

MUSINGS ON MOTHERHOOD, MARSHALL, MOLECULES: A PASSAGE THROUGH THE HEART OF MATERNAL DARKNESS FROM GOD'S CREATION TO MAN'S

Aleta Wallach*

*Be not ashamed women, your privilege encloses the rest, and is the
exit of the rest,
You are the gates of the body, and you are the gates of the soul.*
—Walt Whitman¹

*Throughout patriarchal mythology, dream-symbolism, theology,
language, two ideas flow side by side: one, that the female body is impure,
corrupt, the site of discharges, bleedings, dangerous to masculinity, a
source of moral and physical contamination, "the devil's gateway." On
the other hand, as mother the woman is beneficent, sacred, pure, asexual,
nourishing; and the physical potential for motherhood—that same body
with its bleedings and mysteries—is her single destiny and justification in
life. These two ideas have become deeply internalized in women, even in
the most independent of us, those who seem to lead the freest lives.*

—Adrienne Rich²

*Through birth control [woman] will attain to voluntary motherhood.
Having attained this, the basic freedom of her sex, she will cease to
enslave herself and the mass of humanity. Then, through the understand-
ing of the intuitive forward urge within her, she will not stop at patching
up the world; she will remake it.*

—Margaret Sanger³

*We treat a human being as a person provided, first, we permit the
person to make the choices that will determine what happens to him and,
second, when our responses to the person are responses respecting the
person's choices. . . . This right to be treated as a person is a fundamen-
tal human right belonging to all human beings by virtue of their being
human. It is also a natural, inalienable, and absolute right.*

—Herbert Morris⁴

Almost a decade ago, I first read Herbert Morris' essay "Persons and Punishment" in *The Monist* and, ever since, it has had a profoundly shaping

* Senior Judicial Attorney, California Court of Appeal. This work is dedicated to my wonderful mother and father.

I am indebted to Kenneth Karst and Adrienne Rich, whose writings have been a continuous source of intellectual nourishment and inspiration.

1. W. Whitman, *I Sing the Body Electric*, in *Leaves of Grass* 93, 97 (1968).

2. A. Rich, *Of Woman Born* 34 (1976) [hereinafter cited as *Of Woman Born*].

3. M. Sanger, *The New Motherhood* 13 (1922) [hereinafter cited as *The New Motherhood*].

4. Morris, *Persons and Punishment*, 52 *The Monist* 475, 493 (1968), reprinted in H. Morris, *On Guilt and Innocence* 31, 48-49 (1976).

influence on my thinking about what the right to be treated as a person means. Like others who have been pondering the status of women, I have mostly focused on derogation of the right to be treated as persons when women are not permitted to make choices that will determine what happens to them,⁵ and have given less attention to how the denial of the responsibilities that attach to full citizenship also operates to deprive women of the right to be treated as persons insofar as such denial is a response that does not respect women's choices. An obvious example of a response that does not respect women's choices is a statutory declaration that women, like children and other incompetents, lack capacity to commit criminal acts and, therefore, are exempt from punishment.⁶ To so except women, who are neither children nor incompetents, is to respond to them without respect for their choices by depriving them of the right to be responsible for their conduct, a right that is normally part of full citizenship and, thus, would treat them as less than persons.

I hope it does not too greatly distort Professor Morris' paradigm to apply its principles in another context. Less apparent than the model of punishment, perhaps, is how the Supreme Court decisions permitting indigent women to choose abortion, but allowing the state to provide funds for childbirth and to refuse them for elective abortion, is a response that does not respect their choices to determine what happens to them and, therefore, deprives them of the right to be

5. See, e.g., Wallach, *Social Consciousness and Discretionary Law in the State and Federal Courts*, in *Social Psychology and Discretionary Law* (L. Abt & I. Stuart eds. 1978); Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection and the Uniform Parentage Act*, 23 U. KAN. L. REV. 23, 28 & n.21, 68 & n.210 (1974).

6. See, e.g., California Penal Code § 26 (West 1971) which, until 1976, provided that "[a]ll persons are capable of committing crimes *except* those belonging to the following classes": (1) children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness; (2) idiots; (3) lunatics and insane persons; (4) persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent; (5) persons who committed the act charged without being conscious thereof; (6) persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence; (7) "*married women (except for felonies) acting under the threats, command, or coercion of their husbands*"; (8) persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe and did believe their lives would be endangered if they refused. (Emphasis added). Married women are curiously included within a group of irresponsible persons who are presumed to be without moral conscience or the capacity and reason sufficient to enable them to distinguish between right and wrong, or without free will.

This exemption embodies a presumption of duress for married women based on the common law rule that where a crime (with some exceptions) was committed by a married woman conjointly with or in the presence of her husband, prima facie she was not criminally liable, as it was presumed that she acted in obedience to his commands and under his coercion. "This doctrine is announced by Blackstone, who says that it is a thousand years old." *People v. Statley*, 91 Cal. App. 2d Supp. 943, 947 (1949), quoting *O'Donnell v. State*, 73 Okla. Crim. 1, 117 P.2d 139, 141 (1941). It

. . . had its foundation in the peculiar relation which existed between husband and wife in the earlier days. At common law the husband had almost absolute control over the person of his wife; she was in a condition of complete dependence; could not contract in her own name; was bound to obey; she had no will and her legal existence was merged into that of her husband, so that they were termed and regarded as one in law, "the husband being that one."

Id. at 950, quoting *King v. City of Owensboro*, 187 Ky. 21, 218 S.W. 297, 298-99 (1920). *Accord* *Braxton v. State*, 17 Ala. App. 167, 82 So. 657 (1919); *State v. Cauley*, 244 N.C. 701, 94 S.E.2d 915 (1956). *Contra* *Commonwealth v. Barnes*, — Mass. —, 340 N.E.2d 863 (1976).

In 1976 the statute was amended to delete the presumptive incapacity of married women. (Cal. Pen. Code § 26 West Supp. 1977.) California married women are now subject to the criminal law principles of actual, not presumed, duress and coercion of general application, which are defenses to be affirmatively proven by the accused rather than presumptions of irresponsibility.

treated as persons.⁷ In addition, insofar as responsibilities, as much as rights, are incidents of respected, participating citizenship in the community, these abortion cases abridge the full citizenship of indigent women by violating their duty to make responsible decisions pertaining to their fertility. The denial of equal responsibilities, no less than the denial of equal rights, to persons similarly situated denigrates the status, dignity, and standing in the community of the class upon whom the discrimination is invidiously imposed. In its broadest terms the argument that will be made is simply this: a just society is one in which (among other things) women are permitted freedom of choice about their motherhood capacity; our society denies this freedom of choice and, therefore, is not a just one.

Among the reflections which follow I shall examine Mr. Justice Marshall's dissenting opinion in the second group of abortion decisions, which suggests a deeply humanitarian concern for the rights and responsibilities of women and their motherhood, personhood, and citizenship.⁸ I will reach that destination by way of a discursive passage through the history of the institution of motherhood from early Judeo-Christian mythology through the scientific revolution in reproductive technologies; to know whence we come is to behold the ignoble creatures we are, and envision the transcendent beings we might become. The abortion decisions do not come out of the blue but, rather, are the contemporary link in motherhood's long chain of history under patriarchy.

Motherhood is a delicate subject and, for me, not an easy one to discuss. Remaining after centuries of vitriolic contention still the object of a bitter power struggle between men and women for its control, motherhood is as complex as it is sensitive. Although many of the rounds have, not surprisingly, been won by men, their victories have not overcome women's contumacy, as a glance at the heritage and tradition of motherhood reveals. The history of motherhood depicts a social tapestry woven with strands of theology, science, medicine, law, politics, and language.

I. MOTHERHOOD: CHURCH AND SCIENCE

. . . [T]here is a Persian myth of the creation of the world which precedes the biblical one. In that myth a woman creates the world, and she creates it by the act of natural creativity which is here and which cannot be duplicated by men. She gives birth to a great number of sons. The sons, greatly puzzled by this act which they cannot duplicate, become frightened. They think, "Who can tell us, that if she can give life, she cannot also take life." And so, because of their fear of this mysterious ability of woman, and of its reversible possibility, they kill her.

—Frieda Fromm-Reichmann⁹

Women's organized struggle for birth control spans a full century, but its historical antecedents extend far beyond the last century. Resistance to birth control has been virulent and understandably so, since procreation engenders the deepest, most primitive and irrational fears and feelings that inhabit the darkest part of the male subconscious. The ability to reproduce human life and perpetuate

7. *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). See Part IV, pp. 85-93 *infra*.

8. Mr. Justice Marshall's dissent in all three cases appears in 432 U.S. at 454. See pp. 123-34 *infra*.

9. F. Fromm-Reichmann, *On the Denial of Woman's Sexual Pleasure*, quoted in *Of Woman Born* 110.

the human species is the most awesome and important power possessed by human beings. This power, however, perhaps to her great misfortune, belongs exclusively to woman and is unshared by man.¹⁰ To be sure, in the scheme of things no one would argue that this was a fair distribution of power or that the allocation was not arbitrary, but it is not woman's doing. Ever since, the attempt by men to dispossess women of this endowment, to control it, to enslave it in the service of male hegemony, has been relentless and is the heart of women's eternal grief and suffering.¹¹

But obtaining any direct physical control of this power has been impeded because, through the ages, the generation process itself has been cloaked in mystery. Like other inscrutable laws of the natural universe, before which human beings felt powerless and helpless, it eluded comprehension. Only in relatively recent times have we understood human reproduction as a physical, explainable event. For a long while the only consolation available to the disquieting consciousness of the overwhelming life-making power were myths man made to account for it, thereby to diminish his unabidable feelings of fear, anxiety and helplessness, a sort of mind-over-matter, self-help technique. As it happened, however, ideological control was tantamount to physical capture.

I suppose the chief myth in Western civilization was the one that attributed the *origin* of this life-giving force, miracle of nature, to an anthropomorphic maker—God, who by most chronicles was a man, as is evident from the fact that he made man in his image—and thereby accomplished possession through identity. The imperative to women in Genesis, "Be fruitful and multiply," is preceded by the myth of Adam, in which woman's procreative power is denied and *she* is taken out of the man's body. When Eve is cursed and told that "in sorrow [she] will bring forth children," she is symbolically dispossessed of her own power of procreation.¹² Thus it is arguable that religion became the first, and historically extremely significant, attempt to yoke the female power of human reproduction.

10. By comparison the greatest power men to date have acquired as their own is a veto power over life: with the creation of a deadly arsenal of destructive weapons men have gained the power to extinguish life on a genocidal scale. *But see* Part V, pp. 93-96 *infra*, on the new reproductive technologies.

11. *See generally* B. Bettelheim, *Symbolic Wounds: Puberty Rites and the Envious Male* (1968).

12. Adrienne Rich offers the insight that:

Patriarchal monotheism did not simply change the sex of the divine presence; it stripped the universe of female divinity, and permitted woman to be sanctified, as if by an unholy irony, only and exclusively as mother (without the extended *mana* that she possessed prepatriarchally)—or as the daughter of a divine father. She becomes the property of the husband-father, and must come to him *virgo intacta*, not as "second-hand goods"; or she must be ritually deflorated. If he is to know "his" children, he must have control over their reproduction, which means he must possess their mother exclusively. The question of "legitimacy" probably goes deeper than even the desire to hand on one's possessions to one's own blood-line; it cuts back to the male need to say: "I, too, have the power of procreation—these are *my* seed, *my* own begotten children, *my* proof of elemental power." In addition, of course, the children are the future receivers of the patrimony; by their prayers and sacrifices, they will ensure the father's spirit a safe passage after death; but they are also present assets, able bodies to work fields, fish, hunt, fight against hostile tribes.

Of Woman Born 119 (emphasis original).

Moreover, in Judeo-Christian theology, woman's pain in childbirth is converted into punishment from God. Since the curse laid on Eve in Genesis was taken literally well into the nineteenth century, the mother in labor had to expect to suffer. The nineteenth century use of chloroform to relieve the pains of labor invoked fierce theological opposition:

... [T]he clergy attacked anesthesia as "a decay of Satan, apparently offering itself to bless women; but in the end it will harden society and rob God of the deep earnest cries which arise in time of trouble for help." The lifting of Eve's curse seemed to threaten the foundations of patriarchal religion; the cries of women in childbirth were for the glory of God the Father. An

Although not a substitute for authority based upon true understanding and knowledge of the mechanism itself, nonetheless the ideological explanation was doubtless comforting to the male psyche confronted with this indomitable magic of nature because it was believed as truth.

Religion, then, through its agent, man, staked its claim to the miracle of birth as divine provenance *and* province; whomever could possess and regulate this most imposing phenomenon in the cosmos could also derivatively acquire sovereignty over life. Women's ensuing struggle to regain control of their progenerative power has been in opposition to religion's competing claim over it and vested interest in maintaining command over the raw material on which it consolidated its institutional authority, and, of course, its control over the lives and destinies of women. Perhaps here there is a testament to the power of an idea to possess the body through the mind. Why women acquiesced and surrendered their great power to the church (men) is not clear, but it might have something to do with the absence of any means of birth control, without which there was really no contest since women were so very vulnerable.¹³ The first round must have been an easy victory. In any case, since then the church has been a violent opponent to women's reproductive freedom, possibly because its might rests upon the bent backs and broken spirits of the women of the Western world.

The effectiveness of this early, ideological expropriation of woman's reproductive power was remarkable. Not only were both clerical hierarchy and secular patriarchy built upon conscripted motherhood, but the former justified the latter. The civil death imposed upon women because of motherhood was declared to be the "law of the Creator," and "founded in the divine ordinance,"¹⁴ which dictated that women be "protected" from making contracts, owning property, voting, serving as jurors, obtaining higher education, pursuing professions, and even being held responsible for criminal acts, so that they might breed and bleed themselves to death.

But regardless of how comforting are explanations based upon belief, faith has never substituted for humankind's seemingly innate epistemophilia, or satisfied our insatiable quest to understand the wonders of the natural universe. In science was to come theology's undoing; when the undoing is complete (if it is not before then, perverted, and this is a very big if) women shall be the incidental beneficiaries. By the nineteenth century the scientific method was producing a

alleviation of female suffering was seen as "hardening" society, as if the sole alternative to the *mater dolorosa*—the eternally suffering and suppliant mother as epitomized by the Virgin—must be the Medusa whose look turns men to stone.

Id. at 168 (footnote omitted) (emphasis original). Compare the clearly superior mode of annexation of the female reproductive power through modern techniques such as cloning, enabling males (as well as females) to identically reproduce themselves, in Part V, pp. 133-36 *infra*. See generally D. Rorvok, In His Image: The Cloning of a Man (1978). See also text accompanying note 145 *infra*.

13. There is an interesting nexus between vulnerability, pregnability, and rape: "It would be extreme and contentious . . . to call mothers rape victims in general; probably only a small percentage are. But rape is the crime that can be committed because women are vulnerable in a special way; the opposite of 'vulnerable' is 'impregnable.' Pregnability, to coin a word, has been the basis of female identity, the limit of freedom, the futility of education, the denial of growth." *Rape Has Many Forms*, review of S. Brownmiller, *Against Our Will: Men, Women and Rape* (1975), in *The Spokeswoman*, Vol. 6, No. 5 (November, 1975), quoted in *Of Woman Born* 14.

14. *Bradwell v. Ill.*, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring). Cf. note 13 *supra*. While civil death applied only to married women, all women were economically coerced into marriage. The occasional exception is ostracized as an "old maid." But as Mr. Justice Bradley states, "The rules of civil society must be adopted to the general constitution of things, and cannot be based upon exceptional cases." *Id.*

huge explosion in knowledge that commenced to unlock the mysteries of the physical and biological world and to replace received doctrine with truth. From the mid-nineteenth century onward the world increasingly turned to the biomedical sciences for resolutions of the problems of health and life, culminating in the quintessential biochemical breakthrough in 1953 when James Dewey Watson and Francis Crick broke the genetic code with the finding of the double helix molecular structure of deoxyribonucleic acid, the substance of heredity.¹⁵ This redoubtable discovery opened the way to the rapidly unfolding realm of molecular biology and recombinant DNA which, in conjunction with the radical advances in the technologies of fertilization and reproduction, poise us on the brink of a revolution of unprecedented, and unimaginable, scale and scope: a revolution in human reproduction and genetic splicing the far-reaching consequences of which can not yet be conjured, but which will certainly cause so profound a transformation of social organization and human interaction that the Industrial Revolution, in comparison, may well seem like a mere revision. When this event in human history occurs, the birth control issue that presently concerns us may become obsolete and, if not replaced by worries about even more perilous potentialities, women will at long last be free, as will be suggested with greater particularity in the last part of this essay.

For now, though, we are engaged in the final phase of a movement for birth control that has engrossed women and scientists for one century. Women's struggle through the ages to free themselves of the bondage wrought in the name of motherhood by ecclesiastical and secular patriarchy surely did not enhance the persuasion of the church, although it did increase its oppressive choke.¹⁶ From time immemorial women used whatever methods of birth control were handed down in secret from mother to daughter,¹⁷ and so strong was the female spirit of liberation¹⁸ that, when the doomed attempts to prevent or terminate pregnancy

15. See J. Watson, *The Double Helix* (1968); R. Olby, *The Path to the Double Helix* (1974). See also I. Asimov, *The Genetic Code* (1962); D. Halacy, Jr., *Genetic Revolution* (1974).

16. Margaret Sanger observed that although the Catholic Church stands firmly upon the proposition that artificial abortion is murder, "[i]t took that church, even in the days of its unlimited power, many centuries to come to its present sweeping condemnation of abortion." M. Sanger, *Woman and the New Race* 25 (1920) [hereinafter cited as *Woman and the New Race*]. Adrienne Rich informs us that:

Within the Catholic Church opinion has swayed back and forth as to when a fetus is "ensouled," a controversy which began with Tertullian, a self-confessed loather of female sexuality and also the first to say in effect that "abortion is murder." The early Christian theologians, still cleaving to Aristotle, believed that abortion was murder only if the fetus (if male) was within forty days of conception and (if female) within eighty to ninety days, the time when "ensoulment" was presumed to occur for each sex. . . . By 1588, Pope Sixtus V, a fanatic Counter-Reformation cleanser of the Church, declared all abortion murder, with excommunication as its punishment. His successor, finding the sanctions unworkable, revoked them in 1591, except for abortions performed later than forty days from conception. By 1869, Pius IX decided the time was ripe to swing back to the decision of Sixtus V: All abortion was again declared murder. This is at present the official, majority Catholic position. In spite of it, Catholic women comprise over twenty percent of all abortion patients.

Of *Woman Born* 266 (footnotes omitted).

17. Although all sorts of "home preparations" were used, for centuries most women had no means of preventing conception other than abstinence, which violated the "conjugal duty" of married women. Methods of self-abortion have been the use of wire coat-hangers, knitting needles, goose quills dipped in turpentine, celery stalks, drenching the cervix with detergent, lye, soap, Ultra-Jel (a commercial preparation of oil, soap, and iodine), drinking purgatives or mercury, and applying hot coals to the body.

18. Of the indomitable female spirit for freedom Margaret Sanger wrote:

. . . [W]oman's desire for freedom is born of the female spirit, which is the absolute, elemental, inner urge of womanhood. It is the strongest force in her nature; it cannot be

failed, infanticide was often a common practice.¹⁹ But never did invincible defiance to church doctrines result in a strong, organized birth control movement. At the turn of the century it was, instead, biomedical science, committed to resolving the problems of health and life, that responded to the desperate cries of women for freedom and, in partnership with them, eventually launched the vital and widespread birth control movement. In the final analysis, I think, it will be acknowledged that it was science, not women, that vanquished the church by sinking the dogmatic rock upon which that moribund order, once founded, now founders. But even dying, it flails with a vengeance, a might that is impressive even if despised.

For the present, then, there remains for women the very real unfinished task of liberating our motherhood from bondage.

II. MOTHERHOOD AS INSTITUTION

All human life on the planet is born of woman. This is the one unifying, irreducible experience shared by all women and men. Strangely, despite the commonality of this phenomenon, motherhood seems to be for most of us an incomparably problematic subject about which to write, indeed even to think. We enter this theoretically uncharted terrain as uncertain novices, hoping at best for fragmentary insights amid the obscurity. Motherhood has mainly been taken for granted like other seemingly "automatic" functions and services provided by women and, perhaps for this reason, has remained relatively unexplored in the

destroyed; it can merely be diverted from its natural expression into violent and destructive channels.

The chief obstacles to the normal expression of this force are undesired pregnancy and the burden of unwanted children. These obstacles have always been and always will be swept aside by a considerable proportion of women. Driven by the irresistible force within them, they will always seek wider freedom and greater self-development, regardless of the cost. The sole question that society has to answer is, how shall women be permitted to attain this end?

Society, in dealing with the feminine spirit, has its choice of clearly defined alternatives. It can continue to resort to violence in an effort to enslave the elemental urge of womanhood, making of woman a mere instrument of reproduction and punishing her when she revolts. Or, it can permit her to choose whether she shall become a mother and how many children she will have. It can go on trying to crush that which is uncrushable, or it can recognize woman's claim to freedom, and cease to impose diverting and destructive barriers. If we choose the latter course, we must not only remove all restrictions upon the use of scientific contraceptives, but we must legalize and encourage their use.

Woman and the New Race 27-28.

19. Throughout history countless women have killed children they knew they could not rear, whether economically or emotionally, children forced upon them by rape, ignorance, poverty, marriage, the absence or prohibition of birth control and abortion. These acts are to be distinguished from infanticide as a deliberate social policy, practiced by peoples (both men and women) everywhere, against female infants, and malformed children, twins or the first born, of both genders as a form of population control and of eugenics. From antiquity to the middle ages female infants were routinely killed. Adrienne Rich has noted that although it could be argued that just as infanticide in general was a form of population control and of eugenics, female infanticide was a method of limiting births since females were seen primarily as breeders, "[s]till, the implicit devaluation of the female was hardly a message to be lost on women."

Legal, systematic infanticide was practiced until the middle ages whereafter individual maternal infanticide was made a crime. (The Church contributed to creating the crime of maternal infanticide by declaring all children born outside of marriage unlawful or "illegitimate.") Maternal infanticide was the most common crime in western Europe from the middle ages through the end of the eighteenth century. In 1845 Diaraeli stated that "infanticide is practised as extensively and as legally in England as it is on the banks of the Ganges." Infanticide still occurs today. In 1973 *The New York Times* headlined an epidemic of infanticide in Japan; according to reports, a newborn infant was found stuffed into a railway-station coin locker on an average of every ten days, sometimes with a note

conceptual sense;²⁰ like the rest of women's culture and history, it awaits our unearthing. This is not to say that there does not abound a surfeit of social, legal and canonical pontifications about motherhood made by men in the territorial battle to control, if not possess, the maternal function. But comparatively little is said by women about what the experience of motherhood means within the institutional context. It is this understanding that is needed with some urgency, before even more misguided pronouncements and rules are made by others.

A. *The Inheritance of Shame*

Motherhood has been curiously omitted from the histories of conquest and serfdom, wars and treaties, exploration and imperialism, even though it has a history and an ideology and is more fundamental than tribalism or nationalism. The individual, seemingly private pains of the mothers around us and before us, whatever our class or color, the regulation of women's reproductive power by men in every totalitarian system and every socialist revolution, the legal and technical control by men of contraception, fertility, abortion, obstetrics, gynecology, and extrauterine reproductive experiments—are all essential to the patriarchal system, as is the negative or suspect status of women who are not mothers.

It is difficult to think about motherhood in part because of the confusion created in us by the internalization of the polarities fabricated by the masculine imagination that has divided us, and forced us to see ourselves, in terms of the contradictions of good or evil, fertile or barren, pure or impure. The male's subjective experience of woman as asexual angel-wife or prostitute were institutional projections that had nothing to do with woman's actual being. Where sexism and racism converge, these dualities are seen to produce a horrifying pathological economic and political system. The historical revision given the encouragement of the rape of black women by the sons of white planters, in a deliberate effort to produce mulatto slaves (who were considered more valuable) by two mid-nineteenth century southern writers illustrates the divided male perception:

The heaviest part of the white racial burden in slavery was the African woman of strong sex instincts and devoid of a sexual conscience, at the white man's door, in the white man's dwelling.

. . . .

Under the institution of slavery, the attack against the integrity of white civilization was made by the insidious influence of the lascivious hybrid woman at the point of weakest resistance. In the uncompromising purity

expressing contrition and guilt. In Tokyo alone during a single year 119 babies had been deserted. The *Times* failed to associate these deaths with the repeal of liberal abortion laws and the limiting of available contraceptives to the diaphragm, measures which were reported in the same month (December, 1973) by the newsletter of Boston Female Liberation. See *Of Woman Born* 262. See also *id.* at 226-27 and 258-62; *Woman and the New Race* 11-25.

20. Adrienne Rich observes that:

We carry the imprint of this experience for life, even into our dying. Yet there has been a strange lack of material to help us understand and use it. We know more about the air we breathe, the seas we travel, than about the nature and meaning of motherhood. In the division of labor according to gender, the makers and sayers of culture, the namers, have been the sons of the mothers. There is much to suggest that the male mind has always been haunted by the force of the idea of *dependence on a woman for life itself*, the son's constant effort to assimilate, compensate for, or deny the fact that he is "of woman born."

Of Woman Born 11 (emphasis original).

of the white mother and wife of the upper classes lay the one assurance of the future purity of the race.²¹

In these fantasies not only is the motherhood created by rape degraded but the raped woman is made the criminal, the attacker. But query who brought the black woman to the white man's door and whose absence of "a sexual conscience" was responsible for producing the financially profitable mulatto children. One wonders whether the white mother and wife, presumed to be devoid of "strong sex instincts," was not also raped by the white planter. Thus the American south was an unusually monstrous example of the economic necessity that children be produced and women, black and white, were the means to this end.

I think perhaps one reason why motherhood is an extremely difficult subject to write about, for me at least, is that it evokes strong feelings of ambivalence, guilt and shame; lurking in our collective conscience is a sense of complicity, of responsibility unfulfilled. For, as Adrienne Rich has astutely observed,

[n]either the "pure" nor the "lascivious" woman, neither the so-called mistress nor the slave woman, neither the woman praised for reducing herself to a brood animal nor the woman scorned and penalized as an "old maid" or a "dyke," has had any real autonomy or selfhood to gain from this subversion of the female body (and hence of the female mind). Yet, because short-term advantages are often the only ones visible to the powerless, we, too, have played our parts in continuing this subversion.²²

It is the responsibility of women to abandon our passive, powerless participation in the subversion of motherhood and to bring to bear the intellection that will deliver motherhood from darkness and ourselves from shame and humiliation. At least we must make the effort; it is a matter of honor.

B. *Unmasking the Axioms of Patriarchy*²³

The stellar poet Adrienne Rich has already taken up the proud challenge. Her brilliant work, *Of Woman Born*, provides this valuable analytical perspective from which to think about motherhood:

. . . I try to distinguish between two meanings of motherhood, one superimposed on the other: the *potential relationship* of any woman to her powers of reproduction and to children; and the *institution*, which aims at ensuring that that potential—and all women—shall remain under male control. This institution has been a keystone of the most diverse social and political systems. It has withheld over one-half the human species from the decisions affecting their lives; it exonerates men from fatherhood in any authentic sense; it creates the dangerous schism be-

21. A. Calhoun, *A Social History of the American Family from Colonial Times to the Present* (1917); see also G. Lerner, *Black Women in White America: A Documentary History* 149-50 (1973).

22. *Of Woman Born* 35.

23. Adrienne Rich has correctly stated:

For the first time in history, a pervasive recognition is developing that the patriarchal system cannot answer for itself; that it is not inevitable; that it is transitory; and that the cross-cultural, global domination of women by men can no longer be either denied or defended. When we acknowledge this, we tear open the relationship at the core of all power-relationships, a tangle of lust, violence, possession, fear, conscious longing, unconscious hostility, sentiment, rationalization: the sexual understructure of social and political forms. For the first time we are in a position to look around us at the Kingdom of the Fathers and take its measure. What we see is the one system which recorded civilization has never actively challenged, and which has been so universal as to seem a law of nature.

Of Woman Born 56 (asterisk omitted).

tween "private" and "public" life; it calcifies human choices and potentialities. In the most fundamental and bewildering of contradictions, it has alienated women from our bodies by incarcerating us in them. At certain points in history, and in certain cultures, the idea of woman-as-mother has worked to endow all women with respect, even with awe, and to give women some say in the life of a people or a clan. But for most of what we know as the "mainstream" of recorded history, motherhood as institution has ghettoized and degraded female potentialities.

The power of the mother has two aspects: the biological potential or capacity to bear and nourish human life, and the magical power invested in women by men, whether in the form of Goddess-worship or the fear of being controlled and overwhelmed by women. We do not actually know much about what power may have meant in the hands of strong pre-patriarchal women. . . . We know far more about how, under patriarchy, female possibility has been literally massacred on the site of motherhood. Most women in history have become mothers without choice, and an even greater number have lost their lives bringing life into the world.

Women are controlled by lashing us to our bodies. . . . "[R]ape is a form of mass terrorism, for the victims of rape are chosen indiscriminately, but the propagandists for male supremacy broadcast that it is women who cause rape by being unchaste or in the wrong place at the wrong time—in essence, by behaving as though they were free. . . . The fear of rape keeps women off the streets at night. Keeps women at home. Keeps women passive and modest for fear that they be thought provocative. . . . [E]nforced, indentured motherhood may originally have been the price paid by women to the men who became their "protectors" (and owners) against the casual violence of other men. If rape has been terrorism, motherhood has been penal servitude. *It need not be.*²⁴

The current rebellion is not an attack on the family or on motherhood except as defined and restricted under patriarchy, in which not only our progenerative power but our very beings themselves have been expropriated. The rebellion is neither simple nor easy. It requires an awakening to realities that are painful and a strength of character and self-directed purpose to examine them and change them. Most of all it requires that we look deep into ourselves. Much of what we see is not pretty. Not only has woman's being been shaped by the manipulation of the experience of maternity and the experience of sexuality to serve male interests, so that behavior which threatens these institutions is considered deviant or criminal (such as "illegitimacy," abortion, lesbianism), but also, like fashion, our protean identity has fluctuated with the times:

Institutionalized heterosexuality told women for centuries that we were dangerous, unchaste, the embodiment of carnal lust; then that we were "not passionate," frigid, sexually passive; today it prescribes the "sensuous," "sexually liberated" woman in the West, the dedicated revolutionary ascetic in China; and everywhere it denies the reality of women's love for women. Institutionalized motherhood demands of women maternal "instinct" rather than intelligence, selflessness rather than self-realization, relation to others rather than the creation of self. Motherhood is "sacred" so long as its offspring are "legitimate"—that is, as long as the child bears the name of a father who legally controls the mother. It is "woman's highest and holiest mission," according to a socialist tract of 1914; and a racist southern historian of 1910 tells us that

24. *Id.* at 13-14 (asterisk omitted) (emphasis original). See S. Brownmiller, *Against Our Will: Men, Women and Rape*, *supra* note 13.

“woman is the embodied home, and the home is the basis all institutions, the buttress of society.”

. . . .

Patriarchy would seem to require, not only that women shall assume the major burden of pain and self-denial for the furtherance of the species, but that a majority of the species—women—shall remain essentially unquestioning and unenlightened. On this “underemployment” of female consciousness depend the morality and the emotional life of the human family. . . . [S]ociety [is] threatened when women begin to choose the terms of their lives. Patriarchy could not survive without motherhood and heterosexuality in their institutional forms; therefore they have to be treated as axioms, as “nature” itself, not open to question except where, from time to time and place to place, “alternate life-styles” for certain individuals are tolerated.²⁵

Women must question several “axioms of nature” if we are to regain the power stolen from us and the power withheld from us in the name of the institution of motherhood and, thus, escape from the hopelessness of not having any control over our lives, the condition of motherhood without autonomy. Paramount among these axioms is the clerical and secular ethic that the value of a woman’s life is contingent on her being pregnant and a mother and that producing new life is her destiny. Patriarchy has instilled in women that labor and suffering is the purpose of her existence, that the new life she brings forth (especially if male) is valuable, and that her own value depends upon bringing it forth. Rethinking this tool-like function (it is a function not a role) requires the recognition that we are not of equal worth among male citizens, and that this is the reason why we are not treated as persons. This axiom of unequal and conditional value vis à vis others is hard to accept. Yet we do assimilate it each time the imposed function—motherhood—becomes the role assumed: we engage ourselves with each repetition of this archetypal ritual of self-deprecation. And since one’s relative value in the community reflects a judgment by others and is not self-determined, one’s self-esteem is irrelevant; there is nothing women can do about it except internalize a gross self-deceit:

As the means of reproduction without which cities and colonies could not expand, without which a family would die out and its prosperity pass into the hands of strangers, she has found herself at the center of purposes, not hers, which she has often incorporated and made into her own. The woman in labor might perceive herself as bringing forth a new soldier to fight for the tribe or nation-state, a new head of the rising yeoman or bourgeois family, a new priest or rabbi for her fathers’ faith, or a new mother to take up the renewal of life. Given this patriarchal purpose she could obliterate herself in fertility as her body swelled year after year, and pain and suffering might well become associated, for her, with her ultimate value in the world. She might equally know that her pregnancy and labor would result in a life without a future, a child who could not be fed, or who would be strangled at birth; a wasted human life.²⁶

Moreover nonmothers are not exempt from devaluation. Women who refuse to become mothers have been considered emotionally suspect and dangerous. Not only do they refuse to continue the species but they also deprive society of its

25. *Of Woman Born* 42-43.

26. *Id.* at 159.

emotional nourishment.²⁷ Woman's status as childbearer has been made into the major fact of her life. Locutions such as "barren" or "childless" imply a negation of any further identity or value of the female persons. (Conspicuously the term "nonfather" does not exist in any realm of social categories.²⁸) Throughout recorded history the "childless" woman (with certain specific exceptions such as the cloistered nun or the temple virgin) has been regarded as a failed woman; "childless" women have been burned as witches, persecuted as lesbians, and have been not permitted to adopt children because they were unmarried. "Mothering and nonmothering have been such charged concepts for us, precisely because *whichever we did has been turned against us.*"²⁹ Both childbearing and childlessness have been manipulated to make women into negative quantities, or bearers of evil; in this respect motherhood has been made the bane of women.

A second axiom that must be questioned is motherhood as a "sacred calling." We assume that the "home" as we know it always existed. But the notions of the "sanctity of the domestic hearth" and "decent seclusion of private life" were late arrivals in the development of human history. The ideal of the mother and children immured together in the home, the specialization of motherhood for women, the separation of the "domestic" from the "public" and "political" spheres, of the home from the "man's world" of remunerated work, power, ambition, and aggression were products of the nineteenth century and of the Industrial Revolution.

Before then both the white pioneer mother and the black female slave labored as a fully productive part of the economy. Black women frequently worked the fields with their children strapped to their backs. Under slavery

. . . it was common for planters to command women and girls to have children. On a Caroline plantation of about 100 slaves the owner threatened to flog all of the women because they did not breed. They told him they could not while they had to work in the rice ditches (in one or two feet of water). After swearing and threatening he told them to tell the overseer's wife when they got in that way and he would put them on the land to work.³⁰

Throughout time, women have as a matter of course borne and cared for children while doing a full share of productive labor. By the nineteenth century, however, when technology began to reduce the general level of physical hardship

27. "[T]he suffering which a woman undergoes in labor is one of the strongest elements in the love she bears her offspring." W. Haggard, *Devils, Drugs and Doctors* 116 (1929).

28. Adrienne Rich points out:

In the interstices of language lie powerful secrets of the culture. . . . I have been thrown back on terms like "unchilded," "childless," or "child-free"; we have no familiar, ready-made name for a woman who defines herself, by choice, neither in relation to children nor to men, who is self-identified, who has chosen herself. "Unchilded," "childless," simply define her in terms of a lack, even "child-free" suggests only that she has refused motherhood, not what she is about *in and of herself*. The notion of the "free woman" is strongly tinged with the suggestion of sexual promiscuity, of "free love," of being "free" of man's ownership; it still defines the woman by her relationships with men. The ancient meaning of the word "virgin" (she-who-is-unto-herself) is obscured by connotations of the "undeflorated" or intact hymen, or of the Roman Catholic Virgin Mother, defined entirely by her relationship to God the Son. "Amazon" suggests too narrowly the warrior-maiden who has renounced all ties with men except for procreation: again, definition through relatedness. Neither is "lesbian" a satisfactory term here; not all self-identified women would call themselves lesbians; and moreover, numberless lesbians are mothers of children.

Id. at 249-50 (emphasis original).

29. *Id.* at 253.

30. A. Calhoun, *A Social History of the American Family from Colonial Times to The Present*, *supra* note 21, at II:244.

and the size of families began to decline, protests were heard against the idea of the "working mother," and in praise of the "mother at home." During the last century and a half, the idea of full-time exclusive motherhood became entrenched and "the home" became a religion. Just when the factory was opening the way to a new economic independence for women that they did not have in the colonial or frontier periods, it was asserted that women's work was subversive to "the home" and to patriarchal marriage, perhaps because men could find themselves economically dependent upon their wives' earnings and because women might no longer be economically coerced into marriage, and therefore, could choose independence. Since female labor was cheaper, their employment was seen as threatening to male workers. Also, children left at home, often in the charge of the oldest nonworking child or grandmother, were not cared for properly.³¹ Concern for child welfare and fear for patriarchal values provoked legislation regulating the labor of women and children outside the home and the insistence that "the home, its cares and employments, is the woman's true sphere."

The home thus defined had never before existed. It was a creation of the Industrial Revolution, an ideal invested with the power of something God-given, and its power as an idea remains unexpunged today. For the first time, the productivity of women (apart from reproductivity) was seen as "a waste of time, a waste of property, a waste of morals and a waste of health and life." Women were warned that their absence from home did not only mean the neglect of their children; if they failed to create the comforts of the nest, their men would be off to the alehouse. The welfare of men and children was the true mission of women. Since men had no mission to care for children or keep house, the solution was to get the women out of the factories.³²

The reality of the lives of women, especially poor and working class women, could not have been in greater contradiction to the ideal of the home as a place apart from the brutal realities of work and struggle. The average woman bore from five to eleven children with several miscarriages and with no prenatal care or adequate diet.³³ Usually she was either expecting a baby to be born or had one at the breast. Mortality from childbirth and pregnancy and the loss of infant lives was extremely high, the lifespan of women brief; many died in childbirth. Countless attempted ineffective self-abortions. Anxiety, mental strain and physical debilitation from incessant childbearing were the rule, not the exception.³⁴

In my early motherhood I took it for granted that women had to suffer at these times, and it was best to behave and not make a fuss. . . . I do not know which is the worst—childbearing with anxiety and strain of mind

31. As public opinion became aroused over the fate of children whose mothers worked in the mills, some efforts were made to set up nurseries; but in Victorian and Edwardian England, as in twentieth-century America, state-supported child-care was opposed on the grounds that it would violate "the sanctity of the domestic hearth and the decent seclusion of private life." *Of Woman Born* 49 (footnote omitted).

32. *Id.*

33. "At the time when she ought to be well fed she stints herself in order to save; for in a working class home if there is saving to be done, it is not the husband and children, but the mother who makes her meal off the scraps which remain over, or 'plays with meatless bones.'" *Maternity: Letters from Working Woman 5* (collected by the Women's Cooperative Guild 1915).

34. See generally M. Sanger, *Motherhood in Bondage* (1928), consisting of a selection from among thousands of heartbreaking letters sent to Margaret Sanger each year pleading for contraceptive information (the "Secret"), for deliverance from the bondage of enforced maternity. Each letter contains the record of a woman caught in the toils of unwilling maternity, enslaved not only by the great imperative instincts of human nature—hunger and sex—but hopelessly enmeshed in this trap by

and body to make ends meet, with the thought of another one to share the already small allowance, or getting through the confinement fairly well, and getting about household duties too soon, and bringing on other ailments which make life and everything a burden.³⁵

Letter after letter written by young women reveal lives ravaged by the total lack of preparation for marriage and pregnancy, and by husbands demanding conjugal rights throughout pregnancy or immediately after delivery. All were ignorant of methods to prevent pregnancy³⁶:

. . . During the time of pregnancy, the male beast keeps entirely from the female: not so with the woman; she is the prey of a man just the same as though she was not pregnant. . . . If a woman does not feel well she must not say so, as a man has such a lot of ways of punishing a woman if she does not give in to him.³⁷

One woman who had seven children and two miscarriages wrote: I do not blame my husband for this birth. He had waited patiently for ten months because I was ill, and thinking the time was safe, I submitted as a duty, knowing there is much unfaithfulness on the part of the husband where families are limited. . . . It is quite time this question of maternity was taken up, and we must let the men know we are human beings with ideals, and aspire to something higher than to be mere objects on which they can satisfy themselves.³⁸

The reality of lifelong pregnancy and the heavy labor and sweat of scrubbing, hauling of wash, ironing, cooking over coal and wood fires that had to be constantly fueled belied the invented exaltation of motherhood and the home; the reverence was chimerical. But the central ambiguity of the ideas of the sanctity of motherhood and the redemptive power of woman as means, in counterpoint to the degradation of women, serves to obfuscate for us the sexual caste and institutional misogyny at the heart of patriarchy. The new vogue of veneration, though false, was sufficiently confusing to produce in women a velleity that makes us tame, compliant, malleable, because it made us feel valued and worthy.

Because the glorification and romanticization of motherhood is still a decoy that lulls us into unconsciousness, it is an adversary to be met with vigilance, mindful that absence of respect for women's lives is the warp of the social fabric.³⁹ Adrienne Rich writes:

When we think of motherhood, we are supposed to think of Renoir's blooming women with rosy children at their knees, Raphael's ecstatic

poverty, heredity, ignorance, the domination or the indifference of the husband, the timid passivity of the family physician, and the ever-increasing complications of successive pregnancies. Among the most tragic are the letters from girl-mothers, testimonies by young mothers of twenty-one years who have already given birth to eight infants, or six by the age of seventeen. *See id.* at 5-23.

35. Maternity: Letters from Working Women, *supra* note 33, at 27-28.

36. *See* M. Sanger, Motherhood in Bondage, *supra* note 34.

37. Maternity: Letters from Working Women, *supra* note 33, at 49.

38. *Id.* at 67-68. Husbands have used many kinds of pressures on women, including brute force, to get the use of their wives' bodies. It is not considered rape, however, but "conjugal duty." One working class woman writes that

no amount of State help can help the sufferings of mothers until men are taught many things in regard to the right use of the organs of reproduction, and until he realizes that the wife's body belongs to herself, and until the marriage relations takes a higher sense of morality and bare justice. And what I imply not only exists in the lower strata of society, but is just as prevalent in the higher. . . . Very much injury and suffering comes to the mother and child through the father's ignorance and interference.

Id. at 27-28.

39. And it is an international phenomenon. Lack of respect for the lives and bodies of women is manifest in every ethics and every society where crimes against women are mysteriously unnamed or

madonnas, some Jewish mother lighting the candles in a scrubbed kitchen on Shabbos, her braided loaf lying beneath a freshly ironed napkin. We are not supposed to think of a woman lying in a Brooklyn hospital with ice packs on her aching breasts because she has been convinced she could not nurse her child; of a woman in Africa equally convinced by the producers of U.S. commercial infant formula that her ample breast-milk is inadequate nourishment; of a girl in her teens, pregnant by her father; of a Vietnamese mother gang-raped while working in the fields with her baby at her side; of two women who love each other struggling to keep custody of their children against the hostility of ex-husbands and courts. We are not supposed to think of a woman trying to conceal her pregnancy so she can go on working as long as possible, because when her condition is discovered she will be fired without disability insurance; or of the woman whose children have gone un nourished because they had to hire themselves out as wetnurses, of the slave who, severed from her own child, has rocked and tended the children of her masters; of the woman who passes for "childless," who remembers giving birth to a baby she was not allowed to touch and see because she might love it and wish to keep it. We are not supposed to think of what infanticide feels like, or fantasies of infanticide, or day after wintry day spent alone in the house with ailing children, or of months spent in sweatshop, prison, or someone else's kitchen, in anxiety for children left at home with an older child, or alone. Men have spoken, often, in abstractions, of our "joys and pains." We have, in our long history, accepted the stresses of the institution as if they were a law of nature.⁴⁰

But how is one to be watchful for an invisible enemy? The institution of motherhood is abstract, and cannot be seen or touched.⁴¹ It can, however, be evoked, made concrete, through visual and literary expression:

It must go on being evoked, so that women never again forget that our many fragments of lived experience belong to a whole which is not of our

glossed over. Women have always been outside the law (although we have been more severely punished for violating it, as in the case of prostitution and adultery). Over 2000 women from forty countries participated in the first International Tribunal on Crimes Against Women, which took place at the Palais des Congrès in Brussels, Belgium, March 4-8, ending on International Women's Day, 1976. Their testimonies revealed that in every country rape is on the increase; physical cruelty is considered normal as well as the psychological or frankly brutal attacks to which they are exposed if, for example, they walk by themselves on the street. This widespread violence is unanimously unrecognized and passed off in silence. Even against specific acts of violence, such as rape, assault, and battery, there is, in the majority of cases, no recourse in a court of law. The women participating in the International Tribunal testified to, among others, the following crimes against women: forced motherhood (denial of abortion and contraception); compulsory nonmotherhood (forced sterilization and denial of rights to unmarried mothers); crimes perpetrated by the medical profession, including brutality toward women giving birth and general medical crimes; compulsory heterosexuality and persecution of lesbians; crimes within the patriarchal family, including marriage without consent, economic crimes (economic discrimination within societies and resultant economic dependence on men; lack of social security and pregnancy disability benefits, "protective" laws, unpaid and forced maternity leave, inferior employment opportunities and wages, exploitation of female labor, etc.); unpaid domestic labor; poverty and victimization of welfare women and children; polygamy and slave treatment of third world women; violence against women—rape, woman battering, forced incarceration in mental hospitals and marriage, assault, femicide, castration of females (clitoridectomy, excision and infibulation), brutal treatment of women in prisons; sexual objectification of women (prostitution and pornography). This is just a partial catalogue of the crimes about which testimonial evidence was received. It is reported in *Crimes Against Women: Proceedings of the International Tribunal* (D. Russell & N. Van de Ven eds. 1976). See also D. Russell, *The Politics of Rape* (1975). For a more detailed discussion of the practice of clitoridectomy and other mutilations of female sex organs, see G. Corea, *The Hidden Malpractice: How American Medicine Treats Women as Patients and Professionals* 94-95 (1977) [hereinafter cited as *The Hidden Malpractice*].

40. *Of Women Born* 275-76.

41. The institution of motherhood has no symbolic architecture, no visible embodiment of author-

creation. Rape and its aftermath; marriage as economic dependence, as the guarantee to a man of "his" children; the theft of childbirth from women^[42]; the concept of the "illegitimacy" of a child born out of wedlock^[43]; the laws regulating contraception and abortion; the cavalier marketing of dangerous birth-control devices; the denial that work done by women at home is a part of "production"; the chaining of women in links of love and guilt; the absence of social benefits for mothers; the inadequacy of child-care facilities in most parts of the world; the unequal pay women receive as wage earners, forcing them often into dependence on a man; the solitary confinement of "full-time motherhood"; the token nature of fatherhood, which gives a man rights and privileges over children toward whom he assumes minimal responsibility; the psychoanalytic castigation of the mother^[44]; the pediatric assumption that the mother is inadequate and ignorant; the burden of emotional work borne by women in the family—all these are connecting fibers of this

ity of power, like many other institutions, such as the Supreme Court, the Pentagon, the Vatican or the Sorbonne.

42. The many aspects of the theft of childbirth from women are well presented in the chapter "Alienated Labor," in *Of Woman Born* 156-85. Consider now only one aspect, the great violence which has been committed upon women by American hospital obstetrics (not the least consequence of which is that the United States has one of the highest infant mortality rates in the world). Among the practices that have been routinely followed that are often damaging to both mother and child are: withholding information on the disadvantages of obstetrical medication; requiring all normal women to give birth in the hospital; elective induction of labor (without clear medical indication); separating the mother from familial support during labor and birth; confining the normal laboring woman to bed; shaving the birth area; professional dependence on technology and pharmacological methods of pain relief; chemical stimulation of labor; delaying birth until the physician arrives; requiring the mother to assume the lithotomy position for birth; routine use of regional or general anesthesia for delivery; routine episiotomy; separating the mother from her newborn infant; delaying the first breast-feeding. See also *The Hidden Malpractice* 184-231; *Our Bodies Ourselves: A Book By and For Women* 251-316 (The Boston Women's Health Book Collective 1975).

43. On the network of discrimination against "outlawed" childbirth and motherhood that coerces women into patriarchal family units and dependency, see Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An analysis of the Institution of Illegitimacy, Equal Protection and The Uniform Parentage Act*, *supra* note 5. Adrienne Rich helped me to realize the problem is not the discrimination against unmarried motherhood and in favor of "lawful" motherhood. The castigation of unmarried motherhood is merely a symptom, an outgrowth of the root problem: the degradation of compulsory motherhood itself. Without doubt childbearing is the pivot of women's oppression.

44. Another source of coercion is the professional male psychiatric establishment. Consider these pronouncements by psychiatrists on the subject of ("pathological") women who in one way or another attempt to resist the demands (and violence) of the institution of patriarchal motherhood:

The very fact that a woman cannot tolerate pregnancy, or is in intense conflict about it, or about giving birth to a child, is an indication that the pre-pregnant personality of this woman was immature and in that sense can be labelled as psychopathological. . . . The problem centers around unresolved oedipal situations. . . . Since pregnancy and birth are the overt proofs of femininity, the exaggerated castrative factors become overwhelmingly threatening. Identification with the mother is predominant and hostile. Receptivity in the feminine sexual role appears as debasing. Competition with the male is always at a high pitch. . . . Pregnancy as a challenge of femininity is unacceptable to them.

Fromm, *Psychoanalytic Considerations on Abortion*, in *Abortion in American* 210 (H. Rosen ed. 1967).

With sterilization the woman voluntarily surrenders a portion of her femininity. . . . Some women with unresolved hostility for their mother thereby hope to appease that same hated and hating mother and to obtain forgiveness for their wish for Father and Father's child.

Myers, *The Problem of Sterilization*, in *id.* at 93.

[Vasectomy] frequently is requested as a contraceptive measure. It seldom, if ever, can be so considered. Some emotionally sick women would like to castrate their husbands, and manage for this reason to force their own equally emotionally sick mates to request vasectomies.

Erickson, *The Psychological Significance of Vasectomy*, in *id.* at 57-58. It is really amazing how much men, who themselves cannot give birth or be mothers, have to say and teach on virtually every particular of the motherhood experience, and without the slightest trace of modesty, reserve or misgiving, or awareness of their impertinence.

invisible institution, and they determine our relationship to our children whether we like to think so or not.⁴⁵

This is the emotional thicket that envelops the abortion issue, precludes rational solution, and will continue to do so unless the whole arrangement of things were radically to change, which is improbable. The pressures of these tangled interests are brought to bear on (and exist within) the nine men on the Supreme Court who make the final decisions about pregnancy and motherhood for the whole nation. Their hit and miss performance is understandable, but nonetheless inadequate; in terms of the interests of women, not better than straight misses since the freedom that we have been considering is absolute, if at all. History has demonstrated that there is no assurance, under socialism, democratic capitalism, Protestantism, "humanism," or any other value system, that a liberal policy will not become an oppressive one, unless women have absolute decisionmaking power over the use of our bodies.⁴⁶ We have witnessed conservation programs yield to the logging, pipe-laying and stripping of our natural wilderness. Too, we have seen chameleonic laws and opinions about birth control and abortion fluctuate throughout history, in accordance with patriarchy's contemporary requirements of military aggression, the labor market, or sexual mores.

The final axiom to be questioned is the ethical premise upon which the "right-to-life" position is bottomed, that respect for human life has been and is a fundamental, even absolute, value. Accordingly, the presumed antagonism has been contrived in terms of woman versus fetus. But this is really not the issue at all.⁴⁷ As Adrienne Rich has observed,

[t]he absence of respect for women's lives is written into the heart of male theological doctrine, into the structure of the patriarchal family, and into the very language of patriarchal ethics. This is the underlying deceitfulness and hypocrisy of the Catholic or "Right-to-Life" argument against abortion. It is a fiction—not just an "unexamined assumption"—that respect for human life has been an ideal, or . . . "an almost

45. Of Woman Born 276.

46. From this perspective, and in light of the matters thus far considered, I cannot agree with the distinction made by Professor Karst in his extraordinarily fine essay that "[t]he equal citizenship principle comes to bear . . . not so much in recognizing a woman's interest in controlling the use of her body—the interest emphasized by the Court in the first set of abortion decisions—as in recognizing that there is great weight in a woman's claim of the right to control her own social roles." Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-58 (1977) (footnote omitted) [hereinafter cited as *Equal Citizenship*]. It seems to me that this distinction, if I understand it correctly, is one without a difference, since the right of access to contraceptives, or the right to an abortion, under the present regime, is inseparable from the right to take responsibility for choosing one's own future. On the inextricability of control of one's body and control of one's destiny, Margaret Sanger wrote: "No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother." *Woman and the New Race* 94.

On the same ground I would respectfully disagree with Professor Karst's statement that: "Denial of the right to choose to be a parent, involved in *Skinner v. Oklahoma* [316 U.S. 535 (1942)], is arguably a more serious denial of one's fundamental humanity than is the denial of the means of contraception or abortion. The decisions on the latter questions rest more soundly on a theory emphasizing issues of 'woman's role.'" *Id.* at 32 n.180. I would suggest that each of these denials is a qualitatively equal abridgement of one's fundamental humanity in that they are equally severe negations of "the presumptive right to be treated as a person, one of equal worth among citizens." *Id.* See pp. 125-31 *infra*.

47. A woman's right to not be a mother does not analytically or actually entail the killing of fetal life capable of extrauterine survival and development. The fate of live fetuses is a collective decision to be made in accordance with social policy. Assuming the existence of fetal-sustaining technology, which is likely to exist very soon, if it does not already (see Part V, pp. 93-96 *infra*) fetal development will not depend upon sociological caretaking by the biological mother. This function can be provided

absolute value in history." Women, upon whom most of the burden of respect for life has been placed, know that it is not. We know too much at firsthand about the violence of the warrior, the rapist, the institutional violence of political and social systems in which we have little part, but which affect our bodies, our children, our aging parents: the violence which over centuries we have been told is the way of the world, but which we exist to mitigate and assuage.⁴⁸

To the theologians, the "right-to-lifers," the fertility experts and the ecologists concerned with "humanity" and "humanistic values," women are not participating members of the community but, rather, are its tools. The fact that those now concerned with the quality of life on the planet (the ecologists, Planned Parenthood, Zero Population Growth, among others) currently favor freedom to choose abortion is not particularly hopeful. From an historical perspective, legislation regulating abortion has always come and gone with the ebb and flow of economic and military aggression, the need for cheap labor, or for increased consumerism. By supplying these demands for more human beings women have cheapened life itself.

In pre-Christian Rome a husband could order or permit his wife to have an abortion in one pregnancy and forbid her to in another. Through centuries, the policy of the Catholic Church has swung like a pendulum. After the Revolution the Soviet Union legalized abortion in 1920 and the state provided abortion on demand. Abortion was again prohibited when confrontation with Nazi Germany approached. After the Second World War, there was a new emphasis on consumerism and abortion was once again legalized to encourage wives to remain in the work force and increase family income.⁴⁹ Moreover, because of an inadequate contraception information program the Soviet Union has, in effect, made women choose abortion who would have preferred to prevent pregnancy. Japan repealed a liberal abortion law and limited the availability of contraceptives to the diaphragm in 1973 when the birth rate began to decline and the supply of cheap labor was threatened.⁵⁰

During the past decade the Peoples' Republic of China has virtually succeeded in limiting families to two children, a truly impressive achievement,

by males and females who are not the biological parents, and by a variety of other social arrangements for the care and raising of children. Indeed there is presently a demand for infants by individual would-be adoptive parents. Whether to create other forms of collective and institutional methods of child-rearing is a decision for which the society as a whole is responsible. If the value of human life is as sanctified as has been alleged, then we can expect a great commitment of personal and material resources in this direction. Given, however, the relatively low value that our society has thus far expressed toward human welfare in general (the poor, the disabled, the working classes, the aged, minorities) and child welfare in particular, it would be surprising if, able to preserve fetal life, society actually chose to do so. Daily and routinely other values, anti-life values of an economic, military, and nuclear power nature, are given priority over human life and we are not about to renounce them for the sake of fetuses, and everyone knows it. We already have an abundance of human welfare interests scrambling to divide a piteously slim allocation of budgetary resources and too many people barely scraping by with shameful standards of health care, sanitation, housing, nourishment and education (not to mention the absence in their lives of real joy and satisfaction) that should offend any ideal of human dignity and preciousness. It is sad, but unfortunately true, that the advocates of the sanctity of life pander an indecent sanctimony that betrays us all; they probably would not choose to nurture fetal life if they could. See also text accompanying note 143, et seq., *infra*. On the new biological technology, see Part V, pp. 135-41 *infra*.

48. Of Woman Born 269-70 (asterisk omitted). See note 39, and accompanying text *supra*.

49. See Wallach, *Comparative Legal Status of Soviet and American Women*, 5 VAL. U.L. REV. 439, 458 (1971).

50. See note 19 *supra*.

primarily through the dispensing of oral contraceptives. Fertility control experimentation is active, but animal toxicity requirements do not exceed six to twelve months. Subjects for clinical experimentation are recruited on behalf of "science for the revolutionary cause." To be sure, an urgent population problem does exist, but it seems that haste takes priority over the safety of the women upon whom the experiments are performed. During a visit to the Peoples' Republic of China in 1976 I inquired at health centers in several cities and provinces whether the widespread dissemination of oral contraceptives was safe, in light of recent findings of their harmful, even lethal potential. The inevitable response was that they were "100 percent safe" and that no negative effects were known. And one is mindful that even in the great Peoples' Republic of China, in another time, according to the then-prevailing social and political needs, the revolutionary cause might require that contraceptives be limited, that abortion be forbidden and that, as in the Soviet Union today, medals be awarded to the real heroines who produce more than ten children.

The use of women as breeders ordains that we either limit our fertility or increase and multiply, as determined by the contemporary political ambitions and purposes of others.⁵¹ The natural tendency of populations to increase to and beyond the limits of their food supply causes mass poverty and misery, and aggressive expansionism beyond territorial boundaries with attendant human slaughter. This results in the concomitant determination of nationalism to subordinate women to the purpose of patriotic breeding (often in the name of the glory of empire, a place in the sun, a path to the sea, or a route to India). The interlinked realities of geometric population increase and territorial aggression were two of the informing ideas of the Neo-Malthusian movement for contraception.⁵² But the seminal idea of the *birth control* movement as such, the name given by Margaret Sanger to the crusade to which she devoted her life, was the liberation of women and their sexuality, a fundamental mode of self-expression, from the political enslavement of involuntary motherhood.⁵³ In this respect the birth control movement is to the bondage of motherhood what the civil rights movement is to slavery. One might wonder, with good reason, whether Margaret Sanger's effort was,

51. A recent example of fertility expansionism is Argentina. In 1975, the government, wanting to double its population by the end of the twentieth century, forbade the distribution of birth control information and curtailed the sale of contraceptives. It was unabashedly printed in the Peronist Magazine *Las Bases*:

. . . [W]hen the year 2000 is at hand, we will have over-populated neighbors with great food problems, and we, on the contrary, will have three million kilometers of land, practically unpopulated. We will not have the arms to work this immense and rich territory, and if we do not do it there will be others who will. . . . We must start from the basis that the principal work of a woman is to have children.

Quoted in *Of Woman Born* 272. Two American feminists reported from the East Berlin World Congress of Women for International Women's Year in 1975 that the reports and working papers presented at this male-dominated conference expressed the view that women's major value is as "the bearers of future generations" and in their "dual social functions as mothers and workers." "Hardly ever during the entire Congress was it pointed out that women are human beings first and foremost and deserve their rights for that and no other reason." McKinley, Russell, et al., *The 'Old Left' Divided in Berlin over the 'Woman Question'*, in Majority Report, March 6-20, 1976, at 11. Cf. text accompanying note 4 *supra*.

52. See *Woman and the New Race* 151-66.

53. *Id.* at 93-100 and 167-85. To Margaret Sanger the separation of the functions of maternity and sexuality was vital: "Voluntary motherhood also implies the right of marriage without maternity. Two utterly different functions are developed in the two relationships. In order to given the mate relationship its full and free play, it is necessary that no woman should be a mother against her will." *Id.* at 229-30.

ultimately, futile, in view of the ongoing evidence that men continue to manipulate maternity despite the advent of modern techniques to control birth.

Admittedly, the long-term prognostication, if based on past experience, is inauspicious. Nevertheless, the birth control movement in America and Europe was an extremely important development. At least for upper and middle class twentieth century women in Western nations of the Northern Hemisphere, it was the first step out of darkness and toward consciousness and autonomy. It was a necessary, although not sufficient, condition precedent to the control of our destinies and full, participating, respected citizenship in society. The history of the birth control movement illustrates the dilemma women encounter when we are dependent upon medicine and science for the instrumentalities of freedom, yet have no decisionmaking power within these male-controlled establishments. It is similar to the present quandary posed by the exclusive possession of science, in which women do not participate, of the potentially liberating reproductive technologies, and control over the future direction of scientific inquiry and development, which will be considered in Part V.

III. THE BIRTH CONTROL MOVEMENT: A BEGINNING

. . . [W]e have been criticized for our choice of the term "Birth Control" to express the idea of modern scientific contraception. I have yet to hear any criticism of this term that is not based upon some false and hypocritical sense of modesty, or that does not arise out of a semi-prurient misunderstanding of its aim. On the other hand: nothing better expresses the idea of purposive, responsible and self-directed guidance of the reproductive powers.

. . . .

Birth Control is no negative philosophy concerned solely with the number of children brought into this world. It is not merely a question of population. Primarily it is the instrument of liberation and of human development.

—Margaret Sanger⁵⁴

A. Margaret Sanger and the Revolution

The pioneering work of Margaret Sanger began when, with undivertible single-mindedness of purpose and vision, she took on the intransigent opposition of both the medical and legal establishments. Her crusade began in 1912, and concluded at the time of the Second World War when conditional governmental acceptance of birth control was finally achieved. During this period she was arrested eight times. She embraced the cause of contraception because the medical profession refused to respond to the desperate supplications for the knowledge and the means to prevent conception of millions of women whose personhood was submerged by the connecting links of pregnancies, births and miscarriages.⁵⁵ Yet

54. M. Sanger, *Pivot of Civilization* 12 and 238-39 (1922) [hereinafter cited as *Pivot of Civilization*]. The growth of the movement dates from 1914 when a small group of women, meeting in Sanger's home, organized the first Birth Control League. The first necessity was to find a name for contraception which would convey to the public the social and personal significance of the idea. For other names they considered, see M. Sanger, *My Fight for Birth Control* 83 (1931) [hereinafter cited as *My Fight for Birth Control*].

55. It was Margaret Sanger's belief that ". . . in the end a free womanhood turns of its own desire to a free and happy motherhood, a motherhood which does not submerge the woman, but which is enriched because she is unsubmerged." *The New Motherhood*, *supra* note 3, at 240, ". . . [A]s long as she must docilely and humbly submit to the decisions of others, how can woman ever lay the

throughout she considered science, the great instrument of social change, her indispensable collaborator and propangandized to awaken the interest of scientists in the birth control movement.⁵⁶ To her, science was the great ally of a humanity compelled to combat continuously "those great forces of nature which have opposed it at every moment of this long indomitable march out of barbarism."⁵⁷

The ideological and political character of the birth control movement was shaped by Margaret Sanger's intellectual formation and her experience in nursing.

Resolved to leave the world a better place because she had dwelled in it, she wanted to become a physician but became a nurse instead because she could only afford the shorter preparation of nursing school.⁵⁸ While studying nursing in New York she was exposed to inspiring ideas that were later to influence her birth control activities. Her consciousness was raised during her early associations with the eminent Socialist leaders and activists at Mabel Dodge's salon, where congregated politicians, painters, sexologists, futurists, dramatists, sculptors, editors, writers, anarchists, socialists, Wobblies and poets. She heard the formidable Emma Goldman, feminist, anarchist and, since 1900, advocate of voluntary motherhood, defending the anarchist tactic of direct action; Walter Lippmann explaining Freud; Will Durant describing the sexual theories of Havelock Ellis; Big Bill Haywood telling of the International Workers of the World.

She committed herself to the dream of socialism and became a woman's organizer for New York City, believing that the time was right for socialism—industrialism had at last created a proletarian class-consciousness and a visible enemy in the class of capitalist bosses.⁵⁹ In the daily Socialist *Call* she read the theories of a growing radical feminism. The thesis was that industrialism forced women out of the home by depriving it of its productive function and requiring women to supplement their husband's low wages; capitalists compelled the forced draft of women's industrial labor to glut the working pool and depress all wages. Inherent was the antithesis that, in industrial self-sufficiency women's historical slavery and oppression had been destroyed; for the first time, women now had to make use of their dominant powers of reasoning and concentration.

Influenced by her friend and mentor Emma Goldman, she turned away from the socialists' political tactics and embraced the anarchist tactic of direct action and the International Workers of the World's direct assault on the problems of industrial organization, working conditions, wages, and hours. The Ferrer School, a liberal educational experiment begun by Emma Goldman and others in 1910, was a focal point for the activities of the anarchists. Here the political demand expanded into an aesthetic and psychological one, steeped in the romantic tradition of the dignity of the human personality and the related need for unfettered self-expression. At Ferrer, the anarchists absorbed dramatically new sexual ideas from Europe, especially those of Freud and Havelock Ellis, and the ideas of the Swedish feminist Ellen Key. It was from Key that Margaret Sanger took her most enduring ideas of the nature of womanhood and marriage. Key

foundations of self-respect, self-reliance and independence? How can she make her own choice, exercise her own discrimination, her own foresight?" *Pivot of Civilization* 259.

56. See, e.g., *id.* at 220-42.

57. *Id.* at 225.

58. M. Sanger, *An Autobiography* 23 (1938) [hereinafter cited as *Autobiography*]; *My Fight for Birth Control* 32-33.

59. *Autobiography* 75.

believed that only sexual love, not law or tradition, could make marriage sanctified, durable; that the denial of female sexual satisfaction in marriage violated the highest imperative of the inner self, which should be allowed full freedom of expression.

These ideas were the intellectual grist of the radicals of the Ferrer School and members of the Dodge Salon, who tried to fit the new sexual theories to their programs of social reform. Margaret Sanger came to believe that sex was essential in social reconstruction.

As a nurse, Sanger attended obstetrical cases in the crowded immigrant tenements of Manhattan's Lower East Side slums where she discovered firsthand the squalid conditions of the masses that were the ideological concern of the radicals and the progressive reformers.⁶⁰ The lack of sanitation and public health had prompted efforts to improve sanitation and cure and prevent tuberculosis and disease. These endeavors were motivated by both solicitude for the welfare of the poor and the desire to insulate the rest of the community from alien contamination. This dual motive had its analogue in the birth control movement and, while it galvanized public support for it among the upper class it also fostered a hostility among the lower class that was later to become apparent.

Margaret Sanger was horrified by the ignorance of immigrant women about their own bodies and by the resultant high incidence of social disease. And fecundity, perhaps an asset in Europe, was a liability in the packed New York slums. Without knowledge or means of contraception they resorted to self and back-alley abortion which frequently resulted in permanent injury or even death. The death of Sadie Sachs from an attempted self-abortion, three months after Sanger had attended her in childbirth, was to change the course of Margaret Sanger's life. Sadie Sachs' doctor had warned her that another pregnancy would endanger her life but he refused her entreaties for the contraception "Secret." His contraceptive advice was that Mr. Sachs sleep on the roof.⁶¹ Sadie Sachs hemorrhaged to death in 1912 after she had stuck a sharp instrument inside herself to prevent the birth of another child she could not feed. Sanger, attending the dying Sadie, was overcome by the tragedy and thereafter resolved to abandon palliative healing to begin a career dedicated to the emancipation of women.⁶²

In 1913 Margaret Sanger departed for France to find out about reliable

60. *Id.* at 88.

61. Sanger recounts the event as follows:

At the end of three weeks, as I was preparing to leave the fragile patient to take up her difficult life once more, she finally voiced her fears, "Another baby will finish me, I suppose?"

"It's too early to talk about that," I temporized.

But when the doctor came to make his last call, I drew him aside. "Mrs. Sachs is terribly worried about having another baby."

"She well may be," replied the doctor, and then he stood before her and said, "Any more such capers, young woman, and there'll be no need to send for me."

"I know, doctor," she replied timidly, "but," and she hesitated as though it took all her courage to say it, "what can I do to prevent it?"

The doctor was a kindly man, and he had worked hard to save her, but such incidents had become so familiar to him that he had long since lost whatever delicacy he might once have had. He laughed good-naturedly. "You want to have your cake and eat it too, do you? Well, it can't be done."

Then picking up his hat and bag to depart he said, "Tell Jake to sleep on the roof." Three months later Sadie was dead. *Id.* at 90-91.

62. After Sadie Sachs died Sanger had this mystic experience:

. . . [F]or hours I . . . walked and walked and walked through the hushed streets. When I finally arrived home and let myself quietly in, all the household was sleeping. I looked out my window and down upon the dimly lighted city. Its pains and griefs crowded in upon me, a moving picture rolled before my eyes with photographic clearness: women writhing in travail

contraceptive information so that she could teach women herself. Although the American medical profession had some contraceptive knowledge, apparently it was limited,⁶³ and those who knew refused to share it with any but the upper class who had been practicing contraception of some sort since the nineteenth century. In 1913 Rosa Luxemburg in Germany and Anatole France in France were advocating that workers undertake a birth-strike—a cessation of childbearing in order to curtail the production of exploited “manpower” into the industrial and military institutions, an idea heretical to the classic Marxist view that a reduction in the proletarian birth rate would enervate socialism by diminishing the revolutionary impetus of the working class and undercut its numerical strength. Sanger was convinced that controlled fertility would not only alleviate the suffering in the slums and emancipate women but would also serve as a working class weapon in the class struggle.

Returning to America, she launched in March of 1914 her publication *Woman Rebel*, the manifesto of which was “No Gods, No Masters,” to stimulate working women to think for themselves and build up a conscious fighting character and to advocate and impart knowledge about contraception. This issue of *Women Rebel* did *not* describe contraceptive practices in detail, and, in fact, the term “birth control” itself did not appear until the June issue. Nevertheless, the postmaster for New York City notified Sanger that the March issue could not be mailed because it violated section 211 of the United States Criminal Code, part of the Comstock Act,⁶⁴ a group of statutes passed in 1873 at the behest of Anthony Comstock and his Society for the Suppression of Vice, to protect sexual purity. Congress enacted sweeping prohibitions against mailing, transporting, or importing “obscene, lewd, or lascivious articles” generally, but specifically banning all devices and information pertaining to “preventing conception.” A nine-count indictment was returned against her; before trial she departed to further study contraceptive methods in Europe.

to bring forth little babies; the babies themselves naked and hungry, wrapped in newspapers to keep them from the cold; six-year-old children with pinched, pale, wrinkled faces, old in concentrated wretchedness, pushed into gray and fetid cellars, crouching on stone floors, their small scrawny hands scuttling through rags, making lamp shades, artificial flowers; white coffins, black coffins, coffins, coffins interminably passing in never-ending succession. The scenes piled one upon another on another. I could bear it no longer.

As I stood there the darkness faded. The sun came up and threw its reflection over the house tops. It was the dawn of a new day in my life also. The doubt and questioning, the experimenting and trying, were now to be put behind me. I knew I could not go back merely to keeping people alive.

I went to bed, knowing that no matter what it might cost, I was finished with palliatives and superficial cures; I was resolved to seek out the root of evil, to do something to change the destiny of mothers whose miseries were vast as the sky.

Id. at 92.

63. Margaret Sanger tried to educate the medical profession by sending Dr. James F. Cooper to hundreds of county medical societies in the 1920s to speak on birth control and by sponsoring medical symposia, as in Zurich in 1930 and New York in 1934.

But the profession continued to scorn any information connected with her or with her clinic as “sensational contributions by fanatical propagandists or hysterical ladies.” Dr. Hannah Stone found the leading medical journals closed to all clinic reports. What little information did exist, therefore, was not widely known in the profession. In 1930, only 13 of the 75 American medical schools rated grade-A gave regular courses in contraception. Another 29 gave “incidental instruction,” the rest, none. By 1936, nearly half of these schools still gave no instruction. Many doctors came to the Clinical Research Bureau to be taught contraceptive technique, but the bureau could not possibly educate enough doctors to meet the growing public demand. One physician observed in 1932 that the number of doctors “who know little or nothing about contraceptive measures is tragically amazing.”

D. Kennedy, *Birth Control in America* 211 (1970) (footnotes omitted) [hereinafter cited as *Birth Control in America*].

64. Act of March 3, 1873, ch. 258, 17 Stat. 598 (entitled “An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use”).

With Havelock Ellis as a guide she began to shape the ideas she assimilated into a systematic philosophic justification for birth control. She acquired the ideological structure necessary to focus and launch a successful campaign. She went to Holland, to visit the government-supported birth control clinic at The Hague where, under the tutelage of Dr. Johannes Rutgers, who operated the clinic and had pioneered in the field of clinical contraception in the 1880's, she learned the technique of adjusting the Mensinga pessary, a diaphragm devised in 1883 by the German gynecologist, Dr. Wilhelm Mensinga, and Dr. Aletta Jacobs, who established the first birth control clinic in the world in 1878 in Amsterdam.⁶⁵ The Mensinga pessary was superior to the Mizpah cervical cap that Sanger had been recommending. From Rutgers she learned that each woman must be examined and fitted individually by a physician with the proper type of pessary. He convinced her that contraception was strictly a medical matter. Her acceptance of that lesson determined the subsequent course of the birth control movement. Moreover, Dr. Rutgers was training midwives and nurses in the technique and expertise of hygienic methods of family limitation; they were then set up in practice in towns and cities throughout Holland. A deeply impressed Margaret Sanger wrote: "The fact that each woman had to be examined by Dr. Rutgers before the method of contraception could be advised presented an entirely new aspect of the situation to me."⁶⁶ And: "[T]o Dr. Rutgers we owe the idea of training nurses and sending them into congested quarters to teach contraception to the overburdened mothers of the poor."⁶⁷

In September 1915, she received word that her husband William Sanger had been convicted on a Comstock obscenity charge and had elected to go to jail for thirty days rather than pay the fine.⁶⁸ Margaret Sanger returned to America, now thoroughly focused on creating a movement for the *scientific* control of human reproduction and establishing a network of clinics across America, where the cause was considered so baleful. By the time she decided to make birth control a public issue it was already very much a private one among the upper class, compatible with the once-shocking notions of the "modern family," the "new woman," and the "sexual revolution" that, by the time of the First World War, in fact characterized a pattern of American social life of which most educated and articulate Americans approved. To Margaret Sanger fell the task of making birth control a consciously accepted part of that pattern and of extending it to the lower class and the poor whose suffering so disheartened her. Her formidable adversaries were the patriarchical institutions of medicine and law.

65. My Fight for Birth Control 110, 114. In 1882 Dr. Aletta Jacobs opened a free clinic for poor women and children in Amsterdam and gave contraceptive advice and information. At the time Sanger was in The Hague there were over 50 clinics in Holland. *Id.* at 112, 114.

66. *Id.* at 110. Dr. Rutgers dissuaded her from the view expressed in her 1914 pamphlet, *Family Limitation*, that women could teach each other contraceptive methods or that they could learn from pamphlets such as hers.

67. *Id.* at 115.

68. William Sanger had given a copy of Margaret Sanger's *Family Limitation* to an undercover agent; Comstock himself personally made the arrest:

In late 1914, a man who gave his name as Heller appeared at William Sanger's studio and asked for a copy of "Family Limitation." Professing to sympathize with Margaret Sanger's work, he said he would like to have her pamphlet translated into different languages, "to distribute amongst the poor people he worked with." Sanger innocently gave him a copy. Heller turned out to be a decoy. A month later, in early 1915, Anthony Comstock came in person to Sanger's studio and arrested him for violating the New York law which forbade "obscene, lewd, lascivious, filthy, indecent and disgusting" literature. Comstock's real purpose, although he relished the arrest, was to flush Margaret Sanger from hiding. This his

B. *The Battlegrounds: Medicine and Law*

Determined to implement the lessons learned from Dr. Rutgers, free birth control clinics were the goal. On October 16, 1916, Margaret Sanger, with her sister Ethel Byrne, also a trained nurse, and Fania Mindell, opened the first birth control clinic in America at 46 Amboy Street in the Brownsville section of Brooklyn.⁶⁹ News of it spread like wildfire through the tenements; large numbers

action ultimately accomplished; but in the meantime William Sanger's trial generated considerable support for birth control as a free-speech issue—so much so that, when Mrs. Sanger returned to the United States in October 1915, she found that a good many people had done a great deal of work for the cause. . . . As for Comstock, death, in September, cheated him of a last attempt to get Margaret Sanger in the clutches of the law.

Birth Control in America 72-73.

69. Each morning they distributed handbills printed in English, Hebrew and Italian:

MOTHERS!

Can you afford to have a large family?

Do you want any more children?

If not, why do you have them?

DO NOT KILL, DO NOT TAKE LIFE, BUT PREVENT

**Safe, Harmless Information can be obtained of trained
Nurses at**

46 AMBOY STREET

NEAR PITKIN AVE. — BROOKLYN.

Tell Your Friends and Neighbors. All Mothers Welcome

A registration fee of 10 cents entitles any mother to this information.

מוטערס!

וויס איהר פערמעגליך צו האבען א גרויסע פאמיליע?

וויילט איהר האבען נאך קינדער?

איפן ניט ווארום האט איהר זיי?

פערדערט ניט, נעמט ניט קיין לעבען, נור פערדום זיך.

זיכער, אנטהאלט איסקונסט קען איהר נעקסטן טאג פארשטעלן זיכערס אז

46 אמבוי סטריט ניער פיטקין עוועניו ברוקלין

טאגס ראט נעקסטן צו אייניק פרייט און זונטן. קלער טאגס אז ווילקאסן

פיר 10 סענט אינשוריסטענץ וויילט איהר נעקסטנס צו זייען אינשוריסטאן.

MADRI!

Potete permettervi il lusso d'avere altri bambini?

Ne volete ancora?

**Se non ne volete piu', perche' continuate a metterli
al mondo?**

NON UCCIDETE MA PREVENITE!

Informazioni sicure ed innocue saranno fornite da infermiere autorizzate a

46 AMBOY STREET Near Pitkin Ave. Brooklyn

a cominciare dal 12 Ottobre. Avvertite le vostre amiche e vicine.

Tutte le madri sono ben accette. La tassa d'iscrizione di 10 cents da diritto

☉ a qualunque madre di ricevere consigli ed informazioni gratis.

of neighborhood women crowded the clinic daily, approximately 100 on the opening day.

The activities at the clinic were in violation of New York Penal Code section 1102, making it a misdemeanor for anyone to sell, lend, or give away, or to loan, advertise, or distribute, "any recipe, drug or medicine for the prevention of conception."⁷⁰ Section 1145 provided an exception: "An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use, within this article. The supplying of such articles to such physicians or by the direction or prescription, is not an offense under this article."⁷¹ On October 26, police officers raided the clinic and confiscated articles (condoms and Mizpah pessaries) that Sanger was prescribing. On November 14, they returned and heard her lecture to a group of neighborhood mothers. An undercover policewoman and five undercover policemen arrested Margaret Sanger and Ethel Byrne for violations of Penal Code Section 1142. Ethel Byrne and Fania Mindell were also charged with distributing "obscene" literature, Margaret Sanger's book, *What Every Girl Should Know*, in violation of Penal Code Section 1141. Sanger and Byrne were found guilty and sentenced to thirty days in the Workhouse. Their arrests and trials provided an opportunity to publicize the birth control clinic and test the constitutionality of the New York statutes.

Although on appeal both convictions were affirmed,⁷² the cause was advanced. In *People v. Sanger*, Judge Crane, writing for the unanimous New York Court of Appeals (including Judge Cardozo), expanded the physician exception of Penal Code Section 1145 to include more than the cure and prevention of venereal disease:

This exception in behalf of physicians does not permit . . . promiscuous advice to patients irrespective of their condition, but it is broad enough to protect the physician who in good faith gives such help or advice to a married person to cure or prevent disease. [¶] "Disease," by Webster's International Dictionary, is defined to be: "An alteration in the state of the body, or of some of its organs, interrupting or disturbing the performance of the vital functions, and causing or threatening pain and sickness; illness; sickness; disorder."⁷³

This construction permitted physicians wide discretion to determine the conditions that warranted contraception, either as a preventive or therapeutic measure, but the doctors refused broadly to exercise their prerogative. From Dr. Rutgers, Margaret Sanger had learned the indispensability of medical support to the success of birth control, since only doctors and doctor-trained personnel could ensure a safe and effective contraceptive technique. And, at least in New York, the 1918 decision in *People v. Sanger* made the involvement of physicians even more imperative, because only licensed physicians could lawfully prescribe artificial methods of birth control. In the ensuing two decades Sanger implored the organized medical profession to endorse contraception. Its refusal to do so was in part based on its theory that contraceptives, if "indiscriminately em-

70. *Id.* at 158-61. See also *id.* at 169-86.

71. See *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918), appeal dismissed for lack of jurisdiction, 251 U.S. 537 (1919) (*per curiam* opinion).

72. *Id.*; *People v. Byrne*, 99 Misc. 1, 163 N.Y.S. 682 (Sup. Ct. 1917).

73. 222 N.Y. at 192, 118 N.E. at 637.

ployed," would corrupt personal morality and national strength.⁷⁴ Another ground was the profession's renunciation of any relation between birth control, as a purely medical matter, and social and economic problems. Besides, doctors were ignorant of a reliable, harmless contraceptive method and rejected artificial devices in favor of continence or sterilization. Early medical reaction to birth control derived principally from a relatively new sense of medical professionalism, prestige and elitism, and expressed three persistent themes:

Doctors had a reflex aversion to anything that smacked of lay medicine, sensationalism, or quackery. They opposed other than pathologic indications for medical treatment. Most forcefully, they rejected any therapeutic technique so untried as artificial contraception. All these themes proceeded from the history of medicine in nineteenth-century America [that] . . . had witnessed the nadir of public confidence in medicine.⁷⁵

Margaret Sanger conceded the need to give birth control over to medical professionalism. She would step aside when it fulfilled its responsibilities in the matter of contraception. But she insisted on social indications, urging medicine to broaden its perception of its responsibilities to include the amelioration of eugenic, economic and social problems through the application of medical knowledge. Realizing that the major source of medical opposition to birth control lay in ignorance of an acceptable contraceptive technique, she decided to open a clinic which, as the Brownsville clinic had, would provide service, but the new clinic would also be a first-rate center for medically supervised study of contraceptive techniques.

The Clinic Research Bureau, as it was called, opened on January 2, 1923. The most successful technique proved to be the combination of a spermicidal jelly with a Mensinga pessary. Sanger procured the jelly formula in Germany in 1920 and, soon thereafter, it was being manufactured in the United States. American manufacturers, however, made only the unsatisfactory cervical cap diaphragm, and federal statutes prohibited the importation of contraceptive supplies. The few Mensinga pessaries the clinic could obtain came from Germany to Sanger's husband's Three-in-One oil plant in Montreal, from where he ran the contraband diaphragms across the Canadian border in oil drums. Even so, the supply was inadequate. Sanger encouraged the formation of a domestic manufacturing concern to produce a quality Mensinga diaphragm, which finally happened in 1925.⁷⁶

The clinic's very existence and growing popular response to Sanger's propaganda began to alarm doctors—the clinic did not distinguish between sociologic contraception and therapeutic contraception; besides, it was a "lay organization essentially sociologic in its aims and programs," yet had the affrontery to "enter or dictate the practice of medicine." By 1925, Sanger, in an effort to

74. Contraception was contrary to the national purpose "to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women." *Eisenstadt v. Baird*, 405 U.S. 438, 448, quoting *Commonwealth v. Allison*, 222 Mass. 57, 62, 116 N.E. 265, 266 (1917).

75. *Birth Control in America* 176. The profession was willfully ignorant about contraceptive techniques and information and, in fact, some medical journals refused articles on contraceptives out of fear that they would be unmailable under the Comstock Act. Contraceptive information was also omitted from medical textbooks in order to keep them mailable. *Id.* at 226. On Margaret Sanger's effort to educate the medical profession, see also note 63 *supra*.

76. *Id.* at 174-75.

“professionalize,” recruited an advisory board of physicians and scientists. The physicians remained aloof, however, still citing fear of quackery, aversion to non-medical indications and lack of scientific knowledge of contraception, the very impediments that only medical involvement could remove. Consequently non-medical scientists dominated the board—geneticists, eugenicists, zoologists, biometricians—who believed that the birth control clinic was more important as a source of sociologic information than as a medical service. Bitterness arose between the social and biological scientists and the medical doctors, each group fearing that the control of the clinic by the other would constrict or contaminate its own professional interest there.

In the end it was, ironically, the booming business in contraceptives, developed by scores of unscrupulous profit seekers in response to public demand; that moved the medical profession. “Demand for contraceptives outstripped the supply of medical knowledge and gave rise to a huge birth control industry riddled with quackery and dishonesty. On that sorry product of ‘public opinion,’ the organized medical profession did finally, though reluctantly, meet the issue.”⁷⁷ Many doctors demanded action against the flood of questionably effective and often dangerous devices sold to their patients. In 1935, the American Medical Association decided to investigate contraceptive practices and related problems and, in 1937, it virtually endorsed birth control, still insisting, however, that clinics be under strict medical supervision, but it refrained from castigating lay organizations. Commercial exploitation of contraceptives was indicted and contraceptive education in medical schools demanded. At last the AMA accepted the position Margaret Sanger had been promoting for two decades—that other than pathologic conditions were valid indications for contraception. The AMA position went beyond purely medical and sociological indications. It advised that doctors should no longer insist contraception be used only in the treatment or prevention of dangerous disease; they should honor the good faith of their patients who request birth control: “Voluntary family limitation is dependent largely on the judgment and wishes of individual parents.”⁷⁸

When Margaret Sanger received the Town Hall award in 1937 she was hailed: “Among foremost health measures originating or developing outside medicine like ether under Morton, microbe hunting under Pasteur, nursing under Nightingale, Margaret Sanger’s world wide service holds highest rank and is destined eventually to fullest medical recognition.”⁷⁹ Of course the problem remained, as it does today: the lack of a harmless and completely effective contraceptive technique.⁸⁰

77. *Id.* at 213.

78. *Id.* at 216.

79. Telegram from Dr. R.L. Dickinson to Margaret Sanger, January 15, 1937, quoted in *id.* at 217.

80. See note 162 *infra*. An examination of the subsequent development of modern female contraceptives reveals that too often devices and drugs have been inadequately researched before being widely distributed and that, once available, many women have used them without informed consent. This is not unreminiscent of the commercial exploitation of questionably effective and often dangerous devices that originally motivated the medical profession to accept responsibility for research and education in the field of contraception. See generally *The Hidden Malpractice* 137-69. Especially tragic are the estimated 2.1 million to 3.5 million “DES daughters,” daughters of mothers given diethylstilbestrol in the 1940s, ‘50s and ‘60s as an antimiscarriage drug despite the fact that there had never been clear evidence for its effectiveness in preventing miscarriages. Many DES daughters have developed vaginal cancer at puberty, and in the next two decades thousands of more DES daughters will reach puberty. Ninety-one percent of DES daughters have adenosis, abnormal glandular structures in the vagina or on the cervix. Almost all DES daughters with vaginal cancer also had

It is probably more than coincidental that 1937, when the medical profession officially endorsed birth control, was the year of Margaret Sanger's greatest legal victory. In *United States v. One Package*⁸¹ (of Japanese pessaries), the Second Circuit Court of Appeals, through Judge Augustus Hand, clarified the status of contraception, in permitting Dr. Hannah Stone to import a package of contraceptive diaphragms to be used at the clinic, saying that intended use "for the cure or prevention of idisease" was not prerequisite to lawful use of contraceptives. With this test of intent thus stripped of its subterfuge, doctors were allowed wide discretion to decide licit purpose for contraception. The *One Package* decision made possible precisely what Margaret Sanger had demanded for twenty years—medical prescription of contraception for whatever reasons a physician, in the intimacy of the physician-patient relationship, saw fit. *One Package* could not have been uninfluential in the AMA's endorsement of birth control that same year.

One Package, however, was the last battle Margaret Sanger waged with the law. For almost a quarter of a century after her initial indictment under the Comstock Act in 1914, she worked relentlessly to have its provisions nullified, both legislatively and judicially, as well as the similar prohibitions enacted in individual states. Twenty-two states had so-called little Comstock laws that imposed restrictions ranging from New York's confinement of lawful contraception to physicians prescribing "for the cure or prevention of disease,"⁸² to Massachusetts' interdiction of publishing information and distributing material relating to contraception, to Connecticut's ban on the "use" of birth control devices.

After the decision in *One Package* "little" Comstock laws still existed in several states. All but Massachusetts and Connecticut ceased to enforce them or repealed them. In Massachusetts⁸³ and Connecticut,⁸⁴ which had the most stringent anticontraception statutes, the courts seemed more inclined to follow the begrudging concurrence of Judge Learned Hand than Judge Augustus Hand's opinion for the court in *One Package*. But in *Griswold v. Connecticut*⁸⁵ the Supreme Court invalidated the Connecticut prohibition and in 1966 Massachusetts repealed its anti-brith control statute, clearing away much of the remaining debris of restrictive contraceptive legislation.⁸⁶ Margaret Sanger died

adenosis and the cancer often occurred in the same location as the adenosis. DES is still being prescribed for women in the form of the "morning-after pill" (postcoital contraceptive). The estimated risk of pregnancy for a single unprotected coitus is only four percent. Abortion in cases where conception occurs would clearly seem safer than DES "morning-after" pills. *See id.* at 242-52.

81. 86 F.2d 737 (1936). Judge Learned Hand concurred but with gravest reservations. *One Package* involved section 305 of the Tariff Act of 1930, an outgrowth of the original Comstock Act that customs officials had enforced much more rigorously than other government agents had enforced the postal and interstate transportation statutes: "All persons are prohibited from importing into the United States from any foreign country . . . any article whatever for the prevention of conception or for causing unlawful abortion." (19 U.S.C.A. § 1305(a) (1930).) Dr. Hannah Stone, medical director of the Clinical Research Bureau, was the appellant, having received the pessaries from Japan for use at the clinic.

82. *See note 72 supra.*

83. *Commonwealth v. Gardner*, 300 Mass. 372, 15 N.E.2d 222 (1938); *cf. Commonwealth v. Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940).

84. *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940); *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582 (1942) *appeal dismissed for lack of standing*; *Tileston v. Ullman*, 318 U.S. 44 (1943); *Buxton v. Ullman*, 147 Conn. 48, 158 A.2d 508 (1959); *see also Poe v. Ullman*, 367 U.S. 497 (1961).

85. 381 U.S. 479 (1965).

86. *But see Eisenstadt v. Baird*, 405 U.S. 438 (1972).

in 1966. Part of her legacy is Planned Parenthood—World Population, with 500 American birth control clinics serving 400,000 patients annually, grown up from her seedling American Birth Control League which she established in 1916 with its one Brownsville clinic.

The eventual relinquishment of resistance to birth control among the medical and legal professions undoubtedly liberated many women from compulsory motherhood. But the very fact that these establishments, the targets of reform, took it up as their own cause, underscores that the revolution which Margaret Sanger announced so defiantly in *Woman Rebel* in 1914 had been co-opted, and became a middle-class phenomenon. The prosperous bourgeoisie, not the proletariat, became the self-conscious class in America and led a birth control movement that served well the purposes, prejudices and needs of a mobility-conscious middle class, panicked by the declining birth rate among the native, white, Anglo-Saxon, Protestant stock and high fertility of the immigrants.

The self-consciousness of the thriving bourgeoisie engendered the hope that it would be possible in America to remake a wholly middle class society. In the early twentieth century the middle class at first tried to implement that ideal by absorbing lower class elements, but by the 1920's many middle class reformers sought through eugenic rectification simply to eradicate the alien and the poor. They adapted the Spencerian model of society as an organism to accommodate some excisions without damage to the vital parts. After her early radicalism Margaret Sanger herself directed her consciousness-raising not to the poor but to the middle class. Although after the First World War birth control advocates continued to care about the predicament of the prolific poor, that concern became motivated less by compassion for the lower class than by the anxiety of the middle class. Working class misery now was attributable not to economic and political dislocation but to the overbreeding of the working class itself. The poor, especially the black and the alien poor, had become mostly a "problem," the solution to which was the application of birth control to implement eugenic notions.

By the end of the 1920's, birth control propaganda bore little resemblance to the rationales Margaret Sanger had originally developed to support and legitimate the radical idea of contraception and, in fact, was being used to serve a truly sinister design. The potentially reactionary implication of the birth control movement is poignantly evident in its enthusiastic reception by eugenicists interested in biological control of presumed inferior immigrants. This strategy should be well understood for there is an important lesson in it relevant to the use of the swiftly developing power of molecular biology and genetic science to artificially create life and, thus, control it.

C. *The Revolution Perverted: The Eugenic Heritage*

The concept that birth control could be an effective means of social control attracted to the birth control movement a congerie of middle class reformers fascinated with the prospect of biologically regulating science according to the doctrine of eugenics. This support came just at the time Margaret Sanger sought to establish birth control and clinics on a scientific grounding. Although health and medical scientists were opposed to birth control, genetic tinkers were interested. The theory of biological efficiency held out more than the possibility of social harmony. It also meant leadership of the "competent," a position from which the levelling tendencies of the democratic principle of equality could be

resisted. Eugenics gave those who believed in efficiency a specific biological program which included a concern for the general welfare but was overlaid with elitism and racism.

The important role of birth control in the eugenicists program was to get more children from the fit and less from the unfit. Margaret Sanger used the term "unfit" to refer to the mentally retarded and physically deformed. "Birth control," she said in 1920, "is nothing more than the facilitation of the process of weeding out the unfit, or preventing the birth of defectives or those who will become defectives."⁸⁷ Feeble-mindedness, the bogey of all hereditarians, was increasingly seen as antecedent to poverty and social ills. In 1922 Sanger wrote:

The philosophy of Birth Control points out that as long as civilized communities encourage unrestrained fecundity in the "normal" members of the population—always of course under the cloak of decency and morality—and penalize every attempt to introduce the principle of discrimination and responsibility in parenthood, they will be faced with the ever-increasing problem of feeble-mindedness, that fertile parent of degeneracy, crime and pauperism.⁸⁸

The eugenicists' worry about the "feeble-minded" was not restricted to voluntary measures of birth control. It spawned a rash of compulsory sterilization legislation between 1908 and 1935.⁸⁹ In 1927 the Supreme Court upheld the compulsory sterilization of Carrie Buck, who was committed to the Virginia State Colony for Epileptics and Feeble Minded. She was the daughter of a feeble-minded mother and the mother of a feeble-minded ("illegitimate") child. Writing for the Court, Justice Holmes stated:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.⁹⁰

Eugenic theory did not only justify controlling the fertility of "unfit" women. It also encompassed the conscripted motherhood of "fit" women of the upper class. In the goal to "improve the race" there was a correlative relation between the objective of "less children from the unfit and more children from the fit." When it became apparent that the lower class was not clamoring for birth control information, it was thought that the spread of contraceptive practice to middle and upper classes, in the absence of coercive application to the lower class, would not have a eugenic but dysgenic effect. Many eugenicists reversed their attitude toward the birth control movement among the "best" classes to prevent "race suicide."

Adrienne Rich points out that, after the First World War, which was considered lamentably to have destroyed not the ordinary soldier, but the "flower of manhood," the "best and the brightest," pamphlets on motherhood appeared, such as the Reverend George W. Clark's *Race Suicide—England's Peril* in 1917.

87. *Woman and the New Race* 229.

88. *Pivot of Civilization* 81. *See also id.* at 91 and 240.

89. The first sterilization bill was introduced in Michigan in 1898 and the first legislation was passed in Indiana ten years later. By 1935, 27 states had enacted sterilization laws applicable to at least 34 categories of persons. Courts ordered almost 64,000 persons sterilized between 1907 and 1963. As late as May, 1972, 16 states still had eugenic laws. *See The Hidden Malpractice* 128.

90. *Buck v. Bell*, 274 U.S. 200, 207 (1926).

This tract declared that the loss of human life through birth control is more terrible than the lives lost in war. Clark expressed the not uncommon view that voluntary middle and upper class limitations on fertility, while the "physically and mentally inferior" continue to breed, would prove a disaster for British society; family limitation threatened empire, trade ("the merchant with one son has not the same inducement to branch out in new enterprise as his German competitor with two or more sons"), and national defense. The conclusion is, predictably, a familiar exhortation to the "ablest" women of the upper class to render service to their country as brood animals:

No other service woman can render the State can compensate for her failure in this, the one function God and Nature have assigned to her, and to her alone. Everything else man can do. This is woman's function and her glory. For this she was sent into the world. Her best years must be spent in the nursery, or the nation perishes. In the noblest periods of a nation's history the *ablest* women are ambitious of bearing *distinguished sons*. Only in periods of decadence do women seek in barrenness to be distinguished themselves⁹¹

In a system of patriarchal motherhood, then, birth control, when practiced by the "wrong" class of women, undermines the purposes of the eugenicists.

In America blatant racism, as well as classism, provided a base for eugenics. The real "race suicide" threat came from the prolific immigrant "foreigners"—the Slavs, Latins and Jews—and the blacks. Birth control, by restricting their rate of growth, could counter the "melting pot" process of mixing nationalities and races and, thus, "magnify the chance of survival of this civilization." It was hoped that birth control would keep "Yankee Stock" pure and "prevent the American people from being replaced by alien or Negro stock, whether it be by immigration or by overly high birth rates among others in this country."⁹² But again the unresolved dilemma inherent in the relationship of birth control to eugenics was that "the Negroes and poorer element of the white population were not interested in birth control and would not be materially affected by it." Birth control information was "used mainly by white people in better circumstances, among whom the birth rate was already too low, and . . . the poorer white element and the Negroes" continued to have large families which increased "the disproportion in the increase of population as among the different classes of our people."⁹³

To those agitated about "race suicide" one of the most menacing aspects of proliferating "unfitness" was the growth of the custodial welfare state, which was seen as benefiting the "least desirable elements of society" by preserving the "misfit, the degenerate, the low, the unworthy and defective" portions of society at the expense of "the strong and exceptional." It was thought that if birth control

91. G. Clark, *Race Suicide—England's Peril*, pamphlet published by the Duty and Discipline Movement (1917), quoted in *Of Woman Born* 273 (emphasis added). *Compare* note 51 *supra*. Adrienne Rich observes that Nazism, too, "had a clear and unmistakable political formula for women and where they belonged: mothers of men, *kinder, kirche, kuche*. It glorified as no other twentieth-century system has done, the healthy body of the racially 'pure' woman as an incubator of sons and heroes." *Id.* at 79. We hear a familiar echo in the exhortation that "if Jewish families would start having at least three children, the Jewish community may not need to fear" the "coming shrinkage" that demographic studies predict in the size of the Jewish Population in the United States. *Studies Predict Sharp Decline in Population of U.S. Jewry*, *Los Angeles Jewish Community Bulletin*, Apr. 1, 1978, at 2, col. 1.

92. *Birth Control in America* 119.

93. *Id.* at 120.

were practiced by the right people it could eliminate those evils for which welfare laws provided, at best, only symptomatic alleviation.⁹⁴

This individualist, elitist, antistatist, racist attitude was the basis for the eugenic program, and in it can be seen the origins of our generation's depraved treatment of poor women on welfare and the bewilderingly no-exit maze of contradictions in which we ensnare them. Suspecting that poor women have babies in order to get and remain on the welfare rolls, a variety of antinatalist and punitive deterrents and atrocities have been sanctioned. Although child welfare is the stated purpose of providing benefits to families with dependent children, if the family is "too large" this objective yields to the priority of discouraging birth (especially "illegitimate" ones) by the imposition of a maximum family grant.⁹⁵ If this policy is effective, a properly deterred welfare mother, upon discovering herself pregnant and realizing that the resources available to her children will be diminished and, too, the quality of their lives, should prevent the birth. When she voluntarily seeks to terminate the pregnancy, however, an abortion will be refused⁹⁶ (notwithstanding that various past proposals to limit the undesired fertility of poor women have, inconsistently, included payments for those who undergo sterilizations and abortions, compulsory abortion of all "out-of-wedlock" pregnancies and sterilization of "unwed" mothers⁹⁷). Interestingly, it is only since the incidence of unwanted teenage pregnancies reached epidemic proportions among the middle class that the insertion of contraceptives and contraceptive education booklets into boxes of sanitary napkins and tampons has been proposed; for Anglo girls the pregnancy rate has doubled while for non-Anglos it has "increased only slightly."⁹⁸

Instead of permitting the welfare mother to terminate the socially undesired pregnancy we practice a more sadistic form of birth control: the involuntary, irreversible sterilization of poor women on welfare in federally financed clinics came to light when the Southern Poverty Law Center brought suit on behalf of the Relf sisters, ages twelve and fourteen, sterilized under a federal family planning program, in Montgomery, Alabama.⁹⁹ Neither of the young women had ever been pregnant, but allegedly "boys were hanging around the girls" and the family planning clinic of Montgomery Community Action Agency "felt that the most convenient method for the agency to prevent pregnancy was sterilization." One of the Relf sisters was allegedly mentally retarded ("feeble-minded"). Thereafter the Justice Department revealed that, during a ten year period, nine other females—eight of them black, five of them minors, and seven of them "retarded"—had also been sterilized, as well as fourteen inmates of an Alabama school for the mentally retarded. Further Justice Department investigations discovered

94. *Id.* at 116.

95. *Dandridge v. Williams*, 397 U.S. 471 (1970). Mr. Justice Marshall notes that in imposing the family grant maximum the state purported to provide welfare women with "birth control incentive" to prevent or reduce the number of births "out of wedlock." *Id.* at 528, nn.22 & 23 (Marshall, J., dissenting). Compare this with Marshall's view of the effect on the poor family of the state's refusal of abortion to the welfare mother, pp. 88-89 *infra*. See also text accompanying note 119 *infra*.

96. *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). See Part IV, pp. 123-34 *infra*.

97. *The Hidden Malpractice* 133.

98. See, *Birth Control: An Information Blitz*, Los Angeles Times, Mar. 17, 1978, § IV, at 10, col. 1; *Teen-age Pregnancies: An Epidemic Increase*, Los Angeles Times, Mar. 19, 1978, § VII, at 20, cols. 2-5.

99. *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), *remanded sub nom Relf v. Mathews*, 403 F. Supp. 1235 (D.D.C. 1975).

that in the previous fifteen months eighty other minors had been sterilized at government sponsored clinics serving the poor throughout the nation.¹⁰⁰

Judge Gessell found in *Relf v. Weinberger* that during the recent past an estimated 100,000 to 150,000 low-income persons had been sterilized annually under federally funded programs. Of these, about 2,000 to 3,000 each year were under twenty-one years of age and less than 300 were under age eighteen. The record in that case did not indicate what percentage of these persons were mentally incompetent. The record before him, however, contained "uncontroverted evidence that minors and others incompetents have been sterilized with federal funds and that an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various welfare benefits would be withdrawn unless they submitted to irreversible sterilization."¹⁰¹ In addition to the use of involuntary sterilization (instead of a temporary contraceptive) upon nonpregnant welfare women to prevent pregnancy, compulsory sterilization has been punitively practiced on newly delivered welfare mothers to prevent further births. Judge Gessell found that: "Patients receiving Medicaid assistance at childbirth are evidently the most frequent targets of this pressure, as the experiences of plaintiffs Waters and Walker illustrate. Mrs. Waters was actually refused medical assistance by her attending physician unless she submit to a tubal ligation after the birth. Other examples were documented."¹⁰²

Moreover, hysterectomy, a far more drastic means of sterilization because it affects the entire endocrine system, is often used on welfare women instead of tubal ligation because they are unfamiliar with medical terms.¹⁰³ For middle class women it is abortion, not childbirth, that is often packaged with sterilization as a kind of punishment for the crime of wishing not to be pregnant and women who request simple tubal ligation as sterilization are frequently given only the option of hysterectomy.¹⁰⁴

In rebuking the Secretary of HEW's effort to sanction involuntary, irreversible sterilization, Judge Gessell observed that it was in diametric opposition to the Congressional purpose of facilitating voluntary family planning—to assist individuals in the exercise of their right to govern their own procreation. Rather prophetically he cautioned:

This controversy has arisen during a period of rapid change in the field of birth control. In recent years, through the efforts of dedicated proponents of family planning, birth control information and services have become widely available. Aided by the growing acceptance of family planning, medical science has steadily improved and diversified the techniques of birth prevention and control. Advancements in artifi-

100. See *The Hidden Malpractice* 134-35.

101. 372 F. Supp. at 1199.

102. *Id.* In 1973 more than half (18 out of 34) of the welfare mothers who gave birth at Medicaid expense in Aiken County, South Carolina, had been sterilized. All but two were black. A thirty year old mother of four revealed that Aiken obstetricians refused her maternity care because she refused to be sterilized. Three Aiken doctors confirmed that they required sterilization before agreeing to deliver babies for welfare patients with three or more children. One admitted he was trying to help reduce the welfare roles. *The Hidden Malpractice* 135-36.

103. See, e.g., *id.*

104. *Of Woman Born* 268. On the other hand, male doctors are sometimes reluctant to perform requested sterilization upon women who have not had any or "enough" offspring. *Id.* at 29-30. Compare how the male psychoanalytic view twists the "interpretation" of sterilization, so cavalierly performed on welfare women *against their will*, when it is a *voluntarily chosen* procedure, in note 44 *supra*.

cial insemination and in the understanding of genetic attributes are also affecting the decision to bear children. There are even suggestions in the scientific literature that the sex of children may soon be subject to parental control. And over this entire area lies the specter of overpopulation, with its possible impact upon the food supply, interpersonal relations, privacy, and the enjoyment of our "inalienable rights." [¶] Surely the Federal government must move cautiously in this area, under well-defined policies determined by Congress after full consideration of constitutional and far-reaching social implications. The dividing line between family planning and eugenics is murky.¹⁰⁵

Given the classist and racist foundation of eugenics it is no wonder that the lower class and blacks were, perhaps intuitively, not interested in the birth control movement and that, more recently, the black nationalist movement declared that birth control and abortion are genocidal. But that movement reproaches black women if they do not provide children to carry on the black struggle for survival in the same manner that Anglo patriarchy reprimands middle and upper class Anglo women for not providing "able" children to prevent "race suicide." Black women, however, have increasingly rejected the command to breed as "the irresponsible, poorly thought-out call to young girls, on-the-margin scufflers, every Sister at large to abandon the pill that gives her certain decisive power, a power that for a great many of us is all we know, given the setup in this country and in our culture."¹⁰⁶ Janis Morris, community organizer and mother has stated: ". . . the Black woman has got to consider what is best for the child during pregnancy and after birth, and too often she has to bear all the responsibility alone. So frankly, when the sister tells a brother 'I'm not going to have this baby,' it ain't nobody's business but her own."¹⁰⁷

None of these shifting campaigns, for or against the limitation of birth, has the interest or condition of women at heart. All would dictate, as patriarchy has always dictated, whether, with whom, and under what circumstances to give forth children. Clearly, motherhood has become a political issue, a prized possession, to which many are staking their claims, now that women have reasserted their own dominion. As the sociologist Jessie Bernard frames it:

It was not until the late 1960's that motherhood became a serious political issue in our country. Like so many other issues, it came not in clear-cut, carefully thought-through form but in a murky conglomerate of ecology, environmental protection, and a "welfare mess". It took an "antinatalist" slant. The problem posed was how to stop women from having so many babies. Ecologists frightened us with images of millions suffocating for lack of oxygen and hostile reformers with images of women—especially black women—having babies in order to remain on

105. 372 F. Supp. at 1203-204. With regard to obstetrics and the "spectre of overpopulation" compare Adrienne Rich's viewpoint:

The highly developed (and highly dubious) technology of modern obstetrics is merely a late stage in . . . "the gradual attempt by man to extricate the process of birth from women and call it his own." "Overpopulation" is today regarded as a global problem; yet there is far more concern with sterilizing (chiefly black and Third-World) women, and limiting births, than with finding new ways to produce and distribute food throughout the globe. Not simply Western capitalism, but a male need to feel in control of female reproductive power, is at issue here.

Of Woman Born 102. Will the same male need to feel in control of female reproductive power exist if males acquire a reproductive power of their own? See Part V, pp. 93-96 *infra*.

106. Cade, *The Pill: Genocide or Liberation?*, in *The Black Woman* 162-69 (1970). (This was written before the lethal side effects of the oral contraceptive were made public).

107. Rutledge, *Is Abortion Black Genocide?*, *Essence* 86 (September 1973).

welfare rolls. The first group directed their attack against middle-class women, the second, against welfare women.¹⁰⁸

Regardless of the modifying prefix given, there is only one entity, the whole woman. But, in the crossfire of incompatible political interests, woman has been split into two dehumanized objects, producing an unnecessary, but nonetheless schizophrenic, crash of contrary social policies: the policy of promoting child welfare collides with the policy against unrestricted fertility of the lower class, which conflicts with both the policy against access to abortion for welfare mothers and the policy in favor of freedom of choice in fundamental matters of procreation and family planning, which itself conflicts with the policy against abortions; involuntary sterilization promotes the policy against unrestricted fertility of welfare mothers but violates the policy in favor of the basic human right to procreate.

This tangle cannot be unravelled unless the policy against abortion is relinquished, for it is the only loose end. Having recently foreclosed this possibility, however, by its decisions in the second set of abortion cases, the Supreme Court has, in fact, tightened the bind.

IV. THE SUPREME COURT ON FEMALE REPRODUCTIVE POWER

The Supreme Court, as men generally, has had an extremely difficult time with pregnancy and motherhood. It has had much less trouble dealing with those rules of substantive law peripheral to the female progenerative power—those that divide the experiential universe into “the home” and “the world” and forbid women to participate in public life, or in some other way derive from assumptions based upon this dichotomy.¹⁰⁹ Yet the cases concerning pregnancy itself most directly affect the status of females as a slave caste to maintain the species in order to free the other half for the business of the world. But it is precisely because of its pivotal significance that challenges to compulsory reproduction of the species by females, and its outgrowth, the physical dependence of women, advance the threat to patriarchy and portend its demise. Hence, rational and objective responses are blocked by subjective emotionalism. For these attacks bring us perilously close to freeing women from their biology which, as Shulamith Firestone has observed, would be to threaten the family, the social unit that is organized around biological reproduction and the subjection of women to their biological “destiny.”¹¹⁰

These very fears and anxieties, however, have produced strange and erratic results in the pregnancy cases. Despite the patriarchal consensus that pregnancy and childbirth by women redound to the enormous collective benefit of the whole masculine society, not only is there a perplexing absence of incentives and compensations to encourage and reward women for their special social contributions of pregnancy and childbirth, but recent Supreme Court decisions permit, even entice, the state to punish and discourage pregnancy!

These cases amount to little more than spasmodic utterances that continue

108. J. Bernard, *The Future of Motherhood* 268 (1974).

109. *See, e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971); *Gloia v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Kahn v. Shevin*, 416 U.S. 315 (1974); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

110. S. Firestone, *The Dialectic of Sex: The Case For Feminist Revolution* 206 (1970) [hereinafter cited as *The Dialectic of Sex*].

the long tradition of manipulation of female reproduction without regard to the interests of women or their autonomy. The Court has made no attempt analytically to distinguish between the separate functions of biological reproduction and sociological parenting. In fact there is a manifest unawareness of this separation. It is axiomatically assumed, like so much else in patriarchy, that the family is an intrinsic part of the natural universe, even though it is not. Moreover, the Court is oblivious to the omnipresence of patriarchal bias as it affects even the categories in which we think, and which has made even the most educated and privileged woman an outsider, a nonparticipant in the molding of culture. This lack of recognition permeates the Supreme Court's pronouncements on pregnancy and motherhood. Its decisionmaking proceeds in the vacuum of unquestioned axioms that are assumed to be inevitable "facts of nature." Perhaps this accounts, at least in part, for the senseless inconsistency and spastic reflexivity of its decrees, which, at the very least, are short in thematic unity, vision, and insight.

A. Majority View

In *Geduldig v. Aiello*¹¹¹ we are told that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification," and that exclusion of pregnancy-related disabilities from coverage of a state's disability insurance program merely differentiates between "pregnant women and nonpregnant persons."¹¹² In *General Electric Co. v. Gilbert*¹¹³ the Court informed us that an exclusion of pregnancy from a private employer's disability-benefits plan providing general coverage "is not a gender-based discrimination at all."¹¹⁴ While the Court has told us in *Roe v. Wade*¹¹⁵ that the right of every woman to voluntary motherhood, and the necessarily included choice whether to terminate a pregnancy, is of fundamental importance, it has also told us in *Beal v. Doe*,¹¹⁶ *Maher v. Roe*¹¹⁷ and *Poelker v. Doe*¹¹⁸ that a state may coerce childbirth from some pregnant women—even the same state that excludes pregnancy from disability benefits. Just as *Geduldig* exhibits hostility toward the pregnancies of working women, so *Beal*, *Maher* and *Poelker* exhibit a ferocious contempt toward the voluntary motherhood of poor women. Additionally, these decisions impose acute economic disadvantages on certain, though different, classes of pregnant women.

For the working woman, the economic effects caused by pregnancy-related disabilities are functionally indistinguishable from the effects caused by any other disability. Wages are lost due to a physical inability to work and medical expenses are incurred for the delivery of the child and postpartum care. Especially in view of the fact that two-thirds of all women who work do so of necessity, the pregnancy exclusion policy confirmed by *Geduldig* can only *discourage* working women from reproduction, a consequence contrary to the objective of patriarchal

111. 417 U.S. 484 (1974).

112. 417 U.S. at 497 n.20. Justice Brennan, joined by Justices Douglas and Marshall, dissented, expressing the view that a pregnancy exclusion, being based on physical characteristics inextricably linked to one sex, "inevitably" constitutes sex discrimination. *Id.* at 501 (Brennan, J., dissenting).

113. 429 U.S. 125 (1976).

114. 429 U.S. at 136. In *Nashville Gas Co. v. Satty*, 54 L. Ed.2d 356 (1977), the Court refined this doctrine to mean that discrimination is permissible only against the physical *condition* of pregnancy, as distinguished from the "pregnant person."

115. 410 U.S. 113 (1973).

116. 432 U.S. 438 (1977).

117. 432 U.S. 464 (1977).

118. 432 U.S. 519 (1977).

law. Obviously the collective social ethic is nowhere near spreading the costs, both economic and emotional, and minimizing the detriments that attach to the vital social function of human reproduction. On the other hand, the state will assume the economic cost of the welfare woman's childbirth and postpartum care. But her forced motherhood will certainly reduce the economic resources available to her existing family, especially if she already receives the maximum family grant approved by the Court in *Dandridge v. Williams*.¹¹⁹ Ironically, compelling the welfare woman to reproduce also begets a consequence contrary to the eugenic objective of patriarchal law to restrict the fertility of the poor.

With the reader's forbearance we come now by a rather long, but I think not circuitous, route to a consideration of Mr. Justice Marshall's views on female procreation power and motherhood in *Beal v. Doe*, *Maher v. Roe* and *Poelker v. Doe*,¹²⁰ in which the Supreme Court validated a state's decision to deny indigent women Medicaid funds and hospital facilities for abortions but to provide them for "normal" childbirth.

B. Mr. Justice Marshall: A Minority Voice

It seems to me that in *Beal*, *Maher* and *Poelker* Justice Marshall evinces, if at times obliquely, concern with the Court's institutional role as it affects the humanity of women and their right to be treated as persons. Implicit in his dissent are the touchstones of what Professor Karst, in his truly admirable essay, has called the substantive core of the fourteenth amendment and of the equal protection clause in particular—the principle of equal citizenship, "which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."¹²¹ Inherent in the principle of equal citizenship is what Professor Morris has defined as the right to be treated as a person,¹²² which necessarily includes the right to make choices and the right to have them respected and to be held accountable for them. The right to be held responsible for the choices made implies an obligation to make moral choices.

119. 397 U.S. 471 (1970). See note 95 *supra*.

120. See notes 116, 117 and 118 *supra*.

121. Karst, *Equal Citizenship, Equal Citizenship* 4. See note 46 *supra*. Kenneth Karst's work is not only elegant, but important. By placing his imprimatur on this particular way of thinking about equality, status and personhood he gives it a respectability and persuasion that others who have been mulling over these interrelated ideas as they relate to women, in an effort to get to the heart of the objection, could not.

Perhaps this is the place to say why many of us in law, as well as other fields, who are captivated by the ideas of personhood, dignity, status, respect, rights, responsibilities, autonomy—in short, humanity—focus on women as the "ultimate solution." Mary Daly has stated it best: "Only radical feminism can act as 'the final cause,' because of all revolutionary causes it alone opens up human consciousness adequately to the desire for nonhierarchical, nonoppressive society revealing sexism as the basic model and source of oppression." M. Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* 190 (1973). In a personal communication to Adrienne Rich, Mary Daly elaborated:

I hope my use of "final cause" is clear: In "tradition" the final cause is "first", it is motivating purpose, an insight which elicits seeking, movement. It is "first in the order of intention", opening the subject to action. She may not know all of the directions and implications of the action. . . . So to say the Women's Movement is the final cause is to mean it sets many-dimensional movements in motion, e.g. liberation of children, of the aged, of the racially oppressed. To say this is to see a priority for the women's movement as catalyst, as *the* necessary catalyst—hardly to see it as a self-enclosed system.

Personal Communication, Spring 1974, quoted in *Of Woman Born* 80 (emphasis original). See also *The Dialectic of Sex*.

122. See text accompanying note 4 *supra*.

1. *The Nature of the Right of Citizenship*.—As our only antimajoritarian institution, the Supreme Court is charged with protecting the fundamental and basic civil rights of humans when the representative bodies disregard them. When we denominate a right as fundamental, we mean that it is an essential ingredient of an individual's interest in the status and dignity of citizenship. I do not think it is extravagant to suggest that, to Justice Marshall, the right denied to women by the Court in the second abortion decisions is nothing less than the right to be treated as a person. For equal protection analysis, the classification involved here is the denial to women of citizenship equal to that accorded men.

Marshall identifies the interest in issue, declared by the Supreme Court in 1973 in *Roe v. Wade*,¹²³ as "the right of every woman to choose whether to bear a child," and characterizes it as "of fundamental importance."¹²⁴ This right is "vital to the flourishing of a free society"¹²⁵ because the right to control the use of one's own body with respect to procreation is the right to determine one's destiny. In Professor Karst's words it is the right "to be an active participant in society rather than an object,"¹²⁶ tool, means, or victim. Marshall speaks of the "disruptive and destructive" impact that compulsory motherhood has on "the life of any woman," causing her to lose "[a]ll chance to control the direction of her own life."¹²⁷ The meaning of these phrases is amplified by reference to the primary values of the principle of equal citizenship: respect for each individual's basic humanity, self-definition, and self-determination.

The focus of equal citizenship here is the right of a pregnant woman to terminate her pregnancy, for this is the means indispensable to her ability to take responsibility for choosing her own future.¹²⁸ If the community does not respect her choice it treats woman as less than a person—an autonomous, participating member of the community. In subordinating her will and her life to the purposes of others she is made part of a slave caste; she is treated as a person of inferior worth and status among superior male citizens. In relation to the right to procreate, Professor Karst has written that forcible sterilization is a severe deprivation of dignity because the choice to be a parent is a choice of social role and of self-concept: "For the state to deny such a choice is for the organized society to deny the individual so incapacitated of the presumptive right to be treated as a person, one of equal worth among citizens."¹²⁹ I would add that: for the state to *compel* such a choice constitutes a qualitatively equivalent abrogation of the presumptive right to be treated as a person.¹³⁰

Inasmuch as the Supreme Court has "subordinated interests which are central to . . . women's status as respected, participating members of the com-

123. 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

124. 432 U.S. 438, 458 (Marshall, J., dissenting).

125. *Id.*

126. *Equal Citizenship* 58.

127. 432 U.S. at 458-59.

128. For this reason I am puzzled by Professor Karst's statement that "[t]he focus of equal citizenship here is not a right of access to contraceptives, or a right to an abortion, but a right to take responsibility for choosing one's own future." *Equal Citizenship* 58. See note 46 and accompanying text *supra*.

129. *Id.* at 32. These same considerations surround the choice to be a parent. See Justice Marshall's opinion in *Zablocki v. Redhail*, 54 L. Ed.2d 618 (1978).

130. I question Professor Karst's suggestion that "[d]enial of the right to choose to be a parent, involved in *Skinner v. Oklahoma* [316 U.S. 535 (1942)], is arguably a more serious denial of one's fundamental humanity than is the denial of the means of contraception or abortion." *Id.* (*emphasis original*). See notes 4, 46, 122 and 128 and accompanying text *supra*.

munity," it has "utterly fail[ed] to satisfy the principle of equal citizenship."¹³¹ Because the decisions in *Beal*, *Maher* and *Poelker* apply only to the subclass of poor women, the right to be treated as a person is denied to them only, for the time being.¹³² Thus the classification discriminates against poor women and in favor of the class of all men and nonindigent women.

The right to be treated as a person, however, includes not only the right to make choices, but also the right to be respected for the choices made and held responsible for them.¹³³ "The close linkage of responsibility and respect implies that full citizenship is incompatible with dependency of caste."¹³⁴ To the extent that the majority insists that the right to choose to terminate a pregnancy remains intact ("[o]ur conclusion signals no retreat from *Roe* or the cases applying it"¹³⁵) but, at the same time, says the state may provide medical treatment for childbirth only, it is, paraphrasing Professor Morris, permitting the woman to make choices that will determine what happens to her but not respecting her choice, thus denying to the affected class the fundamental right to be treated as a person,¹³⁶ and thereby violating the principle of equal citizenship.

2. *The Nature of the Responsibility of Citizenship*—The right to have one's choices respected relates not only to a woman's right to be treated as a fully respected member of the society, insofar as this entails her right to take responsibility for choosing her own future, but also to the duty she owes to others by virtue of her progenerative power. Margaret Sanger considered the responsibility of women to withhold the production of children from a world that provided them only the meagerest chance of subsistence and self-development to be the *debt* women owe to society¹³⁷:

Woman's power can only be expressed and make itself felt when she refuses the task of bringing unwanted children into the world to be exploited in industry and slaughtered in wars. When we refuse to pro-

131. Equal Citizenship 59.

132. The "right to life" forces admit that the attack made against poor women in *Beal*, *Maher* and *Roe* is merely an interim measure, as was their successful effort in getting Congress to pass a version of the Hyde Amendment which bans the use of federal funds to indigent women who choose abortions. The ultimate objective is a constitutional amendment to outlaw all abortions. In 1977 over 40 constitutional amendments to ban legal abortions were introduced in the 95th Congress. Letter from the National Abortion Rights Action League, Spring 1978. See text accompanying notes 157-160 *infra*.

133. See text accompanying note 4 *supra*.

134. Equal Citizenship 10.

135. *Maher v. Roe*, 432 U.S. at 475.

136. Mr. Justice Blackmun, joined by Justices Brennan and Marshall, touches on this aspect of the discrimination when he states:

The Court concedes the existence of a constitutional right but denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct. For the individual woman concerned, indigent and financially helpless, as the Court's opinions in the three cases concede her to be, the result is punitive and tragic. Implicit in the Court's holdings in the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: "Let them eat cake."

432 U.S. at 462 (Blackmun, J., dissenting in all three cases).

137. Sanger perceived the connection between birth control and this obligation as follows:

Even as birth control is the means by which woman attains basic freedom, so it is the means by which she must and will uproot the evil she was wrought through her submission. . . .

The task is hers. It cannot be avoided by excuses. It is not enough for woman to point to the self-evident domination of man. Nor does it avail to plead the guilt of rulers and the exploiters of labour. It makes no difference that she does not formulate industrial systems In her submission lies her error and her guilt. By her failure to withhold the multitudes of children who have made inevitable the most flagrant of our social evils, she incurred a debt to society. Regardless of her own wrongs, regardless of all other considerations, *she* must pay that debt.

duce battalions of babies to be exploited; when we declare to the nation; "Show us the best possible chance in life is given to every child now brought into the world, before you cry for more! At present our children are a glut on the market. You hold infant life cheap. Help us to make the world a fit place for children. When you have done this, we will bear you children,—then we shall be true women." The new morality will express this power and responsibility on the part of women.¹³⁸

Denial of the right of self-determination to poor women also denies to them the responsibility of citizenship. This responsibility is the moral obligation to decide the use of one's procreative power not only in regard to choice of one's own social role, but with reference to the potential consequence that an affirmative decision would have upon the life of the new human being. It is a responsibility that arises out of possession of the progenerative power itself.

The denial to poor women of the *right* to choose their own future, by not respecting their choice to terminate pregnancy and, in this manner, to refuse for themselves *the future role of parent*, creates an unequal classification of citizenship vis à vis the class of all other women and all men, who can choose their own future without such impediment. The denial to poor women of the *responsibility* of citizenship, by not respecting their choice to terminate pregnancy and, in this manner, to refuse to *bring a new life into the world*, creates an unequal status classification vis à vis the class of all other women, who can conscientiously determine the use of their reproductive power. Although the gender classifications that attend infringement of the right of citizenship thus differs slightly from those accompanying abridgment of the responsibility of citizenship, the racial effect of the classifications is the same. The denial to poor women of both the right and responsibility of citizenship, as Justice Marshall points out, disproportionately burdens nonwhite women, since "[n]onwhite women now obtain abortions at nearly twice the rate of whites, and it appears that almost 40 percent of minority women—more than five times the proportion of whites—are dependent upon Medicaid for their health care."¹³⁹ But I think his principal anguish is over the interrelation of the denial to poor women of both the right and responsibility of equal citizenship; both deprivations connect in the ugly fact of poverty. The poor woman loses "all chance to control the direction of her life" because:

An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point.¹⁴⁰

Justice Marshall knows that the woman whose choices are thus not respected in turn is robbed of her responsibility as a citizen humanely to determine the use

The New Motherhood, *supra* note 3, at 11-12 (emphasis original). See also *Woman and the New Race* 92-93, 96 and 98.

138. *Pivot of Civilization* 210-11.

139. 432 U.S. at 459-60 (footnotes omitted).

140. *Id.* at 458.

of her reproductive power, and to avoid creating consequential harm to other human beings:

The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed-race children now spend blighted lives in foster homes, orphanages, and "reform" schools. . . . Many children of the poor, sadly, will attend second-rate segregated schools. . . . And opposition remains strong against increasing Aid to Families with Dependent Children benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. Cf. *Dandridge v. Williams*, 397 U. S. 471 (1970). I am appalled at the ethical bankruptcy of those who preach a "right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children.¹⁴¹

Implicit in Justice Marshall's sensitivity to the "human dimension of these decisions"¹⁴² is a genuine respect for life: to him life is not a thing to be suffered by involuntary mothers and unwanted children but, rather, something to be honored and endowed with excellence, and maximum opportunities for growth, development and self-realization. Women are not only denied this responsibility of citizenship; they are made unwilling accomplices in our great crimes against children; the creation of their withered existences, devoid of esteem, filled with emotional, nutritional, spiritual and material starvation, gasping for survival against the adult violence of abandonment, battery, sexual abuse, and pornographic exploitation for profit. For women, responsible motherhood requires that we not create life to be mere means (as we ourselves are) to satisfy the ends of patriarchal power, in circumstances in which we cannot avoid depriving children from the start of everything it means to be a human being. From this perspective, the self-righteous solicitude for life moralized by the anti-abortionists is the most offensive, corrupt pretention.

At this point it should be said, parenthetically, that the choice of women not to be mothers does not logically (or even practically) entail the killing of fetuses capable of extrauterine survival and growth.¹⁴³ If such choice results in this consequence it is (or soon will be) because of deliberate collective decision, in view of the reality that no effort has been made to develop (or employ) extrauterine means for the *purpose* of sustaining fetal life for its *own* sake.¹⁴⁴ Society in general is responsible for how it chooses to allocate technological and material resources. If the killing of fetuses occurs, it is not a result of women's choice of abortion but, rather, of social will to ignore life in favor of other societal intents. If the sustaining of life were a priority value, the technological ability to accomplish it would now (or soon) exist. Few efforts, however, have been made in that direction or for that purpose, which is not surprising. A society with our record on the treatment of children, and child care, is unlikely to make such a choice because, in the last analysis, the welfare of children, indeed of human beings, is a relatively low priority. The only effort made toward preserving "valued" life has been an insistence that women are the means to the end of sustaining human life, and that it is the exclusive responsibility of individual women (not society) to perform this service.

141. *Id.* at 456-57.

142. *Id.* at 457.

143. On the new biological technology, see Part V, pp. 135-41 *infra*; see also note 47 *supra*.

144. See notes 166 and 167 and accompanying text *infra*.

Contrast this with the circumstances surrounding the development of the technique of cloning human life, the first achievement of which is reported to have been motivated by *one male's* desire identically to reproduce *himself* and to have a *male heir*.¹⁴⁵ The irrepressible thought is that if implantation of artificially cloned fetuses into *female* incubators is now (or imminently) technologically possible, so too could be the transplantation of aborted fetuses into artificial wombs, had the motivation to do so been present. Instead of seeking to preserve all life for its own hallowed sake, apparently males have been inspired only to create it in their own image, and for self-reflecting purposes. This is a serious, but not intrinsic, limitation in the application of science to prolife objectives; the actual implementation of the "absolute ideal of human life" would seem to be implicated with *who* controls the technology and for what purpose. Notwithstanding that the available alternatives are not being deployed in the furtherance of general humanitarian aspirations, the obdurate flimflam opposition to a woman's right to determine her own destiny persists undiminished, and without regard to the harms inflicted upon the children.

As will be discussed in the last part of this essay, technology *could* be used to enable all adults, both male and female, freely and responsibly to decide whether and by what mode to assume a parental role. Surely the value of the new biological science resides not in its ability to satisfy the vain desires of males but, rather, in the hope that it holds for respecting and elevating the quality of life and the capacity for freedom, for maximizing the autonomy and self-actualization (within the limits of community) of persons already living and those yet to arrive. The authentic realization of the noble ideal of absolute respect for human life will then, and only then, replace its facile verbal counterfeit, and enable homo sapiens to transcend our ignominious selves.¹⁴⁶

It is Justice Marshall who reminds us of our essential humanity and of our strange, but wonderful interconnection. He recalls for us that humanity is not a tautological appellation: it is not a sufficient condition to humanity that we are merely born human, although the right to be treated as a person is a fundamental right belonging to all human beings by virtue of their being human.¹⁴⁷ Rather, humanity is the achievement of a moral quality that justifies the description. It denotes a state of collective being, the necessary condition of which is that every individual is treated as a person: humanity does not exist at all, or for any, unless each individual is treated as a person by virtue of the fact of being human. It is the absolute condition of being free to make choices and of being responsible for the choices made. The necessary condition entails the sufficient one—the duty of each individual to make choices that do not derogate the obligation and right of each one to make responsible choices regarding her, and soon his, power, by any means other than using others as the means, to create new human life, and to thus determine one's own future.

The power to create a new life includes, but is not identical with, the responsibility for bringing new life into the world. The power to create new life, if

145. See D. Rorvik, *In His Image: The Cloning of a Man* (1978) [hereinafter cited as *In His Image*]. Although complete documentation of this accomplishment has not yet been forthcoming, it is not important for the purposes of the present analysis. If the cloning of a human being has not yet occurred, it is imminent. What is notable is the context which, even if not true, has been imagined (or fantasized) to have generated the breakthrough. See also notes 172-174 and accompanying text *infra*.

146. See pp. 93-96 *infra*.

147. See text accompanying note 4 *supra*.

exercised, cannot be a responsible choice unless made with due consideration to the consequence of bringing new life into the world: the ability and willingness of the society to respect the person of the new life as well as the ability and willingness of the self or others to nourish, protect and enrich it. Responsibility for the consequences of creating new life gives one the right to refuse to exercise that power; this is the responsibility of being a person and a citizen. It is rooted in an absolute, irreducible, unconditional personal judgment and decision that inheres in the fundamental right to be responsible and is part of one's status as a respected, participating citizen in the community. Interference with such a decision violates the basic responsibility of citizenship and, hence, denies one's right to be treated as a person. The denial by some to others of the right to be responsible also denies to themselves their own personhood and humanity; our humanity is a whole cloth that interweaves us all into its woof and warp. I think this is what Margaret Sanger meant when she wrote in 1920:

The basic freedom of the world is woman's freedom. A free race cannot be born of slave mothers. A woman enchained cannot choose but give a measure of that bondage to her sons and daughters. No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother.¹⁴⁸

Justice Marshall, as others, fully expected "those who preach a 'right to life' "¹⁴⁹ to wrathfully disregard these elemental aspects of the principle of equal citizenship secured by the Court in *Roe v. Wade*.¹⁵⁰ Indeed he noted: "Since efforts to overturn those decisions have been unsuccessful, the opponents of abortion have attempted every imaginable means to circumvent the commands of the Constitution and impose their moral choices upon the rest of society. . . . The present cases involve the most vicious attacks yet devised."¹⁵¹ He did not, however, anticipate the Supreme Court's own mendacity. Neither did others of us who have depended upon the Court in our struggle to attain self-determination in the intimate matters of personal life, control of our bodies, and reproductive freedom. I doubt that in the entire history of the Supreme Court has there been a betrayal as startling and wounding as occurred in the second abortion decisions.

3. *The Institutional Role of the Supreme Court.*—In the past two decades it has fallen to the judiciary to minister to our most serious social needs and to protect the fundamental rights of citizenship—in part because of the abdication of our political bodies, due to the reluctance of politicians to make unpopular decisions and the inability of government bureaucracies to solve problems. We now turn to the courts to solve our major socioeconomic issues. Consequently it is with considerable activism that the judiciary undertakes to decide public issues when a great public need for decision of such an issue exists and the other branches of government cannot or will not tackle it. Although not the traditional role of the courts, we have come to accept, indeed expect, such activism.

As a forsaken Justice Marshall emphasizes, the Supreme Court fulfilled this high trust when it decided the landmark abortion cases in 1973:

When this Court decided *Roe v. Wade* and *Doe v. Bolton*, it properly embarked on a course of constitutional adjudication no less

148. *Woman and the New Race* 94.

149. 432 U.S. at 456.

150. 410 U.S. 113 (1973).

151. 432 U.S. at 455.

controversial than that begun by *Brown v. Board of Education* The abortion decisions are sound law and undoubtedly good policy. They have never been questioned by the Court, and we are told that today's cases "signa[l] no retreat from *Roe* or the cases applying it." . . . The logic of those cases inexorably requires invalidation of the present enactments.¹⁵²

The Court's refusal to enforce the constitutional right it declared fundamental four years earlier portends ill for the institutional strength and leadership of the Supreme Court. It is not that the Court cannot, as it sometimes does, subsequently decide that a prior rule of decision is incorrect. In such a case it articulates the reasons for the change of viewpoint. But falsely to aver the probity of its rule of decision in an opinion which eviscerates the very rule it professes still to embrace enervates its own doctrinal verity and shakes to the core public faith and confidence in the authority of discretionary law.

Moreover, the sudden imperious assertion of a strong state interest in "encouraging" women to give birth that justifies subsidizing costs incident to childbirth (often coupled with forced sterilization¹⁵³) but not those incident to nontherapeutic abortions, is exactly the kind of political revisionism that through the ages has enslaved the female reproductive power in the service of the prevailing male ambitions.¹⁵⁴ This retrograde announcement heralds a frightening reaffirmation of the patriarchal practice of using power to manipulate women into subservience as a breeder population. Such political wielding of power does not befit the institutional role of the judicial branch for, as Justice Marshall illustrates, the actuality as well as the appearance of consistent, impartial, evenhanded justice is entirely forfeited:

The court describes . . . a "strong interest in protecting the potential life of the fetus." . . . Yet in *Doe v. Bolton*, . . . the Court expressly held that any state interest during the first trimester of pregnancy, when 86 percent of all abortions occur, . . . was wholly insufficient to justify state interference with the right to abortion. . . . If a State's interest in potential human life before the point of viability is insufficient to justify requiring several physicians' concurrence for an abortion, . . . I cannot comprehend how it magically becomes adequate to allow the present infringement on rights of disfavored classes. If there is any state interest in potential life before the point of viability, it certainly does not outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women.¹⁵⁵

To Justice Marshall, the Court's "magical" method was as objectionable as its substance. The diabolical sorcery of the judicial ploy to "coerce women to bear children they do no wish to bear" is anathema to him:

In the present case, in its evident desire to avoid strict scrutiny—or indeed any meaningful scrutiny—of the challenged legislation, which would almost surely result in its invalidation, . . . the Court *pulls from thin air* a distinction between laws that absolutely prevent exercise of the fundamental right to abortion and those that "merely" make its exercise difficult for some people. . . . Mr. Justice Brennan demonstrates that our cases support no such distinction, . . . and I have argued . . . that the challenged regulations are little different from a total

152. *Id.* at 461-62.

153. See pp. 119-20 *supra*.

154. See pp. 102-04 and 116-19 *supra*.

155. 432 U.S. at 460-61 (footnotes omitted).

prohibition from the viewpoint of the poor. But the Court's legal *legerdemain* has produced the desired result: A fundamental right is no longer at stake and mere rationality becomes the appropriate mode of analysis. To no one's surprise, application of that test—combined with misreading of *Roe v. Wade* to generate a "strong" state interest in "potential life" during the first trimester of pregnancy, . . . —"leaves little doubt about the outcome; the challenged legislation is [as] always upheld." . . . And once again, "relevant factors [are] misapplied or ignored," . . . while the Court "forgo[es] all judicial protection against discriminatory legislation bearing upon" a right "vital to the flourishing of a free society" and a class "unfairly burdened by invidious discrimination unrelated to the individual worth of [its] members."¹⁵⁶

On this last point I would respectfully disagree with Justice Marshall. The class is discriminated against *because* of the ascription of inferior worth to its members. Unfortunately one's worth is determined by the views held by others, and is unaffected by one's self-esteem. But it is precisely this type of prejudice and discrimination that is idiosyncratically within the Supreme Court's antimajoritarian province of protection.

When the Supreme Court abnegates its responsibility to protect the basic individual right and responsibility of each woman to choose her own future against the tyranny of the masses, it gives control of the female body back to the popular will of the "democratic processes" and the brutal politicization of the institution of motherhood. The magnitude of this danger to the lives of all women was not lost on Justice Marshall:

. . . I fear that the Court's decisions will be an invitation to public officials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions. The effect will be to relegate millions of people to lives of poverty and despair. When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.¹⁵⁷

Marshall is obviously aware that the ultimate goal of the immensely powerful and seemingly limitless resourceful "prolife" movement is a constitutional amendment prohibiting all abortion. This is a serious threat not to be scoffed at as improbable. Already the use of federal Medicaid funds for abortions has been restricted.¹⁵⁸ And the zealous "prolife" forces have caused the House Education and Labor Committee to attach anti-abortion language to legislation designed to repeal the pregnancy exclusion in *General Electric Co. v. Gilbert*,¹⁵⁹ by forbid-

156. *Id.* at 457-58 (emphasis added).

157. *Id.* at 462. Similarly concerned about the reckless, self-inflicted injury to the Court's institutional authority that is ineluctable in its refusal to enforce its own prior rule of decision against the disobedience of the political branches of government, Mr. Justice Blackmun stated:

The result the Court reaches is particularly distressing in *Poelker v. Doe*, . . . where a presumed majority, in electing as mayor one whom the record shows campaigned on the issue of closing public hospitals to nontherapeutic abortions, punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost. This is not the kind of thing for which our Constitution stands.

Neither is it an acceptable answer, as the Court well knows, to say that the Congress and the States are free to authorize the use of funds for nontherapeutic abortions. Why should any politician incur the demonstrated wrath and noise of the abortion opponents when mere silence and nonactivity accomplish the results the opponents want?

Id. at 462-63. (Blackmun, J., dissenting).

158. See note 132 and accompanying text *supra*.

159. See notes 113 and 114 and accompanying text *supra*.

ding an employer to deny sick pay and other insurance benefits to pregnant workers. The amendment to the bill stipulates that eligibility benefits extended to pregnant workers not include abortions.¹⁶⁰ And now abortion clinics are being burned.

In *Beal*, *Maher* and *Roe* the Supreme Court did not only disgrace the principle of equal citizenship and the right to be treated as a person. Nor did it only weaken its own institutional authority: if the enduring values the Court finds for the society are not binding on the Court itself, all judicially ascertained values are endangered with transience and disobedience. But the Court, in addition, committed an intemperate act of deference to the political bodies which threatens to vitiate the separation of powers that underpins our tripartite system of government. The Supreme Court's final word is: "We . . . hold . . . that the Constitution does not forbid a State or a city, pursuant to the democratic processes, from expressing a preference for normal childbirth."¹⁶¹

Although the decision in *Geduldig v. Aiello* previewed the great difficulty the Court has with the subject of pregnancy, the decisions in *Roe v. Wade* and *Doe v. Bolton* had already given us false assurance and put us off guard. In retrospect, the Court has been fickle and cowardly. When all is said and done, the Supreme Court does knuckle under the sway of public opinion and well-organized, well-financed special interests. The lesson is this: the independence of the judiciary is a much exaggerated notion, and we must look elsewhere for our freedom.

The reader who surveys the historical terrain through which we have journeyed would indeed be justified in observing that *plus ça change, plus ç'est la meme chose*. We see that birth control¹⁶² is an eternal struggle for freedom that has not succeeded in liberating women from the dependency of caste. But if our past is disconcerting, the future is even more unnerving. The rapidly unfolding world of molecular biology augurs, for the first time, the physical possibility of liberation and, at the same time, the probability of final defeat. The advent of asexual reproduction places us "on the brink of a major evolutionary perturbation."¹⁶³ Yet there is no evidence that the interests of women (or humanitarian purposes generally) are motivating forces in the *sui generis* world of male scientists.

160. *Anti-Abortion Bloc Adds Limit to House Health Bill*, *The Los Angeles Daily Journal*, Mar. 3, 1978, at 20, col. 3.

161. *Poelker v. Doe*, 432 U.S. at 521 (footnote omitted) (*per curiam* opinion).

162. Elective abortions are merely one among several birth control methods, none of which are satisfactory. There is no safe, infallible method of contraception (other than continence and sterilization). On the adequacy of abortion as a method of birth control Adrienne Rich has observed:

No free woman, with 100 percent effective, nonharmful birth control readily available, would "choose" abortion. At present, it is certainly likely that a woman can—through many causes—become so demoralized as to use abortion as a form of violence against herself—a penance, an expiation. But this needs to be viewed against the ecology of guilt and victimization in which so many women grow up. In a society where women entered sexual intercourse willingly, where adequate contraception was a genuine social priority, there would be no "abortion issue." And in such a society there would be a vast diminishment of female self-hatred—a psychic source of many unwanted pregnancies.

Abortion is violence: a deep, desperate violence inflicted by a woman upon, first of all, herself. It is the offspring, and will continue to be the accuser, of a more pervasive and prevalent violence, the violence of rapism.

Of Woman Born 268-69 (asterisk omitted).

163. Dr. Joshua Lederberg, Nobel Laureate in genetics, quoted in *In His Image* 17. See note 145 *supra*.

V. THE BIOLOGICAL REVOLUTION: PROMISES AND PERILS

Women, biologically distinguished from men, are culturally distinguished from "human." Reproduction of the species has cost women dearly—emotionally, psychologically, culturally, and physically. Because childbearing is the pivot of women's oppression, the new reproductive technology is the key to liberation. Artificial, asexual reproduction will make unnecessary the enslavement of women by men for the purpose of procreation. Males, who have everywhere tried to imitate, annex, control and magically share in the physical powers of the female,¹⁶⁴ will then possess their own powers to make human beings.

Importantly, the new technologies will allow women to escape from the concept of woman as womb; the idea of "biological destiny" will become indefensible and obsolete, as will the practice based upon it—forced motherhood. Molecular biology will completely upset the totally private, monogamous method of human reproduction and its life support system, the family. Whether, and through what method, to be a parent will become the free choice of each individual, male as well as female, and the possibilities for new modes of childrearing will be wide open too.

Already females have been using artificial insemination asexually to choose biological motherhood. *In vitro* fertilization (the extrauterine union of sperm and ovum) and cloning, a process by which a human being genetically identical to the one cloned is created without union of two sex cells, are, or soon will be, realities. Both of these techniques, however, require embryo transplantation into the uterus of a "surrogate" or "host" female for gestation and birth. Ectogenesis, in which asexual reproduction could be fully accomplished in artificial wombs (extracorporeal membrane oxygenators) will be a possibility by the end of the century.¹⁶⁵ Artificial wombs already exist and human fetuses have survived in them for short periods of time.¹⁶⁶ With the arrival of ectogenesis female pregnancy and childbirth would no longer be necessary.

Another asexual reproductive method is parthenogenesis, reproduction by the female alone without male sperm, through the use of chemical or other agent to stimulate the growth of an unfertilized ovum.¹⁶⁷ Parthenogenesis always produces female offspring but, unlike clonal reproduction, there is a genetic difference between the female from whom the egg comes and the human product. The egg cell is haploid, containing only 23 chromosomes rather than the full complement of 46, and the parthenogene is thus not an exact genetic copy.¹⁶⁸ If performed *in utero*, parthenogenesis would allow women to asexually reproduce much the same way as with artificial insemination, except without male germinal material and with female gender of the offspring almost certain. Parthenogenesis

164. See generally B. Bettelheim, *Symbolic Wounds: Puberty Rites and the Envious Male*, *supra* note 11.

165. In *His Image* 52.

166. D. Halacy, Jr., *Genetic Revolution*, *supra* note 15, at 144. But the development of artificial wombs has not been made an urgent social priority in order to sustain aborted fetuses. In fact, while premature infants born at five months are kept alive in incubators, I know of no attempt to keep a five month old aborted fetus alive in this manner.

167. See generally Laurel, *Radical Reproduction: Women Without Men*, 2 *Amazon Q.*, Mar. 1974, no. 3, at 4. Induced parthenogenesis as a chosen method of reproduction is distinguished from spontaneous parthenogenesis or "virgin birth," cases of which have been reported and documented through the ages.

168. D. Halacy, Jr., *Genetic Revolution*, *supra* note 15, at 149.

has been achieved in animals. Although now still a biological process, it could probably also be accomplished ectogenetically *in vitro* if the technology existed.

Obviously, the new molecular biology promises a wide range of choice to both men and women in the matter of human reproduction and parenting and, consequently, also in the determination of life style, sexual preference and social role. It holds out to everyone the optimum condition for choosing one's own future. Because of this it promises to free women "from the tyranny of their biology" and to diffuse the "childbearing and childrearing role to the society as a whole, to men and other children as well as women."¹⁶⁹

But one cannot contemplate the extraordinary life-affirming beneficence of artificial reproduction and escape recognition of the enormity of the potential destructiveness of this power. Artificial reproduction, like atomic energy, will not be liberating unless it is properly used. Sadly, there are few indications that human beings are yet evolved to a level of civilization where we can be trusted to apply the power of genetic science responsibly, benevolently, and in the furtherance of humanity. In fact many distressing indicia to the contrary already appear.

A recent London report that lesbians choose motherhood by artificial insemination stirred sharp protest and prompted British lawmakers to condemn the use of artificial insemination to provide lesbians with children as "unnatural and immoral." Health Minister David Ennals was asked to draw up guidelines with the British Medical Association to ensure "that artificial insemination is available only to married couples of different sexes."¹⁷⁰ Single women denied the right to be a mother through artificial insemination might welcome the alternative technology of parthenogenesis, in which the egg cell needs absolutely no assistance from sperm. But the development of this technique also appears disfavored by men:

Since the offspring are female, except for an occasional defective male, a governmental decision to promote or even allow parthenogenesis would lead to a female oriented society. The realization that the male is totally unnecessary to the continuation of the species would have profound consequences for his role in society.¹⁷¹

It seems that all it took to make the clonal breakthrough was "any good reason" for cloning a human.¹⁷² In the first reported application of this technology the "good reason" was provided by a "wealthy gentleman in need of a [male] heir" who offered "one million dollars and possibly more to attain a clonal reproduction of himself."¹⁷³ Can it be true, that the first human clone springs from the same male hubris, concerned only with his own interests, and with

169. The Dialectic of Sex 238. Shulamith Firestone has even suggested a society in which all childbearing is taken over by technology and that if in the transition "this proved too much against our past tradition and psychic structure (which it certainly would at first) then adequate incentives and compensations would have to be developed—other than the ego rewards of possessing the child—to reward women for their special social contribution of pregnancy and childbirth." *Id.*

It should be noted that while extrauterine reproduction takes sex out of reproduction it does not take impregnation out of sex. Birth control remains woman's problem, as Margaret Sarger wrote in 1920. *See Woman and the New Race* 100.

170. *Story on Lesbians' Babies Stirs Protests in Britain*, Los Angeles Times, Jan. 7, 1978, § I, at 22, col. —.

171. Kindregan, *State Power Over Human Fertility and Individual Liberty*, 23 HAST. L.J. 1401, 1419 (1972).

172. In His Image 17.

173. *Id.* at 22, 37. ". . . [N]early everyone who was in a position to know believed that human cloning was a very real possibility and that all that was needed to accomplish it was the encouraging of

progeny only insofar as it is (male) heir and ego extension in the private bid for immortality?¹⁷⁴ If it is true, it hopelessly illustrates how, notwithstanding revolutionary technologies, we continue in the same entropic patriarchal system. It has even been mentioned that, since each clone consists only of members of one gender, each gender could indefinitely reproduce itself asexually. It has not escaped the notice of the male competitive instinct that "[t]he female clones, possessed of both wombs and egg cells, would have some advantage at the outset."¹⁷⁵ Men should not worry, though, because "the male clones could use female slaves or, more likely, artificial wombs."¹⁷⁶

Although apparently the use of artificial wombs would be approved for the purpose of enabling males to clone identical duplicates of themselves, opposition can be anticipated to the use of extrauterine reproduction by women who choose it as an option, rather than to overcome sterility. It has already been "feared" that the more limited technique of *in vitro* fertilization (at this point necessarily coupled with uterine implantation),

would rapidly lead to a demand by many women for more frivolous and more dehumanizing uses of this new technology. Women who simply didn't want to undergo the difficulties of pregnancy . . . would hire other women to bear their children for them—for a fee.¹⁷⁷

This practice has been mocked as "wombs for rent."¹⁷⁸ It is acceptable, however, for a "childless" couple to pay \$10,000 to a "surrogate" female to be artificially inseminated with the husband's sperm and produce a child for the couple.¹⁷⁹

One commentator has wryly noted: "[F]irst the moralists insisted that it was not right to have sex without babies. Now the same folks are insisting that it is not right to have babies without sex. [¶] There is just no pleasing some folks."¹⁸⁰ The

available talent with money and will. Obviously, someone had to *want* to do this—and probably want it badly—before it could happen." *Id.* at 55 (emphasis original).

174. The motivating circumstances almost too perfectly embody the essence of patriarchy:

At the core of patriarchy is the individual family unit which originated with the idea of property and the desire to see one's property transmitted to one's biological descendants. Simone de Beauvoir connects this desire with the longing for immortality—in a profound sense, she says, "the owner transfers, alienates, his existence into his property; he cares more for it than for his very life; it overflows the narrow limits of his mortal lifetime, and continues to exist beyond the body's dissolution—the early and material incorporation of the immortal soul. But this survival can only come about if the property remains in the hands of its owner; it can be his beyond death only if it belongs to individuals in whom he sees himself projected, who are *his*." A crucial moment in human consciousness, then, arrives when man discovers that it is he himself, not the moon or the spring rains or the spirits of the dead, who impregnates the woman; that the child she carries and gives birth to is *his* child, who can make *him* immortal, both mystically, by propitiating the gods with prayers and sacrifices when he is dead, and concretely, by receiving the patrimony from him. At this crossroads of sexual possession, property ownership, and the desire to transcend death, developed the institution we know: the present-day patriarchal family with its supernaturalizing of the penis, its division of labor by gender, its emotional, physical, and material possessiveness, its ideal of monogamous marriage until death (and its severe penalties for adultery by the wife), the "illegitimacy" of a child born outside wedlock, the economic dependency of women, the unpaid domestic services of the wife, the obedience of women and children to male authority, the imprinting and continuation of heterosexual roles.

Of Woman Born 60-61 (footnote omitted) (emphasis original).

175. In his Image at 53. Allegedly the cloner who successfully cloned the first male was a physician who stole his egg supply from women who came to him for tubal litigation. "If he saw a chance to get some eggs in the course of carrying out some other procedure, he took it, naturally." *Id.* at 120.

176. *Id.* at 53.

177. *Id.* at 51.

178. D. Halacy, Jr., Genetic Revolution, *supra* note 15, at 143; In His Image 51.

179. \$10,000 Fee—Nurse Offers to Bear Baby for Childless Pair, Los Angeles Times, Oct. 18, 1977, § I, at 3, col. 1.

180. Letters to the Times—Cloning, Los Angeles Times, Mar. 22, 1978, § II, at 6, col. 4.

real issue is that the development of reproductive technology is proceeding on the unquestioned, and oppressive, assumption that its purpose is the reinforcement and preservation of the *present* value system of family life and reproduction (for example, to help a "barren" woman have her husband's child).¹⁸¹ Within this standard it is considered "unnatural" and "dehumanizing" for a woman to choose motherhood through extrauterine methods. It is not, however, the *methodology* itself that is considered "unnatural" (since it would be sanctioned provided the value system's preconditions were present) but, rather, the new values of freedom of choice, based on the elimination of male supremacy and the family, that the technology would make possible. The research undertaken in molecular biology is only incidentally in the interests of women, if at all. For example, development of an artificial womb is excused on the grounds that it might save babies prematurely born. "Thus, although it would be far easier technologically to transfer a young embryo than an almost fully developed baby, all the money goes into the latter research."¹⁸² Shulamith Firestone states, rather to the point, I think: "Until the taboo is lifted, until the decision not to have children or not to have them 'naturally' is at least as legitimate as traditional childbearing, women are as good as forced into their female roles."¹⁸³

Although some of the experimentation in reproductive technology has been motivated by the specific goal to help "childless" couples, it is part of the larger field of molecular biology in which the technological ability to reproduce human life is merely a necessary by-product of advancements toward more ambitious schemes of genetic engineering. The same research breakthroughs vitally needed by molecular biologists for "developments that might make man not only healthier but, ultimately, smarter, better, kinder,"¹⁸⁴ will, incidentally, provide the framework for clonal reproduction. In furtherance of these other objectives, however, genetic scientists are preoccupied with recombinant DNA experiments potentially far more perilous than embryo transfers or cloning.

The impact of this work extends beyond artificial reproduction in the parochial sense in which I have been using the term—reproduction of human life for

181. Many speculate that *in vitro* fertilization and embryo implantation and transplantation "will soon be routinely available for humans." Kinney, *Legal Issues of the New Reproductive Technologies*, 52 CAL. BAR J. 514, 518 (1977). So far, most of the thinking about this technique, both medical and legal, stems from this assumption as to its application: "Embryo transplants provide the means for a couple to become biological parents, when they might otherwise be unable to do [so] because of the wife's sterility." *Id.* Thus the hypothetical medical contexts, and legal speculations, focus upon: (1) removal of an ovum from a female whose oviducts are blocked in order to fertilize it *in vitro* with her husband's sperm and implant the embryo into her uterus; (2) *in vitro* fertilization of an ovum from a donor female with a husband's sperm, with subsequent implantation into his wife's uterus, in cases where she is sterile or has a genetic defect she does not wish to pass on to her child; (3) *in vitro* fertilization of a donor ovum and donor sperm with implantation into a wife, where both husband and wife are sterile; (4) *in vitro* fertilization of ovum and sperm with transplantation into the uterus of a "host" female who, for money, will bear the child and deliver it to the parents at birth. It has been presumed that this latter method "would be most beneficial to a woman who is unable to carry a child due to a series of miscarriages." (*Id.*) Scientific motivation for developing new reproductive technologies, as well as analyses of potential legal issues, are without acknowledgement of the voluntary choice of reproductive method by any woman, for whatever reason, and without regard to "inabilities, disabilities and defects."

182. *The Dialectic of Sex* 198.

183. *Id.* at 220. On the unnaturalness of "natural" childbearing, see also *id.*

184. *In His Image* 27. These developments are sought for many purposes, including to understand the genetic basis for cancer, to prevent genetic birth defects, and to use clones for spare parts in organ transplantation, since they would not be rejected as incompatible by the body from which they are cloned. Of course this latter use would completely disregard the person of the clone.

its own sake. Promising to produce all sorts of substances, such as insulin for diabetics, growth hormones for the stunted, antibodies to fight numerous diseases, enzymes for the treatment of those deficient in them, and so forth, these scientists are combining the genetic material of different species in laboratories to produce new forms of life.¹⁸⁵ Artificial reproduction could be insignificant in comparison with other developments planned by scientists in the realm of molecular biology, and whose possibilities now seem limitless. Opponents of this work are not only worried about the heinous eugenic capacities that lurk in the ability to "create a perfect race" (this was, for example, Hitler's goal in 1933), but also about the possibility that we might create deadly forms of life. The overwhelming feature of this work is what Nobel Laureate George Wald, who has called for a complete halt to all recombinant work, identifies as "our profound ignorance." In view of this ignorance, Columbia University biochemist Erwin Chargaff asks, "have we the right to counteract, irreversibly, the evolutionary wisdom of millions of years in order to satisfy the ambition and the curiosity of a few scientists?"¹⁸⁶

Nevertheless, the entrepreneurial enthusiasm swirling around recombinant exploration probably means we have already passed the point of no return. It is predicted that in the next several years "biology will replace chemistry in importance in this country."¹⁸⁷ We are warned that the power of genetic engineering "cannot be exaggerated," that "a new industry with untold potential is about to appear."¹⁸⁸ Major pharmaceuticals are getting into recombinants, with patents pending in readiness to capitalize on the new forms of life spliced together in laboratories.¹⁸⁹ There is nothing to prevent private ownership, control and exploitation of this unfathomable power.

Most people in genetic engineering concede that recombinant DNA research holds both "promises far grander and perils far blacker" than those of embryo transfer or cloning. Notwithstanding that this field of science is of utmost importance to people everywhere, its "meaning [is] almost hopelessly disguised to the public by the inaccessible code of recondite biochemical equations and

185. The *E. coli* bacterium, a normally benign inhabitant of the human intestine, is the primary vehicle of all the recombinant work. In cancer experiments the genes of cancer-causing viruses will be transplanted into *E. coli* and the bacteria will then be fed to mice. Much of the concern is with containment of potentially deadly new life forms created *in vitro*, and *in vivo*, and fear of human negligence and error. Because *E. coli* has coexisted with humans since the beginning of time, it is ubiquitous and it would be virtually impossible to rid ourselves of an altered strain that could spread through the population like a plague. Most scientists claim that such an event is unlikely but one of them, Dr. A. Chakrabarty of the General Electric Research and Development Center in Schenectady, New York, who created an *E. coli* bacterium with a new gene using plasmid engineering, has destroyed his new life form for this reason. There may be others, however, who will not be so quick to realize the dangers of their work. In *His Image* at 219-21 n.40 and 213-14 n.19. In addition to fear about potential hazards, there is also grave concern about who will control the new technology and toward what end.

186. *Id.* at 214 n.19.

187. *Id.* at 215 n.21.

188. *Id.*

189. In a very important decision, the Court of Customs and Patent Appeals has recently ruled that General Electric had the right to patent a new form of life (an oil-eating organism) created in its own laboratories. Application of Chakrabarty, 571 F.2d 40 (C.C.P.A. 1978). See also *New Man-Made Life Form Patentable, Judges Decide*, Los Angeles Times, Mar. 3, 1978, § 1, at 1, col. 5. The attorney who argued General Electric's case said it was fair to say that if "new life forms were not patentable, there would be less incentive for private industry to spend money for the research to create them. 'There is quite a considerable investment'" *Id.* it *should* be asked, do we need or want private industry to research and create new forms of life? By making recombined forms of DNA patentable courts also make it profitable and therefore inevitable, and on a grand scale.

abstract recombinant possibilities."¹⁹⁰ These molecular biologists defend their "right" to experiment on the rationale that application of science is separate from knowledge, and it is only the knowledge for which they are responsible. They will not, therefore, forbear from possibilities so frightening that they are not much discussed (if they are known) outside scientific circles.

As women, we are caught in a dilemma not of our own making, since we are excluded from science. In the revolution of molecular biology resides our liberation from the caste of motherhood. But also therein loom more distant and terrifying possibilities. The fear is justified if we envision the choice of human types, gender, and capabilities presently being mastered by patriarchy. In the control of our present society, and under the direction of current scientists, few of whom are female or even feminist, any attempted development of technology to "free" anybody is suspect.

In 1976 Adrienne Rich set forth this agenda:

The mother's battle for her child—with sickness, with poverty, with war, with all the forces of exploitation and callousness that cheapen human life—needs to become a common human battle, waged in love and in the passion for survival. But for this to happen, the institution of motherhood must be destroyed. [¶] The changes required to make this possible reverberate into every part of the patriarchal system. To destroy the institution is not to abolish motherhood. It is to release the creation and sustenance of life into the same realm of decision, struggle, surprise, imagination, and conscious intelligence, as any other difficult, but freely chosen work.¹⁹¹

It will have to remain for a more visionary dreamer than myself to imagine how this aim is to be accomplished.

Shulamith Firestone has suggested that, "at the very least, development of an option [for artificial reproduction] should make possible an honest reexamination of the ancient value of motherhood."¹⁹² But under present circumstances, and in light of the ominous harms, it would be irresponsible to urge the *development* of genetic science, the unleashing of a terrible power, as the means to liberate women from the bondage of patriarchal motherhood. The probability of misapplication is a very strong argument against the development of the power itself. Undoubtedly, however, the self-generating, self-justifying, field of molecular biology will speedily expand for its own sake, regardless of external impetus. Since, in some respects, it is already a *fait accompli*, we should turn our attention to the issue of its *application*. In the absence of the participation of women, at an early stage, in the determination of the direction and objectives of this new science, it almost certainly will not be used to liberate anyone. Even with the participation of women, though, there is no assurance that it can be humanely controlled.

Despite the spectre of the irretrievable misuse and contamination of nuclear and, now, molecular power, one has the irresistible impulse to issue a clarion call to humankind to "Awake and hearken!", as if by so doing one can magically convert all the sorrowing empirical indications into the unreality of a bad dream. How hard it is to relinquish the belief that humankind, for all its faults, has that

190. In His Image 26.

191. Of Woman Born 280.

192. The Dialectic of Sex 199.

divine spark that makes us reach upward for something better than we have ever known; the trust that human beings will always try to become the best that we can be, develop the best that is in us, even when it demands forbearance by a few for the benefit of all.