TOUCHDOWNS, TODDLERS, AND TABOOS: ON PAYING COLLEGE ATHLETES AND SURROGATE CONTRACT MOTHERS

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> [A]nalogical reasoning . . . holds promise as a method for finding surprising commonalities that can nudge us all to reassess well-established categories of thought . . . By seeing something in a new light, seeing its similarity to something else once thought quite different, we are able to attribute different meanings and consequences to what we see.
>
> Martha Minow[1]

I. INTRODUCTION

Cris Carter, a wide receiver and Heisman Trophy candidate, became ineligible to play football while attending Ohio State University.[2] His college football career ended early because he violated National Collegiate Athletic Association (NCAA) rules that prohibit an NCAA athlete from signing with a professional sports agent prior to the expiration of the athlete's eligibility status.[3] Carter signed with agents during his sophomore year,[4] in return for which he received a $5,000 interest free loan and monthly payments of $1,800.[5]

In a completely different and yet surprisingly analogous arena, two

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1. Minow, *Foreword to the Supreme Court 1986 Term: Justice Engendered*, 101 HARV. L. REV. 10, 87 (1987) (footnotes omitted). *See infra* notes 260, 264.

2. *See*, Neff, *Agents of Turmoil*, SPORTS ILLUSTRATED, Aug. 3, 1987, at 34.

3. *Id.* at 38.

4. *Id.*

5. *Id.*

years ago, Mrs. Whitehead[6] and Mr. Stern entered into a surrogate contract in which Mrs. Whitehead agreed to bear a child for Mr. Stern.[7] In return, Mr. Stern agreed to pay Mrs. Whitehead's medical expenses and a $10,000 fee.[8] Upon the baby's birth, Mrs. Whitehead reneged on her agreement, and Mr. Stern sought legal enforcement of the contract.[9]

NCAA athletes and mothers,[10] despite their differences, have much in common. Historically, society has channelled both the amateur athlete and the mother into fulfilling similar images. Both must be pure, selfless, and devoted individuals. To maintain these images, society needed to impose strict regulations on both college athletes and mothers.

Over the years, one of the most important restrictions on amateur athletes and mothers has been the absence of monetary reward for their performances or services. Paying them would spoil their images and perhaps much more. Indeed, maintaining their images was, and is still believed to be essential to the continued existence of higher education and the traditional family,[11] respectively.

Situations such as Chris Carter's and Mrs. Whitehead's arouse concern over both NCAA regulation of collegiate athletics and state regulation of surrogate contracts. Central to both concerns is an overriding question: Should college athletes and surrogate contract mothers be paid? Recent legislation in both areas suggests a reluctance to let go of the historical images. For example, Alabama recently passed a law that prohibits professional sports agents from even visiting potential recruits on campus without first registering with a state athletic regulatory commission.[12] Similarly, while many state legislatures do not seem to be moving to outlaw surrogate contracts altogether, the predominant debate among legislators seems to focus on the question whether a woman can be paid a fee for agreeing to bear a child pursuant to such a contract.[13] Recently, Representatives Boxer and

6. Mr. and Mrs. Whitehead were divorced during the course of the dispute over Baby M, and she has since remarried. N.Y. Times, Nov. 30, 1987, at B3, col. 6. Although she remarried, the New Jersey Supreme Court continued to refer to her as Mrs. Whitehead. *In re* Baby M, 109 N.J. 396, 412 n.1, 537 A.2d 1227, 1235 n.1 (1988). For clarification, this paper also will continue to refer to her as Mrs. Whitehead.

7. *Id.* at 411-14, 537 A.2d at 1235-36.

8. *Id.*

9. *Id.* at 415-16, 537 A.2d at 1237.

10. The father's role in child development, family support and our society is vitally important, but not the central concern of this paper. This article focuses on the mother because her role and image significantly differ from the father's and provide more apt analogies to the amateur athlete's role and image in society.

11. "Family" means many different things to different people. By traditional family, I am referring to wife, husband and child. Family units that deviate from the traditional one are becoming more acceptable in our society. *See infra* note 243 and accompanying text.

12. ALA. CODE 8-26-1-8-41 (1987). *See also* CAL. LAB. CODE 1510-1528 (1988) (sports agents must register with the Labor Commissioner); OKLA. STAT. tit. 70 821.61-821.71 (1988) (sports agents must register with the Secretary of State); Frank, *Texas Enacts Law to Curb Cheating*, N.Y. Times, June 27, 1987, at C5, col. 1 (Texas governor signed into law a bill making it a civil offense to violate NCAA rules and making violators liable for monetary damages suffered by schools as a result of sanctions imposed by the NCAA).

13. *See infra* notes 276-77 and accompanying text. *See also In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988) (surrogate mother contracts that include payment of fees to surrogate mothers are invalid as against public policy). *But see* Surrogate Parenting Assoc., Inc. v. Kentucky, 704 S.W.2d 209 (Ky. 1986) (surrogate parenting contracts do not come under purview of present state legislation; such contracts are voidable but not void); Adoption of Baby Girl L.J., 132 Misc. 2d 972, 505

Hyde proposed federal legislation to make unlawful surrogate contracts in which fees are allowed.[14]

The principal purpose of this article is to reach an understanding of the need to dissociate collegiate athletics and motherhood from money, and not to decide the specific issue of whether college athletes or surrogate contract mothers should or should not be paid. The article suggests, rather, that NCAA rules and regulations, as well as recent legislation and judicial decisions on surrogate contracting, effectively serve to reinforce many people's expectations that college athletes and women act to reflect values consistent with their roles. Just as our expectations about women and motherhood generally promote stereotypical views of women, because most college athletes are minorities,[15] adherence to traditional views about college athletes also perpetuates racism. Thus, a comparative analysis of collegiate athletics and motherhood brings a new perspective to the relationships between colleges and athletes, society and minorities, and society and women.

II. IDEALS AND IDOLS

A. *Amateurism and Athletics*

The pure image of the amateur athlete dates back to the ancient Greeks,[16] whose interest in sports competition was as great as their interest in waging wars.[17] Greek society often idolized the athlete much like a war hero.[18] The Greek athlete participated in sport solely for the honor of victory, as symbolized by the olive wreath which was the only prize at the Olympic Games.[19]

Hidden behind the celebration of this amateur ideal was the harsh reality that only wealthy Greek citizens could afford to participate in the athletic

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N.Y.S.2d 813 (1986) (state legislation does not prohibit use of surrogate contract mothers or payment to them under surrogate contracts). The Michigan Supreme Court recently held that *all* surrogate contracts are void as against public policy. Yates v. Keane, 14 Fam. L. Rep. 1160 (1988).

14. Reuters, *Bill Set on Surrogate Mothers*, N.Y. Times, Feb. 2, 1989, at A23, col. 5.

15. *See infra* note 169 and accompanying text.

16. The earliest literary account of sports is Homer's description of the funeral games in honor of Patroclus. ILIAD XXIII 256-897 (ca. 800 B.C.); *see id.* XXII 159-66 (pursuit of Hector around walls of Troy compared to a foot race). The earliest sports pictures to date came from the Neolithic town of Catal Huyuk, which flourished in Asia Minor around 6000 B.C. *See* V. OLIVOVA, SPORTS AND GAMES IN THE ANCIENT WORLD 17-18 (1984). *See also* P. TACITUS, THE AGRICOLA AND THE GERMANIA 107 (trans. by H. Mattingly 1948, as revised by S. Handford 1970). Tacitus, an early Roman historian, describes Germanic warriors in battle, with their "women-folk" nearby. The role of the women was to treat the warriors' wounds, supply them with food, and encourage them in their battles. *Id.* My colleague, Walter Weyrauch, pointed out that the role of women in Germanic warfare resembled the role of cheerleaders in modern athletics.

17. Warring city-states would call a truce during the Olympic Games. *See* E. ZIEGLER, HISTORY OF PHYSICAL EDUCATION AND SPORT 35 (1979); *see also* Thueydides V. 49-50 (ca. 420 B.C.) (Sparta fined for entering city of Elea during Olympic truce), *translated in* R. ROBINSON, SOURCES FOR THE HISTORY OF GREEK ATHLETICS 111-12 (1955) [hereinafter SOURCES].

18. *See* PAUSANIAS VI 9.6-7 (ca. 170 A.D.) (Kleomedes, a boxer, worshipped as a hero); *id.*. VI 11.2-9 (Theagones, victor of 1,400 contests, worshipped as a healing power), *translated in* S. MILLER, ARETE: ANCIENT WRITERS, PAPYRI, AND INSCRIPTIONS ON THE HISTORY AND IDEALS OF GREEK ATHLETICS AND GAMES 59-61 (1979); *see also*, XENOPHANES (Fragmeny 2) (ca. 500-550 B.C.) (protesting the awards and attention showered upon victorious athletes), *translated in* SOURCES, *supra* note 17, at 90-91.

19. E. GARDINER, ATHLETICS OF THE ANCIENT WORLD 2 (1930); *see* Shorey, *Can We Revive The Olympic Games?*, 19 FORUM 313, 321 (1895).

contests that eventually led to the Olympic Games.[20] Being able to afford the travel expenses, coaching, and equipment, allowed the wealthy the luxury to become "amateur" athletes.[21]

The modern Olympics, established in 1896, continued in the Greek tradition, restricting the Games to "amateur" athletes.[22] In effect, this amateur restriction limited participation in the Games to wealthy gentlemen.[23] They were the only ones possessing the leisure time and monetary means to be "amateur" athletes.[24] As gentlemen, they did not have to fully exert themselves in order to succeed at any endeavor.[25] The professional athlete stood in stark contrast; he obviously was not a "gentleman" because he had to devote time to training for his "vocation."[26] Further, prior to the 1920s, amateur athletic competition took place in the absence of spectators. Both the ancient Greeks and their modern amateur counterparts viewed participation alone as generating the real value of the sport.[27]

In America, the distinction between the amateur and professional athlete also reflected a split between social classes. Sports clubs, such as the New York Athletic Club established in 1866, used amateurism to exclude athletes with "inferior" social credentials.[28] Consequently, members of the club were white, upper class males who could "afford" to be amateur. Even the first U.S. Olympic teams were dominated by athletes from sports clubs like the NYAC and the Boston Athletic Association, as well as from Ivy League schools, the other upper class bastion.[29]

Following historical amateur tenets, the first college sports, such as football, crew, and track and field, were student formed and funded.[30] Col-

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20. *See preface to* E. GARDINER, *supra* note 19, at xii (1978 Ed.). Professor Miller concludes his introduction to Professor Gardiner's landmark of Victorian amateur ideology by lamenting the plight of Jim Thorpe, stating, "Sir, you were the victim of an ancient ideal which never existed." *Id. See also* D. YOUNG, THE OLYMPIC MYTH OF GREEK AMATEUR ATHLETICS 7 (1984) ("Ancient amateurism is a myth. . . Ancient athletes regularly competed for valuable prizes . . . and they openly profited from athletics whenever they could.").

21. No word for "amateur" existed in the Ancient Greek vocabulary. D. YOUNG, *supra* note 20, at 1 n.1; *see also* Aristophanes, *Wealth* 1162-63 (ca. 400 B.C.) ("To have contests in music and athletics is the thing most suitable to wealth.") *translated in* D. YOUNG, *supra* note 20, at 105; *but see* D. YOUNG, *supra* note 20 at 147-63 (non-noble participation in Greek athletics).

22. *See* D. YOUNG, *supra* note 20, at 62-63.

23. *See* Shorey, *supra* note 19, at 323 ("The only classes in the modern world whose interest in athletics is wholly genuine and unfeigned are professionals, *idle amateurs of wealth*, a few educators, and the least studious among our college youths.") (emphasis added); *see also* A. GUTTMAN, FROM RITUAL TO RECORD: THE NATURE OF MODERN SPORTS 31 (1978) ("The amateur rule was a weapon of class warfare."); R. MANDELL, THE FIRST MODERN OLYMPICS 114-17 (1976) (lengthy description of the "wealthy amateurs" comprising America's first Olympic team).

24. *See* D. YOUNG, *supra* note 20, at 21-22.

25. Jim Thorpe has been characterized as a "true amateur," because he was naturally gifted at sports. He often would perform events for the first time after viewing other athletes and win. Wheeler & Ridlon, *In 1912 as Now, Inconsistencies*, N.Y. Times, Aug. 19, 1984, SS. 5, at 2, cols. 1-4. Nevertheless, Jim Thorpe and Jesse Owens were never within Pierre de Coubertin's contemplation of the Olympic ideal. *See* D. YOUNG, *supra* note 20, at 57 n.51.

26. D. YOUNG, *supra* note 20, at 78-80; *see* B. RADER, AMERICAN SPORTS: FROM THE AGE OF FOLK GAMES TO THE AGE OF SPECTATORS 58-59 (1983).

27. *See generally*, B. RADER, *supra* note 26 (positing a dichotomy between the player-centered sports of the nineteenth century and the spectator-centered sports of the twentieth century).

28. *See*, B. RADER, *supra* note 26, at 58.

29. *Id.* at 62; *see* R. MANDELL, *supra* note 23, at 114-17.

30. Again, it was the elite schools that could afford the establishment of athletic teams so that amateur tenets could prevail. *See* B. RADER, *supra* note 26, at 70-71 ("sons of the elite").

lege teams lacked professional coaches or trainers; student captains designed workouts and scheduled games and matches.[31] Competitions also were not spectator-oriented. Those students who attended games were admitted without charge, and attendance was premised on school spirit.

Within 20 years of the first intercollegiate football game in 1869,[32] a transformation of college sports began to occur. Because football had become a serious business enterprise, administration of the sport shifted from the students and lodged with the university and alumni.[33] This transformation resulted primarily from the competition among colleges in the late 19th century, with the goal of increased college enrollments.[34] While Ivy League schools could rely on reputation alone to attract students, newer schools needed other ways to attract public and student attention. Sports, especially football, became a profitable method for achieving this goal.

By 1890, football had swept the nation.[35] Intercollegiate football held an added attraction for social climbers; rooting for a particular college's team was a conspicuous way of being associated with a college, even if one had never actually attended it.[36] Additionally, college athletics often symbolized "battles" between regions of the country, and even took on "ethnic" dimensions, highlighted by the "Fighting Irish" of Notre Dame.[37]

Thus, fielding a football team was essential to a university's bid for increased enrollment. But funding a team alone was insufficient; the team had to win.[38] Only a winning team would ensure the increased support of the alumni and community.[39] Funding talented athletes that would provide a winning team became a university's primary mission. Although amateur rules did not allow athletic scholarships, universities offered students other "under-the-table" monetary incentives.[40] American universities thus adopted the rhetoric of amateurism but not its substance.[41]

The National Collegiate Athletic Association,[42] formed in 1905 for the

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31. *Id.* at 71, 75.
32. *Id.* at 70.
33. *Id.* at 75.
34. *Id.*
35. *Id.* at 75-76.
36. Wealthy families would display the school's colors as evidence of their spirited commitment to the athletic team. *Id.* at 77.
37. *Id.* at 210.
38. *Id.* at 76 (the first president of the University of Chicago and his attempts to publicize the new university by fielding a winning football team). Winning is becoming increasingly important, as evidenced by recent changes in rules that allow for over-time play when teams are tied at the end of the game. Hiller, *Language, Law, Sports and Culture: The Transferability or Non-transferability of Words, Lifestyles, and Attitudes Through Law*, 12 VALP. L. REV. 433, 451 n.63 (1978).
39. *See* A. STAGG, TOUCHDOWN! 203 (1927) ($3,000,000 gift to university and its use as a motivating tool during a half-time lockerroom speech).
40. In the 1890's, Yale University, for example, lured one football player by giving him a free suite, free meals, a trip to Cuba, free tuition, a monopoly on the sale of score cards, and a job as a cigarette agent for the American Tobacco Company. R. BOYLE, SPORT: MIRROR OF AMERICAN LIFE 22 (1963).
41. *See* B. RADER *supra* note 26, at 134.
42. Beginning in 1905 with 387 members, the NCAA is a voluntary association of nearly 1,000 colleges, universities, conferences, and individuals. The NCAA's raison d'etre is to set all standards for eligibility, play, and competition in intercollegiate athletics. *See* Lock & Jennings, *The Constitutionality of Mandatory Student-Athlete Drug Testing Programs: The Bounds of Privacy*, 38 U. FLA. L. REV. 581, 582 n.3 (1986).

purpose of regulating the recruiting scandals that existed in college sports,[43] is the governing body of collegiate athletics. Because football generated income for the university, college administrations were hesitant to control their coaches.[44] Consequently, one of the chief objectives of the NCAA was to keep football closer to the tenets of amateurism.

The NCAA defines an eligible athlete as "[o]ne who engages in a particular sport for the educational, physical, mental and social benefits he derives therefrom and to whom participation in that sport is an avocation."[45] An early NCAA proposal would have permitted open payments to athletes in the form of athletic scholarships.[46] The "sanity code," adopted in 1948, allowed athletic scholarships only to those athletes who demonstrated financial need, thus tempering the break with traditional amateur standards. Schools often violated this short-lived restriction. In 1952, the NCAA allowed scholarships based on athletic ability alone,[47] but amateurism continues to be essential to an athlete's eligibility.[48]

Today, scholarships based on athletic ability are the primary way universities attract talented athletes to their schools. It is ironic, then, that today college sports still utilize amateurism in their definition of an athlete. Recent proposals to abandon the facade of amateurism and openly pay college athletes have been resisted by NCAA and college officials.[49] Perhaps the resistance stems from a fear that the adoption of such a policy would signal the abandonment of more than just the "amateur" ideal. The image of the university as being dedicated solely to academic pursuits might also disappear.

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43. B. RADER *supra* note 41 at 136-44. Another example of an early recruiting scandal occurred in 1893 when the University of Michigan allowed seven men who were not students to play on the football team. R. BOYLE, *supra*, note 40, at 21-22.

44. *See* Jordan, *Buying College Victories*, Collier's, Nov. 18, 1905, at 36 ("Faculty control is a myth.").

45. NCAA CONSTITUTION, art. 3 § 1 (1986).

46. B. RADER, *supra* note 26, at 268.

47. *Id.* at 268-69.

48. *See infra* note 93 and accompanying text.

49. The recruiting scandals which rocked the Southwest Conference and the stiff penalties imposed upon Southern Methodist University for making payments to SMU football players are the most recent examples of this refusal to drop the myth of amateurism. The governor of Texas, Bill Clements, was politically damaged for his role in approving those payments. *See* Johnson, *Playing for Pay in Texas*, Newsweek, Mar. 16, 1987, at 32; Magnuson, *Payoff, Hikel*, Time, Mar. 16, 1987, at 34; Reinhold, *Clements offers an Apology Over Payments To Athletes*, N.Y. Times, Mar. 11, 1987, at A18, cols. 1-4; *cf.* N.Y. Times, Mar. 13, 1987, at D21, col. 1 (New York agent admits giving cash to college football players); N.Y. Times, Mar. 3, 1987, at A22, cols. 5-6 (former Houston University coach admits giving his players cash); *see generally* Ivey, *How Educators Are Fighting Big-Money Madness In Athletics*, BUSINESS WEEK, Oct. 27, 1986, at 136-40; Whitford, *NCAA Union: No Pay, No Play*, SPORT MAGAZINE, Jan. 1987, at 14; N.Y. Times, Mar. 30, 1987, at A18, col. 1 (editorial advocating open payment of college athletes).

B. *Motherhood*

> We are woman-born, and almost without exception, we are woman-nurtured in our infancy. It is to a woman we turn in our helplessness; it is a woman who gives us our first grief when we discover she is imperfect and not always available; it is a woman who, by her imperfection and her omnipotence, introduces us to existential angst.
>
> Ann Scales[50]

A discussion of the "origins" of motherhood is peculiar, because the concept seems timeless. It is as if women and mothers were created at the same moment. Simply *being able* to reproduce and breast-feed her offspring made woman a mother.

In more primitive times, biological differences between the sexes perhaps justified a division of labor where women, because of their reproductive capabilities, reigned over the domestic sphere, and where men, because of their physical strength and freedom from reproductive capabilities, reigned over the public sphere.[51] The belief in man's superiority because of his greater physical strength and freedom from reproductive responsibilities accounted for the male-dominated governments and concomitant social hierarchies that developed over time.[52] These social barriers isolated women and children from man's world. Woman's lot was to be man's mate, raising and nurturing his children, and providing him the softness and security lacking in his daily grind outside of the home.

But "motherhood" encompasses much more than the biology of female reproduction, especially in modern times. On a broader level—sociologically, psychologically, economically—motherhood is the touchstone of the traditional family, consisting of wife, husband, and child.[53] In turn, the

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50. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1390 (1986).

51. *See generally* N. CHODOROW, THE REPRODUCTION OF MOTHERING 17-34 (1978) (general description of biological determinism account of sex-role division of labor, which author later rejects).

52. *See generally* S. OKIN, WOMEN IN WESTERN POLITICAL THOUGHT Parts I and II (1979). Okin provides an insightful and thorough historical account of early Greek civilization's views of the relationship between the sexes. The only writing among the three prominent philosophers, Plato, Socrates and Aristotle, that espouses an egalitarian view of women is Plato's *Republic*. *Id.* at 274-76. In *Laws*, however, Plato, unable to harmonize his beliefs about the capabilities of women, and the return to private property ownership and family into society, returned to the traditional view of women as "private wives and the functioning mothers of particular children." *Id.* at 43.

A prominent example of the Greek's view of the relationship between women and men is portrayed in Homer's ODYSSEY. The hero, Odysseus, spends ten years trying to return home to Ithaca following the Trojan War. During his absence, his wife, Penelope, tends to their home, fighting off potential suitors as she patiently awaits Odysseus' return. *See* M. FRENCH, BEYOND POWER 274-76 (1985). *See also* S. OKIN, *supra* note 52, at 15-20 ("strong misogynic strain is obvious" in early Greek literature).

Modern philosophers, such as Rousseau and Mill, advocated sexual equality, but they also believed in the patriarchal family and private life. *Id.* at 278-79. For Rousseau, "the issue remained unresolved." *Id.* at 278. For Mill, renown as an ardent feminist, his theories about sexual equality applied in practice only to single women. It was clear that he believed that married women should not participate in public life until their domestic responsibilities had been fulfilled. J. MILL & H. MILL, ESSAYS ON SEX EQUALITY 179-80 (A. Rossi ed. 1970). *See also* S. OKIN, *supra* note 52, at 280.

53. *See generally* N. CHODOROW, *supra* note 51; C. JUNG, ASPECTS OF THE FEMININE (1982); A. RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1976); *see also*

traditional family is the foundation of a patriarchal society such as ours.[54] At a minimum, motherhood is the set of values, rules, and laws that explicitly or implicitly defines appropriate conduct for us all, women and men. For women, in particular, motherhood is all about the way our lives should be conducted to promote the welfare of our families.

Religion also is significant in our socialization. Like ancient civilizations, most religions are founded upon patriarchal values.[55] For example, most religions believe in a male "Supreme Being," perceived to be the holder of power, truth, and salvation.[56] In carrying out the Supreme Being's commands, most religions ascribe power only to men and select men as their leaders.[57] And while nurturing their followers is essential, whatever healing power the leaders have is perceived to be divine. The religious leader's power is far superior to that of the men and women of lesser stature within the religion.

Because ascription of roles within a religion descends from the Supreme Being's commands, both women and men believe that assumption of their roles is the "right" or "moral" way to live. In turn, the Supreme Being's imprimatur on the often male-dominated religious hierarchy reinforces the

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Scales, *Towards a Feminist Jurisprudence*, 56 IND. L. J. 375, 437 (1980) (distinguishing between motherhood as an experience and motherhood as an institution).

54. "Patriarchy is the power of the fathers: a familial-social, ideological, political system in which men—by force, direct pressure, or through ritual, tradition, law, and language, customs, etiquette, education, and the division of labor, determine what part women shall or shall not play, and in which the female is everywhere subsumed under the male. It does not necessarily imply that no woman has power, or that all women in a given culture may not have certain powers."

A. RICH, *supra* note 53, at 57. Professor Eisenstein states that defining women as mothers "reflects a political need of patriarchy." Z. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY 32 (1984). *See generally* A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 255-60 (1983); Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 294 (D. Kairys ed. 1982); Rifkin, *Toward A Theory Of Law And Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach To The Topic*, 24 UCLA L. REV. 581 (1977). *See also* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 57 (1985) ("[D]iscrimination against women may result from the disproportionate authority of men over lawmaking processes.").

55. *See generally* R. RUETHER, SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY (1983). *See also* M. FRENCH, *supra* note 52, at 150-61, 254-59 (describing the patriarchal values of Christianity, Buddhism, Hinduism, and Islam). French also notes that in earlier times, Christianity at least espoused an "ultimate" equality between the sexes, even if it was not actually practiced, and even though many Christian writings declared the inferiority of women. *Id.* at 154.

56. For example, Christians, Jews and Moslems worship God, although the latter refer to Him as Allah. Some Buddhists worship Buddha, while others simply revere Him. Hinduism is founded upon a belief in the Brahaman caste, which is male dominated.

57. Brooks, *Women in the Clergy: Struggle to Succeed*, N.Y. Times, Feb. 16, 1987, at 15, col. 2-6. Women in every major religion, Protestant, Catholic and Jewish, are having trouble successfully breaking into the male religious hierarchy. For example, the 1400 women clergy (out of 10,000) of the United Church of Christ have difficulty getting jobs in the larger, more prestigious congregations. Also, although there are 968 women ordained as Episcopalian priests in the American Episcopal Church, until this year, no woman had been ordained bishop. *Id. See also Episcopal Women Seek Bishop Posts*, N.Y. Times, March 4, 1988, at 9, cols. 1-6 (resistance to women bishops easing somewhat; a recent report explaining the readiness of the American Episcopal Church to consecrate women bishops); *Women's Role As Bishops Still Divisive*, Washington Post, Mar. 25, 1989, at C14, col. 5 (noting that consecration of Barbara Harris as the first woman Bishop "added urgency" to the Church's need to ease the tension over issue of women as bishops); *see also Women in Clergy Called Low Paid*, N.Y. Times, March 29, 1984, at A22, col. 1 (women in the clergy throughout the United States are lower paid than their male counterparts).

patriarchy.[58] One of the most forceful examples of this is seen in Christianity, where God is the Almighty Father, and where the Virgin Mary is the ideal mother. Christianity, similar to most religions, espouses a world view consistent with patriarchy.

Drawing upon sources and life-styles familiar to them, our Founding Fathers and Mothers chose to perpetuate the status quo in establishing American government and society.[59] Heavily influenced by early Greek and modern philosophy[60] and religion,[61] they wove patriarchal values into the fabric of this country. Our Founding Fathers structured our government and society as a democratic, capitalistic state. Given their history and perspective, they premised their design upon a democracy where men—white and privileged—were equal, and where only they were allowed to participate freely in the commercial world.

Similarly, while many of our Founding Mothers' lives were filled with running and managing their farms,[62] jobs seemingly inconsistent with motherhood, most of them also continued to fulfill their roles as mother. Consistent with their personal histories and backgrounds, as "good Christian" women, they struggled to meet their responsibilities as "good mothers."[63] Ministers reminded women of their duty to instill within their children predominant beliefs about appropriate sex roles.[64] Of critical importance, a fundamental religious tenet during this period was that the domestic sphere not be exposed to worldly, sinful influences. Adherence to this religious principle meant that money, perceived as evil, had no connection with the mother.[65] Thus, by the late 18th and early 19th centuries, when our economy shifted from an agrarian one to an industrial one, women began to settle

58. *See generally* R. RUETHER, *supra* note 55. Ruether explains that male-dominated Christianity conspires to keep women out of the Church hierarchy through mystical and metaphysical reasoning. She writes:

> In Roman Catholic, Anglican and Orthodox writing against women's ordination a constellation of arguments emerges that interrelates maleness, Christology, and priesthood. For these writers it is no longer a matter of the order of creation. They wish to insulate their argument against women's ordination from any changing patterns of secular social relations. Rather, women's inability to represent Christ in the priesthood becomes an unchangeable "mystery" that lies on a sacramental and metaphysical plane.

Id. at 126.

59. Alexander Hamilton, James Madison and John Jay continue to be honored as the men who structured American democracy and government. Their writings, known as *The Federalist Papers*, provide a detailed history of their thoughts, dreams and plans for this country as embodied in our written Constitution. *See* A. HAMILTON, J. MADISON & J. JAY, THE FEDERALIST PAPERS (C. Rossiter ed. 1961). And, of course, in speaking of our Founding Fathers, the term literally means the men who helped shape the Government; women were excluded from the public world of politics. *See generally* Law, *Our Founding Fathers on Families*, 39 U. FLA. L. REV. 583 (1987).

60. *See* Law, *supra* note 59, at 586-93.

61. *See generally* N. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835 (1977).

62. *Id.* at 597. *See also* M. MARGOLIS, MOTHERS AS SUCH 18-22 (1984).

63. Mary Wollstonecraft was a notable exception to the early American women. Her writings, in particular, A VINDICATION OF THE RIGHTS OF WOMAN, published in 1792, marked the beginning of the women's movement in America. *See* Korsmeyer, *Reason and Morals in the Early Feminist Movement: Mary Wollstonecraft*, in WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION 97-98 (C. Gould & M. Wartofsky ed. 1976). *See also* Law, *supra* note 59, at 594-01 (account of women's active role in both public and private spheres during late 18th century).

64. N. COTT, *supra* note 59, at 85-86, and 97.

65. *Id.* at 85-86.

into their traditional mother role.[66]

Today, biological justifications for the division of labor according to gender have largely dissipated, and women and men enjoy greater leeway in deviating from sex-role stereotypes. With respect to women's place within the family, however, little has changed. Continuing today, society teaches young girls that having a husband and child, being a wife and mother, are life's most important goals.[67] As family caretakers, many women believe, from all they have been taught, that they are not as well-suited as their husbands to deal with life outside the home.[68] Consistent with this view, society teaches women that their personal wants and needs can be met through the activities of other family members.[69] Not surprisingly, many women are relieved that they do not have to worry about medical boards, bar exams, or corporate ladders, and feel comfortable and satisfied that they do not have to experience first-hand the competitiveness of the commercial world.

We would not be successful in teaching girls to become mothers, of course, unless we also were successful in socializing boys to become something other than "mothers." Admittedly, being a father is a valued role for boys to aspire to fill, but fatherhood differs from motherhood in significant ways. As the father, society teaches boys that their familial role should be less home-focused and more outside-focused. Consistent with the fatherhood role, most boys grow up believing that their primary familial functions are to be unemotional pillars of strength and sources of financial security. To be successful fathers, most men believe that, daily, they must abandon

66. Professor Law describes this as the Republican Motherhood era. Law, *supra* note 59, at 600.

67. A young woman who bears a child not only meets social expectations that she will become a mother, but she also satisfies what many psychoanalysts describe as the need to fulfill the relational triangle. As a result of her emotional bonding and continuous identification with her mother, a heterosexual woman needs to have strong emotional ties with a man, the focus of her sexual love, and with a third person, who substitutes for the mother-love. Many times the triangle is completed through female friendships, notably very deep and meaningful to women. Alternatively, the triangle is completed with the birth of a child. *See* N. CHODOROW, *supra* note 53, at 199-05. *See also* C. GILLIGAN, IN A DIFFERENT VOICE (1982). Gilligan explores the differences in moral development between boys and girls from the perspective of their needs to form relational bonds and the value those bonds have to their sense of morality. Her starting point is that masculinity is defined by separation and individuation, and femininity is defined by connection and attachment. *Id.* at 8. A girl's need to have relationships and feel connected is more likely to cause her to sacrifice or devalue characteristics that jeopardize her relationships. One example Gilligan uses is competition. Because competition threatens relationships, the need to win and beat their friends may not be as important to girls as it is to boys. *Id.* at 9. *See generally* S. BROWNMILLER, FEMININITY (1984).

Gilligan's work has been criticized by a number of scholars. One criticism I share is brilliantly developed by Professor Joan Williams. *See* Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). Professor Williams stresses that whatever differences exist between men as a group and women as a group with respect to assuming nurturing or competitive roles cannot be traced to biology alone, because society reinforces the choices we make within our patriarchal society. *See infra* note 240. *See, e.g.*, O'Loughlin, *Responsibility and Moral Maturity in the Control of Fertility—Or A Woman's Place is in the Wrong*, 50 SOC. RES. 556 (Autumn 1983) (author criticizes Gilligan for her failure to define "responsibility" in analyzing women's moral development); *see generally* Interdisciplinary Forum, *On In a Different Voice*, 11 SIGNS 304 (1986). *But see* G. BARUCH, R. BARNETT & C. RIVERS, LIFEPRINTS: NEW PATTERNS OF LOVE AND WORK FOR TODAY'S WOMAN (1983); C. BECKER, THE INVISIBLE DRAMA: WOMAN AND THE ANXIETY OF CHANGE (1987); P. CAPLAN, THE MYTH OF WOMEN'S MASOCHISM (1985); M. RANDOUR, WOMEN'S PSYCHE, WOMEN'S SPIRIT: THE REALITY OF RELATIONSHIPS (1987) (authors who praise Gilligan's work).

68. *See infra* note 140 and accompanying text.

69. *See infra* note 70, and 246-50 and accompanying text.

their homes, abandon their immediate emotional involvement with their families, don their competitive armor, and battle with the commercial world.

Thus, our gender still defines, to a large extent, what we do with our lives. Because women are mothers and men are not, women mother and men do not.[70] Consequently, women, and especially mothers, continue to be isolated in significant ways from the commercial world.[71] Correspondingly, men find themselves pulled from the hearth at daybreak. Motherhood has been instrumental in preserving patriarchy.[72]

C. *Mom, Baseball, and Apple Pie*

> In World War II the attacking Japanese troops thought they knew what Americans hold most dear. They made their Banzai attacks not only with weapons but with shouted invectives meant to demoralize. One of those cries was, "To hell with Babe Ruth!" So far as I know they did not defame the religions of America, vilify our economic system, or condemn motherhood. Instead, they selected a sports hero as representative of what Americans held in highest esteem.
>
> Arnold Beisser[73]

> "Her husband cannot look on her . . . without reading in the serene expression of her face, the Divine beatitude, 'Blessed are the pure in heart.' Her children revere her as the earthly type of perfect love. They learn even more from her example than from her precept, that they are to live, not in themselves, but to their fellow-creatures, and to the God in them . . . She has taught them to love their country and devote themselves to its advancement. . .
>
> Maria McIntosh[74]

Blessed with unique physical capabilities, NCAA athletes and women, particularly those who actually become mothers, are set apart from others. They embody many of our highest ideals and aspirations. In fact, it is because our society so highly values athletes and mothers that it is relatively easy to socialize boys and girls to assume those roles.[75] But the magic and

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70. *See* M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 130-32 (1981). Professor Glendon notes that women sacrifice job quality outside the home to be free to take care of the home. *See also infra* notes 246, 250 (statistics about women in labor force). *See also* J. AREEN, FAMILY LAW 133 (1985). Professor Areen cites to a 1981 study where men aged 18-24 spent 14.1 hours on housework and childcare, whereas working women aged 18-24 spent 31-38 hours doing such activities. *Id.*

71. *Id. See also infra* note 250 and accompanying text (discussion of women's representation in various labor markets).

72. *See* Z. EISENSTEIN, *supra* note 54, at 196-200; Polan, *supra* note 54, at 298-99; A. RICH, *supra* note 53 *passim*. *See infra* notes 100-07, 262-66 and accompanying text (cases where Supreme Court upheld laws on the basis of sex-stereotyping consistent with the status quo).

73. Hiller, *supra* note 38, at 448 *quoting* A. BEISSER, THE MADNESS IN SPORTS: PSYCHOSOCIAL OBSERVATIONS ON SPORTS 1 (1967).

74. A. RICH, *supra* note 53, at 45 *quoting* M. MCINTOSH, WOMAN IN AMERICA: HER WORK AND HER REWARD (1850).

75. Female athletes are not as highly valued as male athletes, but they are gaining more respect and recognition. *See generally* Tokarz, *Separate But Unequal Educational Sports Programs*, 1 BERKELEY WOM. L.J. 226, n.164 (1985). The lack of support and enthusiasm for women's sports in comparison to men's sports can be seen in a number of ways. First, it was not until 1972 that title IX of the Education Amendments of 1972 mandated no sex discrimination in inter-collegiate athlet-

awe of these two institutions touch us all.

Consider college athletics. Almost religious in nature, pre-game partying, tailgating rituals, and pep rallies, followed by massive gatherings at the actual events, exemplify our profound commitment to college athletics. Moreover, our idolatry-like awe of the college athlete may border on envy. Not only does he or she have a physique and enjoy a level of physical fitness that escapes many of us, but we also may envy the college athlete's life style. Imagine the day, the week, the semester, an entire college career being structured around a sport you love to play. In fact, college sports are so romanticized, that we may forget about the rigorous training schedules and the intellectual demands being placed upon the college athlete. From the outsider looking in, many may believe, as I tend to, that the NCAA athlete lives an ideal life. Finally, highlighting society's reverence for the college athlete is the continuing celebrity status in which we hold those who turn professional. The college athlete who becomes professional holds one of society's most coveted positions.

Mother also is one of our most celebrated people. Like the college athlete whose life-style seems to be characterized by free time to play sports, a common perception is that the mother also has oodles of free time to "play

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ics at colleges and universities. Pub. L. No. 92-318, Title IX, § 181, 86 Stat. 304 (codified at 20 U.S.C. § 1681). In early 1984, under pressure from the Reagan administration, Title IX was watered down to cover only those college programs receiving direct, program-specific federal funding. Grove City College v. Bell, 465 U.S. 555 (1984) (institution-wide coverage under Title IX not triggered by failure to execute Assurance of Compliance); *see* Alfano, *Women's Sports In The 80's*, N.Y. Times, Dec. 15, 1985, at V6, col. 3; *see also* Good, *Who's Going To Bat For Girl's Sports?*, Women's Sports & Fitness, June 1985, at 68 (long under-financed women's sports hit harder by gutting social welfare programs and Title IX legislation); McGrath, *Let's Put Some Muscle Where It Really Counts*, Women's Sports & Fitness, Dec. 1986, at 78 (advocating reinstatement of Title IX to bolster women's sports).

Second, funding for men and women is not proportionate to the number of participants; women's sports still get much less than their share. *See, e.g.*, Alfano, *Women's Sports In The 80's*, N.Y. Times, Dec. 18, 1985, at D25, col. 2 (Women's athletics at University of Iowa receive unequal financial treatment). Third, the absence or inadequacy of women's athletic fields and facilities also demonstrates its lesser importance. *See, e.g.*, N.Y. Times, Dec. 17, 1985, at B18, col. 4 (limited facilities at Immaculata College). Fourth, the influence of women over female athletes and programs has decreased dramatically since the NCAA took over the regulation of women's athletics in 1982 from the AIAW (Association of Intercollegiate Athletics for Women). *See* N.Y. Times, Dec. 15, 1985, V6, col. 1 ("Women have no significant effect on reforming the NCAA."). As a result, female athletes have fewer other women as role models. *Id.* at V6, col. 2.

Finally, and one of the truest indicators of the social worth of women's sports, not very many people attend their competitions. For example, NCAA officials report that for the 1987 season in Division I women's basketball, each game averaged 572 spectators; in Division II, the average was 260 per game; and in Division III, the average was 157 per game. Gainesville Sun, Aug. 20, 1987, at D5, cols. 4 & 5. The University of Florida Lady Gators' basketball team averaged 1,620 spectators per game during the 1986 season. Florida's men's basketball team, in comparison, averaged close to 12,000 per home game. Telephone interview with Scott Burson, Assistant Director, University of Florida Sports Information (Aug. 21, 1987). The highest attendance figure at a women's intercollegiate athletic event was 22,157 at a college basketball game between Ohio State and Iowa. N.Y. Times, Dec. 18, 1987, at D26, col. 4. The University of Michigan, a Big Ten rival of Ohio State and Iowa, draws over 105,000 to each of its home football games. Low spectatorship, of course, can be the result of an already biased view that women's sports are not that important and that there is not much to see at a women's athletic competition.

With the recent passage of the Civil Rights Restoration Act, we may see greater financial support for women's athletic programs. *See* Molotsky, *House and Senate Vote to Override Reagan on Rights*, N.Y. Times, Mar. 23., 1988, at 1, col. 6. The Act reverses *Grove City College* and states that federal anti-discrimination statutes apply to an institution in its entirety if that institution accepts federal aid even for a single program.

house." We often presume that she chooses to focus only upon her family and to forego a career outside of the home. Many people view this as an ideal life-style and one that most women want, just as we think that most young people, especially boys, would be college athletes if given the choice.

Like the college athlete, the mother also enjoys a sacred position in our society.[76] As the primary caretaker in most families, her influence over the child is profound and everlasting.[77] Regardless of the quality of the mother-child relationship, the child will constantly try to win mother's approval and love.[78] She may be the most influential person in the child's life. Indeed, mother is so important to individual development, growth, and happiness, that many men marry women who are just like their mothers. Most important, most little girls grow up with the dream of marrying, having children, and being just like their mothers.

Upon assuming the status of NCAA athlete or mother, society's image of the individual becomes more pronounced. Specifically, both the NCAA athlete and mother must maintain an image of being selfless, devoted, and pure. This often means sacrificing personal needs for the welfare of team and family, respectively. We feel little sympathy for the college swimmer who spends hours every day doing endless laps in a pool. When the coach asks the runner whose event is the 800 meter race to forego that event to run a leg of the 400 meter relay, that runner sacrifices the potential for an individual victory for the sake of the team. Consistent with the athlete's image of a devoted, selfless individual, the team comes first.[79]

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76. A mother's elevated and idolized position is directly related to her role as the nurturer—the one who always makes things better. As Jung describes her, "[mother] is the much needed compensation for the risks, struggles, sacrifices that all end in disappointment; she is the solace for all the bitterness in life." C. JUNG, *supra* note 53, at 170. *See generally* D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR (1976).

Psychology, mythology, and religion also describe a "dark side" of mothers, and women in general. Jung suggests, for example, that mother is particularly mysterious to men because, as boys develop into adulthood, they must separate and distinguish their sexuality from their mothers'. In Jungian psychology, the tendency to idolize mothers stems from a fear of mother and the need to separate from her. *Id.* at 136. Psychoanalyst Karen Horney attributes the distrust or suspicion of women by men to men's "minute share in creating new life." K. HORNEY, FEMININE PSYCHOLOGY 115 (1967). In mythology, the underworld was ruled by goddesses, who represented one aspect of the feminine and maternal aspect of life. C. JUNG, *supra* note 53, at 1029-10. In mythology, Pandora symbolically is responsible for the evil in the world, just as Eve is the scapegoat in Judeo-Christian ethic. *See also* G. GORER, THE AMERICAN PEOPLE (1948) (stereotypical, negative and sexist view of women's role in American family as seen by British anthropologist; mothers essentially domineer and emasculate husbands, fathers, sons and men, generally).

77. *See generally* N. CHODOROW, *supra* note 51, at 77-91. *See also* E. FROMM, THE ART OF LOVING 50 (1956) ("The effect [of mother's love] on the child can hardly be exaggerated.").

78. For the young child, winning mother's love and affection is instrumental to the child's healthy development. *See generally* N. CHODOROW, *supra* note 51. *See also* A. MILLER, FOR YOUR OWN GOOD (1983) (analysis of detrimental effect of parent's hidden cruelty on child's psychological health). But even as we get older, mother's influence continues to affect us. Nancy Friday highlights the on-going struggle by daughters to gain their own identities separate from those of their mothers. N. FRIDAY, MY MOTHER/MYSELF (1978). The many sitcoms, soap operas, movies, and books in which mother plays a central role also evidence most people's life-long need for mother's approval. The reader, undoubtedly, has a personal experience that captures best the point being made.

79. *See, e.g.*, Stathopolos, *Getting Her Point Across*, SPORTS ILLUSTRATED, Mar. 9, 1987, at 54. Caitlin Kelly Bilodeaux, U.S. Olympic hopeful in fencing, elected to forego world class competition in Budapest in order to compete for her team at Columbia University. Said Bilodeaux: "My school comes first, and my coach can't have his team losing matches just because I want to go to Europe." *Id.* at 55.

Similarly, the tale of the mother who sacrifices night after night of sleep for her sickly child is an all too familiar story. Although we may feel sorry for her, society also expects her to make such sacrifices. Subordinating an outside career to her husband's, or foregoing a career outside the home altogether, and, in either case, assuming primary responsibility for the family's welfare are the ultimate marks of a devoted, selfless mother.

The most important characteristic of the NCAA athlete and mother is society's expectation that they remain pure. Absence of monetary reward for athletic competition is *the* essential characteristic of NCAA athletics.[80] In contrast, if asked to identify the essential characteristic of motherhood, money probably does not even enter most people's minds. Nevertheless, a significant part of being a mother is nurturing her family without remuneration.[81] Just as an athlete who accepts pay for competing in sports is a professional athlete, a woman who accepts pay for nurturing others is a babysitter, nurse (doctor?) or some other caretaking professional. But she is not a mother.[82] Both the NCAA athlete's and mother's images are built on pecuniary purity.[83]

Finally, by definition the NCAA athlete and mother conceptually have no meaning outside the context of others. As the psychoanalyst Jung might describe them, each is part of a syzygy;[84] each has a counterpart that is essential to its own definition. For example, an amateur athlete, such as the NCAA athlete, is an athlete who is not a professional athlete. It makes little sense to speak of an amateur athlete without the concept of a professional athlete. Likewise, endemic to the word "mother" is the notion that she is a caretaker of others. Without a child, conceptually, mother has no meaning.

In short, college athletes and women enjoy unique and celebrated positions in our society. Biologically and sociologically, they are set apart from non-athletes and men, respectively. They assume positions in team and family hierarchies where the welfare of others comes first. They must maintain their purity, maintain their freedom from the taint of money and the corruption associated with the commercial world. To succeed and meet society's expectations, athletes and women come close to surrendering their total selves.

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80. *See supra* notes 16-49 and *infra* notes 85-88 and accompanying text.

81. *See* N. COTT, *supra* note 61 and accompanying text. Chodorow notes that assumption of the mother-role, "an unpaid occupation outside of the world of public power, . . . reinforces and perpetuates women's relative powerlessness." N. CHODOROW, *supra* note 51, at 31. As Jung points out, the Christian Mother of God "was divested of all the essential qualities of materiality," including her physical form, and given an everlasting place in Heaven. C. JUNG, *supra* note 53, at 138. *See also* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499-01, 1523 (1983) (because of women's economic dependence, "the very act of creating a new family was a kind of market transaction") (footnote omitted).

82. My colleague, Frank McCoy, reminded me of the foster mother, who is paid by the state for taking care of foster children. I see her state payment as less of a payment for the actual nurturing of the foster child, and more of a subsidy for the child's food, clothing and other necessaries. If viewed in this light, the foster mother's compensation is similar to the welfare mother's state assistance. Neither mother is truly paid for being a mother; she is a mother and receives state aid for caring for her child when her own family resources fall short.

83. As Ann Scales said, "Pecuniary purity is otherwise known as poverty." (personal comment on prior draft to author).

84. C. JUNG, *supra* note 53, at 136. Jung defines syzygies as "paired opposites, where the One is never separated from the Other, its antithesis." *Id.*

III. RULES AND LAWS GOVERNING NCAA ATHLETICS AND MOTHERHOOD

The institutions of NCAA athletics and motherhood are heavily regulated to assure preservation of the images of the college athlete and mother as devoted, selfless, and pure. Such regulation also ensures that NCAA athletics and motherhood survive in their present form. A prevalent fear is that unless these institutions are regulated, NCAA athletics and motherhood will change in ways that will adversely affect the institutions of higher education and traditional family, respectively. This section explores the rules and laws governing NCAA athletics and motherhood, and examines the purported justifications for those rules and laws.

A. *Regulating to Maintain the Images*

Under NCAA rules, once an athlete makes a commitment to a particular college or university, the athlete is not eligible to play for any other institution.[85] Even if an athlete transfers to another school, the NCAA rules require that the transferee sit out for at least one year.[86] Signing on with a particular school indicates the athlete's intent to devote himself or herself to that institution.

Once committed to a team, the NCAA rules give coaches tremendous control over the athletes.[87] Because winning is extremely important for the coach[88] and the university,[89] it motivates the coach to maintain tight control over the athlete's life. Such control is premised upon the athlete's total commitment to playing on the team and maximizing the chances for a school

85. Most colleges and universities subscribe to a "letter-of-intent" program. Prior to actual enrollment at a particular school, an athlete is asked to sign a letter indicating that he or she plans to attend that college or university. Once the letter-of-intent is signed, no other school in the program is allowed to recruit that particular athlete. If the athlete decides not to play for the institution indicated in the letter, he or she is forbidden from playing for any other institution for at least two calendar years of intercollegiate competition. *See generally* R. BERRY & C. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES, VOL. II 145-52 (1986).

Recently, Sean Higgins signed a letter-of-intent to play basketball for UCLA. Immediately after signing, he announced that he never intended to commit to UCLA and that he only signed the letter because his step father coerced him and because he had been improperly induced to do so by alumni of UCLA. *See* Keteyian & Wolff, *Signed, Sealed and Sorry*, Sports Illustrated, Feb. 23, 1987, at 24. Higgins declared that he always intended to play for the University of Michigan Wolverines. *Id.* at 25. On appeal, NCAA officials released Higgins from his agreement with UCLA and declared him immediately eligible to play for another college. *Id.*

86. An NCAA athlete generally is allowed to compete in four seasons over a span of five years. The practice of having an athlete sit out for a season is called "red-shirting." When an athlete transfers between institutions, the rules require that he or she must wait one year before being eligible to resume competition at the new school. R. BERRY & G. WONG, *supra* note 85, at 127-30.

87. *See generally* J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 1.12 (1979).

88. Some coaches are notorious for their emphasis on winning. For example, Woody Hayes of Ohio State was fired over an incident in which he hit a Clemson player who had just intercepted a pass that clinched a victory for Clemson. *See* Winfield, *Coach Hayes Ousted by Ohio State for Punching Player*, N.Y. Times, Dec. 31, 1978 at § 5, at 1, col. 6. Still going strong, however, is Indiana's Bobby Knight, whose drive to win has brought him three NCAA basketball championships, along with the scorn and contempt for many of his players. *See* Kirkpatrick, *Smart and Super*, SPORTS ILLUSTRATED, Apr. 6, 1987, at 30, 32-33, 35.

89. Whether a team wins or loses can affect student enrollment, university notoriety, alumni giving, and administrative costs of running the university. *See* Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 106 (1985). *See also infra* notes 131-33 (pressure is on to win for sake of making money).

championship. Consequently, rules prohibiting athletes from drinking, smoking, or keeping late hours comport with the mutual understanding of the coach-athlete relationship.[90] The coach must establish authority over the athlete off the field so that during competition, nothing impedes a top performance by everyone on the team. When the coach tells the quarterback to run a certain play, the quarterback knows that he must run that specific play. The coach's rules, premised upon the individual's devoted and selfless commitment to the team, are law.

NCAA rules also reinforce the social expectations that an athlete will remain pure in mind and body.[91] To be eligible to play on an NCAA team, the athlete must register for at least twelve semester hours of study and be working toward a degree.[92] Most important, NCAA rules are explicit that an athlete cannot accept payment for an athletic performance or for using his or her athletic talent in any way.[93] The rules, however, do allow athletes to receive scholarships for "accepted educational expenses," including tuition and fees, room and board, and books.[94] Outside of these permissible forms of "non-payment," the athlete is not allowed to engage in any conduct that even raises the suspicion that he or she is a paid athlete. Simply selling a player's ticket to a game is considered a violation of NCAA rules.[95] Apparently, a coach cannot even bail an NCAA athlete out of jail by posting bond without violating the rules that prohibit giving unauthorized assistance

90. *See supra* note 87 and accompanying text.

91. Drug abuse is one of the most immediate concerns in collegiate sports. Beginning in the 1980's, the NCAA started implementing policies and guidelines to curb the abuse. *See* R. BERRY & G. WONG, *supra* note 85, at 436-52; Lock & Jennings, *supra* note 42. Perhaps public concern was piqued with the death of basketball star, Len Bias, from an overdose of cocaine. Goodwin, *In Big-Time College Athletics, The Real Score is in Dollars*, N.Y. Times, Mar. 1, 1987 at 26, § 4, cols. 1-4.

In comparison to rules regulating the use of drugs, coaches' rules forbidding long hair seem trivial, but they indicate the extreme degree of commitment to an ideal amateur image. J. SCOTT, THE ATHLETIC REVOLUTION 39 (1971); *see* Davenport v. Randolph County Bd. of Education, 730 F.2d 1395 (11th Cir. 1984). Moreover, making athletes cut their hair has been justified on grounds that alumni might disapprove of long hair, and might be more willing to contribute to the college if athletes presented a more conservative image. *Id.* at 42.

Brian Bosworth's experience at the University of Oklahoma is an excellent example of the interplay between these sorts of concerns. At the beginning of his junior year in 1986, Bosworth was hailed as one of the best players in college football, a Heisman Trophy candidate. Moran, *Bosworth: Getting Better Means Getting Tougher*, N.Y. Times, Aug. 24, 1986, at V9, cols. 1-6. His radical hairstyles and earring were a source of friction even then. *Id.* After another Academic All-American season, Bosworth was barred from playing in the Orange Bowl because he tested positive for anabolic steroids, and then his coach, Barry Switzer, terminated his last year of eligibility after Bosworth walked the sidelines at the Orange Bowl wearing a T-shirt that read, "National Communists Against Athletes" and "Welcome to Russia." *See Bosworth Won't Be Back*, N.Y. Times, Jan. 6, 1987 at B12, cols. 5 & 6; *see* Wolff, *Bosworth Barred From Bowl For Steroids*, N.Y. Times, Dec. 26, 1986, at D7, cols. 1-6; *see also* N.Y. Times, Dec. 12, 1986, at D22, col. 2 (Bosworth maintained a 3.28 GPA in Management Information). Bosworth is under an $11 million, ten-year contract with the Seattle Seahawks. N.Y. Times, Aug. 15, 1987, at 42, col. 1.

92. R. BERRY & G. WONG *supra* note 85, at 110.

93. The NCAA regulations prohibit any form of payment, defined as follows:

> The term "pay" specifically includes, but is not limited to, receipt directly or indirectly of any salary, gratuity or comparable compensation; division or split of surplus; education expenses not permitted by governing legislation of this Association, and excessive or improper expenses, awards and benefits.

R. BERRY & G. WONG, *supra* note 85, at 158 (quoting 1985-86 NCAA Manual, Constitution 3-1-(O.I.2)).

94. *Id.* at 152.

95. *Id.* at 159, n.1.

to the student athlete.[96]

In addition to the often rigid social rules defining appropriate behavior and goals for girls and women, many of our laws also function to maintain the pure image of women as mothers and potential mothers.[97] For example, recent legislative efforts to restrict a pregnant women's freedom to drink or smoke or engage in other conduct potentially harmful to the fetus have gained momentum.[98] Child abuse and neglect statutes also protect the child against the mother who suffers from substance abuse to such an extent that it interferes with her mothering ability.[99] In addition, laws that provide funding for childbirth but fail to provide financial aid for abortions force many poor women into motherhood.[100] During his last year in office, President Reagan proposed regulations that would eliminate federal aid to birth clinics that provided abortion counseling.[101] Under the proposed regulations, a clinic would risk losing federal funds if it simply informed a woman of her right to have an abortion.[102] Presumably, disclosure of such information was unlawful even if the pregnancy jeopardized the woman's life.[103] Courts in Colorado, New York and Massachusetts readily enjoined enforcement of the regulations on the basis that they violated the first amendment freedom of speech.[104] As a result, the Reagan administration temporarily suspended enforcement of the rule.[105] Nevertheless, laws that discourage abortions are premised, at least partially, upon the belief that obtaining an abortion is completely at odds with the expectation that a woman risk everything—even her life—for her child.

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96. Auburn University's quarterback, Jeff Burger, was denied eligibility for the 1987 football season as a result of his coach posting a $700 bond to get him out of jail in July. The Gainesville Sun, Aug. 12, 1987, at D1, cols. 4 & 5; *see* N.Y. Times, Aug. 12, 1987, at 44, col. 1. After Auburn appealed, the NCAA restored Burger's eligibility one week later. N.Y. Times, Aug. 19, 1987, at 42, col. 1.

97. Numerous articles describe how the Supreme Court has used sexual stereotypes, either explicitly or implicitly, to justify its decisionmaking. *See infra* note 106 and authorities cited therein.

98. *See generally* Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); Rush, *Prenatal Caretaking: The Limits of State Intervention With and Without Roe*, 39 U. FLA. L. REV. 55 (1987); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994 (1988).

99. *See, e.g.*, CAL. PENAL CODE § 270 (West 1988); N.J. STAT. ANN. § 30:4C-11 (West 1981); *see also In re* Baby X, 97 Mich. App. 111, 116, 193 N.W.2d 736, 739 (Mich. App. 1980) (newborn suffering from narcotics withdrawal symptoms due to prenatal maternal drug addiction is neglected and within jurisdiction of probate court).

100. A woman does not have a constitutional right to have a government-funded abortion. *See* Harris v. McRae, 448 U.S. 297 (1980); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977). For critical analyses of the Court's decisions in these cases, *see* Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 377 (1985); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984); Perry, *Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113 (1980): Tribe, *Commentary: The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

101. *See* Greenhouse, *Abortion Counseling*, N.Y. Times, Aug. 1, 1987, at 8, cols. 1 & 2 (announcement made on July 30, 1987).

102. *Id.*

103. *Id.*

104. Pear, *U.S. Suspends Plan to Cut Off Funds for Abortion Ties*, N.Y. Times, Mar. 4, 1988, at 1, col. 3. The judge also is quoted as saying that the new rule "is an impermissible burden on the presently recognized rights of a pregnant client . . . to elect an abortion . . . [free from] unduly burdensome governmental interference." *Id.* at B8, col. 4.

105. *Id.* at 1, col. 3.

Additionally, Supreme Court doctrine is replete with cases where the Constitution has been interpreted to reinforce the image of the devoted, selfless mother.[106] An unmarried mother, for example, lacked standing to challenge on equal protection grounds a state law allowing the prosecution of only *married* fathers who failed to pay child support.[107] Discriminating between mothers on the basis of marital status is a form of social reprobation. Being an unwed mother violates the mother-image. A single mother presumably is not devoted to motherhood, that institution which society views as having children within a marriage. The Court's decision not to protect single mothers reflects and sanctions the social belief that single mothers are not part of the ideal institution of motherhood.[108]

Critical to maintaining the mother-image, of course, is the need to dissociate sex from money. For example, our laws criminalize theft of goods or money through extortion as robbery, but they do not criminalize theft of a woman's bodily integrity through identical methods as rape.[109] Similarly,

106. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464 (1981) (gender-based statutory rape law prohibiting sexual intercourse with any female under 18 who was not married to the perpetrator upheld); Rostker v. Goldberg, 453 U.S. 57 (1981) (exemption of women from draft registration upheld). Professor Williams has suggested that *Rotsker* is premised upon the image of women as mothers who should stay home and let men protect them. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 183-85 (1982).

The Supreme Court's approach to sexual equality has been described in many thoughtful, analytical, and creative ways. *See, e.g.*, Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U.L. REV. 1003 (1986) (author compares and contrasts anti-differentiation with anti-subordination approach to equal protection analysis); Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE L.J. 913 (1983) (author compares and Rehnquist-Stewart "real sex differences" approach with the Brennan-Marshall "look beyond sexual-stereotypes" approach to sexual equality); Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 448 (1984) (author examines the construct of woman and the "role of constitutional law in the modern reconstruction of the social order that defines 'woman's place' "); Olsen, *From False Paternalism To False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518 (1986) (author compares formal equality (equal treatment) with substantive equality (special treatment) for women) [hereinafter *False Paternalism*]; Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984) (author provides indepth analysis of *Michael M.*, 450 U.S. 464, from perspective of sexual equality) [hereinafter *Statutory Rape*]; Powers, *Sex Segregation And The Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55 (1979) (author examines effect of segregating women from public sphere and offers suggestion for more integrated and equality-minded society); Scales, *supra* note 50 (author examines failure of rights analysis in obtaining equality for women and implores adoption of feminist jurisprudence); Scales, *supra* note 53 (author explores Court's doctrine with respect to reproductive freedom); Schneider, *The Dialectic Of Rights And Politics: Perspectives From the Women's Movement*, 61 N.Y.U.L. REV. 589 (1986) (author explores good and bad aspects of rights analysis in securing equality in reproductive freedom, freedom from sexual harassment, and battery); Sherry, *Civil Virtue And The Feminine Voice In Constitutional Adjudication*, 72 VA. L. REV. 543, 592-613 (1986) (author compares and contrasts Justice Rehnquist's and Justice O'Connor's opinions on theory that gender of a Justice factors into the Justice's decisionmaking); Wasserstrom, *supra* note 54 (author argues for constitutionality of affirmative action programs). *See also* Maltz, *Sex Discrimination In the Supreme Court—A Comment on Sex Equality, Sex Differences, and the Supreme Court*, 1985 DUKE L.J. 177 (1985) (author critiques Freedman's article, *supra*, suggesting that she understates the differences among the conservative Justices, and that she fails to adequately consider significance of institutional factors on the Justices' decisionmaking).

107. Linda R.S. v. Richard D., 410 U.S. 614 (1973).

108. As Professor Tribe suggests, if an unwed father had sued for declaratory relief challenging the constitutionality of the law on "some theory," "a federal court . . . would no doubt give short shrift to any argument by the state that the father was without standing inasmuch as he might elect to pay child support even in the absence of the law." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18 at 130-31 (1988).

109. Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986).

laws prohibiting prostitution[110] and surrogate contracting for profit are consistent with predominant social expectations about women's sexuality.[111]

The Aid to Families with Dependent Children laws[112] provide a more subtle, but nevertheless forceful, illustration of how laws reinforce the mother image of purity. Recipients must first "fit into" a scheme based on "stereotyped thinking about the 'appropriate' roles of men and women."[113] Those receiving top priority for job placement outside the home are "principal wage earners," most of whom are fathers.[114] The regulatory scheme encourages unmarried mothers with children under school age to stay home and care for them.[115] Once her children are able to attend school, however, the government reduces the benefits under the presumption that the mother can then work.

Totally absent from the AFDC laws is a sensitivity to the working mother's reality: child care continues to be essential to her ability to enjoy most full-time jobs. Underlying society's insensitivity, however, is the assumption that money and mothers are only tangentially related. The AFDC scheme associates paid employment and mothers only as a last resort; that is, only if fathers are absent and children are in school. The government expects the unmarried poor mother with school aged children to remain "jobless" and uncompensated. Often the form of welfare payments she receives, such as food stamps, is not even currency.

Finally, pregnancy disability cases also illustrate how our laws perpetuate the social expectation that women be devoted, selfless, and pure mothers. If a woman's pregnancy disables her and forces her to return home from the working world to assume caretaking responsibility for her child, the Supreme Court has held that she is not constitutionally entitled to disability benefits even if other sex-related disabilities are covered under the employer's disability plan.[116] Laying aside the Court's strained constitutional analysis relied on to reach this conclusion,[117] a decision upholding a right to pregnancy disability benefits for women would have been consistent with promoting the mother-image. While many women probably want to take maternity leaves, a common social perception is that at some stage of the pregnancy, a woman *should* drop her job and focus upon her pregnancy to maximize the chances for the birth of a healthy child. Correspondingly, a decision to deny pregnant women disability benefits is consistent with the view that mothers should not be in the public world in the first place.[118]

110. *See generally* Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979). *See infra* note 305 and accompanying text for discussion of differences between prostitution and surrogacy.

111. *See infra* text at notes 240-327.

112. *See* 42 U.S.C. §§ 601-10 (1982). AFDC programs are supported by federal monies but administered by the individual states. Goldberg v. Kelly, 397 U.S. 254, 256 n.1 (1970).

113. Law, *Women, Work, Welfare and The Preservation of the Patriarchy*, 131 U. PA. L. REV. 1249, 1254 (1983) (footnote omitted).

114. *Id.* at 1259-61 and 1267.

115. *Id.* at 1262-64.

116. Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

117. *See* Scales, *supra* note 53 (excellent critique of Court's decisions in pregnancy disability cases).

118. Within two years of *Geduldig*, the Court adopted the same reasoning in General Electric Co., v. Gildbert, 429 U.S. 125 (1976), to reject a Title VII challenge to a similar health plan. *Id.* at

B. *Consequences of Breaking the Rules*

To ensure that NCAA athletes and mothers conform to social expectations consistent with their images, the rules governing both college sports and motherhood must penalize and deter noncompliance. Breaking rules for the athlete may result in a penalty such as being declared ineligible to play,[119] or losing a college scholarship.[120] Depending upon the infraction, a whole team may suffer from rules violations by team members or coaching staff. For example, Southern Methodist University committed recruiting violations so egregious that it suffered one of the harshest penalties imposed upon an institution by the NCAA.[121] The NCAA prohibited SMU from having a football team in 1987-88 and restricted it in other ways through 1990.[122]

Just as the amateur athlete may be severely penalized for breaking the rules, a mother also subjects herself to harsh sanctions for violating social norms and legal rules governing her status. Such disapproval may come in the form of social ostracism or guilt. Women who choose not to be mothers at all, unwed mothers, mothers of latchkey children, surrogate contract mothers, as well as others, all fail in some way to live up to social expectations. Accordingly, they become prime targets for public reproach. Consider the serious ramifications befalling the mother who fails to meet legally defined standards of appropriate nurturance and care. She risks losing her child to the state.[123] Significantly, even when termination of maternal rights is justifiable to protect the child's welfare, the mother never loses her status as a mother. She becomes the "bad" mother; a label she may never overcome despite any remorse and rehabilitation she may experience. Finally, the state may also elect to bring criminal charges against the mother who

136. Congress reacted to the Court's decisions in *Geduldig* and *Gilbert* by amending the Civil Rights Act of 1964 to prohibit discrimination on the basis of pregnancy. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. §§ 2000e(k) (1982). Still, less than half of working women in America get six-weeks of paid maternity leave, the amount of time most physicians consider desirable. J. AREEN, *supra* note 70, at 132-33. Moreover, "[o]nly five states require disability insurance that provides paid leave to remain at home for a brief period with an infant." *Id.* Even when a woman takes maternity leave, she has no clear right to return to her job. *Id. See infra* note 258 and accompanying text (discussion of recent case, California Federal Savings & Loan Assoc. v. Guerra, 479 U.S. 272 (1987)).

119. R. BERRY & C. WONG, *supra* note 85, at 198-99. Recently, eleven football players on the University of Florida's team were suspended from spring practice and the annual Spring Game because they got into a fight at a local fraternity. Tyler & Garcia, *Smith, 10 Teammates suspended after fight*, Gainesville Sun, Mar. 15, 1988, at C1, cols 2-4. Said Coach Hall, "We will not condone this type of behavior by football players who represent this institution." *Id.* While suspended, "[t]he players [spent their time] lifting weights, running and studying their playbooks." *Id.*

120. R. BERRY & C. WONG, *supra* note 85, at 137.

121. *See* Sullivan & Neff, *Shame on You, SMU*, SPORTS ILLUSTRATED, Mar. 9, 1987, at 18. The violations stemmed from illegal booster payments to players—$61,000 was paid to 13 players with the approval of SMU athletic staff members. *Id.* Critical to the NCAA ruling, however, was the fact that SMU was already on probation for violations committed in 1983, and it was SMU's seventh known offense. *Id.*

122. *Id.* The NCAA had suspended teams only twice before. In 1952-53, Kentucky's basketball team was suspended because of illegal booster payments, and in 1973-75, Southwestern Louisiana's basketball team was suspended for recruiting and academic violations. *Id.* at 19.

123. *See, e.g.*, Lehman v. Lycoming County Children's Services, 458 U.S. 502, 504-05 (1982) (mother who voluntarily placed children with state and had parental rights terminated because of her inability to provide minimal care, control and supervision for them not entitled to federal habeas corpus review).

commits a crime against her child.[124]

The purpose of imposing penalties upon athletes and women is to deter them from engaging in disapproved conduct, and reinforce society's control over them. Because the socialization process indoctrinates girls and boys to accept patriarchy and attempt to fit into society in acceptable ways, it becomes extremely important to an individual's mental health that he or she be able to meet society's expectations. Some athletes crack under the pressure.[125] Some women unable to have children kidnap them,[126] kill parents and steal their children,[127] try artificial means of reproduction,[128] or hire other people to conceive and bear children for them.[129] Given that extreme level of commitment and determination to meet those social expectations, which so often are instrumental to achieving individual happiness, the fear of failing to meet and achieve those expectations gives rule-makers tremendous power over individual athletes, mothers, and women generally. In short, socializing individuals to assume certain roles within the patriarchy through fear of social and legal reprisals for failure is a significantly effective way of reinforcing the patriarchy.

C. *Justifications for the Rules*

Restrictions upon a person's freedom to make choices affecting his or her life call for justification. For example, *why* is an NCAA athlete not free to sign with a sports agent any time he or she wants? *Why* is a woman not allowed to accept a profit for bearing a child for someone else to adopt? Generally, and in descending order of weight, justifications for the rules and

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124. All states make child abuse a crime. *See, e.g.*, FLA. STAT. CH. 827 (1985) (child abuse committed by anyone punishable as felony); *see also* FLA. STAT. CH. 827.071 (1986 Supp.) (sexual abuse of child falls within child abuse statute).

125. *See* Moore, *A Life on the Run*, SPORTS ILLUSTRATED, May 1987, at 76, 87 (story of Gerry Lindgren, one-time Olympic hopeful, now living in Hawaii under an assumed name because his reputation as a runner had grown bigger than he could handle). *See also One Year Later*, Runner's World, June 1987, at 8, cols. 3 & 4 (update on Kathy Ormsby, who was partially paralyzed after she jumped off a bridge during an NCAA Track Championship race she was losing).

126. *See, e.g., Judge Orders Release of Kidnapping Suspect*, The Gainesville Sun, Apr. 18, 1987, at B3, col. 2. This article relates the story of a 19 year old woman who had ovarian cysts and wanted desperately to have a baby. She was accused of kidnapping a four day old infant on March 26, 1987, after breaking into the infant's home, shooting the infant's mother to death, and shooting and stabbing the infant's grandmother. *Id.* Apparently, the young woman had planned the kidnapping for a long time; she had been wearing maternity clothes for months giving the appearance that she was pregnant. *Id.*

127. *Id.*

128. *See generally* Armstrong, *Womb and Board: Medical Advances In Reproduction—At What Costs?*, 33 MED. TRIAL TECH. Q. 465 (1987); Knoppers & Sloss, *Recent Developments: Legislative Reforms In Reproductive Technology*, 18 OTTAWA L. REV. 663 (1986); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983); Shapiro, *New Innovations In Conception And Their Effects Upon Our Law And Morality*, 31 N.Y.L. SCH. L. REV. 37 (1986); Wadlington, *Artificial Conception: The Challenge For Family Law*, 69 VA. L. REV. 465 (1983); Comment, *Artificial Insemination: A New Frontier For Medical Malpractice and Medical Products Liability*, 32 LOY. L. REV. 411 (1986).

129. *See infra* notes 267-312 and accompanying text (discussion of surrogacy and the *Baby M* case). For discussions on surrogacy, see M. FIELD, SURROGATE MOTHERHOOD (1988); Clark, *New Wine In Old Skins: Using Paternity-Suit Settlements To Facilitate Surrogate Motherhood*, 25 J. FAM. L. 483 (1986-87), Comment, *Surrogate Motherhood Agreements and the Law in Pennsylvania*, 91 DICK. L. REV. 1085 (1987), and Note, *Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415 (1987).

laws governing college sports and motherhood rest upon beliefs that they are necessary; they provide benefits and are harmless; and they are traditional.

1. *The "Necessary" Justification*

Two predominant fears seem to underlie the purported justifications for many of the regulations governing college sports and motherhood. First, many in society believe that these institutions would fail due to corruption and immorality if they were not regulated. Moreover, their failure also would jeopardize the continued success of higher education and the traditional family, respectively. Second, many fear that regulation of college sports and motherhood is necessary in some situations to prevent exploitation of the individual athletes and mothers. These fears seem to become especially pronounced with respect to associating college athletes and mothers with the commercial world.

a. *Preserving Higher Education and Family*

Keeping amateurism in college sports is said to be essential to maintaining college athletics—an admittedly valuable institution. Harkening back to the old days when amateur athletics belonged only to the elite, upper classes,[130] paying college athletes might mean that richer schools will be able to afford the best athletes and sport the best teams. Competition levels among colleges and universities would become difficult to control, making some competitions unfair. Some fear that athletes will be "bought," and games will be "fixed;" that college sports will become the gaming table of higher education. The ban on paying college athletes gives at least the appearance that college athletics are "pure" and freely competitive. Allowing athletes to be paid might result in the collapse of a desirable and successful college sports network.

Alternatively, the continuation of the payment restriction on athletes may be critical to maintaining the quality of universities as institutions of higher education. Many colleges and universities continue to rely upon sports to enhance their reputations for the purpose of increasing enrollments. Unlike their historical counterparts, however, many of today's colleges and universities have become dependent upon their athletic programs to provide significant endowments.[131] Some post-season football bowl games pay more than $2 million to each team.[132] After expenses, which include all the athletic scholarships, coaching salaries, and other training expenses, some schools' athletic programs make millions of dollars in prof-

130. *See supra* notes 20-31 and accompanying text.

131. Goodwin, *In Big-Time College Athletics, The Real Score is in Dollars*, N.Y. Times, Mar. 1, 1987, § 4 at 26, cols. 1-3. *See generally* D. DEVENZIO, RIP OFF U.: THE ANNUAL THEFT AND EXPLOITATION OF MAJOR COLLEGE REVENUE-PRODUCING ATHLETES (1986). For a humorous yet astute send-up of the business of college athletics, see C. CORBIN, THE ATHLETIC SNOWBALL (1977). For a monograph aimed at aiding athletic organizations in educational institutions develop marketing plans to sell their produce and/or services, see E. ZIEGLER & J. CAMPBELL, STRATEGIC MARKET PLANNING: AN AID TO THE EVALUATION OF AN ATHLETIC/RECREATION PROGRAM (1984).

132. Goodwin, *supra* note 131. D. DEVENZIO, *supra* note 131, at 27; *see* E. CADY, THE BIG GAME: COLLEGE SPORTS AND AMERICAN LIFE 70-71 (1978) (income of football patron expenditures for six home games at Madison, Wisconsin in 1975 nearly $14 million).

its.[133] Those profits are available for use in non-athletic programs, such as research, instruction, faculty salaries, and general scholarships.[134] In addition, alumni giving often is directly related to a school's athletic achievements.[135] Because most institutions of higher education depend upon private donations to maintain themselves, having a successful athletic program can affect the institution's over-all financial security and growth. Thus, athletics gives many colleges and universities an identity that not only enhances enrollment, but also enriches the school financially. Most important, because college sports have been successful in enabling institutions of higher education to survive and even flourish, the incentive to maintain things the way they have been is high.

The taint on college sports that comes from paying student athletes might also affect the school's overall reputation. Alumni and potential alumni do not want to be associated with institutions thought by many people to be corrupt and immoral. For example, Southern Methodist University's recent scandal has threatened its accreditation and funding.[136] Moreover, in an effort to establish a sports program that will lure students and provide funding for the college, administrative officials might be tempted to slight the academic aspect of the college, causing its reputation to suffer academically.[137] In short, many people believe that paying college athletes forbodes disaster for both athletic programs and higher education.

Similarly, regulating motherhood to keep women in the mother role is thought by many to be necessary to the preservation of the traditional family. Closely related, because the family unit provides the basic child care system in this country, its continued existence is thought by most members

133. Goodwin, *supra* note 131. Some schools spend $3 million per year and gross over $9 million in their athletic programs. *See* D. DEVENZIO, *supra* note 131, at 106-08 (University of Michigan football in 1984 posted a $2 million profit).

134. *But see* Begly, *Current Economic Status of Intercollegiate Sport* in SPORT AND HIGHER EDUCATION 287 (D. Chu, J. Segrave, & B. Becker, eds. 1985) [hereinafter SPORT AND HIGHER ED.] Author concludes that the total expenses incurred in operating many intercollegiate sports programs exceeds the revenues that are generated at almost all levels. Although Notre Dame revenues did exceed costs in the 1980-81 years, the profits were far from stunning. Income from football and basketball concessions was greater than $4 million while income after expenses was only $29,000. *Id.* at 283.

135. Sack & Watkins, *Winning and Giving* in SPORT AND HIGHER ED. *supra* note 134, at 299. Authors found that actual yearly fluctuations in a school's football performance had little impact on alumni contributions. However, they conclude that elimination of college sports would lead to financial disaster. *Id.* at 304. *See also* Alfano, *Power in Purse Strings*, N.Y. Times, June 11, 1986 at D27, cols. 4-6. A team's won-loss record was listed 15th of 19 reasons why booster groups have been cited by NCAA officials as being the primary source of NCAA violations involving money. Boosters apparently frequently make cash payments to athletes or give gifts such as automobiles. According to one athletic director: "it is a constant battle with boosters. They think the only way to win is to do things they shouldn't." *Id.* at D30, cols. 1-6.

136. The United Methodist Church considered severing its 76-year affiliation with SMU and stopping its annual $1 million donation to the school. SPORTS ILLUSTRATED, Mar. 16, 1987, at 9.

137. For example, Jan Kemp, an instructor at the University of Georgia was dismissed for opposing favored academic treatment for college athletes. A jury awarded her more than $2.5 million in damages and lost wages. Goodwin, *Protestor of Georgia Grades Policy Wins Suit*, N.Y. Times, Feb. 13, 1986, at B23, col. 1; *see* N.Y. Times, May 6, 1986, at B12, col. 6 (Kemp settles for $1.08 million after judge reduced jury award to $680,000). An audit performed by academic investigators revealed 87 academically deficient athletes who were admitted to the University of Georgia, as well as nine football players who had failed a remedial course being allowed to play in the Sugar Bowl because University officials intervened. Clendinen, *State Survey of Georgia U. Cites Preferential Grading For Athletes*, N.Y. Times, Apr. 4, 1986, at A26, cols. 1 & 4.

of society to be essential to democracy and capitalism. Motherhood is a touchstone of life as we know it, and as many of us like it. The rules are necessary to ensure that this does not change.

Consistent with our socialization, many women assume primary responsibility for overseeing their children's upbringing.[138] Consequently, this isolates many women from the commercial world. For those women who do work outside the home, they often have jobs that require little or no personal identification or investment.[139] Thus, many mothers employed outside the home largely define themselves in relation to their families, not their non-domestic jobs. Further, whether or not they are market wage-earners, many women desperately or unquestioningly also assume the mother's job. For whatever reasons, many women simply may not question their role assignments. Many are unaware of, or think it is impossible or undesirable to implement, or simply cannot afford, alternative child care systems that would free them from their domestic responsibilities and enable them to assume places in the public sphere that would provide them with identifications unrelated to their familial role. Moreover, many women accept the suggestion that even if alternatives were feasible, success in the commercial work would still escape them because women, unlike men, are not as qualified to compete in the market place.[140]

Assumption of the mother-role by women, in turn, liberates men from their child caretaking obligations. As a result, men are able and expected to be active participants in the labor market, which is essential to promote our capitalistic society. Some suggest that having a wife and child dependent upon him motivates the husband/father to produce goods in order to meet his economic familial obligations.[141] Because most men learn to and actu-

138. Our society believes in family privacy and autonomy from the state. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing a "private realm of family life which the state cannot enter"). Because of the state's respect for family privacy and its general disinterest in actively participating in childrearing, the responsibility falls on mothers. A number of prominent scholars have noted that the state's general lack of interest in the dynamics of family life allows for the continuation of male dominance in the private sphere. This dominance is seen in a variety of forms, from excluding women from the public world, to exploitation of women by men, to actual physical abuse of women by men. *See generally* Law, *supra* note 100, at 958, 960-62; Law, *supra* note 113; MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 656-58 (1983); Olsen, *supra* note 81, at 1506-13; Olsen, *Statutory Rape*, *supra* note 106, at 392-93; Powers, *supra* note 106, at 78-79; Scales, *supra* note 53; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW 118-19 (D. Kairys ed. 1982).

139. *See supra* note 70 and *infra* note 250.

140. Horner, *Toward an Understanding of Achievement-related Conflicts in Women*, in THE PSYCHOLOGY OF WOMEN: ONGOING DEBATES 165-202 (M. Walsh ed. 1987) [hereinafter PSYCHOLOGY OF WOMEN]. The ongoing debate as to whether women do indeed have a "fear of success" continues. Dr. Horner, in the early 1960's, found that women did not exhibit the same "achievement imagery" that she found in men. However, she found that women did not avoid success because of fear of failure but rather because of a fear of social rejection as a result of success. *Id. But see* Paludi, *Psychometric Properties and Underlying Assumptions of Four Objective Measures of Fear of Success*, in PSYCHOLOGY OF WOMEN, at 185 (author finds no reliable correlation between sex-role orientation and fear of success).

141. *See generally* Z. EISENSTEIN, *supra* note 54, at 47-49. Professor Eisenstein explores Jerry Falwell's and George Gilder's view of the family in a capitalistic state. From their views, Professor Eisenstein reports that, "[m]arriage creates the sense of responsibility men need: 'A married man . . . is spurred by the claims of family to channel his otherwise disruptive male aggressions into his performance as a provider for a wife and children.' " *Id. quoting* G. GILDER, WEALTH AND POVERTY 67 (1981).

ally do abandon the domestic sphere to women and establish themselves in the commercial world, they may be equally unaware of, or afraid of changes that would jeopardize their perceived freedom. Men's perspective, as a group, thus requires the preservation of motherhood because it gives them both the security of family and the ability to be free of it.

In summary, because of prevailing beliefs that motherhood is essential to our democratic, capitalistic society, those making the rules and laws believe that mother's role needs to be clearly defined and controlled.[142] Significantly, the rules and laws comprising the socialization process are so effective at maintaining our belief in the traditional family unit that some people cannot see alternatives to the tradition. The rules and laws surrounding motherhood necessarily preserve the status quo. And because most members of society believe that it is necessary to preserve the status quo, the rules and laws serve their function and largely go unchallenged.

b. *Preventing Exploitation of the Individuals*

The belief that regulation is necessary to prevent exploitation supports the second major justification for regulating NCAA athletics and motherhood, and in particular dissociating them from commercialism. This exploitation argument has at least two possible rationales. Exploitation can arise in a situation where allowing one party to a relationship to "out-contract" another party would impoverish the second party.[143] Alternatively, exploitation can arise when one party to a relationship takes advantage of another party's inability to judge the consequences of entering into the relationship.[144] The disadvantaged party is said to suffer from "false consciousness," and "needs her choices controlled in her own best interest."[145]

The "voluntary" master-slave relationship illustrates these principles. The party agreeing to be the slave may be competent and fully aware of the consequences of his or her decision. He or she may even have sound reasons for making the contract. However, to socially and legally sanction the rela-

142. *See generally* MacKinnon, *supra* note 138; Morgan, *Making Motherhood Male: Surrogacy and the Moral Economy of Women*, 12 J. LAW & SOC'Y 219 (1985); Powers, *supra* note 106; Olsen, *supra* note 81. *See also* Karst, *supra* note 106, at 456-60 (men need to control women as childbearers to protect their own identity); Law, *supra* note 113 (welfare laws promote state control over poor women's status as individuals who must fit mother-image and remain economically dependent); Rifkin, *supra* note 54, at 94-5 (primary means of preserving capitalistic, patriarchal values is through legal regulations aimed at keeping women in private sphere).

143. Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 634-35 (1982). On paternalism generally, *see* D. VANDEVEER, PATERNALISTIC INTERVENTION (1986).

144. Kennedy, *supra* note 143, at 589.

145. *Id.* at 572, 589. Professor Kennedy suggests that false consciousness is based upon the premise that in a patriarchal society "upper class males . . . [have] superior knowledge, honor and virtue to those below them." *Id.* at 588-89. Part of their gimmick to maintain their elevated status is to induce those below them to accept the hierarchy, and accept what the elites think is best for them. *Id.* at 589. By accepting patriarchy, those excluded from the realm of the elite develop a "true consciousness." *Id. Cf.* Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983). Professor Kronman speaks of the inability to make sound judgments in a more conventional sense. To over-simplify his articulate and eloquent description of judgment, he suggests that someone lacks good judgment when he or she lacks the creativity to be able to critically and objectively reflect upon an action, *id.*, at 789, and anticipate the moral consequences of the action based upon the person's "character and aspirations." *Id.* at 791. Professor Kronman notes that someone with a weak imagination is more susceptible to making regrettable decisions. *Id.* at 794. *See also infra* note 146.

tionship would be morally wrong in and of itself.[146] Consequently, society intervenes to void the agreement because it feels the contract impoverishes the slave and is therefore too harmful to the slave to be conscionable.[147]

Suppose society does not condemn the voluntary slave agreement as inherently immoral. Nevertheless, exploitation may occur if the individual slave is incapable of understanding the ramifications of his or her decision to enter into the agreement.[148] Under this view, some individuals who would agree to be the life-time slave of another fail to truly comprehend the essence of the agreement. Even if the slave-to-be believes the contract is in his or her best interest, society intervenes to void the agreement because it sees that the individual suffers from false consciousness. The slave-to-be therefore must be protected from his or her decision by voiding the agreement.

The distinction between the inherently immoral agreement and the false consciousness agreement is subtle, but significant. If society determines that a relationship is inherently immoral, that decision, by definition, binds everyone. While some members of society may disagree with the majority's conclusion, they cannot hope to prove that involvement in the relationship may be immoral for the majority but moral for them. A particular kind of relationship is either immoral for all, or it is not inherently immoral.

Conversely, society's determination that an agreement is void because one party suffers from false consciousness allows for the possibility of selective application. Who falls into the group of false consciousness sufferers largely depends upon the perceptions of those making the selection. The selectors' perceptions about the needs and abilities of the sufferers, in turn, depends upon what they have been taught about the sufferers. Because the selectors' perceptions may be premised upon inaccurate information, often stereotypes that sweep too broadly, some people may be erroneously labeled false consciousness sufferers.

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146. Kennedy *supra* note 143, at 635. *See also*, Kronman, *supra* note 145. Professor Kronman distinguishes three types of paternalistic limitations on contract. Some limitations are imposed for economic efficiency and distributive fairness reasons. *Id.* at 765. Some are justified on the basis of preserving personal integrity. *Id.* Finally, some limitations are imposed on the basis of sound judgment. *Id.* Paternalistic intervention for the purpose of protecting personal integrity, according to Professor Kronman, is morally justifiable. "A person who would give away too much of his own liberty must be protected from himself, no matter how rational his decision or compelling the circumstances." *Id.* at 775. Under this justification for paternalism, Professor Kronman distinguishes between the regrettable and disappointing decision. A party to a contract regrets a decision when he or she wishes that he or she had never made the contract because the original goals have completely changed since the contract was made. *Id.* at 780. In contrast, when a contract does not meet the party's goals and expectations, he or she experiences disappointment; the goals remain the same. *Id.* For similar accounts, see Feinberg, *Legal Paternalism* in PATERNALISM 13-14 (R. Sartorius ed. 1983); Dworkin, *Paternalism: Some Second Thoughts*, in PATERNALISM 105-11; Regan, *Paternalism, Freedom, Identity, and Commitment*, in PATERNALISM 113-38.

147. Kronman, *supra* note 145. The self-enslavement contract represents an example of the need for paternalistic intervention to protect personal integrity. Professor Kronman suggests that what makes such a promise "immoral," is the possibility for specific performance in the event of breach. *Id.* at 779, 783. Being unable to extricate oneself from a bad decision is essential to one's integrity and sense of self-respect. *Id.* at 783. The same concerns arise with the sale of body organs. *See generally* Note, *Regulating The Sale of Human Organs*, 71 VA. L. REV. 1015 (1985) (advocating regulation of market, not total ban on sales); *see also* Andrews, *My Body, My Property*, Hastings Center Rept. Oct. 1986, at 28, 31-32, 34-35 (ban on sale of human body organs is paternalistic).

148. Kennedy, *supra* note 143.

i. *The College Athlete*

A college premises its relationship with a student athlete upon the mutual understanding that the student's primary purpose in being in school is to receive an education, which the school promises to make available. While athletic competition also may be available to the student, participation generally is not essential to the agreement. This understanding changes, however, when the student athlete accepts an athletic scholarship. Maintaining the athletic scholarship is dependent upon the student keeping his or her promise to play. While the understanding now is that the student will compete athletically for the school, the school remains obligated to provide the athlete with an education. Presumably that continues to be the student's primary purpose in matriculating; athletic competition plays a secondary role.

In NCAA athletics, the promise to provide a student with an education in exchange for the student's promise to perform on an athletic team has not been socially condemned as inherently immoral. First, neither playing college sports nor earning a college degree is immoral. Nor does bargaining to exchange the two (necessarily) impoverish the athlete, the weaker party to the contract. Quite the contrary: the school offers the athlete one of the most valued opportunities in our society—the chance to earn a college education. Also available to the student athlete, although not part of the agreement with the school, is the possibility of being drafted into a professional sports league. Finally, although the student athlete gives up significant freedom to control his or her life during college,[149] the loss of self is not total and permanent as it is with the slave, for example. Most important, whatever loss of self the student athlete surrenders to the school, it lacks the evilness and debasement that inhere to the master-slave type relationship. Thus, unlike the slave contract, the agreement between the school and the student athlete on scholarship should not be condemned as inherently immoral.

Is regulation of NCAA athletics necessary to protect those students who suffer from false consciousness? Certainly one of the justifications for the tight regulation of college sports is a prevalent fear that without NCAA regulations setting academic and recruiting standards, unscrupulous college and university officials might "buy" recruits who lack the requisite academic talent to matriculate and graduate, but who will be able to boost the school's standing in athletic competition. Despite the school's knowledge of the athletes' academic deficiencies, the school might (deceptively) reassure the recruits that they have nothing to lose. The schools will do everything to ensure that they graduate. But even if they do not graduate, the school may tell student athletes that this is their chance to be drafted as a professional. Of course, what the school may not tell the students is that school officials do not control or decide who gets recruited by the professional scouts.

At the end of four or five years, the athletes recruited by the unscrupulous officials may be ineligible for a degree, and they may not be drafted into a professional sports league. When this happens, the presumption is that the

149. *See supra* notes 91, 93-96, 119-22 and accompanying text.

athletes suffered from false consciousness and that schools have exploited them. Implicit in this assumption is the belief that the athletes would not have entered into the relationship if they had truly understood the terms. Under this view, the unscrupulous colleges will have taken advantage of the students' athletic skills, and given them false hopes and empty promises in return. The student athletes will not have earned a college degree and they will not be a professional. They will have misunderstood the demands and expectations placed upon them by the school's false representations that they were academically qualified to matriculate. They also will have over-estimated the school officials' power to help them turn professional. NCAA regulations that set recruitment and academic standards and prohibit payments to athletes, for example, are said to be necessary to minimize, and to the extent possible, prevent this type of exploitation of student athletes believed to suffer from false consciousness.

ii. *The Surrogate Contract Mother*

Surrogate contracts take many shapes and forms.[150] The most common type arises when a woman and a man agree to have the woman bear the child for the man using his sperm and her egg and womb to conceive the baby.[151] As part of the agreement, the man agrees to assume all medical costs of the woman, and she agrees to surrender the child to the man when the child is born.[152] Although some women enter into surrogate contracts for altruistic reasons, other women insist upon being paid a fee to perform the contract.[153]

Opponents of surrogacy justify their position by relying upon the exploitation arguments. In one group are those who condemn such arrangements as inherently immoral. Members of this group might admit that a woman might be competent and have legitimate reasons to enter into the surrogate contract with the father of the child. For example, it is quite understandable that one sister might become a surrogate contract mother for another sister who could not have a child herself.[154] Nevertheless, the opponents believe that to allow any woman to agree to carry a baby for nine

150. *See generally* M. FIELD, *supra* note 129; O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C.L. REV. 127, 130-33 (1986) [hereinafter *Commercial Conceptions*]. The first instance of surrogacy appears to have occurred when Hagar bore a son, Ishmael, for Abraham and his wife, Sarah. GENESIS 16:1-16 (King James Version). Biblical figures Rachel and Jacob also had seven children through a surrogate. *Id.*, at 30:1-21.

151. O'Brien, *Commercial Conceptions*, *supra* note 150, at 132. In what O'Brien calls a "full surrogate pregnancy," the surrogate contract mother only contributes her womb as an "incubator" for the woman's eggs which have been fertilized in vitro. In a "partial surrogate pregnancy," the surrogate contract mother contributes, in addition to her womb, her own egg, which has been fertilized by the father's sperm usually by artificial insemination. *Id.* at 131 n.21. *See also Clinic in Ohio Starts Egg Donor Plan*, N.Y. Times, July 15, 1987, at A16, cols. 2-4 (under the first egg donor plan in the country, eggs will be removed from the donor, fertilized by the sperm of the recipient's husband, then these embryos will be placed in the uterus of the recipient; the plan will cost approximately $5,000 for a single attempt).

152. O'Brien, *Commercial Conceptions*, *supra* note 150, at 135.

153. *Id.*

154. Acting as a surrogate for her own daughter, one woman gave birth to triplets. The ova of her daughter, which had been artificially inseminated by her son-in law, had been transplanted into her womb. Battersby, *South African Woman Gives Birth to 3 Grandchildren, and History*, N.Y. Times, Oct. 2, 1987, at A9, cols. 1-2.

months, and then to surrender it to the father—who often is a man whose only connection to her is a result of the agreement—impoverishes the mother and the baby.[155] Opponents in this camp believe that surrogate contracting debases the mother-child relationship and commodifies the child, even though the contracting mother's motive may be purely altruistic. Like the slave contract, then, some opponents of surrogacy believe it is inherently immoral and should be prohibited.

In a second group are those who support surrogacy generally, but who oppose allowing the surrogate contract mother to make a profit. Members of this group are concerned about the effect payment to the surrogate contract mother might have on the child. While baby selling is a legitimate social concern,[156] it tends to mask another fundamental concern some group members have with respect to exploiting women, especially poor ones. Members of society who oppose surrogate contracting for profit justify their position by relying upon the alternative rationale which underlies the exploitation argument. They suggest that any woman who would agree to bear a child for someone else *for money* suffers from false consciousness; she lacks the capacity to understand the consequences of her decision. Absent some believable altruistic motive, such as having a child for a relative, members of this group are unwilling to accept the possibility that a woman would knowingly and voluntarily enter into a surrogate contracting arrangement. Ironically, they point to the woman's economic motive as evidence of her vulnerability to exploitation, particularly when the woman may appear desperate for money.[157] Her opponents believe that the woman may see no other way out of a devastating economic plight. They conclude that she is

155. *See* O'Brien, *The Itinerant Embryo and the Neo-Nativity Scene: Bifurcating Biological Maternity*, 1987 UTAH L. REV. 1 (1987) [hereinafter *The Intinerant Embryo*]; O'Brien, *Commercial Conceptions*, *supra* note 150. *See also* Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate*, 22 TULSA L.J. 281, 312-14 (1987) (general discussion of exploitation concerns).

156. *See infra* notes 306-12 and accompanying text.

157. *See The Itinerant Embryo*, *supra* note 155, at 29-31. O'Brien suggests that women who are likely to be induced into a surrogate arrangement are indigent or more in need of money than other women who are not so motivated to enter into such arrangements. *Id.* at 31. She then suggests that because these women are so desperate, they might be tempted to become surrogate contract mothers for modest fees, even for mere grocery money. *Id.* (footnote omitted). By condoning surrogate contracts, then, society would be "creating a caste of childbearers." *Id.*, *citing* G. COREA, THE MOTHER MACHINE 272 (1985). Her conclusion is that if the law sanctions surrogate contracts, it would be promoting the exploitation of women, especially "ethnically and mentally disadvantaged women." *Id.*

O'Brien's argument is tempting, but ultimately unavailing. First, most women who become surrogates do so for money, see *infra* note 299, but they also average two years of college, are white, married, and have children. *See infra* note 310. Second, to suggest that women might be lured into surrogate contracts for sums that seem paltry to some people is hardly a reason to deny them the opportunity to enter into them at all. This is especially so where a "paltry" sum to them is not paltry at all, or where they are able to command a high price, by any standards, for their services. Third, the amount of money a woman might be able to bargain for in a surrogate contract is really beside the point; the critical issue is whether she is competent to bargain at all.

Admittedly, a woman who enters into a surrogate contract may feel duress after making her decision. For example, Mrs. Whitehead argued that she was not fully informed of the consequences of her contract with the Sterns, and did not truly understand what she was doing. *In re* Baby M, 217 N.J. Super 313, 377-78, 525 A.2d 1128, 1148 (N.J. Super. Ct. Ch. Div. 1987) *aff'd in part and rev'd in part* 109 N.J. 396, 537 A.2d 1227 (1988). A psychological evaluation of her during the screening process, in fact, indicated that she might have trouble surrendering the child for adoption. *Id.* at 378, 525 A.2d at 1149. Nevertheless, the family court found her competent. *Id.* at 1149. The New

willing to bear a child for profit solely for the purpose of ameliorating her economic problems. Thus, to protect the woman from her own vulnerabilities and potential for being exploited, some members of society believe that the law should prohibit a woman from becoming a surrogate contract mother for profit.

2. *The "Beneficial" and "Harmless" Justification*

Second to the "necessary" justification for regulating college sports and motherhood is the argument that because athletes and mothers benefit from being in their roles, any regulations imposed upon them are permissible. In other words, the benefits an individual derives from playing NCAA athletics or being a mother are the *quid pro quo* for the restrictions placed upon them. Moreover, the argument continues by suggesting that the regulations are harmless. Because they are harmless, the individual athletes and mothers have no cause to object to them.

Focusing upon college athletes, many of them would not be able to attend college without the athletic scholarship.[158] From a poor student's perspective, a scholarship to attend college and participate in NCAA athletics may provide a break in the cycle of poverty that characterizes his or her family's history. For many students, then, the athletic scholarship provides a true and invaluable benefit—the opportunity to earn a college education. Indisputably, as college graduates, student athletes will have greater potential to enjoy a higher standard of living than they would have without the degree.

And the benefits of being an athletic scholar start even before graduation. During college, an NCAA athlete receives expert coaching and training, and has available some of the best athletic facilities in the world. Consequently, the student athlete is able to develop his or her maximum athletic potential, increasing the possibilities of turning professional. In short, everything the athlete could want during college is essentially provided. Everything the athlete could aspire to be awaits him or her upon graduation. Under the view that regulations are beneficial and harmless, it follows that the college athlete has no use for compensation beyond the scholarship.

The analysis of the beneficial-harmless justification for regulating women's lives is similar to that of college athletes'. In many ways, the benefits

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Jersey Supreme Court, in contrast, found the screening report more significant. *In re* Baby M, 109 N.J. 396, 437, 537 A.2d 1227, 1247-49 (1988).

Notwithstanding the fact that some women, like Mrs. Whitehead, might be misled into entering into a surrogate contract, to suggest that women generally are unable to make an informed decision about using their reproductive capabilities to make money is overly broad and paternalistic. It is particularly offensive to suggest that poor women and women of color are somehow even more unable to make decisions. *See supra* notes 143-47 and accompanying text. Understandably, the image of women as only "baby makers" needs to be dispelled. Supporting a woman's right to choose to become a surrogate contract mother, however, should not impede efforts to create an image of women as competent individuals who, in addition to being able to reproduce, are just as talented as men.

158. *See infra* note 171 and accompanying text (story of Isiah Thomas). Nevertheless, athletic scholarships are not dependent on need. *See* H. APPENZELLER, SPORTS & LAW—CONTEMPORARY ISSUES 129 (1985).

women derive from their life-time investment in taking care of their families are immeasurable. Most women are loved quite deeply by their husbands and children. Most women also are proud of their families, enjoy a sense of self-fulfillment, and are grateful for the wonderful life their families have given them. In addition to the emotional fulfillment women expect for becoming mothers, they also expect that their economic needs will be met. By assuming the mother role within the traditional family, a woman is reassured that she will have a home, food, and other necessaries. If her husband fails to provide these amenities, there is the promise of state welfare benefits.[159]

Moreover, assumption of the mother role also gives her assurance that she need not compete in the public world. She need not develop other skills because she will not need to leave the domestic sphere.[160] Because she has no need to relate to the commercial world, rules that keep her away from it are harmless. For example, prohibiting a woman from making a profit pursuant to a surrogate contract merely protects the woman from exploitation. As the argument goes, she is no worse off as a result of the harmless prohibition.

To the extent the rules, regulations, and laws governing NCAA athletics and motherhood are necessary to maintain those institutions, as well as the institutions of higher education and the traditional family, they also provide essential benefits to society. The United States has one of the best educated populations in the world.[161] Many also would agree that the traditional family is one of the most important sources of health and happiness for an individual in this country.

Finally, supporting the "harmless" justification is a premise that subjection to the rules and regulations of NCAA athletics and motherhood is entirely voluntary. If an athlete wishes not to abide by a rigid routine, he or she can refrain from joining the NCAA, or quit.[162] Theoretically, the athlete is free to train under the auspices of a private club or coach.[163] Similarly, a woman can elect not to become a mother. Or, she can choose to delegate caretaking responsibility for her family to someone else. Maybe she and her spouse can simply work out an arrangement that frees the mother of the strictures surrounding motherhood. But nobody is making the NCAA

159. *See generally* Law, *supra* note 113, at 1281 (examination of how welfare system that discriminates against poor women by making them dependent promotes patriarchy).

160. *See generally* Blum, Homiak, Housman, and Scheman, *Altruism and Women's Oppression*, in WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION 222 (C. Gould & M. Wartofsky, eds. 1976).

161. According to statistics compiled in 1980, the United States ranked first out of 122 countries in the percentage of the population over 25 with a post-secondary education. In literacy, for men, the United States ranked 18 out of 154 countries in 1981, and for women, it ranked 13 out of 143 countries in 1980. In 1980, the United States ranked 9 out of 137 countries in educational expenditures per capital. FACTS ON FILE, INC., 1984 NEW BOOK OF WORLD RANKINGS.

162. For example, Bruce Kidd, a Canadian distance runner turned down athletic scholarships in the United States because of the rigorous dual meet schedule. He would have been expected to run a relay and three distance events at each competition. J. SCOTT, *supra* note 91, at 44.

163. For example, Carl Lewis failed to maintain his grade point average and was declared ineligible to run track for the University of Houston. *See, Lewis, Sprinter, Ineligible*, N.Y. Times, Jan. 25, 1982, at C21, cols. 1 & 2. He continued his schooling at Houston and trained for the Olympics while there. *See, Track Star's Alternative*, N.Y. Times, Jan. 26, 1982, at C15, cols. 2 & 3.

athlete or mother do anything. Under this theory, if they do not like the rules, they can choose not to assume the roles.

3. *The "It's Traditional" Justification*

The "it's traditional" argument brings us full circle. When all other justifications for rules prove unconvincing, the force of the "it's traditional" one takes on added weight.[164] Traditionally, amateurism has been the primary characteristic of college sports. Removing the athlete from commercialism elevates the athlete's place in higher education to the lofty perch with knowledge and truth. Over the years, we have learned to look up to the college athlete, much the way we revere college itself. The amateur athlete has earned a place in traditional higher education.

More and more women are becoming market wage-earners, thus breaking away from tradition. But in many respects, the tradition of dissociating women from the work place endures. More important, woman's assumption of the traditional mother-role still remains a hallmark of life in our society. What would life in America be like without *mom*, baseball and apple pie?

Finally, those who support continuing the traditions argue that if regulation of college sports and motherhood were not working, the rules and regulations would have been relaxed or abolished long ago. But because it has always been done and it has been going on for so many years—over 80 years for NCAA athletics and forever for motherhood—society must be doing something right. Under this theory, the long tradition alone is sufficient reason to adhere to old ways.

IV. RE-EVALUATING THE JUSTIFICATIONS: A CALL FOR CHANGE

Recent debates over such questions as whether professional scouts should be allowed on campuses and whether college athletes should be paid, highlight the need to re-examine the justifications for adhering to the amateur ideal in college athletics. Similarly, debates over surrogacy provide a timely opportunity to re-evaluate the role of women in our society. What do we gain by holding college athletes and women to such high ideals and standards? What do college athletes and women lose as participants in systems that seriously restrict their freedom to move away from their traditional and stereotypical roles? Most important, what do *we all* lose as a result of our failure to explore and accommodate the changes going on around us?

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164. Each of us believes in tradition with respect to something in our lives—weddings or graduation ceremonies, to name two possibilities. The concepts of precedent and stare decisis, for example, are the foundation for legal analysis in the United States. *See generally* Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41 (1979-80) (explanation of various forms of judicial usage of stare decisis); Israel, *Gideon v. Wainwright, The "Art of Overruling,"* 1963 SUP. CT. REV. 211, 217 (suggesting danger in overruling precedent). Tradition can be quite a compelling reason for adhering to a system, procedure or custom. This is particularly true where the tradition does not harm anyone, and promotes a sense of unity, and spiritual bonding. When tradition is invoked to promote systems or values that are harmful, however, it should give way to higher principles of morality and justice. The Supreme Court feels less constrained to adhere to precedent, for example, in constitutional cases where the impact of a "wrong" decision can be more imposing. *See* Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 406-07, 410 (1932). *See also* Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979) (limited reasons for deviating from precedent). Rush, *supra* note 98, at 89-94 (role of stare decisis in overruling Roe v. Wade).

A. *The Amateur Ideal*

1. *An Elusive Quest?*

Historically, the move from "pure" amateurism to "scholarship" amateurism was not detrimental to colleges or college sports. Today, the monetary value of an athletic scholarship at some private universities exceeds $10,000 just for the annual tuition and fee waiver.[165] The non-monetary value of receiving a college degree from an accredited institution is immeasurable. Thus, the reality is that a *true* amateur athlete is a rarity on college campuses, and has been for some time now. And the fans could not seem to care less.

Moving away from "scholarship" amateurism to "professionalism," however, is a bolder step. Admittedly, college sports enhance student enrollment and bring a sizable amount of money into many universities.[166] At present, no one knows how abandoning the amateur ideal beyond present rules might affect either enrollment or gross receipts. Nor are we quite sure what we would be saying about how we value education for education's sake if we were to permit a "professional" college sports program. What we do know, however, is that NCAA athletics is built upon the amateur ideal and that it is "successful." We also know that the pursuit of truth and knowledge in environments shielded from "real" world influences and political pressures is one of our most treasured values. Finally, what we fear is that if we were to move away from the amateur ideal, what we know about college sports and higher education might no longer be true.

But our fear about changing should not inhibit us or prevent us from visiting the practice fields and looking behind the ivy walls to see what we should see. Not surprisingly, our initial glance shows us many young people in college who otherwise might not have that opportunity.[167] We also see many happy young athletes who exude a sense of confidence, pride, accomplishment, and success. They are part of and important to a university's athletic team, which is highly valued in this society.

The newly found niche of fame and security overwhelmingly contrasts with many of the athletes' pre-college lives. While many were high school athletic stars, many of their lives also were characterized by poverty and a daily family struggle to make it.[168] Significantly, almost half of the athletes in college football, baseball and basketball are black.[169] The struggle of blacks to overcome cultural biases and racial animosity in our society has been unique and unending.[170] Participation on a college team, therefore, literally makes the American dream of "moving up" a reality for some athletes and their families.[171]

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165. For example, tuition at Vanderbilt University for the academic year 1987-88 was approximately $10,500. Telephone conversation with Bursar's Office, Vanderbilt University (Aug. 14, 1987).

166. *See supra* note 133 and accompanying text.

167. *See infra* note 171.

168. *Id.*

169. Hill, *Pressure on the Black College Athlete*, N.Y. Times, Aug. 7, 1983, at S2, cols. 1-4.

170. *See generally* D. BELL, AND WE ARE NOT SAVED (1987).

171. For example, Isiah Thomas, the youngest of nine children, grew up "in the heart of the ghetto on Chicago's harsh West Side." *See* Nack, *'I Have Got To Do It Right,'* SPORTS ILLUS-

A tour of the practice fields and libraries also shows us many things that are not so good and should be re-evaluated. For example, Proposition 48, effective in 1985, is an attempt by the NCAA to tighten academic standards for college athletes.[172] Under Proposition 48, a potential recruit must have a minimum grade point average of 2.0 and combined Scholastic Aptitude Test score of 700 to be eligible for competition in college.[173] Proposition 48 seems to comport with the predominant social belief that colleges have a responsibility to accept only those students who are likely to succeed and graduate in their programs. By setting minimum academic requirements for potential athletic recruits, Proposition 48 reflects a concern that colleges and universities live-up to their academic responsibilities to the athletes.

A closer examination of Proposition 48, however, reveals just how weak a commitment it exacts from colleges and universities to educate their athletes. First, let's assume, for illustrative purposes only, that it is legitimate to use the SAT as the norm for evaluating every applicant's chances for success in college.[174] Anyone taking the SAT automatically scores a minimum of 400 for answering only one question in each of the math and verbal parts of the exam, and can score as high as 1600.[175] The national average score is 906.[176] Admission to most prestigious universities, including the Division I schools, where most of the best athletes enroll, requires an even higher score, usually over 1000 and often over 1200.[177] Finally, eligibility is denied only in the freshman year to athletes who do not meet minimum requirements. After that, they become eligible to play.[178] The statistics for 1987 reveal that of 684 students who failed to qualify under Proposition 48, 424 failed because they did not attain the minimum 700 SAT score, but enrolled in Divi-

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TRATED, Jan. 19, 1987, at 60, 64. After a career at the University of Indiana on a basketball scholarship, Isiah signed with the Detroit Pistons. He currently is under a ten-year contract for $12 million, and shares his wealth with his family. *Id.* at 72. He recently bought his mother a ranch house in Clarendon Hills, a Chicago suburb. *Id.* Incidentally, Isiah never graduated from college. He is just 22 credits away from a degree in Criminal Justice from Indiana. Thomas has said about his degree: "I gotta finish school. I have to finish, you see, because I'm the start of a new tradition, of a new family era." *Id.*

172. Sack, *Looking Behind the Proposition 48 Image*, N.Y. Times, Nov. 9, 1986, at S10, cols. 2-6. "Most news media references to the new rules credit the N.C.A.A. with 'setting tough academic standards' or with 'restoring academic integrity' in college sport." The author found, however, that the new regulations are merely a gimmick designed primarily to improve public relations rather than to institute real academic reform. *Id.*

173. *Id. See generally* Hanford, *Proposition 48*, in SPORT AND HIGHER ED., *supra* note 134, at 367-72. Alternatively, a score of 15 on the America College Test (ACT) is sufficient. *See infra* note 230.

174. George H. Hanford, President of the College Board, argues that the NCAA proposal misuses the concept of standardized tests. By making a single score applicable to all schools, the new regulations violate proper test application. Test scores, according to Mr. Hanford, should be set by individual schools according to the institution's experience with the test scores. The specific score allowed for admittance should be based on the score's predictive power in relation to other admissions criteria at a particular institution. Hanford, *supra* note 173, at 368. *See also infra* notes 186-89 and accompanying text (unfairness of SAT to some candidates).

175. Edwards, *Educating Black Athletes*, in SPORT AND HIGHER ED., *supra* note 134, at 377, 381.

176. This average score does not necessarily reflect the scores of students who are college bound. *Are More Blacks Bound for College?* U.S. NEWS AND WORLD REPORT, Oct. 5, 1987, at 13.

177. *SAT's, School by School*, U.S. NEWS AND WORLD REPORT, Oct. 26, 1987, at 90.

178. *See New Standards Studied*, N.Y. Times, May 15, 1987, at D22, cols. 4 & 5. *See* Hanford, *supra* note 173.

sion I schools anyway.[179] In short, assuming the SAT accurately reflects a student's chances for succeeding in college, requiring that athletes achieve only a 700 on the exam evidences an insincere commitment to recruiting athletes who are likely to succeed in college.

Reality seems to bear this out. For example, a major study of athletes' academic performances over a 10-year period at Colorado State University revealed that athletes generally scored lower than non-athletes on the SAT and had lower high school GPA's.[180] The graduation rate for athletes who scored below 700 on the SAT was only 18%.[181] The problem is magnified when one considers only football and basketball, the revenue producing sports. Although only 29% of athletes who took the SAT during this period participated in those two sports, 47% of them scored below 700.[182]

The picture is bleaker for black athletes. The Colorado study found that blacks generally were less academically qualified *according to traditional standards* than their white counterparts.[183] Other statistics reveal that although almost half of the athletes in college football, baseball, and basketball are black, 75% of them do *not* graduate.[184] Thus, the number of athletes who leave college after four years without a degree is disproportionately high for blacks.[185]

A major problem is that many athletes come from economically disadvantaged backgrounds and, through no fault of their own, have poorly developed mathematical and verbal skills, but are admitted anyway. Educational studies indicate that some groups, including women, blacks, and Puerto Ricans, do not score as high on the SAT as their white male counterparts.[186] Thus, exacerbating the problem is the assumption that the SAT exam accu-

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179. *Id.*

180. Purdy, Eitzen, & Hufnagel, *Are Athletes Also Students? The Educational Attainment of College Athletes* in SPORT AND HIGHER ED., *supra* note 134, at 224-25.

181. *Id.*

182. *Id.*

183. *Id.* at 227. Dr. Harry Edwards attributes the problem of blacks being less academically prepared for college to a number of factors. He first suggests that lower standardized test scores can be traced to class differences and not race. He points to poor schools for blacks, parents who do not participate in school activities, and high schools which place greater emphasis on sport achievement than on academic achievement. Many black students who emerge from high school are not ready academically for college. Edwards, *supra* note 175, at 378-84 (emphasis added).

184. Hill, *supra* note 169. Nyquist, *The Immorality of Big-Power Intercollegiate Athletes*, in SPORT AND HIGHER ED., *supra* note 134, at 108. *See also* Edwards, *supra* note 175, at 375.

185. Exploitation of athletes falls hardest on the poor and students of color. J. SCOTT, *supra* note 91, at 90. *See also* Note, *supra* note 89, at 96-97 n.3 (1985) (the number of illiterate athletes who leave college after four years is disproportionately high for blacks, although problem affects all races). For a detailed statistical analysis of graduation rates among athletes compared to the general college student population in one study, see Purdy, Eitzen, & Hufnagel, *supra* note 180, at 221-32. A comparison of graduation rates of athletes by race is unavailable, but recently, Congress proposed legislation that would require universities receiving federal financial assistance to publish and make available graduation rates by student athletes. The "Student Athlete Right to Know Act," sponsored by (D) Sen. Bill Bradley, and (D) Rep. Ed. Townes, is still in committee. *See* S.580 and H.R. 1454, 101st Cong., 1st Sess. (1989).

186. In 1985, the average national score for men was 938, and 877 for women. The average score of black men was 748, and 705 for black women. For Puerto Ricans, the average scores were 820 and 744 for men and women, respectively. *SAT's Are Biased Against Girls*, N.Y. Times, April 17, 1987, at B2, cols. 1-4. *See also* Edwards, *Educating Black Athletes* in SPORT AND HIGHER ED., *supra* note 134, at 378. At one national meeting to discuss the NCAA Proposition 48 regulations, presidents of black colleges protested the use of standardized tests. "Calling the use of standardized entrance exams discriminatory, the presidents of the black colleges attempted to eliminate their use.

rately measures the success potential of all college applicants. But reality proves this assumption to be inaccurate. For example, women generally score 60 points lower than men on the SAT.[187] Moreover, 1981 statistics indicate that 49% of black male students failed to achieve a 700 on the SAT.[188] The percentages for other minorities and for white males were 27% and 14%, respectively.[189]

By making the SAT exam the norm against which all athletes are evaluated, the NCAA is making assumptions based upon race and class differences that are illegitimate and unfair.[190] Because the SAT exam is culturally biased against blacks and other historically "marginalized" groups, the NCAA's reliance on the SAT exam to measure the predictable college performance of those students promotes race and class stereotypes. As Professor Charles Lawrence suggests, the conclusion most likely to be drawn by our predominantly white society from data showing that blacks score lower than whites on a standardized test is that blacks are not as smart as whites.[191] Some members of society attribute the differences to genetics.[192] Others may reject the genetic theory, justifying their belief in the inferiority of blacks on their perception that black culture, because it is different, is inferior.[193] In short, consciously or unconsciously, many whites believe in the "myth of racial inferiority," and low standardized test scores of blacks buttress their beliefs.[194]

How does this social attitude affect the individual athletes who barely attain or do not meet the minimum SAT scores? Recall that they can, and

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There are 17 predominantly black Division I schools and all were present to vote." *Entrance Exams Voted by NCAA*, N.Y. Times, Jan. 14, 1986, at A19, cols. 5-6.

187. Evangelauf, *Critics and Defenders of Admission Tests Eye Court's Limit on Use*, The Chronicle of Higher Education, Feb. 15, 1989, p. 1, col. 3. The recent furor over the question whether SAT's are biased against particular groups arose over a federal court's decision to enjoin a state's reliance on SAT scores to award scholarships. The court found that such reliance discriminated against women. *See* Sharif v. N.Y. State Education Dept., 709 F. Supp. 365, 367 (S.D. N.Y. 1989).

188. Edwards, *supra* note 175, at 379.

189. *Id.*

190. Although the SAT exam is written and administered in a neutral fashion, that is, without regard to individual characteristics of the examinee, it nevertheless has a significantly adverse impact on many examinees who stray from a white, middle-upper class background. SPORT AND HIGHER ED., *supra* note 134, at 362-63 (editors introductory comments to section on Reform). Whenever a minority group scores lower than the group setting the standard, we should be suspicious that the exam is invalid with respect to the minority group. For example, the Supreme Court has held unlawful under Title VII an employer's reliance upon standardized intelligence test results when blacks, as a group, scored lower than whites on the test and the test showed no relationship between particular scores and job performance. Griggs v. Duke Power Co., 401 U.S. 424, 431-36 (1971). *But see* Washington v. Davis, 426 U.S. 229 (1976) (standardized exam used by employer to measure verbal skills of potential police officers did not violate equal protection clause without showing of racially discriminatory intent even though four times as many blacks as whites failed the exam). For a critical analysis of *Washington*, see Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 369-76 (1987). *See also infra* notes 191-94 and accompanying text.

191. Lawrence, *supra* note 190, at 373, 375.

192. *Id.* at 373. Two prominent proponents of the superiority of whites over blacks were Arthur Jensen and William Shockley. For a general background on their work, see Delgado, Bradley, Burkenroad, Chavez, Doering, Lardiere, Reeves, Smith and Windhausen, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128, 136-41 (1983).

193. Lawrence, *supra* note 190, at 374.

194. *Id.* at 375.

many do,[195] sign with schools anyway and simply sit out their first year. Those athletes probably feel some stigma;[196] they probably feel to some extent that they really do not belong at college and that they are only there for the purpose of playing their sports. For athletes of color, the stigma may be more debilitating and degrading, because many people may relate the students' low scores to their race. To the extent the athletes themselves buy into the predominant assumption that the SAT measures their likely success in college, they enter college without great academic expectations of themselves. Thinking that they might fail increases the likelihood that they will.

Reliance on the SAT also causes an unfair distribution of scholarship money. Because scholarship requirements are at least partially based on SAT scores, colleges may be unfairly denying financial aid to many students. For example, only one out of ten athletic scholarship recipients is black, although over half of college football, baseball, and basketball players alone are black.[197] Twenty-five to thirty-five percent of black athletes whose talents would otherwise earn them a scholarship cannot accept them because of academic deficiencies.[198] Those students are usually scouted by a four year college and encouraged to attend an "accommodating" junior college.[199] At junior college, they continue to develop their athletic skills while making the grades to transfer to the four year institution.[200] This practice is commonly known as the nationwide "slave-trade."[201]

Moreover, the NCAA's passage of Proposition 42 early this year illustrates how removed some members of the Association are from the world of economically disadvantaged athletes, many of whom are members of minority groups. Proposition 42 denies financial aid to athletes who fail to meet both requirements of Proposition 48. Specifically, an athlete must attain both a 700 SAT score (or 15 on the American College Test) *and* a 2.0 grade point average to be eligible for a scholarship. In reality, 90% of the new rule's victims are black.[202] Basketball Coach John Thompson, of Georgetown University, protested the implementation of Proposition 42 by boycotting two of his team's games.[203] A Berkeley sociologist responded that Proposition 42 is "an elitist, racist travesty."[204] As a result of the outcry, NCAA officials decided to reconsider Proposition 42, which would have

195. *Supra* notes 178 & 179.

196. Delgado, *supra* note 192, at 199-201, stating that, "A public accusation that one is less intelligent or worthy than another or even that one's genetic heritage carries a predisposition to low mentality can seriously damage self-respect. When the accusation attributes a permanent and unchangeable inferiority associated with race, the potential for psychological injury is great." (footnotes omitted).

197. Edwards, *supra* note 186, at 375. *See supra* note 187.

198. Edwards, *supra* note 186, at 375.

199. *Id.*

200. *Id.*

201. *Id.*

202. Ashe, *Coddling Black Athletes*, N.Y. Times, Feb. 10, 1989, at A35, col. 2.

203. Rhoden, *Thompson Walks and So Do Hoyas*, N.Y. Times, Jan. 15, 1989, at G3, col. 1. Coach Thompson's actions stemmed from his belief that the new rule hurts poor students and has a disproportionately negative effect on black students. Rhoden, *Thompson Says He Might Persist in Boycott*, N.Y. Times, Jan. 17, 1989, at D21, col. 2. Eventually the NCAA decided to re-evaluate the new rule and postpone its effective starting date. *See infra* note 204.

204. *See* Ashe, *supra* note 202 (quoting Harry Edwards, a sociologist at the University of California at Berkeley).

taken effect next year.[205]

Once in college, the student-athlete is under tremendous pressure to succeed academically and athletically. Practice consumes a major portion of the day.[206] Even if the athlete is not working to finance his or her education, little time or energy is left for studying after practice. Nevertheless, to stay in good academic standing, the athlete must maintain a "C" average.[207] What is "average," however, generally is measured by the same standards that govern the SAT—the performance level of white, middle to upper class students. When economically disadvantaged students, many of whom are black, or other minority group members, fail to make the grades, we should not be surprised *or judgmental.* Imagine how the pressure is intensified for athletes who have only marginally developed mathematical and verbal skills because of their economically disadvantaged backgrounds.

Finally, our journey to the playing fields and libraries also reveals that, in fact, many athletes do accept payments in violation of NCAA regulations. For example, the NCAA severely penalized Southern Methodist University in 1987 for violating NCAA regulations when its athletic staff approved payment of $61,00 to 13 football players.[208] The NCAA recently accused Oklahoma football players of earning as much as $4,000 each season by selling complimentary football tickets to boosters.[209] Of 22 Oklahoma football players interviewed, eight said that they had benefitted from ticket sales or had known about them.[210] Further, a local bank apparently arranged special loans to players for cars, knowing that the players would receive this cash windfall once a year.[211] The terms of the loan included a single payment per year, made at the time the players received their money for the tickets.[212]

In summary, although our sojourn through the world of college athletics reveals that many young athletes do receive substantial benefits as a result of competing in the NCAA, in reality, many young athletic scholars are not *traditional* scholars at all.[213] Many come from economically depressed backgrounds where meaningful education may not be available or where education may have a lower priority in relation to economic survival. Consequently, many of them approach college with poorly developed mathematical and verbal skills. Others may fail because we expect them to, they expect to, and because they are evaluated against standards that do not accurately measure their abilities or value their experiences. All the while, of course, the student athletes are under overwhelming emotional, physical, intellectual and often financial pressure.

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205. Oberlander, *Rift Over New Rule Eases After NCAA Agrees to Seek Delay*, The Chronicle of Higher Education, Feb. 1, 1989, at A29, col. 2. (NCAA officials proposed legislation to delay the effective starting date, set at August 1990).

206. Purdy, Eitzen & Hufnagel, *supra* note 180, at 231.

207. R. BERRY & G. WONG, *supra* note 85, at 150.

208. *See* Sullivan & Neff, *supra* note 121.

209. N.Y. Times, Oct. 7, 1987, at B14, col. 6.

210. *Id.*

211. *Id.*

212. *Id.*

213. Sack, *supra* note 172 ("[A]thletes with extremely limited verbal and mathematical skills have become a standard feature at almost all Division I schools.").

Notwithstanding the odds against the success of many athletes, especially poor ones, some colleges nevertheless will take a chance on admitting the athlete because of the benefit the university receives from the athlete's talent.[214] Once on campus, the young person fulfills the college's athletic demands, but finds lacking any kind of support system that will help him or her meet the academic challenges. Impugning the student's integrity, some schools allow athletes to take less rigorous programs, which may include such "classics" as backpacking, to ensure that the athletes maintain their playing eligibility.[215] Hoping to make it into professional sports, where many people, including the athlete, may think the college degree is superfluous, the athletic scholar trudges along academically while shining as an athletic hero.[216] Because only eight percent of college football and basketball players are drafted by professional teams, and because only two percent actually do sign contracts,[217] many of them leave college without a sports career or a degree.

2. *Exploitation*

> The true stake is this decades-long gentlemen's agreement between the NFL and the college powers-that-be that has kept all but a handful of football-playing collegians from turning pro before their four-year use to their schools is exhausted. The pros get a free farm system that supplies them with well-trained, much-publicized employees. The colleges get to keep their players the equivalent of barefoot and pregnant.
>
> The Wall Street Journal[218]

What do the above revelations mean? First, they cast doubt upon the belief that removing college sports from the commercial world is necessary to preserve both collegiate athletics and higher education. It would be naive to suppose that simply the *pretense* of maintaining the amateur ideal is essential to continuing the current system. *Thinking* NCAA athletics is pure does not change the reality. Admitting that we have moved away from the ama-

214. One example presented by Appenzeller involves a young basketball star with learning disabilities who failed to meet academic standards, and was passed from school to school so that they could capitalize on his athletic talent. H. APPENZELLER, *supra* note 158, at 118.

215. For example, eight athletes sued California State University for $14 million dollars for failing to provide them with an education. Over a course of 4-6 years, the school did not require them to take the standard curriculum and instead, allowed them to take non-substantive courses such as backpacking so that they could maintain their grade point averages and athletic eligibility. H. APPENZELLER, *supra* note 158, at 118. Seven of the athletes settled with the University, and the University issued a public statement expressing its regret for what had happened. *Id.*

216. For example, Kevin Ross, a former Creighton University basketball player, went back to elementary school in Chicago to try to learn how to read. *Brief Setback for College Gladiators*, N.Y. Times, Feb. 19, 1986, at A22, col. 1. Memphis State University has graduated only 4 out of 38 basketball players since 1973, and none of its black players have graduated. *Id.* At the University of Connecticut, Earl Kelley, a star basketball player, was found academically ineligible and had to sit out the 1986 season with only 6 games left to play. Only 4 basketball players at the University of Connecticut had graduated in the last 10 years. *UConn Is Taking New Look At Sports*, N.Y. Times, Mar. 2, 1986, at Sec. 23-4, col. 6.

217. Hill, *supra* note 169.

218. Klein, *College Football: Keeping 'em Barefoot*, The Wall Street Journal, Sept. 4, 1987, at 15, col. 1 (Sec. 1). *See also* Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1856, 1925 n.262 (1987) (Professor Radin briefly explores commodification of sexuality in context of prostitution; makes analogy to college athletes).

teur ideal, in practice if not in theory, certainly would be more honest.[219]

The above discourse should also cause us to question how valuable NCAA athletics is in relationship to the value of higher education. The sin here is not necessarily that we sometimes and in some ways value college sports more than higher education, but that we often forget that the athletes are individuals. Moreover, many of them are individuals who belong to groups that historically have been oppressed in this country. Most athletes will have limited sports careers.[220] Nevertheless, we let the immediate gratification of a competitive college game become so important to us that we care more about winning than we do about the academic achievement of the individuals and their careers after college. Perhaps our inability or unwillingness to see the harm done to some NCAA athletes reinforces our faith and commitment to NCAA sports generally, and the amateur ideal specifically.

Ironically, one of the major justifications for maintaining tight NCAA regulations, especially the amateur ideal, is to prevent the exploitation of athletes. In the abstract, the student athlete's relationship with the university seems extremely positive and certainly moral. Moreover, it might seem unrealistic to suggest that college athletes do not truly understand what their athletic scholarships or their commitments to various universities mean, and that they therefore suffer from false consciousness. We also should be hesitant and cautious about labelling the athletes false consciousness sufferers. Because many of them are students of color, the paternalistic attitude takes on heightened significance and tends to promote racial stereotyping. Thus, condemning the athlete's relationship with the college on the basis that it is inherently immoral or because the athlete needs his or her choices controlled perhaps is too extreme.

But exploitation is and should remain a major concern. In many of their relationships with athletes, schools are falling short of their promises. If a school were allowed to recruit a young person for his or her athletic talents and promise him or her nothing in return except the opportunity to play, we would be tempted to condemn the agreement as inherently immoral. That agreement would impoverish the athlete, even if he or she fully understood the terms. And what changes this conclusion if instead of promising the athlete nothing, the school promises him or her an education it knows the student is likely never to achieve? Does the distant opportunity of turning professional remedy our objections to the vacuous promise?

Notwithstanding the negative aspects of collegiate athletics, I am, and probably many others are, not ready to abolish them. As empty as a school's promise might be to an athlete, and as remote as that athlete's chances might be for graduating and/or turning professional, slim chances are better than none.[221] For student athletes, the key to the magic kingdom of professional sports is college athletics.[222] Moreover, a college education symbolizes intel-

219. J. SCOTT, *supra* note 91, at 90; R. SIMON, SPORTS AND SOCIAL VALUES 142 (1985).

220. *See* text *supra* at note 217. The average length of a professional football player's career is 3½ seasons. Lipsyte, *The Athlete's Losing Game*, N.Y. Times Magazine, Nov. 30, 1986, at 58.

221. Edwards, *supra* note 175, at 380-81.

222. R. BERRY & G. WONG, *supra* note 85.

ligence, success, and power. Because it is one of the most significant achievements in our hierarchy of values, the opportunity to obtain a college education should be available to members of all classes and races.[223] In my opinion, then, our focus should be on how to increase the odds that college will be a successful and "winning" experience for our student athletes.

3. *Suggested Alternatives*

> In a different way, I cannot empathize totally with the pain of blacks in racist societies, because I am white, and my whiteness both protects me and has influenced me at levels to which I do not have ready access. Yet does that excuse me from reading black literature, hearing black pain and joy, listening to the experience of blacks, *as* blacks? Does that mean I should not attempt an empathic understanding because it cannot be total? Or will my increased understanding allow me to be a more responsible moral agent, a more effective lawyer/law professor, a better legal decisionmaker? To the extent I understand what it is I face, I understand my moral options. I simply cannot pretend absolute certainty.
>
> Lynne Henderson[224]

a. *The Payment Plan*

One alternative to the existing structure of amateur athletics is to openly abandon the amateur ideal and pay college athletes. Experience tells us that paying an athlete to play for a particular college does not necessarily mean that education will lose its lofty place in our hierarchy of values. If an athlete wants to attend college classes and attempt to obtain a degree, paying the student to throw a discus, for example, should not interfere with the student's objective. Scholarships, as well as jobs that exact commitments from students for other types of activities—doing research, acting as teaching assistants, feeding flies in a genetics lab, serving food in the dining hall—do not diminish the inherent value of higher education. While some activities are more closely related to traditional educational objectives (research and teaching), other means of earning money are legitimate ways for students to spend their time. Often, in fact, it may be necessary for them to work part-time jobs to finance their educations.

Equally, if not more important, paying student athletes might eliminate one aspect of the exploitation concern. At one extreme, a payment plan might be adopted by the NCAA that allowed colleges to recruit athletes, without regard to their academic talent or interest in higher education. The college athlete undoubtedly would be someone who was not quite talented and mature enough to turn professional. Let's call this the "semi-professional" plan. Alternatively, a new NCAA payment plan could continue to

223. *See generally* Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988).

224. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1585 (1987) (footnote omitted). *See also* Karst, *supra* note 223, at 42 ("The most important questions to ask are questions about belonging: Does this form of poverty [or racism, or sexism] marginalize its victims, excluding them from effective participation as equal citizens?").

endorse present recruiting efforts, allowing colleges to admit athletes who also meet *minimum* academic standards like Proposition 48. Let's call this the "quasi-professional" plan.

Just as the present scheme is not inherently immoral, neither would it be immoral to give student athletes *something*, albeit money, in return for their promises to play. Moreover, by paying the athletes and demonstrating our appreciation for their talents by showing how much we truly value them, we diminish the possibility that the athletes will suffer from false consciousness. When their association with the college ends, neither the semi-professional athletes who did not expect degrees, nor the quasi-professional athletes who may have failed to obtain one will have been exploited or *feel* as though they were used.

In addition, a system that permitted payment of college athletes might enhance academic standards. A pure semi-professional plan divorces college sports from academe. Colleges would not be tempted to lower academic standards by offering trivial courses simply to accommodate athletes.

Admittedly, a decision to turn semi-professional would significantly change collegiate athletics. Some of the changes would be perceived as negative. For example, the athlete's relationship to the school would be that of an employee. Strikes, unions, worker's compensation, and other facets and complications that attach to an employer-employee relationship would also attach to the university-athlete relationship. The semi-professional athlete would have no other official affiliation with students at the university. The comaraderie between students and semi-professional athletes probably would not develop, possibly detracting from the overall support and enthusiasm students might otherwise have for players and teams. Finally, the student who is not "talented enough" to be semi-professional regrettably might be excluded from participating in college sports. Participation in college athletic competition can be as valuable a learning experience as participating in academic contests.

Alternatively, the quasi-professional plan might enhance academic standards and avoid many of the negative effects associated with paying college athletes. In essence, the quasi-professional plan would not significantly alter the present system with respect to athletes' association with their schools. Although they would be part-time employees of their schools, in other respects, they would be just like any other students working their way through college. Consequently, quasi-professional athletes would be expected to maintain and meet academic standards.

Naturally, colleges would be free, and could even be required by the NCAA, to provide support for quasi-professional athletes who need extra academic attention. As long as the school honors its promise to pay quasi-professional athletes for playing sports, maintaining and meeting academic standards generally would be up to the individual athletes. The "high-risk" admittee should be advised of his or her chances of successfully completing the program. Failing to graduate, although understandably disappointing, is less likely to mar the quasi-professional student's entire college experience. Not only will the athlete leave college with a valuable and enriching experi-

ence, but under this plan any feelings of having been used should be minimized.

In summary, separating college sports from the labor market may not be necessary. Academe and sports can be divorced without damaging either higher education or collegiate athletics.[225] But given the limitations of such a plan, is there not perhaps a better way to improve the chances that student athletes succeed?

b. *Proposition 48 Modified*

> "Background doesn't mean Old Family," said Jem. "I think it's how long your family's been readin' and writin'. Scout, I've studied this real hard and that's the only reason I can think of. Somewhere along when the Finches were in Egypt one of 'em must have learned a hieroglyphic or two and he taught his boy. . ."
>
> "I don't think that's what background is, Jem. . . No, everybody's gotta learn, nobody's born knowin'. That Walter is as smart as he can be, he just gets held back sometimes because he has to stay out and help his daddy. Nothing's wrong with him. Naw, Jem, I think there's just one kind of folks. Folks. . ."
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> "That's what I thought, too,. . . when I was your age. If there's just one kind of folks, why can't they get along with each other? If they're all alike, why do they go out of their way to despise each other? Scout, I think I'm beginning to understand something. I think I'm beginning to understand why Boo Radley's stayed shut up in the house all the time . . . it's because he *wants* to stay inside."
>
> Harper Lee[226]

A second alternative might be to build upon the Proposition 48 concept. This alternative is premised upon the belief that the most important value of attending college is intellectual growth and development, highlighted by earning a degree in a particular discipline. In an ideal world, all students who matriculate at college would succeed in their fields of study and graduate. College entrance standards are adopted by universities with this ideal goal as their objective.

With respect to college athletes, the NCAA could choose to adopt standards that more accurately reflected a high success potential. Recall that in one study less than eighteen percent of athletes who scored lower than 700 of the SAT graduated.[227] Modifying Proposition 48 to comport more with what experts relate is a high success rate would also comport with our goal to increase the likelihood that students graduate. Proposition 48, as modified, would have more meaning that it presently does.

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225. Roberts, *Rules for Athletes Are Elitist*, N.Y. Times, Oct. 4, 1986, § 1 at 24, col. 4. *But see* the Ivy League athletic programs. Pursuant to their charter, the Ivy's do not have athletic scholarships, see Note, *supra* note 89, at 118 n.125, and they are notorious for their general lack of athletic prowess. But then there are exceptions even to that general rule. For example, Cornell's lacrosse team made the NCAA finals last year, and actually won the title in 1971, 1976, and 1977. *Cornell '87*, at 15 (Summer 1987). Significantly, statistics for 1982 show that almost 100% of all athletes in the Ivy League graduated that year, compared to the 40% graduation rate of all athletes in the Pacific 10 Conference. Hill, *supra* note 169.

226. H. LEE, TO KILL A MOCKINGBIRD 239-40 (1960).

227. *See supra* note 181 and accompanying text.

The major problem with this plan is that it magnifies the discriminatory effect already felt by Proposition 48's implementation. If it is illegitimate to assess all applicants' success potential according to the success potential of white middle to upper class males, and I believe that it is, then raising the numbers under Proposition 48 is illogical. Moreover, this solution eliminates many talented athletes from the college eligibility pool—for the most part because of their race, or class, or cultural background. Fourteen percent of white students, forty-nine percent of black students and twenty-seven percent of other minority students already do not score over 700 on the SAT.[228]

In my opinion, then, to raise standards beyond the ability of those groups who have historically been disenfranchised, is fundamentally unfair. Significantly, this solution results in the continued exclusion of many minority and poor students from the university community. It virtually eliminates any chances they have of earning college degrees or turning professional. In other words, it means that many young people cannot be part of a highly valued institution in this society and cannot use that experience as a springboard for attaining positions of wealth and power in our society.

Raising Proposition 48's numbers also sends a message that can have profound effects upon the individual. In essence, we are telling certain young people that they do not belong in college because all they have to contribute is athletic prowess and they need more—more as measured by standards that are meaningless to them. Modifying Proposition 48, then, to reflect "meaningful" standards may make the situation worse. While the absence of those athletes from campus diminishes the college experience for all students, the impact is felt most harshly on those who are excluded—black, other minority, and/or economically disadvantaged students.

c. *Valuing the Differences*

> [T]he commitment of those who seek racial justice remains strong. Tangible progress has been made, and the pull of unfinished business is sufficient to strengthen and spur determination. But the task of equal-justice advocates has not become any easier simply because neither slavery's chains, nor the lyncher's rope, nor the humiliating Jim Crow signs are any longer the main means of holding black people in a subordinate status. Today, while all manner of civil rights laws and precedents are in place, the protection they provide is diluted by lax enforcement, by the establishment of difficult-to-meet standards of proof, and, worst of all, by the increasing irrelevance of antidiscrimination laws to race-related disadvantages, now as likely to be a result as much of social class as of color.
>
> Derrick Bell[229]

A third alternative, and the one I favor, may seem the most implausible. It is premised upon acknowledging the value of obtaining a higher education, the value of being an exceptional athlete, and the value of a non-white,

228. Edwards, *supra* note 175, at 378-79.
229. D. BELL *supra* note 170, at 5. *See also*, Lawrence, *supra* note 190.

less than middle or upper class community. Perhaps naively, it asks why the athlete cannot be accepted into the university for his or her athletic talent and cultural background. Rather than making athletes feel as though they must also be scholars in the *classic* sense, why not accept them for who they are?

Removing the pretenses of traditional academic admissions requirements is fundamental to this alternative. How the athletes score on the SAT or other exams would be irrelevant.[230] Admission could be premised upon athletic talent alone. By eliminating the pretense, we might also eliminate much of the discrimination against non-white, less than middle or upper class applicants. Perhaps removing the stigma that attaches to failing to meet irrelevant standards would enhance students' esteem, integrity, and pride in their talents and abilities.

Eliminating standardized test requirements for athletes' admission to college does not mean that academic standards also become irrelevant,[231] or that we lose sight of the value of academic learning. At present, the notion that students must meet meaningful minimum verbal and mathematical skills before entering college simply is not true for the athlete. At a minimum, high school students would continue to be expected to achieve basic verbal and mathematical skills. This suggestion recognizes, however, that many students, especially low income students, have disadvantaged backgrounds with respect to learning basic verbal and mathematical skills and therefore do not learn the minimum skills by the time they attend college. Rather than penalizing them for society's failure to provide meaningful educational opportunities,[232] why not acknowledge our responsibility to provide them with a meaningful education, and at the same time, appreciate the value they and the rest of society place on athletic prowess. For example, the black community places a high value on athletic achievement.[233] Not only is the black athlete a primary role-model for young people,[234] but athletic achievements are one way for blacks, other minorities and the economically disadvantaged to achieve status[235] in a society that often devalues them because they are black, minority or poor.

The essence of this plan, then, is to acknowledge that education is a broad concept and that accepting students with diverse talents and cultural backgrounds can enhance the academic environment. Consequently, even if we did not want to lower the competition level of the sports programs we currently have, and it appears that we do not, we are morally obligated to include in academe students with diverse backgrounds and talents, including black athletes, other athletes of color, and economically disadvantaged athletes.

Once on campus, we also must eliminate the pretense that some athletes

230. The American College Test, "ACT," is also used. A score of 15 out of 30 on the ACT must be achieved to meet Proposition 48 requirements. Edwards, *supra* note 175, at 377.

231. *Id.*

232. *See generally* Symposium, *Commemorating the 25th Anniversary of Brown v. Board of Education*, 23 How. L.J. 1 (1980).

233. Edwards, *supra* note 175, at 375.

234. *Id.*

235. *Id.*

will succeed in a traditional academic curriculum. Some of them will continue to fail if they are expected to meet traditional standards for assessing their work. For those student athletes, we must consider alternative ways of evaluating their progress. The status of scholar should be available and attainable to those students.

For other student athletes, the imagine of the "athletic scholar" is a myth; an unattainable goal. They truly have poor mathematical and verbal skills. For those student athletes, perhaps we should consider modifying our curricula to accommodate their talents and interests. Instead of "trivial" courses, schools could include classes that would help the non-academic athlete to improve basic mathematical and verbal skills. Admittedly, students in such programs might be stigmatized. But again, to the extent others might perceive them as different in a negative way, their perceptions reflect a lack of understanding of who the student athletes are and the struggles they have had in their lives. At present, many students of all races and classes, including students who perform well on the SAT, need remedial courses to prepare them for college classes.[236] If we could create a better understanding of individual student needs, including the non-academic athletes', perhaps greater compassion and appreciation for diversity would result.

At the same time that a college might create courses that encouraged development of basic mathematical and verbal skills, it might also consider putting into its curriculum courses that stressed the talents and interests of the non-academic athlete. For example, if sports are the student's life, then make it easy for the student to succeed by designing a program that centers on that. In fact, 75% of black athletes who do graduate earn degrees in physical education or other programs designed to accommodate their talents and interests.[237]

Most important, whatever programs were placed in the curriculum to accommodate the athletic scholar and the non-academic athlete, they should lead to degrees. This presents much less of a concern for the athletic scholar who simply needs realistic and fair ways of assessing his or her progress in otherwise traditional courses. More concern may arise with giving the non-academic athlete a college degree. The concern, of course, is that by giving degrees to students who do not meet traditional degree requirements, the college will necessarily be lowering its standards. In turn, the value and prestige of that college's degree will be diminished; alumni may be disturbed and give less, and so forth.

We need to do more to ensure that all young children develop educational skills that will encourage and enable them to freely choose career goals.[238] In our non-ideal world, however, the difference between a college graduate with a degree and a college drop-out is significant. Society perceives the former as a "winner," more employable,[239] and a social success.

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236. *Id.* at 381.

237. Physical education degrees are not very prestigious, and channeling athletes into such programs on the premise that they cannot succeed at anything else would be unfortunate. *Id.* at 375.

238. *See generally* D. BELL, *supra* note 170, 102-22.

239. *See supra* note 237.

That latter is perceived as a "loser," less employable, and a social failure. Presumably most athletes would prefer to leave college as graduates.

From the institution's view, offering programs that enhance the likelihood of success for the non-academic athlete does not necessarily mean that a particular college's degree will be less valuable or that the degree itself will be worthless to the graduate. To avoid both of these perceptions, we must be committed to changing our attitudes. We must be willing to acknowledge that the non-academic athlete is inherently valuable, not just to collegiate athletics, but to the institution of higher education, and following graduation, to society. In other words, college graduates must be willing to share the prestige, glory, opportunities and good will that they experience as a result of their college backgrounds.

In summary, enhancing the chances that student athletes will graduate benefits everyone. It tells the athlete that he or she plays an important role in the college community; his or her athletic ability is valued, and he or she is valued as an individual who is interested in learning and working toward a degree. If we are committed to admitting into college only students who are likely to succeed, it is incumbent upon institutions of higher education to see that admittees have a realistic chance of doing just that. By accepting the reality that both athletic scholars who fail to measure-up to traditional standards, and non-academic athletes play significant roles in college education, perhaps we can drop the pretenses and get on with the task of enriching each other. Because many of the athletes who enter college and fail to graduate are black, members of other minority groups, and/or economically disadvantaged, it becomes even more important to implement programs that will reverse this trend. We can no longer adhere to the amateur ideal and associated myths pretending that the "real business" of college is suitable only to white, upperclass men.

B. *The Motherhood Ideal*

> Perhaps the most we can say with certainty is that even if biological constraints exist that may ultimately limit the possibilities for remaking society, we will not be able to determine that part played by such constraints until we have correctly assessed the part played by the social construction of gender roles.
>
> Frances Olsen[240]

> The notion of responsibilities is related to but prior to conceptions of affirmative rights or communal rights. . . For example, in the workplace the concept of responsibilities would start from a recognition that workers of both sexes have home lives and personal needs that affect them as workers, and that their lives as workers affect other aspects of their lives. . . When we start thinking in a framework of responsibilities and interdependence, workplace policies such as parenting or caretaking leave, flexible hours, and flexible locations seem not only possible, but desirable. . . Alike or not, that other person's existence nonetheless touches ours.

240. Olsen, *supra* note 81, at 1571.

Lucinda Finley[241]

1. *Dated Images*

a. *Generally*

The world is a better place because we believe in taking care of others and devoting ourselves to loved ones. Moreover, our commitments to privacy, personal autonomy and the sanctity of the "family"[242] evidence how dearly we value freedom in maintaining and ordering our loving relationships. Early on, "mother" became the family's focal point from which individual members temporarily strayed to accomplish whatever was necessary to maintain the family unit. Thus, the belief in an institution like motherhood was, and still is, consistent with our basic belief in taking care of others, especially our loved ones.

As valuable as motherhood is to family and society, it is unnecessarily limiting in at least two ways. First, we limit ourselves by believing that there is such a human being as an ideal mother which every mother should aspire to be like. Outside the "ideal," are many, many "good" mothers. For example, some "good" mothers are single; some adopt interracial children; some are doctors; some are gay; some are on welfare; some are mothers as a result of surrogate contracts. Moreover, with respect to actual caretaking ability, the innumerable ways of approaching childrearing make the notion of an "ideal way" absolutely silly. Some "good" mothers may be excellent role models with respect to being organized, for example, but they may be somewhat overbearing in disciplining their children.

Undoubtedly, some "good" mothers probably could be "better." In fact, we may all go through stages of our development when we are convinced this is true of our own mothers. But that should not be the point. Each mother-child relationship is unique to those two individuals. Short of abuse and neglect,[243] we can only pretend to be able to tell them how to relate to each other. Moreover, in any mother-child relationship, there will be problems. Perhaps we should feel less anxiety about childrearing because

241. Finley, *Transcending Equality Theory: A Way Out of The Maternity And the Workplace Debate*, 86 COLUM. L. REV. 1118, 1172 (1986).

242. *See supra* note 138.

243. Generally, the state does not interfere with the parent-child relationship except to impose regulations for the public welfare, or in instances of abuse or neglect. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905) (smallpox vaccination requirement upheld under state's police power); *see also* Santosky v. Kramer, 455 U.S. 745, 767 n.17 (1982) (state's interest in terminating parental rights arises only when parent is unfit); *see generally*, Rush, *The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology*, 36 HASTINGS L.J. 461 (1985).

In recent years, the Supreme Court has sanctioned the non-nuclear family by giving protection to the extended family, Moore v. City of East Cleveland, 431 U.S. 494 (1977), the family in which the father and mother are not married, Stanley v. Illinois, 405 U.S. 645 (1972), and even the family unrelated by blood, Smith v. Organization of Foster Families, 431 U.S. 816 (1977). *See generally* L. TRIBE, *supra* note 115, at 985-90. *See also* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 664-65 (1980) ("freedom of personal choice in matters of marriage and family life . . . goes beyond the relationships of marriage and family to other forms of intimate association") (quoting Roe v. Wade, 410 U.S. 113, 169 (1973) (Stewart, J., concurring)). *See generally* Bartlett, *Rethinking Parenthood As An Exclusive Status: The Need for Legal Alternatives When The Premise Of The Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

chances are high that in some way, at various times, mothers will do something wrong to their children. We can also rest assured that mother and child probably will survive the "mistakes," as they constantly learn about each other. Lucky for us all, the mother-child bond is almost impossible to break.

We also limit ourselves by accepting and adhering to sex-role stereotypes that teach us that only women can and should be "mothers," and that women should be "only" mothers. We know that men can and do make good "mothers." We also have reason to hope that if society encouraged men to assume the caretaking role, many more would feel free to do so.[244] With respect to women being "only" mothers, we know that women are more talented than that single option allows. For example, recent statistics indicate that about fifty-six percent (53,903,000) of the total population of women in this country are in the labor force.[245] Fifty-seven percent of mothers with children under 18 years of age work.[246] Moreover, of the mothers who work, forty-eight percent have children less than one year old; fifty percent have children under three years old; and sixty percent have children between three and five years old.[247] Despite all that we know, however, what we fear is that if we let go of the motherhood ideal, neither men nor women will assume the caretaking role, and the traditional family will disintegrate.

But just as our fears about letting go of the amateur ideal did not keep us from visiting the practice fields and libraries, our fear about moving away from the motherhood ideal should not prevent us from looking into the home and market squares to see what we should see in those places. Not surprisingly, our journey introduces us to some individuals who are married, with children, and who play-out traditional roles where the husband is the market wage-earner and the wife is the primary caretaker.[248] Many in traditional families are happy, and understandably, they feel good about their lives.[249]

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244. *See* Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. CIV. RTS. & CIV. LIB. L. REV. 79 (1989); Williams, *supra* note 67.

245. Green, *Employment and Earnings*, June 1987, at 25 (Bureau of Labor Statistics); *see also* Law, *supra* note 100, at 1254 (from 1954-79 percentage of women over 16 in work-force increased from 34.6 to 51.0%; for women between ages of 25-34, it increased from 34.4 to 63.8%).

246. Voydanoff, *Women's Work, Family, and Health* in WORKING WOMEN: PAST, PRESENT, FUTURE 71 (K. Koziara, M. Moskow, and L. Tanner eds.) (1987).

247. N.Y. Times, Jan. 14, 1987, at B10, col. 1 (based on statistics compiled by the U.S. Bureau of Labor Statistics in March 1985).

248. M. MARGOLIS, *supra* note 62. Statistics indicate that many individuals live in non-traditional family units and lifestyles. Professor Areen reports that about 25% of children under 17 do not live with both parents. J. AREEN, *supra* note 70, at xxi, and that over 20% of children born in the United States are children of unmarried mothers. *Id.* Many mothers also work outside the home. *See infra* notes 250-53 and accompanying text.

249. It is important to understand that the price of "bucking" the socialization process may simply be too high for some women. Finley, *Choice and Freedom*, 96 YALE L.J. 914, 933-34 (1987). As Professor Sunstein suggests, people have adaptive preferences; they want what they can get. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1146-47 (1986). For women, this may mean over valuing the patriarchy in order to reduce the dissonance that might come from having chosen the traditional role over the more modern role of the career woman. *Id.*; *see also* Z. EISENSTEIN, *supra* note 54, at 32 (the new right is refocusing on traditional nuclear family); *see generally* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). *But see* Wil-

A tour of the home and market squares also shows us things that are not so good about traditional sex-role stereotypes, as well as many things that defy the stereotypes and are valuable. Focusing on the not-so-good aspects of sexual stereotyping, we see a belief in a need to maintain the patriarchy. Fundamental to maintaining the status quo is the feeling that society must limit women's economic power and ensure that women assume the mother-role.

Reality bears this out. Notwithstanding the fact that women comprise about fifty-six percent of the work force, they continue to hold the lower paying jobs.[250] They earn about sixty-nine cents on the dollar.[251] Not only do they often lack the requisite skills for the higher paying jobs as a result of their socialization, they also often need to center their work schedules around meeting their family obligations.[252] Most women who leave the work force give as their reasons their need to meet demands being put upon them by their families.[253]

For the pregnant woman who is a market-wage earner, she faces the dilemma of trying to maintain her status in the market place and attaining social and personal goals in her private life. Over and over and over again, she is discouraged from trying to do both at once.[254] Recall how the Aid to Families with Dependant Children scheme promotes the stereotype that wo-

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liams, *supra* note 67, at 829 ("[F]eminists must come to terms with the ways in which women's culture has served to enlist women's support in perpetuating existing power relations.").

250. The average weekly income of men in 1986 in the United States in over 200 occupations was $419. Over the same period and comparing the same occupations, women earned an average weekly income of $290. Mellor, *Weekly Earnings in 1986: A Look At More Than 200 Occupations*, MONTHLY LABOR REV., June 1987, at 41-46. Women are 98.3% of the secretaries and typists, but make less than 88.8% of the income men make in those positions ($322/week for men versus $286/week for women). *Id.* at 43. In sales, 31.7% of the women were supervisors, while 68.3% were men. Female sales supervisors averaged $282 per week, while the men averaged $460 per week. *Id.* Of general sales workers, 57.8% were women, and they earned an average of $183 per week. In contrast, 42.2% of sales workers were men, and they averaged $301 per week in income. *Id.* In short, Mellor found that at every level of the employment, women earned less than men.

Moreover, the percentage of women at the top of the employment ladder is significantly lower than it is for men. At the top end of the employment ladder, of all the women in the work force, 9.9% are at the executive, administrative, and managerial level, whereas 13.1% of the men are at that level. Green, *supra* note 245, at 241. In the technical, sales and administrative support positions, 44.8% of the women are at this level, while 19.8% of the men are at this level. Twenty-nine percent of the women can be found at the clerical level, the low end of the ladder, whereas only 5.8% of the men are found in those jobs. *Id.*

The phenomenon of women continuing to be employed in lower paying jobs and jobs of lesser status is attributable by some to the continued sex-stereotyping of occupations. N.Y. Times, Feb. 6, 1987, at D2, col. 1.

251. Mellor, *supra* note 250. The New York Times reports, however, that women have been earning on the average only 64% of what men earn since the mid-1960's N.Y. Times, Feb. 6, 1987, at D2, col. 1. It seems that younger women, who are completing more school, are faring better. *Id.* Those aged 20 to 24 are earning 85.7% of what men are earning, while women aged 25 to 34 are earning about 75% of what men are earning. *Id.*

252. *See* M. GLENDON, *supra* note 70; Law, *supra* note 113, at 1253.

253. Law, *supra* note 113, at 1253 (footnote omitted).

254. Our failure to accommodate the needs of women who want to be both mothers and market-wage earners comes at a high price to business, the family, women, children, and men. This was recently emphasized in the controversial article by Felice Schwartz in which she reminds us of the differences between men and women, concluding that women workers cost more than men workers. In light of years of efforts by many feminists to overcome notions that women workers are different (inferior) to men workers, this article immediately rewound the clock. *See* Schwartz, *Management Women and the New Facts of Life*, 67 HARV. BUS. REV. 65 (Jan./Feb. 1989). In fact, however, Ms. Schwartz makes a convincing argument that we need to begin to accept and appreciate the differ-

men should be caretakers and enter the work force only as a last resort.[255] Recall how the Supreme Court refused to hold that poor women have a constitutional right to a government funded abortion.[256] Recall how the Supreme Court held that denying disability benefits to pregnant women is constitutionally permissible even when employees with other types of disabilities receive benefits.[257]

Even today, the Supreme Court's view of the pregnant market wage-earner remains unfocused. On the one hand, the Court is able to see beyond stereotypes and empathize with the plight of pregnant women who also are employees outside the home. For example, in *California Savings and Loan Association v. Guerra*[258] a six-member majority upheld a California law that requires employers to give women up to four months of unpaid leave for pregnancy disability even though people with other types of disabilities are not entitled to similar leaves.[259] Rejecting the suggestion that the employer's plan violates the Pregnancy Discrimination Act, the Court held that the Act provides the minimum amount of protection a pregnant worker is entitled to, and that an employer is free to provide more protection without discriminating in violation of the Act.[260]

Implicit in the *Guerra* Court's holding are fundamental beliefs that it is appropriate for women to be in the work place, and that being an employee who also becomes pregnant is acceptable and that society ought to accommodate those types of choices without penalizing the women and families who actually make them. Upholding the constitutionality of laws like California's, however, may not provide broad protection for pregnant women. At present, only nine other states provide similar leave and reinstatement benefits for pregnancy disability.[261]

In contrast to the empathic and progressive decision in *Guerra*, the Court reverted to its "apply the neutral rule neutrally" methodology in *Wimberly v. Labor & Industrial Relations Commission*,[262] also decided last term. A unanimous Court in *Wimberly* interpreted federal law to deny unemployment compensation to a woman who leaves her job due to pregnancy and is not reinstated upon her return to work. Specifically, the Court decided that a state law denying unemployment compensation to any worker who leaves work for reasons unrelated to employment does not violate federal law prohibiting states who participate in federal-state unemployment

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ences between men and women, and implores us to value the diversity. *Id.* at 75-76. *See* Williams *supra* note 67.

255. *See supra* notes 112-15 and accompanying text.

256. *See supra* notes 100-04 and accompanying text.

257. *See supra* notes 116-19 and accompanying text.

258. 479 U.S. 272 (1987).

259. *Id.* at 291. *See supra* notes 246, 250. *See also*, J. AREEN, *supra* note 70, at 132-33 (1985) ("Only about 40 percent of American female workers have the equivalent of the six-week paid maternity leave considered desirable by many doctors").

260. California Federal Savings & Loan Assoc. v. Guerra, 479 U.S. 272, 286-88 (1987). As Professor Minow notes, the Court chose to make pregnant women employees the norm against which other employees were compared, rather than to adhere to the presumption that non-pregnant workers set the standard for establishing workers' benefits. *See* Minow, *supra* note 1, at 41-42.

261. *See* Taylor, *Job Rights Backed In Pregnancy Case*, N.Y. Times, Jan. 14, 1987, at A1, col. 3; *See generally* Hantzis, *Is Gender Justice A Completed Agenda?* 100 HARV. L. REV. 690 (1987).

262. 479 U.S. 511 (1987).

compensation programs from denying compensation on the basis of pregnancy.[263] Rejecting the woman's claim that the federal law requires employers to provide compensation to women who leave work because of pregnancy and otherwise meet reinstatement eligibility requirements, the Court reasoned that the federal law does not require "preferential" treatment of pregnant women.[264] Because the particular state law does not provide unemployment benefits to *any* worker who becomes disabled for reasons unrelated to the job or employer, the law does not discriminate against pregnant women.[265]

The *Wimberly* decision is reminiscent of Mr. Chief Justice Rehnquist's view of the world, which includes only pregnant women and non-pregnant people.[266] From a different perspective, only women can become pregnant. To categorize pregnancy along with all other types of disabilities that are job related is to single out women. To deny them unemployment compensation benefits because of their pregnancies is another way of discouraging women from trying to be mothers *and* market wage-earners.

b. *Surrogate Contract Mothers*

The desire to have a baby is overwhelming for most people. Whether our needs to reproduce are primarily biological or psychological as a result of our socialization is unknown. Whatever the forces are that work upon us, the need and desire to have a family, including children, are essential to happiness for most of us.

Many people are unable to bear children, although they desperately want the fulfillment of having a child. For example, between ten and fifteen percent of married couples in the United States are unable to bear children.[267] Gay and lesbian couples and single people are not able to have children without alternatives means of acquiring them. While adoption provides a possible solution for some of these people,[268] for others it is unacceptable. In some states, gays and lesbians are statutorily banned from becoming adoptive parents.[269] Single parents may be eligible only to adopt older or handicapped children, which may not satisfy the single parent's desires or needs at all.[270] Married couples often are forced to wait years before a baby

263. *Id.* at 516-19.

264. *Id.* Again, professor Minow notes that the *Wimberly* Court unnecessarily reverted to using male employees as the norm against which pregnant employees were to be compared with respect to receiving unemployment compensation. Minow, *supra* note 1, at 42-43.

265. Wimberly v. Labor & Industrial Relations Comm., 479 U.S. 511, 520-21 (1987).

266. General Electric Co. v. Gilbert, 429 U.S. 125, 135 (1976).

267. *In re* Baby M, 217 N.J. Super. 313, 331, 525 A.2d 1128, 1136 (N.J. Super. Ct. Ch. Div. 1987) *aff'd in part and rev'd in part* 109 N.J. 396, 537 A.2d 1227 (1988). (citing to National Center for Health Statistics, *Vital and Health Statistics*, Sec. 23 #11 at 13-16, 32 (December 1982)).

268. In 1984, about 58,000 children were adopted in this country. *In re* Baby M, 217 N.J. Super. at 332, 525 A.2d at 1137 (citing Wilson, *Adoption, It's Not Impossible*, BUSINESS WEEK, July 8, 1985, at 112). Of the estimated 365,000 children eligible for adoption each year, about one-third are in the hard to place category—handicapped, minority, emotionally disturbed, or older. J. AREEN, *supra* note 70, at 1345 n.6.

269. *See, e.g.*, FLA. STAT. §§ 63.042(d)(3) (1987) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

270. Most public adoption agencies consider single parents as "the adoptive parents of last resort" and limit them to hard-to-place children, i.e., older, handicapped or minority children. Although no statistics are currently available, experts in the field estimate that between 5 and 25%

that is suitable for them arrives.[271] Moreover, even if the two million infertile "traditional" couples[272] adopted all 365,000 homeless children in this country,[273] about 1,635,000 of those couples alone would still be without a child.

But the possibility of adoption may miss the point entirely. For many people who are unable to reproduce, the desire to have a child who is biologically related to them is important enough to render adoption an unsatisfactory alternative. Surrogate contracting provides hope for those people who, like most people, desperately want children.[274]

Following the failure of the surrogate contract in the *Baby M* case,[275] public attention is focusing upon the proper role of surrogate arrangements in our society. Prior to *Baby M*, no state had a definite policy concerning surrogate contracts. Consistent with the New Jersey Supreme Court's decision in *Baby M*, recent legislative efforts in several states indicate that they are willing to allow surrogate contracts.[276] In those states, the debate continues on whether to permit the surrogate contract mother to make a profit on the contract.[277] Under most proposed legislation, she will be allowed

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of all adoption placements are made to single people. One in 7 single adoptive parents is a man. Kelmsrud, *Number of Single-Parent Adoption Grows*, N.Y. Times, Nov. 19, 1984, at C13, cols. 4-6.

271. For every baby available at an adoption agency, there are 10 requests. Some waiting lists include requests that were made 7 years ago and many adoption agencies stop taking applications. Rule, *Couples Taking Unusual Path for Adoption*, N.Y. Times, July 26, 1984, at A1, cols. 3-5. The Sterns considered, among other things, the adoption delay factor in deciding to use a surrogate mothering arrangement to have a baby. *In re* Baby M, 109 N.J. at 413, 537 A.2d at 1236.

272. *In re* Baby M, 217 N.J. Super at 332, 525 A.2d at 1137.

273. *See supra* note 268.

274. For the history of surrogacy in this country, see N. KEANE & D. BREO, THE SURROGATE MOTHER (1980). The authors relate a number of stories of individuals and couples who used surrogate arrangements to complete their families. I found it difficult to read this book without feeling some pain and empathy for those individuals. For a more recent account of surrogacy laws in this country, see M. FIELD, *supra* note 129.

275. *In re* Baby M, 109 N.J. at 414-17, 537 A.2d at 1234-37 (1988).

276. Hevesi, *Surrogate-Parenthood Measures Sought*, N.Y. Times, Apr. 2, 1987, at B2, col. 1. Most states have not attempted to specifically regulate surrogate contracting. *See* Special Project, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 638-44 (1986). In early April, 1987, immediately after the lower court's ruling in *In re* Baby M, the New Jersey legislature had two bills before it dealing with the regulation of surrogate contracts. The bills would require complete physical and psychological screening of the potential surrogate contract mother, as well as psychological screening of the biological father and his wife. *Id.*

Simultaneously, one of several bills relating to surrogate contracts before the New York legislature placed surrogate agreements strictly within contract law. The bill would allow payment to the surrogate contract mother and would not allow any grace period after the birth of the child for her to change her mind. One proposed amendment to that bill would limit payment of the surrogate contract mother to medical expenses and lost wages. *Id.*

Another bill before the New York legislature regulating surrogacy would only allow payment for medical and legal expenses. That bill would also give the surrogate contract mother 20 days after the birth of the child to request a custody hearing. *Id.* Still another bill before the New York legislature would have declared surrogate contracts contrary to public policy and therefore void. *Id.*

The New York bills were withdrawn from the legislature in June after the New York City Bar Association asked the legislature for more time to study the issue. Sponsors of the bill promised that they would again be raised during the next legislative session. Schmalz, *Albany Surrogacy Bill Is Withdrawn*, N.Y. Times, June 18, 1987, at B2, col. 1.

277. To date, only five states have passed specific legislation on surrogacy, although seven have banned it for profit. *See* Myers, *7 States Prohibit Surrogacy For Pay*, Los Angeles Times, Mar. 6, 1989, at 5, col. 4. Those states are Florida, Indiana, Kentucky, Nebraska, and Michigan. State courts in Louisiana and New Jersey held surrogacy-for-pay contracts illegal and unenforceable. *Id. See generally* M. FIELD, *supra* note 129, at 155-59. *See also* Yates v. Keane, 14 Fam. L. Rep. 1160 (Mich. 1988) (court held invalid all surrogate contracts). Efforts to pass legislation in Michigan

only reasonable medical fees and expenses.[278]

Our instinct to be wary of surrogate arrangements is correct, in my opinion. Feelings and emotions run high for everyone involved in the arrangements. The most commonly expressed fears about surrogacy are the possibilities of contract failure, breakdown of the traditional family unit, baby-selling, and exploitation of the surrogate contract mother.

i. *Contract Failure*

Legitimate concerns arise over the possibility of a surrogate contract failure. What if the surrogate contract mother or biological father decides to renege, as Mrs. Whitehead did in *Baby M*? What if the surrogate contract mother decides to abort the fetus?[279] What if the baby is born less than physically or mentally healthy? What if there are twins or triplets? Many things might go wrong with the contract, suggesting that perhaps they are more trouble than they are worth.

The problems that arise when a surrogate contract fails are real and painful. They have serious ramifications, and they should cause us concern. In my opinion, however, the potential for problems stemming from surrogate contract failure is not sufficient reason to prohibit them altogether. In addition to fulfilling the need and desire to have children, over ninety-five percent of surrogate contracts are successful.[280]

Moreover, banning surrogate contracts because they *might* fail seems to be a weak reason for infringing upon a person's fundamental rights to procreate[281] and contract freely.[282] I do not mean to suggest that those rights are absolute, or that the government could not, or even should not, interfere in this area. Rather, I believe that only the minimum governmental interfer-

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banning surrogate contracts altogether continue. *See Ban on surrogacy may be strengthened*, Chicago Tribune, Mar. 2, 1989, at M3.

278. Hevesi, *supra* note 276, at B2, col. 1; M. FIELD *supra* note 129, at 155-59.

279. *See infra* note 283.

280. Lacey, *supra* note 155, at 313.

281. Skinner v. Oklahoma, 316 U.S. 535 (1942) Whether the fundamental right to procreate extends beyond the marital relationship is an open question. *See* Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986). Established constitutional doctrine does protect a non-married person's right to sexual intimacy, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965), at least with a person of the opposite sex. Bowers v. Hardwick, 106 S. Ct. 2841 (1986). Moreover, established constitutional doctrine also protects the parent-child relationship even when the child is born outside of marriage. Lehr v. Robertson, 463 U.S. 248 (1983); Stanley v. Illinois, 405 U.S. 645 (1972). Thus, although the state could make surrogate contracts void or voidable when entered into by persons not married to each other based on the rationale that it is protecting a legitimate interest that it has in the marital relationship or the biological parent-child relationship, the state could not constitutionally prohibit non-married persons from procreating. Similarly, the state could not constitutionally abrogate the parent-child relationship on the rationale that the parent only became a parent pursuant to a surrogate contract that violated state law. The New Jersey Supreme Court recognized these limitations. For example, it held that voiding the contract did not abridge Mr. Stern's right to procreate, and that his right to procreate also did not automatically entitle him to custody. *In re* Baby M, 109 N.J. at 447-50, 537 A.2d at 1253-54. The court also acknowledged, in dicta, that Mrs. Whitehead's constitutional right to the companionship of her child could not be abridged merely because she contracted to surrender her parental rights prior to the child's birth. *Id.* at 450-51, 537 A.2d at 1255.

282. *See generally* L. TRIBE, *supra* note 108, at § 9-5 & 9-6 (exploring "limits on degree to which government can sacrifice some individuals to serve the ends of others") (footnote omitted).

ence should be tolerated in any matters that concern sexual and familial privacy.

Consistent with achieving an acceptable balance between the individual's right of privacy and the government's interest in regulating surrogacy, states can pass legislation that provides appropriate remedies consistent with public policy in situations where everything does not go as expected. For example, the surrogate contract mother would retain her right to have an abortion consistent with current law.[283] If she exercised that right, she might be required to repay any medical expenses incurred by the father on her behalf. Given our commitments to having children, as well as our belief in the constitutional rights of privacy and freedom of contract, a total ban on surrogacy arrangements seems unnecessarily harsh and protective. Regulating such arrangements in anticipation of breach, however, would seem advisable.

ii. *Breakdown of the Traditional Family*

> When the freedom of intimate association is seen in the perspective of our recent appreciation of cultural diversity and our recent concern for equalizing the status of women, the principle extends without difficulty to family living arrangements that are alternatives to those of the traditional nuclear family. . .
>
> Kenneth Karst[284]

A second fear that many in society have is that the traditional family unit will break down if surrogacy is allowed.[285] This fear is at least two-fold. The predominant fear is that the stress of the surrogate arrangement will jeopardize the marriages of the surrogate contract mother and her husband, and the biological father and his wife. Others who enter into surrogate contracts have already chosen not to enter into traditional marriages.[286] These non-traditional families entering into surrogate contracts inspire the fear that, by allowing them, society will be encouraging and sanctioning alternative life-styles that threaten the traditional family unit. According to this view, society would be better off if the traditional family remained the primary caretaking unit. Legislation limiting the legality of surrogate contracts to married couples, for example, implicitly operates on these fears and beliefs.[287]

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283. A woman can waive her right to have an abortion, but forcing her to adhere to an agreement not to abort a fetus would unduly interfere with her right of privacy. *See* Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986). Presumably the surrogate contract mother and biological father would provide in their contract for the possibility that the woman might abort the fetus. For example, as part of their agreement, the surrogate contract mother might have to reimburse the father for any costs he incurred in performing his promise through the date of the abortion.

284. Karst, *supra* note 243, at 686.

285. *See* Rush, *Breaking with Tradition: Surrogacy and Gay Fathers*, in KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY—(D. Meyers, K. Kipnis, and C. Murphy eds. 1989 (to be published later this year)).

286. For example, a single man in San Francisco arranged with a woman to bear his child in a surrogate arrangement for $10,000. One agency in San Francisco reportedly has arranged surrogate contracts for homosexual couples. Peterson, *Surrogates Often Improvise Birth Pacts*, N.Y. Times, Feb. 25, 1987, at B2, cols. 1-5.

287. Pending New York and California legislation would limit surrogate contracts to married

Assuming that legislators have legitimate concerns that allowing surrogate contracts might jeopardize the marriages of the surrogate contract mother and the biological father, respectively, the question is whether adequate safeguards exist to minimize the risks. For example, psychologists or other trained counselors could interview those emotionally affected by the arrangement to discover how they feel about it and to assess whether or not they are able to cope with the ramifications of the arrangement. In addition to the surrogate contract mother and the biological father, such counseling could be extended to the surrogate contract mother's husband, any child they have, as well as the adoptive mother, and any children she and the biological father have. Although psychology is an inexact science, and predictions about how someone might act or feel in the future are unreliable, it would be better, in my opinion, to require such counseling. By having a professional counselor evaluate the emotional stability of those affected by the arrangement, perhaps many foreseeable problems can be avoided.

Focusing specifically upon the surrogate contract mother's marriage, the validity of the contract also could be made contingent upon her obtaining the consent of her spouse.[288] The surrogate contract mother and her husband, therefore, would be in agreement about the decision. While the situation undoubtedly will be stressful, as long as both partners know and understand the agreement, the decision need not jeopardize their marriage and family unit.[289] In fact, their reasons for entering into the contract may relate to improving their family's welfare. One reason Mrs. Whitehead agreed to her contract, in fact, was to augment her children's college education fund with the $10,000 fee.[290]

From the perspective of the biological father and his wife, who is also the adoptive mother, surrogate contracts also need not be a threat to their traditional marriage or family unit. Quite the contrary. Undeniably, surrogacy allows traditional couples to carry on the tradition of having children. For example, it is difficult to imagine a more resume-perfect family than the

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couples. *Id.* Comments on proposed legislation in Florida that ultimately outlawed surrogacy for profit also implicitly assumed that only traditional couples would avail themselves of such arrangements. For example, an ACLU representative suggested that the profit prohibition "might violate privacy rights by restricting the ability of *couples* to have children." *Id.* (emphasis added). One senator who voted against the proposed bill commented that the "right of infertile *couples* to have children . . . was being overlooked." *Id.* (emphasis added). Hatch, *Bill would ban profit surrogacy*, Gainesville Sun, Apr. 7, 1988, at 1A, col. 5.

288. Unlike the abortion situation where a spousal consent requirement is unconstitutional, see Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), spousal consent in surrogate contracting presumably would be constitutional because of the statutory presumption in the states that the child born during the marriage is the spouse's. H. CLARK, LAW OF DOMESTIC RELATIONS 172-73 (1968). The potential imposition of support obligations on the husband presumably would justify obtaining his consent. Mr. Whitehead was a party to the contract in *In re* Baby M. *In re* Baby M, 109 N.J. at 412, 537 A.2d at 1235.

289. The Whiteheads separated, apparently because of the stress over Baby M. *See Whiteheads Announce Separation*, N.Y. Times, Aug. 5, 1987, at B1, col. 5. Eventually they divorced and Mrs. Whitehead married Dean Gould. *Whitehead Is Married In Ceremony In Jersey*, N.Y. Times, Nov. 30, 1987, at B3, col. 6. The Goulds learned within one month of Mrs. Whitehead's divorce that they were expecting. *Id.*

290. 217 N.J. Super at 342-43 525 A.2d at 1142. *See also* Fleming, *Our Fascination With Baby M*, N.Y. Times Magazine, Mar. 29, 1987, at 33, 35 (story of surrogate contract mother who entered into contract for purpose of being able to afford private schools for her children).

Sterns in *Baby M*, who, by most standards, are quite conventional.[291] In short, means exist short of prohibition to ensure that the traditional marriages of the surrogate contract mother and biological father, respectively, remain intact notwithstanding the surrogate arrangement.

Outside the context of the traditional family, surrogacy is unlikely to have a significant effect upon people's choices to live alternative lifestyles. For example, despite the institutionalization of motherhood and the strong incentive both women and men have to become part of a traditional family, many people choose to live in families that deviate from the traditional one. Many people remain single.[292] Many people are divorced.[293] Many women in otherwise traditional marriages work outside of the home.[294] Many otherwise traditional couples choose not to have children.

Choices like these are not easy; going against the norm, by definition, is not easy. Moreover, many laws make it more difficult for people to deviate from the traditional family lifestyle, but, people, being true to themselves, do it anyway.[295] Thus, fear that the traditional family unit will disintegrate if surrogacy is allowed is misplaced.

Conversely, prohibiting or making surrogacy available only to traditional couples unfairly burdens and penalizes those who fall outside that norm. Limiting surrogacy as an option to "traditionalists" also raises questions about an individual's constitutionally protected rights to familial and sexual privacy. For example, an unmarried man and woman may agree to have a baby with the understanding that she will relinquish her maternal rights and that he will raise the child. Constitutionally, their relationship is protected whether or not they love each other, or even know each other.[296] Moreover, it is entirely irrelevant that the man may be living in an unmarried relationship alone, with a woman, or a man.

Again, I am not suggesting that legislation prohibiting surrogacy or limiting it to married couples would be unconstitutional. I think such legislation could be upheld on grounds that the state has a legitimate interest in protecting the traditional family. In my opinion, however, such legislation would be unnecessarily restrictive and, as a practical matter, would not further the state's interest. Alternatively, banning surrogacy altogether or passing restrictive legislation that limits surrogacy to traditional couples

291. The Sterns are an ideal, traditional couple. First, they are a heterosexual married couple. Second, they are both well-educated; they both have Ph.D. degrees, and Mrs. Stern is also a medical doctor. *In re* Baby M, 217 N.J. Super at 335, 525 A.2d at 1138. Finally, Mrs. Stern agreed to work only part-time to supplement the family income so that she will be available to care for the baby. *Id.* at 354, 525 A.2d at 1148.

292. According to the 1985 census, 21.5% of the population is single. Statistical Abstract of the United States: 1987, U.S. Dept. of Commerce, Bureau of Census (197th ed. 1986).

293. Almost 8% (7.6) of the population is divorced. *Id.*

294. *See supra* notes 246 & 250.

295. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986) (Court upheld Georgia's anti-sodomy statute as applied to homosexuals). For critical analyses of the Court's decision in *Bowers*, see Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988); Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). *See generally* Comment, *Assessing Children's Best Interests When A Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852 (1985).

296. *See supra* note 281 and accompanying text.

eliminates one way, perhaps the only way, for some non-traditional couples and single people to fulfill their needs and desires to bear children.

iii. *Baby-Selling and Exploitation*

Baby-selling and exploitation perhaps are the major fears associated with surrogacy. Moreover, these fears are magnified in situations where the surrogate contract mother is allowed to earn a fee above and beyond her expenses.[297] Voices opposed to surrogacy for profit characterize such arrangements as baby-selling.

Admittedly, baby-selling commodifies the child and every human attribute; "it wrongs personhood,"[298] and therefore, is inherently immoral. Of course we should be concerned about parents who sell their children,[299] and, in fact, trafficking in children is a crime.[300]

Supporters of surrogacy suggest that the surrogate contract mother is not selling her baby, but rather her services.[301] Some, myself included, may find this distinction unavailing. Regardless of how the transaction is characterized, the surrogate contract mother surrenders the child at birth to the father pursuant to their agreement. Under the terms of their understanding, the surrogate contract mother receives something of value—even if it is simply her medical expenses. The value of what she receives then, whether it is $100,000 or medical expenses, does not alter the essential nature of the contract. In essential respects, the contract appears to be a sales contract.

Assuming surrogate contracts are sales contracts, the more difficult questions are how surrogacy differs from common notions of baby-selling

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297. *See, e.g., Commercial Conceptions, supra* note 150, at 143-44 (surrogate contract sanctions "trafficking in lives") (footnote omitted).

298. *See* Radin, *supra* note 218, at 1925-27. *But see infra* note 303 (Professor Radin distinguishes surrogate situation because baby is biologically related to father).

299. Ironically, parents are free to surrender their children to the state any time they want. Whenever a parent walks out on a child, the child runs a risk of being emotionally and psychologically damaged. The older child who is separated from his or her parents is more likely to suffer emotional harm if ties with the child's past are not maintained. *See* Bartlett, *supra* note 243, at 902-06. Critics of the profit motive in surrogate arrangements, however, fail to explain how a profit motive is more harmful, or more likely to be harmful to the adoptive newborn than a non-profit motive is. The logic of those who approve of surrogacy, but who support the profit-prohibition on the baby-selling rationale, appears to be inconsistent. Perhaps their argument is based upon a theory that fewer surrogate contracts would be entered into if the profit motive were not allowed. Admittedly, removing an incentive to enter into surrogate contracts might reduce the number of such contracts, which, in turn, might decrease the number of children subject to the risk of harm. *See* Lacey, *supra* note 155, at 303 (89% of surrogate contract mothers require a fee, usually at least $5,000 (citing to Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117 (1983)). However, studies have shown that a newborn who is placed with a loving and supportive family is not at psychological risk. Psychoanalysts Goldstein, Freud, and Solnit assert that attachment to a loving and nurturing adult, a "psychological parent," is necessary to a newborn's later ability to form loving relationships. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1970). Thus, in any adoption case, the most important factor in minimizing the potential psychological harm to the child is to place the child in a loving and supportive environment.

300. Lacey, *supra* note 155, at 302 (citing to 23 states that forbid baby-selling).

301. *See, e.g.*, Note, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" for a Fee*, 18 GONZAGA L. REV. 539 (1983). The *In re* Baby M family court held that because the baby is biologically the father's, he cannot buy what is already his. 217 N.J. Super at 372, 525 A.2d at 1157. The New Jersey Supreme Court found the distinction between baby-selling and service-buying unconvincing. *Baby M*, 109 N.J. at 423-25, 537 A.2d at 1241-42.

and why surrogacy for profit is bad? The belief that "pricing" a baby is psychologically harmful to the child, just as it is with existing forms of baby-selling, provides one justification for the profit-prohibition. Who would want to know that they were bought?

This argument that fee-paid surrogacy is baby-selling seems somewhat disingenuous in the surrogacy context.[302] Paying high fees for private adoption of healthy babies is not condemned as baby-selling. Significantly, the other party to the surrogacy contract is the biological father. The child is his, or at least he has a constitutionally protected interest in the child.[303] The fact that the mother might by "selling" her interest in the child is largely off-set, in my opinion, by the fact that it is the father who is "buying" her out.

Further, like the adoption situation, the child's ability to cope with learning about the surrogacy arrangement will depend upon the strength of the parent-child relationship. If the father and child (and other family members) genuinely love each other, the child has no reason to doubt his or her value to the father or as an individual. The father's struggle against traditional norms to have the child is strong indication of his love and commitment to their relationship.

A second justification for outlawing the *general* sale of babies is to prevent the exploitation of parents, especially poor parents. We fear that parents who desperately need money, perhaps for a family emergency, will sell their child to resolve the family's dilemma. We have legitimate reasons for wanting to protect parents from making that kind of decision. There is something pitiful about a society that would allow parents to sell their child because they have no other way to meet their economic needs.[304] Baby-selling generally, like the slave contract,[305] is inherently immoral. There-

302. *See generally* Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59 (1987). Judge Posner distinguishes surrogate contracting from true baby-selling, and suggests that viewing the child as a commodity, with respect to the demand for babies, may be fairer and more efficient for the potential parents, with no increased risk of harm to the child. *Id.* at 66, 67, 70.

303. Radin, *supra* note 218, at 1933 ("as long as fathers do have unmonetized attachment to their genes, . . . we need not see children born in a paid surrogacy arrangement . . . as fully commodified"). *See supra* note 302.

304. Poor parents who consider selling their child to meet pressing economic needs are in a double bind, just like the prostitute. Radin, *supra* note 218, at 1925. They want the freedom to extricate themselves from their poverty, but if they do so by selling their baby, they suffer social reprobation. *Id.* at 1922. Moreover, society's response has not been to provide an adequate welfare program to alleviate their poverty. *Id.*

305. *See supra* notes 143-47 and accompanying text. *But see*, Posner, *supra* note 302.

Prostitution is another area in which laws restrict women's freedom to use their sexuality to make money. At first glance, it may appear that there is a close relationship between prostitution and surrogacy. In fact, opponents of surrogacy for profit attempt to analogize to prostitution to bolster their position that such arrangements should be prohibited. Essentially, their argument is based upon the assumption that prostitution, the selling of sexual favors, is identical, at least from a moral viewpoint, to surrogate contracting, the selling of sexual services. Prostitution is outlawed and condemned in all states except Nevada, and Nevada law contains several limitations. NEV. REV. STAT. §§ 201.380 (maintaining brothel within 400 yards of school or church unlawful), §§ 201.390 (unlawful to have brothel "fronting on principal business street"); 244.345 (licensing of brothels prohibited in certain counties). Because of this widespread prohibition, opponents of surrogate contracting for profit conclude that surrogacy arrangements should also be outlawed and condemned. *See, e.g.*, *The Itinerant Embryo*, *supra* note 155, at 31 (likening surrogate contracting to prostitution if profit allowed); *Commercial Conceptions*, *supra* note 150, at 141 ("An unsavory and

fore, paternalistic laws that protect parents and children from such impoverishment are morally justifiable.

Surrogate contracts, however, are distinguishable from common baby-selling contracts.[306] If society thought that surrogacy in any form were in-

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clumsy, but nevertheless serviceable analogue [to surrogacy] is found in the context of anti-prostitution statutes.") (footnote omitted).

The differences between prostitution and surrogacy are significant. Prostitution can be dangerous for women. There is a high correlation between prostitution and sexual violence against women. *See* S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 390-92 (1975). For example, a startling percentage of juvenile prostitutes are sexually and physically abused by family members. Weisberg, *Children Of The Night: The Adequacy Of Statutory Treatment of Juvenile Prostitution*, 12 AM. J. CRIM. LAW 1, 4 (1983) (author cites to studies in which 60-70% of female juvenile prostitutes and 34-47% of male juvenile prostitutes reported being physically abused in their homes; the statistics for sexual abuse were 31% and 19.1%, respectively). Further, prostitution perpetuates the stereotype of women as sexual objects. The prostitute's worth as a person is measured according to (his or) her value to customers. The prostitute is seen as a commodity. Radin, *supra* note 218, at 1921. In light of evidence suggesting a strong relationship between violence and prostitution, and because the prostitute is commodified as an object, society's decision to outlaw and condemn it as inherently immoral can be accepted as legitimate. Professor Radin suggests, however, that prostitution should not be criminalized, but also should not be promoted. *Id.* at 1924. *See infra* for further discussion.

Arguably, surrogate contracting for profit has many of the same negative attributes as prostitution. Radin, *supra* note 218, at 1925. But just as sex itself is not inherently immoral, neither is being able to bear a child. Society judges prostitution as immoral because of the violence and the personal detachment and debasement that inhere to the prostitute-customer relationship. In contrast, the entire goal and object of the surrogate agreement is positive and beneficial; a childless couple, or a single person, is able to have a child. The child is born into a loving home, with a loving parent or parents. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 299 and accompanying text. Moreover, being perceived as baby-makers is detrimental to women when society cannot see beyond that ability to the other infinite talents of women.

What about the suggestion that both prostitution and surrogate contracting for profit should be outlawed to prevent the exploitation of women who suffer from false consciousness? Do some prostitutes and surrogate contract mothers need their interests controlled through paternalistic laws that prohibit their choices? Many prostitutes would resent such interference on the rationale that they were not competent to know what was in their best interest. *See, e.g.*, S. BARROWS, MAYFLOWER MADAM (1986) (best seller describing Sydney Biddle Barrows' creation of a "dating service" for the rich and elite; women were educated, competent, and quite content with their choices to work for Ms. Barrows). The film, "Working Girls," released in 1987, also relates a story about a young, attractive, well-educated (Yale, M.A.) lesbian, who is a prostitute and by all appearances, seems to know what she is doing, why she is doing it, and would resent anyone who told her she could not do it because she does not really know what is best for herself. *See generally* Richards, *supra* note 110. *See also* Radin, *supra* note 218. Professor Radin suggests that in an ideal world, prostitution should be market-inalienable. *Id.* at 1921. Because the world is not ideal, and because sex is already commodified, she suggests that prostitution should be decriminalized, but not promoted. *Id.* at 192-25. Her conclusion is partially based upon the reality that criminalization of prostitution creates a double-bind for poor women; they use prostitution as a means of economically empowering themselves in a society where welfare falls short, but where prostitution is socially disapproved. *Id.* at 1922-23. *But see* Sunstein, *supra* note 249, at 1156 (suggesting that interference with a woman's choice to engage in prostitution might promote her autonomy).

Surrogacy also should not be prohibited based upon the false consciousness exploitation argument. For most surrogate contract mothers, a decision to enter into a surrogate contract does not reflect either mental deficiency or lack of understanding of the consequences of her actions such that paternalistic intervention is warranted or justifiable. *See* text *infra* at notes 309-11. Moreover, about 95% of surrogate contract mothers follow through on their agreements as planned. Lacey, *supra* note 155, at 313. Fear of exploiting poor women also seems misplaced because most women who agree to be surrogate mothers are middle-class. *See infra* note 310 and accompanying text. But even if that were not so, to suggest that poor women are particularly vulnerable to being irrational and unable to understand what was in their best interest may be to erroneously, and condescendingly label them as false consciousness sufferers.

306. Posner, *supra* note 302, at 70-71. *See also* Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 6-25 (1986) (background on baby-selling prohibition

herently immoral, then all forms would be outlawed.[307] In reality, however, surrogacy for profit is being banned, while surrogacy for altruistic reasons generally is being allowed. The trend to prohibit surrogate contracts for profit is premised upon the belief that only a woman under extreme duress would agree to bear a child for someone else *for money*. Consequently, she must be protected from her false consciousness, her own mistake in judgment. Surrogate contracting laws prohibiting her from making a profit arguably eliminate the exploitation concern by ensuring that she agrees to become a surrogate contract mother for purely altruistic reasons.[308]

Unlike the mother who sells her child after birth and perhaps under severe financial and emotional strain, a woman who freely enters into a surrogate contract is not necessarily under duress when she makes the promise and does not necessarily suffer from false consciousness. She enters into the agreement usually never expecting to keep the child. While she may have an option to keep the child under certain laws,[309] she intentionally conceives the child for the purpose of giving it up for adoption. This distinction differentiates the surrogate contract from the common baby-selling contract, and should allay misplaced fears about exploitation in the surrogacy situation.

More important, we may be overly concerned that some women who enter into surrogate arrangements are susceptible to exploitation because they are poor. At present, most women who agree to become surrogate contract mothers are middle-class.[310] But let's assume some poor women want to and do enter into surrogacy contracts. Although their incentive for entering into the deals is to make money, why should a profit motive invalidate their otherwise moral agreements?

If our goal is to protect the surrogate contract mother who enters into the contract not fully appreciative of the consequences of her decision, milder forms of paternalistic intervention can be imposed to protect her.[311] Traditional contract law protects anyone who lacks the mental capacity or is

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and discussion of distinction between that and surrogate contracting). *See generally* Special Project, *supra* note 276, at 641-43.

307. *See supra* notes 276-78 and accompanying text.

308. *See generally* Kennedy, *supra* note 143, at 638-49. In fact, she may experience "true consciousness" by rejecting the paternalistic intervention and seeing it for what it is. *See supra* note 145 and *supra* notes 247-49 and accompanying text.

309. For example, the New Jersey Supreme Court held in *In re* Baby M that a surrogate contract mother must be given a time period in which to change her mind consistent with the state state's adoption laws. *Baby M*, 109 N.J. at 429-31, 537 A.2d at 1240.

310. Statistics indicate that the average woman who enters into a surrogate contract is white, has completed two years of college, is married, and has completed her family. *See* Radin, *supra* note 218, at 1930 n.278 (citing *Surrogate Motherhood: A Practice That's Still Undergoing Birth Pangs*, L.A. Times, Mar. 22, 1987, § 6, at 12, col. 2).

311. *See supra* note 308. Professor Kronman's suggestion that the inability to substitute money for specific performance in the event of a breach makes some contracts unconscionable and therefore, immoral, *see supra* note 145, would seem to apply to surrogate contracting. One Note suggests, however, that for the surrogate contract mother to give up the child for adoption does not deny her personhood such that her decision would be what Professor Kronman calls a regrettable decision. Note, *supra* note 283, at 1950-54. Without considering the father's procreational rights and needs, however, the Note indicates that surrogate contract mother's rights should be inalienable. *Id.* at 1952-54. In contrast, one might argue that a woman should (must) have the right to place her child for adoption in order to achieve personhood. *See, e.g.*, Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (I analogize from Rubenfeld's argument that the right of privacy protects a woman's personhood by allowing her the choice not to become a mother).

otherwise under duress or coercion from their bad decisions.[312] To presuppose that a woman is incompetent to enter into such a contract for economic enrichment may be to label women, especially poor ones, as false consciousness sufferers. We need to be careful that we do not rationalize the need for laws that restrict women's freedom on the basis that women need to be protected from their own mistakes in judgment. Because women historically are a disenfranchised group, such restrictive laws quickly move from being "benignly" paternalistic to being viciously sexist and classist.

2. *Suggested Alternatives*

> But we are situated in a nonideal world of ignorance, greed, and violence; of poverty, racism, and sexism. In spite of our ideals, justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us.
>
> Margaret Janet Radin[313]

The above exploration evidences society's need to break away from the ideal mother image. Surrogacy legislation provides a unique opportunity for us to change our views of women, mothers, and money. Specifically, surrogacy legislation can be approached three ways: it can be prohibited; it can be allowed and a fee prohibited; or it can be allowed for profit.

a. *Outlawing Surrogate Contracts*

We might choose to outlaw all surrogate contracts on the basis that they are inherently immoral.[314] Those who disagree with this conclusion, must nevertheless find it difficult to hold in total disrepute. For example, some feminists argue that surrogacy promotes stereotypical thinking about the appropriate role of women in our society.[315] They contend that allowing women to become surrogate contract mothers impoverishes the mother for the benefit of the father.[316] In their view, allowing a man to select a woman to bear his child, outside of an intimate, caring relationship, epitomizes male dominance over women,[317] and reinforces the patriarchy. Feminists who view surrogacy in this light understandably want it outlawed.

I also want society to move away from stereotypical thinking about men and women and appropriate sex roles. Even as we try to change the stereotypes, women will continue to be the childbearers. We cannot change this reality, but we can modify our beliefs about what role-assumptions are appropriate for men and women in the public and private worlds. Imagine a

312. SELECTIONS FROM WILLISTON ON CONTRACTS at 270-71; 412-15 (rev. ed. 1938).
313. Radin, *supra* note 218, at 1915.
314. *See, e.g.*, Yates v. Keane, 14 F.L.R. 1160 (Mich. 1988) (all surrogate contracts are void as against public policy).
315. Betty Friedan said that the *In re* Baby M decision had "frightening implications for women." She said that it was a terrifying denial of what should be basic rights for women. "To put it at the level of contract law is to dehumanize women and the human bond between mother and child." Barron, *Views on Surrogacy Harden After Baby M Ruling*, N.Y. Times, Apr. 12, 1987, at A1, cols. 3-5. *See generally* Pollitt, *Contracts and Apple Pie: The Strange Case of Baby M*, The Nation, May 23, 1987, at 1, col. 2.
316. Pollitt, *supra* note 315.
317. *Id.*

society where "equality" meant that the differences between men and women as groups and as individuals were appreciated, accepted, and celebrated. Those who seek to prohibit surrogate contracts diminish our hope that these changes can and will occur.

Simply because men are able to reproduce their genes with the help of women often unrelated or unconnected to them does not necessarily elevate the father's (men's) importance over women in the reproduction process. I understand why some people feel that men who would "use" a surrogate contract mother to bear a child typify male sexual supremacy. I also see that if we deny men the opportunity to enter into surrogate contracts, we not only would be stereotyping them, but we also would be ignoring or devaluing their needs and desires to bear children. We would not be closer to rejecting the stereotypes, or appreciating the differences.

Surrogacy can help us to move away from sex-role stereotyping, and also can provide enormous benefits to many individuals. Acknowledging the men and women who have non-traditional family units, and recognizing that they have needs just like everyone else moves society in the direction of rejecting all kinds of stereotypes and accepting all kinds of diverse individuals and groups. For those who choose traditional life-styles, surrogacy also serves functional and benevolent purposes for them. In my view, then, the surrogacy option provides too much hope to too many individuals to be completely banned.

b. *Legalizing Surrogacy*

i. *General Regulations*

States also might elect to allow surrogate contracting. Pursuant to that decision, legislatures would need to enact regulations setting parameters on such agreements. The scope of the regulations could vary from such concerns as what should happen in the event of breach, whether and to what degree counseling of the parties should be required, and whether the surrogate contract mother should have time to change her mind after the birth of the child. Regulations concerning *who* should be entitled to enter into surrogate contracts, and whether the surrogate contract mother should be allowed to make a profit, however, are the most important with respect to changing our views about stereotypes, in particular women, mothers, and money. Because the argument on behalf of non-traditional family units has been presented,[318] this section will focus upon fee regulations.

ii. *Fee Regulations*

(a) *Not-for-profit Surrogacy*

The not-for-profit surrogacy laws being considered in several states reflect the patriarchal values discussed throughout this paper. Enactment of such laws sends at least two significant messages to the public. First, surrogate contracting is not considered immoral, or it presumably would be prohibited altogether. Although the fee prohibition ostensibly comports with

318. *See supra* notes 284-96 and accompanying text.

other laws forbidding baby-selling, surrogacy and baby-selling are significantly distinguishable so that the profit prohibition on surrogate contracts cannot be justified on the basis that it is baby-selling.[319] More important, the profit prohibition perpetuates the myth that women and money do not mix. Perhaps surrogate contracting—"working" to become a mother—illustrates most poignantly the patriarchy's resistance to working mothers.

A decision to allow surrogate contracts, but to prohibit women from making profits on them, therefore, is the least satisfactory choice. Although this option satisfies basic needs of individuals who otherwise might not be able to have children, it also reifies the patriarchy. Although I disagree with prohibiting surrogacy on the sole rationale that it debases women, I am in agreement with the feminists who take that position with respect to laws that forbid a women from making a profit on her contract. It is not the surrogate contract itself, but rather the prohibition on earning a fee that promotes stereotypical thinking about men, women and appropriate sex roles.[320]

Limiting the surrogate contract mother's market power by stripping her of her fee perpetuates the ideal mother myth that women and money do not go together. Fundamentally, not-for-profit surrogacy laws tell us that it is morally acceptable for the surrogate contract mother to bear the "man's" child so long as she does it from the heart. The broker is allowed to make money for arranging the contract.[321] The father walks away from the agreement with his money in his pocket and his baby in his carriage. The surrogate contract mother walks away from the contract with a feeling of helping *man*kind.

Not-for-profit surrogacy laws are setting the trend. This illustrates how embedded in our society the ideal mother myth is and how important it is to lawmakers, who are mostly men, to maintain the patriarchy. Understanding why such legislation is, or should be seen as detrimental and offensive to *everyone* is essential for change.

(b) *Surrogacy for Profit*

The negative associations many in society are making with respect to surrogacy for profit were explored above. In short, we distinguished it from prostitution,[322] and baby-selling.[323] We also analyzed the exploitation issue and discovered the limitations of that argument as a basis for prohibiting fees.[324] The best alternative to the surrogacy debate, in my opinion, is to allow surrogacy for profit. Paid surrogacy evidences the most respect for individual choices. It not only accepts women as childbearers, but this view also highly values their abilities to bear children. Moreover, it comports more with the reality that women are competent to make critical decisions

319. *See supra* notes 297-312 and accompanying text.

320. *See also* Younger, *What the Baby M Case Is Really All About*, 6 J. LAW & INEQUALITY 75, 81 (1988) ("I am suspicious of people who and laws which would prevent women from earning money.).

321. *See generally* N. KEANE & D. BREO, *supra* note 274. Mr. Stern contracted separately with an agency to pay it $7,500 on delivery of the baby. *In re* Baby M, 109 N.J. at 412, 537 A.2d at 1235.

322. *See supra* note 305.

323. *See supra* notes 297-311 and accompanying text.

324. *Id.*

about how to control their bodies, what is in their own best interest, and what is in the best interest of their families. In essence, it moves society away from stereotypical thinking about women's role in society by dispelling the ideal mother image.

Some proposals have suggested limiting the fee amount.[325] A cap on fees addresses the concern by some members of society that only the rich will be able to afford surrogacy.[326] Typically, the fee agreement is between $5,000 and $10,000.[327] While that may seem like a large sum, when broken down to a 40 hour week (and a pregnant woman's work is constant for 24 hours a day for nine months), the woman makes between $3.44 and $6.87 per hour. My concern with the cap requirement is that the woman's work might be under-valued. If the ceiling is so low that the fee is merely symbolic, then the contract becomes one not-for-profit.

Capping fees is certainly better than prohibiting fees altogether. Simply allowing fees is some evidence that the surrogate contract mother's work is valuable and that women are not always expected to be volunteers. Letting the parties to the contract negotiate their fee arrangement, however, shows greater respect for the surrogate contract mother and women, generally.

V. SUMMARY

Collegiate athletics is a valuable institution. Many people—students, administrators, players, spectators, and alumni—are more committed to higher education because of collegiate athletics than they might be otherwise. The opportunity for some students to attend college is possible because of their unique and special athletic talents. A high percentage of students falling into this group are economically disadvantaged, of whom many are black or members of other minority groups.

Motherhood also is a valuable institution. For most of us, happiness and health depend upon having family where family members take care of one another. With the support of motherhood, many of us are able to achieve our personal and professional ambitions.

As they presently operate, however, the institutions of collegiate athletics and motherhood damage many athletes and women. Significantly, adherence to the myth and ideal of amateurism in college sports has caused many of us to lose sight of reality. Most college athletes in major sports are poor and/or students of color, who enter college even though many of them lack minimum verbal or mathematical skills. Most compete for their schools during their eligibility status, but do not graduate or turn professional. Similarly, most women are socialized to become the family's caretaker. As mothers, most of them strive to meet social expectations consistent with an ideal mother image held by the patriarchy. Consequently,

325. *See generally* M. FIELD, *supra* note 129, at 157-58. The ABA Family Law Section's proposed Model Act on Surrogacy recommends that surrogate contracts be enforceable, but that the fees be limited to amounts between $7,500 and $12,500 with a review of the limits every two years. *Guidelines For Surrogacy*, ABA Jour., Mar. 1, 1988, at 137, col. 3.

326. *See* Pollitt, *supra* note 315, at 684.

327. *See* Lacey *supra* note 155.

most women have little freedom or opportunity to develop their other talents or succeed in business.

Recently, the Olympic Committee decided to allow professional athletes to compete in the 1992 Olympics.[328] Although they must adhere to the Committee's regulations, which still cling to many notions about amateurism,[329] the Committee is able to see that an absolute dissociation of amateurism from professional sports is unrealistic and unnecessarily exclusive.[330] Similarly, surrogate contract legislation presents an opportunity to reject the traditional mother image and implement laws that will promote women and men as individuals with unique personalities who make personal choices about their personal lives.

Many alternatives exist that promote the positive aspects of collegiate athletics and motherhood, while also freeing athletes and women from unnecessary, antiquated restrictions that, in some respects, are racist, sexist, and classist. Implementing successful alternatives depends upon changing social attitudes about the proper relationship between colleges and athletes, society and minorities, and society and women. Our hope for community peace and happiness lies in rejecting the notion that differences among people can be ranked on a value scale. Rather, if community peace and happiness are our goals, then we need to accept, appreciate, and celebrate our differences.

328. *See generally* Johnson, *Goodbye, Olive Wreaths; Hello, Riches and Reality*, Sports Illustrated, Feb. 9, 1987, at 168.

329. For example, in order to be eligible to compete in the 1992 Olympics, the professional athlete must agree to give up his or her professional status, at least temporarily. *See, Homeward Bound*, RUNNER'S WORLD, August 1987, at 12, cols. 1 & 2. Willie Gault, Wide receiver for the Chicago Bears football team, was denied reinstatement of his amateur track status because of his unwillingness to leave the Bears. *Id.* He did compete in the 1988 Winter Olympics in Calgary as a member of the bob-sledding team, however. Sullivan, *Slippin' and Slidin'*, Sports Illustrated, Mar. 7, 1988, at 58. Interestingly, a Harvard student filed a grievance with the United States Olympic Committee when he lost his position on the bobsled team to Gault. The International Olympic Committee was convinced by the U.S. Olympic Committee and the U.S. Bobsled Federation to reinstate the student, who then attended the Olympics but never actually competed. *Id.*

330. Johnson, *supra* note 328. *See also*, Wheeler & Ridlon, *supra* note 25 (authors point out inconsistencies between denying Gault amateur status in track because of his Bears' contract, but allowing Edwin Moses, Mary Decker Slaney, and Bill Rodgers to keep theirs even though their annual incomes are $400,000, $300,000 and $250,000, respectively).