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HOMOLOGIZING PREGNANCY AND MOTHERHOOD: A CONSIDERATION OF ABORTION

Julia E. Hanigsberg*

INTRODUCTION: MOTHERING AND MATTERING

The abortion issue has been the subject of an enormous legal literature.¹ The contours of its legal analysis in the United States are, by now, relatively well known. The right to abortion has been protected under the rubric of the right to privacy guaranteed by the Substantive Due Process Clause of the Fourteenth Amendment and in the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments of the U.S. Constitution.²

In this essay I reconsider abortion in order to bridge what initially seem to be two opposing frameworks: first, the conception of abortion as an issue of women’s bodily integrity and liberty, and second, the acknowledgement of the existence and meaning of intrauterine life.³ The abortion choice is indeed deeply and necessarily tied to women’s bodily integrity. I will discuss how taking away

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1. See, for example, works cited in the bibliography of JANINE BRODIE ET AL., *THE POLITICS OF ABORTION* 186-98 (1992). A Westlaw search of articles with the word “abortion” in the title finds 320 entries.

2. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805-06 (1992); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); *Carey v. Population Servs. Intl.*, 431 U.S. 678, 684 (1977); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

3. I use the far from perfect term “intrauterine life” for two reasons: first, in the interest of precision, to include both embryo and fetus; second, in order to attempt to complicate the analysis of pregnancy without falling into the rhetoric of the “pro-life” movement and its emphasis on the rights of the “fetus” or “unborn” or “pre-born” or “unborn child” as static and immutable. See Julia E. Hanigsberg, Book Review, 37 *McGILL L.J.* 928 (1992) (reviewing CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* (1990)).

women's ability to control their decision not to become mothers can be severely damaging to their very sense of self, for this denial of decisionmaking divides women from their wombs and uses their wombs for a purpose unrelated to women's own aspirations. By interfering in unique ways with women's bodily integrity in the guise of regulation of procreative decisionmaking, law both facilitates and justifies that violation of bodily integrity. Because bodily integrity is necessary for the formation of selfhood, it is essential that law recognize women's subjectivity in its construction of women's procreative lives.⁴ The legal regulation of procreation, in this sense, defines women's very boundaries.

By suggesting a connection between mothering and abortion, however, I seek to highlight that a strict bodily integrity framework is incomplete because it does not acknowledge intrauterine life. Pro-choice considerations of the abortion issue have largely failed to account for intrauterine life and the meaning that life has,⁵ while anti-abortion accounts are insufficiently concerned with women. The rhetoric of both sides — "choice" vs. "life" — oversimplifies the complexity of the abortion issue: the language of "choice" suggests that mere legalization of abortion will provide women with real choices without accounting for structural inequalities that curtail such autonomy;⁶ the adoption of the term "pro-life" both suggests that those who favor legal abortion lack concern for life and obscures the fact that the "pro-life" movement has been consistently more concerned with "the unborn" than the conditions of living women and children.⁷ Thus, this paper will stand back from *both* sides of the abortion debate in an effort to provide a complex articulation of the nature of abortion, and to elucidate why this issue is, from both a legal and political perspective, enormously diffi-

4. This is not to say, I emphasize, that women are constituted by their ability to bear children. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 782 (1989). To the contrary, to the extent that law interferes with women's ability to make procreative decisions, the law reduces them to their childbearing capacity.

5. Some feminists, such as Ruth Colker, have begun to integrate a consideration of intrauterine life into their analysis of abortion. See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1054-60 (1989); see also Jean L. Cohen, *Redescribing Privacy: Identity, Difference, and the Abortion Controversy*, 3 COLUM. J. GENDER & L. 43, 78 (1992). See generally RUTH COLKER, *ABORTION AND DIALOGUE* (1992).

6. Choice is relatively meaningless in the face of inadequate options from which to choose. For an exploration of this argument and the connections between choice and autonomy, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369-99 (1986).

7. See Hanigsberg, *supra* note 3, at 933; cf. Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 128 (1989) (remarking that society's undervaluation of women produces an overvaluation of fetal life).

cult to regulate. It is perhaps useful at this point to note that my project is *not*, first or foremost, to find a compromise position to unite opponents in the abortion debate. Indeed, I suspect that such compromise is unlikely, particularly given the current political and ideological bent of the "pro-life" movement in the United States as it is presently constituted and largely controlled by the extreme political and Christian right.⁸

I posit the view that abortion, and indeed all procreative decisionmaking,⁹ is about *mothering* in its broadest terms, and it is thus that I will make use of the term *mothering decisions* throughout this article. Even when a woman decides to have an abortion, she is still making a mothering decision. I will discuss at some length why I think this is the case, but at the very least, it is because restriction of women's access to abortion forces women to bear children — to become, at least, biological mothers.¹⁰ I will also show how attitudes toward mothers are crucial to the way that North American law and culture defines women, and therefore that the way mother-

8. For discussions of the possibility of compromise, see generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1990); LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990); and Annette E. Clark, *Abortion and the Pied Piper of Compromise*, 68 N.Y.U. L. REV. 265 (1993). For an excellent elaboration of the political forces that make compromise impossible, see Sylvia A. Law, *Abortion Compromise — Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 938.

9. I use "procreativity" and "procreative" because I think the word "reproduction" needs to be treated critically. "Reproduction" suggests technology, manufacturing, and alienation of procreative labor in the context of childbearing.

[The word "reproduction"] derives from the word "production", which implies a mechanical process. Production describes the making of commodities. The metaphor of production is the dominant medical metaphor to describe the process of menstruation, pregnancy and birth: women are the machines that must produce a perfect product, a healthy baby. Just as machines are separate from their products, so too are women separate from their "products", children.

Donna Greschner, *Abortion and Democracy for Women: A Critique of Tremblay v. Daigle*, 35 MCGILL L.J. 633, 647-48 (1990) (citation omitted). In the parlance of obstetrics textbooks:

Labor is work; mechanically, work is the generation of motion against resistance. The forces involved in labor are those of the uterus and the abdomen that act to expel the fetus and that must overcome the resistance offered by the cervix to dilation and the friction created by the birth canal during passage of the presenting part.

JACK A. PRITCHARD & PAUL C. MACDONALD, *WILLIAMS OBSTETRICS* 1980 (16th ed. 1980), quoted in Emily Martin, *The Ideology of Reproduction: The Reproduction of Ideology*, in *UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE* 300, 302 (Faye Ginsburg & Anna Lowenhaupt Tsing eds., 1990); see also Judith Grant, *Intimate Work: The Regulation of Female Sexuality and Reproduction*, 1 S. CAL. REV. L. & WOMEN'S STUD. 225 (1992). Procreation is not merely the physiological fact of pregnancy and childbearing. Anthropologist Carol Delaney has called it "the beliefs related to the question of how life comes into being" and notes that "[p]rocreation, it must be stressed, is not just the fact of physiological reproduction, but the way it is symbolized and understood." Carol Delaney, *Seeds of Honor, Fields of Shame*, in *HONOR AND SHAME AND THE UNITY OF THE MEDITERRANEAN* 35, 36, 44 (David Gilmore ed., 1987).

10. See Rubenfeld, *supra* note 4, at 788; Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 350 (1992).

hood is regulated is significant to all women regardless of whether they ever do bear, or even are capable of bearing, children.¹¹ This significance is even greater because of the phenomenon that I call *homologizing*. I use this term to refer to the way that pregnancy and motherhood are treated as though they are corresponding states of being. By a legal, political, and social process, pregnancy and motherhood are made to resemble each other. There are two sides to this process. First, in a benign way, women making procreative decisions, including the decision whether or not to abort, are making mothering decisions. These mothering decisions include calculations about what would be best for the woman, the intrauterine life, and others. Second, in an invidious way, even women who are merely pregnant are subject to regulatory frameworks inspired by viewing pregnant women as already being mothers.

It makes sense at the outset to try to explain why the regulation of motherhood and the ideological underpinnings of this regulation have broad significance for all women, not just mothers. First, regardless of women's individual choices or capacities, society includes them within the category of "mother."¹² A woman's position in the work force can be altered because of her presumed fertility and its ramifications and social signification.¹³ Two examples are instructive. Employers act on a presumption that women are likely to leave their jobs in order to bear and raise children at some point in their work lives.¹⁴ Therefore all women, regardless of

11. Siegel states the following:

Ideological norms and institutional practices pertaining to reproduction play a central part in defining women's status, the dignity they are accorded, the degradations to which they are subjected, and the degree of autonomy they are allowed or dependency they must suffer. These norms and practices affect women who are mothers most intensely, but in one way or another they affect all women.

Siegel, *supra* note 10, at 267.

12. Martha Fineman has referred to this as a "colonized category." See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 51 (1995); see also *MOTHERS IN LAW: FEMINISM AND THE LEGAL REGULATION OF MOTHERHOOD* (Martha A. Fineman & Isabel Karpin eds., 1995); Lisa Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1304 (1992) ("The Good Mother tends to be used as a universal standard. It is applied to all women in a way that ignores the social reality in which they live.").

13. See Sherry F. Colb, *Words That Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101, 131 (1992).

14. Census data indicate that 85-90% of women of childbearing age expect to conceive at least once. See Patricia Schroeder, *Is There a Role for the Federal Government in Work and the Family?*, 26 HARV. J. ON LEGIS. 299, 301 (1989). Some 45% of mothers of children under the age of four stay home. Most of these women, however, will return to the work force before their children reach the age of majority. See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 56 (1995) (citing census and National Research Council Data).

their actual intention of having children or whether they ever do leave the work force for child rearing reasons, become burdened by the mere possibility of their becoming mothers.¹⁵ Employers respond to this presumption by tracking women into jobs that accord them less respect and fewer opportunities for advancement than their male colleagues.¹⁶ Women thus face "statistical discrimination"¹⁷ based on the presumption of fertility and its social consequences and thereby are disadvantaged in the wage labor market.¹⁸ A second example is the illegal attempt by employers to ban fertile women from workplaces that are allegedly dangerous to fetuses regardless of whether the female employees were pregnant or even had any intention of becoming pregnant. The Seventh Circuit, in *UAW v. Johnson Controls, Inc.*,¹⁹ accepted the company's argument that its exclusion of "women who are pregnant or who are capable of bearing children"²⁰ from working in areas of the factory where lead levels reached a certain concentration was justified as a bona fide occupational qualification.²¹ Although the judgment was overturned on appeal,²² it reflects how women without children, without even the intention of ever bearing children, can be affected socio-economically by their presumed ability to become mothers.²³

Second, significant social stigma may attach to women who *choose* not to mother. Such women continue to be viewed through the lens of motherhood: their decision not to mother is itself considered deviant antimaternalism.²⁴ Third, large numbers of work-

15. See Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 363-64 (1993).

16. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1185 (1989).

17. See Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2168 (1994).

18. See Dowd, *supra* note 14, at 57.

19. 886 F.2d 871 (7th Cir. 1989), *rev'd*, 499 U.S. 187 (1991).

20. 886 F.2d at 876. The fetal protection policy defined this as "[a]ll women except those whose inability to bear children is medically documented." 886 F.2d at 876 n.8.

21. See 886 F.2d at 871.

22. 499 U.S. 187 (1991).

23. See discussion in Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992).

24. See Martha Gimenez, *Feminism, Pronatalism and Motherhood*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 287 (Joyce Trebilcot ed., 1983); Charlene E. Miall, *Reproductive Technology v. the Stigma of Involuntary Childlessness*, 70 J. CONTEMP. SOC. WORK 43 (1989); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 5 (1993) [hereinafter Roberts, *Racism and Patriarchy*] (noting that women who do not become mothers are stigmatized for not following the dominant norm and considered deviants or criminals); Siegel, *supra* note 10, at 379 (noting that women who seek to avoid maternity are castigated as lacking in humanity); Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities*, 38 UCLA L. REV. 1483, 1508 (1991)

ing class women and women of color have a unique position with respect to mothering because their economic labor is often in the area of *motherwork* — that is, paid labor with a significant child care component. Therefore, even if they choose not to become mothers, they may still be mothering in a broader sense of the word. For example, studies have shown that more than ninety-five percent of child care workers are women, and among those more than one-third are black or Latina.²⁵ Women also constitute the vast majority of workers in occupations that require caregiving.²⁶

Fourth, for African-American women, motherhood includes the legacy of the control of their procreativity under slavery. Female slaves, in addition to performing work expected of men, bore the burden of reproduction of the slave workforce, domestic labor of White owners, and wet-nursing — all, once again, motherwork.²⁷

(describing how women in the United States are generally perceived and treated as mothers); Enid Nemy, *No Children. No Apologies.*, N.Y. TIMES, Apr. 6, 1995, at C12 (describing the "Childfree Network," a support system for people who do not have children, and the stigma attached to childlessness); cf. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 24-38 (1993) (discussing social forces that create biases in favor of biological parenting as opposed to adoptive parenting).

Despite the fact that Black motherhood is devalued, the dominant ideology that all women are destined to be mothers still affects Black women. See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 97 n.10 (1993) [hereinafter Roberts, *Motherhood and Crime*].

25. See BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 200-01 (1989). She notes also that the median income for child care workers in 1985 was under \$6000 per annum. Martha Fineman points out that:

An egalitarian family typically hires someone to care for the children (or other dependents). This hardly seems an acceptable feminist solution, however, given that caretaking is undervalued and underpaid in the "commercial" context as well as within the family. All too often, it is women of African American or Hispanic descent who are called upon to subsidize the middle-class woman's ideal of equal partnership in marriage. The expectation that caretaking is a private matter means that someone's (some woman's) labor will be undervalued even if it is compensated.

FINEMAN, *supra* note 12, at 166 (citation omitted).

26. See Sau-ling C. Wong, *Diverted Mothering: Representations of Caregivers of Color in the Age of "Multiculturalism,"* in MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 67, 71-72 (Evelyn Nakano Glenn et al. eds., 1994) (indicating that women are the vast majority in occupations requiring caregiving, which are also, typically, low-paying, low status jobs. In addition, among those women, women of color, including immigrant women of the Third World are increasingly the mainstay of caregiving industries); NATIONAL COMMITTEE ON PAY EQUITY: AN ISSUE OF RACE, ETHNICITY AND SEX 20-26 (1987) (citing statistics that demonstrate that Black women are concentrated in service-oriented occupations), cited in Roberts, *Racism and Patriarchy*, *supra* note 24, at 20 n.106.

27. See ANGELA Y. DAVIS, WOMEN, RACE & CLASS 6 (1983); BELL HOOKS, AIN'T I A WOMAN 39 (1981); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 18-19 (1991); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1970 (1993) [hereinafter Roberts, *Crime, Race, and Reproduction*] ("Female slaves were commercially valuable to their masters not only for their labor, but also for their capacity to produce more slaves. White masters therefore could increase their wealth by controlling their slaves' reproductive capacity through rewarding pregnancy, punishing slave women who did not bear children, forcing them to breed, and raping them." (citations omitted)); Roberts, *Racism and Patriarchy*, *supra* note 24, at 7 ("The social order established by white slaveowners was

Fifth, all fertile women are potentially subject to unintended motherhood either as a result of rape²⁸ or incest or because of the fallibility of even the most reliable birth control.²⁹ Finally, of course, many women do mother their own children, in the more traditional sense of the word, albeit in a variety of domestic relationships often outside of the nuclear family, and through forms of impregnation not limited to heterosexual intercourse.

Norms about mothering affect all women, but these norms do not have the *same* significance for all women, nor do all women similarly experience mothering. For example, most White mothers do not experience the pain of raising Black children in a racist society.³⁰ Nevertheless, because “[a]ll women are, at least to some ex-

founded on two inseparable ingredients: the dehumanization of Africans on the basis of race, and the control of women’s sexuality and reproduction.”)

This legacy includes eugenics, birth control aimed at the Black population in the 1930s, sterilization abuse of Black Americans, and proposals to give women on welfare incentives to use Norplant. See Roberts, *Crime, Race, and Reproduction*, *supra*, at 1971-72. Roberts cites *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977), in which a district court found that an estimated 100,000 to 150,000 poor people were sterilized annually under federally funded programs.

28. The socio-historical meaning of rape is not, however, the same for all women. Rape has been constructed along racial lines as a crime perpetrated on white women by Black men thus making its meaning different for Black and White women in general but also with regard to their procreative and mothering capacities. See, e.g., Kimberlé Crenshaw, *Whose Story is it, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in *RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* 402 (Toni Morrison ed., 1992); Jacquelyn Dowd Hall, “*The Mind That Burns in Each Body*”: *Women, Rape, and Racial Violence*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 328 (Ann Snitow et al. eds., 1983). Patricia Hill Collins traces the influence of this rape into contemporary society and the facile notion of reproductive “choice” and “control” of motherhood:

The ambiguous politics of caring for unplanned children has long shaped African-American women’s motherwork. For example, the widespread institutionalized rape of Black women by white men, both during slavery and in the segregated South, created countless biracial children who had to be absorbed into African-American families and communities. The range of skin colors and hair textures in contemporary African-American communities bears mute testament to the powerlessness of African-American women in controlling this dimension of motherhood.

Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood*, in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY*, *supra* note 26, at 45, 53 (citation omitted).

29. Forty-seven percent of unintended pregnancies occur in women who are using contraception at the time of the pregnancy. For example, six percent of oral-contraceptive users become pregnant within the first year of use. See Rachel B. Gold & Cory L. Richards, *Securing American Women’s Reproductive Health*, in *THE AMERICAN WOMAN 1994-95*, at 196, 203, 205 (Cynthia Costello & Anne J. Stone eds., 1994).

30. See Roberts, *Racism and Patriarchy*, *supra* note 24, at 4-5 (“It is impossible to explain the depth of sorrow felt at the moment a mother realizes she birthed her precious brown baby into a society that regards her child as just another unwanted Black charge. Black mothers must bear the incredible task of guarding their children’s identity against innumerable messages that brand them as less than human.”). But see Lisa Jones & Hettie Jones, *Mama’s White*, *ESSENCE*, May 1994, at 78 (exploring the racism of a Black woman and her White mother). On the complexity of these categories in the context of both family and politics, see Judy Trent-Scales, *Commonalities: On Being Black and White, Different and the*

tent, judged as ‘Woman,’” all women can be said to have an interest in collaborating on issues with a gendered implication in their lives.³¹ Such an understanding does not require the privileging of any one oppression or a belief that racism or patriarchy³² is dominant.³³ Rather, racism and patriarchy are “mutually supporting systems of domination.”³⁴ It is this reality of gender and race that makes the forging of alliances across differences, albeit shifting and impermanent ones, both possible and necessary.³⁵ This essay thus positions itself in a zone of tension: on the one hand I have already asserted grounds to suggest the importance of motherhood for *all* women, yet at the same time, considerations of diversity — of race and socio-economic status — should not be a convenient way to force others into a fixed paradigm. Therefore, although we must be wary of feminist theory’s tendency to homogenize women’s experience, it remains both possible and useful to talk about “women” and “mothers,” and to bear in mind that control

Same, 2 YALE J.L. & FEMINISM 305 (1990); see also SHIRLEE TAYLOR HAZLIP, *THE SWEETER THE JUICE* (1994).

31. See FINEMAN, *supra* note 12, at 13. Fineman has developed the notion of a “gendered life” which she describes as follows:

The idea of a gendered life is based on the premise that as a socially and legally defined group, women share the potential for experiencing a variety of situations, statuses, and ideological and political impositions in which their gender is culturally relevant. These experiences, be they actual or potential, provide the occasion for women to develop an identifiable perspective that is rooted in their appreciation of, and reaction to, the gendered nature of our social world. This concept does *not* assume that women respond identically to an appreciation of gendered existence. It does presume that with gender revealed as a central social and cultural consideration, women’s attention in many areas can be directed productively toward confronting and challenging the gendered implications of our lives.

Id. at 47-48.

32. “Patriarchy” has been defined as the “manifestation and institutionalization of male dominance over women and children . . . and [its extension] over women in society in general.” GERDA LERNER, *THE CREATION OF PATRIARCHY* 239 (1986). *But see* FINEMAN, *supra* note 12, at 23 (criticizing the structural critique of patriarchy and claiming that the focus should be on the ideological aspect of patriarchy); *see also* ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 40 (Bantam Books 1977) (1976) (“Patriarchy is the power of the fathers: a familial-social, ideological, political system in which men — by force, direct pressure, or through ritual, tradition, law, and language, customs, etiquette, education, and the division of labor, determine what part women shall or shall not play, and in which the female is everywhere subsumed under the male.”).

33. See Regina Austin, *Sapphire Bound*, 1989 WIS. L. REV. 539, 546 (describing this phenomenon as the “running of the oppression sweepstakes”).

34. See Roberts, *Crime, Race, and Reproduction*, *supra* note 27, at 1977; *see also* Roberts, *Racism and Patriarchy*, *supra* note 24, at 37.

35. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 171 (1990) (arguing for group identifications that address political necessity, while allowing for the fact that these identifications shift and lack clear borders; she calls this a “relational understanding” of difference).

of women's reproduction is fundamental to race and class oppression.³⁶

I take the position that mothering matters to all women because of the variety of ways in which motherhood is imposed on women's experiences because they are *women*. It matters to each woman whether she is a mother or not. Mothering matters because it has historically been, and continues to be, a locus of subordination for women in North American society.³⁷ If mothering matters in the

36. See Roberts, *Crime, Race, and Reproduction*, *supra* note 27, at 1977 ("The convergence of crime, race, and reproduction illustrates how racism and patriarchy function as mutually supporting systems of domination."). Patriarchy and racism converged when eugenics and the glorification of the feminine sphere were combined with restrictions on abortion in Nazi Germany as a means of racist population control.

[W]here sexism and racism exist, particularly with Nazi features, all women are equally involved in both, but with different experiences. They are subjected to one coherent and double-edged policy of *sexist racism* or *racist sexism* (a nuance only of perspective), but they are segregated as they live through the dual sides of this policy, a division that also works to segregate their forms of resistance to sexism as well as to racism.

Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization and the State, in WHEN BIOLOGY BECAME DESTINY: WOMEN IN WEIMAR AND NAZI GERMANY* 271, 288 (Renate Bridenthal et al. eds., 1984). See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics* (1989), reprinted in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 57 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

37. One example is that the U.S. Supreme Court has declared that discrimination on the basis of pregnancy, which it characterized as discrimination between "pregnant women" and "nonpregnant persons," does not constitute sex discrimination. See *Geduldig v. Aiello*, 417 U.S. 484, 496-97 & n.20 (1974) (upholding California's disability insurance program, which did not provide coverage for pregnancy). The Court stated that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 417 U.S. at 496-97. The Court also stated that "[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. 417 U.S. at 496 n.20; see also *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (applying *Geduldig's* reasoning in the context of Title VII's prohibition of sex discrimination in employment); cf. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 760 (1993) (stating that opposing abortion and blocking access to abortion is not sex discrimination and citing *Geduldig*). But see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (Can.) (holding that discrimination on the basis of pregnancy constitutes sex discrimination under the Human Rights Act of Manitoba of S.M. 1974, c. 65). In 1978, Congress passed the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978), amending Title VII of the Civil Rights Act of 1964 to include discrimination on the basis of pregnancy. See *Pregnancy Discrimination Act*, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)). For the limitations of the protections afforded under the amended Title VII, see *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (Posner, J.) ("Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees."); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987) (firing of African-American employee of Girls Club when she became pregnant because of her violation of role model requirement justified under bona fide occupational qualification and business necessity defenses); and Austin, *supra* note 33 (discussing *Chambers*); see also NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* 9 (1978) ("[W]omen's mothering is a central and defining feature of the social organization of gender and is implicated in the construction and reproduction of male dominance . . ."); and FINEMAN, *supra* note 12, at 103. See generally ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 98-100 (1988) (critiquing both *Geduldig* and the Pregnancy Discrimination Act); Colb, *supra*

way I suggest, it makes sense to rethink how decisions *not* to mother, including the decision to abort, should be construed legally.³⁸ More specifically, how should the abortion decision be envisioned within a framework of mothering, and how should pro-choice analyses confront the significance of intrauterine life? This is *not* an argument that intrauterine life "is" a child, or should be accorded the rights of an adult person in law.³⁹ It is indeed this dangerous and allegedly inescapable implication that I believe has kept feminist theorists, in particular, from adequately theorizing about the importance or meaning of intrauterine life. Rather I want to highlight the inadequacy of interpretations of the abortion decision that *ignore* intrauterine life, and deplore the rhetoric that allows only the "pro-life" side of the political coin to evince any concern for "life."

In Part I, I discuss bodily integrity in law and how women's bodies have been treated differently from men's. I sketch out a theory of the abortion decision and its relationship to selfhood that connects the ability to make this decision to women's capacity to form a stable sense of bodily integrity. By employing the term "bodily integrity" I mean to articulate women's need to maintain a sense of wholeness, of coherence, and, at its most corporeal, of "physical parameters."⁴⁰ The shift from traditional approaches to abortion that this perspective suggests is that the abortion decision is not only about autonomy in the sense of self-determination, but in the more radical sense of self *simpliciter*. Alienating women from their pro-

note 13, at 126-39 (discussing *Geduldig* and *Johnson Controls* and showing how "[s]tructuring the world around male life effectively punishes women for experiences only they can have"); Issacharoff & Rosenblum, *supra* note 17, at 2179-99.

38. Under American constitutional law, the question is conceptualized as one of privacy. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973). In Canada, it has developed as a question of security of the person. See *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.). Some scholars have argued that the issue should be addressed as one of gender equality. E.g. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade, in FEMINISM UNMODIFIED* 93 (1987); Olsen, *supra* note 7; Siegel, *supra* note 10; Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992). Others have argued that the question should be framed in terms of bodily integrity. E.g. DRUCILLA CORNELL, *Dismembered Selves and Wandering Wombs, in THE IMAGINARY DOMAIN: A DISCOURSE ON PORNOGRAPHY, ABORTION AND SEXUAL HARASSMENT* (forthcoming 1995) (manuscript on file with author); Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327 (1991). I draw particular attention to the bodily integrity argument in this essay.

39. Cf. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 600-01 (1991) (discussing the problems with and consequences of deeming the fetus a person in the abortion context and other contexts).

40. In sum, this perspective mandates a recognition that women's physical boundaries encompass their wombs. See Neff, *supra* note 38, at 328.

creative choices inhibits their ability to form a coherent sense of self.

It is, however, insufficient to discuss abortion solely in terms of bodily integrity. In Part II, I discuss how abortion is a kind of mothering decision. I elaborate on what I call the homologizing of pregnancy and motherhood, both as a matter of law and culture, and as a matter of the experience of pregnancy and its conceptualization in language. I also interrogate the meaning of intrauterine life within a feminist pro-choice framework and show that part of the difficulty in discussing abortion as both a political and legal matter is that it is perceived as a particularly egregious form of bad mothering. As a result, abortion becomes enmeshed in a complex set of beliefs and practices that stem from the ideology of motherhood.

I. THE BODY IN LAW: BODILY INTEGRITY AND SUBJECTIVITY

It is clear to me, that . . . all our little skirmishing for better laws, and the right to vote, will yet be swallowed up in the real question, viz: Has woman a right to herself? It is very little to me to have the right to vote, to own property, &c. if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, and as long as she suffers this bondage, all other rights will not help her to her true position.⁴¹

The abortion context provides the archetypal example of the connection between bodily integrity and selfhood. This is true despite the fact that the Court in *Roe*⁴² gave short shrift to the bodily integrity argument made before it.⁴³ Bodily integrity is *constructed*,⁴⁴ for it is developed according to a variety of cultural mechanisms and bolstered by other persons' statements and behav-

41. ELIZABETH CAZDEN, ANTOINETTE BROWN BLACKWELL: A BIOGRAPHY 100 (1983) (Lucy Stone writing to Antoinette Brown in 1855).

42. *Roe v. Wade*, 410 U.S. 113 (1973).

43. See 410 U.S. at 154 (Blackmun, J.) ("[I]t is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past."); see also Neff, *supra* note 38, at 328. *But see* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2846 (1992) (Blackmun, J., concurring) ("[C]ompelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm.").

44. See Rayna Rapp, *Constructing Amniocentesis: Maternal and Medical Discourses, in* UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE, *supra* note 9, at 28, 28 ("[A]s the field of medical anthropology constantly reminds us, bodies are also and always culturally constituted, and their aches, activities, and accomplishments are continuously assigned meanings.").

iors.⁴⁵ Thus, our bodies, by which I mean our symbolic interpretation and sense of dominion over our bodies, are central to our identity and our personal dignity. This is not a simple physical fact. While a missing body part does not result in a loss of identity⁴⁶ and the symbolic meaning we give to our bodies is culturally and historically mediated, our selves and our identities become implicated by our bodies and how we experience them.⁴⁷ This view of bodily integrity also occurs in constitutional discourse. Justice O'Connor's concurring opinion in the "right-to-die" case, *Cruzan v. Director, Missouri Department of Health*,⁴⁸ observes,

Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.⁴⁹

A sense of control over our own bodies is crucial for maintaining both a sense of self and an ability to interact with others. In order to have a sense of self, the individual must believe that she can coordinate her body's functions autonomously and regulate access to it.⁵⁰ Without recognition by others of her autonomous control over her body and her bodily integrity, without at least this most basic acknowledgment of dignity, the individual's self-image becomes crippled along with the security she needs in order to in-

45. For example, a parent who holds an infant up to a mirror allowing it to visualize itself as a whole before it has any ability actually to see itself without outside aid helps in the formation of a sense of bodily integrity. See JACQUES LACAN, *The mirror stage as formative of the function of the I as revealed in psychoanalytic experience*, in *ÉCRITS: A SELECTION* (Alan Sheridan trans., 1977).

46. But the "loss" of body parts does have a psychological impact. Oliver Sacks describes in the following terms the experience of severe nerve damage to his leg:

The surgeon's original words recurred to me, "You've been disconnected. We reconnect you. That's all." What he meant, in a purely local and anatomical sense, had, I now felt, a much vaster (if unintended) sense — the sense in which E. M. Forster says "Only connect." For what was disconnected was not merely nerve and muscle but, in consequence of this, the natural and innate unity of body and mind. The "will" was unstrung, precisely as the nerve-muscle. The "spirit" was ruptured, precisely as the body. Both were split, and split off from one another. And, since "body" and "soul" have sense only insofar as they are one, both became senseless when they no longer connected.

OLIVER SACKS, *A LEG TO STAND ON* 104 (1984).

47. See CORNELL, *supra* note 38; Cohen, *supra* note 5, at 113; Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 965-68 (1982). Of course, the physically handicapped must cope both with the psychological and corporeal consequences of the loss of bodily autonomy that accompanies disability.

48. 497 U.S. 261 (1990).

49. 497 U.S. at 287 (O'Connor, J., concurring).

50. For a discussion of this kind of phenomenon as a neurological disorder, see Oliver Sacks's description of the "disembodiment" of a female patient who had lost her sense of proprioception — the literal loss of a sense of her body and its boundaries. See Oliver Sacks, *The Disembodied Lady*, in *THE MAN WHO MISTOOK HIS WIFE FOR A HAT* 42 (1985); see also Radin, *supra* note 47.

teract successfully with others and to express her own needs and feelings. The sanctity of bodily integrity thus surpasses its corporeal component: “[T]he constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein.”⁵¹

Something resembling this conception of bodily integrity can be found in the Supreme Court of Canada’s decision striking down the abortion restrictions then contained in the *Criminal Code*.⁵² In coming to its conclusion, the Court offers strong support of women’s bodily integrity:

Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman’s body and thus a violation of security of the person.⁵³

What is at stake in the abortion controversy is precisely a woman’s sense of selfhood and identity.

Bodily integrity is not merely something that one *has*, but rather something that must be produced and protected.⁵⁴ Complete and total bodily integrity is, however, an illusion — an aspiration rather than a fact. Human beings never have total bodily integrity. We are contained by our skins, but we are not impermeable. Our very physical borders are a conduit from inside to out and back. We breathe, we perspire, we ingest drugs through our skin, we make love. Substances penetrate our bodies from without continuously.⁵⁵

51. 497 U.S. at 343 (Stevens, J., dissenting).

52. *See R. v. Morgentaler*, [1988] 1 S.C.R. 30, 30 (Can.) (holding abortion restrictions unconstitutional by virtue of the “security of the person” branch of § 7 of the Canadian Charter of Rights and Freedoms, which protects “life, liberty and security of the person”).

53. [1988] 1 S.C.R. at 56-57.

54. *See Rubinfeld*, *supra* note 4, at 790 (“[A]nti-abortion laws exert power productively over a woman’s body and, through the uses to which her body is put, forcefully re-shape and redirect her life.”).

55. *See Cohen*, *supra* note 5, at 114 n.215 (“Of course, this sense of control is symbolic and social (we accord it to one another) — no one can actually control her body fully.”); *Delaney*, *supra* note 9, at 41 (“A woman is not self-contained, her personal boundaries are diffuse and permeable, and these physical attributes take on moral qualities.”); *Martin*, *supra* note 9, at 301 (discussing the 16th-century conceptual opposition between the “classical body” and the “grotesque body,” the latter becoming thought of as naturally feminine; she describes the grotesque body as follows: “[It] is not separated from the rest of the world. It is not a closed, completed unit; it is unfinished, outgrows itself, transgresses its own limits”); *Jennifer Nedelsky, Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 176 (1990) (“The human skin is perhaps the most compelling alternative to the wall image of boundaries: it is permeable, slowly and constantly changing while keeping its basic contours, and a source of sensitive connection to the rest of the world.”).

In the specific context of the pregnant body, Iris Marion Young describes changing boundaries:

Pregnancy challenges the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate. I experience my insides as the space of another, yet my own body. . . .

Law is part and parcel of the process of the production and protection of bodily integrity. Law reifies bodily integrity by investing meaning and significance in it. To have meaning, bodily integrity must be supported by a regulatory infrastructure, and law is part of this infrastructure. Law is not simply prescriptive but has a role in shaping one's self-perceptions, for the law not only recognizes, but also constitutes and confirms who is valued, who matters — who is a person.⁵⁶ For example, when women were not legal "persons" and their rights could not be recognized and adjudicated in a court of law, their fundamental ability to act as autonomous individuals was compromised.⁵⁷ The law's failure to recognize women's bodily integrity similarly has a constitutive effect on selfhood.⁵⁸

The need to project an image of bodily integrity is not unique to women.⁵⁹ To retain even the most basic sense of self, human beings must have some control over the divide between what is inside and what is outside their bodies. The bodily integrity of women, however, is systematically accorded less respect than that of men. For example, in judicial responses to the issue of whether a patient has a right to refuse medical treatment, the so-called "right-to-die" cases, gender plays a significant role in how the court determines the patient's wishes and whether the court follows them.⁶⁰ Over-

....
 The integrity of my body is undermined in pregnancy not only by this externality of the inside, but also by the fact that the boundaries of my body are themselves in flux. In pregnancy I literally do not have a firm sense of where my body ends and the world begins. My automatic body habits become dislodged; the continuity between my customary body and my body at this moment is broken.

Iris Marion Young, *Pregnant Embodiment*, in *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* [hereinafter *THROWING LIKE A GIRL*] 160, 163 (1990) (footnote omitted).

56. For an excellent exposition of competing theories of personhood, see Radin, *supra* note 47.

57. Such was the case under the law of coverture, according to which a married woman's rights were subsumed by her husband's. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *430. Another example, in the Canadian context, is the *Persons* case, in which five women challenged the meaning of the word "persons" in the British North America Act. See *In re a Reference as to the Meaning of the Word "Persons" in Section 24 of the British N. Am Act, 1867*, [1928] S.C.R. 276 (Can.), *revd.*, *Edwards v. A.G. for Canada*, [1930] A.C. 129 (P.C.). The Supreme Court of Canada held that the term did not include women. The Privy Council reversed. See Mary Jane Mossman, *Feminism and Legal Method: The Difference it Makes*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 283, 285-86 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991).

58. "To recognize something as a person is, among other things, to attribute bodily continuity to it." Radin, *supra* note 47, at 963.

59. See generally ELAINE SCARRY, *THE BODY IN PAIN* (1985).

60. See Steven H. Miles & Allison August, *Courts, Gender and "The Right to Die,"* 18 *LAW, MED. & HEALTH CARE* 85, 85 (1990). Miles and August conducted a comprehensive survey of appellate-level, civil, state "right-to-die" cases involving incompetent adult patients. See *id.* at 85.

whelmingly, courts respect the male patients' wishes and do not respect those of female patients.⁶¹ An analysis of the language of these judgments shows that "men are depicted as subject to a medical assault; women are depicted as vulnerable to medical neglect."⁶² This language suggests that the integrity of male bodies is self-evident, while intervention in female bodies is expected.

The notion of bodily integrity is particularly complex in the case of the pregnant woman. The uniqueness of pregnancy has posed significant problems for a legal system constructed along a paradigm of neutrality and devoted to airtight categories.⁶³ Neutrality has been defined along androcentric lines, with "male" standing in for "human" and, consequently, "female" consigned to alterity.⁶⁴ The argument that pregnancy is unique, however, should neither devalue nor sentimentalize it. Uniqueness only refers to the fact that there is no analogous state in men that provides a basis for comparison at the immediate level of the physical body.⁶⁵ The problem within a system of law that constructs equality along an axis of "sameness" is that the uniqueness of pregnancy is underdetermined on the one hand, and overdetermined on the other

61. For example, in cases involving the construction of the patient's own preference, termination of life-sustaining treatment was allowed for 75% of men and only 14% of women. See *id.* at 86.

62. *Id.* at 89. In addition, the wishes expressed by the patients were characterized according to gender. In the case of female patients, courts often viewed such expressions as emotional, unreflective, or immature and thus not sufficient to meet the burden of demonstrating clear and convincing evidence of the patient's wishes. Similar expressions of male patients were, however, more often found to be rational and sufficient to satisfy the evidentiary requirements. See *id.* at 87; see also *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 281-82 (1990) (elaborating on the "clear and convincing evidence" standard).

63. See Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355, 366 (1989) ("Committed to categorization, law is intolerant of porous boundaries (placentas?).").

64. See Iris Marion Young, *Impartiality and the Civic Public, Some Implications of Feminist Critiques of Moral and Political Theory*, in *THROWING LIKE A GIRL*, *supra* note 55, at 92. Arguably the uniqueness of pregnancy has led courts to devalue it and to fail to apply "equitable" standards of review" to restrictions on accessibility. See Gayle Binion, *Securing Access to Reproductive Choice: Undoing the Undue Burdens*, Paper Presented at the Annual Meeting of the Law and Society Association 19 (June 1994) (on file with the author); see also Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 118, 140 (1986) ("The problem is not the uniqueness of something like pregnancy, but the view that our legal system has adopted towards 'special' human qualities, particularly qualities that are special because they are inherently female in the sense that they cannot be experienced by a male."); see also EISENSTEIN, *supra* note 37, at 98; Katherine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CAL. L. REV. 1532 (1974).

65. See SARA RUDDICK, *MATERNAL THINKING* 49 (1989) ("Whatever the state of technology, a man engages in no activity that can match, in labor, a woman's pregnancy, with its anxieties, discomfort, intrusive testing, painful delivery, and unique excitements and pleasures."). But see FINEMAN, *supra* note 12, at 55 n.3 (providing references claiming that technology may be advancing to the point that men could gestate human life).

— pregnancy is either denied legal significance or a woman's pregnancy becomes the totality of how she is defined. Thus, differential treatment on the basis of pregnancy is not illegal sex discrimination (as in *Geduldig v. Aiello*), or the mere potential for pregnancy can affect a woman's ability to earn a living (as in *UAW v. Johnson Controls, Inc.*).⁶⁶ Women have been rendered invisible through the construction of their wombs as containers — they themselves have been contained through this reduction of self to a maternal function.⁶⁷ Once again, law takes the bodily integrity of men for granted and does so in a way that it simply does not for pregnant women. As philosopher Susan Bordo observes,

[O]ntologically 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. . . . 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

66. See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), *rev'd*, 499 U.S. 187 (1991); see also Colb, *supra* note 13, at 106 (discussing the concurrent devaluation and denial of women's unique procreative capacities).

67. See SUSAN BORDO, *Are Mothers Persons? Reproductive Rights and the Politics of Subjectivity*, in *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 86 (1993); E. Ann Kaplan, *Look Who's Talking Indeed: Fetal Images in Recent North American Visual Culture*, in *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY*, *supra* note 26, at 121. Siegel notes that the emphasis on corporeality and, therefore, science, in *Roe* distracted the Court from any consideration of the socially constructed body:

The Court addresses reproduction as if it were primarily a physiological process and evaluates its regulation in terms focused on the female body. This tendency, which I call "physiological naturalism," informs both equal protection law and the analysis of abortion-restrictive regulation offered in *Roe*. Consequently, abortion-restrictive regulation has been evaluated in ways that obscure the social norms that shape women's interests in abortion, as well as public interest in regulation.

Siegel, *supra* note 10, at 265. Contrast the plurality in *Casey* which admits the relevance of the social construction of motherhood in a discussion of abortion:

[A woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992). See also the very nuanced statement in the concurring judgment of Madam Justice Wilson in the Canadian abortion decision *R. v. Morgentaler*, 44 D.L.R.4th 385, 490-91 (Can. 1988):

This decision [to have an abortion] is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

her life-support function. In the face of such a conflict, her valuations, choices, consciousness are expendable.⁶⁸

Women's bodily selves have thus been uniquely subject to legal regulation in the arena of control of their reproductive lives, and therefore women are uniquely subject to the disintegration and loss of selfhood that results from this kind of regulation.⁶⁹ Despite the fact that the right to bodily integrity is a longstanding and "sacred" one,⁷⁰ pregnant women have been forced to submit to surgery for the benefit of the intrauterine life they carry. As a result, other persons can invade the bodily integrity of the woman for the sole benefit of the intrauterine life within her.⁷¹ This practice occurs despite the fact that family members do not have to undergo surgery for one another,⁷² nor are criminal defendants required to give un-

68. BORDO, *supra* note 67, at 79; *see also* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

69. For example, reproductive hazards to men are persistently ignored in favor of regulating women's behavior. *See, e.g.*, Ricardo A. Yazigi et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 JAMA 1956 (1991) (linking damage to sperm with cocaine use); *see also* Jeffrey A. Parness, *Pregnant Dads: The Crimes and Other Misconduct of Expectant Fathers*, 72 OR. L. REV. 901 (1993).

70. *See* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) ("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 clear and unquestionable authority of law."); *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972):

The root premise is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . . True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.

464 F.2d at 780 (footnote omitted) (quoting *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)), *cited in* Ikemoto, *supra* note 12, at 1236 n.134; *see* *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 268-69 (1990); *see also* *E. v. Eve*, [1986] 2 S.C.R. 388 (Can.); *Neff, supra* note 38, at 328.

71. *See, e.g.*, *In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated and reh'g. granted*, 539 A.2d 203 (D.C. 1988); *In re Madyun*, 114 Daily Wash. L. Rpt. 2233 (D.C. Super. Ct. July 26, 1986), *cited in* Ikemoto, *supra* note 12, at 1241; *Re R.*, 9 R.F.L.3d 415 (B.C. Prov. Ct. 1987), *rev'd. sub nom.* *Re Baby R.*, 53 D.L.R.4th 69 (Can. 1988). *See* discussions in Julia E. Hanigsberg, *Power and Procreation: State Interference in Pregnancy*, 23 OTTAWA L. REV. 35 (1991); Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Caesareans*, 74 CAL. L. REV. 1951 (1986); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990).

72. Doctors must obtain the patient's informed consent to perform surgery and must obtain consent to perform an operation on one family member that will save the life or health of another such as skin grafts or bone marrow transplants. *See In re A.C.*, 573 A.2d 1235, 1243-44 (D.C. 1990); Christine Overall, *Mother/Fetus/State Conflicts*, 9 HEALTH L. CAN. 101, 102 (1989) ("Fetuses are the only group of entities that have been given legal entitlement to the medical use of the bodies of adult persons. If we are not willing to authorize compulsory blood 'donations' or organ 'donations' to save the lives of dying persons, then we should not be willing to tolerate compulsory fetal surgery or cesarean sections . . ."); *Siegel, supra* note 10, at 342.

In McFall v. Shimp, 10 Pa. D. & C.3d 90 (Allegheny County Ct. 1978), *discussed in* Rhoden, *supra* note 71, at 1977-78, a bone marrow implant was necessary to save the life of

limited access to their bodies for the purpose of gathering evidence.⁷³ Women receive unequal treatment when courts and legislatures impose their meaning on procreativity and deny them the minimum conditions of selfhood by forcing them to have babies.⁷⁴

Law, as it structures women's procreative choices, disaggregates women from their own bodies, fundamentally disrupting women's ability to conceptualize their bodily integrity because it is the ability to internalize the projection of bodily integrity, to experience oneself as whole, that is necessary to selfhood.⁷⁵ In this sense, the denial of procreative autonomy enforces the kind of split that will undermine a woman's sense of self because her womb and body are no longer *hers* to control but instead have been turned over to the jurisdiction of courts and legislatures.⁷⁶ When law denies women abortions, it imposes on their bodies involuntary pregnancy — and by necessary implication, involuntary motherhood. A woman is

the defendant's cousin. The Court refused to grant a court order requiring it. The Court stated:

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. Forceable extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends.

10 Pa. D. & C.3d at 92; see also *In re Guardianship of Pescinski*, 226 N.W.2d 180 (Wis. 1975) (refusing to authorize a kidney transplant from an institutionalized mental patient to his sister). *Contra* *Hart v. Brown*, 289 A.2d 386 (Conn. 1972) (using doctrine of substituted judgment to hold that parents of a seven-year old identical twin could authorize a kidney transplant necessary to the other twin's survival); *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969) (authorizing kidney transplant from an incompetent ward of the state to his brother); Marjorie M. Shultz, *Abortion and Maternal-Fetal Conflict: Broadening Our Concerns*, 1 S. CAL. REV. L. & WOMEN'S STUD. 79, 87-88 (1992) (arguing that the special relationship between the pregnant woman and the intrauterine life she carries cannot be analogized to that of strangers).

73. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) (citing *Winston v. Lee* and *Rochin v. California*); *Winston v. Lee*, 470 U.S. 753, 761 (1985) (holding that a criminal defendant does not have to submit to removal of bullet from his body at least on simple probable cause because of Fourth Amendment right to "personal privacy and bodily integrity"); *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (holding that forcibly pumping the stomach of a criminal defendant constitutes a violation of the Fourteenth Amendment); *Adams v. Indiana*, 299 N.E.2d 834, 837 (Ind. 1973), *cert. denied*, 415 U.S. 935 (1974) (holding that removal of bullet would be "an intrusion of the most serious magnitude"); *People v. Smith*, 362 N.Y.S.2d 909 (Sup. Ct. 1974); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1329-37 (2d ed. 1988).

74. See CORNELL, *supra* note 38 (manuscript at 57-58); see also BORDO, *supra* note 67, at 94.

75. See generally CORNELL, *supra* note 38.

76. See Neff, *supra* note 38, at 350 ("From the moment a pregnant woman decides that she does not want to carry the pregnancy to term, from the moment she ceases voluntarily to participate in the pregnancy, it becomes a pregnancy against her will and a significant bodily intrusion. This bodily intrusion is, in effect, state action to commission the womb for use as a fetal incubator. The state has entered the woman's body, seized control, and established an adversarial relationship between the woman and her womb.").

thus denied the necessary conditions of selfhood because she is either separated from her womb or reduced to it.⁷⁷

Accordingly, the wrong in denying or limiting access to safe and affordable abortions is a wrong that prevents the development of the minimum conditions necessary for individuation and any meaningful concept of selfhood.⁷⁸ I do not intend to argue that abortion, being merely about autonomy, is a simplistic negative liberty — a right to be left alone — or a right to make choices unburdened by state interference.⁷⁹ On the contrary, conditions in which safe abortions are available to women of every race, socio-economic stratum, and nationality are an integral requirement of bodily integrity — and the realization of these conditions may depend upon social obligations that recognize positive rights.⁸⁰

A positive notion of rights that can surmount the sameness-difference debate,⁸¹ however, will require a resymbolization of sexual difference within the law that neither denies women's sexuality nor reifies differences that are perceived to be "natural" in order to defeat equality claims.⁸² It is thus important to examine critically

77. See CORNELL, *supra* note 38 (manuscript at 21, 28).

78. *Id.* (manuscript at 27-28).

79. See ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM* 382 (rev. ed. 1990) (describing control over "whether, when and in what circumstances" to bear children not just as a "libertarian 'right'" but as a "positive and necessary enabling condition for full human participation in social and communal life").

80. This has not been mandated under the privacy framework set out by the Supreme Court in *Roe*. See *Harris v. McRae*, 448 U.S. 297 (1980) (rejecting constitutional challenges to public funding limitations barring payments for most medically necessary abortions); *Maier v. Roe*, 432 U.S. 464 (1977) (upholding law excluding nontherapeutic, medically unnecessary abortions from a Medicaid-funded program); see also *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding restrictions on providing information about abortion in family planning clinics that receive public funding); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding restrictions on the use of public facilities for abortion services); see also Laurence H. Tribe, Comment, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

For a more general discussion of the distinction between positive and negative liberty, see the classic exposition by Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969). According to Berlin, negative liberty is "not being interfered with by others," *id.* at 123, while positive liberty "derives from the wish on the part of the individual to be his own master," *id.* at 131. See also CHARLES FRIED, *RIGHT AND WRONG* 110-12 (1978); David P. Curie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864-67 (1986); Richard H. Fallon, *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994).

81. For a discussion of the sameness-difference debate in feminist legal theory, see Martha Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers*, in *CONFLICTS IN FEMINISM* 149, 151-54 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

82. These views include an argument that the fact that women can become pregnant and men cannot is a difference in nature, not law. See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding restrictions on working hours for women because of their procreative role); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfill the

how law views these "natural" differences and how law enforces them. These processes determine how bodies come to "matter" in law because their legal construction shapes their very reality.⁸³

II. MOTHERING

Motherhood is a central but confusing icon within our social structure. It is at once dominating and dominated, much as mothers are both revered and regulated.⁸⁴

By envisioning abortion as a mothering decision I explore three interconnecting theses. First I make explicit that at least part of the reason why the regulation of abortion has proven so intractable legally and politically is because as a cultural phenomenon it has not been separated from mothering and relationships between mother and child — and perhaps it cannot be, given the social and political context it occupies. Thus, legal regulation of abortion has been steeped in ideological interpretations of motherhood that result in women's subordination.⁸⁵ Second, I reveal that homologizing pregnancy and motherhood has been possible because the notion of abortion as part of a spectrum of mothering activities resonates with many women's experiences.⁸⁶ Third, by putting abortion in the frame of mothering decisions I include intrauterine life in the feminist discussion of abortion and salvage that side of the discourse from anti-abortion rhetoric.⁸⁷

noble and benign offices of wife and mother."); *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), *revd.*, 499 U.S. 187 (1991).

83. See JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 69-71 (1993). See generally EISENSTEIN, *supra* note 37; JOHN O'NEILL, *THE COMMUNICATIVE BODY* (1989); JOHN O'NEILL, *FIVE BODIES: THE HUMAN SHAPE OF MODERN SOCIETY* (1985); MAURICE MERLEAU PONTY, *THE PHENOMENOLOGY OF PERCEPTION* (Colin Smith, trans., 1962); SCARRY, *supra* note 59; BRYAN S. TURNER, *THE BODY AND SOCIETY* (1984); *THE FEMALE BODY IN WESTERN CULTURE: CONTEMPORARY PERSPECTIVES* (Susan Rubin Suleiman ed., 1985); *PEOPLE OF THE BODY: JEWS AND JUDAISM FROM AN EMBODIED PERSPECTIVE* (Howard Eilberg-Schwartz ed., 1992); Axel Honneth, *Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition*, 20 *POL. THEORY* 187, 190-93 (1992); Kendall Thomas, *Beyond the Privacy Principle*, 92 *COLUM. L. REV.* 1431 (1992).

84. Carol Sanger, *M is for the Many Things*, 1 *S. CAL. REV. L. & WOMEN'S STUD.* 15, 17 (1992). She also states that:

The reverence and regulation are not so much in conflict as in league. The rules remind women of how to behave in order to stay revered. This reverence is something more than a fan club for mothers. It matters in such practical and concrete ways as keeping one's children, having credibility in court, getting promoted at work, and so on.

Id. at 17-18.

85. See *infra* section II.A.

86. See *infra* section II.B.

87. See *infra* Part III. The danger in incorporating abortion into other mothering decisions is that I might appear to imply that intrauterine life is the same as a child and is the focus of other mothering decisions, thus leading to the implication that the intrauterine life

Although the abortion question has a fundamental connection to issues of body and self, the decision whether to have an abortion is also one that generates conflict because it is simultaneously about mothering — about connections between the woman making the choice and the intrauterine life she carries.⁸⁸ Like many other choices made during pregnancy, abortion generates moral outrage because it is conceptualized as bad mothering⁸⁹ and selfish behavior.⁹⁰ From the moment a woman becomes pregnant, other persons treat her decisions, ranging from whether to ingest alcohol or drugs (from aspirin to cocaine), smoke, abide passive ingestion of smoke, what to eat, whether to have sex, travel, own a cat, and so on, as

has the same *rights* as a child. This, however, is not a necessary conclusion, as I elaborate below.

88. According to Carol Sanger, the privacy framework in *Roe*, necessarily diverted attention from a woman's interest in controlling her post-pregnant, child-now-out-of-body life. As abortion became a reproductive rather than a maternal issue, the very idea of motherhood became antithetical to a prochoice position instead of its essence. But deciding whether or not to have an abortion is making a decision exactly about what place motherhood will occupy in one's life. The decision necessarily encompasses hard thinking on such questions as when one would become a mother, how often, with whom, and what obligations already exist to other children, to a partner, or to oneself.

Sanger, *supra* note 84, at 23. But see the highly sentimental consideration of motherhood by the plurality in *Casey*:

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice [of carrying a child to term].

Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992).

89. For example, the Assembly sponsor of New York State's alcohol warning statute, John Brian Murtaugh, justified the state's decision to warn only pregnant women of the dangers of drinking on the grounds that pregnant women have a "special responsibility" saying: "There certainly are other alcohol-related problems you could talk about. But if you put all of them on a poster you would dilute the message." Kevin Sack, *Unlikely Union in Albany: Feminists and Liquor Sellers*, N.Y. TIMES, Apr. 5, 1991, at B1, B4; see also Roberts, *Racism and Patriarchy*, *supra* note 24, at 15 (explaining that Black women who ingest drugs while pregnant are being punished for their failure to meet society's image of the ideal mother.); Siegel, *supra* note 10, at 375 & n.447 (recognizing that public outrage directed at pregnant, drug-dependent women is a manifestation of a pregnant woman being branded socially-legally as a bad mother).

For discussions of the notion of "bad mothers," see, for example, Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992); and Anna Lowenhaupt Tsing, *Monster Stories: Women Charged With Perinatal Endangerment*, in UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE, *supra* note 9, at 282.

90. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) ("At the heart of the controversy . . . are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, are unwanted for any one or more of a variety of reasons — convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc."); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1572-94 (1991); Moira L. McConnell, *Capricious, Whimsical and Aborting Women: Abortion as a Medical Criminal Issue (Again)*, 3 CAN. J. WOMEN & L. 661 (1989) (book review).

mothering choices.⁹¹ Suppositions about the special responsibilities that women assume as mothers may produce legal responses that single out the conduct of pregnant women, thus homologizing the states of pregnancy and motherhood.⁹² It is in these ways that the ideology of motherhood — *inter alia*, the simultaneous idealization and demonization of mothers in our culture — is imposed on abortion decisionmaking.⁹³ I do not mean to suggest that the social

91. See Johnsen, *supra* note 23, at 585-86 (reporting on government efforts to impose criminal or civil sanctions on a range of activities during pregnancy deemed to present some risk to intrauterine life including: failing to obtain adequate medical care; not following a doctor's advice; choosing vaginal delivery over a cesarian section; failing to eat a balanced diet; smoking cigarettes; engaging in sexual intercourse with spouse; being injured in a car accident while driving negligently or while intoxicated; taking prescription drugs; and taking illegal drugs). Rapp quotes one pregnant woman undergoing genetic counseling:

Now, I'm not even allowed to pet my cat, or have a glass of wine after a hard day's work. I'm supposed to think that three cigarettes a day is what caused my first miscarriage. They can see a lot of patterns, but they sure can't explain them. But they talk as if they could explain them. I mean, they want you to have a baby by the statistics, not from your own lifestyle.

Rapp, *supra* note 44, at 38-39. These kinds of restrictions are being enforced despite the fact that even the degree of danger of cocaine use during pregnancy has been called into question. See Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure, A Rush to Judgment*, 267 JAMA 406, 406 (1992) ("Our review of the current literature on the subject [of in utero exposure to cocaine] indicates that available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development."); see also Michelle Harrison, *Drug Addiction in Pregnancy: The Interface of Science, Emotion, and Social Policy*, 8 J. SUBSTANCE ABUSE TREATMENT 261 (1991); Wendy K. Mariner et al., *Pregnancy, Drugs and the Perils of Prosecution*, CRIM. JUST. ETHICS Winter/Spring 1990, at 30. This is consistent with persistent errors about the medical treatment of pregnant women. See generally Hanigsberg, *supra* note 71, at 50-52 (discussing DES, thalidomide, and the practice of "twilight sleep").

92. See Siegel, *supra* note 10, at 347 ("When the state imposes duties of motherhood on pregnant women, it employs public power to enforce a gender status role.").

93. Historian Gerda Lerner defines the "ideology of motherhood" as "its symbolic meaning as defined in particular periods and under different circumstances." GERDA LERNER, *THE CREATION OF FEMINIST CONSCIOUSNESS* 116-17 (1993). In contemporary North American culture, mothers are characterized by their tenderness, willingness to sacrifice, and total involvement with their children. See Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 54 (Barrie Thorne & Marilyn Yalom eds., 1982); cf. Hanigsberg, *supra* note 71, at 44. These good mothers are also White and middle-class. See Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political,"* 2 YALE J.L. & FEMINISM 25, 29 (1989); Ikemoto, *supra* note 12, at 1210-11. As Carol Sanger has described it:

The ideal model is used to determine what conduct by mothers is in some official sense "motherly;" that model then becomes the essence of what mothers are about, an unstated reference point in the formation of public policy and the application of legal rules. For most of this century, the dominant model of motherhood has meant something closer to "housewife" — a married, nonworking, inherently selfless, largely nonsexual, white woman with children.

Sanger, *supra* note 84, at 18. Yet, the figure of the mother is simultaneously demonized: she is responsible for anything that goes wrong with the child. For example, the psychiatric profession blamed both autism and schizophrenia on bad mothering. See Catherine McBride-Chang et al., *Mother-Blaming, Psychology and the Law*, 1 S. CAL. REV. L. & WOMEN'S STUD. 69, 71 (1992). When she poses a danger to her child, she is held to a higher standard of care than anyone else in society. Cf. Christine Overall, "Pluck a Fetus from Its Womb": A Critique of Current Attitudes Toward the Embryo/Fetus, 24 U. W. ONT. L. REV. 1, 10 (1986).

meaning of motherhood is women's experience of mothering,⁹⁴ however, this ideology does influence individual women's experiences of motherhood.⁹⁵ Contrary to the "ideal," motherhood is just as much about fear and danger as it is about self-sacrifice. Mothering is work for women and can produce both ecstasy and rage; it can be debilitating and intrusive and a great joy⁹⁶ — it can be done well or badly. Pregnancy brings with it the same range of responses. Likewise, while some mothering decisions reflect the qualities of the idealized mother, such as self-sacrifice and generosity, at other times decisions stem from the mother's desires and aspirations alone totally apart from the child's needs.⁹⁷ Most of the time, mothering decisions fall somewhere in between these two extremes. I argue that, like other mothering decisions, the abortion decision is not exclusively a "selfish" or "irresponsible" choice.⁹⁸

For other discussions of issues related to the ideology of motherhood, see FINEMAN, *supra* note 12; E. ANN KAPLAN, *MOTHERHOOD AND REPRESENTATION: THE MOTHER IN POPULAR CULTURE AND MELODRAMA* (1992); RICH, *supra* note 32; ROTHMAN, *supra* note 25; SHARI L. THURER, *THE MYTHS OF MOTHERHOOD: HOW CULTURE REINVENTS THE GOOD MOTHER* (1994); *MOTHERHOOD: A FEMINIST PERSPECTIVE* (Jane Price Knowles & Ellen Cole eds., 1990); *MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY*, *supra* note 26; *REPRESENTATIONS OF MOTHERHOOD* (Donna Bassin et al. eds., 1994); Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 *TEX. J. WOMEN & L.* 75 (1993); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 *GEO. L.J.* 459 (1990).

94. See RICH, *supra* note 32; RUDDICK, *supra* note 65, at 29; Roberts, *Racism and Patriarchy*, *supra* note 24, at 4.

95. See Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 *FLA. L. REV.* 25, 38 (1990); Siegel, *supra* note 10, at 272.

96. See RUDDICK, *supra* note 65, at xi:

The conception of mothering as a kind of caring labor undermines the myth that mothers are "naturally" loving. There is nothing foreordained about maternal response. Birthgivers or legal guardians may respond to children with indifference, assault, or active neglect. Nor is there a single emotion—love—that children inspire in mothers. A mother's emotions can vary within the course of a day, and certainly vary over time, depending on the behavior of her children, the space, time, and services available to her, and myriad other desires and frustrations. Maternal love itself is a mix of many feelings, among them: infatuation, delight, fascination, pride, shame, guilt, anger, and loss. See, e.g., Roberts, *Motherhood and Crime*, *supra* note 24, at 97; Siegel, *supra* note 10, at 378-79; West, *supra* note 68.

97. See Carol Sanger, *Mother From Child: Maternal Decisions to Separate From Children 37-38* (unpublished manuscript, on file with author) (giving as examples of mothers' separations from their children springing from the "free-standing desires and preferences of the mother herself": separation in order to study, to work, to relax, and simply because they do not like being mothers).

98. For example, in the anti-abortion campaigns in the late-19th century the incidence of abortion was attributed to the "growing self-indulgence among American women." JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 1800-1900*, at 108 (1978). As another anti-abortion activist put it, "Have you the right to choose an indolent, selfish life, neglecting the work God has appointed you to perform?" AUGUSTUS GARDNER, *Physical Decline of American Women*, reprinted in *CONJUGAL SINS AGAINST THE LAWS OF LIFE AND HEALTH 199, 225* (1870). A published report of the Ohio Senate special committee introducing anti-abortion legislation deplored women who sought abortions as

A. *The Legal Mother: Homologizing Pregnancy and Motherhood*

As I have already begun to elaborate above, the difficulties posed by abortion have resulted in part from a lack of separation in legal and political discourse between abortion, on the one hand, and mothering and relationships between mother and child on the other. A statement made in 1991 by Representative Henry Hyde on the floor of Congress exemplifies this thesis: "[T]hat tiny little atom of humanity surrounded by a wom[a]n called 'mother' is a member of the human family . . ."99 This comment, like much of the rhetoric of abortion and pregnancy more generally, fails to disaggregate motherhood from pregnancy. Examining restrictions of abortion in their social framework demonstrates that they represent value judgments concerning women as mothers, paralleling a shift from legal protection of mothers, to protection of fetuses *from* their "mothers."¹⁰⁰ Courts frequently refer to the pregnant woman as a mother.¹⁰¹ No rhetorical differentiation is made between the pregnant woman's status before and after birth. This kind of language is perhaps most blatant in the context of so-called "fetal protection" cases, in which a court is called upon to restrict a woman's behavior during pregnancy or to intervene forcibly on behalf of the intrauterine life. In such contexts courts have referred to having nothing

yielding to the "demands of society and fashionable life." 1867 Ohio Sen. J. App. 235. All cited in Siegel, *supra* note 10, at nn.161, 162, 164, & 231.

This kind of rhetoric is mirrored in the contemporary context. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) (describing *Roe* as protecting women's right to terminate a pregnancy for reasons of "convenience, whim, or caprice" or for "no reason at all"); RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 32-33 (1993) (discussing the moral quality of the decision to have an abortion in order not to have to postpone a vacation trip); see also KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 227 (1984) (citing opinion polls that demonstrate that Americans disapprove of "casual" abortions); McConnell, *supra* note 90. On the contemporary use of the rhetoric of irresponsibility, see Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989 (1994).

99. 137 CONG. REC. H5125 (daily ed. June 26, 1991) (statement of Rep. Hyde), quoted in Siegel, *supra* note 10, at 327 (commenting that "when opponents of abortion call 'that tiny little atom of humanity' a 'baby,' and condemn the practice as murder, killing, or the destruction of human life, they are in fact expressing a moral judgment about a relation between mother and child, and condemning women for violating the most fundamental conceptions of the maternal role").

100. See Siegel, *supra* note 10, at 265 ("[S]ocial discourses concerning women's roles have converged with physiological discourses concerning women's bodies, as two distinct but compatible ways of reasoning about women's obligations as mothers.").

101. For example, in both *Roe* and *Casey* the Supreme Court often used the word "mother" when referring to a pregnant woman. In *Roe*, this happened 42 times, while in *Casey*, it occurred 21 times. The following example from *Casey* illustrates this ledgerdemain in action. In that case, the Court made reference to the pregnant woman as the "mother" carrying the "child" to full-term. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992).

stand between a fetus and its "mother" but a scalpel;¹⁰² they have expressed a willingness to infringe upon the "mother's" "wishes" to benefit the "child";¹⁰³ they have described transfusions as being giving to the "mother" in the case of a woman who was 18 weeks pregnant;¹⁰⁴ and they have described the actions of a pregnant woman that a court deemed to be dangerous to the intrauterine life as the "mother's" conduct.¹⁰⁵ The proposed enactment of a federal child abuse statute that would take effect during a woman's pregnancy is another manifestation of this tendency to conflate pregnancy and motherhood.¹⁰⁶ The "logic" of such statutes is that a pregnant woman is acting not like, but *as* an abusive mother during her pregnancy, parallel to the logic of prosecutions of parents for child abuse in the ordinary scenario. Similarly, prosecutions of drug-abusing women, compelled medical treatment of pregnant women, as well as judicial and political admonitions that their conduct may threaten the welfare of the intrauterine life they carry reinforce the treatment of pregnancy as already mothering.¹⁰⁷

Although this regulation of behavior during pregnancy is expressed in race- and class-neutral terms, these court decisions and legislative initiatives often rest upon unexamined normative judgments about the mothering of poor and non-White women who bear the brunt of these regulations.¹⁰⁸ These women, after all, are

102. See *In re Madyun*, 114 Daily Wash. L. Rptr. 2233 (D.C. Super. Ct. July 26, 1986), reprinted in *In re A.C.*, 573 A.2d 1259 app. at 1262.

103. See *Jefferson v. Griffin County Hosp.*, 274 S.E.2d 457, 458 (Ga. 1981) (approving Super. Ct. order).

104. See *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. Sup. Ct. 1985).

105. See *In re Troy D.*, 263 Cal. Rptr. 869, 874 (Ct. App. 1989).

106. E.g., Child Abuse During Pregnancy Prevention Act of 1989, S. 1444, 101st Cong., 1st Sess. (1989), cited in Ikemoto, *supra* note 12, at 1271.

This kind of legislative initiative is likely a response to the judicial reluctance to apply existing child abuse and criminal laws to events that occur during pregnancy. See, e.g., *Reyes v. Superior Court*, 141 Cal. Rptr. 912, 914-15 (Ct. App. 1977) (holding that child endangering statute does not refer to an unborn child or include a woman's alleged drug use during pregnancy); *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges on ground that such application misconstrues the effect of the law and violates public policy of preserving family life).

107. See Siegel, *supra* note 10, at 329-30; see also George J. Annas, *Forced Cesareans: The Most Unkindest Cut of All*, HASTINGS CTR. REP., June 1982, at 16; Janet Gallagher, *Pre-Natal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988); Note, *Rethinking (M)otherhood*, *supra* note 71.

108. Economically disadvantaged women are subject to greater government scrutiny than other mothers because of their reliance on government aid such as Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-87 (1991 & Supp. 1995). Martha Fineman discusses this as the phenomenon of the "public family." See FINEMAN, *supra* note 12, at 177-

overwhelmingly the object of state interventions and comprised the vast majority of the women who died when abortion was illegal.¹⁰⁹ These women do not conveniently match the figure of the "good mother."¹¹⁰

B. *Abortion: Experience and Language*

The legal and political tendency to homologize pregnancy and motherhood that I have described is problematic because it produces legal consequences that hold women to a certain standard of motherhood before they have even given birth. When lawmakers and courts conceptualize pregnant women as mothers, they will be mired in antifeminist, even sometimes misogynistic, conceptions of maternity and the ideology of motherhood while making decisions about abortion. In other words, the problem is not viewing pregnant women as women making mothering decisions per se, but ascribing to pregnant women the ideological baggage associated with mothering in this culture. This danger can be seen in the words of Catholic theologian Bernard Haring:

If it were to become an accepted principle of moral teaching on motherhood to permit a mother whose life was endangered simply to "sacrifice" the life of her child in order to save her own, motherhood would no longer mean absolute dedication to each and every child.¹¹¹

It is the particular idea of a mother that is superimposed on the pregnant woman that makes this statement especially disturbing. In describing the contest over the meaning of being a woman, which she sees as central to the debate over abortion, Petchesky touches on what I have identified as homologizing pregnancy and motherhood:

Because the pregnant woman is Mother, she must be ready to die for the fetus. More than the survival of the individual fetus, what is ultimately at stake in the abortion struggle, in this view, is the "moral teaching" of motherhood as "absolute dedication." It is the *idea* of

98; see also Roberts, *supra* note 107; Roberts, *Racism and Patriarchy*, *supra* note 24, at 32-33. For a discussion of administrative and bureaucratic aspects of the distribution of government aid, see Lorne Sossin, *The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement*, 22 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 1996).

109. See DAVIS, *supra* note 27, at 204 ("In New York, for instance, during the several years preceding the decriminalization of abortions in that state, some 80 percent of the deaths caused by illegal abortions involved Black and Puerto Rican women." (citing Edwin M. Gold et al., *Therapeutic Abortions in New York City: A Twenty-Year Review*, 55 AM. J. PUB. HEALTH 964-72 (1965))).

110. See Ikemoto, *supra* note 12, at 1206-09.

111. PETCHESKY, *supra* note 79, at 344 (quoting Bernard Haring).

woman as Mother, and of the fetus as the tie that binds her to . . . selflessness, that takes precedence over anything else.¹¹²

Prohibition of abortion therefore functions as the mechanism for assuring women's subordination because it implies that a woman's preeminent purpose and essential nature is to be a mother. Homologizing pregnancy with motherhood defined as an absolute moral and social duty is thus clearly detrimental to women.¹¹³

The political and legal results of elevating pregnancy to motherhood are potentially devastating to women because they are likely to tie women to an exclusively reproductive role, but thinking about pregnancy as mothering, in and of itself, does not have any *necessary* legal consequences, good or bad. Such a view of pregnancy may, indeed, in a helpful manner, bring together the experiences of pregnant women and a distinctly feminist vision of procreativity.¹¹⁴

Although women's bodily integrity is deeply involved in pregnancy, pregnancy is not *only* about women's bodies. To speak *only* in terms of bodily integrity is to miss a key, if not *the* key element of pregnancy. The state of pregnancy entails the ineluctable fact of intrauterine life. As Marie Ashe has put it:

Even to speak of the pre-birth period as one of the mother-child "interdependence" does not begin to do justice to the experiential reality of pregnancy as a state of being that is neither unitary nor dual, exactly; a state to which we can apply no number known to us. Pregnancy discloses the truth of paradox.¹¹⁵

Pregnancy is thus fundamentally different from other bodily states and challenges the traditional bodily integrity framework described in Part I. This challenge is posed by the paradox Ashe describes, and also by the present value of intrauterine life, even if that life

112. *Id.*

113. *See id.* at 345.

114. *Cf.* Williams, *supra* note 90, at 1590 ("This [moral] approach not only makes for persuasive rhetoric; it may well provide a more accurate reflection of most women's abortion decisions. My sense is that, in the context of most women's lives, the decision to abort is made thoughtfully, carefully, with quiet sorrow and moral courage."). The challenge here, however, is to be able to articulate this feminist vision of mothering decisions without "essentializing" mothers. *See* PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 118 (1991); Sanger, *supra* note 84, at 19 ("By 'maternal essentialism' I mean the belief that the real, true 'whatness' of women is motherhood."). One danger of this position would seem to be its use to rearticulate a vision of women as nothing more than wombs. Such a vision has consistently been used to women's detriment. The theory that I articulate, however, does not depend in its conception on any singular understanding or experience of mothering, nor does it seek as a result to relegate women to traditional mothering roles.

On the notion of "essentialism" in feminist thought, see generally DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (1989); and ELIZABETH SPELMAN, *INESSENTIAL WOMAN* (1988).

115. Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 *NEW ENG. L. REV.* 521, 551 (1988).

represents only the possibility of a child. One does not have to attribute rights to intrauterine life to consider it meaningful.¹¹⁶ Similarly, the fact that one considers such life meaningful does not imply that one must restrict access to abortion.

Women define pregnancy and intrauterine life in myriad ways,¹¹⁷ and most individual women seeking abortions are not unaware of or indifferent to a consideration of the meaning of intrauterine life, contrary to the heavy-handed stereotypes much anti-abortion rhetoric perpetuates.¹¹⁸ It is for this reason that most women do not equate having an abortion with having a tooth or a bunion removed, even if the woman is entirely sure of her decision.¹¹⁹ Women do distinguish between children and intrauterine life, but they also distinguish between intrauterine life and mere parts of their own bodies.¹²⁰ This distinction helps to explain why, at least for many women, abortion can be expressed as a mothering decision.¹²¹

116. This is not to eschew the importance of rights or the gains achieved under their banner. Rather, rights rhetoric is not the only discourse within which to discuss procreation. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387 (1984); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Janet Farrell Smith, *Rights-Conflict, Pregnancy, and Abortion*, in BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY 265 (Carol C. Gould ed., 1984); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

117. See Rapp, *supra* note 44, at 34; *infra* text accompanying note 139.

118. Anti-abortion activists routinely call those who favor liberal access to abortion "baby murderers." See, e.g., Diane Hirth, *Pensacola Haunted by History of Violence in Abortion Debate*, SUN SENTINEL (FT. LAUDERDALE), July 23, 1995, at 1A; Ed Vulliamy, *Is Abortion Washington's New Vietnam?*, OTTAWA CITIZEN, Mar. 4, 1995, at B2.

119. Marie Ashe has commented upon this over-simplification in pro-choice rhetoric: I have been struck . . . by the absence from most "pro-choice" rhetoric of a discourse of death as well as of discourses of horror and guilt. Pro-life advocates have accurately recognized in pro-choice discourse a practice of abstraction that tends to obliterate or to erase the realities of bloodiness and violence attached to abortion. Women who consciously experience abortion become familiar with those realities and respond variously to them; women whose anaesthetized experiences of abortion distance us from awareness of the bloody violence of abortion sometimes discover in post-abortion experiences reminders of the death-dealing power that is exercised in abortion. Both kinds of recognition — that occurring during the course of abortion and that arising later — may evoke a range of differing responses in different women.

Ashe, *supra* note 63, at 371-72.

120. See РЕТСНЕСКУ, *supra* note 79, at 331 ("[M]any . . . ground their practical morality about abortion in the real relations in which the necessity for abortion arises. This is the often inchoate, unarticulated perspective I refer to as 'moral praxis' . . ."); Siegel, *supra* note 10, at 350 ("An individual woman deciding whether to terminate a pregnancy will evaluate the morality of that act in light of her obligations to herself and others, including the unborn . . .").

121. It is worth pointing out a "chicken and egg" problem. The value placed on intrauterine life by women is not unrelated to the value placed on it by law and other influential

In this section I provide some examples of first-person narratives that may help to illustrate how the abortion decision can be conceptualized within a continuum of mothering decisions.¹²² Unlike the discussion in Part I, which focussed on women's bodily integrity and the connection between women's selfhood and their ability to control the abortion decision, these examples suggest a contextualized approach to abortion decisionmaking.

* * *

Anti-abortion protesters, as part of their clinic protest strategy, "educate" pregnant women seeking abortions by showing them pictures of "preborns," or bottles containing the products of abortions

regulatory (broadly speaking) structures, for example, government and the media. The anti-abortion movement has expended enormous energy ensuring that women will think of intrauterine life as valuable in a specific way. See CONDIT, *supra* note 3, at 79-95. Sociologist Lynn Chancer has questioned whether "abortions and fetuses are merely floating signifiers, an occasion for projecting and displacing a host of cultural contradictions onto a symbolic terrain." Lynn S. Chancer, *Abortion Without Apology*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 113, 114 (Marlene Gerber Fried ed., 1990).

Technology has also provided us all with unprecedented access to intrauterine life. The value of this life has certainly evolved. Where once quickening — the moment a pregnant woman first feels the intrauterine life move — might have marked the moment that a woman considered herself pregnant, now this moment can be marked as early as the day after menses was expected by a blue line on a pregnancy test stick in a woman's own bathroom. Thus, for example, the notion of value in early intrauterine life and women's experience of grief in terminating such life may be a very recent phenomenon related to technological advances. See generally Women's Legal Education and Action Fund, Intervenor's Factum at para. 32, R. v. Sullivan 63 C.C.C.3d 97 (Can.); RABBI HAYIM HALEVY DONIN, TO BE A JEW 140-41 (1972) (explaining that traditional Jewish law does not regard intrauterine life as a living soul until birth, although its status as "potential life" — after the fortieth day, before which it is "mere water" — means that there are conditions on its destruction); BARBARA DUDEN, DIS-EMBODYING WOMEN: PERSPECTIVES ON PREGNANCY AND THE UNBORN (1993); ANN OAKLEY, THE CAPTURED WOMB ch. 7 (1984); Constance Backhouse, *Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada*, 3 WINDSOR Y.B. OF ACCESS TO JUST. 61, 79 (1983) (noting the historical prevalence of infanticide and thus the changing perception of the status of even an infant's life); Shelley A.M. Gavigan, *On "Bringing on the Menses": The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law*, 1 CAN. J. WOMEN & L. 279 (1986) (discussing the significance of technological advances as they relate to abortion); Rosalind P. Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263 (1987); Rapp, *supra* note 44, at 37-39.

Outsider women — women of color, poor women, and lesbians — may be particularly affected by this "chicken-egg" problem. Because of cultural, religious, and other differences, outsider women may be more likely to value intrauterine life differently than the law does. Simultaneously, the law may have even greater impact on their lives because their value differences may lead them to act in violation of the law more often than would women whose values are more in concert with those expressed by law. See Letter from Lisa Ikemoto to Julia E. Haningsberg (April 27, 1995) (on file with author).

122. Such accounts are epistemologically useful because the explanatory potential of moral and political theory depend upon their having a basis in reliable knowledge of human experience. For discussions of the usefulness and dangers of first-person narratives, see Ashe, *supra* note 115, at 526; Lorraine Code, *Experience, Knowledge, and Responsibility*, in WOMEN, KNOWLEDGE, AND REALITY: EXPLORATIONS IN FEMINIST PHILOSOPHY 157 (Ann Garry & Marilyn Pearsall eds., 1989). See also Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (examining the emergence of feminist narrative scholarship).

preserved in formaldehyde, and displaying messages such as "Abortion Kills Children."¹²³ But women do not need to be told that they are making life and death choices — they already know it. As one scholar has stated, "[a]bortion is not merely a 'moral' — but also a 'mortal' decision."¹²⁴ This understanding of the life and death nature of the abortion decision comes across in the comments of a counselor in an abortion clinic discussing her role in the abortion decision:

[Y]es, *life* is sacred, but the quality of life is also important, and it has to be the determining thing in this particular case. the quality of that mother's life, the quality of an unborn *child's* life — I have seen too many pictures of babies in trash cans and that sort of thing, and it is so easy to say, "Well either/or," and it just isn't like that. And I had to be able to say, "*Yes, this is killing, there is no way around it, but I am willing to accept that, but I am willing to go ahead with it, and it's hard.*"¹²⁵

Similarly, one person quoted by Kristin Luker underscores the fact that "pro-choice" advocates do not necessarily deny that the "fetus" is a potential human life: "I take the idea of ending the *life of the fetus* very, very gravely. I'm troubled by that, but this doesn't in any way diminish my conviction that a woman has the right to do

123. See *United States v. Terry*, 17 F.3d 575, 576 (2d Cir. 1994) (Randall Terry of Operation Rescue confronted then-Governor Bill Clinton and Senator Al Gore with "fetal remains" during the Democratic National Convention in New York); Verlyn Klinkenborg, *Violent Certainties: A Report From a Milwaukee Abortion Clinic, Where the Crowd Outside Brandishes the Weapons of Righteousness and the Women Inside Bear the Weight of Their Choice*, HARPERS, Jan. 1995, at 37, 42.

124. Ashe, *supra* note 63, at 372.

125. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 58 (1982) (emphasis added). A discussion of the merits of Gilligan's study exceeds the scope of this paper. See, e.g., SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS 148-77 (1992); MACKINNON, *supra* note 38, at 38-39; SUSAN M. OKIN, JUSTICE, GENDER, AND THE FAMILY 15 (1989); Linda K. Kerber et al., *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304 (1986); Isabel Marcus et al., *Feminist Discourse, Moral Values and the Law: A Conversation*, 34 BUFF. L. REV. 11 (1985); Carol B. Stack, *Different Voices, Different Visions: Gender, Culture, and Moral Reasoning*, in UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE, *supra* note 9, at 19; Joan C. Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644 (1987); Williams, *supra* note 90. On the widespread use of Gilligan's work by feminist legal theorists, see Elizabeth M. Schneider, *Hearing Women Not Being Heard: On Carol Gilligan's Getting Civilized and the Complexity of Voice*, 63 FORDHAM L. REV. 33 (1994). I am not using Gilligan's work for the purpose of adopting her position on moral women or in order to assert that women reason differently from men. I only wish to use some of the examples of the ways that the women in her abortion study characterized their own feelings about the complexity of their abortion decisions.

For other first-person accounts of abortion, see COLKER, *supra* note 5, at 43-57; KRISTIN LUKER, TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT (1975); KATHLEEN McDONNELL, NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION (1984); THE CHOICES WE MADE: 25 WOMEN AND MEN SPEAK OUT ABOUT ABORTION (Angela Bonovoglia ed., 1991); Lynn Paltrow, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN'S RTS. L. REP. 3 (1986).

that”¹²⁶ The abortion decision can be made within a framework of altruism and respect for intrauterine life. For example, a nineteen-year-old trying to decide whether to have a second abortion when both her family and her lover opposed continuing the pregnancy. For her, the abortion became an act of altruism complicated by sacrificing the “fetus” in order to satisfy other’s wants.¹²⁷ Another example of this reasoning is the story of a twenty-four year old Catholic woman who became pregnant two months after having her first child. She characterized her reasons for wanting the abortion as a combination of selfish and responsible ones, noting that another pregnancy would strain both the emotional and financial resources of the family and would be contrary to medical advice:

It is taking a life. Even though it is not formed, it is the potential, and to me it is still taking a life. But I have to think of mine, my son’s, and my husband’s [lives]. And at first I thought it was for selfish reasons, but it is not. I believe that, too, some of it is selfish. I don’t want another one right now; I am not ready for it. . . . [But I cannot be] so morally strict as to hurt three other people with a decision just because of my moral beliefs.¹²⁸

This description illustrates the difficulty in determining whether a solution that involves an abortion is selfish or self-sacrificing. This complexity is further illustrated by another woman’s decision: although this woman felt that the responsible course of action would be to continue her pregnancy and that it would be irresponsible and selfish to have an abortion, she also realized that deciding to bear the child might be a way to assuage her guilt and thus the selfish thing to do in the circumstances. Faced with alternatives each of which might be construed as serving either others or herself, she was unable to determine which course of action would be the self-sacrificing and therefore the “good” one. She concludes that

126. Kristin Luker, *Abortion and the Meaning of Life*, in *ABORTION: UNDERSTANDING DIFFERENCES* 25, 41 (Sidney Callahan & Daniel Callahan eds., 1984) (emphasis added); see also Olsen, *supra* note 7, at 131-32 (rebutting the anti-abortion argument that widespread legal abortion would “dehumanize” society by arguing that “pro-choice” advocates view the “fetus” as sharing humanity, yet still advocate that women have a right to choose abortion). Olsen emphasizes that women do not want to have abortions but will sometimes feel that abortions offer the best solution when their personal situations present only bad alternatives. She further suggests that the criminalization of abortion denies women the opportunity to express the ambivalence and grief they sometimes feel as a result of terminating a pregnancy. *Id.* at 124.

127. See GILLIGAN, *supra* note 125, at 80.

128. *Id.* at 83-84.

no solution will meet the standard of not hurting anyone, and that she therefore has no "right" choice to make.¹²⁹

In its amicus brief to the Supreme Court in *Thornburgh v. American College of Obstetricians*,¹³⁰ the National Abortion Rights Action League attempted to demonstrate to the Court "the realities of abortion in women's lives."¹³¹ One story the group shared contained the following statement that reflects concerns based in the intersecting relationships in which the woman in question found herself:

I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and it's his turn. . . . There is no way I could continue this pregnancy because of my responsibilities to my family.¹³²

In a Canadian case in which a biological father sought by injunction to prevent his former girlfriend from getting an abortion,¹³³ the "mother," Chantal Daigle, expressed her reasons for wanting the abortion in the following terms: "I do not wish to have a child at the present time in light of my age, my social situation as a single person and my moral values as I want to provide for a child in a serene stable family environment in which there is no violence"¹³⁴

Feminist journalist Katha Pollitt, who is adamantly pro-choice, has written of her own pregnancy:

129. See *id.* at 117-18. Although she decided that to have the abortion would be the best decision in her situation, she realized that given different circumstances the decision could have gone the other way. See *id.*

130. 476 U.S. 747 (1986).

131. Amicus Brief for the National Abortion Rights Action League, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379), quoted in Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1635 (1987).

132. *Id.* at 1637; see also West, *supra* note 68, at 29-33 (describing the quandaries of others mentioned in the brief).

133. See *Daigle v. Tremblay*, [1989] 2 S.C.R. 530 (Can.).

134. The "violence" she mentions refers to her abuse at her boyfriend's hands. See [1989] 2 S.C.R. at 537. The Quebec Court of Appeal characterized Daigle's reasons for wanting the abortion as unreasonable, meaning that for her to have had an abortion would have been an *abus de droit* (abuse of law). The Court of Appeal went on to find that the balance of convenience favored the "fetus" and upheld the injunction. *Tremblay v. Daigle*, 59 D.L.R.4th 609 (Que. Ct. App. 1989). Although on summer recess at the time, the Supreme Court of Canada held an emergency hearing and unanimously vacated the injunction that day, with written reasons following several months later. *Daigle*, [1989] 2 S.C.R. at 530. Ms. Daigle, by the time of the Supreme Court's hearing, had already fled to have an abortion in the United States, thereby risking being held in contempt of court. At the time of her abortion, she was some twenty-two weeks pregnant. See Martha Shaffer, *Foetal Rights and the Regulation of Abortion*, 39 MCGILL L.J. 58, 60 n.8 (1994).

Now, why do I follow my doctor's advice: swill milk, take vitamins, eschew alcohol, cigarettes, caffeine, dental X-rays and even the innocent aspirin? And why, if I had to, would I do a lot more to help my baby to be born healthy, including things that are uncomfortable and wearisome (like staying in bed for months, as a friend of mine had to) or even detrimental to my own body (like fetal surgery)? It's not because I want to turn out a top-of-the-line product, or feel a sense of duty to the baby's dad, or have invested the baby with the rights and privileges of an American citizen whose address just happens to be my uterus. I do it because I love the baby. Even before it's born, I'm already forming a relationship with it. You can call that biology or social conditioning or an emotional fantasy. Perhaps, like romantic love, it is all three at once. But it's part of what pregnancy is — just ask the millions of pregnant women who feel this way, often to their own astonishment . . . ¹³⁵

These examples help to illustrate how the abortion decision is a kind of mothering decision, as women decide when, whether, and with whom to bear children.¹³⁶ Unlike a common anti-abortion position, which assumes that women are not considering intrauterine life in making their decisions,¹³⁷ putting abortion within this frame-

135. KATHA POLLITT, *REASONABLE CREATURES: ESSAYS ON WOMEN AND FEMINISM* 75 (1994). Some women name the intrauterine life while *in utero*, especially if they know its sex; this practice can be seen as part of this same process of developing a relationship.

136. See Sanger, *supra* note 97 (manuscript at 44). As I have tried to be, Sanger is careful to specify that "an abortion is still not a separation from a *child*," and she notes that she does not "want to confuse separations from children with separations from fetuses, zygotes, or eggs, especially when the political rhetoric of reproduction stands ready and willing to identify these entities as persons, patients, children, the bearers of rights." *Id.*

137. See Mary C. Segers, *Abortion and the Culture: Toward a Feminist Perspective*, in *ABORTION: UNDERSTANDING DIFFERENCES*, *supra* note 126, at 229, 240-41:

[The] fear[] of casual abortion for selfish reasons may derive from the most deadly anti-woman bias of them all, namely: that unless women are carefully controlled they will kill their own progeny without reason because they are not fully rational creatures. . . . [P]regnancy terminations are rarely undertaken lightly, frivolously, or casually. . . . [A]bortions are never chosen "for convenience" sake" but are undertaken "in necessity and sorrow" and in many cases with considerable ambivalence. (citation omitted); see also Overall, *supra* note 93, at 10 (arguing that women's bodies have traditionally been regarded as dangerous places and that now they are seen as dangerous to the intrauterine life because the pregnant woman cannot be trusted not to abuse it, not to pass defective genes to it, to protect it from environmental harm, and to give birth safely); Siegel, *supra* note 10, at 274 (noting the "criticism of the abortion right as an instrument of feminine experience").

The same fear seems evident in the framing of responsibility for the abortion decision in *Roe*. In that case, the abortion right is framed as a right protecting a physician's justified medical decision, rather than a trust in women's competence to make reproductive decisions. As the *Roe* Court stated:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

Roe v. Wade, 410 U.S. 113, 165-66 (1973). For an interesting comparison between society's view of birth and technological advances, see Martin, *supra* note 9.

work of mothering decisions suggests what is often the complexity of the "choice" *not* to become a mother.¹³⁸ This point must not, however, be overstated. As at least one legal scholar has observed, women say that they are *going to have a baby* when they are pregnant, rather than that they *have* one, acknowledging that what they carry is potential only — an early stage in the project of having a child.¹³⁹ In the early stages of their pregnancies some women do not conceptualize the intrauterine life as a "baby" at all. Rayna Rapp's ethnography of women undergoing genetic counseling in New York City quotes several Latinas whose descriptions used, in Rapp's words, "nontechnological imagery."¹⁴⁰

Cultural as well as ethnic differences affect how women value pregnancy and intrauterine life. The particular ways in which women express such values may be a result of numerous factors that include: women's own subjective appreciations of the value of intrauterine life; the way that abortion has been politicized as a mothering decision;¹⁴¹ the socialization of girls and women to use

138. Cf. Hester Lessard, *Relationship, Particularity and Change: Reflections on R. v. Morgentaler and Feminist Approaches to Liberty*, 36 MCGILL L.J. 263 (1991).

139. See Greschner, *supra* note 9, at 649-50 (discussing the grammatical form used by pregnant women); William Ruddick, *Parents and Life Prospects*, in *HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD* 124 (Onora O'Neill & William Ruddick eds., 1979) (describing the *gradual* way that children become "distinct beings"). Of course, use of language is not determinative either. The language in which women speak about pregnancy, procreation, and abortion is not itself value-neutral, so women may not have the communicative capacity to describe fully a truly woman-centered view of abortion — or, for that matter, pregnancy. See Greschner, *supra* note 9, at 647 (advocating development of a new vocabulary and a willingness to hear women speak their experience); see also Ashe, *supra* note 115; Ashe, *supra* note 63, at 358; Marie Ashe, *Conversation and Abortion*, 82 Nw. U. L. REV. 387 (1988) (book review):

The current public discourse regarding [menstruation, pregnancy, abortion, childbirth, lactation, and the suffering of rape] . . . has been dominated by male perspectives and male definitions. Women have only recently begun to make ourselves heard, challenging dominant and traditional understandings, giving new accounts — in our own words — of the significance for female personhood of uniquely female experiences. As women speak more fully and listen to one another more attentively, what we often discover is the plurality of our voices — a reality demonstrating that, indeed, there is no essential "Woman." That reality, the rhythm and tone of plural speech, has created what often seems a dissonance in the public discourse.

Id. at 387-88 (footnotes omitted).

140. See Rapp, *supra* note 44, at 34. These women are all Spanish-speaking, and Rapp characterizes them by their "relative autonomy from technological imagery . . . due as much to having recently emigrated from countries and regions where hospital-based prenatal care is both less common and less authoritative, as to anything inherently 'Hispanic.'" *Id.*; see also DUDEN, *supra* note 121, at 25-29.

141. See *supra* section II.A.

maternal or caring frameworks in decisionmaking;¹⁴² and the pervasive effect of technology in framing the experience of pregnancy.¹⁴³

In asserting that a number of social forces affect a woman's abortion decision, I am not arguing that there is only one individual experience of abortion that takes the form of a tortured decision by a woman who makes her moral choices by analyzing all the responsibilities and interests at stake.¹⁴⁴ Nor can I agree with the view of one midwestern doctor that, "[t]here is *only one* reason I've ever heard for having an abortion: the desire to be a good mother."¹⁴⁵ Among the many reasons women give for having an abortion, some could be interpreted as conforming to the anti-abortion stereotype of the abortion-seeker as a selfish, self-indulgent, promiscuous woman, irresponsibly and thoughtlessly having an abortion.¹⁴⁶ For example, Peggy Noonan, a White House speech writer in the Reagan administration, has written about her view when she was a college student that abortion was "no more than a surgical procedure."¹⁴⁷ Feminist author Barbara Ehrenreich has said, "Would I feel comfortable getting rid of a fetus in the first few months of its life? Yes, indeed . . . [a]nd I have done it without qualm."¹⁴⁸ Some women use abortion as birth control and other women have multiple abortions. These examples might appear to be less about mothering in the way that I have been discussing it and perhaps more tied to the primacy of sexual freedom or other values, yet these two

142. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 51-52 (1989).

143. See *supra* note 121.

144. See Ashe, *supra* note 63, at 378-39 (describing accounts of abortion that express relief rather than grief as their prevailing emotion); Petchesky, *supra* note 121, at 271 (describing the enormous range of women's reactions to abortion suggested by recent research). To do so would be both to essentialize the abortion experience as well as to posit a "good mother" model of the abortion-seeker. Such a distillation of experience is bound to be unreliable. See Sanger, *supra* note 84, at 31 (arguing that "attempts at distilling all women into mothers and all mothers into good ones are bound to be unreliable").

145. Elizabeth Karlin, *An Abortionist's Credo: I try to educate my patients and withstand my opponents*, N.Y. TIMES, Mar. 19, 1995, (Magazine), at 32 (emphasis added).

146. See generally Williams, *supra* note 90, at 1578-79 (discussing negative stereotypes of women and teenage girls who have abortions).

147. *She's Come for an Abortion. What Do You Say?*, HARPERS, Nov. 1992, at 51-52, cited in DWORKIN, *supra* note 98, at 32.

148. Jason DeParle, *Beyond the legal right; why liberals and feminists don't like to talk about the morality of abortion*, WASH. MONTHLY, Apr. 1989, at 36. See also one of the many accounts offered to the Court in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986): "On the ride home from the clinic, the relief was enormous. I felt happy for the first time in weeks. I had a future again. I had my body back." Amicus Brief for the National Abortion Rights Actions League, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-498 & 84-1379), quoted in Ashe, *supra* note 63, at 379.

concerns are not mutually exclusive, for restrictions on abortion are also a means to control women's sexuality.¹⁴⁹ This possibility does not, however, stop these abortions from being homologized into mothering. The stereotype of women obtaining abortions that I have described here draws its force from the fact that these women will be treated not as irresponsible women, but as irresponsible *mothers*, and as a consequence are subject to much harsher moral — as well as legal — sanction.

In short, the argument that I have made is that the fact that law and political discourse homologize motherhood and pregnancy may be *facilitated* by the fact that for many women the abortion decision falls within the spectrum of mothering decisions, but my argument does not rely on *all* women feeling this way. Moreover, *all* abortion-seekers, whether or not their experience of abortion suggests mothering, remain within the framework of motherhood imposed on the abortion decision, and suffer from the ideological constraints this implies. Abortion-seekers become framed as "bad mothers." As a result, homologizing *abortion* to motherhood narrows the legal system's analysis of the range of procreative choices, including abortion.

III. ACCOUNTING FOR INTRAUTERINE LIFE: MEANING AND POLICY

Part and parcel of the acknowledgment of abortion as a mothering choice is a consideration of the value of intrauterine life. However one tries to define the different ways that women value that life, acknowledging it is critical to a theoretical framework of abortion.¹⁵⁰ It is the fact that abortion is not uniquely about the woman that the *Roe* court, albeit inadequately, tried to address with its controversial trimester framework.¹⁵¹ By allowing the "pro-life" side

149. See, e.g., PETCHESKY, *supra* note 79, at 242-52.

150. Ronald Dworkin, for example, uses the notion of the "sacred" or "intrinsic importance." See DWORKIN, *supra* note 98, at 71-84. In his view: "The great majority of people who have strong views about abortion — liberal as well as conservative — believe, at least intuitively, that the life of a human organism has intrinsic value in any form it takes, even in the extremely undeveloped form of a very early, just-implanted embryo." *Id.* at 69. Jean Cohen states, "[I]n the case of abortion, the moral issue of the value of fetal life and when it begins must be addressed (implicitly or explicitly) by the Court in the process of adjudication." Cohen, *supra* note 5, at 73. She herself, however, fails to theorize adequately the meaning of this life, relying instead on Dworkin's framework, while simultaneously distancing herself from it, which she appears to find thought-provoking if not entirely convincing. *Id.* at 78-82; see also Williams, *supra* note 90, at 1591 ("The subtext of pro-choice stories needs to be that pro-choice forces share with their opponents a reverence for human life.").

151. In *Roe*, the Court held that because a woman's right to have an abortion is fundamental, only a compelling state interest can justify impinging in any way upon that right. In

of the abortion debate, and more specifically the religious right in the United States, to monopolize discussions of "life," feminists have ceded both the moral high ground and the discursive framework of the abortion question.¹⁵² To combat the anti-abortion movement, even as a strategic question, the "pro-choice" movement needs to display a moral vision rather than depend on abstract individual rights.¹⁵³ The apparent dichotomization, which equates anti-abortion forces with concern for "life," and "pro-choice" forces with indifference to it, is an obvious and damaging oversimplification.¹⁵⁴

the first trimester, therefore, the state may only require that an abortion be performed by a licensed physician. During the second trimester, the compelling state interest in the mother's health permits it to adopt reasonable regulations to ensure safe abortions. In the third trimester, once the intrauterine life is, according to the *Roe* Court, viable, the state interest in preserving the intrauterine life becomes compelling. The state may therefore proscribe abortions during the third trimester except when necessary to preserve the mother's life or health. *Roe v. Wade*, 410 U.S. 113, 155-64 (1973); see also TRIBE, *supra* note 73, at 1341-42. The Court has subsequently retreated from the trimester framework. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2811, 2817-18 (1992); see also *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 529 (1989) (O'Connor, J., concurring); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 453-59 (1983) (O'Connor, J., dissenting).

152. See Ashe, *supra* note 63, at 372:

The failure of pro-choice discourse to so recognize it — to acknowledge the violence intrinsic to abortion — has constructed impediments to our speaking truly and deeply — and more variously — of what abortion means to us. It has discouraged our discoveries — beneath rhetoric and sloganeering, and beneath the obfuscation of medico-legal discourse — of the reality of common bodily experience underlying the various interpretations of different women.

153. See, e.g., Larry Letich, *Abortion: Bad Choices*, in *TIKKUN ANTHOLOGY* 264, 265 (Michael Lerner ed., 1992):

"Reproductive freedom" and "the right to choice" are rejected by many Americans because these slogans seem to emphasize the primacy of the individual and neglect other moral considerations. Sadly, these phrases conjure up a vision of self-indulgence and selfishness, which leads many Americans to think that those who favor choice are insensitive to other moral concerns.

See also Carole Joffe, *The Moral Vision of the Pro-Choice Movement: A Response to Ruth Anna Putnam*, *TIKKUN*, Sept.-Oct. 1989, at 82 (arguing that abortion involves moral decision-making); Shultz, *supra* note 72, at 81 ("However understandable and tempting it may be, uncritical embrace of extreme autonomy rhetoric and of exclusively woman-regarding positions seems to me to undermine our persuasiveness, to render us vulnerable on grounds of principle, and to damage our aspirations for a humane and responsible world."); Williams, *supra* note 90, at 1585-89 (addressing, as a strategic issue, the necessity for pro-choice rhetoric to move away from simple notions of autonomy and acknowledge that "the American public has bonded with the fetus").

Feminists have arguably also ceded both the symbol and experience of motherhood as it relates to abortion to the anti-abortion camp. See Sanger, *supra* note 84, at 23-24 (citing Rushworth M. Kidder, *Marriage in America: Staking Out High Ground in "Pro-Family" Debate*, *CHRISTIAN SCI. MONITOR*, Nov. 26, 1983, at 25).

154. See Cohen, *supra* note 5, at 78; Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1316 (1991) (describing the fetus as a "form of life," "[m]ore than a body part but less than a person"); Siegel, *supra* note 10, at 348-49. Paradoxically, the most fanatical wing of the anti-abortion movement calls into question the "life" framework by its acts of violence against abortion providers. See CONDIT, *supra* note 3; Tamar Lewin, *Abortion Providers Attempt to Handle Growing Threat*, *N.Y. TIMES*, Dec. 31, 1994, at A8; Mireya Navarro, *Jury Recommends Death Penalty for Abortion Foe Convicted in*

Yet, because the anti-abortion side of the debate does most of the talking about the value of intrauterine life, it has assumed, unchallenged, the power to articulate the *consequences* of the value of such life, while feminists have been left to take a defensive and responsive posture. What has not been sufficiently expounded is a *feminist* vision of the value of intrauterine life. I argue that the current problem is not that intrauterine life has too much status, but that it has an insufficiently articulated meaning, and the meaning that intrauterine life does have, by virtue of who has ascribed that meaning, is not examined for gendered implications and implications about women as mothers.

One can see the value of intrauterine life as falling along a continuum. As I stated in Part II, it is common for pregnant women to think about the intrauterine life they carry as a "child." The sense of the "child-ness" of the intrauterine life may often originate with quickening — when a woman first feels movement. The moment of quickening is important also because it is a marker that only the woman perceives without mediation, rather than by technology that "reveals" the contents of a woman's womb to her. Historically it was *the* socially (and legally)¹⁵⁵ relevant moment that established the fact of pregnancy — and women's self-image as pregnant — in contrast to today, when this moment is more likely to be experienced looking at a home pregnancy test or in a doctor's office.¹⁵⁶

The sense of connection to a "child" or "baby" usually becomes greater the closer the pregnant woman is to term. The *possibility* that is this intrauterine life is the measure of its value. As a *possible child*, it is not valued in the way we value full human life. Thus, for example, most North Americans do not mark a miscarriage with a funeral in the way we do the death of a person.¹⁵⁷ The value

2 *Killings in Florida*, N.Y. TIMES, Nov. 4, 1994, at A20; *Canada Tightens Security at Abortion Clinics After a Shooting*, N.Y. TIMES, Nov. 10, 1994, at A6. Interestingly, there is a movement for a "Consistent Ethic of Life" among Catholics and Protestants who are firmly opposed to any kind of abortion. This ethic entails that people who oppose abortion must show consistent respect for human life in other contexts by opposing the death penalty, working toward promoting welfare policies that will improve human life, and so on. See JOSEPH CARDINAL BERNARDIN, *THE CONSISTENT ETHIC OF LIFE* (1988).

155. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *125 ("Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."). On the history of the role of quickening in abortion law, see MOHR, *supra* note 98, at 4, and Backhouse, *supra* note 121, at 69.

156. See DUDEN, *supra* note 121, at 80. On the iconography of quickening, see generally *id.* at 78-82. Duden notes that the concept of quickening has been eliminated by scientific advancement and dropped from English usage. See *id.* at 80 (quoting BERNARD N. NATHANSON, *ABORTING AMERICA* 206 (1979)).

157. See Cohen, *supra* note 5, at 79 n.114. A number of states, however, have enacted fetal remains laws that place special requirements on the disposal of the products of abortion.

ascribed to the intrauterine life also becomes greater further into the pregnancy, with later term abortions dramatically less common and generally causing more moral conflict.¹⁵⁸ But this continuum of value probably is not unique to the period of pregnancy. It may be that although we intuitively feel that a miscarriage is tragic, and arguably feel that more when a miscarriage occurs closer to term,¹⁵⁹ we also may intuitively feel that the death of a two-month old child is worse. Moreover, we may consider the death of a teenager "worse" than a stillbirth, while one can also consider the death of a very elderly person less tragic than the death of a younger adult. As these examples illustrate, the mere existence of "life" may not be decisive as to our perception of its worth or value.¹⁶⁰ Rather,

See discussion in *Planned Parenthood v. Minnesota*, 910 F.2d 479, 481-82 (8th Cir. 1990). One such law enacted by Louisiana referred to the remains of the "child." See *Margaret S. v. Treen*, 597 F. Supp. 636, 670 (E.D. La. 1984). Finding this law an unconstitutional burden on the woman's abortion decision, the court held:

By requiring the physician to confront the woman with a choice on the method of disposal, the state suggests to the woman that it equates abortion with the taking of a human life. Such a suggestion can only serve to increase the woman's feelings of guilt and impose a psychological burden on her. This requirement thus penalizes those women who exercise their constitutional right in choosing abortion.

597 F. Supp. at 670 (citation omitted); see also *PETCHESKY*, *supra* note 79, at 332 (describing the cultural variation in the treatment of intrauterine life: "some cultures bury fetuses like adults, others distinguish between miscarried and aborted fetuses for burial purposes, still others discard them indiscriminately 'in the refuse heap,' and at least one cannibalizes them 'in times of famine'").

158. *Petchesky* notes:

In the everyday practices of abortion and childbearing, more clearly than in opinion polls or surveys of attitudes, we can read the social record of a moral sense about abortion If 1.5 million abortions a year indicate a compelling need and desire for abortion among women, we may also notice that between 92 and 96 percent of those abortions occur within the first trimester, and over half within the first eight weeks. These data are significant in understanding popular values about "fetal life." They confirm the sense that most women have, in term pregnancies, of developmental differences that correspond to differences, changes, in their relationship/obligation/bond to the fetus. This sense determines, too, that a miscarriage often has a different meaning when it occurs in the first or second month of a pregnancy, when it may not even be noticed, than when it occurs in the fifth or sixth month, when it becomes the occasion of mourning — the loss of "someone." Even our ordinary language expresses this. We say, "She had a miscarriage," in the earlier case, and after some hard-to-define but real point later on, "She lost her baby."

PETCHESKY, *supra* note 79, at 351.

159. Typically, women do not reveal that they are pregnant until after the first trimester, when the chances of miscarriage fall dramatically. See *COLKER*, *supra* note 125, at xvi.

160. I do not want to underestimate the degree of historical and cultural specificity of the continuum of "meaning" that I have been exploring. In an era when women endured large numbers of pregnancies and faced high infant death rates, the death of a young infant probably meant considerably less than it would for a couple today who has postponed childbearing into their thirties. See *LERNER*, *supra* note 93, at 121 (noting that 25% of children born in England up until the 18th century died in their first year). But see Patricia Crawford, "The Sucking Child": *Adult Attitudes to Child Care in the First Year of Life in Seventeenth Century England*, 1 *CONTINUITY & CHANGE* 23 (1986). For an "infertile" couple using new reproductive technologies, the loss of frozen sperm or embryos might be something quite significant. See *Hecht v. Kane*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993) (contestation of decedent's bequest of his cryogenically preserved sperm to his girlfriend); *Davis v. Davis*, 842 S.W.2d 588 (Tenn.

there may be at issue a degree of cultural and personal investment in a life, and the degree to which these have come to fruition in any given individual.¹⁶¹

There is, of course, danger in a feminist approach to procreative decisionmaking that acknowledges intrauterine life. The first threat posed by this approach is the presumption that any acknowledgement of the meaning or value of intrauterine life necessarily will lead to denial, or at the very least severe constraint, of women's access to abortion.¹⁶² The history of access to abortion since the *Roe* decision exemplifies this danger. The greater the status attributed to intrauterine life, it appears, the more narrow women's access to abortion. This argument has been made by those who have been attributing the greatest value to intrauterine life — the "pro-life" side of the abortion debate. To these advocates, valuing intrauterine life entails imbuing that life with legal rights that oppose the rights of a pregnant woman. Thus, in "pro-life" terms, "abortion is murder." As I will go on to discuss below, a feminist vision of intrauterine life does not give rise to that conclusion.¹⁶³

A second danger is that a feminist acknowledgement of intrauterine life might result in protecting a particular "woman's" understanding of that value. Any legal recognition of such an understanding would result in enforcement of a particular unitary perception of the value of intrauterine life, belying the cultural, religious, and other differences that lead diverse groups of women to value intrauterine life differently. This peril does not obviate the need for a feminist version of "life" discourse, but it does require that women's subjective understandings of pregnancy and intrauterine life be safeguarded.

What, then, might a feminist articulation of the value of intrauterine life look like? It should translate into advocating that the state play a role in promoting the welfare of *all* intrauterine

1992) (custody battle over frozen embryos). In a society in which the elderly were revered rather than relegated to old-age homes, the death of an old person might take on different meaning.

161. Dworkin suggests that it is the degree of frustration of life, not its mere absence, that is deplored in premature deaths. See DWORKIN, *supra* note 98, at 68-101.

162. See Glendon, *supra* note 8, at 61-62.

163. See *infra* text accompanying note 180. The Feminists for Life of America, however, argue that abortion on demand is bad for women because it forces them to kill their children. See Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, in FEMINIST NIGHTMARES: WOMEN AT ODDS 159 (Susan Ostrov Weisser & Jennifer Fleischer eds., 1994).

life.¹⁶⁴ This life must be valued regardless of the race of its parents, the age of its mother, or the socio-economic stratum into which it would be born if it were carried to term.¹⁶⁵ The value of life carried by, for example, teenage women, or women receiving Aid to Families with Dependent Children (AFDC), or women receiving AFDC who already have children, should not be any less in the eyes of the state than the life carried by women who do not rely on government aid for subsistence.¹⁶⁶ The promotion of the welfare of intrauterine life may take many forms, all of which, within the framework I have been elaborating, allow women an expanded range of mothering choices.¹⁶⁷ Intervening to prevent women's poverty will have a direct correlation both with the health of intrauterine life and with

164. See Hanigsberg, *supra* note 71, at 69-70; Johnsen, *supra* note 23, at 571 (arguing that "the most effective policies for improving the health of newborns are those that facilitate women's choices, not those that infringe on their liberty"); Rosalind Petchesky, *Giving Women a Real Choice*, THE NATION, May 28, 1990, at 732.

165. As Frances Olsen has argued, "[f]etal life has value when people with power value it." Olsen, *supra* note 7, at 128. Dorothy Roberts has pointed to the devaluation of Black children as fundamental to the devaluation of Black mothering. See Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 876-78 (1994); see also DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 162-77 (1987) (suggesting that White children would receive preferential treatment if an epidemic struck the nation's youth); Rickie Solinger, *Race and "Value": Black and White Illegitimate Babies, 1945-1965*, in MOTHERING: IDEOLOGY, EXPERIENCE AND AGENCY, *supra* note 26, at 287; Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913 (1994) (arguing against valuation of life based on race or culturally determined beauty). Lisa Ikemoto has called attention to the fact of socio-economic and race bias in devaluing motherhood and put this notion of "devalued motherhood" in historical context. See Ikemoto, *supra* note 12, at 1219-21. On the devaluation of Black motherhood more generally, see Roberts, *supra* note 107, at 1436-44; see also Austin, *supra* note 33, at 553 ("The material consequences that . . . plague . . . black women who have children despite their supposed role modeling responsibilities, are not inherent by-products of single pregnancy and motherhood. The condemnation and the economic hardships that follow in its wake are politically and socially contingent.").

166. Current American welfare reform proposals being discussed include denying additional cash assistance to welfare recipients who become pregnant or have additional children and refusing cash assistance for children born to unmarried women ages 17 and younger. See REPROD. FREEDOM NEWS, Mar. 10, 1995, at 3; see also Robert Pear, *House Backs Bill Undoing Decades of Welfare Policy: Control for the States: Measure to Cut \$69 Billion in 5 years, Goes to Senate — Changes Are Expected*, N.Y. TIMES, Mar. 25, 1995, at A1, A9.

167. Dawn Johnsen describes this as a "facilitative model":

This model recognizes that women who bear children share the government's objective of promoting healthy births, but that existing obstacles — and not bad intentions — impede the attainment of this common goal. Women inevitably must make numerous decisions that require them to balance varying and uncertain risks to fetal development against competing demands and interests in their lives. Rather than depriving women of the right to make these judgments or punishing women after the fact for making "wrong" choices, facilitative policies seek to expand women's choices . . .

Johnsen, *supra* note 23, at 571. I discuss the false adversary model of maternal-intrauterine life relationships to which Johnsen is responding at greater length in Hanigsberg, *supra* note 71, at 43.

the number of babies who are carried to term.¹⁶⁸ Targeting community welfare will affect the health of intrauterine life carried by women in that community in a positive manner. For example, access to drug treatment facilities for drug-addicted pregnant women and their children is necessary and currently largely unavailable.¹⁶⁹

Moreover, access to adequate prenatal medical care, education and nutrition for pregnant women would also promote the welfare of intrauterine life. A good example of the failed potential that exists is the Special Supplemental Food Program for Women, Infants and Children (WIC).¹⁷⁰ WIC provides food supplements and nutritional education and screening to needy pregnant, breastfeeding, and postpartum women and their infants, as well as to needy children up to the age of five. The program, while federally funded, is administered by the states.¹⁷¹ The WIC program has proven to be highly successful in reducing the incidence of low birthweight, infant mortality, and other infant health problems.¹⁷² The program, however, is so underfunded that only about half of the income-eligible women and children are able to participate.¹⁷³ This lack of funding has occurred despite the fact that WIC is so effective in improving infant health that expanding funding would result in sav-

168. Poverty poses a major risk of low birth weight infants. Low birth weight is a major predictor of infant mortality in the United States, and low birth weight babies also have a higher risk of a range of health problems later in life, including neurodevelopmental handicaps, congenital anomalies, mental retardation, blindness, autism, and growth and development problems. See Siegel, *supra* note 10, at 345.

169. Those facilities that take pregnant women generally do not provide childcare. See Testimony Presented to House Select Committee on Children, Youth and Families, 101st Cong., 1st Sess. (Apr. 27, 1989) (statement of Wendy Chavkin), cited in Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femaleness*, 7 BERKELEY WOMEN'S L.J. 1, 9 n.35 (1992). See also U.S. GAO, DRUG-EXPOSED INFANTS, A GENERATION AT RISK (1990); Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUB. HEALTH 483 (1990); Wendy Chavkin, *Help, Don't Jail Addicted Mothers*, N.Y. TIMES, July 1989, cited in Moss, *supra* note 107, at 287-88. For a critical analysis of therapeutic responses to pregnant drug users drawing upon the work of Michel Foucault, see Iris Marion Young, *Punishment, Treatment, Empowerment: Three Approaches to Policy for Pregnant Addicts*, 20 FEMINIST STUD. 43-48 (1995).

170. 42 U.S.C. § 1786 (1988) (originally enacted as § 17 of the Child Nutrition Act of 1966, Pub. L. No. 89-642, § 17, 80 Stat. 885).

171. Along with other welfare benefits, WIC is currently on the government chopping block. See Bob Herbert, *Formula for Tragedy*, N.Y. TIMES, Mar. 25, 1995, at A23; Pear, *supra* note 166.

172. See Johnsen, *supra* note 23, at 574-75 (citing CENTER ON BUDGET AND POLICY PRIORITIES, WIC: A WINNING STRATEGY FOR MATERNAL AND CHILD HEALTH (1990)); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1323 (1993).

173. See Johnson, *supra* note 23, at 575.

ings to the government in health assistance to low income women and children.¹⁷⁴

Would any of these suggestions obviate the need for abortions? The answer is no. In countries with a social welfare net beyond the wildest dreams of Americans, women still need abortion as a way to manage their procreative lives.¹⁷⁵ Instead, promoting the welfare of intrauterine life also requires trusting women to make decisions about when it is best, when it is desirable, and when it is necessary that this life should not be carried to term and trusting that the pregnant woman is uniquely well-positioned to make decisions about the intrauterine life she carries.¹⁷⁶ This involves a radical reversal from both legislative and judicial pronouncements that imply that women are not always legally qualified or entitled to make this determination by defining the right to abortion as a doctor's right to make medical decisions,¹⁷⁷ by insisting on parental notification in the case of young women seeking abortions,¹⁷⁸ or by notifying hus-

174. See *id.*; Spencer Rich, *Mothers' Nutrition Program Is Effective, U.S. Study Finds*, WASH. POST, Oct. 19, 1990, at A21; see also Loffredo, *supra* note 172, at 1323.

175. Katha Pollitt states:

Sweden has a system of social benefits and family supports that is more likely to be established on the moon than in the United States (where, as none of the kinder, gentler anti-choices have noticed, the trend is to cut, rather than expand, programs benefitting women and children). But even so, Swedish women abort at a hefty rate of 25 percent of all pregnancies.

Katha Pollitt, *Abortion in the American Mind*, THE NATION, May 25, 1992, at 718.

176. As Petchesky notes:

[I]t is pregnant women themselves whose consciousness is closest to the reality of the fetus and the total circumstances in which it exists. In the last analysis, their decisions are most likely to be morally informed. What the anti-abortion movement is about is the discrediting of women's moral judgment.

PETCHESKY, *supra* note 79, at 354. Petchesky draws upon Sara Ruddick's notion of "maternal thinking" grounded in "maternal practice." See RUDDICK, *supra* note 65, at 17-27.

For other arguments respecting the woman as the best decisionmaker, see Laurence Tribe, *Structuring Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 296-98 (1975); Laurence Tribe, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1 (1973); Williams, *supra* note 90, at 1592.

177. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986) (finding that certain informational requirements were unconstitutional based on their intrusion "upon the physician's exercise of proper professional judgment"); *Roe v. Wade*, 410 U.S. 166 (1973) ("[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.").

178. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (upholding requirement that one parent consent to an unemancipated minor's abortion, with judicial bypass provision); *Ohio v. Akron Reprod. Health Ctr.*, 497 U.S. 502 (1990) (upholding parental notification with judicial bypass provision); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (striking down requirement that both parents be notified before a minor's abortion but upholding 5-4 a parental notification requirement that provided for judicial bypass); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 490-93 (1983) (striking down Missouri parental consent requirement); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (striking down parental consent requirements); *H.L. v. Matheson*, 450 U.S. 398, 411-13 (1981) (upholding in a 6-3 decision a Utah statute requiring a physician to notify, if possible, parents of dependent un-

bands of their wives' intent to obtain an abortion or requiring a husband's consent to a wife's abortion.¹⁷⁹

The gestational age of the intrauterine life might be one factor that would influence women considering abortion. Given the increased moral significance that seems to attach to later term abortions, a feminist approach to intrauterine life would seek to encourage and facilitate early term abortions, particularly those prior to quickening. These abortions comprise more than ninety percent of abortions and working toward making them accessible and safe would affect the greatest number of abortion-seekers.¹⁸⁰ One way of doing this would be to lobby for the legalization and widespread use of such abortifacients as RU-486, a pill that can induce abortion early in pregnancy.¹⁸¹ For RU-486 to make a difference, however, it would have to be available to low-income women once it is approved.¹⁸²

married woman under 18 prior to performing abortion on narrow grounds as applied to "immature" minor); *Bellotti v. Baird*, 443 U.S. 622 (1979) (striking down Massachusetts parental consent provisions); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (striking down a parental consent requirement for unmarried minor women); Renée Joyal, *Adolescentes, Avortement et Dignité*, 3 CAN. J. WOMEN & L. 234 (1989) (discussing a case of a fourteen-year old who became pregnant while in a group home and whose request for an abortion was opposed by the Quebec Youth Protection Service).

179. See *Casey*, 112 S. Ct. at 2826-31 (striking down in a 5-4 decision a husband notification provision); *Danforth*, 428 U.S. at 67-72 (striking down requirement of husband's written consent).

180. See PETCHESKY, *supra* note 79, at 351 (noting that 92-96% of abortions occur in the first trimester); Council Report, *Induced Termination of Pregnancy Before and After Roe v. Wade: Trends in Mortality and Morbidity of Women*, 268 JAMA 3231, 3238 (1992) (noting that about 50% of women who have abortions after 15 weeks do so because of financial difficulties).

181. RU-486 blocks the action of the hormone progesterone which is crucial to maintaining a pregnancy. Blocking progesterone results in a breakdown of the bond between the embryo and uterine wall, resulting in uterine bleeding and contractions that eject the embryo. RU-486 is currently available in France, Britain, and Sweden. To date, the drug has been shown to be remarkably safe. See Clark, *supra* note 8, at 302-05. RU-486 has not yet received Food and Drug Administration (FDA) approval for use in the United States, largely because of pro-life lobbying. See Tamar Lewin, *Plans for Abortion Pill Stalled in U.S.*, N.Y. TIMES, Oct. 13, 1993, at A17. On October 27, 1994, a New York-based non-profit organization, the Population Council, announced that clinical trials of RU-486 were being conducted. See *Clinical Trials on Non-Surgical Abortion Commence in U.S.*, REPROD. FREEDOM NEWS, Nov. 4, 1994, at 5. The Council announced its intention to submit the data from the clinical trials to the FDA with its application for approval of the drug. The Council expects the FDA to approve the drug in 1996. See *id.*

182. Although the vocal anti-abortion movement vigorously lobbies against legalization of RU-486 in this country, see Jerry Grey, *Issue of Abortion Is Pushing Its Way to Center Stage*, N.Y. TIMES, June 19, 1995, at A1, A9 ("The Christian Coalition and other groups have also called for legislation to overturn executive orders that allowed Federal money to be used for . . . clinical testing of the abortion drug RU-486 . . ."), the drug holds promise as a potential point of compromise in the abortion debate. At least one author, who locates herself as neither pro-choice nor pro-life, has suggested that RU-486 would be welcome to "moderate" because it could reduce the number of later-term abortions that may be considered more morally objectionable. See Clark, *supra* note 8, at 305.

One benefit of the use of RU-486 is that it is highly respectful of women's bodily integrity. Unlike a surgical abortion, which requires a doctor to enter a woman's body with medical instruments, and from which a woman is usually shut out as she lies supine, feet in stirrups, with a sheet draped over her, the use of RU-486 provides the woman much greater agency in and control over the abortion process.¹⁸³ Simply making an abortion pill available would not, however, be enough to meet the needs of large numbers of women. The circumstances that result in later term abortions need to be addressed, including delays imposed by parental and husband notification requirements.¹⁸⁴ An adequate system of sex education must also address the lack of knowledge some women, particularly young and poor women, have about their bodies that results in late detection of pregnancy.¹⁸⁵ In addition, because RU-486 must be used within the first seven or eight weeks of pregnancy, it would not be useful in the case of abnormalities detected through amniocentesis nor for pregnancies discovered later, such as those of adolescent or premenopausal women who have irregular menstrual cycles.

In addition to a woman's consideration of how close her pregnancy is to term, a woman's decision would depend upon her own assessment of her ability to mother effectively and *her* assessment of the quality of life that the intrauterine life could reasonably be

183. See Clark, *supra* note 8, at 306 (citing Marge Berer, "Inducing a Miscarriage": *Women-Centered Perspectives on RU-486/Prostaglandin as an Early Abortion Method*, 20 LAW, MED. & HEALTH CARE 199, 201 (1992)). This greater autonomy may be a double-edged sword because the RU-486 process is much more solitary and can be more alienating as a result. These very facts, however, may silence some members of the abortion opposition who are concerned about the idea of capricious abortion-seekers. See Clark, *supra* note 8, at 307 n.198 ("At first glance, the availability of RU-486 would seem likely to heighten [the] concern [that some abortion decisions are casually made and too easily carried out]. But if the discourse on RU-486 were expanded beyond its present state, it might help persuade those who believe otherwise that abortion through use of a pill is an emotionally and physically demanding process that women would not undertake lightly."). Of course, hard-line anti-abortion advocates do not find any of the arguments in favor of RU-486 compelling.

184. Notice requirements also appear to increase the health risks of abortion to women. See Council Report, *supra* note 180, at 3237.

185. See Ruth Colker, *Feminist Consciousness and the State: A Basis for Cautious Optimism* (Review of *Toward a Feminist Theory of the State* by Catharine A. MacKinnon), 90 COLUM. L. REV. 1146, 1167 (1990) (noting that "[t]wenty-four percent of the women who terminate their pregnancies through abortion are teenagers. Thirty-three percent have family incomes under \$11,000."); see also Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 683 (1986) (explaining that young women are more likely to seek later term abortions because of irregular menstrual cycles that make it more difficult to detect pregnancy, denial of their pregnancy until it cannot be ignored, and fear of their parents' reactions); Sara Ruddick, *Procreative Choice for Adolescent Women*, in *THE POLITICS OF PREGNANCY* 126, 134-38 (Annette Lawson & Deborah L. Rhode eds., 1993) (describing what she calls "education for choice").

expected to have if born.¹⁸⁶ Such considerations would include the extent to which the state promotes the welfare of pregnant women and their children.

How, one might ask, does trusting women to make abortion decisions constitute concern for intrauterine life? It acknowledges that sometimes the life circumstances surrounding a given pregnancy are such that to carry the intrauterine life to term would have a deleterious effect on that life, the life of the pregnant woman, and perhaps other lives as well. As the director of the Women's Medical Center of Madison, Wisconsin, puts it:

Women know when we don't have the resources to be the mother we expect to be. Those resources may be lacking because of rape, incest, alcohol, youth, poverty or an abusive relationship, but the resulting despair is the same. Women have abortions because they are aware of the overwhelming responsibility of motherhood. Of course, those who choose to punish will have to continue escalating the penalty for abortion. Violence, or even the thought of an eternity in hell, is nothing compared to a woman's own despair over an unwanted pregnancy.¹⁸⁷

As we understand that women may give up a child for adoption for the child's own good, similarly the decision to abort and care for intrauterine life are not inconsistent.¹⁸⁸

CONCLUSION: CORPOREALITY MEETS DUALITY

The abortion decision, like other mothering decisions, occurs within a framework of circumstances that the pregnant woman confronts. Far from a *de facto* devaluation of life, the abortion decision can be life-affirming in itself, by both acknowledging the importance of the woman's life and intrauterine life, and by recognizing the imperfection of the social contexts into which children are born.

By contrast, abortion law centers around notions of rights, boundaries, and autonomy in the liberal sense of the individual citizen able to structure his decisionmaking free of state coercion. The underlying supposition of this view of abortion is that women's bodily integrity can be violated and that the state needs to mediate between intrauterine life and mother, between mother and womb.

186. These concerns also would include both social and medical issues — for example, the intrauterine life's genetic make-up, ranging from diagnosis of Down's Syndrome to Tay Sachs, and whether it had been exposed to toxins in utero such as alcohol or drugs. See also DAVIS, *supra* note 27, at 204-05 (describing the social conditions contributing to Black women's "reluctant" decisions to abort).

187. Karlin, *supra* note 145, at 32.

188. See MacKinnon, *supra* note 154, at 1313 ("Many women have abortions as a desperate act of love for their unborn children.").

Notionally, women's wombs and their contents can be abstracted from women themselves, and women's decisionmaking about the contents of their own bodies entails a conflict of rights. The way the law frames these decisions pays no attention to the subjective realities of mothering decisions, and the law fails to see the body that surrounds the intrauterine life, thereby both erasing the maternal and reducing women to it. The law is unable to "see" corporeal materiality — unable to account for how bodies, particularly female bodies, matter.

The political and legal constructions that pit women's self-interest, and assert that this interest must be a unified and fixed one, against a concern for "fetal life" fundamentally misconstrue the relationships of women to their own bodies and to intrauterine life. By envisioning women as uniform containers that may be emptied at will, the law ignores and perhaps destroys any concept of women's bodily integrity, nullifies the role of the mother, and at the same time, paradoxically, establishes women's bodies as always maternal. Neither the law, as a fundamental system of symbolization, and as a real and inflexible structure of constraints and requirements, nor the fact that the law cannot serve a "neutral" role vis-à-vis women and their relationship with procreativity can be ignored. Women's right to bodily integrity must be protected, and women's own multiple understandings of intrauterine life must serve as the anchor for the interaction of law and their procreativity. The meaning that women ascribe to their abortions, to their mothering decisions, and to intrauterine life is crucial to this legal process. Any legal construction that keeps women from making these decisions will reaffirm procreativity as the object of male domination. A reconceived right to abortion would be transformative because it insists that women define how mothering matters to them and because this right would be situated within a framework that asserts the primacy of both the liberty to have children and not to have them. This process would be a revolutionary task for a legal system that seeks to choose between stories, to look for *the* correct version of events, to ignore multiple accounts of experiences and to abide by only one *mens rea*.¹⁸⁹ Law is thus of necessity torn between its need for what it interprets to be certainty and its regulation of

189. I discuss this issue in greater detail in Julia E. Hanigsberg, *An Essay on The Piano, Law, and the Search for Women's Desire*, 3 MICH. J. GENDER & L. (forthcoming 1995).

human subjectivities in their necessarily multiple and mobile complexity.¹⁹⁰

The law must also face the fact that women have changing bodies — the fact that (most) women's bodies can become pregnant. The law is ambivalent about motherhood and discomforted by the state of pregnancy, the fact of intrauterine life, and the complexity of its relationship to the pregnant woman. A law torn between protecting the mother or the intrauterine life sees in the primacy of rights no possibility of the immediacy of interdependence or the paradox of duality within unity. Whatever procreative decision a woman makes in such a legal regime presupposes a denial of her agency over her bodily integrity and a usurpation of the meaning of intrauterine life from her experiences. The body becomes colonized by such state regulation; it becomes a place on a map that has been redrawn on many occasions, in many cultures, to signify the boundaries of gender and the imprimatur of those empowered to seal off one territory from another. By reconceptualizing the abortion decision within the context of mothering decisions, feminists can begin to examine the meaning of intrauterine life without falling into the trap of forgetting about women.

For the more than two decades since *Roe*, the pro-choice movement has dodged the question of the meaning of intrauterine life. The right to legal, safe, and accessible abortion is still at risk. Both personally and politically the time has come to articulate a feminist interpretation of the abortion issue that is explicit about intrauterine life, not to forge compromise, but to enrich the discussion of procreativity per se.

190. See KATHY E. FERGUSON, *THE MAN QUESTION: VISIONS OF SUBJECTIVITY IN FEMINIST THEORY* 155-83 (1993).