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The James McCormick Mitchell Lecture

Looking Toward the Future: Feminism and Reproductive Technologies

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BARBARA KATZ ROTHMAN,
BARBARA OMOLADE—CONVERSANTS*

I. MORNING SESSION: THE TECHNOLOGY

ISABEL MARCUS: We have arranged a program with a number of conversants so that you can hear different perspectives on an extremely complicated set of issues which demand careful, thoughtful consideration. Our goal is to explore the impact and implications of alternative reproductive technologies for feminism and for feminists. We have invited Professor Ruth Hubbard, an internationally known authority in this area and a woman of great social conscience, from Harvard University's Department of Biology. After Professor Hubbard's presentation, she will join in a morning conversation with Barbara Omolade, of the Center for Worker Education at the City University of New York, and Professor Barbara Katz Rothman, also from the City University of New York. They will discuss the social, cultural, and economic contexts in which alternative reproductive technologies are embedded.

After lunch we shall focus on the legal issues posed by the new reproductive technologies. That conversation will be shared by Professor Rhonda Copelon of the City University of New York Law School at Queens College, myself, Isabel Marcus from SUNY-Buffalo Law School, the morning's conversants, and all of you.

Ruth Hubbard: I have been asked to explain the technologies that

* This Article is an edited transcript of the discussion held on March 17, 1987 at the Law School of the State University of New York at Buffalo as part of the James McCormick Mitchell Lecture Series.

underlie the legal, political, and ethical issues that we will be talking about. Obviously the technical issues are embedded in societal decisions and beliefs, and it is impossible to separate them. I will try to explain the more technical aspects, but feel free to raise questions as they come up.

The place to start, even if we are just going to look at the technical issues, is to ask how we got here. Why are we trying to invent new ways of producing babies and why are we developing techniques to assess the health of fetuses before they are born? To understand that, we have to acknowledge several things. One is the medicalization of life in general. We use health and sickness as metaphors: healthy means good, as in "healthy relationships," and sick means bad, as in "a sick society."

More significantly, we look for individualized medical and technical solutions to social problems. The inability to generate or conceive or gestate our own biological children could be tackled socially by expanding the concept of family—the people who are considered grandparents, parents, uncles, and so on. Instead, we insist on a narrow definition of family that doesn't reflect most people's experience. Family is one mother, one father, and one or more children. With present divorce and custody arrangements and single parent families, many and perhaps most children's families consist of a mother and her partner or partners and their children, a father and his partner or partners and children, and lots of grandparents. We also have precedents in adoption, and now in open adoption. Society's treatment of adoption is interesting in this regard because it has tried to become more open and tolerant of less conventional arrangements. But when it comes to the new reproductive technologies and arrangements, in which a child can have five potential parents—a sperm donor, an egg donor, the woman who gestates, and two social parents—we insist that only two of them can be real parents, and the others are . . . ? We don't know what to call them, but they are not parents. So that is a peculiar contradiction.

The other thing we need to think about carefully is the individualistic concept and language of rights which we have perpetuated in the civil rights and women's rights movements. Our legal structure forces us to talk about rights in individual terms, and so lays the groundwork for justifying some of the new reproductive technologies. It is this structure which leads to statements like: "Every couple (or every woman) has a right to have a child"; "Every couple (or woman) has a right to a healthy child"; and "Every child has a right to be born healthy," which by a peculiar sleight of hand gets transmuted into "A child that is not going to be healthy has no right to born." So we suddenly have these rights to

reproductive technologies, both technologies to help a fertile couple have children and technologies for the prenatal diagnosis of disabilities and diseases.

First, let's think about the new technologies for producing children. Presumably the reason for them is that men, women, or couples find they cannot generate or gestate children. Some say the rate of infertility among both men and women has been increasing, although there is disagreement about this, as well as about the proper criteria of infertility. In any case, about one couple in six cannot conceive a child within one year of regular, unprotected intercourse. This number is relatively evenly divided between couples in which the man cannot produce an adequate amount of sperm or sufficiently mobile sperm, the woman either cannot produce eggs or gestate embryos, or both partners have problems.

Why is infertility increasing, if it is? There are various social reasons, including pollution and workplace hazards such as chemicals and radiation. Lots of women work in technical capacities, in hospitals, as beauticians, and in jobs that have reproductive hazards associated with them. So do many men. Then there is what has been called the sexual revolution. Various forms of contraception, specifically female contraception such as the pill and other hormone contraceptives, can result in temporary or permanent infertility. The IUD can, and often does, lead to infection, which in turn can either prevent conception or impair the ability of the uterus to carry an implant. And sexually transmitted diseases which can cause sterility, such as gonorrhea, chlamydia, and, again, pelvic inflammatory disease, have been increasing. We are also told that delayed childbearing plays a role. That is an ideologically loaded subject and there are differences of opinion on the extent to which this is correct. Obviously, if women delay child bearing beyond age forty or forty-five, there are going to be problems. But whether delayed childbearing beyond age thirty or thirty-five creates problems, that's more questionable. There are also social reasons, such as lesbian parenthood and gay parenthood, which lead some people to look to reproductive technologies to get an egg and sperm together.

There are four main technologies in use, two quite old and two new. The oldest is artificial insemination by donor, also called donor insemination by people who don't like the word artificial in there. Here the issues are mostly social and legal. While donor insemination is often performed in a medical setting, people can do it in the privacy of their own home. All that is required is that a man masturbate into a condom or some other container. His sperm is handed over to a woman who uses a turkey

baster or a syringe to get the sperm close to her cervix. Then she waits to see whether it takes. The technical issues mostly have to do with the medicalization of this process, such as differences in effectiveness of frozen and fresh sperm. Using frozen sperm makes it possible to screen, say, for AIDS. It also makes it easier to preserve the anonymity of the donor, and obviates the need for the donor to provide sperm at a specific time, when the woman is about to ovulate. Physicians and sperm banks tend to use frozen sperm for these reasons.

People who are interested in sex selection might want to use donor insemination. Since the sperm determines the sex of the child, availability of sperm in a test tube raises the possibility of sorting sperm that contain an X-chromosome and will therefore produce girls, and those that contain a Y-chromosome and will produce boys. People resort to donor insemination for sex selection or for social or medical reasons. Donor insemination is used to avoid diseases that are more prevalent in males. It is also used by some couples when the male partner has a low sperm count. Sperm can be concentrated by separating the ejaculum into early and later phases and using only the early ejaculum, which contains most of the sperm. This is called artificial insemination by husband, but increasingly it has been replaced by the more high technology procedure of *in vitro* fertilization which we will talk about in a moment.

The second technology, which clearly is not very technological, is what has been called surrogate motherhood. I will say very little about this now. I am sure you all have been hearing and reading about it and we can talk about it later. Basically, it involves donor insemination and the issues are economic and social and legal, having to do with pay to the woman and to the mediators and arrangers of this transaction, with the ability to contract, with custody issues, and so on.

So let's talk about the two more complicated techniques: *in vitro* fertilization and embryo flushing and transfer. I was very surprised about a year or year-and-a-half ago to have a legal expert in a panel such as this refer to *in vitro* as the simplest of all the procedures. He was, of course, speaking from a legal perspective. It is true that usually the donated egg is from the woman who expects to be the social mother and the donated sperm is from the man who expects to be the social father. Since we are talking about only one possible mother and father, we don't have to ask, "Who are the parents?" Beyond that simplicity, however, it is a technically complicated procedure, considerably more complex than the previous ones. Before the procedure, the woman who donates the egg has to undergo a host of tests. There is usually exploratory surgery to be sure

the ovaries are accessible. She is routinely treated with hormones, so-called fertility drugs, to know the time at which the ovary is going to release the eggs and to stimulate it to produce more than one egg. Nowadays it is considered better to fertilize several eggs and transfer several embryos into the uterus at the same time to improve the chances that one will implant. The process of implantation is the weakest link in the *in vitro* sequence.

What you have to consider, then, is a whole set of preliminary procedures that screen the woman to find out whether she is even a reasonable candidate for *in vitro* and screen the man to see if he has enough sperm. These screenings are followed by exploratory surgery and chemical intervention, after which comes the surgical procedure, called laparoscopy, by which the eggs are removed from the ovary. It has to be done under anesthesia which carries its own risks. Once the eggs and sperm have been collected, fertilization occurs in a carefully developed bacteria-free medium, in a small glass dish at the appropriate temperature.

At this point let me digress for a few moments and give you a quick rundown of early human embryology. One of the scientific advantages from this technology is that we have learned a lot more about early human embryology than we knew when the science depended on looking at early miscarriages, or at women who had to have operations or who died during early pregnancy. Immediately after fertilization, the fertilized egg is called a zygote. It begins to divide during the first few hours so that after three divisions you get an eight-cell embryo which they have begun to call a pre-embryo rather than an embryo. I think this novel term has been coined more for social than scientific reasons. The implication is: It is not yet human, not even an embryo; it is a pre-embryo. At the eight-cell stage, that is after the first three divisions, all the cells are not only genetically identical, but they are still equivalent and equi-potential. That means if the embryo breaks in half or if one removes a cell, each cell and each clump of cells can generate a complete embryo. Nothing has been determined yet about where the cell is going to end up or what kind of a cell (liver, kidney, heart) it is going to be. That is important because it opens possibilities for genetic screening.

Although this is not being done yet, it is perfectly possible to go to an eight-cell embryo, remove one of the cells, freeze the rest, screen that one cell, find out what genetic problems it has, and then either discard the rest of the embryo if the future parents don't like the screening results or do genetic engineering, so-called gene therapy, and reimplant it. This

would be the most logical place to do genetic engineering. It is not technically feasible yet, but it is certainly a possibility and a likely technical development about which we should be making social and legal decisions now. Changes made at this stage would manifest themselves not only in that individual but would be passed on to his or her offspring.

By about two sets of divisions later, at about the thirty-two-cell stage, the pre-embryo begins to differentiate. Until this stage, there is essentially no net growth. The embryo is about the same size as the fertilized egg was. As the cells have been dividing, they have gotten smaller. From here on, the cells not only divide but they begin to differentiate and develop into the different kinds of tissues and organs in the body. Around this time or shortly after, in the natural process of fertilization, the embryo would reach the uterus and begin to implant. This would be several days down the road from *in vitro* fertilization. By the time the embryo implants, there is a clear distinction between its outer and inner layer, or the inner embryo. The outer layer goes through the first and most comprehensive differentiation to establish communication between the embryo and the pregnant woman's uterine lining, so the exchange of nutrients and wastes can begin between the embryo and the mother. In the ordinary course of events, sometime early during the second week after fertilization, the embryo becomes established within the uterine wall. The inner mass, which then becomes the embryo proper, begins to differentiate, first into two layers and then into three. That is really the first point where you can be sure that this is going to develop into a single individual rather than identical twins, because different cells have begun to take on different destinies, so to speak. They can still substitute for each other and there is much more flexibility at these early stages then there will be later on.

In Britain, it is permissible to let embryos develop *in vitro* up to this stage. The same limit has been suggested by the Fertility Society in this country. After fourteen days the cells are what is called determined. The growing individual is called an embryo rather than a pre-embryo. Beyond this point it should not be experimented on.

In *in vitro* fertilization the embryo is introduced into the uterus much earlier than this, around the six- or eight-cell stage. This is done without anesthesia. It is essentially the opposite of an abortion and relatively painless. A rather thin tube that contains the drop of fluid with the early embryo (usually three embryos) is inserted through the cervix. It is important not to dilate the cervix since you want it to retain that drop of fluid and the embryo.

Most of the failures of *in vitro* happen around implantation. It is generally assumed that in the usual, normal pregnancy, of three or four embryos that make it into the uterus, only one actually implants and develops. Most do not. In *in vitro* fertilization, the best that has been done is about a one in five chance of implanting. But that does not mean that all of these will lead to successful outcomes. That is important to bear in mind because people who inquire about the success rate at a lot of *in vitro* clinics are told that it is twenty percent—one in five—which they take to mean one chance in five of having a baby. That is not true. There may be one chance in five of the embryo implanting, but there are lots of losses beyond that. The successful outcome rate varies enormously among the centers that do the procedure. In Britain, there are eight clinics altogether. One, Steptoe's and Edwards', has had most of the successful fertilizations; the others have much lower success rates. Interestingly enough, in Britain as of 1985 there had been about 200 babies born out of eight clinics; in this country by mid-1985 something on the order of 180 babies had been born out of 108 clinics. Here, too, a handful of clinics accounts for most births. There are many clinics that have not produced any babies, but that advertise success rates based on the number of embryos that implant, sometimes only for hours or days. There are also quite a number of multiple births, twins or even triplets, because, as I mentioned before, the chances of success go up if physicians implant up to three embryos. If they implant more, chances begin to go down again. If multiple pregnancies occur they get counted as separate babies, so it is important to be aware that marketing strategies are concealed in the data.

The other thing to be clear about is the result of having private organizations develop reproductive technology. If private clinics are going to offer this complex technology under a capitalist, for-profit system, they are going to expand the market for it. Initially, *in vitro* fertilization was promoted for a rather small number of possible clients: women with intact ovaries and an intact uterus who lacked fallopian tubes, or women whose fallopian tubes were sealed off. Now it is also being promoted for the partners of men with low sperm counts (because it is easier to control fertilization in a dish if there are fewer than the usual number of sperm) and for couples whose infertility is of unknown origin. If *in vitro* fertilization becomes an accepted way of doing genetic screening, then the door is open to promoting it for whoever wants it and can pay for it.

The fourth technology I mentioned is embryo flushing and transfer, which is used much less than *in vitro* fertilization. Embryo flushing is

being developed entirely in private hands, for profit. It is a standard agricultural practice used for cattle and other farm animals. A few days after artificial insemination, the embryo is flushed out through the cervix. That embryo can be frozen and stored for later transfer, or transferred directly to the gestating cow. Or woman. The medical reasons for doing this with people would be, say, if a woman cannot produce eggs and perhaps does not have intact fallopian tubes but has an intact uterus, or she can produce eggs but cannot gestate an embryo. In either case, you can get donation of the embryo, that is, a transfer of the embryo from the woman who has eggs to the woman who can gestate. The point is that the gestating woman is different from the woman who provides the egg. The health risks have to do with the repeated lavage or flushing of the uterus to collect the embryo, which carries with it discomfort and the risk of infection. Since the embryo cannot always be flushed out, the woman who planned to donate her egg to a woman who was going to gestate the baby and be its social mother may find herself pregnant and then have to decide whether to carry the baby to term or have an abortion.

All four of these techniques are costly and, therefore, raise class and racial issues. Donor insemination is the cheapest, although its expense depends on whether one uses a medicalized form or does it privately. The Oakland Feminist Health Center, which uses frozen sperm, charges something like $1,500 for the initial work up and access to sperm and then $150 per attempt at insemination. That is pretty expensive if it takes an average of five or six tries. Surrogacy costs around $10,000 for the woman who is going to gestate the baby and another $30,000 or so for the broker and other fees, plus the expense of the pregnancy and birth. *In vitro*, which is also very expensive, costs something on the order of $4,000 per cycle. That is just for the work up and the initial procedure, and does not include the pregnancy and birth. This is often done by caesarean, which is more expensive and riskier for the woman than vaginal birth. Caesareans are used because an *in vitro* pregnancies and many of the other pregnancies that result from special fertility procedures are perceived as "precious" pregnancies. Physicians in general try to have the most control they can of a precious pregnancy. Since they tend to think that they have better control of the birth process by doing a caesarean, that's what they prefer to do.

Another issue to consider is that, although many of these procedures are still experimental, the people who participate are expected to pay. The procedures do not follow experimental protocols and are not considered studies, where people who enroll do not have to pay. Class

and race bias is inevitable not only because of the expense, but because infertility rates are higher among poor people and especially among people of color because of reproductive hazards at work and because the incidence of disease, including venereal disease, is higher than among affluent people. The techniques are clearly being developed for middle and upper middle class people, for those who can pay. That is especially true in this country, the only industrialized country besides South Africa that does not have some form of national health insurance which pays for and monitors medical procedures.

Finally, a few words about prenatal tests. Here again I will stress the more technical issues and leave questions about why these tests are being developed for later. I am sure you are aware that more and more tests are coming on the market. They fall into several categories. The least invasive and painful, I suppose, is ultrasound imaging. Its risks are still being debated. All we can tell at this point is that there do not seem to be ill consequences that are noticeable at birth or in early childhood. Unfortunately, studies have only begun on long-term effects. Since the method is already in widespread use, it is difficult to say just what will happen if, in ten or fifteen or twenty years, longitudinal studies show (as they did with x-rays) that health problems are associated with exposure to ultrasound.

The next least invasive procedures are blood tests. The one that is most generally being done and advocated is the maternal serum alpha fetoprotein (MSAFP) test to detect neural tube defects. These are problems in the closure of the spinal cord. Because this test is getting to be so widespread, I want to concentrate on it to illustrate the problems.

But first, let me explain about two other sets of procedures that are more invasive. One is chorionic villus sampling (CVS) which is a way of removing fetal cells for testing early in the pregnancy, during the eighth to tenth week. In CVS, a small amount of the outer layer which the embryo develops to get in contact with the uterus is withdrawn through the cervix. The other procedure is amniocentesis, which also samples embryonic cells, but can only be done after the sixteenth to eighteenth week, during the second trimester. Both chorionic villus sampling and amniocentesis make it possible to diagnose a number of genetic or developmental problems in the fetus. This allows the woman, or couple, the decision to abort if the fetus has a health problem with which they feel they cannot cope, or gives them time to collect information and resources to be ready for the baby when it is born.

Let me now say a few words about maternal serum alpha fetoprotein

screening because this test is widely advocated for all pregnant women, not just for specific women who might want it because of their health histories. California has now instituted a program whereby every pregnant woman must be offered the test and sign either a consent or a refusal form during the fourteenth or fifteenth week of her pregnancy, when this test is usually administered.[1] I choose this test because it illustrates some of the problems with screening. For one thing, neural tube defects vary in severity from fatal or extremely disabling to very mild. A lot of people walk around with mild forms of spina bifada without most of us being aware that they have any disability. At the other extreme is anencephaly, in which the fetus lacks a brain and dies *in utero* or the baby dies shortly after it is born. The MSAFP test gives no information about the degree of the disability, merely that there is one. How can one make rational decisions on the basis of this information? Neural tube defects are not genetic and nobody really knows why they occur, but their incidence varies among different parts of the country and among different countries. In California, where the test is now offered to every pregnant woman, the incidence is about one in one thousand births. It is fairly rare by comparison with other health problems that a lot of women, particularly poorer women, have to deal with. So one question is, how much time a health care provider should put into diagnosing a relatively rare disease in the face of other, much more pressing, health problems.

The rate of positives on the MSAFP test is five percent, meaning fifty per thousand. With an actual incidence of one per thousand, that means that on a first test forty-nine people will get a positive reading who in fact are not carrying a fetus with a neural tube defect at all. They will then have to go through further tests, possibly including amniocentesis, to figure out whether the fetus they are carrying actually has a neural tube defect. This takes weeks and, of course, is stressful. One of the things that troubles me about this is that the stress a pregnant woman experiences is communicated to her fetus, as is everything that affects her hormones, blood pressure, and state of well being. But this is usually not considered when assessing risks. The reason for the very high rate of wrong diagnoses is because alpha fetoprotein levels in the pregnant woman's blood change in the course of pregnancy. Therefore, if the dating of the pregnancy is off by a week or two, which it can easily be, or if the woman is carrying more than one fetus, that will throw the value off.

1. *See* CAL. HEALTH & SAFETY CODE § 289.7 (Deering 1988).

There can also be technical errors and differences in standards used by different laboratories.

For this procedure, too, the market is being expanded. Physicians have begun to suggest that MSAFP screening detects not only neural tube defects, but also Down's Syndrome. Elevated levels indicate a neural tube defect; low levels indicate Down's. But the decision of what is normal, low, and high is somewhat arbitrary. It is based on a distribution curve for a color test and different laboratories draw the curves differently and differ in their interpretation of what is normal, high, and low, so there is considerable ambiguity in test results. Yet, when a woman is told she may be carrying a fetus with a neural tube defect or Down's Syndrome, it is a serious matter for her.

For all these tests, we need to ask why we want to know in the first place. Physicians act as though the information we can get is a great deal more rigorous and certain than it is, and that the decisions concerning what to do about it are a lot clearer than they really are. This fosters the illusion that we can make pregnancy a great deal more predictable, and that it would benefit us if we could. It also ignores and diverts attention from the fact that, in this country, the main reason babies are born with disabilities and illnesses, or even die, is poverty and not inherited defects. As with the infertility treatments, these tests are being developed for middle and upper class women and not for the women and infants at greater risk.

Barbara Katz Rothman: Ruth has been putting this in context issue by issue. I would like to look at the development of a range of technologies and put what is happening in the context of our ideology. Motherhood is becoming a media staple these days. We hear about drug addicted mothers, mothers who are very young (twelve, thirteen, fourteen years old), mothers who are considerably older, the so-called late childbearing mothers, abusive mothers, infertile would-be mothers, and so-called surrogate mothers. Anybody who reads the newspaper would conclude that motherhood is in some kind of cultural turmoil. There has been an ongoing attempt, a feminist attempt, to deal with the changing experience of motherhood.

In these truly troubled times I think there's a pattern to what is happening. Babies and children, or some babies and some children, are becoming increasingly precious, while motherhood is becoming increasingly less precious. Motherhood is becoming devalued or proletarianized. Biological motherhood, as well as social nurturing motherhood, is being seen as cheap labor. This is most obvious with the surrogate mother.

Surrogacy entails the notion that one can rent a womb and can affix an arbitrary price tag on pregnancy, often $10,000. This price has stayed fixed for the past decade. While the cost of everything else has risen, the cost of surrogacy stays the same. This is as clear a case of devaluation as I've ever seen, spelled out in dollars and cents. The cost of the brokers has increased. It used to cost approximately $20,000 to purchase a baby through surrogacy contracts. It now costs approximately $30,000.

Not only are we devaluing motherhood in a very clear, economically measurable way, we are also looking at motherhood as a production process, as cheap labor, as work, and we are increasingly applying the standards of work to motherhood. When I first started to look at prenatal diagnosis, genetic counseling, and the whole phenomenon of wrongful life suits, I saw developments leading to treating the fetus as a commodity. My friend and colleague Rosalyn Weinman Schram helped me phrase it. Genetic counseling is serving the purpose of quality control, and wrongful life suits are a variety of product liability litigation. Motherhood is now seen as a work process, babies as a product, and we are beginning to see some quality control of the product. We are beginning to think of the baby as a purchasable and perfectable commodity. We are beginning to put different price tags on different products.

The pricing down of motherhood services goes along with the development of work standards. The notion arises that pregnant women have to adhere to certain work protocols, such as not drinking during pregnancy. More dramatically, we have the incredible, bizarre story of charges brought against a San Diego mother for not having called her doctor early enough in labor and having sex with her husband during the pregnancy.[2] We have the development of court-ordered caesarean sections, with the juvenile court taking custody of the fetus and ordering the surgery for the benefit of the fetus.[3] I feel like Alice in Wonderland at the Mad Hatter's tea party, seeing an attorney represent the fetus and a separate attorney represent the mother, when they are one person on the bed. We have the beginning of the language of fetal abuse developing out of the concept of child abuse. We are looking at such things as warnings in bars regarding drinking during pregnancy. Absolutely related to these phenomona are Baby Doe squads. They enter after pregnancy, but often what you are looking at is an extrauterine fetus, that is a very very early premature fetus, of which the court can take custody.[4]

2. People v. Stewart, M508197 (Mun. Ct., San Diego Cty. 1986).

3. Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981).

4. Annotation, *Power of Court or Other Public Agency to Order Medical Treatment over Parental*

Mothers are increasingly not trusted. It has been a long time since anyone has trusted mothers, but the working philosophy used to be that mothers had their babies' best interests at heart. Mothers might not have been intelligent enough to figure things out. We needed Dr. Spock to tell us how to take care of our babies. But the notion was that we basically wanted to take care of our babies, and just needed some nice firm assurance how to do it. Now the culture suggests that we don't necessarily want to take care of the babies, that we have to be watched because we really are selfish. Selfish is replacing selfless in the current ideology of motherhood in America.

In the past we were treated to images conveying the message that mothers protected babies at all costs and under all circumstances. We became superhuman in our abilities to save our children. The current image is starkly different. Doctors have the best interest of babies at heart; the state has the best interest of babies at heart; lawyers have the best interest of babies at heart. The people in America who absolutely cannot be trusted to have babies' interests at heart are mothers. Mothers may drink or smoke or do other dangerous things. They don't really care about babies the way doctors and lawyers and other responsible people do. We have a shifting of imagery from the classic stories of the 1950s in which doctors advise a mother with a damaged baby to institutionalize it, abandon it, and the mother says, "Never, not my baby!" and goes from doctor to doctor fighting the world to make her baby a happy person. In the new story, the baby has a missing toe, the mother doesn't want it, and the state has to save it from this evil mother who abandons it.

Some people think that it is just a backlash to the women's movement. If we have made noises about looking out for our own interests then, clearly, we are no longer as selfless as we used to be. Therefore, we can't be trusted to look out for our babies' interests. I'm not saying that there has been any real change in maternal protectiveness. We haven't

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Religious Objections for Child Whose Life Is Not Immediately Endangered, 52 A.L.R.3d 1118 (1980); Annotation, *Power of Court or Other Public Agency to Order Medical Treatment over Parental Religious Objections Not Based on Religious Grounds,* 97 A.L.R.3d 421 (1980). *But see* Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) (striking down regulations by the Department of Health and Human Services which required hospitals to provide health care to mentally or physically handicapped infants when, in the judgment of the Department, the health care was necessary to protect the child's life, parental consent notwithstanding); *see also In Re* Weber v. Stony Brook Hosp., 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 62 (1983), *cert. denied,* 464 U.S. 1026 (1983) (upholding dismissal of action seeking judicial authorization for surgery on infant with spina bifida, where plaintiff was unrelated to infant and parents had decided against surgery).

gotten any worse about watching out for our babies. We just aren't trusted anymore.

One of the more bizarre examples of this shift in ideology was presented at a meeting of doctors and lawyers. An ethicist talked about a fetal surgery program in which they could do surgery that would help babies. Of course, to do surgery on a fetus you have to slice right through its mother. So the ethicist thought they would need an advocate to represent the fetus, because the fetus' interests were seen to be in conflict with the mother's interest. She would not want to be sliced into, but the fetus needed the surgery. The ethicist said that he found that doctors actually were talking the mothers out of the surgery. Mothers would come begging and the doctors would say, "There is a really small chance of success. You have a young child at home. Do you really want to risk yourself in this kind of major surgery? This baby is probably going to die anyway." The mothers would say, "If there is a chance in a million, please save my baby." The ethicist said he was really surprised to discover that the mothers actually turned out to be advocates for the fetus. And I thought, give this man ten more minutes and he will discover apple pie.

Our society's approach to reproduction grows out of a patriarchal analysis that seeds are precious and the genetic tie between generations is a very important one. In this analysis, mothers are essentially fungible. You can plant the seeds here. You can plant the seeds there. It doesn't make a lot of difference. They grow a baby. From a woman's point of view, you could get pregnant with this man or you could get pregnant with that man. You still get a big belly. Your breasts still flow with milk. You will produce a baby. You may prefer one man's seed to another, but the essence of creating a baby is not going to be which seed gets planted. From the man's perspective, the only connection is the seed, that genetic tie, not where it is planted. From this patriarchal perspective, the crucial consideration is control of the environment. So now we can make substitutions in the environment for the seed. We can finish the last few months of pregnancy in an incubator or even in a dead mother. We can substitute a glass dish for the nurturing environment of a womb because we don't need the mother. What we have to do is take this seed and gestate it somehow, somewhere, so this particular seed—not that one or that one—so this particular, precious seed, grows into a baby.

Not all seeds are equally precious. There are two levels on which this ranking of seeds happens: a macro and a micro level. We look at reproduction with an agricultural approach, to decide which seeds we

will cultivate, which we will develop and treat as precious, and which are expendable. On the macro level, which includes racism, we say we have plenty of some kinds of babies. We want to do birth control with that population. Some years ago I accompanied a student doing research on infertility to a major infertility center. We asked, what kinds of payment do you accept? The staff told us that people who don't have private insurance or the money for the treatment would not want to get pregnant. On the micro level, there is another kind of eugenics program: genetic screening. The seeds with an extra twenty-first chromosome, which will make people with Down's Syndrome, are not precious seeds. We don't want those. Some people fear the seeds that don't have a Y-chromosome, female seeds, are not going to be as precious.

Barbara Omolade: In my analysis of the current urgency around mechanical and artificial reproduction, three concepts underlie the social implications of the new reproductive technologies: (1) the continuation and expansion of the racial patriarchy in the United States; (2) the universal urgency to reproduce biologically; and (3) the technological discrepancy between the social and biological reproduction of white people and people of color with its attendant allocation of resources for different groups.

All the issues around reproduction are tied in with power, and with how powerful men function and organize our society. White women and women of color each occupy a separate but interconnected place in the social hierarchy. They are usually unaware of the comprehensive organization of social control. One week, Mary Beth Whitehead is described as not being a capable mother, in part because she demanded to mother the child she was hired to birth. The next week, teenage mothers, especially black teenage mothers, are characterized as inept, incapable, and confused, in part because they demand to have children although they are young. In spite of differences between the experiences of these white and black mothers, both are attacked in the media as unfit. This attack is part of a general attack on motherhood which has been going on since the beginning of the country.

The first concept is the development of the racial patriarchy: a group of men who use racism and racial violence to control men and women of color, and to usurp the traditional patriarchal relationships between men and women. During the earliest stages of United States history, a numerical minority of white European men took political and economic control using military power. They were surrounded by nations of native Americans, indentured white labor, and African slave labor. The racial pa-

triarchs established a social order in which everyone had a carefully prescribed place: Africans were to become perpetual bonded cheap manual labor; whites were to be semi-free labor (wage earners, independent farmers, and merchants); and Native Americans were to be annihilated. That social order has been held in place by a combination of ideology, social law, and economic control.

The social order that racial patriarchs established has always contained a sexual and sexist component centered around the control of all women's sexuality and reproduction. The first laws of the country were organized around the children of indentured and slave mothers. A 1662 Virginia statute stipulated that "all offspring follow the condition of the mother in the event of a white man getting a Negro with child."[5] The child of a slave mother would be a slave, irrespective of its father. The traditional patriarchal relationship between men and women was broken.

Usually the patriarch in a society is the father, husband, brother, or son of a woman. These men protect, take care of, subjugate, and dominate women, but these are also men with whom women have a primary emotional, biological, and social attachment. The racial patriarchy fosters another set of agendas, especially for women of color. The racial patriarchy has no primary relationship with women of color and, therefore, no interest in protecting women of color. It has only an interest in exploiting these women and their men. On the other hand, the white women of the racial patriarch are held in place by both traditional patriarchal power and by the seeming invincibility of men who exercise control over other men.

The earliest examples of manipulating women's reproductive capacities began in this country over two hundred years ago with slave mothering. What happened to the fetus and infant of a slave mother? Who owned it? If the mother claimed the child because she loved it, that claim was invalid because the child wouldn't be profitable to the racial patriarch who owned it. If a black man fathered the child, he couldn't claim patriarchal protection for that child or his woman because he had little patriarchal power of his own.

With the advent of technologies which can control and manage biological reproduction, the racial patriarchy is able to extend and expand its power over women. The technologies are an expansion of its direct

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5. 2 W. HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 170 (1823); *see also* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD 40-47 (1978).

control over white middle and lower class women's reproductive choices, with ominous implications for all women. Women may say, "I want to be a surrogate mother, because I love children and I want to help these infertile couples," but they do not see themselves caught in a more comprehensive plan.

The second aspect of my analysis is the universal urgency to reproduce. All peoples have a racial urgency to reproduce themselves. Every patriarch wants to reproduce the son. Every woman in every culture gets messages to become a mother and thereby support the desires of the patriarch to reproduce. All cultures have tremendous penalties for women who cannot mother. To be a woman is to mother. In most societies, women who can't have children are penalized and stigmatized. Women who are feminist still desire to mother, and feel lack and loss when they haven't become mothers.

Ironically, black women are stigmatized by the racial patriarchy because they have too many babies. But their own men want them to have their children—particularly their sons. There is a conflicting message to women of color. The racial patriarchy gives them one message and through social policies actively prevents women of color from taking care of their children properly. Our men say: "Reproduce babies for the nation."

The urgency to reproduce is intense and often irrational because it is based solely on biological parenting. The social aspects of parenting are often ignored. Adoption, a means of becoming social parents, is viewed as a last resort of the desperate, rather than a socially acceptable expansion of parenting.

The current urgency of the racial patriarch to reproduce is connected to demographics and power. The birth rate of white people is declining compared to the birth rates of people of color. White people are a racial minority. Only a minority of that minority controls the world's resources. There are about four billion people in the world. China has a billion people, about one-fourth of the world's population. Over two-thirds of the world's people live on the continents of Africa and Asia; 10.3% of the world's population lives in Africa. In the developed regions, the population will grow at a 0.6% average rate until the year 2000; in the underdeveloped world, it will grow at a rate of 2.1%, three times faster. The racial patriarchs of today fear that there will not be enough white males to whom they can pass the reins of power. The reproductive choices of white women are critical to the biological reproduction of the racial patriarch. Thus, the women's movement, with its emphasis upon

reproductive choice and sexual freedom, threatens the very existence of the racial patriarchy and white people. The universal racial urgency to reproduce has been reinforced by the racial patriarchs' desire to control white women's reproductive freedom and choices.

In addition to demographics undermining the international power of white male rule, the women's movement and the civil rights movement began to seriously challenge that power in this country about twenty years ago. Underlying the social and political agendas of these movements were demands for increased domestic spending for housing, childcare, education, and health care, including abortion and prenatal care. Since the rise of conservatism, the agenda has been pushed back, stifled and contained, and replaced in part by an ideological and now biological drive to increase the numbers of traditional nuclear white middle class families, thereby enhancing the mass base of white male power.

The third concept I use in my analysis of reproductive technologies is the conflict between biological reproduction and social reproduction. The racial patriarch has placed biological reproduction at the top of the list and, of course, that biological reproduction is of healthy white children. At the same time, social reproduction of black and other children of color is placed at the very bottom of the list. This is a source of tremendous conflict. Resources are here, but children are starving over there, literally malnourished. The research findings on prenatal care for black women in Harlem are astounding. The prenatal death rates are comparable with those of an undeveloped country. Yet, Harlem and other communities exist in the middle of a highly developed country where scientific knowledge can be used to do anything in the lab, where the capacity to reproduce is daily being expanded. We have an imbalance which leads to fundamental conflicts about the direction of our society, especially the application of our scientific knowledge and technology. The imbalance is linked to the increased underdevelopment of people of color. Part of the increasing rate of unemployment of Hispanic and black men is due to a shift from production to service jobs. Poor single mothers cannot adequately care for their children because they lack adequate resources. Poverty and unemployment among men and women of color are directly related to social and political policies which undermine the development of the black working class. However, the underdevelopment of the black working class is tied directly to the reproduction and development of the white middle class through reproductive technologies.

Audience: You seem pretty negative about alternative technologies.

Do you see any value or virtue in these scientific methods which are available for couples who want to have children?

Omolade: The concept of infertility is a social expansion of a biological concept. As a social concept, it is linked with the patriarch's need to reproduce and our universal biological-social constructions around reproduction. The couple who desires to have a child to raise and parent has many sources of children available. They can have them biologically or they can adopt children. The focus has been to define the couple who cannot conceive a child as biologically infertile, and equate that with the inability to be parents.

The difficulty of adopting children reinforces the concept of infertility. If adoption were an open relationship between the social and biological parents administered by lawyers, doctors, and social workers who were concerned about the well being of all parents and children, then the patriarchal focus and construction of infertility would be eliminated. The concept of infertility must be decoded to deconstruct the patriarchal foothold and control of reproduction.

Rothman: I think you have to be cautious about victim-blaming. We are looking at the individual couple getting caught in a very personal way in this system. In fact, a white couple cannot get a black boarder baby from the New York City hospitals. The system has decided that it is better for a baby to learn to walk chained to a crib in Kings County than to live in my house. So to those who say, "I have extra space and love and room and would be glad to take on an extra child," we don't grant access. We have to be careful not to blame the victims and put all of our anger on the infertile people who feel caught in a system they didn't create either.

Omolade: But changing attitudes and practices surrounding adoption is a political decision which involves organizing for adoption, not for the expansion of technologies which only support the concept of infertility. It is a question of political choice and construction of a political response.

Hubbard: I think there is one other piece of this puzzle that has been mentioned, but that needs to be put out front. That is eugenics, our focus on genetic continuity and on good genes as opposed to bad genes. Eugenics was an arrogant, quasi-aristocratic British invention. It was spelled out by an upper class British gentleman, Francis Galton, a cousin of Charles Darwin. He noted that occupations like being a judge or government minister ran in families. Those, he noted, were the kinds of families of which you want more. Similarly, he pointed out that pauperism, alco-

holism, and prostitution ran in families. Society wants fewer of those people. This placing of social values into our genes was taken up in the United States with great enthusiasm. It fit the increasing nineteenth century class, ethnic, racial, and gender divisions. Eugenics encouraged the sense of need and urgency not just for white babies, but for good white babies. As a society, we don't want nonwhite babies, and we want technology to tell us which of the white babies will be good enough to be born.

Audience: At a certain point you can remove one of the embryos, do a little genetic tinkering, and either implant it or freeze it. But it is all the same person, all the cells have the same genetic material. If you identify the embryo as a good one, it can be implanted in a number of women.

Hubbard: That is cloning. It can't be done yet. Here, I think, the scientists are correct when they say, "Don't blame us." The technology is not the problem. We need to be absolutely sure that the society won't allow such a thing to become possible, not because it is technically impossible, but because we don't want it to happen. An amazing picture on the cover of *Science* magazine showed a field of white cows, and penned in a corner a bunch of brown cows. Over here was one white cow and then lots and lots of white cows. These white cows were the genetic offspring of the one white mother. But they were gestated in the brown mothers in the pen.

Omolade: There are black and white feminists who fear that the wombs of women of color will be used to carry fetuses fertilized *in vitro* for white women. I have a different position because I believe that white working class women are the designated wombs and surrogate mothers during this period. Many white and black feminists fail to recognize the calculating nature of the racial patriarchy and its plans for control over white working class women.

The design for controlling black women and black people is assuming another direction. During this era of desegregation, the racial patriarchy has promoted racism by describing and mystifying social policies as economically, not racially, motivated. The use of women of color as wombs would be viewed as racist and would sharpen the political consciousness of people of color regarding racism at a time when political consciousness is dulled. Moreover, racial practices in this country have been moving toward personal distancing between black and white. During slavery, black women had sexual and intimate relations with whites, but today both whites and blacks want to maintain distance.

Rothman: Events need to be put in the context of changing ideas

about motherhood. A baby in a woman's body is not necessarily hers; pregnancy doesn't make you a mother; pregnancy is not a relationship; it's just housing.

I was on the *Today* show recently with some doctor talking about transplanted embryos. He said that embryo transfers avoid any attachment or bonding between surrogate mothers and the baby. His notion was that the only relationship was a genetic relationship. Wet nursing provides another good example. We took milk, turned it into a commodity, and said nursing a baby is not a relationship with the baby. We can measure and test the quality of milk. Then we either buy the milk directly or factor the cost of milk into the cost of a slave. There is not a breast feeding relationship. There is a product we need. Eventually we can make this product from cows and we can bottle it. The social relationship between women and their children can be removed and substituted with the marketable commodity of milk. I think we now are doing the same thing with pregnancy by saying that you can take away the relationship and the sense of attachment.

In my work on prenatal diagnosis, I observed women being told not to establish a relationship with their fetus until they were told that the fetus was a good one. This is part of a changing ideology which claims that women are not connected to their babies, even the babies they choose to carry to term. This opens the way for using yet cheaper labor. Just walk on the streets and see who is pushing white babies in the park, who is pushing white old people in wheelchairs. I find it very hard to believe that those same people won't be carrying white babies in their bellies.

Audience: It seems that, because of your fear of abuse, you are throwing out a baby with the bathwater. I have an autistic son. I wouldn't want another one. I feel that if I had another child, I certainly would want to be prepared, or to know whether autism is a possibility.

Hubbard: I am glad you are saying this. If these resources are developed, they ought to be there for the people who need them. Now you will say you didn't expect to have an autistic son the first time, so you didn't know the technology would benefit you. That raises the question, does it really make sense to medicalize every single act of procreation and gestation in order to try to avoid the rare instance of an event such as the one you have experienced? That does not make sense. In fact, there is no way to test for autism *in utero*. That's true for most disabilities because most of them have complex origins that are different for different individuals. It's a mistake to expect quick and easy fixes.

Rothman: It isn't a technical problem. It is a social problem. The solution is not controlling the technology. The issue is controlling the society. We are not saying there are problems, so let's go bomb the labs. We are saying we need some social responses and social justice because, as technology gets more powerful, what an unjust society can do becomes more terrifying.

Omolade: I think that the social control not simply of technology, but of institutions, is very critical. Instead of our technology and institutions being controlled by those with narrow interests in profit, they need to be controlled by those who reflect and represent the broadest possible interests of our population: poor people, people of color, women, the handicapped, the elderly.

Most agree that technology should continue to sustain and improve the quality of people's lives. Reproductive technology is problematic because it raises so many issues of rights and social control, but at the very minimum, it must be optional. Today, pregnant women over forty years of age are virtually forced to have amniocentesis, even though many women such as myself were willing to risk the consequences of birthing a disabled child. We now have an abusive technology which is forced on people who may have different cultural values and attitudes. Women who have a different understanding than the medical profession of what they want to do with their bodies and the children that come out of their bodies are not listened to or respected. There is a medicalization of pregnancy and childbirth which undermines women's choices, cultures, and values. Poor women, especially those on Medicaid, often find that they and their children are victims of experimentation during pregnancy and childbirth. There must be limits and guidelines for genetic experimentation and the uses of reproductive technology because we live in a society with a long history of interference and manipulation of women's reproductive activity in the name of racism and sexism.

Hubbard: The economics of the situation mean that poor women, women of color, are the ones having very low birth weight babies who are at much greater risk for disabilities. Yet, prenatal technologies are being focused on the precious babies of the people who can pay to avoid what may be major, but what often are quite minor, disabilities compared to those happening to the babies of poor women. It would be easy to prevent many infants being born ill or disabled by feeding and caring for women before and during pregnancy. We know how to do it. We just don't.

Rothman: The belief that prenatal diagnosis is used only so that

wealthy people can have perfect babies is not accurate. These technologies are pushed on women who would be dependent upon public assistant for care of those children. I heard genetic counselors planning to lobby in Albany, saying the argument they used for opening more publicly funded genetic counseling centers is that every terminated sickle cell pregnancy saves the state $20,000 per year.

Audience: Traditionally our society divides between home caretaking and income making responsibilities. Do you think that the separation of women from motherhood and the changes in the relationship between mother and child are necessary for professional women to gain a proper place in the workplace? Perhaps some women see themselves needing a separation.

Omolade: There have always been surrogate mothers in this society. Slaveholders' wives were helped by black women. During most of the twentieth century, domestic workers have reared the children of professional women.

Audience: My point is that the same traditional line of segregation between home caretaking and income making is still continued. But women are now having a choice. Segregation in terms of sex may be somewhat breaking down.

Rothman: Exactly. One of the thrusts of the women's movement was to to make space for women who want to live like men. One of the thrusts in the development of the technology has been to reaffirm women's paternity rights, so that if Mary's seed grows to term in Susan's body, we will still put on the birth certificate the name of the seed parent, Mary, and not the gestator, Susan. There are birth certificates in America that have, under mother, the egg donor and not the woman who was pregnant. We act as if the genetic tie that men have is the most profound possible tie in reproduction, and that women's reproductive experience can be split between our seed and our gestation. In that sense it is our paternity rights or our seed rights that need to be maintained. We do this in the name of fairness, and like the Supreme Court ruling on pregnancy discrimination, say it's not discrimination against women because women who act like men don't face discrimination.[6] It is only women (or men) who want to act like women who face discrimination.

6. Geduldig v. Aiello, 417 U.S. 484 (1974). The Court held that a state insurance program which failed to provide health benefits for pregnant women was not in violation of the equal protection clause of the fourteenth amendment because "[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 496-97 n.20.

Audience: It is apparent that the development of these technologies makes possible the further, more explicit, commodification of gestation. Clearly, gestation occurred in an economic context as labor that was receiving limited compensation before the development of these technologies. What is your sense of how the relative social value of the work of gestation has changed?

Rothman: First, I don't see the technologies creating the ideology. The ideology promotes the development of certain kinds of technology. If we start with a different way of thinking, we would have clearly different solutions.

Consider the case of two people who are carriers for something dreadful, like Tay Sachs disease, which gives you six months of normal, delightful, cheerful development and then a very long period of dying. If both parents have the potential for Tay Sachs, these people desperately need prenatal diagnosis. I have interviewed women who have gone through a pregnancy, prenatal diagnosis, abortion, and absolutely horrendous grief, and then faced a second pregnancy. The question was, how could this couple have a healthy baby? The answer was, by prenatal diagnosis. I would have asked the question, how can this woman have a healthy baby, for this couple to raise as parents? My answer would be, artificial insemination. That answer is not often the one chosen. So the kind of ideology you have determines the way you phrase the question. How can this man and this woman make together, genetically, a baby that is theirs? This gives you one set of solutions and develops one kind of technology. The question, how can this couple have a baby socially, even with a biological pregnancy, and produce a baby that is theirs, gives you another option. As new technology develops, we will probably see egg donations for Tay Sachs. It will be his sperm with its Tay Sachs potential but not her egg. Egg donation rather than sperm donation is expensive, more physically dangerous, more painful, with a lower success rate, but his paternity will be maintained and her gestational tie will be maintained. It will be another alternative for a couple, but it comes from a certain kind of ideology. It is not the technology that creates the ideology; but the ideology clearly creates the technology.

We already have the notion that women bear babies for somebody: for the state, for men, for slave owners, for somebody. That idea was always there. Women were differentially rewarded depending on who wanted the baby and for what purpose. If you desperately wanted a lot of babies in a big hurry for cannon fodder, you increased the reward such as giving women more services. If you wanted a son for the throne, you

rewarded that woman royally. If you didn't want her to have any babies, you starved her. The rewards are dependent upon how badly you want that woman's baby out of her body.

Audience: I am interested in the immediate acceptance of the devaluation of motherhood. It seems that the media plays a large part in legitimizing the commodification of motherhood. Are there studies on the role of the media?

Rothman: I teach a class on motherhood at the CUNY Graduate Center. We look at magazines over the last thirty years to find articles on aspects of mothering. Something happened around 1974 in American magazines. Articles on bad mothering prior to 1974 focused on overprotection, on the smothering mother. The post-1974 articles are on abusive and abandoning mothers. I don't think we stopped smothering and started beating our children in 1974. But the image of where we were erring changed. I think the media helps to create these images. Media constructs reality in the very language it gives us to talk about these issues. The media language in the Baby M case, the phrase Baby M rather than Sarah, her mother's name for her, gives it away. The media has used such terms as natural fathers and surrogate mothers as well as the term surrogate parenthood—a term created to make the issue gender neutral.

Omolade: We must all be careful not to generalize about these issues. The particular focus of articles about mothering during the 1940s and '70s are the practices of white middle class mothers. Black and other mothers of color have been excluded from those popular magazines. During the late '30s and early '40s we begin to get the first scholarly studies of the black family and black people by mainstream white and black sociologists, although W.E.B. DuBois wrote one of the earliest studies on the black family at the turn of the century. During and after the civil rights movement, a whole literature began to develop, focusing on the culture of poverty analysis of black family life. One major point was the negative impact of black mothers on their children. Most black and white social scientists have assumed that, because black people are poor and were slaves, their parenting is pathological. But research organizations such as the Urban League have consistently documented the success of poor black families in raising children who are successful.

But the mass media and social science research continue to portray the black family in negative terms. Bill Moyers produced a television special, *The Vanishing Black Family*, which portrayed three families headed by women. The show was an attacking, negative, blaming of black women and their families and their personal choices. Social scien-

tists will continue to use those shows as a reference point for their research and not do the hard work of examining the lives of black women and men.

Audience: A further question that emerges is, what are the psychological consequences across generations of having this extraordinarily complicated relationship with your body? Much of this discussion revolves around motherhood as the battleground for the social construction of identity for women.

Rothman: Because the focus is on where the sperm will go, on genetics. Women's bodies are one place to grow sperm. Women become just one place where sperm can be grown.

Hubbard: In a medical journal article, the authors state that it is sometimes less safe to transport a fragile, sick newborn than to move the fetus *in situ*, which means to move the pregnant woman. In this construct, the mother is erased as a person and exists merely as the location of the vulnerable fetus.

Rothman: When we look at sonograms of fetuses, the image in our minds of women becomes empty space. We see fetuses floating. The fetus is there. It is real. The woman is the invisible environment.

Audience: Seeing a baby *in utero* is absolutely fantastic. For a while we see the fetus as fetus, but a time will come when fetus and mother will unite and we'll think of pregnant women.

Rothman: I'm not sure that's correct. This technology didn't land from Mars. Doctors had been hunting for a way to get mothers out of the way so that they could get to the fetus physically and visually without the barriers that the woman represented to them. Technology was made for the purpose. They looked for it. The technology serves to reify the ideology.

Audience: I wanted to get back to some of the class issues that we raised before. A naive economist's view of what has happened over the last fifty years might run like this. The workforce has opened up to women. Women have more opportunities to make money in the labor market. That means the opportunity costs of gestation and nurturing are higher. We should have pushed the economic reward for gestation and nurturing up. As women go into the workforce, fewer of them are available to fulfill men's imperative to reproduce themselves. Though the compensation should be higher rather than lower, that has not been happening.

Rothman: Opportunity for women increased in a race and class specific way, which meant that you could then continue to have cheap labor

by moving down. It is not that the opportunities for women increased, but rather that women are now bifurcated in their opportunities.

Audience: Are you saying that opportunities for women from high social class backgrounds have diversified and the compensation available to them for childrearing and childbearing has increased so that their babies have increased in value, but the total number of jobs and opportunities for employment hasn't increased? As opportunities for socially well-off women have increased, opportunities for socially not-very-well-off men have decreased. Their ability to compensate women for bearing their children is decreased, with the result that the social payoff for poor women in bearing children has decreased.

Rothman: Or if you want to take a more conspiratorial view of the whole thing, men use women. Men use women to have their children. But it has become very costly to use your wife for all purposes, so what you need are several surrogate wives: one wife to bring in a second income and to be a social asset, one wife to rear your children, and yet another to clean the bathroom. If the wife who is the social asset doesn't have a functioning uterus, then you need yet another temporary wife for childbearing. In a patriarchy, all these women, housekeepers, baby nurses, and women working in day care centers, are surrogate wives raising men's children, although women may not experience it in this manner.

Omolade: A multiplicity of surrogate wives has always served the racial patriarchy. That has been the social arrangement from the beginning. It is not men using women. It is a very specific group of men, who have state and economic power to control and command the organization of surrogate wives.

Audience: What are some of the ideological barriers to adoption?

Omolade: There is a supposed shortage of good babies. Adoption agencies have said that one is more likely to get a child of color, an older child, or a handicapped child. There are also prohibitions against adoption by older couples, single adults, gay and lesbian couples, and adults who differ racially and ethnically from the child. There is also the ideology of a good child, meaning a child of one's own, a child from the sperm of your married mate and from your own body, a child that looks like you.

It is not only marketing. All men want a child of their own to reflect their biological inheritance. Black and other men of color have great concerns about infertility. But infertility is thought to be a white middle class issue and that's where the concern is focused. Wealthy men have found a

way to resolve the infertility issue—financing reproductive technology. Black men often say their manhood is reflected in having a child. In fact, all cultures worldwide emphasize the connection between manhood and reproduction, between motherhood and birthing.

Hubbard: There is an interesting contradiction hidden in this too. There is evidence that genetic confusion among adoptees is very hard on them. The revolution in adoption with open adoptions, and being frank about genetic origins and social parentage, is a response. At the same time that one population is advocating openness, another population is talking about donor insemination and wanting to keep it anonymous. For example, the American Fertility Society still advises keeping the identity of sperm donors anonymous. Similarly, with so-called surrogate motherhood and the issues around Baby M, there is the question what she is going to be told about who is what. Although there is a lot of information about what people who have different genetic and social parents want to know about their origins, our society continues to insist that a child must have only two parents.

Audience: Do we know how people regard psychologically a father whose wife has been inseminated by another man, or the mother's response?

Hubbard: There is getting to be a literature on adoption, but there is very little interview material on children who result from artificial insemination. Because it usually has been kept secret, there is no population to study.

Omolade: We don't have the social capacities yet for dealing with these complex issues well, efficiently, and humanely. Notions of how you love children, how you take care of them, how you respond to their caring, are very underdeveloped in our society.

II. Afternoon Session: The Legal Issues

Isabel Marcus: This afternoon we will explore some of the legal implications of alternative reproductive technologies. Rhonda Copelon from the City University of New York Law School and I, Isabel Marcus from the SUNY-Buffalo Law faculty, will be joining our other conversants.

To establish a framework, it is important to review the contributions of the reproductive rights movement during the past fifteen years. The movement identified the separation of sex from reproduction as a significant development for the status of women. It focused on the right to be sexual as a human experience, independent from reproduction or family.

It articulated a vision of reordered relationships between women and men. It challenged the prevailing ideology of patriarchy which reinforces the existing sex-gender systems.

Rhonda Copelon: There is no question that one of the goals of the reproductive rights movement was to separate sex from reproduction to help liberate women's sexuality. Proponents of the criminalization of contraception like Anthony Comstock fully intended that women should engage in nonmarital, nonreproductive sex under a cloud of potential pregnancy. This included the risk of abusive, back alley abortions, Florence Crittenden homes for unwed mothers, societally coerced adoption, shotgun marriages, and the social stigma and legal disabilities of illegitimacy. Twentieth century women concerned with reproductive rights challenged the stereotype of female sexual passivity by claiming the right to express desire, to initiate sexual relationships, and to enjoy casual as well as serious relationships. This was a substantial shift from the nineteenth century feminist position which opposed contraception and advocated abstinence as a means of containing male and protecting female sexuality.

Agitation for legal abortion was begun by doctors facing criminal charges, family planners advocating control over childbearing, eugenicists complaining of overpopulation and disproportionate childbearing among the poor, and social justice advocates concerned with the toll of criminal abortion on poor women's lives and health. Although feminists like Catherine Roreback and Tom Emerson, who framed the *Griswold*[7] strategy, were involved in these mid-twentieth century efforts, it was not until the second wave of the feminist movement coalesced in the late 1960s that the necessity of reproductive control to women's ability to live full and healthy lives took center stage. The involvement of feminists transformed the opposition to criminal abortion from a medical-social reform effort into a human rights struggle. The recognition in *Roe v. Wade*[8] of the right to decide whether to bear a child is a significant accomplishment, but that right is qualified by deference to medical judgment, claims on behalf of the fetus, a libertarian insistence on individual private responsibility, and ultimately by the Court's manipulation of access to abortion through its refusal to require Medicaid funding.[9] We will return to the impact of these concerns on reproductive

7. Griswold v. Connecticut, 381 U.S. 479 (1965) (the first case to recognize a right of privacy extending to contraceptive use for married couples).

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

9. Harris v. McRae, 448 U.S. 297 (1980).

technologies.

A number of elements were essential to feminist advocacy. In the original slogan, "free abortion on demand," feminists challenged the subordination of women to law and medicine and demanded affirmative state support to guarantee universal access. Concepts such as "our bodies, our lives" embraced the challenge to the sexual double standard as well as to the traditional subservient role of women.

Although antagonism to women's sexual freedom is clearly the leitmotif of the attack on abortion, the reproductive rights argument for women's sexual freedom has taken a backseat to the family planning perspective. I believe this development is a consequence of feminist ambivalence about sexuality as well as the tendency to mainstream the abortion issue.

Marcus: I am of two minds regarding the impact of the contraception and abortion cases on the reordering of sexual relationships between women and men. Let's look at access to contraception first. On one hand, many women have clearly benefited from access to contraception. The shift in the birth rate reflects in part the availability of contraception, purchased by women for themselves and for male partners. The latest statistics, which admittedly may be influenced by the concern over AIDS and other genitally transmitted diseases, reveal that women purchase forty percent of all the condoms sold in the United States.

Whether women experience access to contraception as a way of reordering relationships with men is less apparent. Women are now more readily available to men. Is sex without the risk of pregnancy the ultimate realization of male fantasy? Does this possibility of access to sex without pregnancy give women the confidence to make demands on their male partners? Or to want more partners?

Copelon: There is a significant difference between removing a negative barrier to sexuality and creating an environment which fosters affirmative expression and enjoyment of sex. Decriminalization affects, but does not eradicate or transform, the traditional construction of heterosexual sexuality. If changes have occurred, and I think they have, they are a consequence not simply of legal change, but also of cultural change interacting with feminist demands. While women must still tread a course between pleasure and danger, the feminist insistence on sexual freedom as a right has helped build women's sense of entitlement to seek sexual pleasure, and decriminalization has mitigated the disastrous consequences and shame of sexual exploration.

The flourishing of lesbian sexuality is also a critical consequence of

the demand for the separation of sex and reproduction. In spite of the continued absence of federal constitutional protection, the emergence of a lesbian-gay movement insistent on legal recognition directly and indirectly alters the relationship between men and women. It opens the possibility of sexual and intimate lives that reflect a celebration of women's sexuality and do not depend on mediating the gender gap. The editors of *Powers of Desire* also make the important point that lesbian sexuality benefits heterosexual women because it remains an option for them that men must take into account.[10] Indeed, we cannot underestimate how deeply threatening, and therefore important, the idea of separating sex and reproduction is to challenging the sex-gender system. This was reflected in the Court's refusal to recognize sexual pleasure as a human right in *Bowers v. Hardwick,* a case in which a gay man challenged the criminalization of sodomy.[11] This decision serves to contain women's and gay sexuality. It also raises serious questions about the rights of single women, lesbians, and gay men to form and maintain parental relationships with children. These questions are reflected in negative decisions on custody, foster care, and adoption, and in decisions about access and parental status involving reproductive technologies.

Marcus: Now let's turn to the impact of the abortion cases on the reordering of relationships between women and men. In the initial abortion decisions, the Court made it clear that the doctor-patient decision could not be compromised by a spouse, lover, or casual acquaintance. In that sense, the decisions appeared to lead to, or at least facilitate, the reordering of relationships between women and men. Women could have sex without fear of having to carry an unwanted child to term. If contraception failed or was unavailable, safe legal abortion was the backup.

But the same questions I raised about contraception and the reordering of relationships apply to abortion. What is the relationship between a qualitatively different access to sex and the change in relationships between the sexes? We may have assumed rather ingenuously that reproductive rights decisions involving abortion would transform our relationships with men.

Copelon: Again, this is a hard and important question and, as someone who has spent the most significant part of my work as a constitutional litigator, I may overestimate the transformative effects of legal change. With that *caveat,* I think it does make a difference that a woman

10. A. SNITOW, C. STANSELL & S. THOMPSON, POWERS OF DESIRE: THE POLITICS OF SEXUALITY 34 (1983).

11. Bowers v. Hardwick, 478 U.S. 186 (1986).

knows she is entitled to make an independent decision about abortion and even that she is entitled to do it secretly—without her husband or lover knowing. Even Carol Gilligan's study on abortion decision making,[12] which was supposed to demonstrate the interconnectedness rather than individualism of women's decision making, emphasized the significance of the moment when a woman started to see her own needs as legitimate rather than understand them as derivative of the needs or desires of other family members.

Despite legal entitlement, women can be subordinated. Men exert tremendous influence and sometimes coercion in the decision-making process. When a husband says, you can't have an abortion or, if you have the baby, he'll do no more than put up with it, or he'll leave, those statements can coerce a woman's decision just as violence can and does. But even under the worst circumstances, women do exercise agency in the sense of asserting their own needs. I have helped battered women get secret abortions when they thought they'd be killed for it. For one woman with whom I have kept in contact, the abortion was an act of survival and self-assertion that probably began the process of getting out of the relationship. It made a difference that she didn't have to go underground for the abortion or answer questions in the doctor's office about whether she had told her lover or whether he agreed. So there has been a symbolic as well as practical effect, although it is a small piece of a larger puzzle of subordination and agency.

Rothman: Some of the talk about abortion needs to be reconsidered. Most American support for abortion has nothing to do with women's control of their own bodies. American support for abortion has always been eugenic support for abortion. Americans want certain kinds of fetuses not to come to term, and that has to do specifically with genetic disease and poor women's babies. The overwhelming majority of Americans strongly support having abortion available, but not on feminist grounds.

It is wrong to assume that access to abortions is always a feminist issue, that women want access to abortions and that men and the state apply pressure to have babies. When you look at the period in which there was small growth in the Anglo population, it was upwardly mobile men who pressured their wives not to get pregnant and to have abortions. It wasn't women who wanted abortions to free themselves. It was the state needing different kinds of children.

12. C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

Copelon: I think we should be troubled, Barbara, by oversimplification of one position or another. You can argue that the mid-nineteenth century rise in abortion among the married, bourgeois, and upper classes had in part to do with men's desires to be upwardly mobile and restrict expenses to accumulate or preserve wealth. But to say that middle class women's aspirations for a fuller life or working class women's needs to limit childbearing to continue working were not significant factors in the rising abortion rate vitiates women's agency in history.[13]

Similarly, there is no question that the right to abortion was sought by non-feminist and anti-feminist interests as well as feminists, and that polls show greater support for rape and incest and eugenic abortions than for women's choice. But, just as it is critical to grapple with the weaknesses and contradictions in the support for abortion, it is important to recognize the progress that the feminist position has made. Indeed, as a consequence of feminist insistence on abortion as a woman's right, the Court has abandoned the *Roe v. Wade* position that the decision is primarily the doctor's. It now recognizes, albeit by a smaller majority, that the ability to make this decision is essential to women's equal citizenship.[14] However, we are still leagues from guaranteeing universal and unqualified access to abortion, and from creating a society and laws that assure all women of real procreative choice.

Marcus: This is a good moment to focus on the relationship between gender and reproductive technologies. If I have doubts that the availability of contraception and abortion has resulted in the transformation of relationships between women and men, I have even stronger doubts that alternative reproductive technologies contain such a transformative potential.

For example, the terms we use in talking about alternative reproductive technologies rely on the socially constructed categories of male and female, father and mother. The focal point has an almost essentialist quality to it. You are your biology—ova and uterus or sperm. While feminists seeking the reordering of relationships are concerned that women and men are not simply their biology, the new reproductive technologies may push us back into those very categories as the definition of our entire being. In this sense, progress may play a very cruel joke on us. We will be the categories that we fought against as our primary identification. As

13. L. GORDON, WOMEN'S BODY; WOMEN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA (1977).

14. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

Barbara Katz Rothman suggested this morning, the ultimate females may become mother machines.

Another limit on the transformative potential of the new reproductive technologies is that they tend to reify genetics and family ties. One aspect of the liberating potential connected with sexuality and reproduction for the women's movement was the recognition that genetic and conventional nuclear family ties were not necessarily the most important and most significant ties. Other bases for connection between and among people could be acknowledged as valuable. The new reproductive technologies focus on male and female genetic material placed in some female.

Copelon: I share your ambivalence and caution about the dangers of reproductive technologies, not because they create these problems but because they have the potential to reaffirm them. But I don't think we should ignore the progressive possibilities. To the extent that reproductive technologies break the connection between the traditional heterosexual family and reproduction, they have progressive possibilities. The increasing acceptance of donor insemination, for example, has made childbearing more accessible to women, whether lesbian or straight, who do not want to condition parenting on the participation of a male partner. At the same time, extension of donor insemination has drawn criticism from commissions and ethicists who decry insemination outside of marriage. Some sperm banks limit eligibility to the married and many state laws still protect only the rights of married couples.

The impediments to access by nontraditional people are not simply formal, however. Although informal arrangements for donor insemination cannot be regulated by the state, it is not necessarily easy for women to find willing donors. AIDS has disqualified or discouraged many gay men from being donors and heterosexual men or couples have far greater difficulty being donors, largely because it requires a willingness to abandon the traditional connection between reproduction and sexuality and loosen the boundaries of the nuclear family. I do not mean to suggest that the question of whether to assist another person to reproduce should be taken lightly. But I have been stunned by the tenacity of heterosexism, which values the nuclear heterosexual model as superior, in the value systems of even the most progressive people.

In other words, the limitations of the reproductive technologies cannot be primarily ascribed to rules and regulations "out there." They flow from unexamined premises and stereotypes that influence even those who consider themselves feminist. It is not surprising that courts have

upheld the claims of known donors to fatherhood status over women's efforts to form alternative families, essentially because it is considered desirable to assure that children have a father for support and social acceptability.[15]

I am optimistic, however, that we will see changes. Many women, particularly lesbians, are having children through donor insemination and forming alternative families notwithstanding these barriers and risks. On the other hand, where medical technology is required to assist reproduction, it presents a new opportunity to define who is eligible to reproduce. This boils down to financial and heterosexual privilege.

Hubbard: I don't see technology as the problem. The values to which the society adheres are the driving force, though what we call the medical-industrial complex has a serious impact on this too. Technologies which aren't necessarily high tech have the potential for opening up reproductive possibilities. But white, middle class, heterosexual couples have the most access to them. You've got to be wealthy enough to pay a lot of money to doctors. You are not acceptable in many places, not by virtue of state statutes which limit what doctors can do, but by virtue of hospital rules that say we won't deal with single women or we won't deal with somebody over forty years old. Or you may raise troubling issues like the disability rights groups do. Our society, with its eugenic ideology, has kept these groups out of discussions about prenatal screening designed to prevent disabled babies from being born. Thus it is essential that, at the same time we critique and oppose certain technologies and their abuse of women, we fight for inclusion of those who don't fit the proper norm—those who are single, who are poor, who are of color, or who don't fit the mold of traditional family. It is a very serious problem, but it is not the technology but the culture that creates it.

Marcus: How do reproductive technologies affect our concept of women and pregnancy? Do they exacerbate a range of ideological tensions regarding the status of women?

Copelon: Like other questions about ideology, the two you pose require complex answers. On the one hand, reproductive technology may increase the tendency to treat women as fertility vessels. This tendency is

15. *See* C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (1977). In this case a donative father, who was aquainted with the mother, was granted visitation rights because the court found that it was in the best interest of the child to have two parents, even though the mother utilized artificial insemination for the purpose of becoming a single parent. *See also* Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986). Factually similar to *C.M. v. C.C.*, this case upheld the trial courts decision to grant the donative father legal paternity despite the mother's intention to raise the child with a female friend.

fed by the age-old male desire to wrest control over reproduction from women. It is reinforced by fertility specialists who don't give women full information on the risks and benefits of elaborate and experimental therapies. On the other hand, undoubtedly in response to the fear of dehumanization, feminists as well as sexual and moral conservatives have reasserted the maternal essentialist position. When we oppose surrogacy, for example, on the ground that the maternal bond is sacred and no woman in her right mind could knowingly and voluntarily undertake to bear a child for another, at least when she receives a fee, I worry that we are both denying the multiplicity of women's experience and acceding to being defined by our reproductive function.

I think it is critical for feminists to find a path through these two thickets. We are not going to stop reproductive technologies. The demand, which comes from women as well as men, is too great, although much of that demand would be avoidable by major public health initiatives to prevent infertility and infant morality. It is critical that feminists work to preserve the integrity of women who choose to use reproductive technologies and to ensure opportunities for nontraditional childbearing.

Omolade: I find a parallel between the experience of the women's movement and the civil rights movement. For both, their court victories carried within them the seed of backlash. All the issues you raised about *Roe v. Wade* were built into the *Brown v. Board*[16] desegregation decision. The basis of the argument was that all-black institutions were separate, unequal, and inherently inferior. While the decision was supposed to empower black people by declaring the injustice of segregation, it also has given support to the mistaken perspective that all-black institutions are inferior, even though much of their problem is the economic one of underfinancing. Civil rights advocates view *Brown* as a real breakthrough. It ended legal segregation, but it also underminded the success and existence of all-black institutions.

In what ways can such knowledge of the limitations of our court victories inform the new strategies evolving around reproductive technology? Can the law be used in a progressive, self-determining way?

Marcus: To address that question we may need to begin with a discussion of whether the rights analysis which has often been identified with progressive self-determination in law is useful and desirable in the context of the new reproductive technologies.

Copelon: We have to continue to shape the rights analysis to protect

16. Brown v. Board of Education, 347 U.S. 483 (1954).

women from reproductive abuse at the same time as we recognize limitations in the existing framework of reproductive rights and work to correct them. The deficiencies flow less from the notion of rights than from the values that shape their contours and context.

Let's look first at some of the things that are useful in rights analysis. The recognition in *Eisenstadt v. Baird*[17] that the married couple is not a unit, but two separate and independent individuals, can be used to guarantee individual procreative rights outside marriage. Similarly, the *Eisenstadt* ruling that a husband cannot accomplish his procreative purpose by forcing his wife to continue a pregnancy provides an important foundation for women's reproductive autonomy, a foundation which underlies the analysis whether the beneficiary be a spouse, contractor, or the state. It is based on the broader principle that a person cannot subordinate the body or labor of another to his own ends. This principle should preclude enforcement of surrogacy contract provisions to forego abortion, follow certain prenatal regimes, or turn over a child against one's will. All precedents are under attack today and their survival depends on the degree to which we can convince this nation and its courts that the subordination of women is unacceptable in itself and in its consequences for everyone.

Marcus: However, there are deficiencies in rights analysis and, when rights analysis is applied to reproductive technologies, troubling issues emerge.

Copelon: I agree. For example, the recognition in *Roe v. Wade* that the viable fetus is a permissible constraint on a woman's reproductive autonomy[18] can create a legal basis for interventions on behalf of the fetus. This approach has been used to justify forced caesarian section; approximately eighty percent of these cases involve women of color. This is only a prelude to other prenatal interventions, presumably to benefit the fetus.[19] Both men and women will potentially lose control to science if protection or perfection of the fetus becomes a permissible basis for medical bodily intervention against a woman's will. The alleged protection of potential human life could become the vehicle for dangerous eu-

17. Eisenstadt v. Baird, 405 U.S. 438 (1972).

18. In *Roe v. Wade*, the Court held that after viability the state can prefer the preservation of fetal life, except when doing so would threaten the health or life of the pregnant woman. 410 U.S. at 163-164.

19. *See* Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987).

genic experimentation unless a pregnant woman is constitutionally entitled to say no.

Marcus: You are quite correct. A fetus conceived through reproductive technology may be accorded protection through rights, especially if gestating and producing the perfect or, as Barbara Katz Rothman suggests, the precious baby is the goal. Preciousness may have a range of legal consequences we have barely begun to anticipate or explore. Moreover, high technology may reinforce trends toward the medicalization of reproduction. Conception and gestation will become a multistage process supervised by doctors and scientists.

Copelon: The medicalization of reproduction has consequences for rights analysis. I worry that improved embryo transplant technology could lead to the conversion of early abortion into embryo transplant, irrespective of the woman's consent. Here, the right to control whether one's genetic child is brought into the world becomes significant. I am concerned about the preoccupation with genetics that comes from using reproductive technologies as alternatives to adoption, although I don't think that it's fair to single out those who struggle with biological infertility for blame. Everyone needs to work to build a culture of reproductive generosity, which means volunteering to share one's reproductive capacity. But I also think that it is necessary to retain the power to withhold our gametes or fetuses if we are to limit state or commercial control.

On the other hand, if recognition of a relationship with a child is based only on genetic or gestational ties, or on being denominated a parent, then we have done little to reshape the structure of social infertility that Barbara Omolade identified this morning as far more significant than biological infertility.

Marcus: A further twist to the argument concerns the right to privacy. Reliance on a right to privacy, a recognition of individual control, has disparate consequences for different classes.

Copelon: The constitutional notion of privacy is individualistic and negative. It is inadequate to the dual tasks of assuring procreative choice and preventing procreative incapacity. The Medicaid abortion cases exemplify the problem. They define procreative liberty only as the right to be free of state-created barriers, not to be free of state manipulation and discrimination, not to be entitled to call upon the state to guarantee meaningful access through subsidization. Even though some poor women will find it impossible to secure abortions and consequently will suffer health- and even life-endangering risks, the Court has held that the exclusion of abortion coverage from Medicaid does not infringe the right of

privacy. These decisions legitimate the power of the state to manipulate procreative decisions of poor women for demographic or ideological reasons. If this is the case, there is no reason to believe that poor women, who suffer much greater levels of biological infertility, will obtain access to reproductive technologies through litigation. Access is a privilege that depends entirely on majoritarian bias and resources.

From a broader perspective, it is unacceptable that a negative right of privacy exempt the state from responsibility to protect or facilitate procreation. We know, for example, that biological infertility is largely preventable through better health care and reducing toxicity in the environment and workplace. Effective early detection of sexually transmitted disease would contribute significantly to reducing infertility. But without a positive concept of rights or reproductive liberty, we cannot invoke the constitution to insist that the state provide even this simple, affirmative protection.

Omolade: The social context shapes and defines the implementation of rights. The civil rights issue provides a perfect illustration. We can identify institutional racism as a problem and eliminate it legally, but the person who can't get a job is still poor and black. That person has a right to work but has no right to claim that she is being institutionally limited by the economy, the society, or the law because there are no legal restrictions. There is only racism and the emergence of new forms of containment.

Copelon: The constitution ought to be a vehicle not only to protect individual action but to insist on affirmative state policies. This perspective transcends the narrow concept of rights that the Court has quite deliberately embraced.

Audience: It seems to me that the thirteenth amendment is extremely relevant both as a limitation on capital and as a definition of rights. It says you cannot sell other people. In fact, it obliterated property in other people. Black people who were slaves were worth six million dollars one day and the next day they weren't worth anything to anyone but themselves. A radical tradition of rights may have gotten lost in the late nineteenth century reinterpretation of rights as a commercial enterprise. That radical tradition is about autonomy and, as expressed in the thirteenth amendment, about the right to control the use of one's body. The *Baby M* case[20] is about the selling of a person. What is so threaten-

20. *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988). The *Baby M* case was decided between the time of this symposium and publication. The trial court's termination of the biological mother's

ing to the social order is that such situations open the doors to the purchase of human beings in a market in which there is a big demand.

Actually, I was just going to emphasize that the Baby M case is not so much the selling of the baby as the renting of the mother's body. Very shortly after the passage of the thirteenth amendment, the notion that a person could sell or rent a portion of themselves in the form of services became the defining feature of freedom.

Copelon: I also find the thirteenth amendment relevant to the surrogacy context, but perhaps for different reasons. For the state or any individual to deny a woman access to abortion is to make pregnancy a form of involuntary servitude. Conversely, the purchase of an unwilling woman to bear and bestow a child violates the principle of the thirteenth amendment that people cannot be required to serve against their will, contracts notwithstanding. I hesitate to say that the thirteenth amendment applies if a woman undertakes this willingly, but it is clear to me that the so-called surrogacy contracts have to be unenforceable in light of the thirteenth amendment and the equitable principles that it embodies.

Some argue that the thirteenth amendment applies only while a woman is pregnant, but that her service after the child is born is no longer being exacted. I am aware of the trap of maternal essentialism and I recognize that some women are able to give up a child without extended trauma, but the woman who has changed her mind finds it impossible to think of the newborn as suddenly separate from the gestational process. Nor do I think that a woman's service ends with childbirth. In the case of surrogacy, the service is a profound act of will to renounce all parental rights and relationship and confer them on another. To enforce such a promise would reduce a woman to the object of someone else's desire and divest her of entitlement to respect for her will and identity, which is one of the central evils of slavery.

Audience: I think there is confusion when we look at the mother because there is prostitution and wage labor, both of which are forms of alienating capacities. I'm talking about the baby. If you write laws that absolutely prohibit any exchange of money in connection with surrogacy on the grounds that it involved the purchase of another human being, you would turn it into something else. It would become a different institution.

Copelon: I am frankly not sure that the core problem with surrogacy

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parental rights was reversed and her rights restored by the Supreme Court of New Jersey while custody was allowed to rest with the biological father and his wife.

is that money is being exchanged to obtain a child, since people are in a sense purchasing children when they pay doctors for their services. The larger problem is that the availability and quality of medical services necessary to conceive or bear or raise a child depends on wealth rather than entitlement. I don't think that selling a child into slavery is really comparable to exchanging money to provide a wanted child. The angst expressed over the impact on the children seems little different from people's worries about any departure from the traditional heterosexual norm. However, I am very concerned about the child of such an arrangement who becomes unwanted. I fear that the drive for a perfect child is exacerbated in surrogacy arrangements and that the prospective parents will be unwilling to accept their disabled child.

What moves me to consider controlling or prohibiting paid surrogacy is the fear that women will be commodified in the process. Surrogacy contracts contain outrageous provisions dictating how women should handle their pregnancies. If *in vitro* fertilization techniques improve, allowing for the implantation of the perfect embryo in any womb, I fear the potential for the creation of a breeder class, impressing the poorest and most desperate women into this service.

While I am constantly arguing with myself on this subject, I feel quite certain about two things: we must both fight for the unenforceability of surrogacy contracts and oppose their prohibition. To refuse as a society to enforce surrogacy agreements that become involuntary protects a woman's basic integrity and operates as a substantial, but I think warranted, discouragement of the process. In my view, the woman can be paid only for the service of being pregnant and not for turning over the child. Payment constitutes recognition that pregnancy is work and not invisible, natural, and simply expectable. Turning over the child must be a free act of will untainted by financial need or desperation. A woman's contract in that regard is an ethical promise, but not an enforceable one. If she has engaged in fraud, there are separate remedies for that. The prospective parents in a surrogacy arrangement must take a number of risks. As in adoption, their expectations may be dashed; as in open adoption, they will have a responsibility in some cases to maintain some relationship between the gestational mother and the child if she gives them custody, or between themselves and the child if she doesn't.

I think we must oppose criminalization, not because I like paid surrogacy, but because it will exacerbate the exploitation and commodification of women. If the exchange of money is made illegal, then we will replicate the exploitation that is the product of the criminalization of

prostitution. It will be easier to impress women into breeder service, they will have less rights to change their minds or assert their autonomy, and, I suspect, they will receive even less for their work. Criminalization breeds dependency, strips a person of the legal right to protection, and stigmatizes the woman for her conduct. Just as with sex, the demand for women to bear children is likely to be too powerful to deter with criminal sanction. Instead we have to grapple with how to preserve the dignity of women in the process.

Hubbard: If you are going to recognize labor as a commodity then it seems to me that surrogacy will have to be radically restructured. A so-called surrogate mother would have to get her $10,000 or whatever the price, irrespective of outcome. But this is not happening. In some ways I agree that, if she wants to do that as her way to earn a wage, so be it. But then it would have to be structured that way. She would have to get the wage for the labor of pregnancy and birth, not for handing over a baby.

Audience: I was struck all along with how powerful the connection is between the assertion of rights and commodification. Once one entertains that connection, there is no escape. We bring market culture to these questions. The only escape is to stop thinking about it as a rights issue and to start thinking about it as a question of community. I can imagine a surrogate situation in which fertility was seen as a really wonderful thing, something that one could share in a really nice way. It would be very positive and wouldn't raise the kind of dilemmas that we are talking about. That would presuppose a community in which everything didn't have to get translated into a question of rights and therefore a question of commodity. It would be better if we had a nonindividualistic culture. Every time you say "my rights," it is a statement of exclusion. Because it is a statement of exclusion, it is a statement of commodification and, by definition, anti-community.

Copelon: Perhaps I don't fully understand, but I certainly don't agree that every statement of rights is an act of commodification. The right to define one's sexuality or make procreative decisions may well be an entitlement to resist commodification. Women were commodified in the rightless world of coverture and traditional marriage. Slavery is certainly the paradigm of rightlessness and commodification.

I also don't agree that every statement of rights is a statement of exclusion. The black, women's, lesbian-gay, and disability rights movements, among others, have asserted rights for the purpose of inclusion. This is also true of the right to bodily integrity. The danger is that we

settle for inclusion into a system whose terms and reality our movements set out to challenge.

Finally, I must take issue with the idea that any statement of exclusion based on rights is negative. The demand that women be essentially communitarian rather than self-regarding has been historically a key aspect of our subordination. While some of our oppression flows from the fact that we are told to be communitarian in an otherwise capitalistic society, I find it hard to imagine feeling safe in a communitarian process where I had no power to say "no," particularly in regard to sex and reproduction. I agree that we need to build a culture of reproductive generosity and I think a broad commitment to communitarianism would change the process of decision making. But if the woman's decision is not respected, which seems to implicate rights, then communitarianism is a friendly word for coercion.

Rothman: There is a tension between notions of individualism and notions of community which usually restrict some individual choices. But the reality is that women in reproductive decision making do not have individual choice, autonomy, rights, or community support. Either individualism or community would be preferable to this situation.

Omolade: The oppressed in this country have always spoken of using the law to guarantee their rights. Unless there is some other cultural and ideological way of shaping thought and behavior, the law and rights analysis is the most effective force we have to assure that people of color can survive and exist in this society. Without rights analysis, how do we make sure that individuals who don't want black people in their society cannot force them out of the society? Unless we use law and rights analysis, how do we affirm cultural values of universal humanity and tolerance of difference against those who seek to limit and restrict others because of their gender or race? If I can't say in a court of law, "You violated my rights," what do I say?

Audience: It seems to me that in the process of saying, "You violated my rights," you're wielding a double-edged sword.

Omolade: How would you articulate a position that does not reflect that double bind? Is there any other kind of statement that could be made in court about race and gender discrimination?

Audience: What you have to say in court differs from what people need to say to each other when they are really being honest. I guess I'm more concerned with the latter. The key is that when we talk to each other we are clear that we're not about rights but rather that we're about something else—the possibility of a better community. Some of us lis-

tened to Oren Lyons, a Native American speaker who is very powerful. In his community, if you have something that one could think of as an advantage, it carries responsibility with it. I can think of fertility as an advantage that carries with it a responsibility of sharing that could be freely and happily given, not something that was coerced by others because you're part of the community. It seems possible to live that way. It's just that we can't think of it very clearly because we are so bound up in thinking that the only freedom that we can have is the notion of rights. I didn't think that's what freedom was all about.

Omolade: Native Americans would argue that to protect that kind of traditional society they would have to fight for land rights and the rights of native peoples to the land. It sounds as though there is another double edge. To keep the communal way of life alive, they have to fight forces outside the community which would deny community members the rights to occupy and use land as they wish.

Audience: My sense is that in that community, they don't talk to each other about rights. That's not part of the community. But when they are dealing with the people outside who are a threat, then sometimes they've got to use the language of rights.

Audience: I'm just flabbergasted by this discussion. The last thing I want to submit to communal determination is sexual expression—the last thing because the nature of it is individual. If you want to know what's done more for women's sexual freedom in the whole history of the human race, it has been an ideology of individual expression, not notions of communality. Historically, communality has been a restraint on women's sexual behavior. Equal rights to individual expression protect variety and difference.

Audience: Community could value difference.

Audience: But that is an individualist ethic of difference, of individual expression recognized and protected communally.

Copelon: That's right and that's why I'm not willing to give up rights in a communitarian society. To be legitimate, a communal ideology must embrace the notion of entitlement to self-determination. I don't think we will ever get to the end of the tension between normalcy and taboo. I'm not sure that a society that wants something badly enough, whether it be procreators or workers, is going to unswervingly respect its dissidents without an entitlement to dissent. I would hope that the process of decision making in a communitarian society would enhance the possibility of respect for difference, but I would not give up individual veto power.

Audience: There can be a community where people share moral and ethical values about individual autonomy and their rights and distinguish them from the struggle to assert and prove and enforce legal rights in an adversarial arena of the courtroom. This distinction is important because to talk about community doesn't necessarily mean that you don't value all kinds of individual differences.

Omolade: The history of communalism and tribalism (if you will) has been riddled with tremendous inequality and oppression. But there is a desire to build a new communalism using the notion of individual rights and collective concerns. To build this kind of future community, we must become much more aware of daily oppression of people who are different from white, middle class males. We must also have tolerance from those who have very different cultural values and attachments to communalism.

It is, however, very difficult to envision an informal method of developing community without extending and expanding upon the legal strategies which have already worked. The informal legal ways have a trap. Suppose white people don't want people of color in that envisioned community, or suppose they don't know how to include people of color. If the process were informal and not legally binding, there would not be a single black person in the room to talk about community. Thus, when we discuss community, there is a concern about how we move from step A, what we have now, to step B, what we envision, without defending civil and women's rights. My question is how do we expand those rights so we can assure our forward movement?

Marcus: I want to push this from the more abstract to a slightly more concrete level. Let's go beyond the surrogate situation to talk about the situation that Ruth described this morning. In that situation there are five parents: the woman who gestates, the biological donors, and the persons who rear the child. What does the assertion of rights do? Do you use rights language to order the situation?

Copelon: There is a problem with both the assertion of rights and the nature of the rights that would be asserted under prevailing law. First, as to the assertion of rights. One would hope all the people who want some form of relationship to the child could achieve it through agreement based on regard for the interests of others as well as the child, rather than through an antagonistic assertion of rights. Even under existing conditions, agreements are made. We do not hear about the situations where surrogate mothers changed their minds and were not challenged. However, social pressures militate toward antagonism.

The definition of parenthood, according to the traditional, albeit waning, white middle class norm, assumes genetic connection and exclusive control over the child. Closed adoption and the trial court's termination of Mary Beth Whitehead's parental rights illustrate the potential intensity of this drive for control. A second source of pressure is the assignment to the family or the private realm of the responsibility for economic support. Since parental rights carry an obligation to provide support, the state has a stake in identifying people it can hold to that responsibility. Where control or possession is attenuated, for example where one parent has custody, the noncustodial parent cannot be counted on to provide child support. A third is the heterosexist norm that defines family as minimally consisting of a mother and father, preferably married, and children.

At another conference on reproductive technologies, Barbara Omolade suggested that the ultimate infertility is social not biological. If the issue is meaningful relationships with children, then social infertility is the consequence of the failure of society and law to recognize parenting when done by members of unrecognized relationships, whether an extended family, a lesbian or gay couple, or a friendship network. As a consequence, the nature of the claim of right is not the desire to have a meaningful relationship with the child, but to have control in one of the two approved roles.

If we changed the social organization of childrearing and the privatization of familial support, I think it is less likely we would have surrogacy arrangements because a greater variety of meaningful relationships with children would be validated. It also seems that the five would be more likely to work things out without the need to fit two people into the rigidly defined categories of mother and father. I would be tempted to use the occasion to abolish the dichotomous terms mother and father which remain the most tenancious example of gendered terminology. Perhaps I'd retain the word mother, honor it, and give it to anyone who assumes active parental responsibility.

There is a chance that the new technologies, because they depend on already validated claims based on genetic, gestational, and social contributions, will require that the law open a broader range of relationships to resolve the conflict of rights. The problem is that traditional norms, which have been challenged in so many ways, are likely to be reaffirmed by the decisions required by the new configurations produced by technology.

Omolade: In our society, there are children who have many social

parents and whose situations approximate that of a child with different biological parents and social parents because of the new reproductive technologies. A tradition in black families assumes that blood and nonblood kin raise the child. Everybody in the household raises the child. We also have a tradition of informal adoptions, women and men who leave the child with their parents or siblings to raise. By studying those cultures, one could easily examine the relationship between the five adults and the child. It becomes problematic when one of the adults feels that the child belongs to him or her and the adult resorts to legal ways of resolving the conflict. We can again turn to the cultural practices of people of color and white ethnic groups to discover informal, nonlegal, and effective ways of resolving conflict about childrearing.

Marcus: When we talk the language of rights in this context, rights become sex role specific. The ideology of the sex-gender system exists outside and inside the home. It affects who we are and how we view ourselves. To, me the discussion about who the people are and how we cast them, how we identify them in the new reproductive technologies, whether we use rights discourse, and what that implies is not something out there just for the law. It has profound personal implications. Even if we didn't use the term rights, we would be likely to talk about claims, control, and exclusion. That's what makes me more pessimistic about it. It profoundly affects the way we think about ourselves, how we connect with each other in intimate situations, the way we talk about children or complex pluralistic family arrangements, and the extent to which the new technologies will aid or abet the reordering of relationships between women and men. My pessimistic assumption is that these issues will be played out in rights discourse which, in turn, will accelerate the trend about which I think we all have ambivalent feelings.

Omolade: Alternatives to this horrific direction can be found in the cultural practices of people of color and white ethnic groups. They might respond by saying to the concerned adults: "You must share this child with other people, their blood and nonblood parents and kin; that's the way we do things in this community, culture, or group." Sharing becomes the value, not individual ownership. The current social dogma on parenting says that to have a child, to rear her or him properly, you have to be middle class, which means married and heterosexual. We must pay more attention to discovering how other people live with childbearing within alternative situations: poor people, single mothers, nonresidential fathers, and gay and lesbian couples.

Copelon: I agree that we need to move towards a more sharing

model. But we also have to recognize that people who are currently discouraged from creating families need to exclude others to create something new. Of course, they are precisely the group that may be least benefited by the assignment of rights, given that cultural norms have so powerful an effect on that process. Thus with donor insemination, we have the courts happily embracing donors who have changed their minds in order to give the child a father. At the same time, we saw in the Baby M case a powerful drive to eliminate the mother and, thereby, protect the traditional middle class family model.

Hubbard: The expert testimony in the Baby M case is a caricature that displays white, middle class, professional expectations of the caring parents for everyone to see.

Audience: It strikes me that there is a spread of a kind of an individualist ideology associated with rights discourse. I think back a couple of generations and recall how grandparents and uncles and aunts would take care of children. If the parents died, the kids would move over to their relatives. These were communal obligations and duties which were not always joyous. I don't know whether it is a function exclusively of class or of the increasing spread of an ethos of individualism which leads to a disconnection between people and their inability to work together.

Rothman: People of higher social class do have other people raising their kids. It is just that they have control over them. They hire one person to raise their baby. If they find that she doesn't provide enough stimulation, they fire her when the kid is two. When you talk to those housekeepers, you find that they put a lot of energy into that kid and they miss that child. Their right to that child, their sweat equity in that child, their enormous childrearing tasks for two years, are worth nothing. If the housekeeper gets two weeks notice, she is in good shape. The parents hire someone else for another couple years, and then somebody else. They have the right to have control economically.

Audience: But does it make a difference that it's bought and paid for, as opposed to offered on some other noncommodified basis?

Rothman: When you talk to women who are in working class positions, they say, "My mother is watching the kids because I can't afford a housekeeper. My mother is watching the kids. Boy, do I pay for it. I'm paying for it in obligations to my mother. My mother has rights over these kids. I cannot say, 'No mom, do it my way.' I have to do it her way. When I have enough money, I can control it and raise my kid in my way. When I don't have money, I have to do it her way." The higher you are in this system, the more manipulative you can be with people that you

buy because there is no reciprocal pressure. They have no leverage. If they try to pressure the parents, the only leverage they have is the emotions of the child and then the parents fire them immediately. That's evil.

Omolade: From my experiences as a black woman, it's different when it's your mother, even though you have problems with your mother. She is your closest, most reliable relative. The child and grandmother have wonderful experiences with each other.

Audience: The bad part is that people who didn't have enough to begin with had to extend themselves further to take in a child at great personal costs. It was a double-sided experience. People could depend on one another in some way that was really good. On the other hand, they felt obligated. Maybe sensing that your mother has control over your child is not entirely a good feeling.

Omolade: But I still think that some of those models of childrearing might be useful.

Audience: I'm suggesting that rights talk is one part of a situation which helps create and perpetuate an ethos of individualism, making it more difficult to have connection with people.

Audience: The question we're asking is, where does this desire to privatize one's children come from? You can make fun of maternal instincts easily enough. Is the wish to have or to own one's own children an historical development? I don't know how to describe that history because all we are talking about is economic capacity.

Hubbard: It certainly must have something to do with our isolation, the fact that we have relatively few people except children with whom we can share love, dependency, responsibility, and longterm attachments.

Audience: That's the best interpretation of it. The more negative interpretation is that historically people have been confused with their capacity to reproduce. When they don't have children, they are nothing. Men have deep emotional attachments to creating genetic heirs to pass on that which they earned. In her book *Women's Body Women's Right,*[21] Linda Gordon states that there are all kinds of historically oppressive reasons adults need children, ways that are not particularly helpful to children.

Rothman: Here is an interesting point that speaks to class-based differences in ownership. The Sterns played a tape of a conversation between them and Mary Beth Whitehead. They focused on Whitehead's suicide threats. But they discounted another part of the tape in which

21. L. GORDON, *supra* note 13.

there was a discussion about custody. Whitehead's claim wasn't for exclusive ownership. She kept saying, "Can't I take the child every other weekend?" The Sterns were the ones who said if she has any claim at all, we want none. All or nothing. Whitehead was saying, "Our child, Bill. Don't say my child. She's our child."

Copelon: Which indicates the tendency of rights to go toward exclusivity as opposed to mutual claims.

Rothman: But maybe it's a class issue: who thinks they could ever have exclusive rights to anything, and who just wants a share of something.

Omolade: Ownership conflicts surface around issues of child support, both inside and outside the court system, and involve all classes of men. When the mother asks the nonresidential father for child support, he feels he has the option to say yes or no, especially if he views the mother and the child as one unit. He might not support the child because he can't have the mother or because he has lost the mother. The tension is not merely in the Baby M case and surrogacy, but throughout all parenting in a patriarchal system. When women who have separated from or divorced their husbands request child support, they also have to deal with the issues of male possession of children and women.

Rothman: Men with money and sperm can purchase babies. Mrs. Stern couldn't purchase that baby by herself. Whitehead couldn't qualify herself. This is what is so particularly, uniquely dangerous for women about reproductive technology. It is only technology for rich men who expect that money can purchase control.

Copelon: As a class matter, men are more able to purchase childbearing assistance. But the availability of various technologies is responsive to women's desire to reproduce as well. Some argue that women are less interested in genetic connection, but are more likely to seek the experience of pregnancy. I know women of both persuasions so I think there is danger in generalizing. It is important to recognize that the intensity of desire—the lengths to which one will go to reproduce—is shaped by social circumstances. We are currently witnessing the construction of a fertility panic, whether one looks at the Style page of the *New York Times* or the recent movie listings. It has to do with reaffirming motherhood, romanticizing fatherhood, and denying that there could be different degrees of meaningful and continuous relationships with children.

I'd like to go back for a minute to Isabel's concern about the danger of solving the problem of the five parents through assignment of rights.

There is a larger problem with our focus on reproductive technologies or individual privileged solutions as a response to biological infertility. Infertility is a significant problem that in many cases can be avoided rather than tinkered with. The riveting drama of the Baby M case threatens to divert our attention from the need for preventive health measures. Likewise, the focus on the conflict of rights threatens to obscure the irrelevance of individualistic rights to a broader social solution. There appears to be far less enthusiasm for technological efforts to clean up pollutants and change our lifestyles than for the treatment of individual infertility and the allocation of rights. As Ruth Hubbard mentioned this morning, rights analysis comes into play as a consequence of failed social policy.

The consequence is that no one is safe, but the poor least of all. Because of poverty, black women experience a higher rate of biological infertility than white women, together with one of the highest rates of infant mortality in the industrialized world. Yet the reproductive technologies are accessible only to those with means and, therefore, provide the least relief to those with the greatest need. Beyond that, they divert the public into thinking something is being done and thus render the problem invisible, individualized, and unaddressed.

Omolade: Are you saying that, if there were two sorts of cases, one around an individual life concern and one around a social policy issue such as access to resources, the latter are the kinds of case we should be litigating?

Copelon: I think both battles have to be fought. It is critical to women to establish that the gestational mother cannot alienate her constitutional rights by contract before birth, and to fight sexist, racist, and classist stereotypes where they emerge. But it is also critical that we not become absorbed by the issues of individual rights. We must devote ourselves with no less vigor to the longer term and lower visibility efforts to secure the necessary preventive measures.

The white middle class feminist movement has gravitated toward the former. Abortion rights have been defended without sufficient attention to abuse or to the necessity of guaranteeing conditions to facilitate procreation. Opposition to the abuses of reproductive technologies threatens to take precedence over concern for access by the poor or the prevention of infant mortality.

In this regard, I would like to raise one other increasingly pressing issue before this conversation closes. That is AIDS and reproduction. A disproportionate amount of governmental and media energy is being focused on screening pregnant women, with the goal of encouraging those

who test HIV-positive to abort. A baby with AIDS is a tragedy, but not every infected woman will have a sick or HIV-infected child. Indeed, studies suggest that fifty to seventy percent of babies born to infected mothers will be free of the virus, although all will test positive until their own immune systems develop, which can take over a year. Those babies who are infected tend to develop the disease very young and die. Women should have access to HIV testing and to non-goal directed genetic counseling on whether to test and whether to continue the pregnancy. But the drive to screen high risk pregnant women has little to do with preventing transmission of AIDS or even the suffering of AIDS babies. Approximately eighty-five percent of the AIDS babies are born to women of color, most of whom acquired the virus through IV drug use or sex with an IV drug user. The focus on AIDS screening involves stigmatizing ineligible reproducers. It is no surprise that the medical, social, and potentially legal response to a reproductive danger affecting primarily poor women of color is to try to foreclose reproduction, rather than trying to facilitate safe reproduction. And just as surrogacy is not a real solution to biological infertility, so AIDS testing, which identifies and converts people into victims, is no substitute for massive preventive social programs.

Hubbard: I've served on a task force where I have seen a lot of effective gay rights pressure to block HIV-antibody screening. The weak points are prenatal screening and screening of prostitutes. Unless we have a strong, organized feminist response for these situations, that's where HIV-antibody screening will sneak in, and that will open the door to across-the-board HIV-antibody screening and to prenatal screening for other reasons. I think we're in a very dangerous place right now. Within the next months, I suspect we are going to get states beginning to legislate in those two areas: prenatal HIV-antibody screening and screening of prostitutes.

Copelon: Everything we have spoken of today underscores the need for organized and broad-based feminist responses that attempt to transcend our own differences as well as link all the assaults on women's reproductive rights. It is through organizing that we can affect the values that underlie both the definition and allocation of rights and the direction of technology. And, in all our work, whether in the courts, legislatures, or public fora, we must argue for a conception of rights that includes governmental responsibility to facilitate the preservation of reproduction capacity and the conditions for reproductive choice for everyone.

Omolade: I am concerned that feminist responses emerge from a dialogue between white women and women of color. I'm very sensitive to

the exclusion of black and other women of color from the group that finally made a public statement about the Baby M case. Black feminists have responded in many similar ways to the portrayal of black mothers in the media and to the treatment of teenage motherhood. These issues are interrelated, yet there is a separate response. We need to pool our resources and our insights.

Marcus: We've spent an entire day talking about a broad range of issues regarding reproductive technology. By no means have we exhausted the subject. The message is clear. We need many more serious conversations and discussions in order to make well-informed sensitive choices.