal employee who can "balance" a variety of commitments without letting her employer down. See JOAN WILLIAMS, UNBENDING GENDER, *supra* note 8 (discussing "ideal worker" problem); see also AASTA S. LUBIN, MANAGING SUCCESS: HIGH-ECHELON CAREERS AND MOTHERHOOD (1987). Women in support staff or factory positions encounter similar tensions, with a smaller margin of economic safety. See, e.g., EILEEN BORIS, HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES (1994); HOCHSCHILD, TIME BIND, *supra* note 12, at 143-73; see also Melissa A Childs, Comment, *The Changing Face of Unions: What Women Want From Employers*, 12 DEPAUL BUS. L.J. 381 (1999/2000).

confirms the idea that real motherhood and contracted childcare are an ideological contradiction in terms. Their real wages being of low value, furthermore, preserves the idea of real motherhood as occupying a space outside of the market.⁷⁸ For these reasons, attempting to value maternal labor is often derided (derived?) as offensive or impossible, since the affection and satisfaction women receive from it makes it of such high value that doing so becomes useless. Still, women's experiences of doing unpaid labor in the private sphere indicate other forces at work. Women customarily spend their time away from work on domestic care. Men, primarily, do not. Where "leisure time" away from work is supposed to be a means by which people recover from their work day and find rejuvenation in rest and recreation, women may be so overworked that they cannot take advantage of the benefits that the private sphere can offer.⁷⁹ Instead, women occupy their hours of leisure with work that is "theirs"--"theirs" as duties to be assumed rather than as obligations to be rewarded.

As such, we must conclude that maternal labor receives sentimental rather than economic value, and that maternal transactions are always attended by some kind of flaw or failure. As she negotiates her way between the public and private sphere, the maternal transactor is reminded constantly that other people's care can never be as good as hers, and that every moment spent in the marketplace harms her children. Whether transacting to have work done for her or contracting to do work for another, she is reminded again and again that the experience of transacting harms all the parties involved by alienating caretaking from its supposedly "natural" and biological mores and moving it to a form of low-level economic exploitation. Once she does so, she is told that the labor is no longer "special" because it is no longer provided by a particular kind of mother; it may be compensable, but it will never be priceless. The responsibility is hers in the contracting. The experience is hers for the contracting. And in all events she will end up a bad mother, once her negotiations begin.

⁷⁸ See JOAN WILLIAMS, UNBENDING GENDER, *supra* note 8; Roberts, *Housework*, *supra* note 15.

⁷⁹ See HOCHSCHILD, SECOND SHIFT, *supra* note 13, at 2-10, 27-28, 37-40.

Part of my insistence in this essay on re-imagining marriage, pregnancy, and child-rearing through the language of contract, then, has arisen out of my desire to demonstrate the usefulness of contract as an analytical paradigm to feminists to demonstrate the ways in which women encounter motherhood and the costs they incur as they attempt to negotiate their relationship with that institution. In the process, however, I hope that I also have demonstrated the ways in which all of these topics are presided over simultaneously (and contradictorily) by ideas of contract and status. While recognizing the transactions mothers enter, we must also recognize the ways in which women, through motherhood, have been given an offer that they cannot refuse. Both motherhood and contract are surprisingly fluid, so much so that an overly rigid formulation of choice is neither useful nor realistic. If motherhood is a status, and a status that cannot be refused in its entirety, then the ways in which mothers are allowed to transact offer up other insights that demonstrate the threat that even these limited negotiations present to prevailing ideals of both motherhood and contract.