

LEGISLATING THE FEMALE BODY: REPRODUCTIVE TECHNOLOGY AND THE RECONSTRUCTED WOMAN

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INTRODUCTION: THE RECONSTRUCTED WOMAN

Legal conceptions of the female body tend to assume a singular, uncontested, received idea of the "nature" of that body. I argue, on the contrary, that in the process of regulating the female body, the law legislates its shape, its lineaments, and its boundaries. However, law does not act alone to fix the shape of the female body. It collaborates with other defining discourses such as science and popular culture. The effect of this collaboration is to blur the lines of influence, enabling each discourse to refer to the other to substantiate its claim about the "nature" of the female body. This paper is concerned with the intersection between these discourses and with challenging those premises about women that arise as a result of this insistence by law and legal discourse on an omnipresent female body that "we" all know, understand, and agree upon.

"Woman" is not something that we can clearly define by reference to a particular known body. Rather, in the act of speaking about, legally regulating, scientifically examining, or culturally representing the female body we construct and reconstruct Woman. Her reconstruction occurs every moment we attempt to define her. The description of Woman as "reconstructed," rather than simply constructed, bespeaks not only her contingent status but the continuous process of creation and recreation that we engage in through various attempts to define her. I want to highlight the limiting and containing impetus of some of the discourses that seek to naturalize disempowering configurations. What follows is an examination of the politics of the female body as it is reconstructed today in popular culture and in law in light of technological advances and scientific

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imperatives regarding reproduction.

Part A examines how the construction of Woman is manifested in popular culture and legal, scientific, and political discourses. Part B explores how those constructions are used to disempower women, particularly women of color and poor women. Part C looks at legal conceptions of the female body.

A. REPROCULTURE

The current shape of the female body, as it is "described" in legal discourse, is not determined by a series of scientifically verifiable facts, but instead is dependent upon and directed towards the disempowerment of women. Multiple descriptions of the material female body make it available for political use by both feminists and anti-feminists alike. For instance, a feminist description might emanate from the standpoint of an empowered, enfranchised woman, with the capacity to make choices, not only about whether to bring a fetus to term, but also about the management of her pregnancy. By employing a feminist description, we would force the configuration of the woman's body to be perceived differently. Rather than being "ensnared by nature,"¹ or subordinated to her biological destiny, a woman accorded the autonomy described would be powerfully in control of the interpretation of her body. Pregnancy, rather than being interpreted as the gestation of a fetus or baby, would be interpreted as that process which the woman undergoes. The notion of a woman in control of her body depends on a refusal to define the female body as, in Simone de Beauvoir's words, a "stock-pile of colloids, an incubator."² In this empowering configuration that I am positing, the woman's body is seen as neither container nor separate entity from the fetus. Until the baby is born the fetus *is* the female body. It is part of her body/self. Attempts by science and the law to legislate the female body as a separate and adversarial container for the fetus are attempts to reconstruct Woman in a system of patriarchal description and control. There is no scientifically verifiable "fact" that designates woman and fetus as separate. There are only scientific descriptions that hypothesize a notion of separateness, and certain descriptions are being privileged over others. For example, the scientific "fact" that the fetus and mother are genetically different does not answer

¹ Simone de Beauvoir, *The Second Sex* 495 (H.M. Parshley ed. & trans., Knopf 1953) (1949).

² *Id.*

the question of whether the description of them as separate is appropriate. This distinction is a political choice and one that I would suggest materially shapes women.³

1. Popular Culture: The Woman Eclipsed

In order to examine the politics of the female body, it is necessary to explore its representation in cultural discourse. Recent media accounts of the feats of reproductive technology shed light on how popular culture is both shaping and re-presenting Woman. Technology has become an important component of the cultural discourse about women, making the reconstructed Woman something of a "technocultural" production.⁴ In this technocultural production, women are positioned in opposition to their fetuses and to law, science, and "society at large." I will offer a number of examples from popular culture that begin to tell the story of women's political reconstruction. Together with the later examples drawn from discourses of science, technology, and the law, they support the thesis that the female body in its very materiality is a contingent, contested site. It is the constant subject of a legislative force to recreate Woman in the image of a certain political project and thereby make that project the "natural state of affairs." Thus, a political battle is being fought on and in women's bodies.

Popular cultural representations of reproductive technology often completely negate the significance of the existence of the woman. A recent issue of *The Trentonian* reported the story of a local family whose two-year-old son required a bone marrow transplant.⁵ The child's mother was pregnant, and the doctors planned to harvest the placenta upon delivery in an effort to secure a donor match. The newspaper headline suggested a different story. The front page read, "Unborn Child May Save Brother's

³ In fact the imperative to describe the mother and fetus as either one being or two, but not both one and two, indicates the limitations of logocentric and phallocratic discourse. A postmodern perspective would challenge this need to create clearly defined boundaries.

⁴ I am borrowing the word "technoculture" from the book of that title. Technoculture (Constance Penley & Andrew Ross eds., 1991). The editors describe technoculture as technology that is used to bolster the agenda of majority culture. They write: "We fully recognize that cultural technologies are far from neutral, and that they are the result of social processes and power relations. Like all technologies, they are ultimately developed in the interests of industrial and corporate profits and seldom in the name of greater community participation or creative autonomy." Id. at xii.

⁵ Laura Fortunato, Family Seeks Donor for Boy: Needs \$300,000 and Miracle, *The Trentonian*, Nov. 2, 1991, at 1, 3.

Life.”⁶ The accompanying photograph depicts the sick child, the “brother” of the headline, in the arms of his father. The mother’s role in this drama, her very materiality, is irrelevant. Her photograph is not part of the attention-grabbing front page. She is an incidental carrier of the “unborn child.” The words of the headline peer past the woman and into her womb. The fetus has become a separate, heroic entity with the power to heal that which the “defective” mother has already produced.

In the July 31, 1986 edition of the *San Francisco Chronicle*, the headline reads, “Brain-Dead Mother Has Her Baby.”⁷ Here the woman is not rhetorically absent, but her presence is significant only in the fact of her mental absence. Valerie Hartouni, in her article “Containing Women: Reproductive Discourse in the 1980s,” addresses this headline, saying, “The coherence of this statement rests, in part, on a very particular understanding of ‘motherhood’—an understanding in which motherhood is equated with pregnancy and thereby reduced to a physiological function, a biologically rooted, passive—indeed, in this case literally mindless—state of being.”⁸ Hartouni goes on to argue that if “mothering” were conceived as a “historically specific set of social practices, an activity that is socially and politically constructed and conditioned by relations of power, and that differs according to class, race, history, and culture,” then it would not be possible to equate a brain-dead female body with a mother.⁹ Thus, the headline serves to reroute our understanding of “mother” back to the biological female body. This understanding of motherhood is far from new. It seems that despite the revolutionary zeal of reproductive technicians, new technologies tend to give rise to the same rhetorical strategy that describes women as subordinate to their biological destiny to reproduce—even in death.

These technocultural productions highlight how diffuse the female body is as a material entity and how different discourses about the female body feed into each other. Talking about the female body analogically illustrates its contingent material status, its rhetorical flexibility, and therefore, its openness to reconstruction. The examples I have described so far draw on the discourses of technology and journalism. In the case of *The Trentonian*’s unborn “savior,” the female body, through its absence, is analogized as a container. In the case of the “brain-dead mother,” Hartouni explains how “mothering” is made analogous to the “physiological

⁶ Id. at 1.

⁷ Thomas G. Keane, Brain-Dead Mother Has Her Baby, S.F. Chron., July 31, 1986, at 1, cited in Valerie Hartouni, Containing Women: Reproductive Discourse in the 1980s, in *Technoculture*, supra note 4, at 27, 27.

⁸ Hartouni, supra note 7, at 30.

⁹ Id. at 31.

function" of the female body. A discourse that frames women as equivalent to their biology, and at the same time analogizes that biology to the maternal, renders the non-biological woman anti-maternal. In this way a "good" mother can only be a passive disempowered woman.

2. Disempowering Configurations: Woman Versus Fetus, or Can't We Be "Not-One-But-Not-Two"?

I want now to look at how the separation between woman and fetus functions in legal discourse. It is clear that popular representations of mothers¹⁰ and their fetuses insist on this separation. They view the female body as a space to be used profitably in the interests of the fetus, or, in the previously mentioned case of the unborn "savior," in the interests of other children. These popular representations foreground a paradox I wish to explore in law. In *Lynch v. Lynch and Another*,¹¹ the court upheld the right of a child to sue its mother for injuries sustained as a fetus during an automobile accident.¹² The rationale of this decision seems to go like this: where injury to the fetus occurs, it is the mother as responsible agent who must be held to account. This case highlights the political expediency of the notion of separateness. The mother and the fetus are separate in so far as it is necessary to exteriorize the fetus, to give it power in the form of legal sovereignty against the mother. However, in order to make the woman responsible, it is also necessary to emphasize their bodily connection, their inseparability. The fetus' claim for damages is based on injuries incurred through the mother's body. When she is injured, so is the fetus. To this extent she is the fetus. Yet, the woman is held responsible to that fetus as a separate being.

Thus, there is a paradox at the very center of any discussion of women's rights and "fetal rights." As scientific advances reveal more and

¹⁰ You will notice throughout this paper that it is often possible to use the word "woman" where the word "mother" appears and vice versa. However, I have tried where possible to distinguish the two. In the present case, it may have seemed more empowering to use the word "woman," but I have deliberately chosen not to do so in order to avoid the erasure of "mother" as a possible, partial construction of woman, and one that we would not wish to disavow.

¹¹ A.T.R. (CCH) ¶ 81-117, at 69,090 (1991) (Austl.).

¹² While it is clear that the motivating force behind the decision was to enable an insurance pay-out to assist in the care of the child, the case has wide implications for women. It means that a mother could be liable in law if her child sustained injury as a consequence of her taking part in strenuous sport, or smoking, or taking drugs during pregnancy. There must be a more straightforward way to ensure that there are adequate resources available to provide for the care of a child born with brain damage without recourse to such destructive legal process.

more ways in which the mother who carries a fetus is able to have an impact upon that fetus, or is integral to it, the response of the law and science has been to see these connections as a point of competition between mother and fetus and as a mark of their separate trajectories. Thus, connections are recast as vulnerabilities. The fact that a woman's body can sustain a fetus even after she is brain-dead, that the fetus is affected by what she ingests, by the decisions she makes about her body—whether she rides in a car, whether she will allow herself to be cut for fetal surgery, whether she will agree to a blood transfusion or a recommended Cesarean section—illustrate the intimate connection between mother and fetus. Yet such descriptions position the fetus as vulnerable to the actions of the mother and are part of a rhetorical strategy to pit mother-as-female-body against fetus.

The decision to pit mother against fetus is not a scientifically objective decision or a legally reasoned decision; it is a political decision which affords the possibility of greater control over the female body and over women. Scientific objectivity and legal rationality are narratives used to “naturalize” what is in fact highly contentious and political. It is not insignificant that the female bodies targeted for this control are more often poor women and women of color—the very people whose political strength is the most limited.¹³ In order to counter this political strategy, we must take the information provided by reproductive technologies as signifying a crucial connection between the female body/woman and the fetus, as opposed to signifying their separation, and develop an alternative political strategy. The female body must be transformed into an empowered, autonomous woman. This strategy would seek to place the woman in control of her body/self and the fetus and not, as she was constructed in the pre-technological era, as subject to her body nor, as she might otherwise be constructed in the age of technology, as subject to the fetus.

It is my aim, by focusing on the female body as a site of legislative activity and control, to shift the discussion away from the detail of reproductive technologies and instead to foreground the policing of the shape and understanding of the female body. That legislating process is not affected only by legal discourse. Other discourses that contribute to this process include history, philosophy, and science. By critically examining these discourses it is possible to heighten awareness of the rhetorical and epistemological techniques used to construct the female body. We can begin to see that each assumption we have about its material construction is encoded and constructed by these epistemologies. If we are to give effect to an empowered female body/woman, it is necessary that we resist the naturalness and inevitability of current disempowering popular constructions

¹³ See discussion *infra* pp. 337–39.

of the female body.

3. One History of Reproduction

The naturalness of current popular constructions of the female body depends to a large extent on the suppression of a historical account of how those constructions emerged. It is not simply enough to report the "facts" of the past, even if that were possible; we must examine what enabled certain constructions to move forward while others were abandoned. Scientific accounts of the body accord with the dominant political imperatives of the day. The same kind of critical pressure that allows us to chart the changing shape of the body throughout history must be brought to bear on modern scientific accounts. What follows is one historical account.

At the beginning of the nineteenth century, reproductive technology underwent an enormous shift. Prior to this period medical science held to the view that female orgasm was necessary for conception to occur.¹⁴ It was also believed that men and women had the same genitals, except that those of women were inside their bodies (inverted and less developed) while those of men were outside their bodies.¹⁵ Thomas Laqueur suggests that by 1800 this view, like that linking orgasm to conception, had come under attack.¹⁶ In his article, "Orgasm, Generation, and the Politics of Reproductive Biology," Laqueur argues that there was a lack of interest in "looking at the anatomical and concrete physiological differences between the sexes until such difference became politically important."¹⁷ "[N]either the demotion of female orgasm nor the biology of incommensurability of which it was a part follow simply from scientific advances. . . . [I]n fact the reevaluation of pleasure occurred a century and a half before reproductive physiology came to its support."¹⁸

Laqueur describes how this enormously significant shift in the view of reproduction led to the scientific description of "spontaneous" ovulation.¹⁹ I argue that the modern view of ovulation as a process outside the individual woman's control, as something which proceeds autonomously through its cycle, develops from the political imperative that preceded or

¹⁴ See Thomas Laqueur, *Orgasm, Generation, and the Politics of Reproductive Biology*, in *The Making of the Modern Body: Sexuality and Society in the Nineteenth Century* 1, 1, 4 (Catherine Gallagher & Thomas Laqueur eds., 1987).

¹⁵ See *id.* at 5.

¹⁶ *Id.* at 17-18.

¹⁷ *Id.* at 3-4.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

propelled the scientific knowledge of ovulation.²⁰ Laqueur identifies several of the factors that gave rise to this scientific/political shift, including the French Revolution, the rise of the women's suffrage movement in Britain, and the effects of democracy in the United States.²¹ He writes:

Women's bodies in their corporeal, scientifically accessible concreteness, in the very nature of their bones, nerves, and, most important, reproductive organs came to bear an enormous new weight of cultural meaning in the Enlightenment.

... In short wherever boundaries were threatened arguments for fundamental sex differences were shoved into the breach.²²

Londa Schiebinger puts forward a similar analysis with respect to anatomy in her article "Skeletons in the Closet: The First Illustrations of the Female Skeleton in Eighteenth-Century Anatomy."²³ She writes:

When the French anatomist Marie-Geneviève-Charlotte Thiroux d'Arconville published drawings of the female skeleton in 1759, she portrayed the female skull as smaller than the male skull, and the female pelvis as larger than the male pelvis. . . . The depiction of a smaller female skull was used to prove that women's intellectual capabilities were inferior to men's. This scientific measure of women's lesser "natural reason" was used to buttress arguments against women's participation in the public spheres of government and commerce, science and scholarship. The larger female pelvis was used in parallel fashion to prove that women were naturally destined for motherhood, the confined sphere of hearth and home.²⁴

These accounts of the body demonstrate the careful exchange between science and politics. They show science reacting defensively against a resistant female subject—the suffragette, the working woman, the woman scientist, the woman scholar, the woman in government. In response, the body is reshaped not, as science claims, through discovery and experimentation, but to support political imperatives. Science is political and is deployed politically. The law also participates in this anatomizing process. Thus, "public" women are marked by science and the law as incongruous—

²⁰ The fact that women can, in fact, stop themselves from menstruating, as in the case of amenorrhea by fasting or excessive exercising, for example, is not seen as significant enough to challenge the scientific description of ovulation as spontaneous.

²¹ Laqueur, *supra* note 14, at 18.

²² *Id.*

²³ Londa Schiebinger, *Skeletons in the Closet: The First Illustrations of the Female Skeleton in Eighteenth-Century Anatomy*, in *The Making of the Modern Body*, *supra* note 14, at 42.

²⁴ *Id.* at 42–43.

biologically antithetical to their aspirations.

4. Science in Action: Woman as Container

As can be seen from this brief historical perspective, scientific discourses are integrally linked to the political context. That context is crucial when analyzing contemporary scientific "descriptions" of and about the body, and how they are popularly received. The modern use of ultrasound illustrates this point. As Rosalind Pollack Petchesky has shown, the use of ultrasound for fetal imaging has compromised the supposed opacity of the womb, rendering it spectacularly visible.²⁵ This technology has led to the construction of the female body as a permeable outer layer, its boundaries so open and flexible that it is open to public intervention.²⁶ Ironically, the fetus has more bodily integrity and closure afforded to it than the female body. The containment of the fetus by the female body is ambivalent. The woman has been technoculturally constructed as a passive container for the fetus, and thus, she is denied the ability to actively contain the fetus—in the sense of determining its boundaries. The nature of that containment and the construction of the female body as permeable can be demonstrated through this changed representation of the womb. The image of the womb has been transformed from an opaque, unknowable haven for the fetus to a place of danger and permeability. Furthermore, the argument for the legal liability of women who smoke, drink, or take drugs while pregnant has legislated this construction of the womb as a permeable barrier and created the need for legal intervention against the so-called "irresponsible" mother. To this we might add the extraordinary charge in some cases that women who have taken drugs while pregnant are guilty of supplying illegal substances.²⁷ As the woman is no longer seen as a protector of the fetus, the modern project has been one of wresting control of the "endangered" fetus from the woman and removing it to a place of masculine scrutiny and control—the clinic, the laboratory, and, if need be,

²⁵ Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 *Feminist Stud.* 263 (1987).

²⁶ *Id.* Valerie Hartouni describes a media example of this construction of women: "A special report on abortion aired by ABC's *Nightline* framed the matter and, one could say, the decade, this way: 'With new technologies peering into the womb, women have been forced to peer into their hearts.'" Hartouni, *supra* note 7, at 39.

²⁷ In most cases the courts have not upheld these charges. See *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992). In Florida, the appellate court upheld charges of delivery of a controlled substance to a minor in *Johnson v. State*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), but the Supreme Court of Florida overturned the decision, 602 So. 2d 1288 (Fla. 1992).

the courtroom. Her refusal to hand over the fetus is seen either as an act of radical resistance or as an ignorant response that evokes a pre-technological irrationality.

5. Popular Culture Revisited: The Atomization of Gender

It is appropriate here to return to my earlier discussion of popular cultural representations and to explore further how these shape our understanding of the body. Some popular constructions of the female body, evoked at the micro level, gender our atomized selves. *Time* published an article on fertility which described the moment of conception as follows:

Like a beacon guiding ships at night, the egg sends forth a calling signal. A convoy of sperm—the remnants of an armada that was once a couple of hundred million strong—sails into view, their long tails thrashing vigorously. Lured by the chemical signal, several hundred of the most energetic swimmers close in on the egg, their narrow tips unleashing a carefully timed sequence of biochemical salvos. One substance dissolves the jelly-like veil surrounding the egg. Another softens the egg's tough outer shell, preparing it for penetration. In the last moments before conception, a few dozen sperm race to break through the final barricade.

One and only one succeeds.²⁸

This is gendering at the micro-biological level. Not only does this passage present us with images of war, military technology, and colonialism, but it trafficks in images most often associated with virginity and monogamy. The penetration of the tough outer shell, the success of only one sperm, and the devastated armada that used to be a couple hundred million strong bring together images of male heroism (the heroism of the few, the sacrifice of the many) and female fidelity (the egg “waits” for the single successful sperm which breaks through “her” barrier). Further, the enormous, inert presence of the receptor egg (evoked not only in the prose of this quotation but also in the accompanying photograph—a gross magnification of the moment of conception that is so great that the egg cannot be contained within the page) conjures up the image of a powerless, immobile female, destined to reproduce.

Significantly, micro-biological gendering is just as active in scientific texts as in the journalist's imagery. Emily Martin, discussing this issue, writes:

It is remarkable how “femininely” the egg behaves and how

²⁸ Philip Elmer-Dewitt, *Making Babies*, *Time*, Sept. 30, 1991, at 56.

"masculinely" the sperm. The egg is seen as large and passive. It does not *move* or *journey*, but passively "is transported," "is swept," or even "drifts" along the fallopian tube. In utter contrast, sperm are small, "streamlined," and invariably active.²⁹

Further along, Martin identifies the newest research that challenges the passivity of the egg and the activity of the sperm. However, she explains that even those actually conducting this latest research continue to redescribe it in gender-stereotyping terms.³⁰

6. The Female Body as Environment

The project to disempower women is not simply derived from discourses of science and law. Many of the technological and cultural debates of our era draw on the politics of environmentalism. This movement has a stronghold in the mass media and impels yet another popular construction of the female body—the female body as environment. In this construction, the female subject is disempowered through a patriarchal reconstructive imperative that designates the female body as environment for the fetus, and in so doing identifies toxic dangers, atmospheric collapse, and world (female body) destruction as the greatest threats to the fetus. The project of science and reproductive specialists, in concert with that of the law, is to intervene in the environmental "break-down" of the female body at the point where damage is most directly linked to the "polluting" forces of the female subject.

Interestingly, the rhetoric of the debate which concerns waste and the depletion of resources confirms the construction of women as physiologically immoral. Scientific description and popular conception produce an image in which women's bodies are uncontrollably "wasteful." According to Emily Martin, the female reproductive cycle is represented repeatedly in medical texts as a cycle of degeneration.³¹ In these texts, when the egg remains unfertilized, a process of destruction is initiated, in which the walls of the uterus erupt and fall away, and the egg itself is squandered and disposed of despite the fact that resources (eggs) are limited. Martin, discussing Bruce Alberts' *Molecular Biology of the Cell*, recounts that text's description of oogenesis as follows:

[O]f the seven million oogonia, or egg germ cells, in the female

²⁹ Emily Martin, *The Egg and the Sperm: How Science Has Constructed a Romance Based on Stereotypical Male-Female Roles*, 16 *Signs* 485, 489 (1991) (footnotes omitted).

³⁰ *Id.* at 492–98.

³¹ *Id.* at 488.

embryo, most degenerate in the ovary. . . . [A]t birth only two million eggs remain in the ovaries "During the forty or so years of a woman's reproductive life, only 400 to 500 eggs will have been released," [the authors write]. "All the rest will have degenerated. It is still a mystery why so many eggs are formed only to die in the ovaries."³²

Martin argues that "the real mystery is why the male's vast production of sperm is not seen as wasteful."³³ On the contrary, the male's production of sperm is celebrated. "Perhaps the most amazing characteristic of spermatogenesis is its sheer magnitude: the normal human male may manufacture several hundred million sperm per day."³⁴ According to Martin, at a conservative estimate, during an average reproductive life of sixty years a man will produce well over two trillion sperm.³⁵ If he fathers two children he will have successfully "deployed" two sperm. Yet the man is celebrated as a marvel of biology, even a great factory, while the woman is considered a poor manager of resources.

By looking at these examples, we can see that the rhetoric of the environmental debate that attacks waste and the depletion of resources can be used in different ways to describe opposing political strategies. In this case waste is gendered. The male body is productive, whereas the female body is destructive. We must examine what is at stake for us as feminists in this debate. I would suggest that the very concept of the wasted egg is what allows the *Time* article cited earlier to present the problem of fertility in the following terms:

The advent of the Pill, the women's movement and an economy that pushes women into the workplace during their most fertile years have led many numbers of the baby-boom generation to wait so long to have children that they are in danger of waiting forever. This same generation was also party to the sexual revolution, and that too has taken a toll. With exposure to more sex partners came a sharp rise in sexually transmitted diseases and other infections that can impair fertility. In addition, tens of thousands of women now in their 30s and 40s were born with malformed reproductive systems as a result of their mothers' use of the drug DES (diethylstilbestrol) which was widely prescribed in the 1940s and 50s to prevent miscarriage.³⁶

³² Id. (quoting Bruce Alberts et al., *Molecular Biology of the Cell* 795 (1983)).

³³ Id.

³⁴ Arthur J. Vander et al., *Human Physiology: The Mechanisms of Body Function* 483-84 (3d ed. 1980), quoted in Martin, *supra* note 29, at 486.

³⁵ Martin, *supra* note 29, at 488-89.

³⁶ Elmer-Dewitt, *supra* note 28, at 56.

Despite the almost equal rate of infertility in men, this article situates the fertility problem squarely with women, with their sexual promiscuity, and, most tellingly, with their entry into public life. They have missed their chances and wasted their fertility on sex without conception.³⁷

B. THE DISEMPOWERMENT PROJECT

In part A, I examined how the discourses of science, law, politics, history, and popular culture work to construct partial pictures of the female body and Woman. It is not simply a question, however, of exposing these constructions as constructions and, therefore, as having no greater claim to represent the truth. We must also look at how these constructions are deployed.

1. Who Is a "Bad" Mother Really?

The majority of women prosecuted for drug use while pregnant (resulting in either criminal sentence after delivery or so-called protective incarceration during gestation) are women of color, and the majority of those are Black women.³⁸ Dorothy Roberts argues that the high number of prosecutions of poor Black women is historically and politically connected to the construction of Black women as "bad mothers." Roberts states:

Poor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status. Their devaluation as mothers, which underlies the prosecutions, has its roots in the unique experience of slavery and has been perpetuated by complex social forces.³⁹

³⁷ Interestingly, *Time* is doing some recycling of its own. As reported in Hartouni, *supra* note 7, at 45, *Time* presented a similar story and argument in a 1984 article. However the "times" have changed a little and the magazine no longer claims "strenuous athletic activity such as dancing, jogging, and distance running" as causes of infertility. *Id.*

³⁸ Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy, 104 Harv. L. Rev. 1419, 1421 n.6 (1991). Of 52 women prosecuted for fetal abuse, 35 were African-American, 14 were white, 2 were Latina, and 1 was Native American. Roberts cites Paltrow & Shende, State by State Case Summary of Criminal Prosecutions Against Pregnant Women and Appendix of Public Health and Public Interest Groups Opposed to These Prosecutions, Oct. 29, 1990 (unpublished memorandum to ACLU Affiliates and Interested Parties, prepared by the ACLU Reproductive Freedom Project) n.2.

³⁹ Roberts, *supra* note 38, at 1424.

A little further on she states:

It is also significant that, out of the universe of maternal conduct that can injure a fetus, prosecutors have focused on crack use. The selection of crack addiction for punishment can be justified neither by the number of addicts nor the extent of the harm to the fetus. Excessive alcohol consumption during pregnancy, for example, can cause severe fetal injury, and marijuana use may also adversely affect the unborn

Focusing on Black crack addicts rather than on other perpetrators of fetal harms serves two broader social purposes. First, prosecution of these pregnant women serves to degrade women whom society views as undeserving to be mothers and to discourage them from having children.⁴⁰

Roberts argues that the construction of the Black woman as salacious has also contributed to a collective view of Black mothers as "bad" mothers. By reading race in this way, the conservative community can direct its concern towards the non-vocal fetus, displacing the race and class of the targets of this interventionist project—the mothers. They are presumptively "bad mothers": their race and class form a substratum of implication and inevitability. However, once again this reconstruction can only be effected if the mother and fetus are seen as separate. If, however, the female body is redrawn as intimately connected to the fetus and as a body that is politically situated, it becomes impossible to make these clean distinctions. The race and social circumstance of the woman's body—its empowered or disempowered status—would become essential to how we think about the legislative and medical measures used in the name of the fetus. The lack of resources and health care available to women of color and poor women directly affects their health and therefore that part of their body which is the fetus. By separating the fetus from its mother, it becomes possible to both talk about the fetus' health without talking about the health of the mother and to act to protect the fetus without concern for protecting the mother. In fact, it is often the case that action is taken in the name of the fetus despite a resulting harm to the mother. This is what happens in the case of so-called protective incarceration.

The conservative strategy that displaces race and class to a substratum of implication insists upon a maternal body that is materially and biologically fixed rather than one which differs according to its socio-political status. This account of "Mother," while pretending to a transcendent

⁴⁰ Id. at 1434–36 (footnotes omitted). Roberts writes that prosecution of crack-addicted mothers also "diverts public attention from social ills such as poverty, racism, and a misguided national health policy and implies that shamefully high Black infant death rates are caused by the bad acts of individual mothers." Id. at 1436.

raceless, classless identity, in fact describes a conservative ideal that is implicitly white, middle-class, and heterosexual. The class and race of this transcendent "Mother" is revealed in the moment of qualification or hyphenation. "Single-mothers" and "welfare-mothers" are qualifications that within conservative rhetoric represent failure, an immoral revision of the ideal. In this revision the race and class of the mother are transformed. That drug-addicted mothers chosen for prosecution are disproportionately Black is crucial to the construction of "Mother" as a category that excludes Black women.

When the fetus (which in popular construction is raceless and classless) is pitted against its mother, and when that mother is, more often than not, a woman of color and/or a poor woman, we have to ask not which body is more human or has more right to life, but why particular bodies are given little or no access to control and power over their own reproductive capacity and health. This question determines how we view surrogacy, abortion, and, of course, the medical treatment of pregnant women.

2. The Reproductive Woman and The Right: Welfare Discourse

The reproductive woman has become a focal point for conservative anger about the welfare state. In particular, conservative politicians direct their energies against the reproductive woman as a so-called welfare abuser. In order to talk about women as welfare "abusers," they must be construed rhetorically through their bodies as unethical and massively productive. Either the woman deliberately has more children to gain welfare benefits, or she has too many children for the welfare system to accommodate. Attempts to force welfare recipients to use or submit to birth control are based upon the rhetorical construction of a noncompliant female body.⁴¹ The woman who is less able to control her circumstances because of poverty or social subordination is rhetorically constructed as most actively subversive through her reproductive capacity.

This account also has a place in the criminal sphere. I am referring to the recent case in which Darlene Johnson, a Black woman convicted of child abuse, was given a "choice" between a jail sentence or probation with the condition that she submit to the surgical insertion of contraceptive Norplant rods under her skin.⁴² In the very space where a conventional

⁴¹ New Jersey recently enacted legislation denying an increase in benefits to women who have children while receiving public assistance. N.J. Stat. Ann. § 44.10-3.5 (West 1992 Supp.).

⁴² See Bill Ainsworth, 'I Take Away People's Rights All the Time,' *Legal Times*,

punitive measure is anticipated—a jail term—we find an order of coercive birth control. In lieu of incarcerating her entire body, her womb is incarcerated and her otherwise noncompliant, reproductive body is contained.⁴³ The so-called welfare abuser and the criminal child abuser are from markedly different spheres, but in the rhetoric of the Right they are related because in both cases their reproductive capacities are seen as potentially threatening.

C. LEGAL “CONCEPTIONS”

My interest in the construction of the female body through legal and scientific discourses accords with feminist accounts of the manic inscribing and de-limiting of women's sexuality by various masculine discourses of power, which attempt to construct women inside a monolithic system of subordination.⁴⁴ Rather than concentrating on Woman's sexuality, however, I want to examine the contingency of the materiality of Woman. I argue that the physical shape of the female body is carved out by legal and other discourses. This argument forces a break with any lasting attachment to a notion of the real. It challenges the existence of essentialized matter and engages with the construction of the female body at a different level. By indicating that this body is made, we open up the possibility of contesting its current forms and presenting alternative ones.

1. The Anatomizing Process: Physical Reconfiguration of Disabled Girls

Accounts of the inability of intellectually disabled girls to comprehend

Apr. 8, 1991, at 10, 11. The decision was handed down by Tulare County Superior Court Judge Howard Broadman in January 1991. Although Ms. Johnson first agreed to the Norplant condition, she later decided against it. Judge Broadman, however, refused to rescind his order. In response to Ms. Johnson's lawyer's argument that the order violated Ms. Johnson's fundamental right to reproduce, the judge replied that she had lost that right by abusing her children. *Id.* Ms. Johnson was later sentenced to five years in prison for cocaine use in violation of her probation and her appeal of the Norplant condition was dismissed by a California appellate court as moot. See *Birth Curb Order Is Declared Moot*, N.Y. Times, Apr. 15, 1992, at A23.

⁴³ I am not arguing in favor of incarceration. Rather, I am using this example to highlight the anxiety generated by a reproductive woman in control of her reproductivity.

⁴⁴ It is impossible to list here the variety of recent feminist work that has been done on the constructedness of female sexuality. For a place to begin, see generally Toril Moi, *Sexual Textual Politics* (1985); *New French Feminisms* (Elaine Marks & Isabel De Courtrivon eds., 1981).

and therefore to manage the surfacing of their sexuality is another part of a conservative political strategy which attempts to create, rhetorically and hence materially, a female body that is noncompliant and amoral: a body that requires legislation and control. I want to illustrate the collaboration between law and science in an anatomizing procedure by turning to some cases in Australian Family Courts which have dealt with the issue of whether an intellectually disabled girl should, as the parents wish, be given a hysterectomy to avoid the onset of menstruation. In these instances the female body is seen as modifiable in the face of both the individual's and society's inability to deal with the "grotesque" scenario of public menstruation, a threatened exteriorization of that which is normally and normatively an interiorized regimen. There is, however, something even more threatening in these cases, something that illustrates the collective power of science and law to act upon and physically reconstruct the female/feminine and to *police* the public/private construction of Woman. The rules about menstruation and pregnancy are seen as so internal to Woman that it seems less intrusive to modify her body than to modify the social constructions themselves. The woman is physically reconstructed in "her own best interests."

In the case known simply as *In re S*⁴⁵ which went before Judge Simpson of the Family Court of Australia at Brisbane in November of 1989, the parents of an intellectually disabled girl petitioned for a court order to allow a hysterectomy to be performed on their daughter who was permanently institutionalized and had the mental capabilities of a one-year-old. Matters which the judge considered established by evidence included S's tendency to favor male adults over female adults, particularly men with beards, and S's preference for "soft sticky textures and regular[] engage-[ment] in faecal smearing."⁴⁶ The judge added that, "if not common ground, it was clearly established that S is unfit to, and ought not, bear a child."⁴⁷ Thus, Judge Simpson identified as material matters those things that manifest an anxiety about the inevitable surfacing of the sexualized female body, a body that defies constraint in this case because it defies masculine socialization. The girl's sexuality is seen as a frightening specter that need be only spoken of to invoke the need for legal interception and surgical reconfiguration.

Evidence presented by Mr. R, director of the institution in which S was in full-time care, stated that, although they could not predict the success of attempts to train S to manage her menstrual hygiene, the center

⁴⁵ Australian F.L.C. (CCH) ¶ 92-124, at 77,813 (1990).

⁴⁶ *Id.* at 77,815.

⁴⁷ *Id.*

was prepared to do whatever was necessary to help her. From a staffing point of view, he did not consider the problem any different from other problems with which they dealt every day. The judge found this evidence to be "somewhat theoretical and accordingly only of limited assistance."⁴⁸ On the other hand, Mrs. M, whose duties included provision of daily care, said that masturbation is a "virtual constant activity of the child. . . . [and if she] is restrained from engaging in masturbation she reacts badly."⁴⁹ Dr. A.J. reported that the inaccessibility of S's genital area during menstruation "'would add further frustration to her day and I suspect the frequency of agitated behavior would increase significantly.'"⁵⁰ Although Dr. A.J. recommended a trial program of gradually getting her used to a mini pad, the judge did not agree.

Instead, the judge found in favor of a hysterectomy. As part of his general statements summarizing the evidence, he stated' "Although I agree that the risk of pregnancy, on its own, is not of sufficient likelihood as to indicate a need to submit her to a sterilisation procedure I would not dismiss the probability of sexual intercourse occurring."⁵¹ The significance of this statement lies in the judge's evasion of the question of the means by which sexual intercourse could occur with a girl who has the mental age of no more than twelve months. Presumably sexual assault is being alluded to here.

In another case dealing with similar issues, Chief Justice Nicholson was not so circumspect. In *In re Jane*,⁵² the judge stated, "It is apparent given her mental state, physical attractiveness and tendency to wander, coupled with a developing sexual awareness, that she is at risk of sexual assault and unwanted pregnancy."⁵³ Thus, Justice Nicholson used the possibility of sexual assault by others as part of his justification for ordering a hysterectomy.

In another such case, *In Re Elizabeth*,⁵⁴ presided over by Judge Ross-Jones, discussion again focused on the possibility of sexual abuse, which would lead to undesirable pregnancy. "Dr. H placed some reliance on this matter, saying that once pregnant Elizabeth 'would be quite unable to comprehend and therefore be very upset about the changes in her body and

⁴⁸ Id. at 77,816.

⁴⁹ Id.

⁵⁰ Id. at 77,818.

⁵¹ Id. at 77,820.

⁵² Australian F.L.C. (CCH) ¶ 92-007, at 77,234 (1989).

⁵³ Id. at 77,240.

⁵⁴ Australian F.L.C. (CCH) ¶ 92-023, at 77,361 (1989).

by the process of birth. She would not be able to parent her offspring.’”⁵⁵ The judge stated, “The question of sexual abuse is remote but none the less a real concern. . . . I believe, like the Chief Justice in *In re Jane*, that pregnancy for Elizabeth is a real concern and would be ‘an unmitigated disaster’”⁵⁶

In these three cases it can be seen that the rule of law must accommodate rape and sexual abuse in the face of the noncompliant female body. Sexual abuse is received as so normal, so natural, that the intellectually disabled girl must have her uterus excised in order to accommodate the inevitability of “errant” male desire.

2. Legislating the Insignificance of Women: The Case of the Frozen Embryos

An Australian case concerning frozen embryos further illustrates the construction of Woman by legislative and media forces. In this case the “parents” of two frozen embryos were killed in a plane crash, leaving the fate of the embryos undecided. A special statute was passed which legislated their future gestation by providing that under certain specified circumstances the embryos “shall” be made available for implantation in “another woman.” The amendment reads as follows:

(1) Where, after an embryo has been derived from an ovum produced by a woman and fertilized outside her body for the purposes of a relevant procedure to be carried out in relation to her or another woman, the embryo cannot be implanted in the body of that woman whether by reason of her death or an accident or injury causing her to be incapable of receiving the implantation or otherwise—

(a) the embryo shall be made available, in accordance with the consent of the persons who produced the gametes from which the embryo was derived, for use in a relevant procedure carried out in relation to another woman; or

(b) where those consents cannot be obtained because the persons are dead or cannot be found, the Minister shall direct the designated officer of the approved hospital where the embryo is stored to ensure that the embryo is made available for use in a relevant procedure.⁵⁷

⁵⁵ Id. at 77,374.

⁵⁶ Id. at 77,374–77,375.

⁵⁷ Infertility (Medical Procedures) Act, 1984 Vict. Acts No. 10163, Part II, §

When these events were reported in the San Francisco Chronicle in 1984, the headline read "Orphan Embryos Saved."⁵⁸ The article continued, "Legislators approved an unprecedented measure last night blocking the destruction of two frozen embryos and clearing the way for their adoption and implantation in surrogate mothers."⁵⁹ This story demonstrates a more subtle reconstruction of the female body than in the cases of the disabled girls. The absence of the female body legislates its insignificance. The centering of the fetus and its inherent transferability among "surrogates" constructs the female body as exchangeable and the fetus as constant. Thus it is possible to control and contain the female body by constructing the subject of that body, the woman, as irrelevant. The newspaper report cites public outcry against the destruction of the embryos as one of the reasons the Victorian State Parliament passed the legislative amendment.

The cold legal prose, however, paints a slightly different picture than the language of the news report. In the press, these embryos are going to be implanted in surrogates; in the law, they are to be made available for use in other women in accordance with those sections of the Act dealing with in vitro fertilization. In the press the embryos are anthropomorphized and "saved"; in the statute they are made a valuable commodity which must be shared if they cannot be used by the original owner. The language of the statute is deliberately evasive. There is no legislative comment on what is to be done with embryos that are no longer wanted by their "parents" and where the "parents" will not consent to their being dispatched for use in other women. There is no mention of what is to be done with the embryos if there is no woman who wants to have them implanted in her womb. The technical prose of the law is almost a relief compared to the press' elevation of these embryos to orphan status. What the legislation leaves out, and the press clipping inserts, is a high-pitched anxiety about the destruction of the embryos. The legislation ignores it completely by simply not providing for the destruction of unused embryos. What if the legislation had gone as far as the news clipping suggests, and had legislated against the destruction of the embryos in any circumstance? Would a surrogate mother have to be found? Would she be paid to gestate the embryos, and by whom? The class and race implications of such an arrangement are obvious. Certainly the Victorian parliament has relied upon the insensibility of the "pro-embryo" movement to the perils still unprovided for in the legislation. Can

14(1)(a) & (b) (1984).

⁵⁸ Orphan Embryos Saved, S.F. Chron., Oct. 24, 1984, cited in Hartouni, *supra* note 7, at 28.

⁵⁹ *Id.*

the parents decide that they want the embryo destroyed? What if, as happened in a Tennessee case,⁶⁰ the parents divorce and their wishes concerning the future of the embryos conflict?⁶¹

In discussing the issue of the frozen embryo, I have unwittingly lost sight of the female body. I seem to have moved away from my project of analyzing reproductive technology for its impact on legislative and scientific constructions of the female body. It is exactly this absence or insignificance of the mother, or a maternal body, that makes the Victorian legislation so untenable. In Section 14, the embryo is preserved, but the key figures, "a woman" and "another woman," are not prominent. The embryo is talked about in isolation, in separation from the only thing that can give it the possibility of life—the female body.

Perhaps the Victorian legislature is right to make the embryos available for use by others if the parties involved do not disapprove. But to state, as the newspaper article clearly does, that the embryos will be implanted in "surrogates," removing even the need to identify these women as women, or even as female bodies, rhetorically eliminates the woman from the discussion. As soon as it becomes possible to talk about women in this way, as mere procreative flesh, it becomes possible to legislate about them/us in that way. Perhaps the best example of such legislation (in this case, judge-made) is the United States case of *In re A.C.*⁶²

3. The Certainty of the Surgeon's Knife: Cesarean by Coercion

In re A.C. is probably the best known of the court-ordered Cesarean cases because it was a case in which the order of the court would almost surely result in the hastened death of a terminally ill woman, Angela Carder, who was twenty-six-and-a-half weeks pregnant.⁶³ As her illness

⁶⁰ Davis v. Davis, No. 34, 1992 Tenn. LEXIS 400 (Tenn. June 1, 1992).

⁶¹ "In Tennessee a divorced couple go to court over custody of seven frozen embryos—she calls the embryos the 'beginning of life' and her only chance at bearing a child, while he fights to keep the embryos frozen, at least for the present." Robert H. Blank, *Regulating Reproduction 1* (1990).

⁶² 533 A.2d 611 (D.C. App. 1987), rev'd, 573 A.2d 1235 (D.C. 1990).

⁶³ Although this case was reversed on appeal, 573 A.2d 1235 (D.C. 1990), the original decision (the only one that mattered to Angela Carder and her family) is still important since it represents a way of thinking about the female body that has been reproduced in other cases where the woman's life was not in issue. Further, most of these court-ordered Cesareans are decided very quickly and with little information precisely because timing is of the essence. In any case, in the Court of Appeals decision, the court did not rule out the possibility that circumstances may exist where

progressed, the doctors became concerned for the fetus' life. Despite the fact that Angela did not consent, a Cesarean was determined necessary and a court order to perform it was obtained. The Cesarean was performed, and the fetus died, followed by Angela Carder two days later. In this case, the woman was seen as hostile to the fetus' interests because her body was a toxic environment. It is not clear whether Angela Carder would have consented to the Cesarean had she understood all the facts. She was heavily sedated at the time and attempts to ascertain how she felt seem contradictory and insincere. In fact, the tubes placed down her throat made it impossible for her to speak. Angela's husband, mother, and some of the medical staff were opposed to the operation.⁶⁴

In re A.C. represents, along with other court-ordered Cesarean cases, the ultimate case for the construction of the female body as a replaceable container for the separate and alienated fetus and the annihilation of the female as active participant. Angela Carder was given very little in the way of real information about the pros and cons of a Cesarean. In his article, "*In re A.C.: A Court-Ordered Cesarean Becomes Precedent for Nonconsensual Organ Harvesting*," Robert Sturgess writes, "Had Angela been informed that a cesarean would help relieve her pain and make her stronger as well as improve her fetus's chance of survival, she might have consented all along."⁶⁵ Angela's quiescent, terminal status physically embodies what has been perpetrated symbolically all along. The court chose to treat her body as permeable, penetrable, and insignificant, as mere flesh to be cut into to save the "innocent." *In re A.C.* is an extreme case since the woman's life is actually physically closing, but even in those cases where the mother is perfectly healthy but refuses a Cesarean on religious grounds, the health of the fetus is treated as paramount.⁶⁶ The effect of this emphasis is to render the significance and materiality of the mother's life valueless and terminal.

such an order could be warranted. The court stated: "[I]n virtually all cases the decision of the patient, albeit discerned through the mechanism of substituted judgment, will control. We do not foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, but we anticipate that such cases will be extremely rare and truly exceptional." *Id.* at 1252 (footnotes omitted).

⁶⁴ Interestingly, many prominent medical associations are opposed to judicial intervention. The American Medical Association has published a report in which it argues, "Judicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus." Helene M. Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2670 (1990).

⁶⁵ Robert H. Sturgess, *In re A.C.: A Court-Ordered Cesarean Becomes Precedent for Nonconsensual Organ Harvesting*, 13 Nova L. Rev. 649, 655.

⁶⁶ See discussion *infra* pp. 347-48.

In the case of *Jefferson v. Griffin Spalding County Hospital Authority*,⁶⁷ a woman in the thirty-ninth week of pregnancy had a condition known as a complete *placenta previa*. The condition is such that the afterbirth is between the fetus and the birth canal, in effect blocking the passage. Her physicians believed that if she attempted a vaginal delivery the fetus would almost certainly die and that she had only a fifty percent chance of survival. The woman refused to undergo a Cesarean section on religious grounds. The court found that the fetus was capable of sustaining life outside its mother. As a result, custody of the fetus was given to state human resources officials and the woman was ordered to submit to a Cesarean section if the attending physician found it necessary to sustain the life of the child. The judgment reads in part:

"Temporary custody of the unborn child is hereby granted to the State of Georgia Department of Human Resources and the Butts County Department of Family and Children Services. The Department shall have full authority to make all decisions, including giving consent to surgical delivery appertaining to the birth of this child. The temporary custody of the Department shall terminate when the child has been successfully brought from its mother's body into the world or until the child dies, whichever shall happen."⁶⁸

The language of the *Jefferson* decision is extraordinary. It is both a custody battle and a battle over the bodily significance of the mother whose wishes are deemed irrelevant in the face of the medical and legal certainty of the surgeon's knife. The prohibition against resistant ways of describing this procedure is highlighted by the court's use of the seemingly neutral description "brought from its mother's body." The use of the verb "brought" in this context denies the woman either the possibility of an active resistance or active compliance. She is neither delivering the baby nor having it forcibly taken from her. It is merely "brought." In fact, if *Jefferson* had not gone into hiding to have her child vaginally, she would have been forced to submit to the Cesarean. Given her tremendous opposition to the procedure, it is possible that the doctors would have had to use restraints in order to administer anaesthesia. There can be no doubt that the act of cutting her open and taking the child in these circumstances is very much a forcible taking and not a passive "bringing."

Many of the court-ordered Cesarean cases have relied on the concept of viability elucidated in *Roe v. Wade*⁶⁹ to argue their position.⁷⁰ The

⁶⁷ 274 S.E.2d 457 (Ga. 1981).

⁶⁸ Id. at 459 (quoting order of the Superior Court of Butts County).

⁶⁹ 410 U.S. 113 (1973).

⁷⁰ See Nancy K. Rhoden, *Cesareans and Samaritans*, 15 Law Med. & Health Care

recent decision in *Planned Parenthood v. Casey*⁷¹ enlarged the scope of this argument. In that case, the trimester system of determining viability, and thus determining when the state has an interest in the fetus, was expunged. Justice Sandra Day O'Connor stated:

We have seen how time has overtaken some of *Roe*'s factual assumptions . . . and advances in neonatal care have advanced viability to a point somewhat earlier. But these facts go only to the scheme of time limits on the realization of competing interests . . . [.] viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it is sometimes done today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided⁷²

As a result of *Casey*, viability is now arguably a matter of scientific proof. If the scientist can argue that the fetus is capable of sustaining life outside the mother, it will be considered viable. Clearly, technological advances will play an important role in determining when this state of viability occurs. Such advances, coupled with legal impulses to conceptualize the fetus and the mother as individuals whose competing interests can be resolved by a mere slice of the knife, increase the risk that a woman will be subjected to Cesarean by coercion.

CONCLUSION—THE RECONSTRUCTED WOMAN RECONSTRUCTED

The legislation of and about the female body represents the control of women in their very materiality through the use of privileged masculine epistemologies. The woman is "reconstructed." This reconstruction is by no means analogous to the reconstructed man. He was once macho, now sensitive; once brutal, now gentle; and once unthinking, now endlessly thoughtful. He has everything to do with his own reconstruction. The

118 (1987) (discussing *Jefferson*, 274 S.E.2d 457; *North Central Bronx Hosp. Auth. v. Headley*, No. 1992-85, slip op. at 5 (N.Y. Sup. Ct. Jan. 6, 1986); and *In re Unborn Baby Kenner*, No. 79-JN-83, slip op. at 6-9 (Colo. Juv. Ct. Mar. 6, 1979)).

⁷¹ 112 S. Ct. 2791 (1992).

⁷² *Id.* at 2811 (citations omitted).

reconstructed woman, on the other hand, has little to do with hers. As a body she is legislated about; as that which her body is pitted against by science and by the law, she is legislated against. She is engaged in a protracted lawsuit about how she will be constructed and reconstructed.

Social construction theory argues that the oppression of women is based upon social attitudes towards women's biology. Women's bodies become representable, according to this theory, only in the very act of trying to represent them. In this account, representation is mediated through the symbols, images, and language of patriarchy. This view of the representation of women's bodies is a rhetorical move not a "skeptical" one. It is not a questioning of the existence of matter or bodies. Rather it seeks to place "the real" on a continuum of privileged and under-privileged descriptions. In other words, rhetorics of "the real" are strategic.

I want, however, to take the account one step further and inject into it a recognition of the historical specificity of what counts as "reality." Privileged constructions are not simply those constructions which are abstractly enhanced by institutional support. They are social, political, and historical formations. To allow that there is a distinction between that which is described and the describing of it, does not license the idea that someone can authenticate or give special privilege to *any* particular description he or she offers. The illicit move made by many of those who call themselves "realists" is to merge the claim that "reality itself cannot be denied" with the insistence that their description must be accepted as correct and privileged in its priority or importance. I suggest that we decenter notions of "the real" and "authentic" altogether, and view "the essence" as always already a construction, and each new description a reconstruction. Thus, rather than denying the validity of a reconstructed woman, we need to take on a feminist project of reconstruction. This project must be unhampered by anxieties generated by a feminism that looks toward authentication in "the real."

In this paper I have attempted to map out an understanding of the way the female body is being legislated, and even, as we have seen, carved out. This has led me to challenge the current legal and scientific ways of considering and representing the female body. I deny that such constructions are either natural or inevitable, and call for resistance to the legislating of a female body that disempowers women and makes them available for public use.

