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Are Mothers Persons?

Reproductive Rights and the Politics of Subject-ivity

Many people, both in academic and nonacademic circles, have come to regard feminist arguments concerning the biases and exclusions of Western culture either as outmoded by progressive changes in gender relations, or as paranoid delusions, fueled by a mania for "political correctness" rather than truth. These notions persist despite increasingly strong cultural evidence to the contrary. As the Clarence Thomas/Anita Hill hearings demonstrated, images of the woman as lying temptress still triumph in this culture over women's rights to an equal hearing under the law. Women still earn significantly less than men for equal work. And the feminist ideal of an egalitarian domestic division of labor so far appears no match for an ideology that insists women must continue to bear the major responsibility for cooking, cleaning, and child-care even when they are also working full-time in jobs and professions formerly reserved for men.

Some of the most resilient inequalities in our legal and social treatment of women lie in the domain of reproductive control. But despite the highly publicized and turbulent nature of the battles that have been fought in this domain, the most glaring inequalities have yet to receive the exposure and emphasis they deserve. This omission results at least in part, I would argue, from the fact that, although abortion rights are a prominent issue, both pro-choice and pro-life arguments are locked into rhetoric and strategies that fail to situate the struggle within the broader context of reproductive control. In this essay I will attempt to locate the struggle over abortion rights within that context.

The first three sections of the essay will be largely devoted to exposing and interpreting some remarkable, pernicious contradic-

tions in legal and medical practices concerning the protection of the "subject" and to examining some of the cultural ideology, metaphors, and images that animate those contradictions. Although law and medicine claim to have a unified and coherent tradition concerning individual rights, in fact two different traditions have been established, one for embodied subjects, and the other for those who come to be treated as mere bodies despite an official rhetoric that vehemently forswears such treatment of human beings. I will also explore the expression of this practical metaphysics—this deeply sedimented, cultural duality—in more everyday arenas, and as it has crystallized in movements for fetal and father's rights. In the last section of the essay I will briefly consider some implications my analysis holds for feminist discourse on reproduction.

My examinations of the legal double standard concerning the bodily integrity of pregnant and nonpregnant bodies, the construction of women as fetal incubators, the bestowal of "super-subject" status to the fetus, and the emergence of a father's-rights ideology will reveal, I believe, that feminist anger and frustration are far from paranoid or anachronistic. I hope they will demonstrate, as well, that the current terms of the abortion debate—as a contest between fetal claims to personhood and women's right to choose—are limited and misleading. In the context of my analysis in this essay, the current battle over reproductive control emerges as an assault on the personhood of *women*.

EMBODIED SUBJECTS AND DE-SUBJECTIFIED BODIES

Our legal tradition officially places a high—some might say inordinately high—value on bodily integrity. As the United States Supreme Court acknowledged over one hundred years ago:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by a clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."[1]

Bodily integrity and the "right to one's person" are philosophically knit together by the Cartesian conception of the human body as the

"home" of the person—the "ghost in the machine," as Gilbert Ryle has called it[2]—the self-conscious, willing, desiring, dreaming, creating "inner" self, the "I." The historical influence of this construction on Western modernity, especially on legal conceptions of bodily integrity, privacy, and personhood, has been sweeping and profound. Yet, as we will see, the "ghost in the machine" is not always the legislating metaphor in concrete social practice; sometimes entirely mechanistic conceptions of the body dominate, conceptions from which all concern for the inner self have vanished. In practice, our legal tradition divides the human world as Descartes divided all of reality: into conscious subjects and mere bodies (*res extensa*). And in the social expression of that duality, some groups have clearly been accorded subject-status and its protections, while others have regularly been denied those protections, becoming for all medical and legal purposes pure *res extensa*, bodies stripped of their animating, dignifying, and humanizing "subject-ivity."

First let us examine the tradition regarding embodied subjects. This is one in which bodily integrity is privileged so highly that judges have consistently refused to force individuals to submit without consent to medical treatment even though the life of another hangs in the balance. So, for example, in the case of *McFall v. Shimp* (1979), Shimp's bodily integrity was legally protected to the extent that he was permitted to refuse a procedure (a bone-marrow extraction and donation) that could have prevented his cousin's otherwise certain death from aplastic anemia. (McFall did indeed die two weeks after the decision was handed down.) Other similar suits have been equally unsuccessful, including highly publicized ones such as that pressed by a Seattle woman to have the father of her leukemic child donate his marrow, and that of an Illinois father who sued the mother of his son's twin half-siblings to have tests done to see if their marrow matched his son's.[3] Many of us—and I include myself—may find Shimp's action and similar refusals morally repugnant. They are, however, thoroughly sanctioned by law, which insists on *informed consent* for any medical procedure, and which permits us to be Bad Samaritans in the interests of preserving *principles* that are viewed as constituting (in the words of the *McFall* decision) "the very essence . . . of our society."[4]

The doctrine of informed consent is, in a very real sense, a protection of the *subjectivity* of the person involved—that is, it is an

acknowledgment that the body can never be regarded merely as a site of quantifiable processes that can be assessed objectively, but must be treated as invested with personal meaning, history, and value that are ultimately determinable only by the subject who lives "within" it. According to the doctrine of informed consent, even when it is "for the good" of the patient, no one else—neither relative nor expert—may determine for the embodied subject what medical risks are worth taking, what procedures are minimally or excessively invasive, what pain is minor. When that meaning-bestowing function is in danger of being taken away from the subject, the prevailing ideology (and the accompanying legal response) conceptualizes the situation as a violent invasion of the personal space of the body. For example, physicians performing unconsented-to treatment are legally guilty of battery.[5] Or consider the impassioned justification for his decision given by the judge who ruled on *McFall v. Shimp*:

> For a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forcible extraction of living body tissue causes revulsion to the judicial mind. Such would raise the specter of the swastika and the Inquisition, reminiscent of the horrors this portends.[6]

The key metaphor of this description, vampirism, not only evokes the pulsing, flowing, *vital* nature of the human body but suggests that to invade it is tantamount to parasitism, a stealing of the inner essence of the person. The body here, clearly, is no mere physical entity but a self embodied, or (to put it the other way around) a body suffused with subjectivity. The system which would countenance its invasion is likened to Nazi Germany and the Inquisition, or (as in *Rochin v. California* [1952]), to medieval torture:

> Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[7]

Rochin, a suspected drug dealer, had merely been made to regurgitate two capsules he had swallowed. Moreover, the invasion of

Rochin's privacy falls within a clearly recognized category of possible exception to the protection of bodily integrity: invasion of a minimal nature may be permitted when it is required to promote the state's interest in the prosecution of criminals.[8] So, for example, blood-alcohol tests may be required of drivers suspected of intoxication.[9] But even for suspected criminals, the law has emphatically drawn the line at major surgery. In *Winston v. Lee* (1985), law-enforcement authorities needed a bullet, lodged in the defendant's chest, as evidence against him. Both the circuit court and the Supreme Court ruled against the state, the Supreme Court arguing that "surgery without the patient's consent, performed under a general anesthetic to search for evidence of a crime, involves a virtually total divestment of the patient's ordinary control over surgical probing beneath his skin." Both the circuit court and the Supreme Court, interestingly, were especially emphatic concerning the degrading and "demeaning" nature of "drugging" this citizen "into a state of unconsciousness" against his will.[10]

In contrast to all this privileging of the hallowed ground of "the subject's" body[11] is the casual and morally imperious approach medicine and law have taken to nonconsensual medical interference in the reproductive lives of women—particularly when they are of non-European descent, poor, or non-English-speaking. In this arena we see racism, classism, and sexism interlock virulently, whether we are looking at the history of involuntary sterilization in this country, the statistics on court-ordered obstetrical intervention, or the Supreme Court's *Rust v. Sullivan* decision, which forbids doctors in federally funded clinics to discuss or offer information about abortion or to indicate where such information might be available, even when a woman has no other access to medical advice.[12]

The history of involuntary sterilization, overwhelmingly aimed at the "mentally defective" ("feeble-minded," "retarded," "mentally ill") and one of the most blatant examples of medical and legal disregard for the personhood of certain groups in this country, has been strongly shaped by the politics of race, class, and gender. From 1900 to 1960, 60,000 persons in the United States were sterilized without their consent, many never even informed of the nature of the operation.[13] Initially fueled by nineteenth-century versions of evolutionary theory (almost invariably racist) and the eugenics-

inspired vision of a society purged of "defective genes," the history of involuntary sterilization of the "mentally defective" in this country has in practice largely affected those groups considered genetically suspect and racially inferior: those convicted of crimes, the poor, African Americans, Native Americans, Spanish Americans, and Puerto Ricans.[14]

Less often noted is the overwhelming gender-bias that began to develop in the 1930s and 1940s, as the Depression shifted the concerns of those officials empowered to sterilize from the prevention of genetic defect to the prevention of parenthood in those individuals deemed unable to *care* adequately for their children. Philip Reilly, in *The Surgical Solution*, notes the change in ideology and the increasingly glaring disparity between the numbers of men and of women sterilized.[15] He fails, however, to see the connection between the two. Today, virtually all sterilization abuse (as well as proposals for less drastic bodily invasions, such as the use of Norplant) is directed against women on welfare, and is rationalized by the "inability to care" model. Often, as in the case of *Rust*, the reproductive rights of poor women are threatened without outright legal deprivation of those rights. In *Walker v. Pierce*, for example, the defendant admitted that his practice was to require consent for postpartum sterilization of his Medicaid patients who came to him pregnant with a third child. If consent was not given, he would refuse to treat the patient, and on occasion he threatened to try to have their state assistance terminated. He did not insist on these conditions for patients *not* on Medicaid, no matter how many children they had.[16]

Turning to court-ordered obstetrical interventions—and these include forced cesarean sections, detention of women against their will, and intrauterine transfusions—the statistics make clear that in this culture the pregnant, poor woman (especially if she is of non-European descent) comes as close as a human being can get to being regarded, medically and legally, as "mere body," her wishes, desires, dreams, religious scruples of little consequence and easily ignored in (the doctor's or judge's estimation of) the interests of fetal well-being. In 1987, the *New England Journal of Medicine* reported that of twenty-one cases in which court orders for obstetrical intervention were sought, 86 percent were obtained. Eighty-one percent of the women involved were black, Asian, or Hispanic.[17]

In one of the most extreme and revealing of the forced-cesarean cases, George Washington University Hospital won a court order requiring that a cesarean section be performed on a terminally ill patient, Angela Carder, before her fetus was viable, and against the wishes of the woman, her husband, and the doctors on staff. Both the woman and her baby died shortly after the operation. The District of Columbia Court of Appeals, in affirming the order against a requested stay, ruled that the woman's right to avoid bodily intrusion could justifiably be put aside, as she had "at best two days left of sedated life."[18] Here, clearly, a still living human subject had become, for all legal purposes, dead matter, a mere fetal container. A woman whom *no court in the country would force to undergo a blood transfusion for a dying relative* had come to be legally regarded, when pregnant, as a mere life-support system for a fetus.

It is important to emphasize here that the legal analogues to cases such as these are *not* interventions such as those involved, for example, when a Jehovah's Witness is ordered to permit a dependent child to receive a blood transfusion, but precisely cases such as *McFall v. Shimp*, in which the *body* of the person subject to the court order is required for the intervention. This is why the protection of bodily integrity is an issue in cases of this latter sort, but not in cases solely involving the overriding of parental wishes, where the body of the parent is not itself involved. With the correct moral analogues in mind, it is clear that even granting full personhood to the fetus does not mute the force and depth of the legal and moral inconsistency here. On the one hand, we have Shimp's refusal to submit to a procedure that could have saved his cousin's life, a refusal which was upheld by law on the grounds that to do otherwise would be a gross invasion of the privileged territory of the subject's own body. On the other hand, we have numerous cases in which judges not only have ordered pregnant women to submit to highly invasive procedures[19] but have conceptualized these interventions as the protection of the fetus's rights against the inappropriate and selfish maternal evaluations of the physical, emotional, and religious acceptability of those procedures.

Consider the language of court orders for medical treatment of pregnant women. These orders, in striking contrast to the rhetoric of violent subjugation, the metaphors of the rack and the screw, the analogies with fascist regimes employed in the rulings on *McFall v.*

Shimp and *Rochin v. California*, often dismiss the proposed intervention as minor, inconsequential, of significance only to an individual whose desires for personal freedom and "convenience" are excessive. So, the judge in *Taft v. Taft* (1982), in issuing an order for cervical surgery against the will of the woman (the order had been sought by her husband), referred to the procedure as "the operation of a *few sutures* . . . to hold the pregnancy."[20] This is clearly to sidestep utterly, in the case of the pregnant woman, the doctrine of informed consent, which requires that the individual affected be the final judge of the degree of invasiveness and risk that is acceptable. Without that requirement, informed consent has no meaning at all.

Even, however, if we are likely to agree that cerclage is a minimally invasive procedure,[21] let us not forget the judicial horror expressed at even less intrusive procedures carried out on the bodies of suspected criminals (such as the forced regurgitation that was the issue in *Rochin*). The discomfort, risk, and invasiveness of cesareans are another matter. The court record has made it abundantly clear (cf. *Winston*) that major surgery without consent is an extreme and demeaning violation of bodily integrity and control; it is also risky, no matter how "routine" the procedure. If marrow transfusions and even blood tests have not been required, surely a refusal to undergo the "massive intrusion"[22] of a major surgical procedure such as a cesarean section should be honored. Yet when Ayesha Madyun refused a cesarean on religious grounds the judge ruled that for him *not* to issue a court order forcing her to have the operation would be to "indulge" Madyun's "desires" at the expense of the safety of her fetus.[23]

As a number of analysts have pointed out, there are no legal justifications for the discrepancies between the treatment accorded pregnant women and that given to nonpregnant persons.[24] Rather, to explain such contradictions we must leave the realm of rationality and enter the realm of gender ideology (and, in many cases, of racial prejudice as well). These decisions, clearly, are mediated by normative conceptions of the pregnant woman's appropriate role and function. Note the judge's choice, in the *Madyun* case, of the term *desires* (over, for example, the more legally conventional *wishes*). The idea of female "desire" is potent and threatening in our culture, with its sexual overtones and suggestions of personal gratification and capricious self-interest—particularly when paired with the notion of indulgence, as in this judge's ruling. Madyun's objections, we should remember, were religious (as are most maternal refusals of obstetrical intervention).[25] For the judge, however, religious scruples are on a par with the flightiest of personal whims when they come into conflict with the supreme role the pregnant woman should be playing: that of incubator to her fetus. In fulfilling that function, the pregnant woman is *supposed* to efface her own subjectivity, if need be. When she refuses to do so, that subjectivity comes to be construed as excessive, wicked. (The cultural archetype of the cold, selfish mother—the evil goddesses, queens, and stepmothers of myth and fairy tale—clearly lurks in the imaginations of many of the judges issuing court orders for obstetrical intervention.)

Thus, ontologically speaking, the pregnant woman has been seen by our legal system as the mirror-image of the abstract subject whose bodily integrity the law is so determined to protect. For the latter, subjectivity is the essence of personhood, not to be sacrificed even in the interests of the preservation of the life of another individual. Personal valuation, choice, and consciousness itself (remember the *Winston* court's horror at unconsented-to anesthesia) are the given values, against which any claims to state interest or public good must be rigorously argued and are rarely granted. The essence of the pregnant woman, by contrast, is her biological, purely mechanical role in preserving the life of another. In her case, *this* is the given value, against which her claims to subjectivity must be rigorously evaluated, and they will usually be found wanting insofar as they conflict with her life-support function. In the face of such a conflict, her valuations, choices, consciousness are expendable.[26]

Intersecting with this gender ideology, in cases such as *Madyun*, is our historical tradition of effacement of the personhood of people of color, racist beliefs about their "irresponsibility," and disdain for religious and cultural diversity. These elements can come into play at both ends of the spectrum of reproductive abuse—coerced sterilization, and coerced cesareans. In coerced-sterilization cases the mediating racist image is often that of the promiscuous breeder, populating the world irresponsibly, like an unspayed animal. One of the witnesses in *Walker v. Pierce* said that Pierce lectured her: "And, he said, 'Listen here young lady . . . this is my tax money paying for something like this. . . . I am tired of people going

around here having babies and my tax money paying for it.'"[27] In forced-cesarean cases like *Madyun*, the mediating racist image may be that of the ignorant, uncivilized primitive whose atavistic religious beliefs are in conflict with the enlightened attitudes of modern science.

FETAL SUPER-SUBJECTS AND MATERNAL INCUBATORS

> As a one-time cocaine abuser, Debbie abused her son in the womb. Now, thanks to support from Alliance, she's learned how to be the responsible parent little Ricky needs.
>
> *From the 1991* United Way *brochure*

Clearly, there has been one legal tradition for those who occupy the cultural location of the subject and another for those who are marked as "other." Some acknowledgment of the injustice of forced cesareans was finally made when the District of Columbia Court of Appeals, in a widely publicized decision, set aside the original ruling on Angela Carder's case and even raised the question of whether "there could ever be a situation extraordinary or compelling enough to justify a massive intrusion into a person's body, such as a cesarean section, against that person's will." (It is not to depreciate the court's ruling to note that Angela Carder was a white woman.) The appeal had been filed by the American Medical Association and thirty-nine other organizations, whose consciousness had been significantly raised by the efforts of Lynn Paltrow of the American Civil Liberties Union, George Annas of the Boston University School of Medicine, and several others who brought the Carder case and others to national attention.[28] In 1987, 47 percent of the obstetricians surveyed by the *New England Journal of Medicine* had approved of forced cesareans and had agreed that the precedent set by the courts in cases requiring emergency cesarean sections for the sake of the fetus should be extended to include other procedures such as intrauterine transfusion.[29] Since the Angela Carder case, these attitudes may be changing. Yet there are extremely vocal and powerful advocates of pervasive obstetrical intervention,[30] and pregnant women continue to be treated as fetal incubators in other ways as well. The past few years have seen increasing numbers of cases in which brain-dead pregnant women have been kept alive for

as long as seven or eight weeks, until the fetus is mature enough to deliver by cesarean section,[31] and the Catholic church has declared life-sustaining treatment to be mandatory for a pregnant patient "if continued treatment may benefit her unborn child."[32]

Indeed, I believe the ideology of woman-as-fetal-incubator is stronger than ever and is making ever greater encroachments into pregnant women's lives. The difference is that today it is most likely to emerge in the context of issues concerning the "life-styles" of pregnant women. In 1986, Lawrence Nelson and his colleagues warned that "compelling pregnant women to undergo medical treatment sets an unsavory precedent for further invasions of a woman's privacy and bodily integrity." As though imagining the horrifying terrain of a future dystopia (such as that depicted in Margaret Atwood's *The Handmaid's Tale*), they list such potential intrusions:

> [These] could include court orders prohibiting pregnant women from using alcohol, cigarettes, or other possibly harmful substances, forbidding them from continuing to work because of the presence of fetal toxins in the workplace, forcing them to take drugs or accept intrauterine blood transfusions, requiring pregnant anorexic teenagers to be force-fed, forcing women to undergo prenatal screening and diagnostic procedures such as amniocentesis, sonography, or fetoscopy, or mandating that women submit to *in utero* or extra-uterine surgery for the fetus. . . . The prospect of courts literally managing the lives of pregnant women and extensively intruding into their daily activities is frightening and antithetical to the fundamental role that freedom of action plays in our society.[33]

Just five years later, this landscape no longer seems so futuristic. Although the Supreme Court has banned employers from adopting "fetal protection" policies that would bar women of childbearing age from hazardous jobs, this decision seems almost anomalous in the contemporary zeitgeist, within which the protection of fetal rights has burgeoned into a national obsession. Prosecutions and preventive detentions of pregnant women for fetal endangerment, once a rarity, are becoming more and more common. Since the Pamela Rae Stewart case of 1985, in which Stewart was charged with criminal neglect of her child for failing to follow medical advice during pregnancy, such cases have multiplied. In 1989, a Florida judge sentenced twenty-three-year-old Jennifer Johnson to fifteen

years' probation on her conviction of delivering illegal drugs via the umbilical cord to her two babies. A Massachusetts woman who miscarried after an automobile accident in which she was intoxicated was prosecuted for vehicular homicide of her fetus. A Connecticut woman was charged with endangering her fetus by swallowing cocaine as police moved to arrest her. A Washington judge sent Brenda Vaughan to jail for nearly four months to protect her fetus, because a drug test, taken after she was arrested for forging a check, revealed cocaine use.[34] In 1990, a Wyoming woman was charged by the police with the crime of drinking while pregnant and was prosecuted for felony child abuse. In South Carolina, a dozen women have been arrested after the hospitals they went to for maternity care tested them for cocaine use and turned them in to the police for fetal abuse.[35]

In some ways even more disturbing than these legal actions are changes in the everyday attitudes of people. In March 1991, two waiters were fired from their jobs when they tried to persuade a nine-months-pregnant customer not to order a rum daiquiri because drinking alcohol could harm her fetus.[36] Soon after, they appeared on the "Oprah Winfrey" show, where many members of the audience indicated their strong support for the waiters' action. As might be expected, the customer's action was construed as reckless and "selfish," even though it is highly unlikely that one drink at her advanced stage of pregnancy could affect the fetus's health. Audience members were insistent, as was columnist Cal Thomas, that pregnant women who engage in *any* activities that have even the *slightest* risk are behaving "selfishly" and that others are only acting responsibly in pointing this out to them. In Thomas's condemnation of the customer, all distinctions—between levels of harm, between fetuses and children, between prohibitions that affect the deployment of the mother's own body and those that do not—are effaced:

> What if the woman had come in a month from now with her newborn child and ordered two drinks, one for her and one to put in the baby's bottle, because the child had been crying and the mother thought this was a good way to get it to sleep? Would the waiter have been justified in refusing service to the baby because it is underage? Of course. Then what's the difference between wanting to protect a child that is newly born and one that is about to be born?[37]

Once again the specter of the evil mother looms large. The biting injustice is that pregnant women are in general probably the Best Samaritans of our culture. The overwhelming majority will suffer considerable personal inconvenience, pain, risk, and curtailment of their freedom to do what their doctors advise is in the best interests of their fetuses. As one obstetrical surgeon put it, most of the women he sees "would cut off their heads to save their babies."[38] In the specific case of the customer who ordered the daiquiri, by her own account she had been extremely careful throughout her pregnancy and thought hard before ordering the drink:

> I was a week overdue . . . and I thought it would be safe to have just this one drink, which I ordered with dinner. . . . I've always made it a point to read everything I could find about alcohol in pregnancy. I felt guilty enough as it was for ordering the drink. . . . They tried to make me feel like a child abuser.[39]

Most poignant about this quote is the woman's internal sense of transgression, which I interpret as an indication, not of her recognition of the *actual* threat of one drink to her fetus's health, but of the extraordinary levels of vigilance now expected of and taken upon themselves by pregnant women. Yet at the same time as supererogatory levels of care are demanded of the pregnant woman, neither the father nor the state nor private industry is held responsible for any of the harms they may be inflicting on developing fetuses, nor are they required to contribute to their care. Fathers' drug habits, smoking, alcoholism, reckless driving, and psychological and physical treatment of pregnant wives are part of the fetus's "environment," too—sometimes indirectly, through their effect on the mother's well-being, but sometimes directly as well (through the effects of secondhand smoke and crack dust in the air, physical abuse, and alcohol's deleterious effect on the quality of sperm, to give a few examples). But fathers are nonetheless off the hook, as is the health system that makes it so difficult for poor women to obtain adequate prenatal care and for addicted mothers to get help.[40] As Katha Pollitt points out:

> Judges order pregnant addicts to jail, but they don't order drug treatment programs to accept them, or Medicaid, which pays for heroin treatment, to cover crack addiction—let alone order landlords not to evict them, or obstetricians to take uninsured women as pa-

> tients, or the federal government to fund fully the Women, Infants, and Children supplemental feeding program, which reaches only two-thirds of those who are eligible. The policies that have underwritten maternal and infant health in most of the industrialized west since World War II—a national health service, paid maternity leave, direct payments to mothers, government-funded day care, home health visitors for new mothers, welfare payments that reflect the cost of living—are still regarded in the United States by even the most liberal as hopeless causes, and by everyone else as budget-breaking giveaways to the undeserving, pie-in-the-sky items from a mad socialist's wish list.[41]

While public service announcements on television target the smoking and alcohol habits of pregnant women as though they were the sole causes of low birth-weight and infant disability, a task force commissioned by the government concluded that "if we just delivered routine clinical care and social services to pregnant women, we could prevent one-quarter to one-third of infant mortality." As things now stand, one out of every three pregnant women gets insufficient prenatal care (a situation that is not helped, of course, if drug-addicted mothers avoid seeking medical help, for fear they will be turned in to the police). Among other improvements, the task force recommends a public information campaign and a "nurturing approach" to pregnant women's needs, with home visits by nurses, social workers, and other counselors. The Bush White House, however, acted on none of this, withholding most of the report from Congress in the interests of preserving "the confidentiality of the deliberative process" in the Executive branch.[42]

Only the pregnant woman, apparently, has the "duty of care."[43] Indeed, according to the construction examined in the first section of this essay, this is her essential function. That it is framed, moreover, in entirely mechanistic terms—as fleshy incubator—is revealed by the exclusive attention given to her physiological state. The facts that a drink now and then might relax and soothe her, and that continual vigilance over the "environment" she is providing (if not the threat of public scrutiny and condemnation itself) may make her perpetually tense and worried, and that such factors may also affect the well-being of the fetus are not considered. Rather, a crudely mechanistic portrayal of her bodily connection with the fetus prevails. One daiquiri taken by the mother is imagined as equivalent to serving the fetus a cocktail. This image is so distasteful

that it is then easy to leap to the further equation: one drink = fetal alcohol syndrome.

Sometimes the womb is described not as incubator but as prison. "The viable unborn child is literally captive within the mother's body," argued the dissenting judge in the appeal of the Carder case. Anti-choice spokesperson Barnard Nathanson describes the fetus as "bricked in, as it were, behind . . . an impenetrable wall of flesh, muscle, bone and blood."[44] Perhaps such images can be dismissed as those of an ideologue. Michael Harrison's description, then, will serve as an example of the increasing *subjectification* of fetal being. For, strikingly, as the personhood of the pregnant woman has been drained from her and her function as fetal incubator activated, the subjectivity of the *fetus* has been elevated:

> The fetus could not be taken seriously as long as he remained a medical recluse in an opaque womb; and it was not until the last half of this century that the prying eye of the ultrasonogram rendered the once opaque womb transparent, stripping the veil of mystery from the dark inner sanctum, and letting the light of scientific observation fall on the shy and secretive fetus. . . . The sonographic voyeur, spying on the unwary fetus, finds him or her a surprisingly active little creature, and not at all the passive parasite we had imagined. . . . The fetus has come a long way—from biblical "seed" and mystical "homunculus" to an individual with medical problems that can be diagnosed and treated, that is, a patient. Although he cannot make an appointment and seldom complains, this patient will at all times need a physician.[45]

The gender ideology that permeates this quotation is various and obvious, and need not be belabored here. Here, I need only highlight the duality Harrison constructs between the "opaque," impenetrable womb, a territory itself bereft of the light of consciousness, a cave, a place merely to sleep, and the psychologically complex, fully personified fetus, at once "shy and secretive" and vitally "active." (And, of course, unlike his mother, he "seldom complains"—an ideal "patient"!) Ruth Hubbard notes, as well, the remarkable arrogance of the assumption that before developments in ultrasound, "we" had imagined the fetus to be a "passive parasite." Who is this "we"? she asks. "Surely not," she points out, "women who have been awakened by the painful kicks of a fetus!"[46] Those women, of course, have been rendered metaphorically unconscious by Harrison; only their inert, shrouded wombs remain.

Of course, the increasingly routine use of ultrasound *has* made the fetus seem more of a person, both to the doctor and to the mother.[47] Because of such changes in the perception of the fetus's status, combined with the advancing technologies that enable the doctor to treat the fetus directly, as an autonomous patient, doctors have come to feel confused, angry, and, perhaps, morally outraged when mothers refuse a recommended treatment. I can understand their discomfort and frustration. But the disturbing fact remains that increased empathy for the fetus has often gone hand in hand with decreased respect for the autonomy of the mother.[48] And, in general, the New Reproductive Technology has been a confusingly mixed bag as far as the subjectivity of women is concerned. On the one hand, women now have a booming technology seemingly focused on fulfilling *their* desires: to conceive, to prevent miscarriage, to deliver a healthy baby at term. On the other hand, proponents and practitioners continually encourage women to treat their bodies as passive instruments of those goals, ready and willing, "if they want a child badly enough," to endure however complicated and invasive a regime of diagnostic testing, daily monitoring, injections, and operative procedures may be required. Thus, one element of women's subjectivity is indeed nurtured, while all other elements (investment in career, other emotional needs, importance of other personal relationships, etc.) are minimized, marginalized, and (when they refuse to be repressed) made an occasion for guilt and self-questioning.

One of the most disturbing examples is presented by Dr. Stefan Semchyshyn. Semchyshyn argues for an extremely aggressive approach to the prevention of miscarriage, dismissing the (generally accepted) belief that many early miscarriages are the inevitable result of genetic defect and ought not to be rigorously prevented. He reassures readers that genetic testing (amniocentesis and ultrasound) will pick up those defects at the beginning of the second trimester, when the women can still elect to have an abortion.[49] Semchyshyn is, I presume, aware of the physical pain and (well-documented) psychological trauma involved in a second-trimester abortion; yet, apparently, these factors are too trivial for him to mention even as possible considerations.[50] In our present cultural context, the New Reproductive Technologies *do* cater to women's desires (that is, to the desires of women who can afford them), but

only when they are the *right* desires, desires that will subordinate all else (even in the face of technological success rates which continue to be very discouraging) to the project of producing a child.

Gradually over the last century, and steeply accelerating over the decade of the 1980s, the legal status of the fetus has been greatly enhanced as well.[51] For over half a century, the *Dietrich* rule (1884), which established that damages (for instance, accidental death or injury) incurred on a fetus were not separately recoverable, because the fetus was "a part of the mother," prevailed.[52] Then, in 1946, in what has been described as "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts,"[53] a federal district court in *Bonbrest v. Kotz* held that there may be recovery for injury to a viable fetus subsequently born alive.[54] Nelson points out that even this change, however, did not recognize the fetus as a person with full legal rights; the point of the ruling was to allow damaged *born* persons in need of special medical treatment, schooling, and so forth to be compensated for injuries wrongly suffered when they were not yet legal persons.

The same intent, on Nelson's analysis, is behind the New Jersey Supreme Court's unfortunately worded statement, in *Smith v. Brennan* (1960) that "a child has a legal right to begin life with a sound mind and body." *Smith*, recognizing a child's cause of action for negligently inflicted prenatal injury, explicitly denies that this entails recognition of fetal personhood. The point is simply to establish the legitimacy of the *live-born* child's injury claim.[55] Yet the phrase taken by itself (out of context of the decision) *is* problematic, not only suggesting an unprecedented scope of rights, but ambiguous concerning to whom they belong. Over the past thirty years this ambiguity has been frequently exploited at the expense of the intent of the ruling, as advocates of obstetrical intervention have freely invoked the *fetus's* right to "begin life with a sound mind and body" as justification for their suits. The slippage here, from a live-born child's right to bring action against injuries suffered when in the fetal state to the right of the *fetus* to force its mother to accept treatment against her will, is profound and pernicious.

But let us, for the sake of argument, lay aside the issue of misapplication of tort law. Let us grant a fetus's right to be born healthy and sound and to be provided with a safe, healthy environment to promote this end. If we grant this, we are obliged to recognize also

that this gives the fetus rights that *no one else* in this society has. Here we are once again confronted with the strange set of affairs entailed by fetal-rights arguments, that a two-year-old child has far fewer rights than a six-month-old fetus![56]

My point here is *not* to deny protection or dignity to the fetus or to suggest that it is no more than tissue or an appendage to the mother. In fact, I will later argue very strongly against such perspectives. Rather, my object is to bring attention to the ontological construction that is entailed (but never openly acknowledged) by the fetal-rights position, a position that is increasingly becoming conventional wisdom in many quarters of our culture. Very simply put, that construction is one in which pregnant women are not subjects at all (neither under the law nor in the zeitgeist) while fetuses are *super*-subjects. It is as though the subjectivity of the pregnant body were siphoned from it and emptied into fetal life.

FATHER'S RIGHTS

> This offspring was begot without a Mother.
>
> *Montesquieu, epigraph to*
> The Spirit of the Law

> O why did God,
> Creator wise, that peopl'd highest Heav'n
> With Spirits Masculine, create at last
> This noveltie on Earth, this fair defect
> Of Nature, and not fill the World at once
> With Men as Angels without Feminine,
> Or find some other way to generate
> Mankind?
>
> *Milton*, Paradise Lost,
> *Book X, lines 888–895*

Alongside attempts to define the pregnant woman's status as that of mere incubator, we have seen a corresponding emergence of a more and more vocal movement for father's rights. James Bopp, a highly visible advocate of this movement and general counsel of the National Right to Life Committee, has marketed a "Father's Rights Litigation Kit," a how-to guide for bringing suit against wives and girlfriends.[57] And although such cases have thus far invariably been defeated in higher courts, in November of 1989 the Pennsylvania State Senate passed legislation that has gone further than any other

in addressing father's rights, requiring that women notify their husbands of abortion plans and holding physicians who perform an abortion without a form showing that the husband has been notified liable for civil damages to the husband and punitive damages of $5,000.[58]

One reason why the movement for father's rights has grown so rapidly is the culturally powerful rhetoric of "equality" with which the movement has trumpeted its cause. "It's a balancing of rights," says James Bopp.[59] But it is a mystification to conceptualize father's-rights cases in this way, as though equitable distribution is the goal, like the allocation of a child's time in a custody case. For the basis for these cases is always a concrete occasion when the mother's and the father's goals are mutually exclusive. In that context, equal treatment *cannot* be achieved. Rather, one must prevail over the other in the dispute. Any father seeking his "rights" in such a case is claiming that his desires should not merely *equal* but *supersede* those of the mother. That is, what is being sought in father's-rights cases is not equality for fathers but the *privileging* of paternal interests.

The imagination of the father as not merely half-partner in the creation of life but the true parent of the child is a construction that has deep roots in Western culture. In *The Furies*, which dramatizes the triumph of rational, impartial Apollonic justice over matriarchal "blood" justice, Aeschylus has Apollo argue, pointing to the motherless Pallas Athene, who sprang fully formed from the head of Zeus, that the "true parent" is "he who mounts":

> The mother is no parent of that which is called
> her child, but only nurse of the new-planted seed
> that grows. The parent is he who mounts. A stranger she
> preserves a stranger's seed, if no god interfere.
> I will show you proof of what I have explained. There can
> be a father without any mother. There she stands,
> the living witness, daughter of Olympian Zeus,
> she who was never fostered in the dark of the womb
> yet such a child as no goddess could bring to birth.[60]

James Hillman has argued that the Genesis story, which reverses the actualities of birth, making the "male . . . the precondition of the female and the ground of its possibility rather than vice versa," is another version of the "male as true parent" fantasy.[61] And

certainly the dominant seventeenth-century account of reproduction, which spruces up the Aristotelian theory of generation with modern, mechanistic dress, is another.

From Aristotle to contemporary representations of the romance of the sperm and the egg,[62] the male contribution has been portrayed as the "effective and active" element in reproduction,[63] the female as passive, unformed matter, waiting to be individuated and vivified by the valiant sperm who wins her. But the mechanistic theory of preformation and embodiment went still further, representing the female body not even as providing the *material* stuff out of which the human being is formed (Aristotle's view), but merely as a *container* for the housing and incubation of already formed human beings, originally placed in Adam's semen by God, and parceled out, over the ages, to all his male descendants.[64] In 1577 the Dutch microscopist Antonie van Leeuwenhoek received what was for him decisive confirmation of this theory, when he discovered tiny tadpole-like creatures—"animalcules"—in the semen of male animals. He declared that this discovery empirically established Aristotle's intuition "that it is exclusively the male semen that forms the fetus, and that all that the woman may contribute only serves to receive the semen and feed it."[65] The imagination of woman as fetal incubator, in disturbing ascendance today, and of male as true parent (clearly attempting a comeback) has, then, deep historical roots.

In 1976 the Supreme Court clearly and resoundingly rejected the father's-rights argument, ruling in *Planned Parenthood of Central Missouri v. Danforth* that a spouse has no right that competes with, balances, or limits the woman's right to choose abortion. The court recognized both "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus" *and* the fact that an implication of the *Danforth* ruling (as of *Roe*) was that there would be cases when the mother might act unilaterally, without the approval of her husband. But the court insisted that since "only one of the two marriage partners can prevail" and since "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance weighs in her favor."[66]

The seemingly incontrovertible fact that only the mother experiences pregnant *embodiment* (obscured by the current fashion of speaking of *couples* as pregnant) is a powerful impediment to the father's-rights position, as those who have brought suit against their wives have obviously recognized, judging from the rhetoric and strategy of their arguments. Listen, for example, to Erin Conn, one of James Bopp's clients, as he describes his case on a "Nightline" show of July, 1988:

> My rights—I'm the—father of the child. My wife and I were joined in matrimony, and there's a bond there which makes me the father of the children that come out of our family. God—you know, the way the system's set up, the woman carries the child. And if I could carry the child, I would. But that's not the way the system's set up. But the thing is, that after that child is born, half of that child—part of that child is me. And I'm part of that child. And I feel like by her having the right to abort that child is her having the right to destroy a part of me without me having any say-so. And—she—you know, she wants control of her body. But what about me? Am I not allowed to have control of my body? That baby is a part of my body also.[67]

For Erin Conn, the biological reality of pregnancy is described as "the way the system's set up." This mechanistic imagery, I would suggest, although instinctively rather than methodically chosen by Conn, is not accidental. Conn has inchoately recognized that he must divest pregnancy of all emotional, spiritual, religious significance, of all evocation of hardship or burden, of all connection with the *experience* of the pregnant woman. He must turn the fact that women bear children into merely one instance of the impersonal, arbitrary functioning of an impersonal, arbitrary "system." In this imagination of things, there are no female subjects, only "carriers" (as Conn puts it) of fetuses, and the only true loci of subjective experience are the men who (it is implied) have been so cruelly and unfairly excluded (by the "system") from serving as "carriers." It's been "set up" that way; what's a poor fellow to do?

It is easy, of course, for Conn to say that if he *could* carry the child, he would—for he can't. But details like this pale alongside Conn's impassioned description of himself as so intertwined and interconnected with the fetus that not only is *he* "part of that child"—which is true—but *the child* is a "part of [Conn's] body" as well—which is

not true. The slippage from father-as-part-of-the-child to child-as-part-of-the-father allows Conn actually to evoke the image—emotional, if not visual—of himself as pregnant, and from there to appropriate and emotionally manipulate the rhetoric of the pro-choice movement (and indeed of his own wife's case): "She wants control of her body. But what about me? Am I not allowed to have control of my body?" Such exploitation of ideas that feminists have introduced to the culture is a typical strategy of father's-rights arguments. In a September, 1989, hearing, one litigant went so far as to claim—shamelessly equating his situation with that of a woman whose body has been invaded against her will—that he would feel "raped of his reproductive rights" if he lost the case.[68]

Such rhetoric attempts to strangle feminism with its own rope ("reproductive rights") and to win sympathy for the man as brutalized "rape" victim. More deeply, it attempts to create an image of the man as *woman* (that is, as women have been imagined in our culture). As "woman" he can lay claim to sensitivity, nurturing instinct, tenderness, and caring—the construction of subjectivity that has been assigned to us, and in many people's minds the justification for privileging maternal over paternal claims. To win father's-rights cases, that justification must be undercut; thus, the men who have brought these cases to court have rarely been ashamed to cry, to speak of their helplessness, to "feminize" themselves. "I just felt helpless," said Gary Bell, describing his feelings after his girlfriend had an abortion. "I cried for hours. I hurt so bad inside."[69]

The strategy is to underscore that men have tender feelings too, especially tender feelings of a parental nature. That they *do* have such feelings (and many others discouraged from full expression by dominant Western constructions of masculinity) is indisputably true. My point, once again—as in my argument concerning fetal rights—is not to dehumanize men or challenge their claims to enhanced subjectivity, but to point out the corresponding price that *women's* subjectivity has been required to pay. In the father's-rights cases, every assertion of male feeling has been accompanied by a corresponding denial of *female* sensibility; every attempt to prove that men can be nurturers, too, has involved an attempted discreditation of the *woman's* nurturing capabilities—for instance, picturing her as lacking the qualities of caring, selflessness, and so forth that

are required of a "true parent." While the men describe themselves as tender flowers, easily bruised and damaged, the women are portrayed as cold, ruthless destroyers of fetal life, running roughshod over paternal sensibilities.

In one of the most striking of these cases, an Indiana man sought an injunction prohibiting his girlfriend's abortion, arguing that her reasons for wanting an abortion were that "she wishes to look nice in a bathing suit this summer . . . not to be pregnant in the summertime . . . and not to share the petitioner with the baby." The judge granted the man's petition (without hearing from the woman), ruling that since the woman was not in school, was unemployed, and was living with her mother, "the continuance of her pregnancy would not interfere with either her employment or education." Moreover, he went on, "The appearance and demeanor of the respondent . . . indicated that she is a very pleasant young lady, slender in stature, healthy, and well able to carry a baby to delivery without an undue burden."[70] Are we in a courtroom, or at an auction for prize heifers?

RECLAIMING REPRODUCTIVE SUBJECTIVITY

The future of *Roe v. Wade* is now the central cultural arena for the battle over reproductive control. In this essay, however, I have emphasized the necessity of locating the struggle for abortion rights in a broader context. What gets obscured when abortion rights are considered in abstraction from issues involving forced medical treatment, legal and social interference in the management of pregnancy, and so forth, is the fact that it is not only women's reproductive rights that are currently being challenged but women's status as *subjects*, within a system in which—for better or worse—the protection of "the subject" remains a central value. What also may get obscured are the interlocking and mutually supporting effacements of subjectivity that are involved when the woman is perceived as a racial or economic "other" as well. So long as the debate over reproductive control is conceptualized solely in the dominant terms of the abortion debate—that is, as a conflict between the fetus's right to life and the woman's right to choose—we are fooled into thinking that it is only the fetus whose ethical and legal status is at issue. The pregnant woman (whose ethical and

legal status as a person is not constructed as a question in the abortion debate, and which most people wrongly assume is fully protected legally) is seen as fighting, not for her *personhood*, but "only" for her right to control her reproductive destiny.

The nature of pregnancy is such, however, that to deprive the woman of control over her reproductive life—whether by means of involuntary or coerced sterilization, court-ordered cesarean, or forbidden abortion—is necessarily also to mount an assault on her personal integrity and autonomy (the essence of personhood in our culture) and to treat her merely as pregnant *res extensa*, material incubator of fetal subjectivity. Unfortunately, feminists have in the past sometimes colluded in such constructions, arguing that reproduction and pregnancy are "functions" that are disengagable from the being of the subject and—like all alienated labor—amenable to being sold or rented to another. Over time, the severe limitations of this model, crystallized for many feminists by the "Baby M"/Mary Beth Whitehead surrogacy case, have become clear. It is crucial, I believe, that we now shift our discourse and strategies away from an abstract rhetoric of choice to one focused on (1) exposing the contradictions in our legal tradition regarding bodily integrity and insisting that women's equal protection under the law requires that they be resolved,[71] and (2) challenging the fetal-container conception, by reclaiming (from the right wing, which now holds a monopoly on such ideas) the view of pregnancy and abortion as *experientially* profound events. Only on the basis of such a reclamation can we assert women's moral authority, not only by virtue of our distinctive embodiment but also by virtue of our social histories, to adjudicate the complex ethical dilemmas that arise out of our reproductivity.

The foregoing contains several notions that may give contemporary feminists pause, and that require some further explanation. First, there is the problematic notion of women's "experience," and the concomitant danger of essentializing the experiences of some groups of women while effacing the histories and experiences of others. Although I acknowledge that danger, I believe that invoking women's embodied experience need not be equivalent to an alliance with "essentialism," so long as we remain mindful of the historical, racial, and cultural diversity of that experience—for example, so long as we recognize the different social histories within which the

freedom and economic conditions that permit women to *have* children have been as tenuous as the right *not* to have them. At the same time, consciousness of our diversity ought not to be permitted to dilute recognition that, *as women*, we *all* have an "authority of experience" that men lack, and that gives us "a privileged critical location from which to speak" concerning reproduction.[72] Women's varied historical experiences of reproduction and birth—such as those described by Emily Martin[73] and Angela Davis,[74] and including the experiences of the infertile and the voluntarily childless—provide such locations of authority for us. So, too, do more philosophical, reconstructive accounts, such as Iris Young's study of "pregnant embodiment."[75]

Feminists may be made queasy, too, by the idea of emphasizing the experiential significance of pregnancy and birth, out of a fear of the conceptual proximity of such notions to constructions of mothering as the one true destiny for women. I believe, however, that we stand a better chance of successfully contesting such ideology if we engage in the construction of a public, feminist discourse on pregnancy and birth rather than leaving it in the hands of the "pro-lifers." It now seems to me, for example, that feminists should never have permitted debate over the status of the fetus to have achieved center stage in the public imagination, but ought, rather, to have attempted to preempt that debate with a strong *feminist* perspective acknowledging and articulating the ethical and emotional value of the fetus.[76] (I suspect that we would have developed such a perspective if African American women, with their historical experience of having not only their bodies but their children appropriated from them, had played a more central role in framing the rhetoric and arguments of earlier feminist politics.) Granting value, even personhood, to the fetus does not make social control of women's reproduction any less problematic, as I have argued in this essay. Attempts to *devalue* fetal life, on the other hand, have fed powerfully into the right-wing imagination of a possible world in which women would be callously and casually scraping fetuses out of their bodies like leftovers off a plate. This image—so cruelly unrepresentative of most women's experiences—must be challenged, must be shown to be a projection of "evil mother" archetypes, reflective of deep cultural *anxieties* about women's autonomy rather than the *realities* of its exercise.

And, finally, there is the currently problematic status of concepts such as authority and the subject, concepts which have played a crucial role in Western modernity but are now in various philosophical and literary quarters being declared decentered, dying, or dead. This is not the place to detail those arguments. But it is easy, I believe, to call for the wholesale deconstruction of concepts such as subjectivity, authority, and identity only so long as we remain on the plane of high theory, where they function as abstractions. Once we begin to examine the role played by such concepts as they are institutionally and socially embodied in contexts such as law and medicine, in which the philosophical blueprint is transformed into real social architecture, a different agenda may suggest itself. This is what I have argued in this essay with regard to the politics and rhetoric of subjectivity as they are played out in the arena of the current legal and social battle over reproductive control.

Within this battle, we cannot afford, whether in the interests of theoretical avant-gardism or political correctness, to abandon conceptions such as subjectivity, authority, embodied consciousness, and personal integrity. But this does not mean that we will be reproducing them in precisely the form in which we have inherited them. We need to remember that when poststructuralist writers declare that the "author" or "man" (or "metaphysics" or "philosophy") is dead, they refer to conceptions that were historically developed by European men, under conditions of their cultural dominance. Under those conditions, subjectivity took a very particular form by virtue of the experiences excluded from it. Iris Young's study of pregnant embodiment, for example, suggests that pregnancy makes uniquely available (although it does not guarantee) a very different experience of the relationship between mind and body, inner and outer, self and other than that presumed by Descartes, Hobbes, Locke, and other architects of the modernist subject. The conception of autonomy assumed by that model, for example, is challenged by an embodiment that literally houses "otherness" within the self.

Young's argument makes us aware of the fact that invoking the authority of marginalized subjects may ultimately result in a reconstruction of subjectivity itself. This is not to say that the (historical) subjectivities of subordinate groups have developed fully *outside* of or unaffected by dominant constructions of the subject. (It

is not as though, for example, women have not sought autonomy or cherished possibilities for individuation and self-development.) But our relation to these values has been different: more ambivalent, less purely identified; one could even say, less oppressed.[77] Historically excluded from participation in the making of philosophy, law, and politics, we have nonetheless created culture in our own assigned "spheres," and these cultures now provide a valuable resource for us as we begin to make philosophy, law, and politics in the public arena.