6
PARENTHOOD

Gestation and birthing are at the heart of how legal parents are identified in English law. A child can only have a maximum of two legal parents[1] and there are several factors that are deployed and afforded different weight in different contexts to identify these two legal parents.[2] Gestation (the term used by the law to describe the work in pregnancy), however, is the one factor that is *always* determinative at birth. Irrespective of context, the person who facilitated gestation by sustaining a pregnancy is the legal mother.[3] In many circumstances, the legal father/second female parent is defined by their relationship to the person who facilitated gestation via pregnancy.[4] That gestation determines the legal mother is a long-standing legal principle, often traced to the maxim *mater semper certa est* ('it is always certain who the mother is') that is claimed to have its origins in Roman Law.[5] That 'the mother is always certain' is entrenched as a fundamental legal rule in both common law and civil law jurisdictions across the world. Despite significant variance in the cultural, social, and legal meanings of family between jurisdictions, the identification of the person who gestates and births as the legal mother is widespread. Jurisdictions where other factors, such as intention, are used to identify the legal mother at birth are rare exceptions to the prevailing norm.[6]

The attribution of parenthood in English law has been subject to much critique—particularly since the enactment of rules surrounding assisted procreation in the Human Fertilisation and Embryology Acts 1990 and 2008 (HFE Acts 1990 and 2008). This critique has been wide-ranging. Commentators have outlined the limitations of only recognizing two legal parents,[7] revealing

[1] Human Fertilisation and Embryology Act 2008 s 36; s 42.
[2] Emily Jackson, 'What Is a Parent?' in Alison Diduck and Katherine O'Donovan, *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) 59–74, 60.
[3] *Ampthill Peerage Case* [1977] AC 547; Human Fertilisation and Embryology Act 2008, s 33(1); *R (McConnell and YY) v Registrar General* [2020] EWCA Civ 559.
[4] Jackson (n 2) 65; Julie McCandless and Sally Sheldon, 'Genetically Challenged: The Determination of Legal Parenthood in Assisted Reproduction' in Tabitha Freeman and others (eds), *Relatedness in Assisted Reproduction: Families, Origins, and Identities* (CUP 2014) 61–78, 62.
[5] Rita D'Alton Harrison, *Mater Semper Incertus Est*: Who's Your Mummy?' (2014) 22 Medical Law Review 357–83, 383.
[6] eg California, United States; *Johnson v Calvert* 851 P.2d 776 (1993).
[7] Jackson (n 2).

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the inconsistencies between how parenthood is determined in different contexts,[8] accentuating how the rules attributing parenthood are sexed/gendered[9] and reinforce a binary nuclear family model,[10] and highlighting how legal outcomes do not match lived realities in some contexts.[11] Much has been written about the problems associated with gestation defining a legal mother and how it fails to reflect the intentions of the relevant parties to their disadvantage in surrogacies;[12] simultaneously, there has been much written by commentators against surrogacies,[13] specifically against enforceable surrogacy arrangements, implying that pregnancy *should* determine legal motherhood.[14] Though this debate references the role of the/a pregnant person a lot, it is very much *about surrogacies* and not about gestation: it considers a particular technology enabling gestation where one person performs gestational work on the part of another person. Many commentators are explicit that outside of surrogacies, gestation is a legal criterion not worth interrogating, since outside of surrogacies the person who sustains a pregnancy is usually the/a person intending to parent. Jackson describes the criterion as 'unproblematic' with its 'principal defect' being its application only in surrogacies.[15] Most of the critique of gestation as a criterion in the attribution of motherhood focuses on whether the attribution of motherhood in a given context is right. In this chapter, I do something much narrower: exploring why we use gestation to attribute parenthood and whether the reasons to use gestation change if the *nature* of gestation changes. Within the discussion of gestation *qua* legal motherhood, the language used implies that the criterion for the attribution of parenthood is *gestation*, this term is merely a proxy for pregnancy. Where gestation is discussed, it is taken as a given that this means gestation sustained by a pregnant person and this person would be readily identifiable in most cases.

As technologies capable of enabling gestation in different ways come to fruition, some not involving pregnancy and some changing how a pregnancy can

[8] Stuart Bridge, 'Assisted Reproduction and the Legal Definition of Parentage' in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999) 73–88.

[9] See McCandless and Sheldon (n 4); Zaina Mahmoud and Elizabeth Chloe Romanis, 'On Gestation and Motherhood' (2023) 31 Medical Law Review 109–40.

[10] See Alan Brown, *What is the Family of Law? The Influence of the Nuclear Family* (Hart Publishing 2019).

[11] Kirsty Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24 Medical Law Review 608–21.

[12] eg Carmel Shalev, *Birth Power: The Case for Surrogacy* (Yale University Press 1989).

[13] eg Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (HarperCollins 1985).

[14] Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-sex and Unwed Parents* (Beacon Press 2001).

[15] Jackson (n 2) 65.

be sustained, *mater est* may no longer be so simple at all. Understanding where '*mater semper incerta est*' comes from and what is, historically and in contemporary terms, taken to be *legally* valuable about gestation and birthing is important in understanding why it is such a pervasive rule and to understand how to think about identifying a legal mother when there is no human-facilitated gestation, or where multiple people/devices undertake different forms of gestational and birthing work. In the first half of this chapter, I illustrate that the justification for treating gestation as determinative of legal motherhood has changed over time. I consider the potential justifications for centring gestation in the attribution of parental status. The logic of these justifications assumes that gestation is a process undertaken in a pregnancy sustained by one person. This sets the scene for considering the specific challenges arising out of novel technologies enabling gestation.

With pregnancy taken as *necessary* for recognition of a person as a legal mother, there are inevitably difficult and complex questions raised by novel technologies enabling gestation. As the Chapter 5 explored, that pregnant people are legally labelled *mothers*, rather than parents, renders invisible the lived experience of trans men and non-binary people who gestate and birth. Pregnancy being labelled as a gendered activity, in addition to one that is biosexed, might prevent the use of uterus transplantation (UTx) by people who want to be recognized as a father or a parent. This chapter looks at further challenges that arise from the potential future *divisibility* of gestational work. Where the law says that the pregnant person is the legal mother, it assumes that there is *one* person who facilitates gestation. Many commentators explain that in UTx the legal mother is clear[16]—in fact, this is one of the reasons why UTx is so attractive to some people.[17] In this way, the law renders the gestational contribution of a donor completely irrelevant. This makes visible that the law does not emphasize any (potentially tenuous) *gestational connection*: but rather *gestational work—pregnancy*. In the context of partial ectogestation, the legal mother would be identifiable as the person who sustained gestation for some period before the fetus was removed for continued gestation *extra uterum*.[18]

[16] Laura O'Donovan and others, 'Ethical and Policy Issues Raised by Uterus Transplants' (2019) 131 British Medical Bulletin 19–28, 20; Laura O'Donovan, 'Pushing the Boundaries: Uterine Transplantation and the Limits of Reproductive Autonomy' (2018) 32 Bioethics 489–98, 490.

[17] Benjamin Jones and others, 'Options for Acquiring Motherhood in Absolute Uterine Factor Infertility: Adoption, Surrogacy and Uterine Transplantation' (2021) 23 The Obstetrician & Gynaecologist 138–47, 142; Alexandra Mullock and others, 'Surrogacy and Uterus Transplantation using Live Donors: Examining the Options from the Perspective of "Womb-givers"' (2021) 35 Bioethics 820–28, 827.

[18] Elizabeth Chloe Romanis, *Regulating the 'Brave New World': Ethico-Legal Implications of the Quest for Partial Ectogenesis* (PhD thesis, University of Manchester 2020) 231.

But in this process there are clearly *two* facilitators of gestation; one human and one machine. Should we ignore a machine's gestational contribution and the associated work (albeit not psychofleshy work) of those involved? Additional challenges arise where there is no human-facilitated gestation at all. In complete ectogestation, does a gestateling 'have [only] a machine for a mother?'[19] In the second half of this chapter, I explore these challenges to consider who is/are the mother/s of children born from technologies enabling gestation.

Being a Legal Parent

Some of the legal consequences of parenting flow from the status of being a legal parent (having legal parenthood), and others stem from having parental responsibility (having legal rights and duties in child rearing).[20] In England and Wales, while only a maximum of two people can have the legal status of parent, more than two people can have parental responsibility[21] and therefore 'all of the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child'.[22] In contrast, legal parenthood or '*being a parent* is a legal status which has traditionally been associated with a presumed or actual genetic link'.[23] Where parental responsibility gives more than two individuals rights and responsibilities in the day-to-day of child-rearing, the distinction between status and rights/duties might seem relatively unproblematic. Because parental responsibility *can* be afforded to multiple interested parties involved in the social rearing of a child, and because parental responsibility is literally described as the 'rights, duties, powers, responsibilities and authority' that parents have—which many might take to be the most material matter, it might be argued that who has the legal status of parent is of little consequence. However, there are both functional and symbolic reasons why being a legal parent matters to individuals.

First, it is much easier for a legal parent to obtain parental responsibility. Every live birth in England and Wales must be recorded and issued a certificate that identifies the 'mother' and, where apropos, the 'father'/'second parent'.[24]

[19] Jennifer Hendricks, 'Not of Woman Born? Technology, Relationship and Right to a Human Mother' (2011) <http://trace.tennessee.edu/utk_lawpubl/45> accessed 6 March 2023, 49.
[20] Jonathan Herring, *Family Law* (10th edn, Pearson 2021) 498.
[21] Children Act 1989, s 2(5).
[22] ibid, s 3(1).
[23] Andrew Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in Bainham, Day Sclater, and Richards (eds), *What is a Parent?* (n 8) 25–46, 29.
[24] Births and Deaths Registration Act 1953; The Registration of Births and Deaths Regulation 1987.

While legal parenthood can come without parental responsibility,[25] legal parents are often automatically vested with parental responsibility in the birth registration process: all mothers (being the former pregnant person),[26] some fathers (where they are married to the mother, or are named on the birth certificate),[27] and some second female parents (where they are married/civil partnered to the gestational mother or have followed other legal processes during assisted conception at a licensed clinic).[28] While other persons can obtain parental responsibility through legal processes and/or court intervention,[29] such rights and duties are assigned by default to some legal parents, which functionally makes it much easier for those individuals to be social parents.

A social parent that succeeds in obtaining parental responsibility will have the powers/rights that enable them to rear a child, but this will not transform them into the '*legal parent* in the fullest sense'.[30] As Bainham notes, legal parenthood brings with it some 'fundamentals which go beyond everyday decisions involved in upbringing',[31] for example a presumption of contact, liability to financially support a child, creating a legal relationship between the child and the legal parent's existing family, and (where the legal parent also has parental responsibility—as mothers always do) the right to consent/refuse consent to adoption.[32] There are far reaching consequences here for both people who want to be parents, and equally for people who are deemed parents where they do not want to be recognized as such.

There is increasing recognition that the language used in attributing parenthood and recording it on birth certificates has significant expressive and symbolic effect. As Fineman notes, 'the legally constructed image of the family expresses what *is* considered "family" '.[33] Swennen and Crone observe that the law, and more specifically the normative power it has in claiming to explain

[25] eg a biological father might be the legal father but would not have parental responsibility if not married to the gestational mother or named on the birth certificate.

[26] Children Act 1989, s 2(1) and s 2(2)(a).

[27] ibid s 2(1); *Banbury Peerage Case* (1811) 1 Sim & St 153 H.

[28] Children Act 1989, s 4ZA.

[29] eg through a parental agreement with the gestational mother per Parental Responsibility Agreement Regulations 1991, or by obtaining a Child Arrangements Order per Children Act 1989, s 8. It is much easier for an unmarried father to acquire parental responsibility through a Child Arrangements Order because for the child to live with the father they *must* give parental responsibility to the unmarried father. Parental responsibility also endures after the Child Arrangements Order. I am grateful to Dr Dafni Lima for pointing this out.

[30] Bainham (n 23) 35.

[31] ibid 34.

[32] ibid 33; on adoption, a person must both be a legal parent and have parental responsibility. The court can also dispense with parental consent where it is deemed necessary; see Polly Morgan, *Family Law* (OUP 2021) 499.

[33] Martha Alberta Fineman, 'The Neutered Mother', in Richard Merelman, *Language, Symbolism, and Politics* (Westview Press 1992) 169–84, 176 (emphasis added).

how 'things stand in reality', has considerable power in providing a 'description' of what counts as family. This description, they explain, 'operates like a sieve that makes certain relationships sociopolitically visible, and thus speakable, and confines others to the realm of political (and to some extent social) inexistence'.[34] In legitimating some kinship groups as 'families' (based around identified parents), while failing to recognize others (by not recognizing some people as parents) people involved in the care of children are treated differently legally. For those who do not have their 'parenthood' recognized legally, this might constitute a form of psychological oppression in that these individuals are subject to a wrongful constraint of labelling: they are not recognized as having an attribute (being a particular person's parent) that they consider an essential attribute of their sense of self.[35] Being legally recognized as a *parent*, rather than someone able to make decisions about a child day-to-day, has identity implications for individuals. There are identity implications both for people who believe themselves to be the parent of a particular child in the (lack of) legal recognition for how they see themselves in relation to a particular child and for children in a (lack of) legal recognition that they are a particular person's child.

There are numerous examples of judicial reasoning emphasizing the identity implications for children in who their legal parents are.[36] As Theis J observed, determinations of legal parenthood reach 'far beyond the strict application of the law . . . it has emotional, psychological and social significance, as well as being at the core of the child's identity'.[37] Despite recognition of the importance of identity for children in who parents are, there are substantive problems in the operation of the law. As Brown and Wade argue that 'there is no coherent concept of identity from which the rules attributing legal parenthood flow; rather, the concept is invoked to provide a veneer of normative support for decisions as to who the parents should be in the different legal contexts'.[38] While there has been some recognition of the identity implications of parental status for the adult(s) surrounding a child, these implications often

[34] Frederik Swennen and Mariana Croce, 'The Symbolic Power of Legal Kinship Terminology: An Analysis of "Co-motherhood" and "Duo-motherhood" in Belgium and the Netherlands' (2016) 25 Social & Legal Studies 181–203, 189.

[35] Sandra Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (Routledge 1990) 30.

[36] *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam), per Munby P at [54]; *M v W* [2019] EWHC 648 (Fam), per Theis J at [64]; *A v J* [2022], per Morgan P at [34].

[37] *M v W* [2019] EWHC 648 (Fam), per Theis J at [35].

[38] Alan Brown and Katherine Wade, 'The Incoherent Role of the Child's Identity in the Construction and Allocation of Legal Parenthood' (2022) Legal Studies <doi:10.1017/lst.2022.21, 16> accessed 3 September 2024.

are not asserted in such forceful terms nor referenced as determinative considerations (in different ways in different contexts) in the attribution of parenthood. *R (McConnell and YY) v Registrar General*[39] concerned a trans man seeking to change his status from being the legal mother of his child to the legal father (discussed in Chapter 5). In the Court of Appeal, there was explicit recognition that being recorded as a mother on a birth certificate interfered with Mr McConnell's gender identity and that there was an interference with his right to family life[40] 'because the state describes [his] relationship [with his child] . . . as being that of mother and son; whereas, as a matter of social life, their relationship is father and son'.[41] Despite this, however, the Court determined that the law is clear that Mr McConnell is his son's mother. This case clearly illustrates that identity claims of parents in their specific relationships to children are not taken to carry much weight. This is also exemplified when we consider that little space is made for non-binary parental identities.[42] While in some instances persons can be named as parent 1/parent 2, this is only in specific cases (following a parental order in surrogacies/adoption) and not where an individual performs a specific biological role in the conception/gestation of a new human entity or in their relationship to a pregnant person,[43] as is explored in the next section.

Legal parenthood clearly has broad reaching implications; we all have an interest in the institution of parenthood and the ways in which it is determined that some experiences of being a parent are legally recognized and others are not. As Munby J put it, the attribution of legal parenthood is 'of the most fundamental gravity and importance'.[44] Investigation of the attribution of legal parenthood in the context of technologies enabling gestation is, therefore, of critical importance. In this chapter, I focus on gestation and the attribution of parenthood as an identity status—why does gestation denote being a mother? And what does this mean where the nature of gestation changes?

[39] *R (McConnell and YY)* (n 3).
[40] ibid, per Lord Burnett of Maldon CJ, King, Singh LJJ at [55].
[41] ibid.
[42] I am grateful to Dr Anna Nelson for discussions on this point.
[43] Mahmoud and Romanis (n 9) 118.
[44] *Re Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H)* [2015] EWHC 2602 (Fam), at [53].

The Attribution of Legal Parenthood in England and Wales

In ascribing parenthood, the law follows a strict set of defined rules. The attribution of legal parenthood begins with the mother: identified as the person who is pregnant (facilitating gestation) and births.[45] This rule is a long-standing principle in the common law,[46] codified in the HFE Acts 1990 and 2008.[47] A legal mother can abdicate their parental status to another only though adoption[48] or where the court hands down a parental order,[49] both of which cannot occur until a minimum of six weeks post-birth. Following either of these processes, a child has no legal mother, only one (or two) legal parents: 'motherhood' is reserved only for formerly pregnant people.[50]

Identifying the legal father/second female parent of a child[51] is much more complex. In contrast to legal motherhood—determined solely by one attribute—there are several relevant factors taken into consideration and these are applied in different ways in different contexts. Where procreation was 'natural' (conception occurred following sexual intercourse), the marital presumption applies; where the person who sustained the pregnancy is married/in a civil partnership at the time of giving birth, their husband/male civil partner is the legal father.[52] Where the legal mother is unmarried/not in a civil partnership, the legal father is the person named as such on the birth certificate.[53] Finally, where there is a dispute about parentage and/or where the mother is unmarried and there is no father is named on the birth certificate, the genetic progenitor will be the legal father.[54] In 'natural' procreation the law, in the first instance, ranks the factors in the following way: (1) relationship with the pregnant person; (2) genetic contribution.

An adapted set of rules is used to identify the legal father or second female parent where procreation involves assisted conception (in vitro fertilization (IVF) or artificial insemination). Where the person who sustains the pregnancy is married or in a civil partnership at the time of insemination/embryo

[45] *Ampthill Peerage Case* (n 3).
[46] ibid.
[47] s 33(1).
[48] Adoption and Children Act 2002, s 52(3).
[49] Human Fertilisation and Embryology Act 2008, s 54.
[50] Mahmoud and Romanis (n 9).
[51] As noted, these are the only category of parental roles outside of adoption and surrogacy where parental orders are issued.
[52] *Ampthill Peerage Case* (n 3).
[53] Adoption and Children Act 2002, s 111.
[54] *Leeds Teaching Hospital NHS Trust v A* [2003] EWHC 259.

transfer, the legal parent is their spouse or civil partner unless it can be shown that this person did not consent.[55] Where the spouse/civil partner is male, this person is recorded as the legal father, where they are female, they are recorded as the second female parent. Where the person who sustains the pregnancy is unmarried/not in a civil partnership, the legal father is the man who consented to be treated as the legal father provided there is also consent from the person who sustains the pregnancy that this same man is to be treated as the legal father.[56] Equally, there is a second female parent (as opposed to a father) where a woman consented to be treated as the second female parent and the intended pregnant person consents that this same woman is to be treated as the second female parent.[57] In the context of assisted conception, genetic contribution is expressly given no weight (unlike in the context of sexual procreation where it can matter). The HFE Act 2008 emphasizes that the pregnant person is the mother irrespective of whether donor oocytes were used[58] and that a sperm donor is not the legal father.[59] While intention has no formalized role in the law surrounding natural procreation, intention is very clearly centred in the attribution of parenthood where conception is assisted (except, of course in cases where assisted conception is followed by surrogacy). This happens literally in that when undergoing fertility treatment, patients and their partners are provided with forms to consent to parenthood while consenting to treatment.[60]

In setting out the rules for attributing legal parenthood, what becomes immediately evident is that considerable thought went into determining how to identify fathers/second female parents in different contexts. I make no comment on whether these rules provide the right answers,[61] but wish to highlight the discrepancy in the fact that varied factors are taken to be material in determining fatherhood/second female parenthood, but motherhood is 'stagnant' and treated as 'innate' to pregnancy facilitating gestation by the law. In contrast to the large body of academic literature that explores the

[55] Human Fertilisation and Embryology Act 2008, s 35 (on legal fathers); s 42 (on second female parents).
[56] ibid s 37.
[57] ibid s 44.
[58] ibid s 47.
[59] Human Fertilisation and Embryology Act 1990, s 28(6); *Leeds Teaching Hospital NHS Trust v A* (n 54).
[60] These forms embody the agreed fatherhood/second female parenthood conditions in the Human Fertilisation and Embryology Act 2008.
[61] There is a considerable body of literature that critiques how these factors are against each other. Some commentators eg Bridge (n 8) argue that the little recognition afforded to genetic contribution runs counter to most people's intuitions.

conceptual foundations of legal fatherhood,[62] Willekens and Scheiwe point out that '[s]ince motherhood for a long time was seen as "natural" and self-evident ("*mater semper certa est*"), no theoretical debate about the foundations and justifications of the legal assignment of motherhood emerged'.[63] While procreation might be a natural phenomenon, and procreative work indisputable in gestation facilitated by pregnancy, 'the fact that procreators are responsible for rearing their children is not'.[64] So where did *mater semper certa est* come from? It is important to ask this question to track the lineage of this legal maxim and understand its meaning and evolution. It is often put that gestation is the natural source of legal motherhood *because it always has been*. However, the characterization of legal motherhood as innate in a single biological fact of origin, and the values behind this determination, have changed over time. Without tracing the evolution of the value placed in gestation by the law, the fact that the law is making a value judgement about what makes a mother is obscured. The assertion pervasive in accounts of where the 'gestation determines motherhood' requirement comes from perpetuates an authoritative diagrammatic account of the origin of legal rules, which has come to limit thinking in contemporary contexts.

What follows is not a complete historiography of legal motherhood across different social contexts, but rather, an account of the possible origins and meanings of '*mater semper certa est*' in English law and how these have evolved. This is useful in revealing some of the power given to the rule attributing legal motherhood due to its consistent reinforcement as being historically rooted.

A Critical History of *Mater Semper Certa Est*

Where referenced, the maxim '*mater semper certa est*' is cited to the following passage in the sixth century Digest of Justinian:

> *quia semper certa est, etiam si uologo conceperit: pater vero is est, quem nupitae demonstrant*.[65]

[62] eg Sally Sheldon, 'Fragmenting Fatherhood: The Regulation of Reproductive Technologies' (2005) 68 Modern Law Review 523–53; Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing 2008).

[63] Harry Willekens and Kirsten Scheiwe, 'Motherhood and the Law: Introduction' in Harry Willekens, Kirsten Scheiwe, Theresa Richarz, Eva Schumann (eds), *Motherhood and the Law* (Universitätsverlag Göttingen 2019) 9–22, 10.

[64] Susan Kennedy, 'Willing Mothers: Ectogenesis and the Role of Gestational Motherhood' (2020) 46 Journal of Medical Ethics 320–27, 320–21.

[65] *Justinian's Digest,* Liber Secundus, iiii, 5 (d. 2.4.5 Paulus).

This passage is difficult to translate; it engages the ablative case and several relative clauses and thus has several potential literal meanings. A rough literal translation would be: 'For/because it/she is always certain, even if she conceives illegitimately, the father is without doubt him to whom the marriage points'.[66] However, the terms that are acknowledged as potential alternatives here 'for/because' and 'it/she' are significant and change the entire meaning of the maxim. *Quia semper certa est* could translate to 'For it is always certain' or 'Because she is certain'. If the former, the maxim is reiterating the marital presumption in identifying a legal father, which does, of course, have the *inference* that a biological mother is easily identifiable, but that a mother is certain is not given as a matter of law (a legal status is not conferred on her). Though this might seem a small detail, the language is revealing, and it is unclear that this passage should be used as authority for the statement that the *legal* mother is always certain even if there is the implication of who a 'natural' mother is within the statement. Moreover, as Willekins posits, it is notable that throughout history law has 'remained silent (and yet crystal clear) as to the basis on which the maternal status is assigned, so silent that one might be tempted to conclude that we are not at all dealing with a social norm here, but with a pre-legal, natural "given" not subject to differentiated human decision-making'.[67] It is arguably misleading to describe the maxim as explaining the attribution of legal motherhood: it is simply giving power to silence and conflating an implication of biological motherhood with a legal status.

Even if the latter translation is preferred, 'because she is certain', it is still significant that the maxim does not use the language of 'mother'. That 'she' is not called 'mother' is revealing about the objective of the maxim and the greater scheme of Roman family law. Roman law had no interest in codifying who a mother was because it was of little consequence. Roman mothers were afforded no formal legal rights over their children;[68] rather persons who gestated and birthed were treated as a functional means of identifying fathers. Fathers mattered because the oldest male relative in a familial structure had executive authority over all family members until his death (*paterfamilias*):[69] mothers had no authority whatsoever. It is untrue, therefore, to say that *legal motherhood*

[66] I am grateful to Dr Sindre August Horn and Hannah Philp for their help translating this phrase.

[67] Harry Willekens, 'Motherhood as a Legal Institution: A Historical-Sociological Introduction' in Harry Willekens, Kirsten Scheiwe, Theresa Richarz, Eva Schumann (eds), *Motherhood and the Law* (Universitätsverlag Göttingen 2019) 21–52, 29.

[68] Andrew Riggsby, *Roman Law and the Legal World of the Romans* (CUP 2010) 182.

[69] Judith Evans-Grubbs, *Women and the Law in the Roman Empire: A Sourcebook on Marriage, Divorce and Widowhood* (Routledge 2002) 20.

has been determined by gestation since Roman law because legal motherhood *did not exist* in the sense that we know it today.

A 2014 decision of the Supreme Court of Ireland acknowledged that '[t]here does not appear to be any evidence that the maxim mater semper certa est formed part of the Common Law'.[70] The decision surveyed legal writings on Common Law ranging from 1658 to 1939 and concluded there was no 'stream of reference to *mater semper certa est*' within them that would have indicated it was a maxim of common law, while the marital presumption of fatherhood was consistently elucidated.[71] The *Ampthill Peerage Case* in 1977 was the first case to, *obiter*, state with conviction that a mother is certain: '[m]otherhood, although a legal relationship, is based on a fact, being proved demonstrably by parturition'.[72] This statement, unlike the oft-cited Roman law maxim,[73] actually provided an account as to what it was that made a mother certain: 'parturition'. From this eventually, the maxim '*mater est quam gestatio demonstrat*' (by gestation the mother is demonstrated) begins to appear in academic writings about parenthood.[74] Baldassi credits the convention *by gestation the mother is demonstrated* to a textbook by Mason and McCall Smith in 1983.[75] She is critical of the failure of many scholars to notice the more recent origins of 'gestation equals motherhood', instead perpetuating the principle as if *it had always been there*. Dickens, writing from Canada, is a notable exception: '[t]he legal maxim *mater est quam gestatio demonstrat,* while necessarily of more recent origin than the Latin form may suggest, accords to established understanding' that legal motherhood is determined by gestation and birth.[76]

That both Roman Law and Common Law were likely not explicit about the certainty of a legal mother, and definitely not explicit that pregnancy facilitating gestation was determinative of motherhood, does not mean, for some commentators, that 'the rules determining the maternal status *do not have a history*'.[77] Willekins, for example, accepts that in most legal orders *mater*

[70] *MR and DR & ors v An t-Ard-Chláraitheoir & ors* [2014] IESC 60, at [70] per Denham CJ

[71] ibid at [73], see [74]–[77].

[72] *Ampthill Peerage Case* (n 3), per Lord Simon o'Glaisdale at 577.

[73] If one surveys Roman law, there are other places where the inference is much clearer that a mother is the person who births, for example, in the law surrounding citizenship sources say things like a person is a citizen where 'born of a Roman mother', eg Edward Poste, *Gai Institutiones* (4th edn, OUP 1904) §32.

[74] Cindy Baldassi, '*Mater est quam gestatio demonstrat:* A Cautionary Tale' (2006) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=927147> accessed 6 March 2023, 6.

[75] ibid, 4; J Kenyon Mason and Alexander McCall Smith, *Law and Medical Ethics* (Butterworths 1983).

[76] Bernard Dickens, 'Reproduction Law and Medical Consent' (1985) 35 The University of Toronto Law Journal 255–86, 283.

[77] Harry Willekens, 'Motherhood as a Legal Institution: A Historical-Sociological Introduction' in Harry Willekens, Kirsten Scheiwe, Theresa Richarz, Eva Schumann (eds), *Motherhood and the Law* (Universitätsverlag Göttingen 2019) 21–52, 29.

semper certa est was not 'explicitly formulated' but still 'the basic rule for assigning the legal status of motherhood has always and everywhere been the same . . . it is only recently that it has come to be deemed necessary to write down the rule'.[78] However, this statement is illusory about 'legal motherhood'. It has long been taken as a given that a pregnant person facilitating gestation/the birth-giver was a *biological* parent, however it is relatively recently in legal history that such a person was afforded a legal status that meant *any* recognition, never mind any rights.[79] Until 1839, married women who birthed had no right to custody of or visitation with their children if they divorced their husbands.[80] In stark contrast, in today's legal context, legal motherhood has come to conscript. Hendricks asserts that the law should value pregnancy and birth as creating the relationship between 'mother' and 'child' without 'stereotyping'.[81] However, as I have argued with Mahmoud elsewhere, it is significant that 'law affords those who do not gestate and birth the freedom to make social determinations about their legal parental status, whereas biological determinism inhibits the freedom of gestating people to make such arrangements'.[82] In contemporary social contexts, 'the motherhood penalty' now imposes a completely different social, economic, and political tax on people who (can) gestate and birth (predominantly women).[83] The rule that birthers are 'naturally' legal mothers and thus have a status that affords them rights over and responsibilities for their children historically helped rectify an injustice, but today it propagates one in essentializing the female body for motherhood (and stereotyping people who can become pregnant as mothers).[84]

Furthermore, even if we take it that rules determining maternal status have a history, some commentators have observed the significant ambiguity as to the values behind the content of these rules. As Bridge explains, before the advent of IVF, '[t]he genetic mother was the gestational mother and was the legal mother. Nothing else was biologically possible, or therefore legally necessary'.[85] As Martin puts it, '[i]t was not necessary for the law to define motherhood, for it was evident from the fact of childbirth'.[86] Birth has always been an obvious means of identifying a person's connection to a new human being

[78] ibid.
[79] Fineman (n 33) 171.
[80] Custody of Infants Act 1839.
[81] Jennifer Hendricks, *Essentially a Mother: A Feminist Approach to the Law of Pregnancy and Motherhood* (University of California Press 2023) 3.
[82] Mahmoud and Romanis (n 9) 119; see also Jackson (n 2) 66.
[83] Elaine Glaser, *Motherhood: A Manifesto* (Fourth Estate 2021) 4.
[84] See Mahmoud and Romanis (n 9).
[85] Bridge (n 8) 75.
[86] Morgan (n 32) 455.

since that entity literally emerges from being a part of their body to become a part of the world. The connection between a birther and a resulting child is thus an easy marker by which to ground consideration of who a new human entity exists in relation to. Before the advent of any reproductive technology and genetic testing, indeed, this was the only marker.[87] What is interesting, however, is how that marker is conceptualized.

First, the link between baby and legal mother is consistently described by commentators as one of *gestation*, rather than *of birth*. This is presumably because they are not being attentive to the difference between pregnancy and gestation. Legal sources elucidate some conceptual confusion in that the common law refer to motherhood being demonstrated 'by parturition'[88] (a synonym for birth), whereas the HFE Acts 1990 and 2008 stipulate a legal mother as the person 'carrying or has carried a child'[89] (a synonym for gestation facilitated by pregnancy in common parlance). This might seem like it is of little consequence, after all a pregnant person (beyond a certain duration of pregnancy) is necessarily also a birther.[90] However, as I argue later in this chapter, novel technologies enabling gestation give us reason to seek conceptual clarification. Second, the biological connection in gestation/birth clearly has significant value placed in it by the law. However, there remain questions about *what* it is that is being valued. As Hill explains:

> This principle [that the person who sustains pregnancy/births is the legal mother] reflects the ancient dictum mater est quam gestation demonstrat (by gestation the mother is demonstrated). The phrase, by its use of the word 'demonstrated' has always reflected an ambiguity in the meaning of the presumption. It is arguable that while gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguity as the basis for maternal rights. Under this latter interpretation, gestation simply would be irrefutable evidence of the more fundamental genetic relationship.[91]

[87] eg there are multiple cases throughout history before reproductive technology whereby men seek to a claim that a child was not theirs based on the length of gestation vs their last sexual intercourse with their wife. See *Alsop v Bowtrell* (1619) 79 ER 464; *Wood v Wood* [1947] P 103; *Glenister v Glenister* [1945] P 30; *Clark v Clark (No 1)* [1939] P 228.

[88] *Ampthill Peerage Case* (n 3).

[89] s 33(1).

[90] In making this comment, I do not wish to diminish experiences of pregnancy that do not end in live birth, but merely highlight that after the fetus attains a particular size delivery is necessarily a birth.

[91] John Hill, 'What does it mean to be a "Parent?" The Claims of Biology as the Basis for Parental Rights' (1991) 66 New York University Law Review 353–420, 370.

The question is, as Jackson put it: '[i]s it gestation itself that is decisive [of legal motherhood], or does gestation merely *demonstrate* or offer proof that the woman who gives birth is the *genetic* mother of the child?'[92] Before the advent of IVF, there was no separability of genetics and gestation in those assigned female at birth (AFAB),[93] thus it is unsurprising that we cannot find the answer in Roman family law perhaps because they thought the question was easy to answer, though more likely because they did not ask the question at all. On the advent of IVF, however, the gestational and genetic role of a person AFAB in procreating could be severed. It became possible for a person AFAB capable of becoming pregnant to become pregnant using an oocyte donated by another person AFAB. Some people will become pregnant using a donor oocyte because they want to become a mother but do not have (good quality) oocytes of their own. Some people in a same-sex relationship gestate using the oocyte of their partner so that both parties can be biologically connected to the resulting child. Other people are gestational surrogates, performing gestational work using the oocyte of another person AFAB (with or without a partner/family network) who intends to parent it. As such, it is critical to ask the question of *why* we value gestation/birth and *what* we value in it as the determinative factor of legal motherhood.

If we continue to embolden *mater semper certa est* as historically rooted, and reiterate that this means that motherhood is innate in sustaining pregnancy/birthing, we give it considerable power. However, the reality is, this rule has not been enshrined for thousands of years—both in the sense that the rule was not expressly given in the formulation now known to be so familiar, but also in that we are not clear what it encompasses. In the story often told, the mother as a legally defined person in relation to her child was just so obvious that it did not need reiterating in express terms; this tells us a story about the 'naturalness' of motherhood and negates the conceptual challenges in what is heralded as a simple rule. However, if we recognize that motherhood was not legally defined and this was often the case because mothers had no rights in relation to their children, a different story is revealed.

[92] Jackson (n 2) 65.
[93] ibid.

Contemporary Meaning in *Mater Semper Certa Est*

Despite the confusing history, English law is clear that the legal mother is the person who sustains a pregnancy and births. This is not just the position of English law, but in fact, it is the case in much of Europe. The European Court of Human Rights noted in 1980 that:

> [T]he Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim *mater semper certa est.*[94]

Even in jurisdictions with more progressive regulation enabling two female people to be recognized both as 'mothers' (which is not possible in England and Wales), such as 'co-mothers' in Belgium or 'duo-mothers' in the Netherlands,[95] motherhood remains tethered to gestation; the person who facilitates gestation by undertaking pregnancy is the mother and another person can *also* be a mother.

The system of '[f]amily law cannot help but reflect the society's values and choices'.[96] While traditionally western societal convention and law treat parenthood as 'a question of fact rather than judgment', the reality is that 'parenthood is not a fact waiting to be discovered' and the law is consistently making normative judgments about the comparative significance of differing claims to parenthood.[97] As Johnson explained, '[b]iology does not give an answer to the question: what is a parent'[98] unless we make the normative decision to value biology above other factors. The law makes a value assessment in determining that gestation is the most important aspect in determining parenthood. McCandless and Sheldon explain that 'it has been seen that motherhood is firmly grounded in gestation and, while some speculate that historically this merely stood as a proxy for a genetic link, today it clearly holds significance per se'.[99] But what is this significance? There is a tendency to afford this biological

[94] *Marckx v Belgium* (1979–80) 2 EHRR 330 at [39].
[95] Frederik Swennen and Mariano Croce, 'The Symbolic Power of Legal Kinship Terminology: An Analysis of "Co-motherhood" and "Duo-motherhood" in Belgium and the Netherlands' (2016) 25 Social & Legal Studies 181–203.
[96] Elizabeth Paul, *Taking Sides Clashing Views on Controversial Issues in Sex and Gender* (McGraw-Hill 2001) 260.
[97] Jackson (n 2) 67.
[98] Martin Johnson, 'A Biomedical Perspective on Parenthood' in Bainham, Day Sclater, and Richards (eds), *What is a Parent?* (n 8) 47–72, 68.
[99] McCandless and Sheldon (n 4) 67.

account significance, but we must take the time to scrutinize the potential motivations, presented as a continuation of a natural long-existing biological rule, rather than a value judgement. In what follows, I consider the justifications for the leading role of gestation in the attribution.

A meaningful biological tie? ('Best interests of the child')?

In *Re G*, Baroness Hale famously opined that 'the process of carrying a child and giving him birth . . . brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other'.[100] The emphasis of a 'maternal tie based on presumed *in utero* bonding' exemplifies the assumption that it was in the best interests of a child to be raised by the person who birthed them irrespective of the circumstances.[101] In Norway, commentators suggested that the *mater semper certa est* rule is favoured to prevent interference with nature ('tukle med naturen').[102] In Spain, the report of a special Commission into assisted reproduction concluded that:

> [t]he more important than the genetic one, as the gestating mother bears the child within her for nine months and protects the child physiologically and psychologically . . . the biological preponderance of gestational motherhood over the genetic one is considered and that the legal mother is always the gestating woman, even in the case where egg donation is involved.[103]

There are some scholars that support the gestation *qua* motherhood rule on these grounds; for example, Hendricks explains that '[a]t birth, the only existing, tangible human relationship on which a child can draw is with the woman from whom she has just separated'.[104] She describes pregnancy as 'caretaking'[105] and argues that where pregnancy is not seen as determinative of motherhood, as she shows is the case in some jurisdictions within the United

[100] *Re G (Children)* [2006] UKHL 43, per Baroness Hale at [34].
[101] Mahmoud and Romanis (n 9) 125.
[102] Marit Melhuus, 'Sperm, Eggs and Wombs: The Fabrication of Vital Matters through Legislative Acts' in Penny Harvey, Christian Krohn-Hansen, and Knut G Nustad (eds), *Anthropos and the Material* (Duke University Press 2019) 122–42, 123.
[103] Miguel Palacios Alonso, *Informe de comisión especial de estudio de la fecundación 'in vitro'y la inseminación artificial humanas* (Madrid 1986): translation from Itziar Alkorta, 'Surrogacy in Spain: Vindication of the *Mater Semper Certa Est* Rule' (2020) 26 The New Bioethics 298–313, 302.
[104] Hendricks, 'Not of Woman Born?' (n 19) 49.
[105] Hendricks, *Essentially a Mother* (n 81) 3.

States, then there is a concerning propagation of problematic genetic essentialism.[106] She retorts that when there is argument about changing how gestation is valued in the law (especially where there is reflection on equality for biological progenitors) this 'equates biological motherhood with biological fatherhood, as if gestating and ejaculating are the same thing'.[107] There are two claims at work in these arguments: first, the idea that there is a special bond between a person who facilitated gestation with bodily work and the fetus that needs recognition (both for the welfare of a resulting child and for the welfare of the birthing person) and second that if pregnancy is not seen as determinative of parental status then there is the risk of devaluing the bodily work that pregnant people undertake.

These first claim is essentially stipulating that 'social bonds are grounded biologically in pregnancy'[108] however, as Lewis suggests, 'what some call the "nine-month head start" to a relationship—is ultimately incomplete'.[109] Though many pregnant people and birthers conceive of themselves as undertaking a form of care work, this is not a universal experience. Many see pregnancy and birthing as intimately connected to their desire to become a parent (for some, specifically to be a mother) and describe a feeling of prenatal bonding, others describe feelings of prenatal bonding though unrelated to being a mother after birth,[110] and others describe having no experience of prenatal bonding at all.[111] Furthermore, as Hill has pointed out, 'the implications [of any prenatal bonding, however understood] for parental-rights arguments are unclear'.[112] As Mahmoud and I have argued, gestation is not parenting work, since parenting is a relational activity and a fetus is a part of a pregnant person, pregnancy facilitating gestation is a precursor to parenting.[113] As such it is rather odd that we perpetuate gestation and birthing as the 'natural' sources of parental status. It is clear in the law that gestation is considered a meaningful biological tie, and with the move towards recognition of informing children about their origins,[114] the way that gestation is described as above makes the case for

[106] ibid 63.
[107] ibid 99.
[108] Sophie Lewis, *Full Surrogacy Now: Feminist Against Family* (Verso 2019) 14.
[109] ibid.
[110] For example, some surrogates refer to themselves as 'babysitters': Zsuzsa Berend, '"We Are All Carrying Someone Else's Child!": Relatedness and Relationships in Third-Party Reproduction' (2016) 118 American Anthropologist 24–36.
[111] Gregory Pence, 'What's so Good about Natural Motherhood? (In Praise of Unnatural Gestation' in Scott Gelfand and John Shook (eds), *Ectogenesis: Artificial Womb Technology and the Future of Human Reproduction* (Rodopi 2006) 84–85.
[112] Hill (n 91) 398.
[113] Mahmoud and Romanis (n 9) 111–15.
[114] Culminating in the Human Fertilization and Embryology Authority (Disclosure of Donor Information) Regulations 2004 which permit individuals who were conceived through gamete or

the recognition of gestational origins being as important in origin stories as genetics but does not necessarily explain why pregnant people ought to be definitively *always* the legal mother.

After birth, when a new human entity exists, there is a clear moment of transformation—not just in the emergence of a new person, but in the 'becoming' of new parents. There are visible social and biological relationships between childrearers and children, and these people may not necessarily be those involved in their creation or gestation. Some commentators have thus argued the clear delineation between biological and social parenthood often perpetuated in Western culture and in the law is not so clear-cut because 'many of the processes and relationships involved in childrearing—particularly of very young children—are shaped by biology'.[115] Examples include chestfeeding[116] (a person need not have been pregnant to chestfeed),[117] feeding in general, and the physical intimate relationship that a child can have with a parent to regulate biological parameters (eg skin to skin contact can regulate temperature and heartbeat).[118] These are all biological activities that last much longer than the duration of pregnancy. Despite this, however, the law privileges the biological relationship in gestation.

Undoubtedly, pregnancy and birth are significant bodily work. However, if we take the approach Hendricks takes, in her concern for avoiding genetic essentialism, we end up reifying *gestational essentialism*. Essentially in her work, she criticizes one form of biological essentialism to justify the propagation of another form of biological essentialism. One does not need to say gestation is *the* determinative factor in attributing parental rights in order to hold the position that gestational work is significant work, encompassing of greater physical and emotional labour of a wholly different nature, that is not equivalent to ejaculating. Importantly, if we hold that pregnancy always identifies a mother we are not respecting the intentions of the person undertaking gestational work (and all it involves) because we are not respecting any negative intentions

embryo donation after April 2005 and are eighteen years old or older to request the identity of their donor from the Human Fertilisation and Embryology Authority.

[115] Teresa Baron, *Pregnancy, Procreation, and Moral Parenthood* (PhD thesis, University of Southampton 2020) 20.

[116] eg Tonse Raju, 'Breastfeeding Is a Dynamic Biological Process—Not Simply a Meal at the Breast' (2011) 6 Breastfeeding Medicine 257–59.

[117] Gemma Cazorla-Ortiz and others, 'Methods and Success Factors of Induced Lactation: A Scoping Review' (2020) 36 Journal of Human Lactation 739–49.

[118] eg Ann Bigelow and Michelle Power, 'Mother–Infant Skin-to-Skin Contact: Short- and Long-Term Effects for Mothers and Their Children Born Full-Term' (2020) 11 Frontiers in Psychology <doi.org/10.3389/fpsyg.2020.01921>(accessed 3 September 2024).

they may have including not wanting to mother.[119] The work that the person has done in sustaining a pregnancy (that which Hendricks calls 'caretaking' that demands respect), as Ruddick writes, is not compromised where they decide to transfer 'to others the responsibility for the infant she has birthed'.[120]

Legal certainty

While feminists have long distinguished between 'giving birth and being a mother',[121] English law recognizes no such distinction.[122] As birth is completed, the birther becomes a legal mother with serious practical ramifications, as this person has parental responsibility from birth.[123] This has particularly harmful effects for persons who undertake pregnancy but who do not wish to parent.[124] This construction means, however, that routinely there is always an identifiable person responsible for a human entity from the moment of its existence in the world.[125] This might be considered important for the welfare of the child. Concealment of birth and abandonment of an infant under two years are both criminal offences in England and Wales,[126] reiterating the insistence of the law that the person who sustains gestation and births must always identify themselves and be responsible for the child after birth[127] (and if they do not want to parent they are responsible for initiating adoption). Though a compelling motivation, it remains unclear why the person who sustained a pregnancy *must* be recorded as the legal mother where another person is willing to be recorded as such (and thus to take responsibility for the child).

In the *McConnell* case, the High Court decision reiterated *obiter* the importance of certainty as a matter of clear and consistent record keeping in birth registration.[128] Though, as Fenton-Glynn observed, no clear rationale was provided for the importance of homogeneity in birth registration, especially over the specific harms to people who sustain pregnancies being recorded as

[119] Dafni Lima, 'Legal Parenthood in Surrogacy: Shifting the Focus to the Surrogate's Negative Intention' (2024) 46 Journal of Social Welfare and the Law 245–66, 250.
[120] Sara Ruddick, *Maternal Thinking: Towards a Politics of Peace* (Beacon Press 1989) 51.
[121] Adriene Rich, *Of Woman Born: Motherhood as Experience and Institution* (WW Norton & Company 1995).
[122] Mahmoud and Romanis (n 9).
[123] Children Act 1989, s 2(1) and s 2 (2)(a).
[124] Mahmoud and Romanis (n 9) 138.
[125] Morgan (n 32) 458.
[126] Offences Against the Person Act 1861, s 60 (concealment); s 27 (abandonment).
[127] Mahmoud and Romanis (n 9) 123.
[128] *R (on the application of TT) v The Registrar General for England and Wales* [2019] EWHC 2384 Fam, per Sir Andrew McFarlane P at [234], [243], [244].

legal mothers where it is not their intention to parent.[129] The determination of legal parenthood and the birth registration process were historically of importance to settle inheritance and succession. However, in more recent years, birth certificates are considered more a matter of specifying a child's origins.[130] As noted, recording origins is something potentially facilitated independently to determining legal parents, thus, the certainty of birth registration does not appear sufficient justification for *mater semper certa est*.

A surrogacies deterrent/Preventing the exploitation of people sustaining pregnancies

In Europe, it is interesting that the *mater semper certa est* rule operates both in jurisdictions that have banned surrogacies and those that have not. It is arguable, however, that pregnancy *qua* legal motherhood operates as a deterrent in all jurisdictions—just to different degrees. Alkorta, writing from the Spanish context in which surrogacies are unlawful,[131] asserts the importance of the 'gestational-model of motherhood' on the grounds that it 'not only deters surrogacy malpractice but is also a fair principle by which to protect birth mothers and their children from the abuses of reproductive market force'.[132] I will not go into detail about prohibitions on surrogacies here, but I raise this to note that in jurisdictions that prohibit surrogacies, there is more consistency in *mater semper certa est* as an additional deterrent for surrogate-seekers. What is confusing is the maintenance of this rule in jurisdictions permitting surrogacies (in some circumstances). In England and Wales, surrogacies are permissible for altruistic reasons only, with commercial surrogacies prohibited,[133] though there is a lack of clarity related to compensated arrangements.[134] Johnson, critiquing the apparent contradiction in the HFE Acts ignoring genetics in the

[129] Claire Fenton-Glynn, 'Deconstructing Parenthood: What Makes a Mother?' (2020) 79 The Cambridge Law Journal 34–37.

[130] See Edward Higgs, 'A Cuckoo in the Nest? The Origins of Civil Registration and State Medical Statistics in England and Wales' (1996) 11 Continuity and Change 115–34; Liam Davis, 'Deconstructing Tradition: Trans Reproduction and the Need to Reform Birth Registration in England and Wales' (2021) 22 International Journal of Transgender Health 179–90, 180.

[131] Assisted Reproduction Technologies Act of 1988 (Law 35/1988, 22nd November) Art 10.

[132] Alkorta (n 103) 299.

[133] Surrogacy Arrangements Act 1985, s 2.

[134] Per the Human Fertilisation and Embryology Act 2008, s 54(8) surrogates can be compensated for 'expenses reasonably incurred'. However, sometimes the line between reasonable expenses and payment is not always clear-cut. Moreover, because this is considered by the Courts as part of the process of making a parental order, expenses are considered retrospectively and often approved even where they look like they may exceed 'reasonable expenses': *Re Q (Parental Order)* [1996] 1FLR 369; *Re X and another (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030.

context of surrogacies, implies that the purpose of the law may be to deter these sorts of arrangements. He writes, '[c]ouples are almost challenged by the law not to risk entering unenforceable surrogacy agreements by giving them little or no control over their own genetic material'.[135] The European Court of Human Rights acknowledged that UK law maintains a deterrent against surrogacies in the attribution of legal motherhood:

> [T]he legislature has chosen to confer parenthood on the gestational mother and her husband. This choice appears to have been influenced both by the need to prevent gamete donors from being recognised as legal parents at birth and the desire to prevent surrogacy agreements from being enforceable so as not to encourage the removal of babies from their gestational mothers against the mothers' wishes.[136]

So why permit surrogacies but pass laws that may deter it? As discussed in Chapter 4, the Warnock committee's recommendations, resulting in the Surrogacy Arrangements Act 1985, had sought to capture the permissibility of surrogacies where intended parents have a compelling medical need.[137] Most of Warnock's members hoped that surrogacies would just go away by constructing a regulatory regime that would not encourage its use.[138] In making surrogacies more legally complex, the surrogacy journey is limited to people who *need* assisted gestation, rather than those who might want to outsource gestation.[139] These legal complexities, however, have not completely undermined demand for surrogacies,[140] since there are many biological, psychosocial, and/or social factors affecting a person's ability to become pregnant that contribute to their being involuntarily childless without surrogacies, or, indeed, novel technologies enabling gestation.[141]

One of the key concerns that Warnock raised that has been built into the fabric of the regulation surrounding surrogacies; the prevention of the exploitation of pregnant people. While much of the report's concerns are about

[135] Johnson (n 98) 66.
[136] *H v United Kingdom*, Application No 32185/20 (2021) at [55].
[137] Margaret Brazier, 'Regulating the Reproduction Business?' (1999) 7 Medical Law Review166–93, 169.
[138] ibid 179.
[139] The report described people 'with compelling medical need' as deriving medical need. On the complexity of determining need where people seek out assisted/assistive gestation see Elizabeth Chloe Romanis, 'Assisted Gestative Technologies' (2022) 48 Journal of Medical Ethics 439–46, 444.
[140] Kirsty Horsey, 'Not Withered on the Vine: The Need for Surrogacy Law Reform' (2016) 4 Journal of Medical Law and Ethics 181–96, 182.
[141] Romanis, 'Assisted Gestative Technologies' (n 139).

exploitation in commercial surrogacies, they also indicate they had concerns about exploitation in altruistic arrangements too.[142] For some, there remains an 'inherent exploitation' in the altruistic pregnancy-facilitated gestation of a child that is to be parented by others.[143] Such an account assumes that there is something in the biological nature of the work of gestating that makes one not raising the resulting child a harm to the person who sustained the pregnancy. A holder of this belief would advocate that there is some protection for the pregnant person in *mater semper certa est* because it gives them the opportunity to use the law to ensure they have custody of a born child, and there are legal mechanisms that enable them to give up their parental status if this is still what they want *after* pregnancy.

However, this position—that *never* allows the person who sustained the pregnancy to be anything other than the legal mother, and to remain as the legal parent for the first six weeks after birth even if they mean to have the child adopted or to be given to its intended parents[144]—is a form of biological essentialism that is also exploitative. Presuming that a person who has been pregnant and births *must* feel a biological need 'to mother the resulting baby is a relic of a time when it was biologically impossible and socially unacceptable for people not to "mother" their biological children'.[145] Indeed, it is exploitative to co-opt the identity of a person who has facilitated gestation with bodily work and birthed by labelling them 'a mother'—and potentially enforcing care responsibilities—where they did not see this as their intention in undertaking pregnancy. Some may argue that starting legal motherhood from gestation may conscript, but it is the only way to protect pregnant people from exploitation since intention-based accounts of parenthood negate the fleshy-ness of the contribution of the person who was pregnant; it 'ignores the months she has spent *in a relationship with a* developing human being'.[146] This continues to promulgate essentialism and one way of understanding gestation and pregnancy. Moreover, it creates a false dichotomy in possible intention-based accounts. As I have argued with Mahmoud elsewhere:

> [An] intention-based parenthood model does not necessarily displace the gestating individual's central role in the creation of a new human entity.

[142] Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) [8.17].
[143] Ingvill Stuvøy, 'Troublesome Reproduction: Surrogacy under Scrutiny' (2018) 7 Reproductive Biomedicine and Society Online 33–43, 38.
[144] Adoption and Children Act 2002, s 52(3); Human Fertilisation and Embryology Act 2008, s 54(7).
[145] Mahmoud and Romanis (n 9) 116.
[146] Shanley (n 14) 116.

> We see no reason why an intention-based model would not start from the gestating person's intention [to ensure some recognition of the bodily labour a gestator does in a way that does not conscript them].[147]

I am not denying that there are and will be circumstances where surrogacies can be exploitative—where a person is pressured or coerced—but we should not take from this that the law should be structured in a way that reinforces the idea that surrogacies—assisting another to become a parent by undertaken gestation—are *innately* exploitative. Rather, as Begović highlights, specificity is important; we must carefully 'identify in what ways it can be exploitative, and how this can be avoided'.[148] The law offering no flexibility about who the mother is does not prevent exploitation; it can sometimes enable it if we look at the biological essentialism it propagates. This seemingly indicates the motivation as concern about the fabric of the nuclear family where a third person plays a crucial role in a family's procreation[149] indicating the contemporary meaning of *mater semper certa est* is a legal deterrent against surrogacies for the protection of the nuclear family.

As this section has explored, there are several potential contemporary rationales for *mater semper certa est* that are clearly distinct from the (questionable) origins of this maxim. I have also illustrated why these rationales do not stand up to scrutiny. Understanding the potential rationales behind the rule that gestation is determinative of motherhood/parenthood is important context for thinking about the novel conceptual problems that are raised by novel gestations.

Novel Gestations; Novel Conceptual Problems

In a recent study, I asked reproductive rights advocates about novel technologies enabling gestation and the problems and pressures arising from their availability.[150] Overwhelmingly, participants stressed that the law surrounding

[147] Mahmoud and Romanis (n 9) 137.

[148] Dunja Begović, *Upholding Women's Autonomy in Pregnancy: Responding to the Challenges of New Reproductive Technologies* (PhD thesis, University of Manchester 2021) 138.

[149] Lewis stresses that surrogacy is considered problematic because it is 'antithetical to so-called traditional family values': Sophie Lewis, 'Defending Intimacy against What? Limits of Antisurrogacy Feminisms' (2017) 43 Signs: Journal of Women in Culture and Society 97–125, 100.

[150] Elizabeth Chloe Romanis, '"The Law is Very, Very Outdated and Not Keeping Up with the Technology": Novel Forms of Assisted Gestation, Legal Challenges, and Perspectives of Reproductive Rights Advocates in England and Wales' (2023) 10 Journal of Law and the Biosciences <doi.org/10.1093/jlb/lsad027> accessed 3 September 2024.

the attribution of parenthood was flawed but its conceptual failings would become even more evident with novel technologies enabling gestation.[151] As Brown explains, 'this choice to privilege gestation . . . reflects UK law's construction of motherhood as a *"natural", indivisible, process*'.[152] However, technologies enabling gestation have and will introduce challenges to this framing. Pregnancy-facilitated gestation is not necessarily an entirely 'natural' process where its inception follows assisted conception (in surrogacies because there need not be any genetic relation between the person sustaining the pregnancy and the conceptus), where it takes place in a transplanted uterus, or where it is facilitated (partially) by a machine. Moreover, it may no longer be an 'indivisible' form of work where another person contributes material to make the gestation possible—as in UTx—or where a machine takes over gestation in place of a person continuing a pregnancy (partial ectogestation). In what follows, I consider who the legal mother is where novel forms of gestation are used in the creation of new human entities. I highlight three serious conceptual challenges to the way that gestation and birthing are understood in the legal framework surrounding the attribution of parenthood. First, I look at the challenges where gestation becomes divisible work. Second, I consider the complexities of gestation beyond the confines of biosex. Finally, I examine the difficulties in attributing parental status where gestation takes place entirely ex utero. I argue that *mater semper certa est* makes little sense in many of these contexts: it is not clear who the legal mother is or should be.

Divisible gestation

Scholars have highlighted the many benefits UTx provides for people who want to become parents and gestate themselves, specifically that it 'not only enables the experience of gestation, but allows biological, social and legal parenthood, thereby avoiding some of the potential problems with surrogacy'.[153] Throughout the commentary on UTx, the person who gestates after a transplant is consistently identified as the legal mother.[154]

While UTx aligns intention to parent with gestation (the person who gestates does so because they want to parent) it also symbolizes a gestation where there are multiple people needed to make it possible. Mitochondrial Replacement

[151] ibid.
[152] Brown (n 10) 116 (emphasis added).
[153] Jones and others (n 17) 142.
[154] ibid; O'Donovan and others (n 16) 20.

Techniques (MRTs) (the process by which the mtDNA of the oocyte used to create an embryo is replaced with mtDNA from another person who produces ovum),[155] though a technique of assisted conception, is an interesting parallel with UTx. MRTs involve genetic contributions from three people (rather than the usual two) and there is a body of literature probing how this affects how we think about parenthood.[156] Some philosophers have been clear that the contribution of genetic material by donors in MRTs must clearly be understood as also denoting genetic parenthood in the philosophical sense,[157] though the genetic contribution from the mtDNA donor is deemed too small to be of note in the attribution of *legal* parenthood.[158] UTx, similarly, might involve a gestational contribution from two people (rather the one); one provides the organ that makes gestation possible and the other sustains the gestation with their bodily work. As explored in Chapter 2, in a pregnancy a fetus is a part of a pregnant person, a fetus is linked to and a part of the pregnant person's physiology and metabolism; it is functionally integrated.[159] In this sense, the gestational contribution of a pregnant person is the creation and sustaining of the environment in which a fetus can develop—it is the being of all that the fetus needs to be created.[160] This gestation, however, is mediated through the uterine wall, and in this way we might come to understand the donor as having making some gestational contribution too, as the donated material creates the means by which the gestation can occur in the first place. While no genetic material from the donor is passed to the fetus, the placenta is connected to the uterus endometrium (the inner lining of the uterus) and material from

[155] Marni Falk and others, 'Mitochondrial Replacement Techniques — Implications for the Clinical Community' (2016) 374 The New England Journal of Medicine 1103–06, 1104.

[156] McCandless and Sheldon (n 4); Johnson (n 98); I Glenn Cohen and others, 'The Regulation of Mitochondrial Replacement Techniques Around the World' (2020) 21 Annual Review of Genomics and Human Genetics 565–86; Rebecca Dimond, 'Social and Ethical Issues in Mitochondrial Donation' (2015) 115 British Medical Bulletin 173–82; César Palacios-González, 'Does Egg Donation for Mitochondrial Replacement Techniques Generate Parental Responsibilities?' (2018) 44 Journal of Medical Ethics 817–22; Catherine Mills, 'Nuclear Families: Mitochondrial Replacement Techniques and the Regulation of Parenthood' (2021) 46 Science, Technology, & Human Values 507–27.

[157] Palacios-González (n 156) 818.

[158] Department of Health, 'Mitochondrial Donation: Government response to the consultation on draft regulations to permit the use of new treatment techniques to prevent the transmission of a serious mitochondrial disease from mother to child' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/332881/Consultation_response.pdf> accessed 26 March 2023, 29; The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015 make no changes to the rules concerning legal motherhood in the Human Fertilisation and Embryology Acts 1990 and 2008.

[159] Elselijn Kingma, 'Were You a Part of Your Mother?' (2019) 128 Mind 609–46, 626.

[160] Michael Power and Jay Schulkin, *The Evolution of the Human Placenta* (Johns Hopkins University Press 2012) 74.

this endometrium constitute an important part of the placenta; blood vessels from the endometrium 'grow into' placental tissue,[161] penetrating it to facilitate the functional integration of fetus and pregnant person, which thus enables and impacts on the gestation. We should recognize that there is some gestational contribution on the part of the donated uterus, even if we do not think that would be sufficient to determine that the donor is a parent by virtue of a *gestational* contribution. Indeed, it is not a clear gestational connection—the contribution of a uterus donor is really no different from a kidney donor in enabling a person to gestate (a person cannot safely become pregnant with no working kidneys).[162] In the MRT literature a persuasive case has been made for the availability of MRTs to same-sex female couples wanting to reproduce in a way in which they have both made genetic contributions[163] (even if they are not both recognized as the *legal* mothers). One could imagine a scenario in a same-sex female couple where *both* want to contribute to the generative labour in procreation (particularly if one of the pair does not have a uterus—though this need not necessarily be the case). One of these contributions in terms of the gestation of a new entity is far more significant than the other (the person who is pregnant facilitates gestation, whereas the other person does not gestate but makes that gestation possible), it is interesting, nevertheless, that there has been limited reflection about the operation of the role affording the status of legal mother where the gestation is enabled by donor material.

While for the most part motherhood applying current rules here is self-evident, it is cases like UTx that require us to ask what it is about gestation that denotes the attribution of legal motherhood. It is the language of the HFE Acts 1990 and 2008 that made it clear that the person who sustains a pregnancy is the legal mother: 'the woman who is carrying or has carried a child as a result of the placing in her of an embryo or sperm and eggs'.[164] While a donated uterus sustains the 'carrying of' a fetus in a person's body, it is the person who is pregnant who is actually 'carrying' a fetus. Further, the reference to birthing ('parturition') in the common law also makes it very clear that it is the person who *births* that is the legal mother; since the new human entity emerges from the pregnant person's body, it is the pregnant person that must be the legal

[161] Neil Gude and others, 'Growth and Function of the Normal Human Placenta' (2004) 114 Thrombosis Research 397–407, 398.

[162] I am grateful to Dr Nicola Williams for this analogy.

[163] Giulia Cavaliere and César Palacios-González, 'Lesbian Motherhood and Mitochondrial Replacement Techniques: Reproductive Freedom and Genetic Kinship' (2018) 44 Journal of Medical Ethics 835–42.

[164] Human Fertilisation and Embryology Act 1990, s 33(1).

mother under the current framework. This is the answer that best promotes the contemporary rationales for *mater semper certa est* except perhaps concerns about exploitation. While thinking about exploitation about gestational labour would favour the mother claim of the pregnant person, if the motivation of the law is to prevent the exploitation of persons involved in the process of gestation, the uterus donor should surely be more visible?

Partial ectogestation more visibly makes gestation into divisible work. Similarly to UTx, there is not much written on how legal motherhood is attributed in *partial* ectogestation, because there is a person who sustains a pregnancy for a period before the developing human entity is extracted for continued gestation *extra uterum*. Thus, the person who facilitates gestation for that period is, under the current legal framework, the legal mother.[165] However, this only seems like a partly satisfactory answer. The gestation is partly undertaken inside a human body, rather than completely, allowing us some recourse to revisit how we conceptualize of gestation/birthing in the attribution of motherhood. Depending on how *extra uterum* gestation is designed and conceptualized, there may be additional people that believe they have built a biological gestational bond with a developing gestateling that would suffice to say they also had a gestational connection to it (eg they engaged with features of the artificial placenta that produce changes in the gestational environment, such as, recording their voice), even if that is not an embodied one. The criterion of gestation thus becomes less clear if different people were to make claims that 'gestation' (distinguishable from pregnancy) supported their claim to legal motherhood. It would certainly impact on the certainty that gestation as a criterion is thought to attribute. However, since the law at present has so deeply embedded within it the assumption that what attributes legal motherhood is 'parturition' or the 'carrying' of a fetus, it is likely the embodied gestational claim that would be favoured. This is a result of the fact that the law does emphasize the biological tie of gestation—the physical oneness where a fetus is a part of a pregnant person. Gestation being meaningful in the attribution of motherhood in the physical biological tie raises its own conceptual challenges in a slightly different set of circumstances. This illustrates the shaky foundations of the *mater semper certa est* maxim when we consider its contemporary meaning and try to apply it in the context of novel technologies enabling gestation.

[165] Romanis, *Regulating the 'Brave New World'* (n 18) 231.

Disembodied gestation

Complete ectogestation 'is unprecedented in that it creates a human being who has no "birth mother" in the usual sense'.[166] Alghrani writes that a machine capable of ectogestation clearly cannot be a 'mother'.[167] Several commentators have thus asked the question, who is the legal mother where no person has gestated?[168] As Hendricks explains:

> The claim that the gestator should be the legal parent assumes human gestation. That is, if parental status must vest in the gestator, then the gestator must be human; we are not going to assign parental rights to . . . mechanical incubators.[169]

Unlike partial ectogestation, where ectogestation is complete there is never a human person who sustains the generative process and/or physically brings the new human entity into the world from their flesh. Embodied gestation as the definitive attribute of legal motherhood cannot function as the sole and irrebuttable presumption in this context. Moreover, the potential contemporary justifications for *mater est*, whether any or all of legal certainty, recognition of a meaningful biological tie, preventing the exploitation of people who sustain pregnancies, do not point us to any obvious or clear answers where gestation is disembodied.

How the current legal framework might respond were such a problem to arise imminently is difficult to anticipate. On the one hand, the law has emphasized the importance of biology in the insistence that the pregnant person is the legal mother, and in much of the law surrounding natural procreation. Against this backdrop, one could speculate that the law would 'fall back' onto genetics to identify the legal parents as the genetic progenitors of a resulting child from complete ectogestation. As Sander-Staudt explains, children born of complete ectogestation 'would have no actual "birth mother" but only a "genetic mother" '.[170] In many ways, this seems likely since the law, as I have illustrated in Chapter 5, tends to reinforce biosex roles in procreation. Moreover, it seems

[166] Maureen Sander-Staudt, 'Of Machine Born? A Feminist Assessment of Ectogenesis and Artificial Wombs' in Scott Gelfand and John Shook (eds), *Ectogenesis: Artificial Womb Technology and the Future of Human Reproduction* (Rodopi 2006).

[167] Amel Alghrani, *Regulating Assisted Reproductive Technologies: New Horizons* (CUP 2018) 259.

[168] Natasha Hammond-Browning, 'A New Dawn? Ectogenesis, Future Children and Reproductive Choice' (2018) 14 Contemporary Issues in Law 349–73, 370.

[169] Hendricks, 'Not of Woman Born?' (n 19) 53.

[170] Sander-Staudt (n 166) 124.

plausible that many people's intuitions would jump to genetics where there is no person sustaining gestation by being pregnant; indeed, many people's intuitions favour genetics[171] even where there is assisted gestation involving a third person (eg surrogacies).[172]

However, equally, the law has, in the context of assisted *conception*, been very clear that genetics are of less importance than an intention to be treated as the parent of a new human entity.[173] Any inconsistency with the law surrounding assisted conception might be rather alarming, especially considering there may be some people who need to use both assisted conception techniques and complete ectogestation to procreate, for example a same-sex male couple may need an oocyte donor. It is plainly confusing that an oocyte donor (who has no intention to parent) could be recognized as the legal mother because of their genetic contribution where ectogestation was used, but not where they used surrogacy. The example exemplifies how people AFAB have little freedom to shape how their biological contributions to procreation are recognized. Similarly, a trans man or non-binary person who produces ovum and does not want to be pregnant because it would potentially be dysphoric or because they *do not want to be recognized as the legal mother* may welcome the opportunity of ectogestation to procreate where their partner cannot gestate, their partner does not want to gestate, or they do not have a partner. Again, it seems baffling that such an individual could be identified as the legal mother because of a genetic contribution where they would not in any other context (if their partner or a surrogate had gestated). Both examples exemplify how LGBTQ+ families are excluded by a legal order that continually emphasizes a biological connection (whether gestational or genetic) in the attribution of parenthood.[174]

How might intention play out in the context of *extra uterum* gestation? In the context of surrogacies, Horsey has explained:

> [B]ecause the intended parents initiate, plan and prepare for the birth of the child, they should be legally recognised as the parents of that child that, *but for them, would not exist.* It is they who choose to use assisted conception, thus choosing whether to use a donor of genetic material or a surrogate. They

[171] Avery Kolers and Tim Bayne, '"Are You My Mommy?" On the Genetic Basis of Parenthood' (2001) 18 Journal of Applied Philosophy 273–85, 274.

[172] This is reflected in the law to some degree eg the conditions for a parental order require a genetic link between at least one of the intended parents and the resulting child per the Human Fertilisation and Embryology Act 2008, s 54(1)(b). I am grateful to Dr Zaina Mahmoud for discussions on this point.

[173] Brown (n 10) 121.

[174] Romanis, '"The Law is Very, Very Outdated"' (n 150).

> are the 'first cause' of the child and as such are of prima facie importance in the procreational relationship.[175]

This way of conceptualizing of intention centralizes factors beyond gestation, which is exactly to make the point that, for Horsey, the role of a gestational surrogate performing the work is of less importance when considering how to attribute parenthood. Intention-based accounts tend to think about the broader social facts of parenting that exist far beyond gestation.[176] Where embodied gestation is no longer a potential factor, it might be possible to adapt our thinking slightly to include thinking about who was involved in forms of gestational work while the entity is *ex utero* as a part of this notion of the intended parents as the 'first cause' of the child, for example, who records their heartbeat for the machine to play, who speaks into the artificial placenta device, etc? These behaviours might feed into broader exploration of the intention to become parents. How would a claim from a person who has involved themselves here with an intention to parent weigh up against someone else who expresses an intention to parent but cannot demonstrate that they took part in the gestation even though it was *extra uterum*? These might be important considerations, but it is important to also think about how this might stratify access to legally recognized parenthood.

As I explored in Chapter 4, access to procreative assistance in the form of complete ectogestation as a choice is likely to be more difficult for people marginalized based on class and/or race, and people with limited economic resources. The way that thinking about expectations of caring relationships during ectogestation, and taking this into account in assigning parental rights, might be another way of further cementing that ectogestation is a technology of the privileged. Spending time involved in the gestation of an entity in an artificial placenta is different from undertaking gestation. While no longer a form psychofleshy work, the work of visiting a medical facility to 'spend time with'[177] the gestateling is now a demand of a different nature: one of time and resources (eg for getting to the facility). This is simply more challenging for people who work demanding jobs, or do low-paid work,[178] and/or have limited parental leave and need to save this for when there is a baby (post-ectogestation) that

[175] Kirsty Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22 Child and Family Law Quarterly 439–74, 472.
[176] Jonathan Herring, *Caring and the Law* (Hart 2013) 200.
[177] See Chapter 2 on the distinction between the gestateling and neonate and the extent to which the gestateling can be interacted with.
[178] Romanis, 'Assisted Gestative Technologies' (n 139) 645.

needs physical care.[179] For families with more income and/or no existing children, attending a facility to be involved in ectogestation is a much more realistic ask. Those who would be least likely to struggle are more likely to be those who have existing and entrenched social privileges: being from a higher social class, being white, and having resources like a car, or the ability to not work, or the ability to hire childcare for any existing children.

The neonatal intensive care unit (NICU) makes for an interesting comparison here—though it is important to note the degree of difference in the physical care a parent could provide to a neonate and a prospective parent to a gestateling. I point this out because it is even more understandable why people who might struggle to get time off work/arrange childcare for existing children/afford travel to a medical facility are even less likely to achieve attending regularly *before* their child is born. Davis illustrates how, in the American NICU, health professionals are known to construct motherhood and enforce their perceptions of maternal failure through various mechanisms (eg calling or threatening to call social services).[180] She uses the response to people who are unable to attend the NICU everyday (mostly because of resources) as a particular example and emphasizes the 'power medical professionals had in referring Black women and men's worth and status as parents. Black women, in particular, have not been respected as mothers'.[181] It is easy to see how, even if a gestateling cannot be interacted with in the same physical sense, putative parents who turn up every day—likely to be those with class privilege and those who do not experience the systemic social effects of racism—will be treated by health professionals as the 'better parents'. Thus, there are clearly negative implications of thinking about behaviour during the ectogestation period as proof of an intent to parent in the attribution of legal parenthood.

With ectogestation, there is not just the matter of how to determine parental status where there is only a partial pregnancy or no pregnancy at all; there is also the question of *when* one becomes a legal parent.[182] Singh, and subsequently Mahmoud and I, have made the case that parenthood is a relational status and thus one becomes a parent once an entity has been born into the world.[183] Thus, Mahmoud and I argue gestation is not mothering, and

[179] Victoria Hooton and Elizabeth Chloe Romanis, 'Artificial Womb Technology, Pregnancy, and EU Employment Rights' (2022) 9 Journal of Law and the Biosciences <doi.org/10.1093/jlb/lsac009> accessed 3 September 2024, 1–33, 18–19.

[180] Dána-Ain Davis, *Reproductive Injustice: Racism, Pregnancy, and Premature Birth* (New York University Press 2019) 77.

[181] ibid.

[182] Romanis, 'Assisted Gestative Technologies' (n 139).

[183] Prabhpal Singh, 'Fetuses, Newborns & Parental Responsibility' (2020) 46 Journal of Medical Ethics 188–93; Mahmoud and Romanis (n 9).

highlight the problem with the HFE Act 2008 describing a mother as a person 'carrying' a pregnancy.[184] Horsey and Jackson concur, legal motherhood is afforded 'at birth'.[185] As I explained in Chapters 2 and 3, in partial ectogestation, a pregnant person has *birthed* but their product of conception has not *been born*.[186] It seems intuitive that parental rights and responsibilities kick in at birth, when there is an entity to be cared for, though where that entity is still undergoing gestation (albeit no longer a part of a pregnant person) that gestateling does not have the same relational needs. However, if we do not afford parental rights over entities in the artificial placenta, there is the potential for excessive medical control where intended parents have little say over clinical decisions made about their gestateling.[187] It seems intuitive that a person who has *birthed* even if their intended future child is not yet born because it is the subject of *extra uterum* gestation attain the rights and responsibilities of the legal mother—they had carried the entity and *birthed* it: and it will need a legal parent in relation to decisions made about it. The same logic in theory could be applied to complete ectogestation. A gestateling gestated entirely *extra uterum* would need legal parents to make decisions for it. What would be important to emphasize, however, is the importance of the distinction between a gestateling and a fetus, to emphasize that there are no parental rights over fetuses, even if there are parental rights over gestatelings, to protect the rights of pregnant people. Who these people are, however, remains confusing where there is no person who gestates. The legal mother (and therefore) the father is not certain.

Unsexed gestation

As explored in Chapter 5, novel technologies enabling gestation—particularly UTx—have the capacity to 'unsex' procreative capacities and enable people assigned male at birth (AMAB) to undertake generative, procreative work. Horsey and Alghrani have both raised the question of UTx enabling trans men or cis men to gestate and what this might mean for the attribution of

[184] ibid.

[185] Kirsty Horsey and Emily Jackson, 'The Human Fertilisation and Embryology Act 1990 and Non-Traditional Families' (2023) 86 Modern Law Review 1472–88, 1478.

[186] Elizabeth Chloe Romanis, 'Artificial Womb Technology and the Significance of Birth: Why Gestatelings are Not Newborns (or Fetuses)' (2019) 45 Journal of Medical Ethics 728–31.

[187] This might be a concern even if there are parental rights afforded since ectogestation will likely be a highly medicalized process: Victoria Adkins, 'Impact of Ectogenesis on the Medicalisation of Pregnancy and Childbirth' (2021) 47 Journal of Medical Ethics 239–43.

parenthood.[188] The HFE Act 2008 specifies that 'the *woman* who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no *other woman*, is to be treated as the mother of the child'.[189] Alghrani, writing in 2018, questioned whether a child born following male gestation (whether trans man or cis man) would therefore be legally motherless, since no woman 'carried' the pregnancy.[190] The *McConnell* case, however, has made it clear that a man gestating does not mean the resulting child is motherless, finding that a person who gestates is a mother, irrespective of their gender identity.[191] The judgment is insistent that mother is a gender-neutral term, and although it did recognize the imposition on trans men who gestate, this could not change the fundamental legal definition of who a mother is.[192] Would the same determination would have been made if a cis man were to gestate and birth? The law has consistently continued to reinforce a traditional, nuclear family model; a child has two parents—usually a mother and a father.[193] Indeed, on paper a family where there is a mother and a father fits the nuclear model in some ways, but such a family also challenges the fabric of the cis-heteronormative assumptions behind the nuclear family where both the mother (person who sustained the pregnancy) and father (sperm contributor) are male. Further, would a court continue to reify the same 'parental labels are gender neutral' in a circumstance where the male person who undertook pregnancy was raising the child with a woman? This leads us into a deeper exploration of the additional questions about the attribution of parenthood where cis men gestate. If they are the mother, who is the other parent?

Where a person has a transplanted uterus, conception would be assisted, and so rules would be dictated by the HFE Acts. Where the male person who undertook pregnancy is married or in a civil partnership their husband/wife/civil partner will be the father/second female parent unless it is shown they do not consent.[194] However, the law does not accommodate the possibility of the pregnant person being a man, it specifies 'where a woman is married to . . . or civil partner of a man at the time of treatment'[195] or where the case of a 'woman in civil partnership or marriage to a woman at time of treatment'.[196] In

[188] Alghrani (n 167) 255; Kirsty Horsey, 'Legal Parenthood and Parental Responsibility' in Ruth Lamont (ed), *Family Law* (OUP 2022) 325.
[189] s 33(1).
[190] Alghrani (n 167) 255.
[191] *McConnell* (n 3).
[192] ibid at [35].
[193] Brown (n 10) 7.
[194] Human Fertilisation and Embryology Act 2008, s 35 and s 42.
[195] ibid s 35.
[196] ibid s 42.

such a circumstance, if the statute were to be interpreted literally, this marital/civil partner presumption would not apply. Another person would be the father/second female person only where both they, and the person who will sustain the pregnancy, consented to them being the father/second female parent during treatment and the agreed fatherhood/second female parenthood conditions are met.[197] Where the pregnant person is a man (with a transplanted uterus), much like where the pregnant person is a woman who has undergone assisted conception, what genetic contributions had (or had not) been made are irrelevant. Thus, if the other person contributed the ovum,[198] and the person who sustains the pregnancy had also contributed the sperm, the pregnant person would still be the mother and their partner the second female parent. Here, there may be another huge conceptual and linguistic challenge to the nuclear family model—effectively an inversion. The man would be referred to legally as the mother because of their role in gestation and the woman legally described as the second female parent (even though there is no 'first' female parent). This is something that lawmakers and courts would be likely to take more seriously as a challenge to the scheme of regulation around parenthood because of the tendency at present to focus on procreation as a biosexed activity (and thus render trans reproduction invisible). In *McConnell*, gestation by a trans man was treated as a technical matter, rather than a conceptual challenge to the entire scheme of legal rules.[199] Procreation beyond the limitations of biosex—embodied in a heterosexual man AMAB gestating and being labelled a mother—is something that is far more likely to spark fundamental reform surrounding the attribution of parenthood since it strikes at the heart of cis-heteronormative conceptions of the family. This challenge is likely to give more pause to the notion that *the mother is always certain* by virtue of being the person who gestates.

Finally, as has been explored in Chapter 5, there are those who have advocated that disembodied gestation is effectively unsexed gestation where there is a conceptual decoupling of bodies AFAB and gestation.[200] I explained that UTx in cis men was likely to have far more transformative potential to socially engrained ideas about who 'mothers' and 'fathers' are than ectogestation. This applies just as much to how we *identify* and *define* these roles in legal terms as

[197] ibid s 37 and s 44.

[198] This person could produce their own ovum if they are biotypically AFAB, or ovum could be generated through *in vitro gametogenesis*.

[199] Alan Brown, 'Trans Parenthood and the Meaning of "Mother", "Father" and "Parent"—*R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559' (2021) 29 Medical Law Review 157–71, 169.

[200] See Chapter 6.

it does in thinking about how social expectations are placed on persons identified as mothers and fathers. Ultimately, novel forms of gestation pose important conceptual challenges to the way that gestation is legally understood and centralized in the attribution of parenthood—both mothers and fathers. At present, the law's insistence that the mother is the person who facilitates gestation is the mother perpetuates sexed, embodied, and 'whole' accounts of gestation that simply no longer make sense where we pay proper attention to technologies enabling gestation, particularly UTx and ectogestation. We need to revisit more carefully, and free from biosexed essentialism and assumptions about gestation and pregnancy and how they are understood by individuals, whether mediated by (AFAB) bodies or not, 'what is it that makes a parent?'

Disembodied gestation also raises broader questions of procreative rights in relation to bodily work. This is discussed in Chapter 7.