FEMINISTS THEORIZE THE POLITICAL

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The Abortion Question and the Death of Man

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In this essay I'm going to offer what I hope will be an extremely controversial argument—even to those who support, as I do, the availability of safe and legal abortions for all women, regardless of age, race, income, or special needs, on demand and without apology. I expect the controversy about this argument to center on my effort to bring poststructuralist assumptions about the "death of man" to bear on the formulation of the abortion question, for, in practice, this conjunction calls into question the basic tenets of liberal individualism—choice, privacy, and rights. I understand that the implications of questioning these cherished ideals extend far beyond the abortion debate, but my argument is that unless feminists who support abortion on demand begin to rethink the gendered assumptions to which these ideals are historically and metaphysically wed, we will inadvertently reinforce the discriminatory legal concepts to which antiabortionists so effectively appeal.

Let me begin by discussing very briefly the two most common defenses currently advanced in support of legal abortion—the privacy defense and the defense of equality.[1] The first of these defenses, the privacy argument, derives its authority from the Fourteenth Amendment's guarantee of due process. As the Supreme Court has interpreted the due-process clause, individuals have been granted the right "to decide for themselves ethical and personal issues arising from marriage and procreation."[2] Among these "personal issues," argue prochoice advocates, is a woman's right to decide whether or not to carry a pregnancy to term. The second defense, the defense of equality, recognizes that there is a "gender dimension" to the abortion issue. As a consequence, advocates argue, antiabortion laws violate the equal-pro-

tection clause of the Fourteenth Amendment because they impose upon women burdens that men do not have to bear. Here is the commentary of one feminist lawyer:

> Although nature, not the state, has determined that women and not men shall become pregnant, innumerable state actions either mitigate or exacerbate the physical burdens of pregnancy that women alone bear. . . . Women's reproductive function does not make them unequal or oppressed; rather, the social demands placed upon them in connection with their reproductive functions oppress women. When state laws "den[y] women access to abortion, both nature and the state impose upon women burdens of unwanted pregnancy that men do not bear" [as well as] "very significant discomfort and health risks."[3]

Each of these defenses has much to recommend it. The privacy defense is appealing because it stresses the equality of women and men: like men, women should have the right to govern their own bodies. By contrast, the defense of equality is appealing because it acknowledges that, given the systemic oppression and devaluation of women in American society, women may not be *able* to act as autonomous agents in the "private" area of their sexuality. The legal notion of "privacy," in other words, may actually exacerbate sexual oppression because it protects domestic and marital relations from scrutiny and from intervention by government or social agencies.[4] The defense of equality combats the abuses to which women have been subjected in the *name* of sexual freedom by identifying reproductive difference as a difference that mandates protective interference.

The relative merits of these two positions have been discussed extensively in the literature on abortion.[5] Instead of going over this well-covered ground again, I want to direct my attention to the problems the two defenses introduce, for the heart of the assumption they share seems to me to be behind the impasse at which the abortion debate has now stalled. Only by identifying the reason for this impasse can advocates of abortion on demand understand what is really at stake in the abortion issue; only in the light of this understanding can we begin to forge a new political vocabulary in which to conduct the struggle.

The primary difficulty with the privacy defense, to my mind, is that, in postulating a realm of the "private" and an autonomous model of the individual, it ignores the extent to which social relations permeate the home and even such "personal" realms as sexual activity. In postulating an individual capable of "free choice," in other words, the privacy defense ignores the extent to which women have been subjected to violence, *especially* in relation to their sexuality.[6] The primary difficulty with the defense of equality seems to me to be the flip side of this blindness. In focusing on

reproductive capacity as that which subjects women to systemic oppression, the equality defense makes reproductive capacity *the* defining characteristic of every woman.[7] The effect of this is not only to reinforce the *grounds* of sexism (i.e., the primacy *of* sexual difference), but also to marginalize all other forms of difference that exist among women—including race, income, and religious and sexual preference. In its attempt to protect all women from unequal treatment in relation to *men,* in other words, the defense of equality inevitably leaves some women subject to the unequal treatment virtually guaranteed in this society by their racial or class difference. The principle of exclusion inherent in the equality defense helps explain why race and class are rarely given extensive attention by advocates of this position; the fact that, even though they are not recognized by advocates of *sexual* equality, other differences are recognized in socioeconomic practice helps explain why race and class always return to haunt would-be supporters of equality.

Both of these defenses, in their attempts to draw upon and conform to legal reasoning, derive their authority from the Fourteenth Amendment to the United States Constitution. In so doing, they remain entrenched in a discourse about rights, which that document codifies as the basis of United States law. But using the language of rights exacts its price, for the language of rights coincides with—indeed, is inextricable from—a set of assumptions about the nature of the individual who is possessed of those rights, which is, in turn, intimately bound to a set of assumptions about gender.[8] My argument is that the problems introduced by the defenses of abortion I have just described are the inevitable consequences of retaining this discourse of rights, choice, and privacy. In order to explain why this is true, I need to elaborate the assumption basic to the discourse of rights, an assumption that philosophers describe as "the metaphysics of substance."[9]

The basic assumption of the metaphysics of substance is that every subject has a substantive being or "core" that precedes social and linguistic coding. This substantive "core," which is the philosophical and putatively "natural" ground for legal "personhood" and therefore for rights, is characterized by the capacity to reason, to exercise moral judgment, and to acquire language. By extension, the social contexts or relationships in which the person engages are understood to be external and incidental to the inner essence. Theoretically, the law simply recognizes the substantive core that pre-exists it and makes effective the rights that that core naturally possesses by virtue of its capacities. Despite the fact, however, that the law seems to recognize something that already exists, it actually creates that which it claims to recognize. The law creates the *effect* of a substantive core by "basing" rights on (the fiction of) that core. "Legal recognition is a real and circular process," according to Parveen Adams. "It recognizes the things that correspond to the definitions it constructs."[10]

One further dimension to the metaphysics of substance is crucial to understanding the abortion debate: this metaphysics is intimately bound to the social system of gender. Although the substantive being "recognized" by law seems to be merely human and therefore to precede gender, the "coherence" and "continuity" of the person are actually socially instituted and guaranteed only *by* the regulatory matrix of coherent gender norms. As Judith Butler has argued, the "*regulatory practices* of gender formation and division constitute identity, the internal coherence of the subject, indeed, the self-identical status of the person. . . . In other words, the 'coherence' and 'continuity' of the 'person' are not logical or analytic features of personhood, but, rather, socially instituted and maintained norms of intelligibility" that are anchored by "'intelligible' genders."[11] Coherence, in other words, is a property that belongs to our ideas about gender and to many of the institutionalizations of those ideas, *not* a property of the human subject.

"'Intelligible' genders," Butler continues, "are those which in some sense institute and maintain relations of coherence and continuity among sex, gender, social practice, and desire."[12] Thus the appearance of a coherent "core" within the "person" is not the reflection of something essential that is really there, but merely the *effect* of a set of social institutions that differentiate between people on the basis of a binary system of coherent genders. In order to attain its own internal coherence, moreover, this system of gender falsely and inadequately homogenizes each term of the binary opposition by reference to the supposedly natural "ground" of biological sex. The connection between gender, sex, sexual practice, and desire is socially constructed, of course, not natural, but, despite the fact that the slippage that can occur among these terms has become evident to almost everyone, the metaphysics of substance to which this equation is crucial remains largely invisible—partly because it is institutionalized and reinforced by the system of law that I have already discussed, a system based on individual identity and individual rights. The appearance of a "core" may be only the effect of the representational system of gender, in other words, but because it is the ground of one's legal status as a "person," it has real, institutional incarnations—including a set of "rights," some of which are inevitably differential according to sex because gender is a differential structure in our society.

Here it is important to see that there are actually two, overlapping differential structures at work. The very concept of rights is differential, as Wai-Chee Dimock explains: "a right exists only because there is something to which one is entitled, and entitled by virtue of something else; it exists only because there are others who must honor that entitlement, and the performance of whose obligation one can demand."[13] This differential structure of entitlement is mapped onto the differential structure of gender, which grants women identity and personhood *only in relation to* the identity and

personhood of "man." In the metaphysics of substance, then, the idea of individual rights is not separable from the idea of individual identity, and this, in turn, is inextricably bound to a binary system of gendered norms that seems to but does not derive from sexual difference. When one uses the discourse of rights, one necessarily mobilizes this entire binary system of substantive, sexed difference, which necessarily introduces the two "problems" I identified in the abortion defenses: it establishes a system of rights that is differential according to sex and it subsumes one group of people into the falsely homogenized category "men" and sets this group in opposition to (and superiority over) another falsely homogenized category, "women."

The metaphysics of substance that is implicit in the discourse of rights is historically related to the basic tenets of individualism, from which the discourse of rights is derived. A cardinal feature of individualism as it was elaborated in the late seventeenth century and institutionalized in the eighteenth and nineteenth centuries was the constitution of maternity as the essence of the female subject. As Michel Foucault and others have argued, during the eighteenth and nineteenth centuries, the female body was constituted as a maternal body because the ideology of bourgeois individualism required maternity as a social practice over and above simple reproduction.[14] From this, it has seemed to follow not only that mother-love emanates from the body, in the form of maternal instinct, but also that the desire to be a mother motivates and lies at the heart of all female desire. Despite the changes that have occurred since the nineteenth century in family size, birth rate, and the frequency of women's paid employment (not to mention attitudes), this assumption about female nature persists in the laws that embody the metaphysics of this historical development. The institutionalization of this assumption in an entire battery of contemporary social practices, moreover, reinforces the feeling that the laws that were developed alongside it are ahistorical—simply natural and right. Behind it lies a set of entailments with dramatic implications for women–and men. For, if the normative woman is a mother, then the mother-nature of woman is one of the linchpins of sexed identity and therefore, by the oppositional logic of gender, one ground of the intelligible masculinity of men. If women are allowed to question or to reject their maternity, then not only is the natural (sexed) basis of rights in jeopardy, but so is the natural basis of female identity and, by implication, of masculine identity as well. From this perspective, in other words, the abortion debate is about what it means to accept–or reject–the notion that there is a "natural" basis for individual identity and therefore for individual rights and sexual identity.

I want to turn now to the two landmark constitutional decisions that have brought these issues before United States citizens and that have thus far set the terms of the abortion debate–*Roe v. Wade* (decided in 1973) and

Webster v. Reproductive Health Services of Missouri (1989). My reason for focusing on these two texts rather than elaborating the defenses of abortion I have already discussed is that these two decisions not only set out the metaphysics of substance that the defenses of abortion rights share, but also contain the terms upon which a new politics could be built.

The class-action suit brought by Jane Roe in 1971 was a challenge to the Texas criminal abortion statute, which criminalized any abortion not considered necessary to save the pregnant woman's life. The ruling handed down by the United States Supreme Court on 22 January 1973 essentially overturned the Texas law, thereby guaranteeing women the right to seek a legal, medically supervised abortion during the first trimester of pregnancy. For my purposes, the crucial articles of the decision are the following: (4) "the right to privacy encompasses a woman's decision whether or not to terminate her pregnancy"; (5) "a woman's right to terminate her pregnancy is not absolute, and may to some extent be limited by the state's legitimate interests in safeguarding the woman's health, in maintaining proper medical standards, and in protecting potential human life"; (6) "the unborn are not included within the definition of 'person' as used in the Fourteenth Amendment"; and (8) "from and after the end of the first trimester, and until the point in time when the fetus becomes viable, the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation and protection of maternal health."[15] One leading interpretation of the core of this decision, as I have already pointed out, is the issue of individual privacy, which was further elaborated in *Roe* as follows: the United States Supreme Court recognizes that "certain areas or zones of privacy" are guaranteed by the Constitution, even though the Constitution does not specify this; that the "guarantee of a right of personal privacy" extends only to those "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' "; and that "the right to privacy, founded upon the Fourteenth Amendment's concept of personal liberties and restrictions upon state action, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[16]

Along the way toward reaching this definition of privacy, the Court also made two, related but potentially contradictory, decisions. The first was that the privacy of a pregnant woman could not be absolute. Her biological condition means not only that she is never really alone, but also that, at some point in the pregnancy, the state's interest in "potential human life" will rival its interest in the woman's right to privacy. "Because a pregnant woman cannot be isolated in her privacy," the majority decision reads, "carrying, as she does, an embryo and later a fetus, it is reasonable and appropriate for a state to decide that, at some point in time, another interest, such as the health of the mother or the interest in potential human life, becomes significantly involved, that the woman's right to privacy is no longer sole, and that any right to privacy which she possesses must be accordingly measured against such other interests" (*Roe* 154). This ruling necessitated the second decision I want to highlight: the determination of that "point in time" at which another interest—most problematically, that of the state on behalf of the fetus—becomes sufficiently "involved" to mandate curtailing the pregnant's woman's "fundamental" right to privacy.

Despite the Court's elaborate refusal to decide "when life begins,"[17] the question of the "point in time" at which the fetus acquires rights clearly had to be addressed, for the Court's strategy was to subsume the right of the pregnant woman to seek an abortion into the right to privacy that every "person," including the fetus at that critical point, is guaranteed. In a ruling remarkable for its rhetorical equivocations, the Court decided that the critical "point in time" was the moment of fetal "viability." "Viability," the Court declared, "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks" (*Roe* 181). The basis for the Court's decision was declared to be "present medical knowledge": "at viability . . . the fetus . . . presumably has the capacity of meaningful life outside the mother's womb" (*Roe* 183). Elsewhere the Court added the further qualification: "albeit with artificial aid" (*Roe* 181).

Even before the Rehnquist Court pried open the ambiguity of fetal "viability" in the *Webster* decision, the language of *Roe* acknowledged that viability could never be stabilized as a precise "point." If the ambiguity of "meaningful" were not enough, all kinds of rhetorical qualifications surround the Court's descriptions of the timing and the likelihood of survival: "usually," "about," "may occur," "presumably." Despite this deliberate imprecision in defining fetal personhood, the Burger Court clearly intended to bring all of the thorny problems of the abortion issue into the relative clarity of the "fundamental" rights guaranteed by the Fourteenth Amendment. To do so, the Court had to simplify the pregnant woman into a single subject during the first trimester of the pregnancy, at the same time that it elaborated the viable fetus into a "person" during the last. The period in between the two was governed by considerations for the admittedly ambiguous category of "maternal health," and here we should note that in this phrase, as elsewhere in *Roe,* the pregnant woman has already begun to be represented as a mother. Since the temporal process that subsumes these trimesters is continuous, the Court further had to draw lines, which ought to but could not be exact, through this continuum in order to divide one period of time into three and one legal person into two.

However torturous the logic of *Roe,* its effect was to uphold for the woman the model of individual (sexed) identity that lies at the heart of the metaphysics of substance. Since the legal person that follows from (but seems to ground) this ruling can presumably exercise reason, the pregnant woman—like any other legal "person"—has the capacity and therefore the right to

"choose." For the fetus, by contrast, *Roe* tried to reify another status, which is related to but not the same as legal personhood. Viability is defined as the potentiality for personhood, although the relationship between "meaningful life" and "personhood" remains unexamined. Presumably, viability is not identical to legal personhood, because the fetus does not have the biological capacity to reason, make decisions, or acquire language. The fetus, in short, is not autonomous physically (despite the illusions produced by laser imaging): nothing can be done for or to the viable fetus except through the medium of the woman's body or whatever technology stands in for the woman's body. The fetus, therefore, does not acquire the right to choose. Instead, it acquires the right to protection. The problem with this reasoning is that the Court was trying both to differentiate between and to connect a sociolegal status—that of personhood—and a biological state—that of viability. The Aristotelian concept it used to separate and link these two—the metaphysical concept of "potential"—naturalizes the relations among conception, gestation, and birth. As a teleological concept, "potential" assumes that the fetus will be brought to term; in so doing, it forecloses not only other possible outcomes of the pregnancy (such as a miscarriage) but also, and as a consequence, any effective differentiation between the biological state of "viability" and the sociolegal status of "person." The concept of "potential," in other words, actually undermines the very distinction it seems to create because it collapses the two states it wants to keep separate. Sixteen years after *Roe v. Wade,* the *Webster* decision elaborated and extended *Roe*'s paradoxical logic.

In many senses, the *Webster* decision was not so much a decision as a series of deferrals and refusals to decide. The case involved a Missouri statute, enacted in June 1986, and the successful challenge to this statute by five health-care professionals, who argued that the Missouri statute was unconstitutional because its various provisions violated a woman's Fourteenth Amendment rights.[18] Upon appeal, the United States Supreme Court reversed the lower court's reversal of the statute, arguing as follows: (1) the Supreme Court does not need to decide whether the Missouri preamble declaring that life begins at conception is constitutional; (2) the statute's injunction against using public facilities and employees to provide abortions places no governmental obstacles in the path of a woman who wants an abortion; and (3) that, as a consequence of (2), the question about the constitutionality of using public funds to counsel a woman about abortion is moot (*Webster* 412–13). Individual Justices concurred with and dissented from parts of this decision, as well as adding more opinions, including the opinion expressed by three Justices that *Roe's* trimester-and-viability framework should be struck down and the judgment expressed by one Justice that *Roe* should be explicitly overruled, instead of being evaded, as the *Webster* decision was so clearly doing.

The first point I want to make about *Webster* concerns its refusal to address the constitutionality of the Missouri preamble. This preamble, which set forth the "findings" of the Missouri legislature, stated "that the life of each human being begins at conception and that unborn children have protectable interests in life, health, and well-being." It further declared that the laws of Missouri were "to be interpreted to provide unborn children with all the rights, privileges, and immunities available to other persons . . . subject to the Federal Constitution" (*Webster* 410). In refusing to address the constitutionality of this preamble, *Webster* implicitly decided that a legislative body could proclaim the fetus—or "unborn child"—to be a person from conception. In other words, it explicitly politicized the decision about what constitutes life. At the same time, *Webster* implicitly extended *Roe's* bridge of "potential," which the Burger Court had used as much to distinguish between the sociolegal and the biological states as to connect them, in order to close the gap between conception and personhood. In so doing, the Rehnquist Court eliminated the requirement that a legal person be an autonomous, embodied individual.

In their ancillary opinion, Justices Rehnquist, White, and Kennedy explicitly attacked the trimester-and-viability rubric that *Roe* had used to block this extension. Their reasoning drew upon a number of issues: the (presumably) medical ambiguity of *Roe*'s "rigid" trimester scheme, reflected in the fact that an error of as much as four weeks can be made in estimating gestational age; the legal incompatibility of *Roe*'s pseudoexact language of "trimesters" and "viability" with the "general terms" of the Constitution; and the fact that it was not socially necessary for *Roe* to remove the abortion issue from the states by "balanc[ing] once and for all, by reference only to the calendar, the State's interest in protecting human life against the claims of a woman to decide whether or not to abort" (*Webster* 421). The burden of these Justices' complaints, in other words, concerned *Roe*'s creation of distinctions. In all three instances, Rehnquist declared—the interpretive schema of trimesters and viability, the language of trimesters and viability, and the delineation of "fundamental rights" that underwrote *Roe*'s protection of choice—*Roe* created distinctions that were not necessary in principle and that have proved unworkable in fact. In a passage that summarizes their overall objections, Rehnquist stated that "since the bounds of inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine" (*Webster* 420).

The authors of *Roe* had spun this "web of legal rules" in their attempt to contain the two ambiguous entities with which they dealt—the pregnant woman and the "potential human"—within the category of the individual "person" as recognized by the Fourteenth Amendment. In cutting through *Roe*'s skein of fine distinctions, the authors of *Webster* implicitly acknowl-

edged the anomalous, nonunitary nature of these entities and therefore implicitly exposed the fact that the Constitution's language of individualized rights is not adequate to cover all of the guises in which so-called persons appear. Rather than pursuing the inadequacy of constitutional individualism, of course, *Webster* took the opposite tack: it shored up the category of the individual person by allowing states to extend their interest in "potential human life" *throughout* a woman's pregnancy, as if the fetus were, from the moment of conception, an individual with rights commensurate to those of the pregnant woman. Whereas *Roe* had drawn a distinction not only between viable and nonviable, but also, at least implicitly, between viable and autonomous or embodied, *Webster* obliterated both distinctions, in part through appropriating and redeploying the critical concept of "potential."[19] In doing so, *Webster* reinforced the constitutional groundwork for contests of interest between a pregnant woman and the fetus she carries and, thus, between a pregnant woman and the state acting on behalf of the fetus and the state's own interest in "potential human life."

But such fetal rights contests had already begun to pepper state and appellate courts before the 1989 *Webster* decision. In the 1977 case of *Simon v. Mullin,* for example, the Connecticut Superior Court ruled that a "child born alive" could sue for "prenatal injuries suffered at any time after conception, without regard to viability of fetus."[20] In 1978, a Missouri law extended fetal rights even further, to a point *before* conception. In *Berstrasser v. Mitchell,* the United States Court of Appeals ruled that a child born with brain damage because of injury inflicted to his mother's uterus during a caesarian section for a prior delivery had an independent cause of action against the physicians who performed the surgery before the child's conception.[21]

The timing of these cases, as well as the emphasis placed on fetal rights by opponents of abortion even before *Webster,* reveals that the basis for shifting the discussion about abortion to the issue of fetal rights was laid not by *Webster* but by *Roe v. Wade.*[22] For, in locating the "point in time" at which an individual acquires rights at a moment *before* birth through the concepts of viability and "potential" life, *Roe* implicitly called attention to the arbitrariness of relying on the biological state of embodiment for a definition of the social concept of "meaningful life" and, by extension, the sociolegal concept of legal personhood. The ambiguity *Roe* left unexplored in the relationship between "viability" and "meaningful" life therefore set the stage for arguments that the fetus can be interpreted as a legal person, and also, since even a viable fetus cannot act independently, for doctors and the state to restrict a pregnant woman's rights in the name of the potential child. *Roe's* attempt to stabilize the biological ambiguities of pregnancy and to subsume these ambiguities into a sociolegal argument about "privacy" and the right of an individual to "choose" obscured the importance of two

debates, which the abortion issue reveals to be crucial to renewing the legitimacy of the United States legal system: one is a debate about the political dimensions of the deployment of such metaphysical concepts as "rights" or "potential" life; the other is a discussion about the relationship between the biological and sociolegal concepts that underwrite the concept of a "person." In effect, *Roe* reasserted the metaphysics of substance without examining either the extent to which the assumptions inherent in this metaphysics are always political or the fact that one of the entities the decision endowed with legal personhood was not substantive in the biological sense that the social rules of gendered identity assume: *Roe* implicitly granted the fetus some of the properties of a gendered subject even though this subject does not have an autonomous, sexed body. Following this logic, there is no reason not to grant personhood to an egg or a sperm or, for that matter, to an organ or tissue that one wants (or does not want) to donate or sell to someone else.[23] By the same token, unless the relationship between biological embodiment and sociolegal personhood can be worked out there is no obvious reason to grant personhood to an infant upon birth, since a neonate is no more capable of independent life than is the fetus. Pregnancy, abortion, and the fierce debates that have materialized around the latter make it clear that these issues need to be aired. Indeed, the crisis of legitimacy that now torments the legal community may well result from the profession's continued reluctance to subject these problems to a public discussion.

I am not arguing that the *Webster* decision was somehow "better" than *Roe,* either in its legal exactness or in its implications for women, just as I would not argue that the equality defense is a better defense of legalized abortion than the privacy argument. I do think, however, that the *Webster* decision has begun to reveal why the metaphysics of substance constitutes an inadequate basis for all the arguments thus far advanced for the right to legal abortions. Most obviously, *Webster* has disclosed the fact that the central terms abortion advocates have tried to defend are susceptible to appropriation and reactionary redeployment by abortion opponents. In the mouths of antiabortionists, "choice," "privacy," and "rights" invert effortlessly into their opposites, precisely because, regardless of who uses them, these terms belong to a single set of metaphysical assumptions. In its attempt to avoid a head-on confrontation with *Roe,* for example, the Rehnquist Court argued that cutting off funding to all public facilities and employees did not really limit a woman's right to choose an abortion. Curtailing public funds, the Justices argued, "left a pregnant woman with the same choices as if the state had chosen not to operate any public hospitals at all" (*Webster* 411). The strategy here was obviously to preserve the individual's right to choose guaranteed by the Fourteenth Amendment. This, of course, is the same strategy proprivacy advocates have used to defend abortion. Even though the meaning of "choice" has significantly altered, the *Webster* decision makes it clear

that, once the concept of individual choice is granted, it is very difficult to decide what choices will be declared legitimate.

Beyond this, the *Webster* ruling also exposes the limitation inherent in the very notion of individualized, "free" choice. If the state "chooses" to operate no public hospitals, after all, the individual will only be "free" to "choose" a private hospital. This means, in effect, that only women who have enough money to hire a private doctor can "choose" to abort an unwanted pregnancy and then only if private doctors are trained and willing to perform abortions. The *Webster* ruling also exposes the limitations of the privacy defense by demonstrating the unreliability of that concept. The statute effectively limits abortions to clinics that are so private that they do not even lease land from the state (or, some lawyers argue, use public water or sewers), thereby once more making abortion an option only for women whose "private" income is sufficient to hire physicians with no sources of public funding at all (if any exist). The *Webster* decision's combined emphasis on rights and restrictions, then, brings into stark relief the instability of the abstractions contained in the metaphysical concept of rights. Because this inherent instability must always be stabilized in practice by the socioeconomic circumstances in which individuals and social institutions exist, moreover, the *Webster* decision also reveals that the argument for abstract rights will always simultaneously mask and assume a set of social conditions that actually defines those rights and delimits who has access to them. Once exercised, "rights" and "choice" cannot remain abstract, and the concrete situation in which they are embedded limits what these concepts mean and who will be able to exercise them. It is because of the situatedness of practice, not incidentally, that the differences of race and class always return to haunt the abortion issue once an abortion statute has been implemented, for in practice and in everyday situations, race and class are determinants that often make more difference than sex.

The individualism implied by the metaphysics of substance is a dead end for supporting abortion on demand for two reasons: first, because the appeal to individual rights *in the absence of* an interrogation of the metaphysical assumptions behind the idea of rights leads almost inevitably to a proliferation of those considered to have rights—in other words, to a defense of fetal personhood; second, because appeals to this metaphysics obscure the fact that both the metaphysics and legal persons are always imbricated in a system of social relations, which, given the existence of social differences, are also inevitably politicized. Indeed, under the United States Constitution, human beings can be legal persons only as a *consequence* of their place in at least one system of social relations—the system of gender, which is, but does not seem to be, the basis for the metaphysics of substance. My argument, then, is that we need to change not just the terms but the tenor of the abortion debate. As long as we engage in what is essentially a metaphysical debate about abstract rights, choice, and privacy, we will remain blind to the fact that metaphysics can be used to reify and rationalize a set of social practices that prohibit access to concrete rights, choices, and privacy. Once we acknowledge the embeddedness of these categories in the social fabric, we will be able to develop another set of arguments, which appeals not to the metaphysics of substance and the individualized, autonomous subject, but to the discursive and institutional networks of social relations that destabilize this individualized subject even as they extend our analysis of subjectivity beyond the autonomous "person."

I will sketch out one version of this alternative politics, but I need to preface my suggestions with two caveats. In the first place, given the antiessentialist position I have been arguing, it would be hypocritical for me to claim absolute authority for my own ideas. If practice, as I have been suggesting, always reflects its embeddedness in the system of social meanings and relations, then no theoretical argument that imports or derives its authority from a metaphysical position should be used to pass judgment on all practices as if they were interchangeable. At most, the kind of suggestion I will offer has the status of a self-consciously politicized contribution to a cultural debate that should have many participants.

In the second place, and following from my antiessentialist position, I suggest that no individual can know what is best or fair for every other individual (including the people she deems to be "like herself"). Indeed, I suggest that no individual who conceptualizes herself as an isolated unit can even know what is best for herself, since the differential concept of "best" implies knowing all the possible options and their outcomes in advance—a knowledge that would inevitably have to extend to the social relations that help structure those options and outcomes. Beyond this, the claim that the individual knows what is best for herself implies that no one ever wanted two, mutually exclusive things at the same time—that, in other words, desire is singular and consciousness the center of the individual. These comments should prepare the way for the shift I now want to make from a mode of thinking that focuses on the individual to one that proposes another conceptualization of the legal unit.

Ironically, the terms of the alternative politics I will outline here have already been introduced into the abortion debate by its most conservative participants—those people who endorse the idea of fetal personhood. The fetal personhood argument, after all, makes it clear that the embodied individual is only one of many possible interpretations of what counts as a legal person possessed of rights. This position therefore introduces the possibility that legal personhood might be assigned to some unit that is lesser or greater than the embodied individual. Beyond this, the attempts by *Roe* and *Webster* to salvage the individualized, sexed, legal subject while suspending the requirement that this "person" be physically autonomous have

inadvertently called attention to two other possible conceptualizations of the subject—one that emphasizes the heterogeneity or nonunitary nature of the individual (and therefore equates personhood with a subset of the embodied individual) and another that stresses the social nature of personhood (and therefore assigns the status of "person" to a unit greater than the individual). If the law acknowledged that it has already upon occasion suspended the necessity of linking personhood to embodiment, then a politics that was not based on the individual, sexed body would make legal as well as practical sense. This politics would not be based on the individual, sexed body. It would not consider one's biological sex the most important determinant of some unitary identity, nor would it imagine the individual to be separable from the social relations in which every person is inevitably bound. Instead of attempting to ensure abstract rights for the individualized legal subject, this politics would strive to create the social conditions in which the heterogeneity of the individual could be accommodated and in which community debates would determine what is considered socially acceptable and fair behavior in the light of the recognition that all behaviors—including those that seem to involve only the individual body—are expressions of relationships that entail difference as well as community. Basically, this nonindividualistic politics would work to complicate and elaborate our commonsense notion of "self." It would emphasize not the ways in which subjects are isolatable, autonomous, centered individuals, but the ways in which each person has conflicting interests and complex ties to other, apparently autonomous individuals with similar (and different) interests and needs.

In terms of the abortion issue more specifically, this nonindividualistic politics would emphasize two things: first, the fact that every woman experiences many reproductive opportunities in her life, not all of which she wants to eventuate in a child; and second, the fact that any pregnancy, perhaps especially an unwanted pregnancy, affects the network of social relations in which the pregnant woman is involved (not just her relation to an individual man, but also to her family, her employer or employees, the health-care system, the social-welfare system and, through that, the tax system that indirectly involves every taxpayer). The first of these emphases would place abortion in the context of contraception, not murder. The second would place it alongside other services that recognize social needs—such services as prenatal care, child day-care for working parents, and medical care for those unable to care for themselves. Far from making the abortion issue more arcane or difficult to identify with, this repositioning of abortion within the landscape of contemporary issues might well increase the number of people willing to support abortion on demand, for it would align advocates of safe and legal abortions with the millions of women and men who support safe and effective birth control and with the growing numbers of people who endorse plans for day care and parental leave, as well as some system of

subsidized health care capable of guaranteeing affordable medical service to everyone.

Casting the abortion issue in these terms represents a critical alternative to the metaphysics of substance because dispensing with the body as the necessary and sufficient criterion for legal personhood forecloses the possibility that sex will be isolated as the determining feature of one's identity. In so doing, of course, it also works against subsuming all women into the homogeneous category "woman," juxtaposing this falsely homogenized category to the generic "man," and—perhaps most importantly—marginalizing or erasing other kinds of difference, including race, class, age, and sexual preference. In refusing the assumption that "identity" is based on some "core" that the law recognizes, this suggestion dispenses with the (unrealistic) expectation that any human being will want the same thing throughout a lifetime or that desire will necessarily be aligned with reproductive potential. By returning the individual, who is now conceptualized as a heterogeneous rather than homogeneous entity, to its place within social relations, moreover, this solution insists that for a concept like "choice" to make sense, it will have to be conceptualized as a social issue and in a social arena: that is, a variety of options will have to be made available and supported with equal social resources. In the case of reproductive choice, these options would include not only access to safe and legal abortions but also to pre- and postnatal care and to day-care facilities.

The reconceptualization I am suggesting would entail fundamental alterations in the way most people now think of themselves and others, because it ultimately challenges what seems to be the primacy of one's immediate experience of (and fantasies about) the body. It also challenges the system of legal entitlements that is not only tied to the concept of an isolatable body but also wedded to the contradictory notion that the majority of these bodies are ruled by self-aware, self-consistent faculties of reason, which will act for the greater good of society even if this means sacrificing personal pleasure or gain. Such a reconceptualization is obviously difficult to campaign for; in all its ramifications, it is even difficult to imagine, given all the institutional and representational bulwarks that shore up the individualistic status quo. I do not, however, think that the details of this reconceptualization are difficult to imagine. When I argue that one's reproductive potential is not the only, or the most important constituent of one's being, after all, I am agreeing with everyone who believes that a woman's place should not be limited to the home, that mother should not be the only role a woman is allowed, and that legal discrimination should not follow sexual difference. When I argue that an unwanted pregnancy warrants the same level of health care as a pregnancy that will be brought to term—and that the same woman can experience both in a lifetime—I am agreeing with everyone who wants to combat the kind of moralization and individualiza-

tion of women's sexual activity that holds only the woman responsible for sexual self-control. In practice, the details of the antiessentialist position I have outlined are attacks on the sexual double standard, which lies at the heart of the metaphysics of substance and therefore lurks in the concept of rights as it has been institutionalized in this country.

I confess that I'm not sure that the discourse of rights could—or even should—be jettisoned completely at this moment. Given the political capital this discourse has accrued in the history of the United States, perhaps it should simply be reworked—as some feminists are now trying to do—so as to serve as a bridge between the old, absolutist metaphysics, whose politics remain masked but not inoperative, and a new, situational or conditional conceptualization of entitlements and restraints.[24] I am certain, however, that the discourse of rights needs to be subjected to a rigorous interrogation, not just by legal scholars and academics but by everyone involved in the political process that is theoretically legitimized by the discourse of rights. The abortion issue has brought crucial questions about entitlement and the politics of the law to the attention of more United States citizens than any issue since civil rights. Perhaps the passion that now attends the debate about whether or not the fetus is a person could be redirected toward the issues that lie behind this single question. I hope that whatever controversy this essay provokes will become part of the debate that will make some new conceptualization of these issues possible.

NOTES

For their help with this essay I would like to thank Judith Butler, Jane Caplan, Ruth Leys, Norma Moruzzi, Joan W. Scott, and the audiences at Queen's University and the Columbia Society for the Study of Medicine and Society.

1. An extremely helpful overview of these arguments is provided by Frances Olsen, "Unraveling Compromise," *Harvard Law Review,* 103 (November 1989), pp. 105–35. In several places, my own analysis of these arguments echoes Olsen's.

2. Ronald Dworkin, "The Great Abortion Case," *New York Review of Books,* 29 June 1989, p. 51. See also Ronald Dworkin, "The Future of Abortion," *New York Review of Books,* 28 September 1989, pp. 47–51.

3. Frances Olsen, "Unraveling," p. 119, n. 68. Olsen is discussing Sylvia Law's "Rethinking Sex and the Constitution," *University of Pennsylvania Law Review* (1984).

4. See Frances Olsen, "Unraveling," pp. 111–13.

5. In addition to the essays and books cited elsewhere in this essay, I especially recommend the following recent studies of the abortion issue and gender and the law: Catharine A. MacKinnon, "Privacy v. Equality: Beyond Roe v. Wade," in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), pp. 93–116; Martha Minow, "Justice Engendered," *Harvard Law Review,* 101 (November 1987), pp. 10–95; Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (Boston: Northeastern University Press, 1985); and Lawrence H. Tribe, *Abortion: The Clash of Absolutes* (New York: W. W. Norton & Co., 1990).

6. Catharine MacKinnon also criticizes the privacy argument, stating that the very concept of privacy assumes that "injuries arise in violating the private sphere, not within and by and because of it" (*Feminism Unmodified,* p. 100).

7. See Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review,* 102 (1989), p. 782; and Frances Olsen's criticism of Rubenfeld, "Unraveling," pp. 112–13, note 32.

8. A very thoughtful analysis of the contemporary debate about rights within the legal community is provided by Martha Minow, "Interpreting Rights: An Essay for Robert Cover," *Yale Law Journal,* 96 (1987), pp. 1860–1915.

9. For a discussion of the metaphysics of substance, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York and London: Routledge, 1990), pp. 10, 16–21, 141.

10. Parveen Adams and Jeff Minson, "The 'Subject' of Feminism," *m/f,* 2 (1978), p. 50.

11. Judith Butler, *Gender Trouble,* pp. 16, 17.

12. Judith Butler, *Gender Trouble,* p. 17.

13. Wai-Chee Dimock, "Rightful Subjectivity," *Yale Journal of Criticism,* 4, 1 (1990), p. 28. I take the term "differential structure" from Dimock's provocative discussion.

14. See Michel Foucault, *The History of Sexuality, Part I: An Introduction,* translated by Robert Hurley (New York: Vintage Books, 1980), and Jacques Donzelot, *The Policing of Families,* translated by Robert Hurley (New York: Random House, 1979).

15. *Roe v. Wade,* 93 *Supreme Court Reporter* 705 (U.S. Supreme Court 1973), p. 148.

16. *Roe,* p. 153; see also p. 177. See also Justice Douglas's concurring opinion, pp. 185–89.

17. Here is the famous passage: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer" (*Roe* 181).

18. *William L. Webster v. Reproductive Health Services et al.,* 106 *United States Supreme Court Reports,* pp. 410–71.

19. See Joanna Weinberg, "Feeling the Chill Wind," *Women's Review of Books* (October 1989), p. 18.

20. *Simon v. Mullin,* 380 A. 2d 1353 (Conn. 1977). For discussions of this and other fetal-rights cases, I am indebted to Katherine A. White, "Precedent and Process: The Impending Crisis of Fetal Rights," unpublished paper, University of Illinois (1989).

21. *Berstrasser v. Mitchell,* 577 f. 2d 22 (1978).

22. See Joanna Weinberg, "Feeling the Chill Wind," p. 19.

23. The case of Moore v. The Regents of the University of California has raised the question of an individual having the right to his or her own body in this sense. The California Supreme Court ruled in July 1990 that John Moore did not have proprietary rights to the spleen that was surgically removed in 1976. By contrast, in September 1989, a Tennessee state court ruled that frozen embryos did have a special legal status—in fact, they were awarded the status of "potential life" when the court granted custody of these embryos to Mary Sue Davis, the woman who produced the eggs. For a discussion of the implications of such decisions for

women, see Rex B. Wingerter, "Fetal Protection Becomes Assault on Motherhood," *In These Times*, 10–23 June 1987, pp. 3, 8.

24. For one legal theorist's attempt to reconsider rights from a feminist point of view, see Minow, "Interpreting Rights." In her essay, Wai-Chee Dimock proposes that we consider the concept of *prima facie* rights. "These are rights which are more or less provisional, which remain sovereign while left to themselves, but can be overridden should a superior right intervene." This notion challenges the "stability of the concept of rights, because, in making rights relative rather than absolute, conditional rather [than] universal, [it] also eliminate[s] the ground from which rights derive their transcendent authority. In a contingent universe, rights are very much a situational variant: less than inalienable, and hence less than natural" ("Rightful Subjectivity," p. 33).

13

"Shahbano"

Zakia Pathak and *Rajeswari Sunder Rajan*

In April 1985, the Supreme Court of India, the highest court of the land, passed a judgment in favor of Shahbano in the case of Mohammad Ahmed Khan, appellant, versus Shahbano and others, respondents.[1] The judgment created a furor unequaled, according to one journal, since "the great upheaval of 1857."[2]

The Supreme Court confirmed the judgment of the High Court awarding Shahbano, a divorced Muslim woman, maintenance of Rs 179.20 (approximately $14) per month from her husband, Mohammad Ahmed Khan, and dismissed the husband's appeal against the award of maintenance under section 125 of the 1973 Code of Criminal Procedure.[3]

For Shahbano this victory came after ten years of struggle. A lower court had awarded her only Rs 25 a month (the average daily wage of a laborer in India is Rs 11.50, or roughly a dollar). Shahbano was not the first Muslim woman to apply for (and be granted) maintenance under the 1973 Code of Criminal Procedure.[4] The repercussions of the Supreme Court judgment therefore took many, including the government, by surprise. When some by-elections fell due in December 1985, the sizable Muslim vote turned against the ruling party (the Congress-I) partly because it supported the judgment. Its candidate at Kishengunj, although a Muslim, was defeated by the opposition's Muslim candidate, Syed Shahabuddin, who would play a major role in the events that followed. When an independent member of Parliament, a Muslim, introduced a bill to save Muslim personal law (with the support of the Muslim Personal Law Board), the ruling party reversed its earlier position and resorted to a whip to ensure the bill's passage. The bill