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**PREGNANCY AND POLITICAL THEORY:
LIBERALISM AND THE FETAL RIGHTS CRISIS**

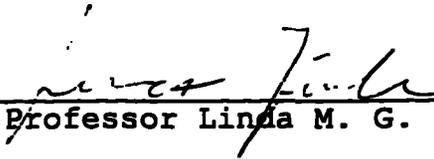
BY DEIRDRE MOIRA CONDIT

A dissertation submitted to the
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in partial fulfillment of the requirements
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Graduate Program in Political Science

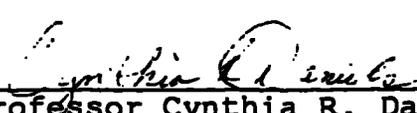
Written under the direction of
Professor Gordon J. Schochet
and approved by



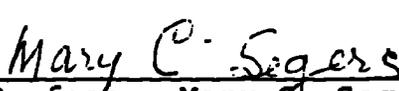
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New Brunswick, New Jersey
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ABSTRACT OF THE DISSERTATION

Pregnancy and Political Theory:
Liberalism and the Fetal Rights Crisis

by DEIRDRE MOIRA CONDIT

Dissertation Director
Professor Gordon Schochet

This work examines the development of "fetal rights" discourse in law, politics and political theory. Fetal rights are credited with creating a crisis within both the law and public policy of pregnancy, and thereby requiring a re-examination of the role of pregnancy in political thought. It is argued that the liberal construct of political "personhood" provides a framework within which the recently dis/covers fetus can find recognition, identity and political status. It is further argued that this new fetal status emerges in juxtaposition to the status of the pregnant woman, who, it is contended, remains excluded from "personhood" by the same requirements of liberalism. The

work finds that differing strategic deployments and discursive constructions of both the fetal body and the pregnant body within liberal thought, specifically, and American political culture, generally, are key to understanding the growing disparities in power between the fetus and the pregnant woman.



DEDICATION

To Celeste Michelle Condit,
the trail blazer who has
always made my life so easy, and
to Clayton and Beatrice Condit,
who taught me to love life,
think well, and enjoy the luxuries

ACKNOWLEDGEMENTS

Like pregnancy, though writing may seem to be done in solitude and alone, it is actually a function of a successful social environment that supports and nurtures the writer while she toils at her task. This work is no different. Many extraordinary people are deserving of my gratitude and recognition for their contributions to both my life during the writing of this dissertation, and to its contents directly. Along the way I've been given more support, patience, leeway, tolerance and assistance than any human being deserves. I am grateful to each of you. The shortcomings of the work are mine, and mine alone.

Saying thanks must begin, of course, with my parents, Beatrice M. and Clayton Condit, who made the world my oyster and told me to relish it. My sister, Celeste Condit, and brother-in-law, Bruce Railsback, have been my security net throughout. Everyone should be so lucky.

John Hempel was unswerving in his support at the beginning, which made it possible for there to one day be an end. The sacrifices he made in service to my dreams have made a debt that I could never repay. Lucy S. long ago told me that I could paint pictures with words when those who should have been my teachers failed in their responsibilities. Lucy dreamed the dreams I realize today

and I credit much of my success to her encouragement.

I am grateful generally for my graduate work at Rutgers University, which laid both the intellectual and personal groundwork for this project. It began with Dennis Bathory's warm welcome to New Jersey. His friendship, teaching and support during my course work continued to make me feel at home. Milton Heumann treated me with respect and made me feel, in his words, "smaht" enough to tackle a dissertation. I credit any "heft" in this work to him; the lack of "dater," however, is not his responsibility.

W. Carey McWilliams will always be larger than life to me -- despite his driving on that first day. The gentle expression of his confidence and those gargantuan bear hugs sustained a scared kid from Idaho on more than one occasion. Sue Carroll always said I always could.

My dissertation committee deserves particular thanks. The genesis of this project took place in a graduate course on abortion policy with Professor Mary Segers. Her thoughtful guidance got me hooked on the questions of fetal identity and fetal rights in the first place. Her comments on that first fetal rights paper have steered me throughout the larger work that followed. Professor Gordon Schochet quickly became both mentor and friend during my graduate training and throughout the dissertation process. Our shared fascination with Locke brought me to Rutgers in part;

our subsequent conversations lead me to rethink my reading of Locke's works. As committee chair, Professor Schochet's wise toleration of my idiosyncratic work habits allowed me the room to finish in my own way, and in my own time. Professor Cindy Daniels generously brought her unique expertise in fetal rights policy to the project and I am grateful for her time. Professor Linda Zerilli has come to occupy a place in my intellectual life and in my heart that can not be expressed well in so public a forum as this.

Pat Boling read and edited parts of chapters 2, 4 and 5, making the language smoother, the ideas clearer. My colleagues and students at Virginia Commonwealth University were charitable in their patience while I brought the work to a conclusion. Roslyn Stein picked up my slack during the final push. Without her magnificent help you would not be reading this. David Saulnier checked citations for me, perhaps the most odious task, but one done with grace.

And finally, Cliff Fox, my partner, let me think aloud with him at each step of the dissertation's evolution. His understanding of John Locke and liberal theory allowed me a superb springboard for sounding out questions and theories. However, any misinterpretations of those ideas are certainly my own. Cliff read numerous drafts of the chapters while simultaneously keeping me together throughout the process. But more importantly, he was there at the end of each day

with the kind of love and support only dreamed of in fairy tales. The debt is large but I have time to repay it now.

One final note, this work was successfully defended in the autumn of 1995, but a number of unforeseen events impeded my ability to complete the final revisions and file the work for the final degree. My apologies to all.

Deirdre M. Condit

October, 1997

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PART ONE: INTRODUCTIONS

Chapter I

Introduction

... pregnancy is above all a drama that is acted out within the woman herself. She feels it as at once an enrichment and an injury; the fetus is a part of her body and it is a parasite that feeds on it; she possesses it, and she is possessed by it; it represents the future, and, carrying it, she feels herself vast as the world; but this very opulence annihilates her, she feels that she herself is no longer anything. (Beauvoir, 553)

Pregnancy is little theorized in the grand works of political thinking. Like many features of human life, it has traditionally been interpreted as "natural" and therefore beyond the reach of both politics and philosophy.

This project, which examines the recent and on-going development of what has become known as the "fetal rights crisis" in American political culture and law, challenges that traditional treatment of pregnancy and argues instead that pregnancy is, at its core, a fundamentally political phenomenon. Furthermore, I shall contend, the crisis in pregnancy spawned by the recent rise of fetal identity is, in large measure, the result of our historical misperception that pregnancy is indeed natural and our

subsequent failure to theorize its political content.

Among the few theorists who have tackled pregnancy as a theoretical question is Simone de Beauvoir. The epigram given above depicts the pregnant body as constituted by complex feelings and multiple interpretations. She paints the relationship between the pregnant woman and the fetus as a purely internal one experienced and interpreted by the woman, without regard to the outside world. In Beauvoir's vision, the gestating woman's identity is entangled with that of her pregnancy as her relationship to the fetus is mediated by its "parasitic" nature -- a nature that is primarily beyond her control. A pregnant woman's relationship to her own identity, as forged by and within the world beyond her body, is simultaneously created and "annihilated" by that part of her growing inside that is both her and not her. It is as if, once she has conceived and then begins to gestate, the pregnant woman's own identity dissolves -- it becomes occupied and replaced simultaneously by the seemingly manifest identity of the fetus she grows.

In this construction of the pregnant body, a direct relationship between the fetus and the outside world is not possible; the pregnant woman serves as the physical, cultural and social conduit between fetus and the world beyond the pregnant form. It is *only* through her mediation

that the external world can have knowledge of the fetus -- at least prior to the moment when the pregnancy becomes evident as a result of her changing physical appearance or through her verbal accounts of her condition to others. Consequently, in Beauvoir's construction of pregnancy, the woman is at the center of her pregnancy, regardless of the transformations in her identity wrought by the development of the fetus. Thus it is the pregnant woman alone who must characterize the drama of her pregnancy: Is she one with her fetus or is she at war with it? Is she, *qua* her body, the fetus, or is the fetus the enemy of her body? In any case, it is the pregnant woman who "feels" and interprets her bodily changes, and, if she chooses, communicates her experiences to the world beyond her womb.

Some feminist political theorists argue that this 'woman-centered' interpretation of pregnancy creates a special kind of political power for pregnant women. Thinkers like Mary O'Brien, for example, find great power for women in the fact that a woman-centered understanding of pregnancy makes it a kind of closed political circle, one which can be observed from outside the pregnant body, but one that the outside world can contact only indirectly.¹

¹ To note this is not to minimize the powerful influences that political forces -- including institutional structure, class and race, all external to the pregnant body -- may have on both the developing fetus

She believes, in fact, that the power for women created through pregnancy is so great that patriarchal political structures have emerged primarily in response to men's envy of women's capacity for and control over pregnancy. (6) Even Beauvoir -- who argues to the contrary that pregnancy actually results in women's subordination rather than empowerment -- acknowledges that many women at least perceive themselves as having a kind of freedom during pregnancy they know at no other time in their lives. (540-561) In either case, historically, we have thought about pregnancy as a "woman's condition," regardless of how that condition affected her hold on political power.

But Beauvoir penned her rich, though perhaps somewhat startling, description of pregnancy long before technology had brought the pregnant woman, the fetus and the outside world together across the boundaries of the pregnant body. As she wrote, fetuses were primarily *known of* but not particularly *known* in our discourse and understanding of

and the pregnant woman. The influences of the social world of which the woman was a part prior to the conception of the fetus contributed mightily to her actions that thus resulted in a fetus in the first place. Once the pregnancy has been established, both she and the fetus are tremendously affected by social and political conditions that determine access to healthcare, economic stability, social support, nutrition and mental well-being, for example. While each of these has a direct effect on fetal development, and on the woman's experience of pregnancy, my point is that they can only be transmitted to the fetus through the medium of the pregnant woman's body.

pregnancy. Consequently, the fetus's place in pregnancy remained amorphous -- unmarked by distinguishing features, unparticularized and virtually unexamined theoretically. Generally, we considered fetuses, when we thought about them at all, as works in process -- events waiting to happen. Thus the only material and theoretical knowledge available about pregnancy necessarily derived from and centered on the pregnant woman.

Recently, however, revolutionary medical and scientific technologies have dis/covered the fetus anew. As the result of developments in medicine, science and some commercial industries, visual, auditory and surgical exposure of the fetus *in utero* is making the once-hidden fetal body more knowable to the public. We are now routinely surrounded by images of the fetus on television, at the doctor's office, and in the workplace as medical professionals and others produce fetal "snapshots" taken with ultrasound imaging equipment. As never before, we now know what fetal bodies look, move and sound like, all while they remain inside the bellies of pregnant women. This has made possible a new and more direct kind of contact between the fetus and the outside world.

As a result, people increasingly find themselves feeling familiar with the idea of the fetus, and in many instances, they become "acquainted" with particular fetuses

residing in pregnant women they know. They feel drawn into pregnancy like a theatrical audience at curtain rise; as never before, parties external to the pregnant body now perceive themselves as integral to the gestational play as it unfolds. Doctors, lawyers, judges, husbands and other partners, and even the average consumer, can now claim a new relationship between themselves and the fetuses carried in the bodies of pregnant women.

A major effect of this new relationship between the fetus and the outside world made possible by technology, however, has been the development of third-party claims on the authority and ability to decide whether the relationship between the woman and the fetus is hostile or as harmonious -- often without regard to or in direct opposition to the interpretation offered by individually pregnant women. While in Beauvoir's description of pregnancy, fetus and pregnant woman are painted variously as antagonists, symbiants or indistinguishable entities, their relationship remains particular to and internal within the pregnant woman. The score of technological innovations that now permit third party incursions into the pregnant woman's body are changing that relationship at the most fundamental levels.

The first traces of this trend toward political intervention in pregnancy were evident early-on with the

initiation of the anti-abortion movement following the Supreme Court's 1973 *Roe v. Wade* decision acknowledging a woman's constitutional right to abortion. At that time, many people external to women's pregnancies began to assert new, tacit connections to the fetuses women carried. Their arguments were often grounded in early research about fetal being and/or religious beliefs about when human life actually begins. Their position, however, was not yet firmly grounded on the kind of overwhelming exposure to and knowledge of individual fetuses that is possible today. Rather, they worked from a kind of abstract conceptualization of global, humanized fetal life which they maintain is shared by each particular fetus. The debate about the "humanity" of the fetus was a difficult one for them to make at that time because to many the fetus was still quite distant, remote, and intangible.

The recent flood of fetal imagery saturating our visual environment is changing our public perceptions of fetal being, however. As we become increasingly familiar with the fetal body, we need contextualiz it, explain it and make sense of our experiences of it. The same theological and ideological interest groups active during the early and current abortion controversy have been joined by some medical professions to make it their mission to humanize and contextualize these new fetal experiences. They have

recently been joined by some commercial forces, interested in capitalizing on this now readily available fetal imagery.

Taken together, the rhetorical, commercial and theoretical efforts of these groups have been remarkably effective; increasingly, we now recognize the fetus as a baby, an unborn child and/or as a tiny human being. In essence, the fetus has become a "person" in the modern world.

This shift in our understanding and interpretation of both pregnancy and the fetus has also brought with it a dramatic reconfiguration of the politics of pregnancy. The abortion debate provided the early example of how the interests of the pregnant woman and the fetus could be construed as divergent. When a pregnant woman wants to abort a fetus that has been ascribed no particular social identity, she is simply having a medical procedure performed on her own body -- a procedure not unlike having a kidney or other organ removed. But when the fetus is construed to be like a tiny, individual person, then the woman's rights to control her body and not be pregnant clash incommensurably with what may be seen as the fetus' right to life. This is, of course, how the abortion debate has been framed in the past twenty-five years.

Today, direct access to and knowledge of the fetus by the world external to the womb now allows for new interpretations of the relationship between fetus and woman.

The tension derived from the fetus being both an "enrichment" and an "injury" to the pregnant woman can now be re-interpreted by third parties as hostility toward the fetus on the part of the pregnant woman. When this happens, parties tertiary to pregnancy are making corresponding demands that the fetus be treated to the kinds of political rights, protections and privileges previously afforded only to born human beings. As a result, this new demand for separate, independent rights for the fetus has created a serious crisis in our understanding of pregnancy -- in a bizarre, abstract twist, turning pregnant woman and fetuses against one another in American courtrooms throughout the country.

The list of potential "threats" to the fetus now identified by science, medicine and other third parties has grown significantly since the onset of the abortion controversy. Developments in medicine, for example, now make it possible to treat the developing fetus for potentially crippling or fatal problems experienced *in utero*. Unlike when treating a child or adult, however, these medical interventions require getting to the fetus through the body of the pregnant woman. When pregnant women refuse to open their bodies and allow such treatments, however, they are perceived as "threatening" their fetuses, and their behavior, regardless of its motivations, is

frequently described as "abusive" and/or "negligent."

In other circumstances, pregnant women have engaged in lifestyle behaviors that third parties deem to be harmful to the fetus as well. These have included a range of behaviors, from talking a walk on a summer's day to having heterosexual intercourse to ingesting alcohol and other drugs while pregnant. Parties outside the pregnant body increasingly feel free to pass judgement on the dangers such behaviors might pose to the developing fetus, and have repeatedly sought legal redress to enjoin pregnant women from doing them.

In order to satisfy third-party demands for judicial protection of the fetus, and therefore recognition of its "rights," judges and others now find themselves pitting the "rights" of the pregnant woman against the newly found "rights" of the fetus. In many such contests, it is the rights of the pregnant woman that have given way. The result, as the second chapter will demonstrate, is that in a variety of cases, across American court jurisdictions, women have been legally forced to submit to medical treatments and surgeries ordered by their physicians, regardless of their own desires or wishes. They have been prosecuted, incarcerated and otherwise punished for life-style choices made while pregnant on the grounds that their behaviors have been criminally negligent, abusive or otherwise dangerous to

the fetuses they carry. Their political power, that is their ability to make and exercise decisions about their bodies during pregnancy, has been "annihilated" in Beauvoir's language; they have been rendered "no longer anything" by third parties extraneous to their pregnancies.²

If one stands back a moment, and thinks about this phenomenon, it seems quite strange. Imagine the courtrooms where these contests between the rights of women and their fetuses take place: rooms filled with judges, doctors, hospital representatives, husbands, lawyers for the fetus, lawyers for the pregnant woman, lawyers for the third parties, the pregnant woman, and somewhere, obscured within the belly of a pregnant woman that is hidden behind a maternity smock, the fetus, all (save one) literally arguing over the value of the fetus and who is empowered to decide how it shall be treated during pregnancy.

How did we come to this point? How did it come to

² Insightful readers might suppose here that my argument is predicated on the assumption that women at some point prior to the fetal rights debate actually had "control" over their bodies during pregnancy and thus were at risk because they were "losing" some already recognized bodily "rights". On the contrary, as will become evident throughout the work, my argument will suggest that while pregnancy has historically been a topic for 'women's circles' and, to some extent, the pre-professional medical community, women have never experienced the political power to control their bodies and/or their pregnancies. Beauvoir's discussion of pregnancy noted in the epigram above is in fact made in her explication of just this point.

pass, that where once the fetus was simply intangible and unknown in pregnancy, it has now become a political actor? How have the bodies of pregnant women, historically simply the site of pregnancy, now become the site of such legal conflicts? The purpose of this dissertation is to engage these questions in the hope of contributing to our understanding of the politics of pregnancy. Strongly influenced by the foundational arguments of postmodern thought, which holds that identity is fundamentally socially constructed, my primary goal here is to examine *how* the so-called fetal rights crisis has come to pass. That is, I want to explore the agents of socialization that have come together to construct this new understanding of pregnancy and have turned pregnancy into a condition of crisis.

When this project was first begun, it was structured under the assumption that the fetal rights debate was a problem of law and could be "reasoned out" with the proper application of judicial doctrine, theory and precedent. Thus, I, like so many other scholars, assumed that the courts were just misapplying statutes, or misinterpreting the Supreme Court's decision in *Roe*³ or subsequent cases. I thought that what was needed was to simply reassert women's rights in the face of fetal challenges and the problem would

³ 410 US 113 (1973).

be solved. What I would eventually realize, however, was that this strategy was unwittingly predicated on a number of assumptions. First, I discounted the possibility that the fetus might indeed warrant political protection. As a child of both '60's liberalism and second wave feminism, my politics inevitably, if unwittingly, structured my thinking about the fetus primarily through the lens of abortion. Thus, I, and many feminist theorists like myself, initially gave little attention to the fetus itself. Second, I assumed that arguing for women's rights to control their bodies (a discourse cemented by a pro-choice ideology) simply needed refinement in the law in order to "solve" the problem, never questioning the idea that law itself could be the problem. Finally, my construction of the "problem" of fetal rights assumed from the outset that all claims about potential harms to the fetus were, by fiat, illegitimate.

As my research on the topic progressed, three things became clear: first, most of the other scholars who had tackled the fetal rights question had begun either from the same vantage point as had I, and so built their arguments on the same assumptions I used at the outset. Or, conversely, they had begun from a vantage point diametrically opposite to mine and thus used the appropriately opposite assumptions to make their claims in the name of fetal rights. This meant both that scholars far more experienced than I had

covered the ground I was now treading and also that they had reached the same conclusions as had I. (For example, on the side of women's rights see Daniels, Gallagher, Glink, Harding, Knopoff, McDonough, Nedelsky, Nelson and Pine; on the side of fetal rights see Camissa, Erb and Mortensen, Flannery, Phelan and Shaw) It meant as well that very good minds were once again locked in what appeared to be an ideological impasse strongly resembling the now twenty-five-year-old impasse of the abortion debate, one that has resulted in characterizations of the abortion question as an impossible "clash of absolutes." (Tribe)

Second, it became clear that no significant progress was being made within the fetal rights debate itself. While feminist legal scholars and others were arguing vehemently (and reasonably) against judicial recognition of the fetus under law, as Chapters Two and Five will illustrate, such affirmation of fetal personhood continues to role along virtually undeterred. Day by day, I argue in Chapter Four, the fetus becomes more and more of a person in American political culture. Thus, while the arguments all seemed reasonable, they also seemed futile as well.

Finally, it became evident that as long as the scholarly community continued to assume that law could provide some "solution" to the fetal rights problem in its present form, we were not going to be successful. One need

only look at the history of the debate and treatment of abortion to understand why this is so. Thus, recognition of these three realities lead me to rethink the fetal rights problem, and ultimately, to understand that before it is a question of law, the fetal rights challenge is a symptom pointing to a broader problem within our understanding of the relationship of pregnancy and political thought.

My thesis in this dissertation is two-fold in its approach. First, I argue that how we treat and perceive either the fetus or the pregnant woman depends on a number of influences that come together to build a political discourse about one or the other. That is, I am arguing that what we now think of and see in either the fetal body or the pregnant body is contextualized by both epistemological and political influences.

The works of Michelle Foucault, Thomas Laqueur and other postmodern thinkers has been fundamental to my thinking on this point. For example, in his extraordinary work, *Making Sex*, Laqueur argues that there is a kind of "space" between the body and its representations wherein our political discourses about the body are manufactured and our meanings for the material body are subsequently ascribed.

(16) Laqueur's particular project is to look at how our notions about the sex of the body have shifted through time, but the frame of his theory is equally applicable to the

condition of both the fetal body and the pregnant body.⁴

Says Laqueur

Sex, like being human, is contextual. Attempts to isolate it from its discursive, socially determined milieu are as doomed to failure as the *philosophe's* search for a truly wild child or the modern anthropologist's efforts to filter out the cultural so as to leave a residue of essential humanity. And I would go further and add that the private, enclosed stable body that seems to lie at the basis of modern notions of sexual difference is also the product of particular, historical, cultural moments. It too, like opposite sexes, comes into and out of focus. (16)

Laqueur's point is that we can not "know" the real "sex" of a body, for the only real "sex" it has is the one we create for it. As his work reveals, science could tell us much about the body by describing it, but it could not tell us what the body *means* or what it *is*. (9) Conversely, however, what we thought it meant, at any given point, determined the descriptions made available about what kind of "sex" scientists saw in the bodies they examined.

Once he has stripped the material body -- the biological, yet unspeakable *thing* -- of any knowable and communicable inherent identity, Laqueur then looks to how bodies get the meanings they eventually are given. He argues that it is through a combination of the epistemology of the body and the politics surrounding that epistemology

⁴ Judith Butler's work in *Gender Trouble* examining the performativity of gendered identity makes a similar, equally applicable argument.

that we derive our understandings about the sex or sexes of the human body at any given time. (11) Laqueur wants to show with his work that "on the basis of [the] historical evidence...almost everything one wants to say about sex -- however sex is understood -- already has in it a claim about gender." Thus sex is "explicable only within the context of battles over gender and power." (11)

If we translate his theory into the fetal rights problem, though the questions and bodies may differ, it is evident that the key problems remain the same. What are the connections between the material fetal body or the material pregnant body and what we think about or how we treat those bodies? We know, for example, that the materiality of the fetus is not new. To the best of our knowledge, and certainly throughout the history of the West, we have reproduced our species by gestating the developing offspring within female bodies. Historically, however, as I argued above, the fetus has played only a minor role in what we have thought about or understood pregnancy to be. But recently, as I will outline below in Chapter Four, we have become increasingly exposed to fetal bodies. As a result we have become increasingly familiar with what fetal bodies look like. The pertinent question in the fetal rights context, however, is, can we now "see" the "person" in that newly exposed body? Those arguing for fetal rights, on the

grounds that the fetus is a person, make just this assertion.

Using Laqueur's theory further, however, we would have to argue that simply experiencing the fetus in a new way does not mean that its "true" meaning has also been "revealed." A shift in how we experience the fetal body, or what science tells us about the fetal body, does not necessarily account for the coincident elevation in our estimation of the fetus' political power: simply seeing is not "knowing," though, as I will argue later, for some it may be "believing."

To make this point, Chapters Six, Seven and Eight examine the contrasting political status of pregnant women.

We know that women have always been visibly pregnant, but that visibility has not also translated into corresponding demands that they are persons with inviolable rights. In fact, just the opposite is true; historically, being pregnant has often lead to the abrogation of or at least arguments against women's rights. That fetuses are increasingly "persons" enough to trump the interests of pregnant women, thus suggests that "personhood" lies somewhere other than *in* the body itself.

Which brings me to the second part of my theory. Here, I argue that key among the many influences that structure what we "see" when we see the fetus or the pregnant woman is

our immersion in the values and mechanisms of liberalism, for it is liberalism which produces the very notion of personhood in the first place. In Chapter Three, I trace the development of the concept of personhood in traditional Lockian liberalism, arguing that for classical liberal thinking personhood is a unique category of political person. To be qualified as such, one must meet the qualifications Locke outlines as necessary for personhood. In that and the subsequent two chapters, I argue that once we have dis/covered the fetus in a liberal political culture, we are virtually impelled by the limits of our dominant political ideology to see it as tiny person.

To complete my theory, I look at the pregnant body through the lens of liberalism as well, and there discover that liberal theory actually may exclude pregnant women from personhood. The qualifications established by Locke simply cannot be met by pregnant women, at least as we currently construct pregnancy.

I argue finally, that the contrast between how the fetus becomes qualified as a person and how the pregnant woman has historically served as the antithesis to personhood are predictable outcomes of liberal political theory; which leads me to conclude that our strong dependence on liberal thinking, and its strong dependence on judicial rights thinking, is responsible, in large measure

for the fetal rights crisis we are experiencing in the modern era.

It should become evident as I make my case that I find that the phenomenon of the materiality of the body plays a key role in how we construct the identities of pregnant women and fetuses within liberal theory. This is a somewhat ironic point given the fact that Locke intended it to be a theory which removed the importance of the body from politics. I will show, however, that the epistemological fact of the body and the significations made of the body play vital roles in traditional liberal thought.

A fundamental element of my theory holds that the pregnant body in particular has been remarkably troublesome for much of Western patriarchal history. As I argue in Chapter Seven, men have actually worked very hard to obscure, deny or erase the pregnant body in order to construct a convincing, if somewhat narcissistic, model of patriarchal reproduction. If meanings are ascribed in the spaces between the material body and its representations, as Laqueur suggests, the problem for patriarchal politics has been to create enough space between the pregnant body and political power that they appear to be unrelated or even antithetical. This, then, allows other constructions to be inserted in the chasm left behind.

In the modern fetal rights debate, on the other hand, the early-term fetus proves to be equally perplexing for those who would personify the fetus. During the first weeks of gestation, for example, the fetus does not even faintly resemble any kind of body, let alone a human one. Not surprising, then, pro-life and fetal advocates have found it more difficult to make their arguments convincing when the space between the epistemological body and its representations is so vast.

Thus, while I draw on that part of postmodern methodology which questions the correspondence between any knowable material world and our linguistic, social interpretations and representations of that materiality, I do not go so far as to deny the material body relevance in the social construction of meaning. Rather, I argue that there is some "there there" from which socially constructed meanings begin -- at least in the case of the fetus and the pregnant body. While I agree that the relationship between material and meaning can be tenuous, I believe that it is one of elasticity rather than pure fabrication. While most postmoderns attribute the construction of meaning to the deployment of raw power, my examination here of the politics of pregnancy and the the fetal rights debate has lead me to conclude that while the pull of the material on the tether to its ascribed meanings varies widely, some grounding in

materiality is necessary for power to be possible.

To illustrate my arguments, this work is organized into three parts. This introduction and the second chapter are combined in Part One, which introduces both my guiding theory in this work and the crisis that the fetal rights phenomenon has brought to pregnancy. Chapter Two takes a close look at court-ordered medical treatments that have been imposed on pregnant women, legal punishments suffered by them in the name of fetal rights, and other arguments for controlling women's pregnant lives should they refuse medical advice or engage in behaviors others deem dangerous to their fetuses.

Part Two focuses primarily on the key elements contributing to the social construction of the fetus. Chapter Three outlines the liberal project and demonstrates the origins and requirements of personhood in that theory. Chapters Four and Five explore how the increasing social exposure of fetal being is being transformed into the "personhood" of Lockian thought. The technological dis/covery of the fetal body and efforts to contextualize such exposure is discussed in the fourth chapter. That chapter surveys the process by which the fetal body is humanized by pro-fetus and other political or commercial influences today. The chapter concludes by examining the problem of fetal rationality, disputing arguments against



fetal personhood on the grounds that they fail to consider the liberal project in its breadth, even while making fundamentally liberal arguments themselves. Chapter Five tackles the issue of how the fetus has come by so many "rights" under law and outlines the current status of the fetus as a "person" within the courts. Having set the stage for understanding the production of the fetus as a person, I then turn, in Part Three, to my examination of the pregnant woman.

This part is also divided into three chapters. The first, Chapter Six, revisits Lockian liberalism to find that women have a poor fit with his construction of the liberal "person," generally, and an even more difficult time fitting into the mold of personhood when pregnant. This is due, in part, to how Locke deploys the male body as the universal body, and how difficult it is to make the pregnant body "pass" as such. The next chapter retraces traditional representations of the pregnant body in popular culture, arguing that it has been predominantly excluded from both the public eye and public discourse, thus creating a kind of vacuum of exposure to the materially pregnant body. This is so, I argue, at least in part, because of the myth of male reproduction inherent in patriarchalism. Finally, in Chapter Eight, the historical treatment of women's rights under law is reviewed. There, I find that while women have

made some legal and political gains over the past quarter century, there remains a veritable dearth of rights discourse concerning the pregnant body specifically. Those rights that have been afforded pregnant women, I argue, have concentrated predominantly on making women seem more like men rather than on enhancing pregnancy itself.

At the end of this chapter I conclude that while liberal theory in some ways actually generates fetal personhood, by definition, it also makes the construction of the pregnant woman as a person virtually impossible. Furthermore, it also means that as the fetus gains political status and thus power, women, who have struggled for years to achieve equality to men, must now turn their attention to achieving equality with their fetuses. The irony, I argue, is that liberalism has no mechanism for allowing fetal protection in a way that will satisfy both the "rights" of pregnant women and the needs of fetal "persons."

Finally, I would like to note that the substance of this project is both professional and personal to me. As a political theorist and legal scholar, understanding the relationship of pregnancy to both politics and law was the most exciting project I could have chosen. On the other hand, as a person who lives as a woman in this culture, the implications of court-ordered caesarean sections and other mandated interventions into the bodies of pregnant women

offer a frightening specter. Women continue to struggle, evidently only marginally successfully, to overcome the idea that our bodies are culturally and politically permeable. Until we have achieved that recognition, women generally can not sleep well at night, and, given the outcomes of challenges to their rights in the name of fetal protection, pregnant women should not sleep at all.

But this project has another important feature for me as well. And that is the opportunity to actually consider the implications of pregnancy -- with all its incumbent parts. As I noted at the outset, pregnancy has gone virtually untheorized to date. A handful of feminist scholars have played around with the role pregnancy plays in the political disempowerment of women, but only a few have examined pregnancy itself.⁵ This is so, I suspect, because feminists, like most other thinkers, historically included pregnancy as a natural event and thus thought it outside political theory. Additionally, a number of internal feminist controversies, particularly between cultural feminists and liberal feminists, have made questions of reproductive identity very difficult topics for professional

⁵ In addition to Beauvoir, see for example the works of Shulameth Firestone, Mary O'Brien, Iris Young, Kristin Luker, Rosalind Petchesky. See also a handful of feminist science fiction and/or utopia writers including Charlotte Perkins Gilman, Marge Piercy, Margaret Atwood, and Joanna Russ.

conversations. And finally, because of the abortion debate I suspect, most feminists have found it (perhaps unconsciously) strategically important to exclude questions about the fetus from view. As it has evolved, the abortion debate has divided many thinkers into two discrete camps -- the pro-choice side which sees only the pregnant woman, and the pro-life side which seeminly sees only the fetus -- and the result has been a failure by feminist philosophers to really tackle the numerous questions posed by fetal being. While this work does not aspire to any kind of full explanation of these issues, it does provide an opportunity to begin to examine them anew. That contribution in itself was enough incentive to undertake what has often been a rather taboo path for young feminist scholars to embark upon.

Chapter II

Framing the Fetal Rights Crisis

**The most dangerous place to live in America
is in a mother's womb.⁶**

As noted in the introduction, Simone de Beauvoir paints pregnancy as a kind of antagonistic relationship -- one in which the fetus and the pregnant woman vie for physical resources and political identity. In her interpretation of pregnancy, the fetus 'wins', at least in some measure, when pregnancy ultimately renders the pregnant woman "nothing" in the world. This is true despite the fact that the conflict between the pregnant woman and the fetus remains internal to the pregnant body, exclusive of the outside world, save for its representation by the pregnant woman herself.

This chapter will trace how this internal battle of pregnancy has recently become manifest as a public reality for women in modern America. In this new incarnation, however, the conflict between the identities of the pregnant woman and the fetus are no longer contained simply within the pregnant body; today, such conflicts have been removed

⁶ Bumper sticker seen in Virginia, 1994. Harbor Coast Gifts, manufacturer, 1989.

to the American court systems and surgical units of hospitals, where judges, hospital administrators and physicians decide who's interests and who's "rights" will be paramount at moments of conflict. The "annihilation" of a woman through her pregnancy, as depicted by Beauvoir, has become a reality through the legal annihilation of the rights of pregnant women in service to their fetuses. While, even one instance of this kind of invasion of pregnancy would be alarming and worthy of study, the fact that such practices are growing increasingly common indicates a burgeoning crisis in our understanding and treatment of pregnancy.

This chapter examines recent instances when judges, lawyers, medical professionals and other parties tertiary to pregnancy have inserted themselves between the pregnant woman and the fetus. These third parties are inclined to find women incapable of realizing successful pregnancies and thus feel justified in substituting their own judgements about what should be done to protect and nurture developing fetuses. In a growing numbers of cases the courts have opted to protect the "rights" of the fetus over those of the pregnant woman.

This chapter will proceed by first tracing the emergence of the pregnant-woman/fetus conflict as it was born in the abortion rights controversy. From there, court-

ordered medical interventions will be examined. This will be followed by an examination of the variety and complexity of judicial punishments and actions that have been levied against pregnant women with the aim of protecting their fetuses. The chapter will conclude with a discussion of how further developments in fetal "treatments" will inevitably lead to further demands for fetal "rights" protections at the expense of pregnant women.

A Crisis is Born: the Abortion Conflict

The initial crisis between the interests of the pregnant woman and the perceived interests of her fetus entered the political arena not from the side of the fetus, but rather from the side of pregnant women, who claimed that laws which outlawed abortion violated their liberties or rights to privacy, autonomy, and/or bodily integrity. Laws prohibiting abortion had sprung up historically, not in response to a wide-spread pro-fetus political movement, but rather in response to a medical community concerned both with enhancing its own status as a "profession" and with the dangers pre-technological abortions posed to women's health. (Luker, 16-27) Occasionally, arguments for protecting fetal life have been voiced throughout western history, primarily on religious grounds, but such arguments were, by and large, subordinate to a wider discourse about protecting the health of women who might seek an abortion.

The late sixties and early seventies marked the second of two periods in American history when women made concerted efforts to cash in on the equality promissory notes offered them, at least theoretically, at the time of an American political culture that had been strongly shaped by liberal theory. The first period, spanning the time from the turn of the century to the 1920's, had been occupied with the successful demand for women's suffrage. The second wave, however, made greater and more varied demands of a liberal American political system. Empowered by the language of equality, women began to demand equal protection before the law and equal treatment in the workplace. Succeeding in these demands required overcoming the millennia old perception that women naturally inhabit a separate (and private) sphere from men. Echoing traditional liberal arguments, which denied the significance of bodily differences for determining one's equal political stature with others, women forced American political culture -- a political culture still heavily mired in patriarchal constructions of sex differences -- to face the contradictions manifest in its treatment of women.

As women's lived experiences increasingly denied the validity of 'separate spheres' ideologies, justifications for unequal and differential treatment dissolved. Women demanded parity across a variety of conditions, including

work, education, economic power, political access and personal security. They did so on the grounds that "womanhood" was no longer sufficient justification for excluding them from public life and political rights.

Historically, however, the idea of "equality" had had a strongly masculinized character to it. Answering the question "To what are women demanding equality?" was the unspoken reply, "To men of course." Thus making demands for equality meant couching them in terms that could be translated into or analogized to a masculine yard stick with which to measure equal treatment. Such demands, if made cognizable to male experience, were more likely to be successful. The idea of equal pay for equal work, for example, is a concept with which men could readily identify.

It was thus only possible to make women's claims to equality seem "rational" when they were expressed in the familiar language of a masculinized discourse of liberal values and ideals.

Abortion, however, proved to be the first completely "womanly" challenge to traditional political authority on liberal grounds. For the first time women were demanding recognition and protection for a distinctly "female" liberty -- the liberty to be or not be pregnant.⁷ This demand,

⁷ Contraception is often thought to be the first instance of women demanding rights peculiar to "womanhood."

ultimately made before the historically all-male panel of the highest court in America, proved deeply troubling to the justices. As with the equally troubling decision the Court faced in the famous civil rights case, *Brown v. Board of Education*⁸, it took reargument and two years of deliberation for the Court to produce its final decision in the landmark abortion case, *Roe v. Wade*.⁹ In *Roe* the Court specifically addressed the question of abortion rights for women -- rights that are, in point of fact, peculiar only to women.

On the surface, the obvious issues facing the Court were the questions of the life of the fetus and whether or not a woman has a constitutionally protected right to an abortion. Underlying the question of the abortion right, however, was the more subtle issue of translating a woman's experience into something cognizable by the all-male Court.

The Court, like much of the country at that time, could not comprehend a *liberty* to abort. It did not seem like other liberties; for example, the liberty to speak freely. This may be because a claim to liberty in this guise was foreign

However, in the case of contraception, the Court's concern for birth control could be generalized to both women and men. As a result, I credit the abortion question as being the first to trouble the courts specifically with regard to women's control over their bodies.

⁸ *Brown v. Board of Education of Topeka*, 347 US 483 (1954).

⁹ 410 U.S. 113, (1973).

to the experience of the historically all-male bench. In its deliberations, and as it drafted its opinion, the Court struggled to find something in the male experience to which it could analogize the problem of pregnancy.

Ultimately, the U.S. Supreme Court settled on the idea of "privacy" as the value at issue in the *Roe* decision; a value with which men certainly could easily identify. The concept of individualized privacy is in fact a fundamental concept in the theory of liberalism. The very idea of having one's own "rights" that create the separations between persons is the hallmark contribution of liberal theory to Western political thought. Indeed, liberalism assumes that individual persons are defined by their particular and private physical selves. Moreover, the influence of liberal theory is clearly evident in the Framers' construction of the *Declaration of Independence*, the *Constitution* and the *Bill of Rights*. The Court's decision to structure the *Roe* case around the values of privacy thus seemed remarkably reasonable at the time. In the Court's thinking, what a woman does in her pregnancy takes place in the private realm and is thus not the business of the government.

Use of the privacy argument simultaneously allowed the Court to dodge the question of whether or not women actually have a "right" to abortion. By submerging this question

within the then-novel idea that women have a right to privacy, the Court avoided having to deal with the perplexing problem of understanding and/or recognizing rights that might be gender specific.

Furthermore, the Court was also able to derive a solution in the *Roe* case, at least in part, by dodging in part and reconciling in part the question of the status of the fetus. The State of Texas and their amici argued strongly that the fetus is both a human life and a person with rights in need of state protection against women who would abort. Circumventing the implications of this argument required that the Court actually erase the fetus politically through a judicial denial of its Constitutional status as a person.¹⁰ Once the fetus was denied the political power that comes with personhood, the Court could deny it any commensurate political protection.¹¹

Furthermore, erasure of the fetus, at least as it is relevant to the question of abortion, also allowed the Court to transform the abortion question from a problem about

¹⁰ *Roe v. Wade*, 156-162.

¹¹ It is important to note (and this point will be taken up much later in this work) that the Court found itself waffling, however, on the question of what happens as the fetus becomes "more like" a person as it progresses toward the end of the pregnancy. As the Court notes, a state's interest in protecting a "potential life" becomes more manifest toward the end of the pregnancy. (162-5)

being pregnant into a problem about trying to be *not* pregnant. And since unpregnant people more readily fit the traditional liberal model of masculine, rational individuals, and therefore seemed more familiar to a yet heavily patriarchal Court and culture, the Court felt comfortable awarding privacy rights for women that would make them seem more like men.

The recent emergence of the broader fetal rights debate, however, poses more difficult questions to the Court. Here, the fetus can not be erased as easily as the Court's treatment of abortion allowed. Rather, the very problem at issue in these new "fetal rights" cases is how to *sustain* and *nurture* the fetus; such fetal "care" is increasingly being solicited from the courts by parties outside of a pregnancy. The basic axiom of liberal theory is that to confer rights is to recognize the autonomy, independence and free exercise of one's will without the intrusion of others. In the case of the fetus, however, the courts must decide how it is possible to do so in the context of pregnancy, where the exercise of fetal rights is frequently incommensurable with the exercise of the pregnant woman's rights. In the case of the provision of medical treatments against the will of the pregnant woman, there is a growing body of case law which illustrates the courts' struggle with this conundrum.

Forced Medical Treatment

The explosion in medicine that has brought us visually and experientially closer to the fetus has also brought new medical therapies and treatments to improve fetal being. Doctors today are proposing and experimenting with amazing remedies to aid the health and quality of life of the developing fetus. Physicians are increasingly able to point to a growing list of anecdotal successes across a number of therapies for treating fetal "ills." (Flannery, 579-584) As a result, physicians, driven by an ethos defined by the Hippocratic Oath, which compels them to do what they can to preserve life, (Solomon, 427) and pushed by the fear of malpractice suits, often translate their *ability* to treat a problem into an *imperative* to do so. (Phelan, 471-472; Kolder, 1194-1195; Nelson, 713) When a pregnant woman refuses treatment for her fetus, some doctors and/or hospital administrators have turned to the courts for the power to make her comply. (Phelan, 473-474; Kolder, 1193)

Court-ordered medical treatments for pregnant women have about a thirty year history. As early as 1964 courts ordered blood transfusions for pregnant women in two separate cases. Physicians in both cases argued that the transfusions were necessary in order to save the lives of the fetuses at issue. Both women had declined the

transfusions on religious grounds.¹² Since then the list of medical procedures courts have ordered pregnant women to undergo in order to protect their fetuses has grown to include cerclage (requested by the father of the fetus),¹³ insulin injections,¹⁴ transfer from one hospital to another,¹⁵ hospital detention,¹⁶ blood transfusions for both

¹² *Raleigh Pitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964) and *Application of the President and Directors of Georgetown College Hospital*. 331 F. 2d 1000 (1964), as cited in Kolder, 1194-1195.

¹³ Cerclage is a procedure to suture the cervix to enable the pregnant woman to retain a pregnancy. *Taft v. Taft* 388 Mass. 331, 446 N.E. 2d 395 (1983). The trial court judge granted the order, which was later overturned by the Supreme Judicial Court of Massachusetts on the grounds that in this case the state did not have interests compelling enough to "justify curtailing the wife's constitutional rights." (446 N.E. 2d at 397) Some commentators note that the judge left the door open for future cases in which the state's interest could be construed as compelling enough. What is more, the court declined to comment on the validity of the father's actions. (Solomon, 423 & n76-79)

¹⁴ *In re Unborn Baby Wilson*, No. 81-108 AV (Mich. Ct. App. March 9, 1981).

¹⁵ *Petition For Emergency Protective Services at 2, In re Walters & Unborn Fetus*, No. 52658 (Md. Cir. Ct. Jan. 12, 1990). Woman was in premature labor and did not want to be transferred to a hospital a great distance from her home and family. (as cited in Goldberg, n 156.)

¹⁶ *In re Steven S.* 126 Cal App. 3d 23, 178 Cal Rptr. 525 (1981) in which a woman was held in a psychiatric hospital until she gave birth; and see also, (Kolder, 1195) in which a young Wisconsin girl was held in against her will because she "tended to be on the run" and "lack motivation or ability to seek prenatal care." Court

pre-viable and viable fetuses¹⁷ (see also, Rhoden, 1959) and court-ordered cesarean sections. (Kolder, generally)

Work by Kolder, Gallagher and Parsons found that in 24 states and the District of Columbia, during a five year period, representatives at hospitals specializing in maternal-fetal care had sought legal recourse 42 times to overrule pregnant women's refusals of treatment. (1192) In addition to these cases, Kolder notes that a number of documented cases of forced cesarean sections were not reached by their research design.¹⁸ The interventions their research did discover, however, included cesarean sections, blood transfusions to either the fetus or the pregnant woman and hospital detention of the pregnant woman. At least 17 of these cases resulted in enforcement of court-ordered treatment.¹⁹ (1193-1194) Eighty-one percent of the women targeted for such legal actions were women of color and

imposed cesarean sections may also require physical restraints.

¹⁷ See e.g. *In re Jamaica Hosp.*, 128 Misc. 2d 1006, 491 N.Y. S 2d 989, 899 (Sup. Ct. 1985). Court-ordered blood transfusion for woman 18 weeks pregnant.

¹⁸ See for example, *Taft v. Taft*, 388 Mass. 331 (1983).

¹⁹ It is unclear how many total procedures were ordered and enforced because Kolder et al. excluded a number of cases that involved either maternal blood transfusions or treatment given after delivery. Additionally, it is not clear whether they include six cases of enforced court orders that were reported to them second hand from other facilities. (1193-1194)

twenty-four percent of the women did not speak English as their primary language. (1193)

Court-ordered medical intervention can be delivered only upon the woman's submission to the Court's demands or through the violent violation of her body. Gallagher (10) recounts the painful experience of one woman forced to undergo a cesarean section:

In 1984, in Chicago, a Nigerian woman expecting triplets was hospitalized for the final period of her pregnancy. The woman and her husband steadfastly reiterated their unwillingness to consent to the Caesarian section that doctors regarded as necessary for a safe multiple birth. As the woman's due date approached, doctors and hospital legal counsel obtained a court order granting the hospital administrator temporary custody of the triplets and authorizing a C section as soon as the woman went into labor....

Eventually, in the face of the C section, the husband was forcibly removed from the hospital, the woman was strapped down, anaesthetized and a C section was performed on her body.

The triplets were born healthy and ultimately went home with the parents. The father committed suicide a few months later. (Kolder, et. al 1193)

As Rhoden points out, women refuse medical advice and treatment for a variety of reasons, including religious grounds, fear of surgery, or their own intuition that "things would be fine" if no drastic medical intervention is permitted. (1959-60) But typically, the courts have chosen to ignore virtually all arguments against forced medical

intervention made by pregnant women; choosing rather to side with arguments for fetal protections that must be carried out on or through the bodies of those pregnant women. In the face of the powerful condemnation and pressure brought to bear on pregnant women by both the judicial system and the medical profession, most women in these cases have ultimately surrendered to the treatment demanded by their physicians in the name of fetal health. (Kolder, 1193)

In a few cases, however, women have stuck to their guns and held out against such pressure, appealing the lower court judges' decisions. In the few cases that have reached the appellate level to date, the courts' responses have been mixed. In 1981, the Georgia Supreme Court upheld a decision giving custody of a fetus *in utero* to state human resource officials and ordering a cesarean section against the wishes of the pregnant woman.²⁰ In another case, the District of Columbia Superior Court, in an unreported order in 1986, affirmed a decision empowering a hospital to perform a cesarean section in opposition to the pregnant woman's

²⁰ *Jefferson v. Griffin Spalding County Hospital Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981), as cited in *In re A.C.* 573 A.2d 1235 (D.C. App. 1990) at 1243. The woman left the hospital before the court directive could be carried out and subsequently delivered a healthy baby at home, despite earlier medical warnings that her condition of placenta previa (where the placenta prematurely pulls away from the uterus) was life threatening to both her and her fetus. (Flannery, 593)

refusal of treatment.²¹

Two other cases of court-ordered forced cesarean sections have risen to the appellate level thus far, the most recent one reaching even to the Supreme Court. In the first case, the District of Columbia Court of Appeals handed down a split decision in 1990 overturning the mandated cesarean section of Angela Carder.²² In 1987, a court-ordered cesarean section was performed on a then-terminally ill Ms. Carder in an attempt to save the life of her fetus.

Ms. Carder had earlier refused the surgery. Despite the fact that both Ms. Carder and the fetus died shortly after the procedure, her family appealed the case in her stead.

Many feminist legal scholars take heart at the higher court's decisions to overturn the recognition of fetal rights by their lower court brethren, believing that the judicial system has finally drawn a line at this kind of forced treatment. (Daniels, 49-50) They note, for example, that majority opinions²³ stress things like "the patient's wishes, once they are ascertained, must be followed in

²¹ *In Re Madyun*, 114 Daily Wash L Rptr 2233 (DC Super Ct July 26, 1986).

²² That same court had refused the opportunity to stay the order mandating the cesarean section while Ms. Carder was still alive. *In Re A.C.* 573 A.2d 1235 (D.C. App. 1990 at 1237).

²³ *In Re A.C.*, 573 A.2d. 1235 (D.C. App. 1990).

virtually all cases, (1249) unless there are truly extraordinary or compelling reasons to override them."

(1247) In these decisions, the Court bases its opinion on the woman's rights to bodily integrity, to accept or forgo medical treatment, and on the determination that her wishes have been fully recognized, either because she is found to be competent or because the court has accurately expressed her wishes through substituted judgement. (1247)

Daniels argues that the appellate court decision in the Carder case signals a "turning point in the cases involving the right to bodily integrity" that are arising in the forced medical treatment cases. (49) I would argue, however, that there are a number of factors that, when taken into consideration, make the Carder decision less of a watershed moment in fetal rights case law than she asserts.

First, I would suggest that the reading Daniels and others give to the Court's decision in *In re A.C.* is done with a somewhat wishful eye. The Supreme Court in this case specifically declined to discuss the lower court's finding that the state's interest in A.C.'s fetus was compelling and therefore merited the forced medical procedure. (1252) A close read of *In re A.C.* reveals that the case turned more on the question of Carder's competency (not as a pregnant woman, *per se*, but rather because of her compromised health condition due to the fact that she was terminally ill with

cancer) and the problem of substituted judgement than it did on the explicit conflict between the pregnant woman and the fetus. Additionally, the Court's choice of language when it says that there may in fact be circumstances when "truly extraordinary or compelling [state] reasons to override" the wishes of the pregnant woman are conceivable, establishes a veritable barn-door-sized invitation for future challenges, as intimated by both the majority itself (n23) and by the dissenting judge in the case. (1256-1257, Belson dissenting)

What is more, to take heart in the majority's decision is to grossly underestimate the cumulative power of cultural exposure to fetal imagery and the political discourse of fetal personhood that will be addressed below. For example, Judge Belson grounds his dissent in *In re A.C.* on the personhood of the fetus at issue. Arguing that the "unborn child's and the state's interests are entitled to substantial weight" (1254) when balancing the interests of the pregnant woman and the fetus, Belson makes it clear that he perceives the fetus as a "child" (1255) with numerous and compelling rights. (1254-1258) In fact, Belson goes so far as to describe the fetus as a "captive" within the pregnant body and argues that the pregnant woman's rights can be compromised because she elected to carry the pregnancy. (1256) In his reading, the fetus is indeed a tiny person, entitled to the protections of law and respect for its

rights, e.g. the right to life.

The second note of caution I would make in response to enthusiasm for the decision in *In re A.C.* deals with the question of court exposure to fetal imagery. How lower courts and higher courts are sensitized to the fetus are markedly different. This is so because the jobs of trial courts and appellate courts differ dramatically. Trial court judges are the triers of fact. Thus they are inevitably exposed to all of the flotsam and jetsam of a case submitted before them by the parties (and their attorneys) at issue in a case. Appellate court judges, on the other hand, are supposed to make decisions about how the law was applied by the lower court. Consequently, they are not so directly exposed to whatever evidence may have been submitted to the court below.

In cases where courts are required to make specific decisions about fetuses, e.g. whether or not they are "persons" and therefore have rights that the Court must defend (predominantly against the pregnant woman of whom it is a part), the trial court judge is much more likely to be exposed, both visually and rhetorically, to evidence that could influence his or her perceptions of the fetus. Given this, it is not surprising, for reasons that will be explicated in the next two chapters, that trial court judges are more inclined than their higher court siblings to find

the fetus a person and thus give great weight to protecting it against potential harms from the pregnant woman.

Appellate court judges, on the other hand, look only at what prior precedent has held about the status of the fetus under law. Given the Supreme Court's ruling in *Roe* it is not surprising that at the appellate level, to date, judges continue to exclude the possibility of fetal personhood. If Judge Belson's argument is any indication, however, it is clear that what I will assert later on is a widespread cultural shift in our understanding of the fetus is reaching into the chambers of appellate courts as well. As such a shift occurs, the Court's ability to re-envision the fetus, and thus overturn its as-yet shaky precedential holdings on this question, may easily erode in favor of robust protections for fetal persons.

Moreover, it should be noted that a number of politically conservative appellate court justices were appointed during the Reagan and Bush presidential administrations. As Luker's work, *Abortion and the Politics of Motherhood*, clearly illustrated, conservatism is closely associated with support for fetal personhood and rights. Thus, it would seem reasonable to anticipate that even high court judges may increasingly "see" the person in the fetus.

Unlike previous cases, the most recent request for a

court-ordered caesarean section to rise to the appellate level following *In re A.C.*, did in fact reach the Supreme Court. In this case, the Cook County Prosecutor in the state of Illinois and the county's Public Guardian asked the court to order the medical procedure for a woman who, for religious reasons, declined to have her 8-month pregnancy delivered early by caesarean section. The county prosecutor argued to the local court that the woman was endangering the fetus and that it was their job to protect it."²⁴ In addition to arguing that the Court impose the surgical procedure, the county prosecutor also suggested that the woman be fined following the birth for refusing the lower court's order. A hospital representative noted, when interviewed, that it was remaining "neutral" in the case. "On the one hand the hospital has an obligation to the mother. But we feel we also have an obligation toward the fetus."²⁵ The lower court denied the request without a hearing, as did the Illinois Appellate Court. When brought to the Supreme Court, that court also refused to hear the

²⁴ Don Terry, "Newborn Settles Caesarean Fight a Mother's Way," *New York Times*, Friday, December 31, 1993, A12.

²⁵ Don Terry, "Legal Fight Over Caesarean Pits Mother Against Fetus," *New York Times*, Wednesday, December 15, 1993, A22.

case.²⁶

Because the courts all the way up to and including the Supreme Court refused both to order the procedure or to hold hearings on the matter, the precedential value of this case is negligible. Without actual judicial reasoning, and in light of what I argued above, this decision, like the Carder decision, does not signal the Court's final position on the issue.

Furthermore, most forced treatment cases are decided by local judges in hurried hearings and are instigated by physicians, hospitals and family members because of an emergency threatening the life and well-being of the fetus. (Kolder, 1195-6) But these "threats" to the fetus are detectable because of the same technological advances that also make the fetus knowable. As therapies like fetal surgery become more routine, one can only wonder at the future pressures women will face to comply with even more invasive medical procedures. Some physicians indicate that despite the ruling in *In re A.C.*, liability issues and concern for their "second patient" may oblige doctors to increase their demands for court-ordered therapies. (Phelan, 485-488)

Even more concerning, perhaps, is the fact that

²⁶ "High Court Refuses to Hear Illinois Case Involving Caesarean," *New York Times*, December 19, 1993, 35.

Kolder's recent survey of physicians at maternal-fetal care centers found that 46% of the doctors questioned "thought that mothers who refused medical advice and thereby endangered the life of the fetus should be detained in hospitals or other facilities so that compliance could be ensured." Forty-seven percent said that the "precedent set by the courts in cases requiring emergency cesarean sections for the sake of the fetus should be extended to include other procedures that are potentially lifesaving for the fetus, such as intrauterine transfusion, as these procedures come to represent the standard of care." And in perhaps the most shocking finding, 26 percent "advocated state surveillance of women in the third trimester who stay outside the hospital system." (Kolder, 1193-1194) As one fetal-maternal specialist summed up his thinking about forced care after reviewing the decision in *In re A.C.*,

If medical probability indicates that the fetus will die or become permanently brain damaged because of the maternal refusal of treatment, the state's interests in the integrity of the medical profession, the preservation of life and the protection of innocent third parties are sufficiently compelling to remove the maternal abdominal wall as a barrier to fetal health care. (Phelan, 490; my emphasis)

Physicians aren't the only one's impinging on women in an effort to manage their pregnancies, however. As noted earlier, in *Taft v. Taft*, the biological father of an early term fetus was granted a court order forcing his wife to

undergo "purse string" surgery to sustain her pregnancy.²⁷ Noting that the Supreme Judicial Court of Massachusetts ultimately overturned that decision, one commentator argues strongly that legal recognition of fetal rights provides a rational for court-ordered medical interventions to ensure the biological father's interests in the fetus. Says Kevin Apollo ominously:

In the context of forced medical treatment, the biological father's interest in post viable fetal life should subordinate a woman's constitutional right to privacy. The biological father could require a pregnant woman to bear an increased health risk, through forced medical treatment, until the point when abortion becomes necessary to preserve the life or health of the mother. Moreover, the father's right to compel medical treatment can coexist with the right to abortion prior to viability. The father, therefore could force a pregnant woman to submit to nonconsensual medical procedures designed to sustain fetal life before the point of viability so long as the mother's fundamental right to abortion is not endangered. (219)

Concerns about fetal healthcare and fetal rights that demand the abrogation of the rights and interests of pregnant women are not confined to doctors and family members, however. Where ever there is a perceived "threat" to the fetus by the pregnant woman, people are demanding legal action be taken against pregnant women for inflicting "fetal abuse." As the next section will illustrate, courts are often finding pregnant women criminal in their actions

²⁷ Supra at note 11.

and liable for damages to their fetuses in cases involving a woman's use of drugs, alcohol or other medically controversial life-style choices during pregnancy.

The Social Construction of "Fetal Abuse": Drugs, Alcohol and Lifestyle Choices

Harm by one person of another is considered "abuse" in the legal model. Use of illegal and legal drugs, alcohol and lifestyle decisions on the part of a pregnant woman all have the potential to harm her developing fetus. For those who perceive the fetus as a tiny person, when a pregnant woman engages in activities that can endanger fetal development, she is committing "fetal" or "child abuse." As with the abuse of born children, the courts have been ready to intervene on behalf of the threatened fetus, and with good reason.

There are compelling reasons for wanting to do something to dissuade pregnant women from using legal and illicit drugs, consuming alcohol, smoking cigarettes or engaging in behaviors that can threaten a developing fetus.

Babies born to drug-using women, for example, can suffer from withdrawal and devastating physical and mental maladies, and as many as 11% of America's babies are now born to women who used drugs while pregnant. (Glink, 533; Weiss, 472-3; and Romney, 328) Fetal Alcohol Syndrome (FAS)

has been well documented for babies born to women who drink significant amounts of alcohol while pregnant.²⁸ In fact FAS "is the third leading cause of mental retardation following Down's syndrome and spina bifida." Fetal Alcohol Syndrom children often suffer from low birth weight and poor intellectual development. (Kennedy, 557-558) Other research suggests that babies born to smokers are much more likely to suffer low birth weight and other physical and developmental problems than are those born to women who do not smoke while pregnant. (D. Condit, 1995) And finally, the course of each pregnancy is idiosyncratically influenced by how the pregnant woman lives through her pregnancy, day to day. For example, how much sleep she gets, how she eats, how much she exercises, her age, etc. As the fetus is increasingly perceived as warranting protection from a wide range of possible harms, including potential harms induced through the actions and choices of pregnant women, the only recourse for parties outside the pregnancy will be to turn to the law for relief. (Romney, 326; Glink, 538)

The earliest cases of prosecution for fetal abuse and neglect stem from cases surrounding illegal drug use. All of these early cases were dismissed by the courts because judges did not agree with the prosecutors that the fetuses

²⁸ "Use of Alcohol Linked to Rise in Fetal Illness," *New York Times*, Friday, April 7, 1995, 1.

were "children," and thus charges of abuse and neglect were not applicable. A 1977 case, for example, *Reyes v. Superior Court*, involving charges of felony child endangerment, was dismissed on such grounds. A 1980 case prosecuted against a woman for neglect because her baby exhibited symptoms of drug withdrawal within 24 hours of delivery was dismissed because the actual delivery of the drug had occurred while the fetus was *in utero*, and thus not yet a person, according to that court.²⁹ (Barrett, 233) Despite the final disposition in this case, however, the woman lost temporary custody of her child as a result of the charge.

In an attempt to circumvent the statutory wording that keeps prosecutors from being successful in these cases law enforcement agencies have sought to expand the nature and scope of the charges they impose on pregnant women. Pamela Stewart, for example, was arrested in 1986 on charges of contributing to the death of her child following its brain-dead birth. (Glink, 536) The charges against her included ignoring her doctor's orders to remain in bed and to abstain from sexual intercourse; failing to return to the hospital immediately if the bleeding she had been experiencing in the last weeks of her pregnancy recurred; and use of a controlled substance (marijuana) on the day before she

²⁹ *In Re Baby X*, 97 Mich. App. 111, 293 N.W.2d 736 (1980).

delivered. (Barrett, 229-230) The court ultimately rejected this approach, arguing that Florida's laws did not allow for such a definition of child abuse.

Since that time, however, the courts have begun to change their understanding of "child" and some legislatures have specifically amended the language of the law to include fetal abuse. As a consequence, women are being convicted of abusing their own fetuses. Jennifer Johnson was convicted in 1988 of delivering cocaine to her twins through their umbilical cords. The court gave her a fifteen year sentence, which included one year of supervised custody and fourteen years of probation. She was required to go to a drug rehabilitation program, do community service, obtain her high school equivalency certificate, abstain from all controlled substances and alcohol, stay out of bars unless given permission by her probation officer, and were she to become pregnant again, she was required to enter an approved prenatal program. (Moss, 280 -281) Regardless of the outcome of her appeal, Johnson served a minimum of four days in jail following her arrest. (Glink, 537)

Pregnant women suspected of drug use have faced a host of other criminal prosecutions, including, criminal neglect³⁰ and felony use of a controlled substance and

³⁰ *People v. K.H.*, No. 89-2931-FY (Mich. Dist. Ct., Muskegon County arraignment on Nov. 12, 1989) as cited in

misdemeanor child abuse. (Moss, 285 at n43) As a result of these charges they have been incarcerated (Moss, 285), lost custody of other children (Romney, 325-326), and lost custody of their newborns. (Chavkin, 110) Between 1987 and 1991, 19 states and the District of Columbia brought more than 50 charges against women suspected of illegal drug use during pregnancy. (Romney, 326) The rationale was to protect the fetus but the means imposed to do so were punitive for the pregnant women involved. The efforts of these courts to control the behaviors of pregnant women have not been confined to cases in which illegal substances were at issue, however. Pregnant women have also been prosecuted or found liable for consuming legal and prescription drugs like alcohol and antibiotics.

A Wyoming woman was charged with child abuse because she drank an alcoholic beverage when she was four-months pregnant.³¹ The charges were ultimately dropped by the judge because the prosecutor could not prove injury to the fetus, which "was unavailable for examination." (Solomon 416) In another case, however, an infant was declared neglected because its mother drank while pregnant. The

Moss at 284 and n37.

³¹ *New York Times*, Jan 22, 1990, at B8, Col.6. (As cited in Solomon, 416.)

charge was used to remove the child from her custody.³²

Still another woman temporarily lost custody of her son after being charged with prenatal child abuse based solely on her conduct during pregnancy. A news report described the testimony against the woman as charging that she had "paid no attention to the nutritional value of the food she ate during her pregnancy -- she simply picked the foods that tasted good to her without considering whether they were good for her unborn child." (Johnson, D. 261) And in the late eighties, a Michigan woman was charged with child abuse and temporarily lost custody of her infant because she had taken Valium while pregnant to relieve pain from injuries she suffered in a car accident.³³

In addition to criminal charges, women are facing liability suits for their behaviors during pregnancy. In a 1993 decision, *Andre Bonte f/n/f Stephanie Bonte v. Sharon Bonte*,³⁴ the New Hampshire Supreme Court held that "a child born alive could sue its mother in negligence for injuries suffered by the child *in utero*."³⁵ The child's mother,

³² *In re Danielle Smith*, 128 Misc. 2d 979 (N.Y. Fam Ct., 1985), (as cited in Gallagher, n164).

³³ *In Re Jeffrey*, No. 99851 (Mich. Ct. App. filed Apr. 9, 1987), cited in Johnson, D. 261.

³⁴ No. 91-461 (H.C.S.C., N.H. October 30, 1992).

³⁵ Griffith, John P. esq, Helen G. Honorow, esq., Gary F. Karnedy, esq., "After *Bonte*: What is Reasonable?" New

while pregnant, was struck by a car while taking a walk. Her fetus was delivered immediately by emergency caesarean section, though the resulting baby suffered severe brain injuries and disabilities.³⁶ In another case, a woman was sued by her child for taking tetracycline during pregnancy.

Her child was later born with discoloration of the teeth that was alleged to be attributable to the use of the antibiotic during pregnancy.³⁷ Cases like these suggest that the list of potential tort and criminal rulings intended to protect the fetus may be endless. As Johnson suggests, in the future,

A woman could be held civilly or criminally liable for fetal injuries caused by accidents resulting from maternal negligence, such as automobile or household accidents. She could also be held liable for any behavior during her pregnancy having potentially adverse effects on her fetus, including failing to eat properly, using prescription, nonprescription and illegal drugs, smoking, drinking alcohol, exposing herself to infectious disease or to workplace hazards, engaging in immoderate exercise or sexual intercourse, residing at high altitudes for prolonged periods, or using a general anesthetic or drugs to induce rapid labor during delivery.
(604)

Pregnant women engage in all sorts of behaviors that could potentially, though unwittingly, damage their fetuses,

Hampshire Bar Journal, March, 1993, 47.

³⁶ Griffith, 47.

³⁷ *Grodin v. Grodin*, 102 Mich. App. 396 (1980).

from walking, to flying to changing their cat boxes. (Weiss, 475) Results of a recent study done at Boston University even found that "Surprisingly low doses of vitamin A -- as little as the amount contained in two or three multivitamin pills -- may increase the risk of birth defects when taken early in pregnancy."³⁸ Thus even behaviors that have historically been alleged to be healthful for women during pregnancy, like taking vitamins, could now be used to prove women negligent in cases where children are born with birth defects or other problems. While one woman was prosecuted for "neglect" because she ate only what she wanted to, at least one pregnancy book recommends pregnant women with morning sickness should indeed "eat only sweet foods if they're all you can abide." (Eisenberg, 106) Evidently, however, the numerous contradictions inherent in the medical treatment of pregnancy have apparently not stopped the swelling impulse to hold women liable for problems that might arise later as a consequence of such seemingly innocent and unwitting actions. What is so concerning is that when examined critically, it becomes apparent, both through logical reasoning and through examining the court records, that the 'threats' a woman may pose to her fetus while pregnant are endless, from nutritional failures,

³⁸ "Vitamin A. May Harm Early Fetus," *Richmond Times Dispatch*, Saturday, October 7, 1995, 1.

(Johnson, D. at 261) to walking, to cleaning house (Oakley, 93; DiJoseph, 87-89), to failing to have genetics testing and possible deformities corrected (Tucker, 675).

Finally, these problems may not stop at a woman's behavior while pregnant, however: control of her lifestyle decisions may eventually precede her conception. Some states have allowed recovery for damages that occurred due a third party's negligence prior to conception. (Osowski, 174)

In one case, a young woman recovered for injuries caused by a negligent blood transfusion to her mother prior to her conception, on the grounds that the girl would one day want to have children.³⁹ In a similar case, the court acknowledged a cause of action for an infant who was brain damaged as the result of a negligent caesarean section for an older sibling that was performed on his mother two years prior to his birth.⁴⁰ Parent-child immunity, the legal standard that has historically provided a protective shield for women, is thus eroding rapidly, and thereby creating an open invitation for pre-conceptual suits between women who may one day become pregnant and their future fetuses. In this way, women may be liable for things they did to their

³⁹ *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250, 1258-59 (Ill. 1977).

⁴⁰ *Bergstresser v. Mitchell*, 577 F.2d 22, 26 (8th Cir. 1978).

bodies prior to ever thinking about conceiving.⁴¹

This hyper-sensitized, medical-model approach to pregnancy may, in fact, be causing a kind of cultural hysteria about potential harms to fetuses caused by pregnant women. The recent attention paid culturally to fetal alcohol syndrome, for example, is restricting women's freedom culturally. As Susan Bordo reports, in March, 1991, "two waiters were fired from their jobs when they tried to persuade a nine-months-pregnant customer not to order a rum daiquiri because drinking alcohol could harm her fetus."

(82) As the next segment will demonstrate, there is a rising tide of concerned people that are suggesting that simply permitting courts to find women negligent is not enough. Like these two waiters, they are instead looking for more prophylactic protections for fetuses: that is, they are hoping to get to pregnancies and stop pregnant women before they engage in actions that could be potentially harmful to their fetuses.

Forced Prophylactic Care in the Interest of Fetal Protection

Arguments for prophylactic intervention on the part of the fetus are coming from a variety of fronts. For example,

⁴¹ This is an alternative to wrongful life suits. This also brings in the possibility of including men, which research now shows can have a big impact on healthy conceptions. See for example, "How Men Affect Their Babies," *Glamour*, August 1991, 196-233.

famed lawyer-turned-celebrity Alan Dershowitz, in his ironically titled book of personal musings about the state of public law in America, *Contrary to Public Opinion*, argues that

It is not enough to give the child, after birth, a legal claim against its mother for negligent or reckless maternity, as some have suggested. Something should be done to protect the fetus while it can still make a difference -- for instance, compelling expectant mothers to stop taking dangerous drugs or to accept transfusions on behalf of the fetus.⁴²

Dershowitz exhibits a strong impulse to continue to put pregnant women under the thumb of the courts to control their behavior while pregnant. A recent argument by Dr. Margery Shaw takes the fetal abuse/protection argument even further. She believes in

giving the courts the power to require women to undergo genetic counseling before conception, to follow medically recommended regimens during pregnancy, to undergo fetal therapy to benefit 'the would-be child' and even to abort a fetus diagnosed as having a serious, non correctable defect. (Jost, 87)

Shaw even gives specific instances when she would use the state to control the behaviors of pregnant women. For example, she argues that "women at high risk of having a child with a neural tube defect could be *required* to decrease that risk by taking folic acid supplements during the last two weeks of every *menstrual cycle*. (Gallegher, 44)

⁴² Alan M. Dershowitz, *Contrary to Popular Opinion*, New York: Pharos Books, 1992, 209-210.

Notice that I have emphasized that Shaw is imposing such regulation on *all* women of child-bearing physiology -- regardless of their intentions about becoming pregnant.

Shaw argues further that to insure against potential low birth weight for fetuses caused by moderate drinking (averaging one to two glasses per week) during conception and implantation, "Every woman should consider herself pregnant on the first day her period is due and avoid exposure to anything that has been implicated in birth defects," (Gallagher 44) and she also believes that "legal controls of maternal alcoholism, comparable to statutes prohibiting driving while intoxicated, should be considered." (Gallagher at n177)

This urge to use the strong arm of the state in an effort to control the outcome of pregnancy is being argued for in wider circles as well. Some authors have recently gone beyond even Dershowitz and Shaw in their responses to rising fears about fetal harm from pregnant women; they are arguing that prophylactic protections against women endangering their fetuses include forced c-sections and other medical treatments. Like Dershowitz, these legal scholars argue that prosecution and incarceration are insufficient for dealing with drug-using pregnant women because the woman is still "in control" of the fetus while it remains within her. But while Dershowitz would simply

incarcerate a pregnant woman to prevent her from getting access to alcohol or illegal drugs, these legal scholars argue that the logical solution is to simply remove the fetus from the woman's body. In this vein, at least one commentator has argued for the use of forced cesarean sections to do so. Forced cesarean section, says Flannery,

as an intervention for the protection of children facing the effects of the mother's drug abuse is now a possible option and will become a more probable one as the procedure becomes safer and the problem of gestational substance abuse grows worse. (597)

The title of Flannery's article sums up his perspective:

"Court-ordered Prenatal Intervention: a Final Means to End *Gestational Substance Abuse*." (519, emphasis added) For Flannery, the simplest solution is to surgically separate the pregnant woman and the fetus, thereby circumventing even the possibility of "maternal abuse" of the fetus.

As the drug problem is sold politically as a problem that is spiraling out of control, there is a corresponding rise in public support for incarcerating and controlling pregnant drug users as well. Bordo notes that on a recent *Oprah Winfrey* program about pregnant women who drink, the audience was overwhelmingly hostile to the idea that a pregnant woman would take even one drink during pregnancy. (82) Public responses like these are fueled by well known legal figures like Alan Dershowitz who call for further prosecutions and incarcerations of pregnant women.

As this cultural belief that pregnant women are incompetent to make decisions about their pregnancies grows, third parties look more and more like White Knights coming to rescue the poor, innocent victimized fetal people inside them. It creates an ethos that suggests that it is women who are the "barriers to fetal health." Consequently, the desire to control women's behavior during pregnancy expands correspondingly.

Ironically, despite popular support for prosecuting pregnant drug users, some research suggests that these kinds of prosecutions may have exactly the opposite effect of that which is intended; prosecutions of drug-using pregnant women may in fact drive them away from prenatal health care and drug treatment centers. (Moss, 295-296; Chavkin, 107) What is more, these prosecutions, like the forced medical interventions, disproportionately fall on the shoulders of poor and minority women -- the women least able to seek treatment or social support for their pregnancies and drug problems. (Moss, 294) Pamela Stewart, for example, was turned away from a prenatal clinic before her arrest for delivery an illegal substance to her fetus.

Implications and Justifications

It is clear from each of these cases that the courts are engaged in a delicate series of balancing acts between

the rights of pregnant women and "care" for the fetuses they carry. The courts are indeed balancing the idea that the fetus has a right to begin life with a sound mind and body⁴³ against the pregnant woman's rights to the privacy, autonomy and integrity of her body. Recognition of fetal rights, however, necessitates the recognition of a mother's legal duty to create the best possible prenatal environment.⁴⁴

One commentator describes this as a "trend toward preservation of fetal rights." (Gately, 320) Many commentators are even arguing for expansion of fetal rights through statutory language as well. (see generally, Osowski; Gately; Erb and Mortensen) Osowski asks the reader to consider either a "federal law which would focus on the rights of the fetus and control the actions of the state"; (2) or a Model Fetal Rights Act which would provide a holistic example for the individual state legislatures." (171-2)

Many people argue that once a woman "agrees" not to abort, and therefore to carry to term⁴⁵, she has a duty to

⁴³ *Stallman*, 125 Ill. 2d at 276, 531 N.E. 2d at 275-276.

⁴⁴ *Stallman* at 275-6, 531 N.E.2d at 359, as cited in *Trindel*, 747.

⁴⁵ There is an uncomfortably liberal cast to this argument. It presumes that pregnancy is a rational process and it also assumes that all women make the choice to keep the pregnancy, as though choice was really the problem for

do the best she can to provide the perfect pregnancy. And if she doesn't, third parties and courts are entitled to force her to. One commentator has argued that the courts impose a duty to care for the fetus upon the pregnant woman "as soon as the parents become aware of the pregnancy and decide not to terminate it." (Kennedy, 571) She argues further that it is because of the connection between the pregnant woman and her fetus that such a duty should be imposed. Says Kennedy,

Because of the integral role a mother's care of her body during pregnancy plays in fetal development, a woman's right to control her body ought to be restricted for the welfare of her child once the decision has been made not to abort. (573; emphasis mine)

The haunting specter of Margaret Atwood's *A Handmaid's Tale* lies just below the surface of such sentiments.

Demands like these to protect fetuses against pregnant women suggest a dramatic shift in how we perceive both pregnancy and pregnant women. As one commentator noted, in calling for increased legislation to protect fetuses, "[The] unborn child's health and safety remain almost exclusively within her [the pregnant woman's] control if state legislatures fail to pass laws that effectively protect the

most women. In a society that fails to support pregnant women generally, the assumption that woman makes such a choice and then can necessarily provide the best environment for her fetus is presumptuous at the least.

fetus....legislative and judicial bodies cannot afford to appear impotent when one *member of society harms another.*"

(Barrett, 230, emphasis added)

This language echoes Beauvoir's perception of pregnancy as an inherent antagonism between the woman and her fetus. Those who champion the rights of the fetus portray women as hostile to the fetus' interests and portray pregnancy as an adversarial relationship between the two in order to make possible their claims for fetal protection against the pregnant woman. Dershowitz, for example, says that

...mothers are already in an adversarial relationship with their fetuses if they selfishly refuse to follow elementary precautions necessary to give their babies a fighting chance after birth. And it is a grossly unfair adversarial relationship since the fetus has no way to fight back and defend itself. (209)

This creates an ethos in which, as Overall suggests,

...the female body is seen as dangerous even to the embryo/fetus because the pregnant woman cannot be trusted not to abuse it, pass on defective genes to it, or even kill it, let alone to protect it from environmental harm and give birth to it safely. (55)

It is evident, then, that the so-called "crisis" of fetal "rights" and "personhood" really reflects a crisis in how we are thinking about and perceiving both pregnancy and pregnant women. As the fetus becomes a person, the pregnant woman of whom it is a part, becomes a threat to its rights, safety and health. To understand the fetal rights crisis, then, we must also understand the crisis of the politics of

pregnancy as well.

Conclusion

In this chapter I have examined the growing fetal rights crisis, laying out the nature of the challenges posed to pregnant women's control of their bodies and how judges are understanding and ruling in these cases. Clearly, resolution in each case has depended on the Court's perception of the fetus: if the court acknowledges the fetus as a person, fetal interests and the state's interest in that fetus are found to be compelling enough to check the rights of the pregnant woman. If, on the other hand, the Court denies the fetus personhood status, the woman's rights have been more likely to prevail.

It is my thesis that there is a second, more subtle but equally important component to the the courts' decisions, however, and that is how they perceive the personhood of the pregnant women involved. Demands for rights protections necessarily presume that the rights of one person are impinging on the rights of another; the process of adjudicating those opposing rights claims requires weighing the relative weight of both arguments. When it comes to the question of adjudicating fetal rights problems, I will argue below that courts are able to find for the fetus, not only because they can clearly "see" the person in the fetus, but

because they simultaneously have great difficulty "seeing" the personhood of the pregnant woman. The implications of this myopic perception and construction of personhood is important for both pregnant women and those who identify the fetus as entitled to rights protections: should the fetus gain wider cultural, legal and political recognition as a person, it will continue to do so at the expense of the rights of pregnant women. Unless a compelling case can be made for the personhood of pregnant women in opposition to the spectre of fetal personhood, pregnant women will continue to lose ground when it comes to controlling their bodies while they gestate their offspring.

The remaining chapters in this work take up the task of accounting for why and how this construction of fetal personhood is increasingly gaining purchase, both culturally and legally, and why, in contrast, the personhood of pregnant women seems more contingent and thus less relevant to parties tertiary to pregnancy but nevertheless intent on inserting themselves into the gestational process. The next chapter turns to the question of the origin and development of the idea of "personhood" within liberal theory, and then looks to the "fit" between fetal being and the idea of personhood.

**PART TWO: MAKING BABIES;
THE BIRTH OF FETAL IDENTITY**

Chapter III

Liberalism, Rights and the Idea of Fetal Persons

In American political culture we come by the notion that we have rights, and that only 'persons' are entitled to such rights, from our close association with the political theory of liberalism. Our debt to liberal theory is further evidenced by our strong belief that government is of the people not over them; that individuals have rights which exclude both the government and others from interfering with their lives; and that law is the tool for determining when governments or others have overstepped their authorities and interfered with protected individual "rights." In fact, American politics is so deeply shaped by liberal theory that it is virtually impossible to conceptualize either the human condition or human conflicts outside of what one philosopher has called our dependence on "rights talk." (Glendon, generally) As a result, the construction of the debate about the social and political value of either the fetus or the pregnant woman who carries that fetus, can only be made

cognizable when couched within the language a "rights" conflict between "persons."

This chapter holds that the idea of fetal personhood has its origins in classical liberalism. It argues, in fact, that how we increasingly interpret, understand and make sense of our recent exposure to fetal being is constructed by and generated from within our conceptions of what it means to have human value -- ideas we derive from the fundamental axioms of liberalism. In this chapter, I trace the origins of the concept of personhood generally to liberal theory, it is in John Locke's work that I find the best treatment of the idea as it relates to the concept of human equality and rights entitlements. As a result, this work will look most closely at Locke's construction of personhood as emblematic of the wider liberal approach to recognizing persons and their rights.

To make this argument, this chapter begins with an examination of Locke's construction of human political power as equally shared among individuals as he developed it in counter argument to Filmer's twinned political philosophies of the absolute divine right of kings and the companion theory of patriarchalism. It will be argued that Locke's efforts to undermine the idea that divine kings ruled because of their lineage required him to reconstruct how we thought of the relationship between the human body and the

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distribution of political power. Locke's alternative to the divine body was necessarily an image of human beings drawn in only the most abstract and vague fashion possible. His rights-bearing persons are demarcated only by an amorphous outline of the human form, but one with an explicitly underscored capacity for and ability to exercise rational thought. I will ultimately suggest that the intentional and necessary vagueness characteristic of the contours of Locke's idea of personhood allows for and in fact encourages the interpretation and argument that the fetus is in point of fact a person. It is my assertion that because our political thinking is so strongly shaped within the narrow confines of liberalism, we have few alternatives but to conceive of the fetus as a person once we feel the need to ascribe some kind of social and political value to its being.

The Political Theory of Liberalism

The notion that government serves individuals rather than the converse is less than half a millennium old in the history of Western political thought. This radical reconstruction of political power was born in the Enlightenment as the political theory of Liberalism, which, in its founding form, construes people as equal individuals with rights that are prior to the powers of their

governments. Early enlightenment philosopher John Locke is credited as a prime architect of liberal theory. His theories were much in evidence at the time of the American founding and continue to exert their influence on American political thought yet today. (See for example, Huyler; Waldron, 1987 in *Blackwell* at 295) This is true, despite the fact that some contemporary political thinkers disagree about the extent of his influence in the work of the American Founders and in our modern political values. (Waldron, 1987, 7; Schochet, 1975) Few contemporary theorists, however, would quibble with the notion that we remain theoretically indebted to Locke for first giving form to the basic ideas that individuals have rights and that governmental authority and power begin with the self-sovereign individual.

Acknowledging Locke's contributions is not to ignore the fact that there are certainly other political philosophers equally important to the development of liberalism, however. Hobbes, for example, provides one of the clearest discussions of rights theory articulated by any liberal thinker. Though, as Flathman notes, the bulk of Hobbes' work is fundamentally opposed to the key values of liberalism. Subsequent scholars of liberal theory look to the works of Montesquieu, Mill and even Rousseau, among a host of others writing at the dawn of liberal thinking.

But it is Locke's methodical development of his theory of government and his epistemological works that establishes a new theoretical construct for self-sovereign power that could be arguably distributed equally across most individuals. Though, as many scholars agree, his work is profoundly inadequate in his treatment of rights, in general his work articulates a substantial framework for the development of the idea of persons as bearers of individual rights. It is Locke's work, together with his theoretical compatriots, that gives us our modern language of liberty, rights, persons, individualism, and rationality. And it is Locke's work, I argue, that gives us the framework for thinking about who is and who is not a "person" in our modern conception of a liberal regimen. Our review of liberal theory will therefore begin by revisiting the Lockian tradition.

Liberal Origins and the Political Theory of John Locke

John Locke (1632-1704) was a political philosopher born at the dawn of the Enlightenment -- a period in Western history forged by the influences of the Protestant Reformation, the end of the industrial revolution, and the explosions of science, reason and the empirical method. In the words of one author, the Enlightenment was "aimed essentially to emancipate human reason from the thralldom of

prejudice and superstition (and especially from established religion), and to apply it to the cause of social and political reform." (Miller, 136) True to his historical era, Locke's work found politics to be conventional and artificial, ascribing the natural state of human beings to be one of equality with each other, inherently free of any political power to which they have not consented. (Zvesper, 285-286) In this theory, government results from the rational decision-making of individuals. Though his work comes early in the Enlightenment,⁴⁶ Locke's political philosophy gave great shape to what has become known as the political theory of liberalism and is recognized as having provided "the classic justification for the Revolution of 1688." (Miller, 136)

Locke's political philosophy had at least two prime purposes. The first was to answer and refute the work of Robert Filmer, who's defense of the divine right of kings theory dominated the political thinking of the era and justified the monarchical rule of his time. The second was to build a new theory of politics and political identity. To meet both of these aims, Locke first needed to produce a new theoretical model for understanding and justifying political power. In contrast to the authoritarian and

⁴⁶ David Miller, for example, defines the Enlightenment as an 18th century phenomenon. (135-6)

hierarchical approach to governance exhibited in Filmer's work, Locke's theory posited a more democratic politics -- one in which freedom, equality and self-sovereignty were the cornerstones of power. As we shall see, Locke's radical shift away from patriarchy eventually provided the groundwork for the future development of a political theory of fetal personhood and fetal rights. To understand how this is so, we must first examine both Filmer's theory and the intricate theoretical web that forms Locke's liberal response.

Filmer and the Theories of Absolute Power and Patriarchy

As indicated above, Sir Robert Filmer (1588-1653) is generally credited with giving theoretical shape to the idea of absolute politics. His primary work on the subject, *Patriarchia*, argued that political power is fundamentally authoritarian -- resting solely in the hands of the monarch -- and indisputably hierarchical. While Filmer was not the first theorist to posit the theory of absolute monarchy -- after all he lived in an age that was defined by such politics -- he was perhaps the best known author of its defense. Using both scriptural citations and his own personal observations of the traditional households which typified his era, Filmer held that the power of the state was both "absolute and indivisible" and "owed its existence

and nature to God." This fairly standard interpretation of the theory of divine absolutism was bolstered by the addition of his own theory of patriarchalism, which maintained that the state's power "had its origin in the divine establishment of 'patriarchal' power in Adam," and was hereditarily "passed on through the heirs" of Adam as well. (Schochet 1987, 155) Filmer's defense of absolutism asserted that not only had God granted kings unquestionable power over their subjects, but he had also established a model of patriarchal rule at the moment of Creation. This meant that just as the monarch was the divine ruler over all his subjects, so too were all fathers the divine rulers over their families. Said Filmer,

[God centered] all Power (of Families, Societies, Kingdoms) in one Supreme and Paternall Head, both for perfection and permanence: So as all other Forms argue not only weakness in, but tend to the perversion of the Fabrick, (the several Policies of Men would seem to raise) because not agreeing to the Model, which God first erected in *Adam*. For even there he established Regal and Paternal Power, that differ only in proportion, not similitude; (it being the same, as a Child is a Man in little). (Filmer, *Discourse*, 6-7)

Thus "princes should be revered because they were ordained as the legitimate authority for rule by God," but also because they, like all men who were the children of Adam, were fathers as well. Subjects should obey their rulers as they would obey their own patriarchs, and so too the converse. Filmer argued that the difference between obeying

one's father and one's prince is merely a matter of amplitude: the Prince, he noted,

whom you may justly call the Father of the country, ought to be to every man dearer and more reverend than any Father, as one ordained and sent unto us by God. (Filmer, *Patriarchia and Other Political Works*, as cited in Elshtain, 102)

According to Sir Filmer, the subjugation of children to their fathers was "the Fountain of all Regal Authority." (Locke, I, 70)⁴⁷ In a kind of self-fulfilling tautology, Filmer's theory thus attributed to and justified the absolute subjugation of most people on the grounds that subjugation is their natural condition from birth. Just as Adam's children were born subject to him, and their children subject to them, and so on, for the rest of humanity, being born under one's father's thumb was proof for Filmer that no one was ever "free" at any point in his (or her) existence.⁴⁸ This meant further that subjection too was inescapable and it was God's design in nature for man. (Locke I, 2) While it is unclear exactly how Filmer derives his theory of absolute sovereignty from the model of the

⁴⁷ Locke's *Two Treatises* will be designated throughout as either 'I' for the *First Treatise* or 'II' for the *Second Treatise*. Citations from his *Essay on Human Understanding* will simply be designated as "Essay."

⁴⁸ Of course in Filmer's theory, women could never be either free nor rulers. This, in spite of the clear historical evidence of women monarchs during and preceding his time.

patriarchal family, he clearly extended the same hierarchical model of rule which defined the relationship between sovereign and subject to all other human relationships, including the rule of fathers over children and husbands over wives.

Absolutism and patriarchalism thus provided justification for inescapable and ruthless uses of political power based on indisputable theories of hierarchy and heredity. In this view, politics was divinely crafted such that human beings were destined either for rule or for subjugation. Such a political theory allowed no room for recognition of notions like individualism or resistance to unjust or unwanted governments. Just as one could resist neither God nor one's father, neither could one resist the will of God's authorized sovereign.

In large part, Filmer's theory located its justification for political inequalities between people in the differing meanings ascribed to the differing bodies of the body politic. There were rulers and there were the ruled, and the differences were knowable by recognition of their physical differences -- differences manifested either through lineage or through the material existence of both ruling and ruled bodies. The history and fact of primogeniture, for example, allowed one to know the bloodlines of the sovereign. Filmer argued that such royal

lineage by definition meant that the bloodlines could be traced directly back to Adam. This was true, he held, at least up until the time of the Great Flood, at which point even he acknowledged that Biblical genealogy became somewhat difficult to trace.⁴⁹

This is important because it means that under patriarchalism and absolute rule, the bodies of the sovereigns were considered to be distinctly different from those of their subjects. It was this difference that determined who was to rule and who was to be ruled. The implications for basing political power on the status of the body had wide-reaching consequences. The same argument was used to justify disparities in power between men and women, fathers and their children, and masters and slaves. In each case, the first was deemed biologically fit to rule and the second biologically fit to be ruled.

In response to both Filmer's patriarchalism, and its twin theory of divine absolutism, Locke's theory claimed that political power was located not in the ruler, but rather in the ruled. His was a theory in which sovereign individuals came together in contract (or compact) to construct a limited and carefully constituted government.

⁴⁹ Filmer says that despite the fact that bloodlines became confused at that point, it is still possible to defend hereditary, monarchical rule. His justification for such a leap is unclear, however.

In this model, government was intended to serve rather than to be served; individuals ruled themselves and sovereigns ruled only when subject to the will of their subjects. To make his argument Locke had to take on directly both Filmer's patriarchalism and the broader theory of divine absolutism; doing so would permit him the room to make his intriguing argument about what it means to be human, and argument that would one day manifest itself within the fetal rights debate.

Locke's Liberalism

To challenge the theory of absolutism, Locke first had to discredit the arguments that had sustained the idea of monarchical, hereditary rule, as outlined by Filmer and others. Using Filmer's own epistemological foundation in Biblical scholarship to refute patriarchalism, Locke devoted the first of his two works on political power to this task.

Locke's *First Treatise on Government* is a painstaking response to the two key arguments for Filmer's patriarchalism. Locke begins by attacking Filmer's grounds for asserting that the power of the patriarch is absolute. He scoffs, for example, at the idea that fathering a child creates an absolute authority over that child by noting that it is in fact *God* who really makes the child, not the man through his mere biological actions. Says Locke

They who say the *Father* gives Life to his Children, are so dazzled with the thoughts of Monarchy, that they do not, as they ought, remember God, who is the *Author and Giver of Life: 'Tis in him alone we live, move, and have our being.* How can he be thought to give Life to another, that knows not wherein his own Life consists?" (I, 52)

If God is the true Maker of humanity, then human beings are but simple biological creatures doing what God has made them to do. Filmer's first axiom is that fathers rule because they are fathers. But Locke makes it clear that man's role in the creation of human beings is so minuscule and insignificant, and this can be proved by simply pointing to how little control a man actually has in the creation of his child. Says Locke,

To give Life to that which has yet no being, is to frame and make a living Creature, fashion the parts, and mould and suit them to their uses, and having proportion'd and fitted them together, to put into them a living Soul. He that could do this, might indeed have some pretence to destroy his own Workmanship. But is there any one so bold, that dares thus far Arrogate to himself the Incomprehensible Works of the Almighty? Who alone did at first, and continues still to make a living Soul, he alone can breathe in the Breath of Life. If any one thinks himself an Artist at this, let him number up the parts of his Childs Body which he hath made, tell me their Uses and Operations, and when the living and rational Soul began to inhabit this curious Structure, when Sense began, and how this Engine which he has framed Thinks and Reasons: If he made it, let him, when it is out of order, mend it, at least tell wherein the defects lie....*That even the Power which God himself exerciseth over Mankind is by Right of Fatherhood, yet this Fatherhood is such an one as utterly excludes all pretence of Title in Earthly Parents; for he is King because he is indeed Maker of us all, which no Parents can pretend to be of their Children.* (I, 53)

Here Locke challenges Filmer's notion that man is the absolute creator of his own child and by rights, then, the child's ruler. If that is true, then fathers should be able to do what any good Maker can do with what he makes -- as God *the Maker* can do; he should be able to mend and heal his child when injured or ill. Anything short of this is evidence that he is no creator and Filmer's theory is therefore incorrect.

Locke further bolsters his argument by noting that any parental authority a father may have is far from being absolute for it does not extend to the liberty to destroy or harm the child. (I, 56) Such power is reserved only for God. What is more, says Locke, any authority which a man has by virtue of being a father obviously ends when the child reaches the age of majority. (I, 55-57) Thus, for Locke, paternal authority is discrete rather than unlimited.

In making this claim he undermines Filmer's argument for absolute patriarchalism.

In his final salvo, Locke reasons that if a father has authority over a child by virtue of lineage and parentage, then a mother should have, if not a greater authority over that child because she bore her, then at a minimum, a mother should share equally with the father in parental authority.

This argument works for Locke and against Filmer in two

ways. First, as Locke himself says, "...the Mother cannot be denied an equal share in begetting of the Child, and so the Absolute Authority of the Father will not arise from hence." (I, 55) Having to share the power that Filmer asserts comes with begetting a child is certainly not the same as enjoying absolute power. But secondly, Locke's inclusion of women, in what for Filmer was a strictly male power and one that virtually defined patriarchy, levels a debilitating blow to Filmer's argument for absolute patriarchal rule. It strikes at the very core of patriarchal theory by denying the very idea that men, by virtue of their position as fathers, actually enjoy absolute rule over their children -- it guts the idea of patriarchy itself. Thereby, it simultaneously undermines the notion that as patriarchs, men also have absolute authority over their wives as well. As will be discussed below, Locke's destabilization of the power of men over women on this ground had broader consequences for a new political theory for women as well. But here, the important point is that Locke's theory erodes rather completely the ground beneath Filmer's patriarchal and absolutist politics.

Locke begins his *Second Treatise on Government* with the assumption that he has successfully defeated Filmer's arguments for absolute subjugation and patriarchal politics.

As he asserts boldly in the opening passages to that work,

the Power of a *Magistrate* over a Subject, may be distinguished from that of a *Father* over his Children, a *Master* over his Servant, a *Husband* over his Wife, and a *Lord* over his Slave. All which distinct Powers happening sometimes together in the same Man, if he be considered under these different Relations, it may help us to distinguish these Powers one from another, and shew the difference betwixt a Ruler of a Common-wealth, a Father of a Family, and a Captain of a Galley. (II, 2)

Having done so also clears the way for him to propose his own theory of political power, one in which power is invested in the self-sovereign individual.

Locke interprets God's creation of humanity differently from Filmer and the other proponents of absolutism. Where as with absolutism, God's hand is ever-present in the goings on of human life, in Locke's strongly Enlightenment reading, God created humanity with the tools needed to see to its own affairs and the ability to fulfill its own destiny. For Locke, God created human beings as unique individuals, each in a state of "Perfect Freedom" with respect to each other. This freedom meant that all persons were entitled to pursue their own lives, happiness and material well-being, unmolested either by government or by other individuals. He called this a State of Nature, wherein, all persons had equal political power, with none having any divine right of rule over another. Said Locke:

there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection... (II, 2, 4)

In this design, political power is derived from within each individual as created by and as a creation of God, not through hereditary bloodlines or patriarchal fiat. Thus political power is located not in the divine and absolute authority of a sovereign, but rather, in the individuals of

an entire society. Locke writes that all people live together equally in a State of Nature and must therefore come together in a contractual agreement to create a broader political authority, one known as legitimate government.

Whereas only monarchs are sovereign in Filmer's plan, in Locke's theory, every person is sovereign because that is what God imparted to them as humans. The shared humanity of all people, expressed in their divine creation, meant that sovereignty was a quality that defined each as a separate individual. This creation as "equals" meant that "all the Power and Jurisdiction is reciprocal, no one having more than another." (II, 2)

Locke's theory held that such divinely created individuals were entitled to pursue certain *liberties* and enjoy certain *rights*. This was so, he said, because all people were made by God, and as the product of His work, they were impelled toward self-preservation. (II, 6) To reasonably meet this mandate would require the ability to acquire food, shelter, property, and other life-sustaining necessities. Locke therefore argued that all people share equally in their freedom to pursue such goals.

But individual freedom is only secure if others recognize it as legitimate and decline to interfere with it.

Locke reasoned that if every individual enjoyed the same freedoms as every other individual, thus if all people

shared equally in their *rights* to the goods of the Earth necessary for self preservation, then those rights would also function as demarcations between each individual. Thus rights act as invisible fences, cordoning off one's identity from that of other persons, and simultaneously creating a barrier that disallows others to cross over into one's self as well. As a result, all individuals, *by virtue of their creation as humans*, are endowed with certain *rights* that create obligations on others to respect the liberties of each.

Such freedoms and liberties were not chaotic, unfettered licenses for action, however. The impulse toward self preservation, realized through the exercise of individual liberties, was to be guided by "the Law of Nature," which governs the behavior of everyone through Reason. It is Reason which tells everyone "who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions." (II, 6) Those who consult Reason will understand what their interests are and how to fulfill them, and they will know how to do so without interfering with the equally important actions of others as they pursue their own interests.

In addition, being under the control of Reason in such a fashion meant that just as each person was mandated to

practice self-preservation, so too, each person was required to preserve others, up to the point that it endangered one's ability for self care. (II, 6) In this perspective, Locke's rights theory meant that in addition to refraining from infringing on another's liberties, one also has a responsibility to respect, and perhaps even enable, others in their personal pursuits of their liberty interests as well.

Following the Law of Nature meant consulting it, understanding it and agreeing to abide by what it told you to do, as any reasonable person should and would do. Locke, however, understood that not all persons would necessarily behave so rationally. Those who failed to reason right were likely to act in ways that threatened the rights of their fellow human beings. When this happened, these irrational people put themselves out of the State of Nature and into a State of War with their fellow citizens. To Locke it was reasonable that each person would have the right to control the abhorrent behavior of rogue persons who declared themselves to be at "war" with their fellows. As a self-sovereign individual, one is therefore entitled to act as both judge and executor over another if she or he fails to consult reason and behaves in a way that violates the Laws of Nature. In Locke's theory, such violations were primarily economic in character. As C.B. MacPherson would

observe in reading Locke some 300 years after it was written, Locke's political theory of the individual was most concerned with the ability to acquire and possess resources without being inhibited by one's equally acquisitive human fellows. (MacPherson, generally)

It was also clear to Locke, however, that spending one's time guarding against the ravings of irrational people would be time-consuming. He thought it equally reasonable that otherwise rational people should come together in agreement to jointly guard against the irrational behaviors of those who failed to reason right. This coming together in consent to form a legitimate governmental authority over one's self and others Locke called Civil Society. (II, generally)

For Locke there was thus no *natural* governmental authority. The State of Nature is a condition of individual rule and the state of Civil Society is the condition of conventional, governmental rule. (Waldron, 1987 in *Blackwell*, 293-295) In stark contrast to the theory of absolute patriarchal power, Locke's liberalism held that the exercise of power by one person over another is legitimate in only one of two conditions. The first is when one person acts to punish and control the behaviors of another who has failed to consult reason and thus somehow violated the Laws of Nature by threatening the "Life, Liberty,

Health, Limb or Goods of another." (II, 6) The second legitimate exercise of power over others is when many people come together in compact, as political equals, to collectively protect their lives and their interests against those irrational beings who fail to recognize their God-given liberties as free individuals. In total, Locke's theory provided an unprecedented challenge to the authority of monarchical rule. It baldly suggested that political rule of the sort argued for by Filmer is *inherently illegitimate*, for only the ruled themselves could authorize anyone to rule over them.

What is more, Locke's theory provided an even stronger challenge to the core argument of patriarchalism which based differences in political status on the differences between material bodies and the meanings ascribed to those bodies of those who ruled and those who were ruled. In Locke's theory everyone was created "equally," meaning that their political identities were determined not by how their bodies were fashioned but rather in what their humanity entailed. By asserting that all people, regardless of the material state of their bodies, were created as political equals from the outset, Locke's theory undercut the power of Filmer's argument that absolute rule was based on heredity and patriarchal relations. Not only did this delegitimize hereditary monarchical rule, it simultaneously defeated the

argument that some were marked by their natural material state to rule, as were fathers, and others were marked by their physical bodies for rule, as were children and women.

Locke's efforts to destabilize the privileged place of the royal body as the ruling body served to re-write the meaning of "bodies" as political sites in general. With liberal theory, material differences between bodies no longer carried any political significance. A political philosophy of self sovereignty meant that everyone ruled, regardless of who or what she or he was or looked like.

It is important to note here that while Locke was debunking the political power that bodily difference had historically held, he knew full well that people were created differently and that there were differences between the bodies of individuals. As he noted in the *Second Treatise*,

Though I have said above, Chap II (sic), *That all Men by Nature are equal*, I cannot be supposed to understand all sorts of *Equality: Age or Virtue* may give Men a just Precedency: *Excellency of Parts and Merit* may place others above the Common Level: *Birth* may subject some, and *Alliance or Benefits* others, to pay an Observance to those to whome Nature, Gratitude or other Respects may have made it due; and yet all this consists with the *Equality*, which all Men are in, in respect of Jurisdiction or Dominion one over another, which was the *Equality* I there spoke of, as proper to the Business in hand, being that *equal Right* that every Man hath, to *his Natural Freedom*, without being subjected to the Will or Authority of any other Man. (II, 54; emphasis in the original)

Locke obviously recognized that bodies may differ, and that such differences could result in subsequent differences in the opportunities and material existences of individuals. He also held, however, that the physical body itself simply could not remain the basis for determining the *political* status of individuals.

This argument for equality, despite individual heredity or material bodily configuration, served well the purpose of justifying the overthrow of monarchy, as illustrated by the Revolution of 1688 and the subsequent adaptation of Locke's theories in the American and French Revolutions. (Waldron, 1987, 295) If kings could be perceived to be no more divine than nor different from their subjects, then their rule could also suddenly be perceived as illegitimate as well. Locke's theory turned the absolutists on their heads by arguing that political rule of one over another is *never natural* but can *only* be legitimate with that person's consent.

It also allowed for the beginning of a broader discourse of liberalism that argued against political differentiation based on material being. Locke's theory of equality allowed (some say forced) him to argue that despite their natural differences from men, women too were created with the same liberties, freedom and political powers as their male counterparts. (Jagger, 28-32)

In the modern era, our direct linkage to Lockian theory is clear on this point. It is axiomatic for most people today, that one's sex, race or physical state may not be used to exclude one from politically shared equal rights or protections. The recent movement for the rights of the disabled provides an obvious illustration of the lengths to which we will go to insure that peoples with differing physical attributes enjoy "equal rights." A philosophical discourse of "equality" among peoples is possible because the particularities of the human body have been rendered politically irrelevant. What has become important is our shared, if ambiguously knowable, "humanity."

Locke's attack on Filmer left him in a curious place. His devaluation of the particularities of the body -- from heredity to excellence of physique to biological sex -- left him without an explanation for the obvious and inevitable differences in power that would be claimed by various people in every political regime. Erasure of the distinctions between rulers and the ruled, by shifting the political meaning of individuals away from the meanings and markers of their bodies, left Locke with a blank slate upon which to begin to reconstruct his idea that human political value can be understood through the concept that individual, rights-bearing "persons" are the fundamental units of politics. What remained on his slate, then, was an image of people who

were all human beings, identifiable as such in only the vaguest, most universalized, and undifferentiated of ways. Their *political* identities were distinguished by their status as bearers of rights and liberties and their abilities to exercise reason in the pursuit of those liberties. This construction of human value, I argue, is the foundation for what we will come to understand in the modern era as "personhood." Locke's theoretical manufacture of this atomized, self-sovereign, rational "person" -- one who is defined in being by rights and liberties -- has become the centerpiece of liberal theory and has paved the way for the discourse of fetal personhood that would come some 300 years later.

Persons in Theory: Locke's Universal Human

To understand the construction of political identity in Locke's liberalism, we must first question what it means to Locke to be human. That is, what makes one or distinguishes one as a human being? The first identifying quality, of course, is that for Locke, human beings are created by God.

As the product of God's work, he held that we are all what God would have us be. But God creates the whole universe in Locke's strongly Protestant theory; therefore, simply acknowledging God as the Maker of the Universe doesn't answer the question, "How does one distinguish a *human* being

from other beings?"

On a physical level, the relevant distinction for Locke is between man and beast: men are like angels, thus more God-like; beasts are on the planet to serve man in his self-preservation. At the most fundamental level, we can tell the two apart because the human form is distinct in its construction. In Locke's words,

An animal is a living organized body; and consequently the same animal ... is the same continued *life* communicated to different particles of matter, as they happen successively to be united to that organized living body. And whatever is talked of other definitions, ingenuous observation puts it past doubt that the idea in our minds of which the sound 'man' in our mouths is the sign, is nothing else but of an animal of such a certain form...For I presume it is not the idea of a thinking or rational being alone that makes the idea of a man in most people's sense, but of a body, so and so shaped, joined to it... (*Essay*, XXVII, 8)

While this may seem obvious, what is important here is that for Locke, human beings are knowable by the material similarities between their bodies; in somewhat of a tautology, having a human body is what makes us human. But recall that Locke's task had been to devalue the political significance of the body. Thus, Locke is faced with a peculiar paradox: on the one hand, he acknowledges that there is a sort of universal, distinctive "human form," but on the other, he can not give it much more value in its particular shape than this or he runs the risk of lapsing

back into a kind of politics based on material distinctions.

What he is left with is a vague outline of the human shape -- one that resembles "man" closely enough to allow distinctions between humans and other animals, but one that remains universal enough to disallow clear distinctions between people that could be interpreted as having political importance. The result is an amorphous, unmarked "human" being that permits great latitude in who or what is included as "human" and thus self-sovereign in design.

But being human is not the same as being a person, for Locke; personhood is a *political* category of being, rather than merely a natural one. In addition to, and only partially coextensive with, our creation as human beings is our creation as rights-bearing, free and equal individuals.

In Locke's philosophy, just as having the human form is reserved for humanity, so too only human beings have "rights" by God's design, and it is our individualized rights that separate us off into unique and particular human beings.

Rights In Locke

The idea that persons come into the world with an assumed entitlement to life, health, property or other liberties, simply because they were created as humans, delineates the development of a discourse of individual

rights for the first time in political thought. Recall that for Locke, part of what it means to be a human is to be endowed with both freedom and liberty, and, of necessity, with rights to those liberties. This is obviously true, says Locke, because God was man's maker and crafted him that way:

For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one anothers Pleasure. (II, 6)

Being God's craft, people are impelled to preserve his workmanship in themselves. As noted earlier, doing so requires exercising the kinds of liberties that tend toward self-preservation. These liberties distinguish and mark the separations between people as individuals with distinct interests.

In Filmer's theory, there were neither rights nor individuals in the same sense as suggested by Locke. As contemporary political theorist Jean Bethke Elshtain has argued, this was so because there was no 'private' in the lives of those who were ruled by absolute monarchs. The existence of the majority of people was directed toward supporting the lives of a very few elites who encapsulated a kind of collective identity. Individualized needs, wants and desires had no relevance under a political system of

absolute politics. But Locke's liberalism is distinguished precisely by the paramount importance of the autonomous individual; in his theory, all persons are created distinctly and separately. What separates them, besides the obvious material condition of living in distinct bodies, is the zone of rights which demarcate each from the other.

While Locke's work is credited as one of the first major theoretical treatments of rights, his is not a theory that offers a clear definition of those rights. He discusses a couple of rights in some detail; for example, the rights of rational individuals to punish offenders and to serve as the executor for violations of the Laws of Nature (II 8, 25-26). He also mentions the right to demand reparation if injured (II 11, 11-12) and the more general Right of self preservation, which is the fundamental right all humans share by virtue of being God's creation. (II 11, 15) In general, however, Locke leaves most rights unenumerated, perhaps assuming that those not discussed fall under the wide net of "liberty and freedom for all persons." (II 6, generally)

What, then, are rights and how do they function for Locke? First, rights are liberties that authorize people to act upon their free will. That is, people are entitled to pursue their particular and individual interests *because God authorized them to do so*. In fact, it is Locke's theory

that God *made* them in order that they might do so. Second, rights function as exclusions that prohibit others from interfering with the exercise of their liberties. Rights thus assume a kind of reasoned action and expression of will on the part of the rights-bearer, while they simultaneously create a zone around that rights-bearer which others may not take action against.

Isaiah Berlin has offered what is now a now famous, if recently controversial, discussion of how rights function. (17-25) Berlin says that liberal rights are either "negative" or "positive" in their application and meaning. Negative rights exclude others from intruding upon or inhibiting the liberties of others. Thus my right to life means that you can not interfere with me as I pursue my life. The command of such a negative right is "STOP! Don't do X for it will interfere with my ability to do Y."

This is in contrast to the command of a positive right, which might actually *require* the actions of another to make possible the successful pursuit of the interests of a rights-bearer. For example, a positive right to life would require you to feed me, perhaps, rather than to simply refrain from interfering with my efforts as I try to feed myself. The command of positive rights is thus "Do X! So that I can fulfill my desire for Y." (Berlin, 22-25)

Berlin argues that liberalism is occupied chiefly with negative rights as exclusions and inhibitions on the behaviors of others. This is also true in Locke's theory, where individuals are set apart in their atomized circles of rights, protected from each other and simultaneously distinguished from each other as well. For Locke, natural rights functions as a means for excluding or stopping others from intruding on one's self.

The positive rights element in Locke's theory is often overlooked, however. As noted above, his theory insists that one must do what one can to provide (positively) for the preservation of others, so long as it does not detract from or otherwise interfere with one's own stores and self preservative abilities.

In Locke's theory all human beings are both created equally with rights and simultaneously distinguished from each other by their rights. Not everyone exercises those rights equally, however; nor are the rights of each uniformly protected. This is because having rights and exercising those rights are different things for Locke. Being human may entail both having a human body -- one that is discernable only in the grossest, most universalized form, but one which serves to distinguish humans from animals -- and also possessing the individual rights that distinguish each human being from all others. But there is

a third and final component required to transform a human into a person for Locke, however, and that is the capacity for and the ability to exercise reason.

Just as only humans have rights, only the rights of those who consult reason and who follow the Laws of Nature are entitled to have them protected. Those who fail to do so are "irrational" and outside the laws and protections of the Law of Nature. It is to this question of rationality in liberalism that we will now turn in anticipation of analyzing the idea that a fetus is a "person" within liberal discourse.

Reasonable Persons

Only persons have rights, according to the political theory of Liberalism. As outlined above, "rights" function as exclusions between individuals and create limits on how government and others can reach into the private world of a person's life. But what identifies one as qualified to have such rights? If, as Locke argued, all humans, by virtue of their creation, are endowed with equal rights and liberties, how can he justify laws and political systems which treat people differently, and even inequitably? Locke's answer, explaining permissible differential treatment within a political system, was based on the one feature equally available to all, but not necessarily used to their own

advantage: the capacity for reason. Those who reasoned right, Locke claimed, are those who are fully "persons" according to Natural Law and thus entitled to the full rights and liberties that define human beings. Those who fail to do so, however, forfeit their rights and liberties and thus forfeit their political status as "persons" as well.

As discussed above, humans know how to behave in their perfect states of freedom and equality by virtue of their "reason." Said Locke,

The *State of Nature* has a Law of Nature to govern it, which obliges every one; And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one out to harm another in his Life, Health, Liberty or Possessions. (II, 6)

According to Locke, the exercise of reason made men much like angels (I, 58) but the failure to use reason right reduced one to the status of the beasts (II 8, 10-20; 10, 1-10; 11, 25-35; 16, 15-20). Such action authorized rational citizens to take actions that would violate the rule of Natural Law against interfering with the "Life, Liberty, Health, Limb or Goods of another." (II 6, 25-30) Locke even goes so far as to conclude that the taking of another's life is justified if one is reasonable and confronted with a "State of War" by someone who has abandoned rationality. But what exactly does this mean for Locke? How do we know

if we are consulting Reason right and behaving as Reason would have us do? Answering these questions is somewhat problematic.

In Locke's thought what it means to *fail* to reason right, or to be irrational, is fairly clear. Reason is that faculty which distinguishes man from beasts and "wherein it is evident he much surpasses them." (*Essay* 415, Chapter XVII of Reason) Indications of irrationality included harming another person or their property, or harming one's self. He asserted that such actions were clearly irrational because they violated the Natural Law of preservation, and because they violated the property interests of God, who made man in the first place. (See for example, II 8)

On the other hand, understanding precisely what it means to *be* rational in Locke's theory is more difficult to discern. In its simplified form, following reason means acting with the Law of Nature. But beyond such simple axioms as those concerned with preserving one's self and/or others, his definition of reason is quite unclear.

In his work on epistemology, *An Essay Concerning Human Understanding*, Locke says that all ideas and reason originate with the senses. (*Essay*, XVII, 2) People are essentially blank papers, onto which data from the surrounding world must be imprinted. (*Essay*, II, 1) The senses allow individuals to absorb information from the

outside world and thus fashion perceptions of that world.

In Locke's words,

When we see, hear, smell, taste, feel, meditate, or will anything, we know that we do so. Thus it is always as to our present sensations and perceptions; and by this everyone is to himself that which he call self; it not being considered in this case, whether the same self be continued in the same or divers substances. (*Essay*, XXVII, 9)

But many animated kinds of life experience sensation, and so sensation is a necessary but not sufficient to establish reason and thus personhood for Locke. The distinctive characteristics that both define reason and set human beings apart from the animals, for Locke, are identified as the qualities of consciousness and self-reflection. A person, says Locke,

is a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking, and, as it seems to me, essential to it; it being impossible for anyone to perceive without perceiving that he does perceive... For, since consciousness always accompanies thinking, and it is that that makes everyone to be what he calls self, and thereby distinguishes himself from all other thinking things, in this alone consists personal identity, i.e. the sameness of a rational being; and as far as this consciousness can be extended backwards to an past action or thought, so far reaches the identity of that person; it is the same self now it was then; and its by the same self with this present one that now reflects on it, that action was done. (*Essay*, XXVII, 9)

Human, self-reflective consciousness is so important to Locke, that he argues that "*without consciousness there is*

no person"; without consciousness he finds the human body to be nothing more than a mere "carcass." (*Essay*, XXVII, 23, emphasis mine)

Locke fails to provide a more detailed discussion of rationality; it is as though he expects rational people to "get it" because they are rational. As numerous political theorists have argued of late, this problem is not peculiar to Locke, but rather it plagues the entire theory of liberalism. In fact, modern theorists, both feminist and traditional, find the entire concept of rationality to be problematic. (Barnes and Bloor, generally)

Despite the problem that the concept of rationality poses for our contemporary analysis of Locke, it plays an important role in his conceptualization of personhood. The overarching requirements of personhood for Locke are the ability to be sensate, the capacity for self awareness, and being able to identify and act on one's interests.

(Hursthouse, 91) If one acts rationally, one is, politically, a person. If one does not reason right, one forfeits one's political status as a rights-entitled person.

In Locke's political world, there were thus two kinds of humans, rational persons and irrational human beings. Political society developed, he argued, as the most orderly and efficient means whereby the former could control the later. (II, 21)

Finally, rationality, combined with having a human form and being endowed with rights, served to identify and distinguish human beings from the animals, as Locke notes here:

Since I think I may be confident that, whoever should see a creature of his own shape or make, though it had no more reason all its life than a cat or a parrot, would call him a man; or whoever should hear a cat or a parrot discourse, reason, and philosophize, would call or think it nothing but a cat or a parrot; and say the one was a dull irrational man, and the other a very intelligent rational parrot. For I presume it is not the idea of a thinking or rational being alone that makes the idea of a man in most people's sense, but of a body, so and so shaped, joined to it; and if that be the idea of a man, the same successive body not shifted all at once must, as well as the same immaterial spirit, go to the making of the same man. (*Essay*, XXVII, 8)

While he plays with the idea of a reasoning parrot, he makes it clear that reason is a distinctly human quality -- one conferred on man by God so that he might understand and follow the Laws of Nature. In Locke's theory, one may be either an intelligent monkey or a dull and irrational man, but one can never be an irrational person with their rights intact; all three elements are necessary for personhood.

The remaining question, then, is now that we have traced the development of the creation of personhood in Locke, how relevant is it today, generally, and to the discussion of fetal personhood, most particularly? In this final section, we will look at the problems of "personhood" posed by the unique state of pregnancy.



Modern Liberalism and Its Connection to Locke: Are Fetuses Persons in Liberal Theory?

The fundamentals of Lockian political theory continue to dominate much of Western political thought still today. Particularly in American politics, from the Founding onward, Americans have made Locke's theory of limited government by contract their own. The *Declaration of Independence* echoes Locke's language with calls for life, liberty and happiness and the debate between the Federalists and the Anti-Federalists about framing the Constitution focused at points on whether or not to enumerate individual rights and/or liberties. Despite the wide disagreement among these particular interlocutors, few questioned the idea of inalienable rights itself. Today, much of the American courts' time is occupied by cases concerned with allegations of governmental intrusions on individual rights and liberties -- whether enumerated or not. While what qualifies us as human is perhaps less divinely linked now than it was in Locke's era, what we understand to be the qualities that identify us as persons -- morally, legally and politically entitled to our liberties and our rights, still includes the capacity for reason, the ability to recognize self-interest and the ability to act on those interests. (see Flathman on Ackerman generally)

Liberalism so strongly shapes our political theory in America that we predominantly conceptualize the human condition as atomized and individualized. In keeping with the Lockian model, boundaries between human beings are separated by the reach of their individual rights, and conflicts between persons are often construed as instances of rights violations by one on the part of another. Such conflicts inevitably require judicial intervention to determine who's rights should be paramount at any moment in time. The historic struggles of African American men and all women, the physically challenged, those who identify with differing sexual preferences, and now the fetus, have been struggles for inclusion as "persons" under liberal theory: those who are "persons" have rights; those who are not have virtually no status -- they are no better than beasts, or perhaps even more astonishing, they have no identity at all in liberal theory.

Fetal value, like all other 'human' value, is thus intelligible primarily within a liberal political regime, expressed through the language of personhood. To know whether or not we should "protect" the fetus, we must first put it to the test of "personhood," as outlined by Locke and liberalism generally. As we have seen, this test requires only that fetuses have the distinct but simultaneously universalized human shape, that they have the capacity for

reason and exercise of reason, and that they be endowed, like all persons, with Natural Rights. If they meet these criteria, they are, perforce, persons -- by definition entitled equally to the protections, rights and liberties of all other persons. If they are not, we are at a loss for understanding what value they could possibly have and how we could make that value politically intelligible.

The challenge of the fetal rights debate, then, has centered on establishing or denying that the fetus has met these criteria for personhood. As the previous chapter demonstrated, there is a growing and substantial body of case law in which the courts have found themselves able to see the "person" in the fetus. The list of rights already granted to the fetus is now quite long, and as noted above, may grow even longer at the urging of parties interested in propelling fetal identity.

The purpose of the next two chapters is to examine this "personalization" of the previously unknown fetal body. Chapter Four will trace what I shall call the recent dis/covery of fetal being through technological and commercial means. It will then explore how this revelation of the fetal body has been humanized and contextualized by pro-fetus political interests and others. Finally, it will examine the problem rationality poses to fetal personhood from within liberal theory. The question of how the fetus

has come to be a rights-bearer will be taken up in Chapter Five. It will recount the growing body of rights afforded the fetus that are both creating and reaffirming our perceptions that the fetus, like all persons, is entitled to recognition of a variety of rights and protections.

Chapter IV

Humanizing the Fetus: Modern Constructions of Fetal Identity

VISUALIZE THE FETUS! (1989)⁵⁰

VISUALIZE THE UNBORN CHILD! (1995)⁵¹

As a consequence of the influences of medical technology, political ideology and commercial interests, we stand poised at an extraordinary moment in time: before our very eyes, we are dis/covering the fetus, materially, socially, politically, and legally. For the first time in human history, as if by magic, images of fetal being are appearing before our eyes. They seem to be everywhere: we see fetal images at the doctor's office, on the first page of many "baby books," on television, in magazines, at the movies, on political placards displayed on the sidewalks of our streets, in our mailboxes and on the billboards that line our highways. Conjured from within the bellies of pregnant women by the sorceries of science, technology and art, these once hidden and little known fetal bodies are becoming ever more familiar.

⁵⁰ Texas Right to Life bumper sticker.

⁵¹ Virginia Right to Life bumper sticker.

Visual, auditory and tactile access can have a powerful effect on how we craft meanings for the material world. We have learned, for example, that a late term fetus looks very much like a full-term new born and that an early term fetus looks much less so. As powerful as this kind of direct sensory information can be, however, the objective world is always interpreted and meanings are ascribed through our need to communicate about that world through language and the theoretical lens through which we filter those sensory experiences.

As was argued in the previous chapter, a primary lens through which information about the meanings of human experience is filtered in American political culture is liberalism. We understand human beings today as "persons" because we see them -- we see ourselves -- through the lens of liberal thought. This lens applies as well to our perceptions and experiences of the fetus. In order for us to understand it as having political and social value we first must recognize it as "human." But the evidence of the "humanity" of the fetus is not necessarily self evident in our experiences of fetal being.

In this chapter, it will be my claim that we transform our encounters with fetal being into recognizable and meaningful experiences as the result of a combination of epistemological and political forces that are tethered

together with liberal thinking. In making this postmodern claim about the social construction of meaning, I want to draw on the work of postmodernists like Thomas Laqueur and others, who suggest that we can only "know" the body (any body) as a consequence of our ability to perceive it as already inscribed with fundamental meanings. That is, no inherent meaning for the material world is possible.

Rather, all that we know and/or can say about the material is already inscribed in system of language we use to think and speak about it. By way of example, in his seminal work, *Making Sex*, Laqueur claims that our understanding of sex difference has been different at different time periods, depending on the political status of the genders of those respective eras. His work argues that at various points we have understood human sexual identity to be either based on a single sex or a two sex model, depending on how we have construed gender at those points in time. (10-11) So too I will argue that our new-found familiarity with fetal being is becoming contextualized as "human" as a consequence of social, political and commercial forces that have found space for personalizing our recent dis/covery of fetal life.

In making this claim, the first section will detail the rise and increasing familiarity of visual and other representations of the fetus in our social and political consciousness. Additionally, I will also argue that we are

increasingly conceptualizing the fetus as a member of the human community because of the rhetorical and historical environment into which those images are introduced. The second section will then examine the personalization of the newly dis/covered fetal body. There, I will argue that in order to perceive fetal imagery to be that of "little persons" the human-like qualities must be pointed to and explained by those who ascribe meaning, value and context to the fetus and who conceptualize it as a person. If the fetus now seems more "human," more like a "baby," and more of a "person" than ever before, it is due in large part because of the push to anthropomorphize or humanize the fetus by a variety of groups -- physicians, pro-life activists, even advertisers and film makers -- which fuel and capitalize upon the explosion of fetal imagery in the American visual landscape.

The last section will return to considerations of the criteria for liberal personhood outlined in the previous chapter, with specific attention to the problem of fetal "rationality." There the primary question will be, "is the fetus rational," and if not, how can we possibly understand it as a "person?"

Dis/covering the Fetus: From Nowhere to Everywhere

Widespread visual exposure to the fetal body is a late twentieth century phenomenon. In earlier times, fetuses were physically and thus conceptually invisible during pregnancy. (Phelan, 463) What we knew about the conceptus was learned either after birth or as a consequence of miscarriage; in either case, it was necessary for the fetus to have separated from the pregnant woman's body in order for it to be examined. Thus scientific knowledge about and political conceptualizations of fetuses were determined by extra-utero images. Upon late-term labor and delivery, the conceptus was a baby; in the event of miscarriage, the form and size of the conceptus varied with the gestational stage of its development. Since these pre-term fetuses were afforded little public value, they were typically disposed of discreetly and were rarely discussed outside medical circles. Therefore, immature or incompletely formed fetal bodies occupied little conceptual space in our epistemology of pregnancy.

Prior to the modern medicalization of pregnancy, the primary data about gestation came chiefly and initially from the personal accounts of pregnant women. It is, of course, the woman who first knows she is pregnant. An 1889 guide to maternity published by a woman physician, for example,

begins the chapter on pregnancy by noting that "The first sign that leads a woman to believe that she is pregnant is her *ceasing to be unwell* [ceasing to menstruate] ... [it] is of itself alone almost a sure and certain sign of pregnancy -- requiring but little else to confirm it." (Saur, 56; emphasis in the original) This meant that pregnancy was predominantly a woman-centered event. (Petchesky 1990; and generally Rothman; O'Brien) In many cultures "quickening" (the first fetal movement felt by the pregnant woman), as reported by the pregnant woman, was considered to be the moment when the pregnancy actually began.⁵² It is only later in the pregnancy, when externally observable changes like an increase in the size of the belly make the pregnancy evident to third parties, that the outside world could have independent knowledge of a woman's condition.

The role of the fetus was thus relatively unimportant in our historical conception of pregnancy. An informal survey of early obstetrical and gynecological medical books, for example, reveals that little attention was traditionally devoted to discussion of or treatment for the fetus. This was due, in large measure, to the fact that the fetus was an unknowable entity -- something under construction but

⁵² As late as the nineteenth century, a woman's decision to abort a fetus was thought of as restoring menses and making her body "regular" again, rather than as the elimination of a pregnancy. (Petchesky 1990, 53)

without unique value or salience until birth. As a consequence, our understanding of pregnancy focused on the woman involved and the anticipation of the baby to be produced at birth.

Today, however, physical separation from the pregnant woman is no longer a precondition for "knowing" the fetus. Medical technology now gives access to the fetus *in utero* for a variety of purposes, including visual imaging and efforts aimed at direct fetal treatment. Graphic images of aborted fetal remains, which in the past were absent from the public eye, are now displayed on placards and in television advertisements by anti-abortion political groups.

Finally, images of fetuses have become avenues for making money in the commercial world, used in advertising campaigns and movies to sell cars, theater tickets and children's toys. The effect, it will be argued, is a fundamental change in how we include the fetus, both in our understanding of pregnancy and in how we think about the human community.

Fetal Dis/covery and Fetal Familiarity

Recent technological developments in twentieth century medicine are dramatically improving our ability to view and learn about the fetus while it is developing inside the woman's body. Ultrasound technology projects sound waves

that bounce off the dense areas of the fetal body, thus outlining it *in utero*. (Eisenberg, 45) Although the early technology produced images that were fairly vague and indistinct to the untrained eye, with only gross body parts and movements recognizable, recent developments make possible more distinct representations of the fetal form. In many cases, evidence of the fetus can be observed as early as the eighth week of pregnancy and videotape equipped sonographic machinery makes it possible to record both moving and still photographs of sonographic imagery for later replay and display. (Phelan, 463 at n. 18) The fetoscope permits the physician direct access to the fetus through a miniature camera-equipped device that is surgically inserted through the pregnant woman's abdomen and uterus, in to the amniotic sac. (Eisenberg, 47) Fetoscopy provides clear, color moving pictures of the fetus *in utero* and allows the physician to take blood and tissue samples from the fetus for diagnosis of a number of diseases.

In addition to visual access, information about the fetus can now be obtained through a number of other technologies as well. Amniocentesis, analyzing fluid from the amniotic sac, permits chromosomal and genetic examination of the fetus. A recently controversial technique, chorionic villus sampling (CVS) provides the same information as amnioscentesis from outside of the



placenta.⁵³ Blood samples taken from both the pregnant woman and the fetus, as well as skin samples from the fetus, obtained either through the abdominal wall of the pregnant woman or through her vaginal canal, also now permit early testing for genetic problems in developing fetuses.

(Eisenberg, 51; Hornick, 565; Stewart et al., 156-157)

Internal and external fetal monitoring technology can now reveal subtle sounds, motions and heart rhythms from very early in the pregnancy through delivery. (Eisenberg, 280)

Each of these technologies has become a routine part of most prenatal and labor room care. Virtually all women seeking prenatal care now routinely undergo at least one ultrasound during their pregnancies and most carry away copies of "pictures" of their fetuses taken through a sonogram. As a result of such widespread and sophisticated technology, doctors, nurses and pregnant women are now able to experience, diagnose and attempt to treat the fetus much more complexly and much earlier than ever before.

Surgical and other medical procedures, called "fetal therapies," can now be performed specifically on the fetus inside the womb. Christine Overall notes that "[t]here are treatments for fluid build-up in the brain, chest, or

⁵³ CVS has come under fire recently because of data suggesting increased rates of miscarriage and fetal infection from its use. (Roland).

abdomen; blocked bladders; fetal hernia; and fetal growth retardation." (as cited in Eisenberg, 43) Recent advances even permit the relatively safe extraction and reimplantation of the fetus in order to perform some surgical procedures. The first successful operation of this kind was performed in 1986 on a 23-week-old fetus to correct a blocked urethra.⁵⁴ A similar ground breaking surgical procedure in 1993 successfully corrected the diaphragmatic hernia of a 24-week-old fetus. Researchers predict that prenatal fetal surgery is only at its early stages of development.⁵⁵ (see also Volpe, generally) Research that requires reaching into the pregnant woman's uterus to extract tissue for genetic analysis and alteration is likely to make intervention and exposure of the fetus during pregnancy more common in the future. (Cardinale, 47)

The ability to treat the fetus specifically elevates it to the full status of patient in the medical community. (Phelan, 462) As the preface to a recent edition of an obstetrical textbook noted:

Quality of life for the mother and her infant is our most important concern. Happily we live and work in an era in which the fetus is established as our second patient with many rights and privileges comparable to those previously achieved after birth. (as cited in

⁵⁴ "Saving Lives Not Yet Begun," People Weekly, June 18, 1990, 40.

⁵⁵ "Saving Lives Not Yet Begun," 40.

Hornick, 537)

Note here that the fetus is a second patient, not a lesser one. For the physician, this conceptual split between pregnant woman and fetus has given rise to a new kind of obstetrical medicine in which the fetus is either a co-equal patient with the pregnant woman, or, in some cases, the *primary* patient of concern. New medical sub-specialties have developed in "maternal-fetal" medicine (Phelan, 463), and "fetal health" is the focus of care at medical centers like the University of California, San Francisco Fetal Treatment Center. (Adzick)

Doctors are not the only ones using and affected by the technologies that allow access to fetal imagery and the fetal body. Just as sonograms used in prenatal care make fetal images familiar to physicians and to the women in whom those fetuses grow, so too casual public exposure to sonographic and other fetal images is making us all more familiar with what fetal life looks like inside the pregnant belly.

Carol Stabile's fascinating look at the history of fetal photography notes that the first widespread public exposure to pictures of fetal bodies occurred in a 1965 edition of *Life* magazine.⁵⁶ In that article, *Life* published

⁵⁶ The magazine cover featured an allegedly 18 month

a series of photographs of fetuses at various stages of development. The cover photo depicted an 18 week old fetus, encased in its amniotic sac. The fingers and toes of this mid-term fetus are clearly distinguishable. Back lighting enhances the outline and shape of its body, accentuating how much it looks like a newborn. While the umbilical chord is plainly evident, it too is lit with a softening light that makes it seem more a part of the amniotic sac than the fetus. The picture creates the illusion that the fetus is free-floating and totally self-contained; there is no evidence of the pregnant body from which it was extracted. (Stabile, 179) With the exception of one photo taken *in utero* using an early version of the fetoscope, all of the pictures were of fetuses that had been "surgically removed" from the pregnant women who had conceived them. (185) These same pictures appeared again in 1978 when *Life* re-ran them, employing a different cover shot of a much earlier term fetus and accompanying them with a revised text.⁵⁷

Images of the fetus have been appearing more frequently on television as well. A 1983 film for the PBS sponsored

old fetus, seemingly floating independently in an amniotic sac. *Life* published these same photographs again in 1972, captioned on the cover by "The First Pictures Ever of How Life Begins." (182)

⁵⁷ See Stabile's analysis of the text changes for an interesting discussion of the influence of the abortion debate on the rhetorical construction of these photographs.

Nova series titled "The Miracle of Life" used a camera-equipped fetoscope to travel into the uterus of a pregnant woman and examine her fetus. This kind of live-action photography gives the viewer a strong sense of the fetus as an autonomous, living entity. The camera photographed the fetus as it seemed to recoil from the light, as it rolled and kicked, and when, in the last shot, it clearly sucked its thumb. In addition to the visual cues pointing to the baby-like features of the fetus familiar to us as watchers of the film, Stabile (182) and others argue persuasively that many of these images have been constructed through tricks of the camera, accompanying texts and voice-overs so as to make them more familiar and seem more like "babies."

A 1993 segment of the PBS aired "Nature of Sex" series, entitled, "A Miracle in the Making," illustrates her point.

This segment featured both sonographic and fetoscopic fetal imagery during a discussion of human reproduction. In order to make cognitive sense of these images, the features most like a human baby were pointed to and explained by an attending physician in the film.⁵⁸ The doctor's explanation is directed at both the woman upon whom the sonogram was being performed and the audience watching the film. While neither the pregnant woman nor the audience was necessarily

⁵⁸ *The Nature of Sex, "A Miracle in the Making,"* Genesis Films, 1993.

able to see a "baby" on the sonogram, they (and we) are inclined to believe what the doctor is telling us.

Today, mass market books about pregnancy and childbirth intended for expectant women and their partners and family members also routinely include pictures and drawings of fetuses. For example, Lennart Nilsson's 1993 pregnancy and childbirth book, *A Child is Born*, features an enhanced picture of a fetus sucking its thumb on the cover. Inside there are numerous fetal pictures and sonograms. These full-color photographs allow us to explore and know the fetal body in an intimate way previously impossible for anyone, including the pregnant woman.

As noted earlier, however, visual and other access to the fetal body is fundamental to how we construct the meanings of that body, but more importantly, perhaps, is the emotional and rhetorical environment into which those fetal images are revealed. Our proclivity for thinking about fetuses as babies in wanted pregnancies, and the agendas of those who seek political victory for their interpretations of the fetus as a baby, are working in concert with these new technologies to create a more personable fetal identity.

The Meaning of Fetal Imagery: Expecting Baby

Wanted pregnancy and childbirth can be the cause for personal and social celebration. On at least some levels,

we value babies and children highly today, as have most cultures through time.⁵⁹ The birth of a newborn remains to many of us, nothing short of a small miracle. Expectant women look forward to labor and delivery, not only as a means to becoming unpregnant, but primarily because they are eager to greet and hold their newborn child. To be "expecting" encapsulates the condition of those who await the births of their newborns. Their imaginations create the child that will be born and many spend countless hours daydreaming about that imagined identity and attributing it to the fetus during pregnancy. As one woman put it recently, "In the first few minutes you know you're pregnant, you mentally put the kid through Harvard."⁶⁰ This is not so unusual a practice. I suspect that many potential parents awaiting the arrival of a child to be adopted speculate equally fancifully about what that child will be like. Many pregnant women even report that they began to "know" their child's personality through its behavior while it was a fetus *in utero*. We have a wide and strong

⁵⁹ There is a distinction between wanted and unwanted pregnancies that should not be overlooked. In addition, social and political cultures at various times in various locals have made even wanted pregnancies undesirable for many women and their partners. China's one-child policy is a case in point.

⁶⁰ Sandee Weeks, as quoted by Laquita Bowen Smith in "Miscarriage," *Commercial Appeal*, Memphis, TN, (August 24, 1993) C1-3.

discourse about babies and children -- they are powerfully familiar to us.

How are we to think about fetuses then? When women become pregnant with a wanted pregnancy, they do not want a fetus: they want a baby.⁶¹ When they imagine their offspring, they do not imagine a blood-sucking, parasitic, life-draining, ill-formed blob of fetal tissue; rather, they imagine a sweet, cuddly, lovable baby. In fact, early term fetuses look much more like the later than the former, but we have little unmediated experience of them. Because having a fetus is not the goal of a pregnancy, the fetus *qua* fetus has no intrinsic value or meaning in and of itself.

Our language deficit for talking about the fetus is indicative of this lack of its cultural value. Until the onset of the abortion debate, we had virtually no lay-language for talking about the fetus during pregnancy except as a child or child-to-be. Early medical and mass market books about maternity and child birth routinely discuss the fetus as a child or baby. Historically, the word 'fetus' has in fact been used primarily as a term of art in the medical community. Lay persons rarely referred to their

⁶¹ As Sandee Weeks, cited above said, "You think in terms of a baby in your arms, not a fetus in your stomach." Sandee Weeks, as quoted by Laquita Bowen Smith in "Miscarriage," *Commercial Appeal*, Memphis, TN, (August 24, 1993) C1-3.

gestating offspring as "the fetus." Only recently have medical distinctions between phases of fetal development gained public familiarity. People are generally now familiar with the term embryo, but words like 'blastocyst' and 'zygote' remain fairly remote from common everyday usage. The combination of our pre-disposition toward thinking of the fetus as a baby and our lack of a concept that gives specific value to and thus language about fetuses predisposes us to think and see babies in the imagery of the fetal body.

In the Nilsson pregnancy book referred to above, while much of the language in the captions describing the pictures refers to the subject as a fetus, there are many instances when the author employs anthropomorphized language, such as referring to the first sonogram of a fetus as its "first portrait" (59) and arguing that the sonogram provides the parents their "first sight of the baby." (104) Similarly, in the PBS special on reproduction discussed above, the narrator's voice-over of the sonogram notes that, "the movement the mother has been feeling can now be given an identity." It "allows parents to begin taking care of their baby before it is born." Many women in fact indicate that seeing sonographic imagery or hearing the heartbeat of the fetus allows them to "bond" with their "child" months before it is born. As one woman put it, "...she was already moving

around inside of me. We even watched her move her hand on the ultrasound. She was our baby." (Brower, M., 41) This too makes sense, for we have a social/cultural discourse about parent-child bonding. (Eyer) The idea of bonding to a fetus, however, makes little linguistic sense. As a result, these new experiences of fetal being are easily translated into the more familiar discourse and experiences of having babies.

Finally, as I argued in Chapter Three, we are pre-disposed to see humans as persons by the very nature of the political theory which shapes our interpretation of both our material and political worlds. Locke's vague human form, unmarked by specific features that differentiate kinds of persons from each other, provides an excellent frame for contextualizing our recent discovery of the fetal form. We are inclined to see the fetal being as a human being for we have nothing other than human-ness to use as a primary referent.

This sense of familiarity with particular fetuses has reach beyond individual pregnant women and their significant others. Those who see no differences between fetuses and babies are using the familiarity of fetal imagery to sustain their pro-life political agendas and further facilitate their rhetorical and political efforts to construct the fetus as a human being. This further contextualization of

the fetus has successfully contributed to our growing translation of the fetus into the idea that the fetus is most like a human baby.

The Meaning of Fetal Imagery: Humanizing the Fetus

Many people opposed to legal abortion on the grounds that the fetus is a human life were stunned at the Supreme Court's 1973 ruling in the pivotal case of *Roe v. Wade*, which prohibited states from restricting abortion access by women during the first three months of pregnancy and allowed increasingly restricted abortions through the final six months.⁶² (Faux) While abortions had been made legal in many places in the U.S. prior to 1973, those opposed to legal abortion had not organized a coherent opposition campaign to fight such legalization efforts. The right-to-life movement originated in the Catholic Church during the early 1960's in reaction to efforts to liberalize abortion laws in some states, (Butler, 630) but it was the *Roe* decision that really shocked them into action. In the two decades since the Supreme Court's acknowledgement of women's abortion rights, the self-named "pro-life" movement has become a serious and well organized force in American

⁶² *Roe v. Wade* 410 U.S. 113 (1972).

politics.⁶³ The success of their anti-abortion political strategies is due in large part to their effective use of fetal images made possible by the new fetal medical technologies. (Petchesky, 1987)

Most Americans, who had no idea what an early or mid-term fetus looked like prior to the 1970's and '80's, are now familiar with fetoscopic photographs and sonographic images of fetuses *in utero*. As general consumers of these images, we incorporate them into our knowledge about pregnancy in such a way that those images now stand for "fetus" in our cultural mind's eye. And yet, as I argued above, sonographic images carry no inherent meanings. Most of the pictures created by ultrasound waves are fuzzy and blurred to the untrained eye and the products of conception for early-term abortions can be an indistinguishable mass of bloody clots and tissue. Had we simply been bombarded by these indistinct images, we would have had no context in which to place them: they would have been meaningless to us.

A key political objective of the pro-life movement has been to give meaning and context to those vague images for

⁶³ There is also an effective international pro-life organization called "International Right to Life." They are currently active in fighting against international dissemination of the abortifacient treatment from France known as RU-486 and against International Planned Parenthood efforts to make abortion available in other countries.

us. (C. Condit) Indeed, the vagueness of some sonographic imagery has been turned into an advantage for anti-abortion rhetors. As Cynthia Daniels argues, sonographic imagery is

distinct enough to suggest the similarities between the fetus and the baby (through the shadowy images of head, limbs, even fingers and toes), while it [is] vague enough to mask the dramatic differences between the fetus and the newborn infant (such as immature brain, central nervous system and lungs.) (16)

Several commentators note that anti-abortion forces have succeeded in constructing a symbolic meaning for fetal being equivalent to "human baby." (Petchesky 1987, 264; C. Condit)

For example, C. Condit shows that pro-life activists have succeeded in translating the broad range of terms that describe the gestating fetus at various states such as, 'zygote,' 'blastocyst,' and 'embryo' into the single, empathy inducing signifier "baby" through a careful rhetorical strategy of metonymy and the effective use of the 1980s "cult of appearances." (82)

The argument for fetal personhood has taken hold fairly quickly in American politics. Many reasons account for this, but as noted above, chief among them are the rise of medical technology, which has made the fetus more accessible and thus familiar; the commercialization of fetal imagery (D. Condit, 1991); the fact that the pro-fetus movement was highly motivated by the decision in *Roe* (out parties are typically more energized politically); and finally, the fact

that the opposing side has mounted a negligible response. Arguments for fetal value have historically originated in the religious belief that the human soul is conferred upon the fetus at conception. (Perkoff, 160-163) In this theory, even the single-celled pre-embryo is "human life" because the essential, defining element is metaphysically imparted rather than materially derived or culturally crafted. Today, many scholars point to Biblical references to the fetus for proof, though these claims are strongly debated within theological circles and across sects. (Perkoff, 160; Wennberg, 43 and 63-69)

Within a liberal political culture, those who believe the fetus is a human life from conception automatically confer the status of personhood on the fetus as well. But one must rely upon faith rather than fact to sustain religious beliefs, for beliefs do not translate well into political discourse. As a consequence, those who understand the fetus to be a human being, and who advocate for its inclusion in the human community, have found it necessary to "prove" the fetus qualified for the moral status of liberal "persons" to make their case for the political status of the fetus.

To do so successfully, pro-fetalists have had to illustrate first, that the fetus meets the abstract requirements of a "human," as framed in early liberal

thought, and second, that as a tiny human, like a child, the fetus' value and rights inhere in its potential to develop the freedom, equality and capacity for reason that lies dormant within its identity. As I have suggested all along, the very vagueness of the Lockian concept of the "person" facilitates this translation of fetal being into personhood.

Within pro-fetus politics, efforts to prove empirically that the fetus is a person have occupied much of their political strategy. The success of these efforts has depended on two primary approaches, the first employs scientific data about the individuality of genetic information transmitted at conception to substantiate claims of fetal humanity. The second approach is what I shall call the "beating heart" strategy which draws on and amplifies scientific and empirical information about the material development of the fetal body.

The Idea of Genetic Humanity

As we have already established, an important key to Locke's theory of individual sovereignty is the idea that each person is created equally, yet uniquely and particularly by God. As a component of a political theory, it casts individuals as separately and uniquely valuable. Theological arguments that God imparts the soul at the moment of conception define us as unique individuals as

well. Arguments about the creation of a unique genetic identity function in the same way, but on a less metaphysical basis. According to this interpretation and use of research, once the ovum and sperm unite, individual identity is set and will emerge, based on the genotype created by that particular union. (Channer, 35) As Wennberg argues

the future human being is latent in the zygote to an extent to which it is not latent in the ovum or sperm. For the first time, with the fertilization of the ovum, we can point to a single living organism in which there is contained encoded instructions for the subsequent unfolding of the whole organism. (56)

The zygote is no different from the soon-to-be-born person in this understanding of human identity. Thus, genetic identity establishes human identity. There is one catch to this theory, however, and that is that identity is latent in the genes, awaiting full expression at maturation. This slippage, however, is the difference between *potential* and the *actual* state of personhood. As we shall see below, this slippage fails to trouble those who see fetal being as human life, for all of human beings rest in a potential state within liberal theory until they reach the age of majority.

For fetal life, the resting potential is just somewhat more immature. "From the point of conception there is a unique genetic package with all the encoded information necessary for the unfolding of a full-fledged human being." (27) This

argument, Wennberg insists, "establishes ... that from the moment of conception there exists the natural *potential* for personhood, which is to say that in time the unique potential in the zygote will (with a certain degree of probability) unfold and a person will emerge." (56, my emphasis) This argument seems to have purchase because, as we shall see below, it is derived from the familiar Lockian notion that children are persons by virtue of their creation as humans, regardless of their state of maturation.

The second argument used to make the pro-fetus theological case politically intelligible relies on the tools of technology in addition to the concepts of liberal theory. The "beating heart" approach is intended to accentuate and define human-like qualities of the fetus to construct a discursive interpretation of the material fetal body that makes it *seem* like a human being.⁶⁴ For example, pro-fetus arguments depend on scientific research about gestational development to illustrate that even in the early weeks past conception the fetus has a "beating heart." (Wennberg, 27) Other 'human' features are accentuated as well. These include the onset of brain-wave activity, fetal

⁶⁴ For an in-depth examination of discursive process used to create meanings for the body, see Foucault, generally. Laqueur's treatment in *Making Sex* is an excellent example. For specific application to fetal politics, see Bordo, 1993; C. Condit, 1990; D. Condit, 1991; Stabile, 1992; and Petchesky, 1990.

animation and the development of sensitivity to pain or sweetness. (Wennberg, 26-30 and 74-75)

Pointing to the beating heart is not enough, however. While it may establish movement -- a culturally recognizable indication of "life" -- it is important that the heart be perceived specifically as a *human* heart as well. The process of insuring that a pulsing movement in the fetal body is interpreted as a "heart," is, as noted above, what C. Condit defines as metonymy. (82-83) The point is to transpose one linguistic, meaning-laden concept into another through repetitive reconstruction of the meanings that define those words. The discursive shift in the meaning between the signifier and the signified causes a kind of gestalt switch in what is "seen." The blob-like or non-human qualities of the fetus become more difficult to perceive as they are pushed aside in favor of those features that are most "human-like" and thereby simultaneously constructed to be even more human in nature. (C. Condit, 82)

For example, scientists may argue that what moves blood in the first weeks of fetal gestation has little resemblance to their traditional medical definition of a human heart, but once it has been discursively analogized and depicted as such, empirical distinctions between the two become less relevant.

It should be noted that it is difficult for those opposing the personhood construction of fetal being to make much headway using the oppositional equivalent of this rhetorical strategy; doing so requires becoming entangled in complex, scientific arguments about the differences between the structures and functions of vessels versus hearts. The discursive ground here clearly favors the pro-fetus rhetor: the more one says "it's not a heart" and the more one draws attention to where that beating vessel differs from a human heart, the more attention one focuses on the "heartness" of the thing itself in the first place. Thus for those who deny the fetus moral standing as a person, becoming entangled in this empirical morass offers little advantage.⁶⁵ The problem incumbent in doing this is that we have a cultural framework for understanding "hearts" that readily accommodates the idea that the fetus has a "beating heart." There is no real equivalent discursive framework for arguing the contrary. Thus anti-fetal personhood

⁶⁵ I am not arguing, however, that making these kinds of empirically based arguments are inevitably doomed to failure, but the reality is that they have been made only infrequently and with little success to date. What I am suggesting, however, is that such a counter-rhetorical campaign must be crafted equally as well as the pro-fetalist campaign, if not better. Ultimately, in the concluding chapter of this work, I will suggest that pro-life/pro-choice arguments to the contrary, the decision about whether or not we "count" the fetus as a person is a political rather than an empirical one.

arguments originating in empirical discussions like these must also and simultaneously create a different and controlling cultural background about the material fetal body in order to have a chance at success.

Despite this problem for fetal-rights opponents, there are a number of problems with the beating heart strategy. The first is that when bared to the world upon separation from the pregnant body, an early term fetus (e.g. in the first 8 weeks of gestation) looks much more like a small blob of bloody tissue than a human being. At this point, the 'soul' is the only 'recognizable' human feature but, paradoxically, it is also the one feature that is clearly empirically undemonstrable. Thus, while there are "human-like" features that eventually manifest themselves as the fetus develops, and that can then be highlighted and/or exaggerated to make them seem most "human," making the case for fetal personhood in the early stages of development is more difficult. The adoption of the genetic identity argument noted above is one way around this problem. A second means for circumventing this problem entails the use of complex and subtle rhetorical tools like the film *The Silent Scream* to mitigate this gestational distinction. In this film, a late term fetus is (mis)re-presented as an earlier term fetus to help erase these distinctions. (C. Condit, 1990, 86) While this film was perhaps effective,

its minimal reach throughout the general population inherently limited its overall persuasive power.

On the whole, then, the beating heart approach easily permits the fetus to be represented as both alive and as a human life. Moreover, the task of equating that living human fetus to a born person (child) is facilitated as well.

Pro-life and pro-fetus rhetoric about "stopping a beating heart" with abortion creates the sense that the fetus is vulnerable, threatened, innocent -- just like a child. A key tenet of liberal theory, as formalized in Locke's many discussions of parenting, teaches us that our task as adults, in fact our reason commands us, to protect children in their innocence. To fail to do so, or to intentionally harm them, is to be irrational. (Locke II, 58-59)

Moreover, the beating heart strategy is facilitated by Lockian theory because it functions on only the vaguest of outlines of the human being. One can point in a sonogram, for example, to a fuzzy form that has some semblance of a leg and that is sufficient to give it the kind of universalized, unmarked "humanity" in its body that Locke invents as he debunks Filmer. In this light, the fetus, as a physically indistinct and undefined "human," may actually be the ideal liberal person -- one unmarked by the distinctions of gender, race, class or physical ability.

Finally, inherent in the beating heart and genetic identity strategies is a focus on the individualization of the fetus. As Petchesky and Stabile, among others have argued, the social construction of fetal personhood is only possible by portraying the fetus as an autonomous, fully self-sufficient person. This illusion has had great weight in the pro-fetus campaign. Only if one has really come to believe that the fetus is in fact, independent, but merely "trapped behind the maternal wall," (Phelan) could one argue for the "liberation" of a fetal "person" from within the body of the woman who makes it.

An excellent example of this strategy is a 1993 television advertisement sponsored by the Arthur S. De Moss Foundation. The 30-second advertisement features a split image of an infant on the left and a sonogram of a fetus labeled "10 weeks conception" on the right. The voice-over directs the viewer's attention and contextualization of the images:

Let's compare these two babies. The baby on the left has a beating heart; so does the baby on the right. The baby on the left has arms, legs, fingers and toes; so does the baby on the right. The baby on the left can turn and jump and kick; so can the baby on the right. The difference is, the baby on the left was just born; and the baby on the right would very much like to be. Life. What a beautiful choice.

What is most striking is the attempt to equate the obvious human infant with the obscurely featured fetus. These two

images look fundamentally different: the infant is rosy fleshed with hair, clear cut features and dressed in baby clothing. The fetal image is grey, fuzzy and full of static and looks like a bulbous squirming worm or amoeba. And yet, they are matched as much as possible to give the illusion that they are identical. The construction of what one is seeing by the voice-over denies the visual cues of difference. The point is to make the viewer perceive the two images as similar individuals: thus the language equates them; the size of the pictures is the same, so that despite the label of "10 weeks conception," the fetus seems to be as big as the infant; and the "desires" seemingly expressed by the fetus appear to be identical to those of the baby. The implications are that there is no difference between the two: they are identical, except one is trapped inside the cave (the pregnant woman) surrounding it. Were it not for that fact, the fetus would be rolling around at will too.

This process of rhetorically constructing the fetus as a baby has been used by pro-life lobbyists to persuade legislators as well as the general public. Many activists routinely confront law-makers with tangible objects they call "fetuses," but which are made in the shape of baby dolls. The point of course is to make the word "fetus" indistinguishable from the concept of baby in lawmakers' minds, thus making it impossible for them to support

"murdering babies" through pro-abortion legislation.

Examples of such tactics abound: placards displayed outside abortion clinics and the homes of pro-choice legislators by pro-life picketers show graphic photographs of the dismembered bodies of late-term fetuses with captions that read "Another child killed by abortion." Other placards with fetal images tell viewers that the fetus is "Alive and growing: heart beats, brainwaves, fingerprints, feels pain."⁶⁶ Pro-life members employ similar tactics in their daily pickets of women's health clinics and medical offices. Even the Supreme Court has been bombarded by baby doll-waving protestors gathered outside the Court during oral arguments of key abortion-rights cases. During the 1992 congressional elections, pro-life candidate Michael Bailey, used graphic fetal images in his television campaign ads to underscore his strong belief that abortion is the killing of innocent "babies."⁶⁷ In a recent radio interview, a pro-life activist with the organization Operation Rescue argued that some forms of contraception, such as the intrauterine device (IUD) and the birth control pill, are "baby killers." He insisted that such birth

⁶⁶ Conversation with Kansas State Legislator, Nancy Brown, 1991.

⁶⁷ "Fetuses Shown in Campaign Commercial," *Facts on File*, 52:2686, May 14, 1992, 353.

control devices, which prevent implantation of the blastocyst, "starve" the newly conceived "baby" by preventing it from getting its life-sustaining nutrition from the uterine wall. As listeners, we have no concept of what "failure to implant" means to a fetus, but we are well aware of the horrors of starving children. His equation of the two is intended to stir the same emotional response toward the fetus most of us feel toward a hungry child.

The tactic is remarkably effective: after twenty years of being told that the fuzzy, grey and red blob we once thought of as fetal tissue (if we thought of it at all), is *really* a tiny, human person, we now see something that, as the male narrator in the *Silent Scream* says, "... sure looks like a baby!" (Petchesky 1987, 264) The association is not a difficult one to make in an environment where we are culturally disposed by wanted pregnancies to think of that thing in there as a baby and there is virtually no countervailing discourse about the fetal images bombarding the average American. Pro-choice political strategies have focused primarily on the harms women experience when forced to resort to illegal abortions, but they have virtually ignored the rhetorical and visual campaigns about fetal personhood relied upon by their pro-life opponents. America's sidewalks are not lined with pro-choice activists carry placards with pictures of bloody, lumpy early-term

abortions or unenhanced early term sonograms. As a result, both the visual and rhetorical public discourses about the fetus have been left to those who sincerely see it as a baby. Consequently, pro-life rhetoric is gaining the upper hand.

The success of both these political strategies and the familiarity that visual exposure creates can perhaps be measured in part by its spread to the less political realm of American popular culture. For example, evidence of this gestalt-like switch, from not thinking about fetuses, to thinking of them as babies, can increasingly be found in purely commercial settings. Market interests are capitalizing on the fetus-as-baby image in advertising and in the other media and the profits are more monetary than political in nature.

Commercial media interests are eager to exploit anything that can be used either to "sell" or to entertain.

While cultural taboos and the simple invisibility of the fetus before the 1960s would have assured that fetal images would not be used in advertising campaigns or commercial films, the fetus *qua* baby of today is becoming a star.

For example, in a recent Volvo print advertisement, a fetal sonogram, which appears to have been doctored to increase clarity and detail, is displayed over a Volvo station wagon. Identifying details -- the outline of the

head, eye, nose, chin, lips, ear, toes, and musculature in the legs -- are perfectly evident. The fetus' arm is outstretched as though it is waving a friendly "hello," and each of its fingers is completely distinguishable. The caption asks the reader, "Is something inside telling you to buy a Volvo?" The fetal image in the sonogram looks like a baby. The marketing strategy would fail if we were not either convinced or persuadable that it was one.⁶⁸

Sonograms were also featured prominently in two 1994 television commercials. The first, for *Pampers* disposable diapers, begins with a shot of a sonogram and then moves to a baby and finally a toddler. The voice over tells the consumer that *Pampers* are designed for "all stages of a baby's life." The implication, of course, is that the fetus *in utero* uses *Pampers*, just like it does later on.

The fetus was the star of a second commercial which tells a mini-narrative about an absent "father." In this ATT ad, a pregnant woman is undergoing a sonogram at her physician's office without her male partner. She is looking at a "clear" image of her "baby" when the doctor brings her the telephone. Her husband is calling to tell her he wishes he could be with "them." She holds the telephone receiver to her stomach and he talks to "the baby" over the phone.

⁶⁸ *Time Magazine* October 29, 1990, 117.

The "baby" responds by kicking and rolling. The pregnant woman both feels and sees the "child's response." She tells the proud "father" that the "baby" knows he cares.

What ATT is obviously hoping to communicate is that it is a cutting-edge, high-tech corporation that brings families together. From an advertising perspective, the ad works because it seems like ATT is making it possible for the "father" to "see" and "talk" to his "child" long distance. When in actuality, of course, it is the sonogram that allows the pregnant woman to see the fetus.

The importance of this ad for our purposes is that it treats the fetus *in utero* much like the *Pampers* ad. The sonogram elides the fact that the fetus is not independently present, but is in fact inside the pregnant woman. In a curious slight of hand effected by virtue of how the visual video medium works, it seems that the father and the fetus are both just a phone call away. The fact that it has not been born makes it no less of a participant in family events.

Film makers have also spied the potential for profits from exploiting fetal imagery. The plots of two recent movies, *Look Who's Talking* and *My Life*, revolve around fetal imagery and fetal personification. In the first, a fetus *in utero* is given an adult, male voice. The "fetus" talks to itself and "thinks" about what's going on in the world

around it (outside of the uterus). In the second, a dying father tries to communicate with the fetus his wife is carrying.⁶⁹

The Volvo advertisement works because the fetus has been endowed with a distinct and valuable identity within the family unit. In addition, the caption indicates that the fetus has a voice: "Is something inside telling you to buy a Volvo." The television ads work because they make the fetus no different than the baby. The film *Look Who's Talking* works because we are attracted to and find humorous the ascription of adult qualities to babies, which we willingly extend to the fetus as a baby *in utero*. Were we to idealize the fetus as a talking bloody, fatty blob of tissue or an internal organ (particularly a reproductive organ in a female body), we would be more horrified than humored. As with the anti-abortion rights photographs and rhetoric, this comic portrayal of the fetus as baby makes it "real" in a new sense. *My Life* makes no distinction between the fetus in progress and the son the father will never

⁶⁹ In a peculiar paradox, the future son is equated throughout with the fetus that resides within, so that while actor Michael Keaton is talking to his son, in the future, he is also talking to his son, in utero. The plot begins with a fetal sonogram filling the big screen. Much of the rest of the film is shot as though the camera eye occupies the perspective of the fetus. Thus, the audience is both exposed to images of the fetus, and virtually becomes one with the fetus as the dying father points a camera at himself and addresses both simultaneously.

know: they are one and the same. That is how he can talk to the fetal image in the same way he does once the fetus is physically transformed into a baby by birth.

Fetal imagery is also used occasionally in some commercial medical endeavors. For example, a recent roadside billboard for a New Jersey infertility clinic featured the image of an amniotic sac-encased fetus over the caption, "Miracles Can Happen." Here the fetus stands for three things: the fetus, the pregnancy, and the end-product baby. The billboard thus plays upon the desire to become pregnant and ultimately have a baby but presents those desires as culminating in the fetus.

Commercialized fetal images are now aimed at audiences of children as well as adults. A 1993 Tyco doll, called "Mommy's Having a Baby," allows children to "feel the baby in Mommy's tummy" and help "deliver" it.⁷⁰ The doll comes with a "baby scope" that allows the child to "see baby move" while it is in utero. The toy ultrasound uses a holographic image that changes when tilted -- the image shifts from lying on its back to sucking its thumb and kicking its feet. The "sonograph" pictures a well defined baby not a fetus

⁷⁰ This is from the literature which accompanies the doll. There are a number of disturbing problems with this doll, including the fact that the "baby" is delivered from an artificial pouch arrangement that is really imbedded in a layer of clothing -- it is the perfect combination of pregnancy and ectogenesis. But those concerns are fodder

and the image floats in a waving sea of fluid with no evidence of the pregnant "Mommy's" body in sight. The word "fetus" never appears in any of the literature accompanying the toy; rather, it refers to the fetus exclusively as a "baby." It is interesting that the "baby," which is proportionally sized and developmentally constructed to more closely resemble a toddler than an infant, can be put back in the mother's "womb," thus eliding the difference for the young consumer between being born and not being born. In the minds of the future generations who will learn about pregnancy from this doll, there will be no fetuses: there will be only babies.

These rhetorical translations of fetal images into babies have a cumulative effect; we perceive these fetuses as babies because we've been exposed to them as such previously. In addition, however, we walk away from each experience having incorporated those images in such a way that they will define our next exposure to a fetal image. As a consequence, the symbolic meaning of "fetus" has been transformed radically. While the abstract idea of "fetus" once signified an invisible, unknowable "potential," it now designates an extant, corporeal entity with a knowable autonomous identity as a "baby."

This autonomous status is possible only through a sort

for work to be done elsewhere.

of peculiar mental separation and distinction of the fetus from the body of the woman of whom it is a part. The perceptual shift suggests that although the two may be connected by shared tissue -- uterus, amniotic fluid, the umbilical chord, the same space -- they are, as some physicians now describe them, "separate *individuals*."

(Phelan, 462)

It would seem by the language that the fetus has been elevated to a position of equal value with the pregnant woman in the medicine and politics of pregnancy. But others would argue that seeing the fetus, both physically and conceptually, is dependent not on equality with the pregnant woman, but rather upon her erasure. (Petchesky 1987; Stabile, 187) The sonogram, for example, erases the external belly of the pregnant woman to allow access to the fetus inside; the fetoscope must be inserted through the pregnant stomach and uterine wall; and fetal surgery requires an incision into the pregnant woman's body to treat the fetus. The *Life* magazine cover discussed earlier, for example, shows a fetus encapsulated, not by a pregnant woman's uterus and body, but rather by an amniotic sac that appears to be part of the fetus.

These pictorial presentations of the fetus, unobscured by the visible presences of the woman and womb of which it is a part, create the sense that the fetus is, as Rosalind

Petchesky calls it an "autonomous, atomized mini-space hero" floating independently in a sort of capsule.⁷¹ (1987, 277) By necessity in this construction, the woman's body has become the unknowable void of outerspace.

Once this physical erasure of the pregnant woman is achieved, it is the fetus that begins to occupy our conceptual attention. In a recent commentary, one physician describes the fetus within the womb as a "recluse" (Phelan, 463) and a "hermit," (464) as though it were a full human being that is simply choosing to hide within the "maternal abdominal wall." (490) The fetal "baby" in the DeMoss commercial noted earlier seems to be almost caged within the cave of the pregnant stomach. Thus, the pregnant woman's body becomes marginalized as a distant "fetal container" or "fetal environment" and is increasingly perceived as a transmitter, a conduit for the fetus, rather than the creative medium which makes fetal life and animation possible.

Thus, after technology and medical science lead us to dis/cover the fetal body today, success in personalizing

⁷¹ It is interesting to note that the "belly" of the pregnant mommy doll in the Tyco toy "Mommy's Having a Baby" discussed above is actually part of a maternity dress that can be removed so that the Mommy figure can be pregnancy free. Thus the woman's belly has become detached even from her: a disposable ectogenic womb. What is more, the shape of this pregnancy device strongly resembles a capsule in shape and form.

what we see there requires that we humanize it. As I have argued, the social, political and commercial forces that lead us to do so have been, for the most part, wildly successful. We are increasingly seeing the fetus as a tiny human, as a tiny person. This process of humanization has not gone unchecked or unanswered, however. Opposition to making the fetus a person has centered on a different aspect of the liberal project of humanizing the fetus: the question of fetal rationality. It is to this countervailing argument that we now turn.

Responding to Fetal Personhood: the Fetus Is Not Rational

It is surprising to discover that despite the considerable attention paid by the country to the abortion controversy since *Roe*, there is but a scant corpus of political or theoretical work aimed at direct refutation of this mounting personification of the fetus. This is due in part to how the abortion debate has been shaped within the confines of liberal theory and politics.

On the political front, the battle-lines drawn around abortion are such that the opposing sides have engaged in rhetorical and political tasks that primarily speak past one-another. As we have seen, the job pro-life advocates set for themselves has been to prove the human value and personhood of fetal being. In contrast, pro-choice work has

been devoted to establishing a woman's constitutional right to choose abortion. Thus, one side has been arguing primarily about fetal life, while the other has been arguing primarily about women's rights. In fact, pro-choice strategists have even adopted the position that they are not "pro-abortion" but rather pro-choice. Making this careful distinction not only locks them into a lop-sided argument about fetal life, but ironically, it also contributes subtly to the legitimization of pro-fetus claims.⁷² As a result, the pro-life argument establishing the personhood of the fetus has gone virtually unchecked within the political arena.

The few responses to the construction of fetal personhood that have been generated, however, have originated within the academic community, primarily on the part of political theorists and moral philosophers. Early feminist theorists, writing prior to the explosion of the abortion rights debate in America, explored the fetus within the context of pregnancy, but did not question the political

⁷² It may be that pro-choice advocates have relied (too heavily) on the Court's language in *Roe*. If that is the case, that is a clear failure to understand the parameters of the abortion debate. As I will illustrate herein, saying the fetus is not a person entitled to a right to life does not make it so. The fact that pro-choice advocates do not want to be associated with being pro-abortion illustrates this point. If the fetus were not recognized as valuable, on some level, pro-choice advocates would not need to make such a distinction.

status of the fetus. Simone de Beauvoir, for example, early on characterized the fetus as both an "injury" to the pregnant body (553) and a "parasite" that "proliferates" in the body of a pregnant woman. (336) Sometime later, surrounding and following the Roe decision, a few feminist theorists turned their attention to the fetus in an effort to combat the political claims for fetal life made by pro-fetus rhetors. Petchesky, for example, in her monumental study of abortion, *Abortion and Woman's Choice*, characterized the early fetus as a parasite in an effort to bring an alternative interpretation of fetal life into the debate. (350) But the strongest attacks on the idea of fetal personhood to be waged within the abortion debate have come primarily from within the community of moral philosophers.

There have been two major approaches to understanding the moral status of the fetus by moral philosophers. The first was outlined early in the abortion debate in the work of Judith Jarvis Thomson. In that famous piece, Thomson is really focusing on the moral imperatives impressed on women to sacrifice their bodies to support their fetuses within the abortion context. (Thomson, 1971) She analogizes a woman's duty to sacrifice her body to the life and needs of a fetus to that of someone linked by a common kidney to a world-class violinist. She argues that no duty to provide

care exists for either the pregnant woman or the person providing blood via the shared kidney to the violinist. Thomson's approach does not address the fetus directly, however, but rather argues that even if the fetus is a person, a woman has no moral imperative to sustain its life.

While she makes a powerful argument for abortion, her work also inadvertently serves to legitimize the fetus as an "individual" in its analogizing the fetus to the violinist.

In doing so, it grants the fetus a kind of status that supports rather than denies the idea of fetal personhood.

Since Thomas, the major argument from moral philosophy against protecting the fetus as a person and for denying fetal rights is simple and starkly liberal in form: persons have the ability to reason but fetuses do not; therefore fetuses are not persons, and because only persons can have rights, fetuses are not qualified as possessors of rights.

(Flathman) As I suggested earlier, in traditional Lockian liberalism the capacity for and, more importantly, the exercise of rationality was the quality which distinguished the rights-bearing person from either the irrational human being or the beast. We owe our modern understanding of personhood to this Lockian tradition. As one contemporary theorist notes,

We continue to use rationality as the marker of personhood. Rationality is attributed to *homo sapiens* in virtue of the ability to reason and act upon the

results of deliberation. To say that an individual person possesses rationality is to say that that person measures up to the minimum standard that establishes a presumption of competence. Absence of rationality is taken to warrant a diminution of legal rights and commonly some kind of supervision or even constraint. Rationality here is a threshold concept. (Brian Barry, 419-420)

Some authors have identified this position as the "actuality" position: until one is able to make use of one's reason and freedom -- has actualized one's potential -- one has no claim to the moral status of personhood. (Wennberg, 81) But identifying "actualization" is itself a matter of some disagreement, even among those who unite in opposition to fetal rights. At what point has one "arrived"?

In order to evaluate whether or not the fetus is rational, we must first answer the question, "What qualifies one as rational?" As I argued in the previous chapter, Locke escaped the kind of hard inquiry this question implies. His measure of rationality was simple: if one acted against the Laws of Nature, one was irrational. But in the modern age, how ought rationality and/or irrationality be measured? What is more, how should this be applied, not only to fetuses, but to children, the elderly, the disabled, to me or to you?

Different proponents take the argument for rationality to a variety of divergent conclusions vis-a-vis fetal rights, depending on their particular measures of

"actualization." In general, most philosophers, in keeping with the Lockian criteria, argue from a hierarchy of values that includes the demonstration of sentience, possession of interests and exhibition of self-consciousness as evidence for the capacity and exercise of rationality.

In her excellent discussion of the fetal rights debate, *Life Before Birth*, Steinbock argues from such a hierarchy, beginning with life, extending to sentience, then self-consciousness and concluding with the ability to have and act upon one's own interests. She says that "Embryos (the unborn during the first eight weeks of gestation) at least do not have interests. At the same time, they are living things." (40) But life is only the first step in the hierarchy of personhood established by Steinbock. She argues, however, that anything without life certainly can't be a person.

Minimally, sentience, as defined as the ability to experience pain, is enough to establish some moral status for Steinbock. Sentience is problematic in her theory, because for her, this is an empirical question. She argues that at least during the first trimester fetuses are not sentient, but she concedes that they may become so as they develop, however. Thus in her schemata, first trimester fetuses definitely are not persons.

The third criterion for rationality, and thus

personhood, is the capacity for and the ability to act upon one's interests. Steinbock makes a noteworthy distinction here. She distinguishes between "those things that are in the interest of a being -- that is, those things that promote its welfare or good," (her emphasis) and those "things individuals take an interest in -- that is, objects of their desires, preferences, aims, and goals." (16, her emphasis). Fetuses, like animals, may have interests in the first sense, but not in the second because they are "Mindless, nonsentient creatures," at least during the first trimester of development. (40) For Steinbock, "Possession of interests is therefore a minimal condition for both rights and moral status," but only if the fetus can actually express and exercise interests for themselves. (10)

What counts most for Steinbock, as it did for Locke, is the capacity to be aware of one's experiences. Says Steinbock, "Without conscious awareness beings cannot care about anything. Conscious awareness is a prerequisite to desires, preferences, hopes, aims and goals. Nothing matters to nonsentient, nonconscious beings." (14) Thus, they can claim neither personhood nor rights.

Steinbock's model closely parallels that of Locke. Recall that at the heart of his understanding of reason -- the criteria that distinguished those who were persons with rights from those who had forfeited that political status --

Locke valued the capacity for self-awareness most highly. Steinbock expresses this as consciousness, other thinkers have translated it into the idea of "will."

Schochet, for example, argues that the possession of interests is "at best a necessary but not sufficient condition [to establish qualification for rights." He adds to sentience the requirement for evidence of a "rational will" to establish "sufficient conditions for the possession of rights." In his thinking, "sentience and will entail interest, and these together are the sufficient condition for rights." (1978, 4) While Schochet does not elaborate on what he means by "will," it seems to function very much like Steinbock's consciousness and Locke's self-consciousness.

What is relevant about Schochet's position is that it allows him to find that "lower animals, trees and even fetuses and young children are not sufficiently sentient and rational to have rights." (4) As he notes, his argument suggests the traditional Lockian view that "in order to possess a right one must be sufficiently rational to recognize, understand, and act upon it." (5) Richard Flathman echoes this interpretation, finding that children are not entitled to rights because they are not rational persons. (228)

The practical difficulty with this interpretation, of course, is the one noted above, and that is the definition

and identification of what qualifies as "rational." In Locke's world it was something like "act like I act" and you are being rational. This is because Locke based his understanding of reason on the interpretation of the senses.

He assumed that all human beings experienced the world just as he did and thus would arrive at the same conclusions and interpretations as did he. Others would therefore reason with him: reason right. In the modern context, we have come to understand that identifying rationality in such a manner is fundamentally ethno- and ego- centric. Some feminists have argued additionally that using this kind of rigid, masculinized definition may preclude women entirely. How the fetus fits in is equally problematic.

Prior to solving the problem of measuring the existence and exercise of rationality, however, is the problem of doing so for the child. The reasonable conclusion of the rationality standard approach is that small children are disqualified as rights-bearing persons, as indicated above by Schochet. Schochet is not alone in this argument, though he does not take the argument to its extreme conclusion, as do some scholars. (Flathman, 238) Tooley, for example, considered by some to be the strongest proponent of this position, argues that because small children fail to qualify as rights-bearers, and because they lack self-consciousness, they also do not have a moral right to life. He further

concludes from this that infanticide is in fact fully justifiable. (Perkoff, 160; Wennberg, 80-82)

Putting aside the ideological problems that killing one's children pose in the modern world, (throwing one's babies into alleyway dumpsters or driving them into lakes, particularly by women, is a source of political outrage today. The reasons for this are beyond the scope of this paper but are certainly germane to it.⁷³), this reading of rationality and personhood is possible only if one discards a number of other traditional liberal principles along the way. Returning again to Locke, people are expressly prohibited from killing their children. Locke explicitly argues that parents can not kill their children: those who do are themselves irrational. (II, 66) In his design, the prohibition against the killing of one's children is justified on three grounds: first, God made those children, not the parents; second, killing children violates the Natural Law command to preserve others as one would preserve one's self; and finally, doing so goes against the natural impulses of nature to propagate and nurture one's offspring.

In the modern context, the prohibition against the killing of children is somewhat less metaphysically

⁷³ See for example, Rick Bragg, "Out of the Trash, an Infant Gets Another Life Chance," *The New York Times*, (February 22, 1994) B3.

grounded. In the American setting we have culturally agreed that children are entitled, at least theoretically, to some measure of protection from both parents and the state simply because they are valuable in themselves as human beings. We recognize that even though children may not exhibit nor exercise reason, they have intrinsic value by virtue of the fact that they are living human beings. (Minow; Freeman) We owe this fundamentally liberal view of children directly to liberalism generally, and perhaps to Locke specifically. To understand how this is so, we must examine where children fit in Locke's seemingly simply two-valued schemata for rationality.

It can certainly be argued that at least in infancy, children lack the qualities Locke argues are necessary for reason. Locke himself makes it clear that he thinks children are far from rational creatures. (Freeman, 53-54) But if they are not rational, then how are they born "free" and "equal"? Locke's answer is that while we are all born with the capacity for reason, we must grow and develop into the ability to use it. Says Locke,

Thus we are *born Free*, as we are born Rational; not that we have actually the Exercise of either: Age that brings one, brings with it the other too. (II, 61)

Recall that in his work, Locke argued that what distinguishes the human being from the beasts is the

combination of both the human form and the capacity for reason. He did not assert, however, that we are born rational creatures -- only that we are born with the capacity to develop reason. This is Locke's famous "tabula rasa" argument: we come into the world, essentially as blank slates, and we must write our upon slates with our sensations and experiences. A key element of Lockian theory is thus a strong dependence on the possibility of education to reason. And in fact, Locke argues that the purpose of the family is to educate children to the age of majority and to the ability to exercise reason in adulthood. (Freeman, 54) Locke's work, therefore, explicitly includes children as persons, regardless of their inability to exercise reason in their own interest.

In Locke's theory, then, we discover a third state of the human being with respect to rationality: we earlier noted that human beings could either be rational persons with rights or they could be irrational humans without political identity -- human beasts, as it were. There is now a third condition, the state of children, which is one of pre-rationality. (Locke, II, 63) Unlike with the cases of people who behave irrationally, children do not lose their freedom nor their status as protected by the rights of rational persons, simply because they cannot reason. Rather, their equality and their reason are exercised

through their parents, who's job it is to protect and think for them until they mature. (II, 61 and 63) In Locke's words, "He that *understands* for him, must *will* for him too..." (II, 58) For Locke it is clear that children are required to be neither rational nor self-conscious in order to qualify as having equal rights: those qualities inhere in being made human -- regardless of how that manufacture is accomplished. The success of the "actualization" argument thus depends on ignoring entirely the question of children as crafted in liberal theory. Some theorists argue, however, that regardless of the status of children in liberalism, children and fetuses are not the same, and thus the case is even more difficult to make for the fetus.

It is true that children and fetuses are empirically different -- one is (obviously) external and physically individualized, while the other remains physically a part of the pregnant woman and is therefore neither individualized nor autonomized in the regular sense. But it is unclear whether the assertion that separation from the pregnant body demarcates either the moment of "life" or the "humanity" of the fetus required for the status of personhood, certainly not in the work of Locke. Opponents to fetal rights claim that while the fetus remains connected to and hidden within the pregnant body, it does not reach the minimal level of endowment with human rights that Locke assigns to children.

And it is true that Locke uses the word "born" throughout his work. But I would argue, on the other hand, that there is also nothing in Locke that would argue specifically against extending parental protection for children back to the fetus.

In fact, Locke assumes that the fetus, *in utero*, for example, experiences sensations. In his chapter in the *Essay Concerning Human Understanding*, where he argues against the notion that ideas are innate in the human being, but rather derived from sensation, Locke discusses specifically the experiences of the fetus *in utero*. He remarks that the experience of sensation by the fetus is no different from the experience of children after birth. Says Locke:

But though it be reasonable to imagine that children receive some ideas before they come into the world, yet these simple ideas are far from those innate principles which some contend for, and we, above, have rejected. These here mentioned, being the effects of sensation, are only from some affections of the body, which happen to them there, and so depend on something exterior to the mind, no otherwise differing in their manner of production from other ideas derived from sense, but only in the precedency of time. (*Essay*, IX, 6)

This capacity for sensation is not enough, of course, to make the fetus "human" and thus endowed with rights, for Locke. His theory requires the ascription of some other humanizing quality. Recall that having a human form was minimally necessary as well. As discussed above, humanizing

the fetal form has been a key factor in pro-fetus arguments for fetal personhood. Here we need only add that Locke's metaphysical belief that every individual is created by God completes the argument for metaphorically and theoretically "humanizing" the fetal body.

Locke's "maker's rights" theory argues that because God made every individual, every individual is the property of God, extends, in a peculiar fashion, to Locke's interpretation of conception and gestation. In a passage aimed at denying Filmer's assertion that men have authority over their children because they beget them, Locke discusses the formation of the human embryo:

And it is so hard to imagine the rational Soul should presently Inhabit the yet unformed Embrio, as soon as the Father has done his part in the Act of Generation, that if it must be supposed to derive anything from the Parents, it must certainly owe most to the Mother: but be that as it will, the Mother cannot be denied an equal share in begetting of the Child, and so the Absolute Authority of the Father will not arise from hence. (I, 55)

Locke's argument about the role of the mother in generation here is fairly clear; she provides all that is not concerned with the impartation of the soul. What is less clear, however, is his interpretation of the process of ensoulment.

He seems to be arguing against the then-popular belief in the "homunculus," which asserted that the sperm of men contained little persons who were transferred into the bodies of women during intercourse for gestation. In

Locke's view, the human soul does not come from the father.

It must come, then, from God. Note, however, that he modifies "soul" with the word "rational" in this passage.

His argument suggests that the "soul" is imparted to the fetus at conception, and that it is a rational one. In the *Essay*, Locke identifies the soul with thinking, as though it were the mind. (Book II; I, 9-11) Thus it would seem that in Lockian theory, the soul is perhaps the site of rationality. Locke discounts the importance of the father in providing much beyond the material substance for conception, but he credits the mother with the material nurturance during gestation; reason comes from God and it is God's making that makes the fetus human. Even here, however, that the fetus has a soul imbued with the capacity for reason, it does not necessarily mean that that capacity has become manifest as expression.

As noted in the introduction, many theologians have historically made even stronger arguments in support of the idea that the soul is imparted to the fetus at the moment of conception by God, and that this is explicitly what being human is. Locke declares himself agnostic on this point. In the *Essay*, he argues that "whether the soul be supposed to exist antecedent to, or coeval with, or some time after the first rudiments of organization, or the beginnings of life in the body, I leave to be disputed by those who have

better thought of that matter." (*Essay*, Book II: I, 10) It is not necessary for Locke to take a clear stand on the question of ensoulment, either to his larger project, nor to the question of fetal personhood, however. For, if God creates the fetus at conception, He creates the fetus as human, regardless of when "He" imparts the soul. Thus whether or not the soul enters the fetal body at that moment is, for the most part, irrelevant to Locke's liberalism. It is God's design that imparts the "humanity" to the embryo, and thus to the fetus. It is evident that at least in Locke's version of liberal theory, there is little relevant difference between infants and/or children and fetuses: both are created by God as human, both are pre-rational, both experience sensation, and both should be preserved and protected by those that made them -- God and their mothers and fathers. (Freeman, 53) Fetuses, like children, are living human beings, and as such, they are by definition endowed with the capacity for rationality, regardless of the fact that their abilities to use that rationality are not yet developed. Consequently, fetuses, like children, must be treated like persons, though they are not actually yet persons in liberal theory.

As modern theorists we do not have the luxury of Locke's metaphysics to provide our source for determining rationality. We do, however, maintain our strong links with

his work -- whether we think children rational or not, we still treat them legally and morally as though they are human beings, as though they are persons. It is interesting to note that the Court's depiction of the fetus, first in *Roe* and later in *Casey*, takes just this Locke-like position.⁷⁴ The Court, while explicitly denying the fetus "personhood" in *Roe*, simultaneously acknowledges and thus legitimates the "potential" personhood of the fetus in much the same way Locke acknowledges and legitimates the "potential" of the child. In Locke's theory, children had natural rights by virtue of their creation. (Freeman, 53) The Court's approach, as with Locke's approach, permits the fetus (child) to be encircled with, entitled to and treated as though it had rights, without actually having to be a full "person" in the fully rational, adult sense of the concept. The Court relies heavily on the language of "potential" and the "value of fetal life" in its opinions.

Thus, that fetuses, like children, are valuable without being the same as adults is the fundamental factor of liberal theory upon which pro-fetalists groups base their arguments for fetal rights. Employing the image of the universalized, unmarked "human" body Locke draws in his founding work on Liberalism to make their case as well.

⁷⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey* 113 S.C.T 2791 (1992).

This re-orientation of the fetus from the vague, invisible "bulge" beneath the maternity smock of a pregnant woman, into an identifiable, individuated and autonomous "baby person," is having wide reach beyond medicine. Exposure to fetal imagery, framed by a rhetorical campaign equating fetuses and babies, fosters the idea that fetuses are baby persons in the general culture. This reconstruction of the symbolic meaning of pregnancy is vital to the success of the anti-abortion and fetal rights movements. As more people experience the fetus as a baby, they find themselves compelled to offer the same legal and medical protections to fetal persons as afforded all other persons in the American political world.⁷⁵ As was suggested at the outset of this work, and as was detailed in the second chapter, seeing the fetus as a baby, combined with the ability to medically treat the fetus, transforms for some into an imperative to treat or "protect" the fetus for ethical, moral and liability reasons, independent of and sometimes directly in opposition to the desires of the pregnant woman involved.

⁷⁵ See for example, Beth Driscoll Osowski, "The Need for Logic and Consistency in Fetal Rights," *North Dakota Law Review*, 68:145, 1992; Richard A. Erb, Jr. and Alan W. Mortensen, "Wyoming Fetal Rights -- Why the Abortion 'Albatross' is a Bird of a Different Color: the Case for Fetal-Federalism," *Land and Water Law Review*, 28:2, 1993; or Alan M. Dershowitz, *Contrary to Popular Opinion*, New York: Pharos, 1992, 209-232.

I conclude from my work in this chapter that far from arguing against fetal personhood, liberal theory provides a means for pro-fetus arguments to be waged. What is more, when compared with the condition or status of women within traditional Lockian liberalism, it becomes increasingly clear how the fetus has gained the upper hand in a the debate about fetal rights. Because the fetus does not have to act on its own to merit protection and have rights, it also does not have to be rational. Someone else will be rational for it and look out for its interests until it can do so for itself, sometime post birth. (Or in strict Lockian theory, until the age of majority.) But the condition of women is very much different.

Once the fetus takes on a human (albeit infantilized) persona, so that a conflict between interests arises between the pregnant woman and the fetus, how could/would it ever be rational in the modern era to kill (via abortion), harm (as in take drugs, smoke or drink during pregnancy), or otherwise neglect one's fetus (refusing to submit to medical treatment recommended by a physician)? (Nelson, 712) Thus pregnant women who do not behave the way other rational persons believe they should can find little security in a claim to rights based on their reason.

Finally, the erasure of the specific importance of the body in Lockian theory works to the advantage of fetal

identity and against the identity of pregnant women as well.

Being human "enough" is good enough to grant the fetus protection: but as I will outline in subsequent chapters, being pregnant is enough to disqualify pregnant women as individuals. If women are seeking a defense for their right to behave during pregnancy as they so choose, liberal theory offers them little solace.

In summary, the pro-fetus argument draws its legitimacy in part from its dependence on key elements of traditional Lockian Liberalism. That the fetus is an unformed potential works as an advantage in this view, rather than as a disqualifier for treatment as a rights-entitled person. It is exactly at this point in the debate about fetal rights that those opposed to fetal personhood enter the dialogue.

Chapter V

The Legal Construction of Fetal Identity

The previous two chapters outline what I have argued to be the Lockian framework for interpreting human value within a liberal political context. Three primary attributes of human beings were identified as necessary for one to be a "person" in Locke's design: having a human form, having the capacity for and the demonstrated ability to exercise rationality, and having been created as a rights-bearing individual. The previous chapter held that the fetal body has recently been dis/covered by technology and medicine and has been and continues to be humanized by translating the material fetal body into recognizable "human" features. The chapter further suggested that the fetus, while not rational, does not need to be in order to meet the necessary criteria required in the liberal construction of personhood.

The remaining element missing from the liberal requirements for personhood is to understand how it might be recognized as being entitled to the same rights that for liberal theory demarcate all persons.

This chapter takes up that subject, arguing that paradoxically, when the fetus gains legal rights, it simultaneously gets ascribed natural rights. This is so, it

will be argued, for when the fetus is perceived as a tiny human person, the response in a culture founded on an ideology of liberal rights is to afford that new member of the human community its privileges and protections. Accordingly, the development of fetal rights in America reflects a growing recognition of the fetus as a person. Intriguingly, the process folds back in on itself; when the courts acknowledge fetal interests as legitimate and compelling, they also contribute to the on-going cultural discourse that fashions fetal personhood.

This powerful change in our cultural perception of the fetus is strongly reflected in the changing status of the fetus under law. The Supreme Court's pronouncement in *Roe v. Wade* that fetuses have never been considered persons under the 14th Amendment to the Constitution notwithstanding,⁷⁶ within the courts and some legislative bodies there is a growing recognition of fetuses as "persons" in need of legal respect and protection by the state. As this chapter will suggest, whether through judge-made law or legislative decision, the fetus is increasingly being recognized as having rights, and thus as a rights-bearing person.

The first part of this chapter traces the incremental

⁷⁶ 410 US 113, at 162.

development of personhood status for fetuses under constitutional, tort and criminal law. The second major section examines legislative efforts to take up where judges leave off in the legal construction of fetal personhood and fetal rights.

The Courts and Fetal Identity

Despite its earlier physical invisibility, the existence of the fetus has been noted in various bodies of law for thousands of years. Early criminal and property laws acknowledged the possibility of harm to the fetuses of pregnant women. In the *Bible*, for example, the *Book of Exodus* prescribes the appropriate punishment for injury to a pregnant woman that causes her harm or produces a miscarriage.⁷⁷ Similar prohibitions on abortion and criminal sanctions for injury to a pregnant woman resulting in miscarriage have traditionally afforded recognition of fetal existence under law.⁷⁸ As with the *Biblical* passage above, however, the idea of harm applied only to the property interests of a third party like the father, or to the actual physical damage done to the pregnant woman. The fetus' interest in loss of existence was not at issue.

⁷⁷ *Exodus*, 22:21, 22-25.

⁷⁸ *Crimes Against the Foetus*, 5.

As will be outlined below, there is a fairly lengthy history of recognition of the fetus as a property of the father predominantly in tort law. The question of fetal "personhood," however, has been framed only recently as a constitutional question in need of interpretation by the Supreme Court. In that decision, our historical treatment of the fetus as the property of the parents played a key role.

Constitutional Status of the Fetus

The Supreme Court first took up the question of the fetus' status as a person in the now-famous abortion case *Roe v. Wade*.⁷⁹ In that case, the State of Texas argued that it was within its purview to outlaw the practice of abortion because it had an interest in protecting the life of the fetus as an unborn person, under the 14th Amendment to the Constitution. (157)

The Supreme Court, on the other hand, interpreted the status of the fetus differently. It argued that "The Constitution does not define 'person' in so many words" and then proceeded to examine the few instances when the word itself was used explicitly in the document. Through the pen of Justice Blackmun, the Court came to the conclusion that

⁷⁹ 410 US 113 (1973).

"None [of these uses of the word person in the Constitution] indicates, with any assurance, that it has any possible pre-natal application."

The Court then examined other applications of personhood with respect to the fetus, and found that, even in cases of wrongful death of the fetus recognized by various courts,

Such an action would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. Perfection of the interests involved, again, has generally been contingent upon live birth. *In short, the unborn have never been recognized in the law as persons in the whole sense.* (162) (emphasis mine)

From this language it would seem that the Court had settled the fetal personhood question for itself. Curiously it continued on, however, finding that the state of Texas had an "important and legitimate interest" in "protecting the potentiality of human life." This interest "grows in substantiality as the woman approaches term, and at a point during pregnancy," becomes "compelling" for the Court. So much so, that it finds that at the point of "viability," state regulation protective of fetal life

has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to

preserve the life or health of the mother. (164-5)

Thus, on the one hand, the Court found that the fetus is not a person, *per se*, within the specific language of the Constitution, but it simultaneously intimated that it could understand the idea that the fetus is a "potential" person, and thus, as it *becomes more like a human* through the process of gestation, it indeed, becomes more and more a person in fact.

Numerous scholars have inevitably taken the Court to task in years subsequent to the decision. The incrementalism evident in the Court's treatment of the fetus failed to satisfy opponents on both side of the abortion question. Pro-life advocates argued strongly that the idea of incrementalism made no sense, but for reasons directly opposite of the arguments made against it by those identifying themselves as pro-choice.⁸⁰ Other, equally key complaints centered on the so-called "trimester" framework built by the Court around its theory of gradual impersonation for the fetus. Finally, and for our purposes here, most importantly, many scholars contend that the current state of confusion on display in lower court rulings about the fetus is directly attributable to the Court's own

⁸⁰ See for example, "The Moral and Logical Arguments Against Abortion," American Life League, P.O. Box 1350, Stafford, VA 22555, 1992.

confused decision in *Roe*.

Scholars, like Rubenfeld, argue that the fact that the Court gave the appearance of sanctioning *both sides* of the debate on the question of fetal personhood, actually left subsequent interpretation of the question to lower court judges. The result is that each judge must make individual determinations about fetal personhood, based primarily on his or her own perceptions of the case, exposure to evidence about the fetus, and personal interpretations. Says Rubenfeld,

Roe's "potential life" holding had distinct advantages [for the Court]. In particular, by sustaining a prohibition on the basis of the fetus's status as a 'potential' person, the Court avoided the necessity of deciding at what point in a woman's pregnancy a state could deem the fetus an *actual* person. (599. Emphasis in the original.)

As he argues further,

The cost of this approach has now become clear. In abortion cases following *Roe*, dissenting justices began forcefully to challenge the idea that the state's interest in protecting 'potential human life' somehow hinged upon the fetus's viability. (600)

Thus, while the Court had intimated that it would allow states to treat fetuses like persons following viability, lower court judges felt free to do so for pre-viable fetuses as well. As a result, the question of whether or not the fetus is a person was no more settled by *Roe* than it was before the decision was handed down.

The Court itself began to monkey with the question of whether or not states could frame their interest in the fetus with its two key subsequent decisions, *Webster v. Reproductive Health Services*⁸¹ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁸². In *Webster* the Court found that a compelling state interest in protecting "potential fetal life" existed "throughout pregnancy." (3057) This decision then mirrored what many lower court justices had been saying despite the Court's earlier decision in *Roe*. But it was *Casey* that tolled the final death knell for the fragile distinction the Court had made in its first abortion case.

In a fragmented decision, handed down by justices O'Connor, Kennedy and Souter, the Court held in *Casey* that it had abandoned its previous trimester framework for state control of abortion and now held that the state

has a legitimate interest in fetal life throughout pregnancy and may promote this interest by enacting previability regulations designed to encourage childbirth over abortion, so long as these regulations do not impose an 'undue burden' on a woman's right to choose abortion. (Benshoof, 2249)

Thus in its most recent machination, even the U.S. Supreme Court hasd given the nod to treating the fetus like a person, even if it had not explicitly acknowledged fetal

⁸¹ 109 S.Ct. 3040 (1989).

⁸² 112 Sct 2791 (1992).

life as fetal personhood. As a result, despite the Court's early finding in *Roe* that fetuses are not persons under the Constitution, and perhaps in accord with its most recent finding in *Casey*, a growing body of law supporting the status of the fetus as a rights bearer has developed in tort and criminal that only serves to further the perception that the fetus is, indeed, a heavily endowed, rights-bearing person.

Tort Law

The fetus first emerged as the subject of legal redress in property disputes over inheritance. As early as 1887 a child, born alive, was able to inherit from the estate of someone who died while he or she was still a fetus *in utero*.⁸³ The interest in these cases remained the property interests of the deceased testator (at the time this usually meant the father) because, as the court reasoned, he would have wanted his offspring to inherit after birth. As the Supreme Court acknowledged in *Roe*, this *live birth* standard had historically allowed courts to respect the property interests of parents without explicitly acknowledging the fetus as having standing in its own right.

Early tort cases also depended upon live birth for

⁸³ See *Cowles v. Cowles*, 56 Conn. 240, 13 A. 414 (1887)

fetal claims: people were permitted to collect on tortious action occurring while they had been fetuses *in utero*, but only if they were born alive following the injury. In 1884, the Court held in *Dietrich v. Northampton* that prenatal injuries were not recoverable because no duty was owed to a person who did not exist. In this case the pregnancy miscarried in the fourth or fifth month following an accident in which the pregnant woman tripped on a flaw in the road as she was walking. The fetus lived only a few minutes after birth. Justice Holmes reasoned that the fetus and the pregnant woman constitute one person, and though a duty could be owed to her, no separate duty could be owed to the fetus.⁸⁴

Courts continued to deny tortious claims occurring during pregnancy to the offspring until 1946. In *Bonbrest v. Kotz*⁸⁵ a cause of action was recognized if the injury occurred after the point of viability. Viability has generally been considered the point at which the fetus could survive independent of the pregnant body.⁸⁶ The live birth standard remained necessary even after the point of

for example.

⁸⁴ 138 Mass. 14 (1884) at 15.

⁸⁵ 65 F Supp 138 (DDC 1946).

⁸⁶ *Colautti v. Franklin*, 439 U.S. 379, 388 (1979).

viability was established for legal action. Relying on the logic used by Justice Holmes in 1946, a 1960 New Jersey court upheld the live birth standard because injuries sustained *in utero* were not recoverable as the fetus was a part of the mother and thus had no independent status.⁸⁷ (Osowski, 173) Finally, the courts applied the parent-child immunity standard which required that the defendant be a third party to avoid actions by minor children against their parents. (Osowski, 173 & n20)

Today, all states recognize the standing of those who were injured while *in utero*, given that the case meets the live birth and viability standards. (Osowski, 174) But in some states, even the viability standard has been abandoned.

In *Hornbuckle v. Plantation Pipe Line* a Georgia court ruled in 1956 that the developmental stage of the fetus at the time of injury was not important if the pregnancy resulted in a live birth.⁸⁸ In 1971, a Michigan court recognized the right of a person to sue who had been a four month old fetus at the time of injury in an automobile accident.⁸⁹ Subsequent challenges to the viability standard are on-going in many states. As a number of courts have reasoned, it may

⁸⁷ *Smith v. Brennan* 157 A.2d. 497 (N.J. 1960).

⁸⁸ 212 Ga. 504 (1956)

⁸⁹ *Womack v. Buchhorn*, 187 N.W. 2d 218, 219-23 (Mich. 1971).

be impossible to determine the exact point of viability, and thus the viability standard is unreliable.⁹⁰

The live birth requirement has held in most jurisdictions, though that standard is also experiencing some encroachment. In a 1991 case, the 9th Circuit Court of Appeals found that a 2 month-old fetus had suffered injuries in the loss of a familial relationship with his father when the father was killed, allegedly by Los Angeles county police officers.⁹¹ Though the plaintive was later born alive, the court reasoned that the injury was suffered prior to his birth.⁹²

⁹⁰ See for example, *Smith v. Mercy Hospital and Medical Center*, 148 Ill. Dec. 567, 560 N.E.2d 1164 (1990), where court found that "Although parents of stillborn child alleged in their complaint in wrongful death action against hospital that mother was being treated for full-term pregnancy when negligent act occurred they were not obligated to establish viability at trial." Or see *Fryover v. Forbes*, 439 N.W. 2d. 284 (1989) in which court found that "Nonviable fetus not born alive is "person" within meaning of Wrongful Death Act, so that wrongful death action can be maintained on behalf of fetus." But see also, *Humes v. Clinton*, 792 P.2d 1032 (1990) where the Court found that "Unborn, nonviable fetus is not "person" within definition of wrongful death statute and is incapable of bringing action on its own behalf; viability is appropriate condition precedent to liability in wrongful death action." Cited in 17 10th D. Pt 1-297.

⁹¹ *Crumpton v. Gates*, 947 F.2d 1418, 1419 (9th Cir. 1991).

⁹² This case was actually filed as a discrimination case, in which the injured party claimed that his inability to recover due to his status as a fetus violated his constitutional rights.

Finally, the requirement that the defendant must be a third party in order to protect parent-child immunity has now been rejected in a growing number of states. (Kennedy, 554) In the first case of this type, a woman was sued in 1980 by her child for having used the antibiotic tetracycline during pregnancy. The use of tetracycline allegedly cause the child to have poor tooth enamel. The court ruled that the child had standing, based on a neglect and abuse ruling that argued for "the reasonable pregnant woman" standard.⁹³ In 1987, an Illinois appellate court recognized the claims of an infant, born alive, to sue its mother for injuries suffered while the child was *in utero* as the consequence of an automobile accident. The fetus was about 5 1/2 months developed at the time of the accident.⁹⁴

In a 1992 case, *Andre Bonte f/n/f Stephanie Bonte v. Sharon Bonte*, a New Hampshire court allowed a child born alive to sue its mother for negligence causing injuries that occurred to the child while *in utero*.⁹⁵ The woman defendant

⁹³ *Grodin v. Grodin*, 102 Mich. app. 396, 301 An.W. 2d 869 (1980). Ms. Grodin had been told by her physician that it was impossible for her to get pregnant so she continued taking the drug. When she learned she was pregnant in her third trimester, she stopped taking the antibiotic.

⁹⁴ *Stallman v. Youngquist*, 153 Ill App 3d 683, appeal allowed, 115 Ill 2d 551 (1987) as cited in Hornick, n20.

⁹⁵ See *Andre Bonte f/n/f Stephanie Bonte v. Sharon Bonte*, No. 91-461 (H.C.S.C., N.H. October 30, 1992), as cited in Griffith, et. al, n1.

was struck by a car during the seventh month of her pregnancy. Her fetus was born by emergency caesarean section and the resulting baby suffered severe brain damage.

The New Hampshire court in *Bonte* relied upon a 1958 case in which the court held that "a fetus becomes a *separate* organism from the time of conception"⁹⁶ (emphasis added) and reasoned that the pregnant woman "is required to act with the appropriate duty of care, as we have consistently held other persons are required to act, with respect to the fetus."⁹⁷

In addition to dramatically changing the perceived responsibilities of the pregnant woman to the fetus, the erosion of the parent-child immunity standard with cases like *Bonte* also marks a fundamental change in the court's perception of the relationship between the pregnant woman and the fetus. Increasingly the court, like members of the medical community, is seeing the fetus as a separate entity with particular interests that may not coincide with the rights of the pregnant woman.

At issue in these tort cases has been the incremental development of an answer to the question, is the fetus enough of a person to qualify as having been harmed? As the

⁹⁶ *Bennet v. Hymers*, 101 N.H. 486, 147 A.2d 109 (1958).

⁹⁷ No. 91-461 (H.C.S.C., N.H. October 30, 1992 at 2. As cited in Griffith, et. al, 47.

standards which keep the fetus conceptually embedded within pregnancy disappear, the fetus becomes more person-like in the courts' eyes. This new court vision of the fetus as having its own legal interests culminates in the appointment of third parties as guardians ad litem to represent fetuses and embryos. (Goldberg)

Third parties as diverse as hospitals, physicians and state social service agencies have been authorized as fetal guardians. (Goldberg 523-524, Gallagher 9; Nelson 727) This legal gambit completely circumvents the reasoning behind the live birth and parent-child immunity standards that recognized the fetus as a dependent part of the pregnant woman until birth. Simultaneously, it allows the fetus to be "present" at the court's proceedings, no longer embodied in the pregnant woman (physically and conceptually) but rather embodied conceptually in the form of its guardian who "speaks for" and "acts for" it. Like the sorceries of ultrasound, it abstracts the fetus by erasing the connection between the pregnant form and the fetus inside. Thus the court never has to "see" the fetus as a bloody, lumpy blob. Through a bizarre linguistic and mental stratagem, courts have even gone so far as to *award custody* of the fetus in utero to third parties.⁹⁸ (Nelson, 727 at n86 & 87)

⁹⁸ Complying with this court order of course requires that the guardian ad litem also take possession of the

States have even supported these maneuvers with legislation. The Texas Family Code, for example, allows a suit for termination of the parent-child relationship to be filed before the child is born,⁹⁹ which then clears the way for a third party to be appointed as guardian ad litem for the fetus to represent its interests independently of the pregnant woman. Courts can only make these decisions if they can conceptually give birth to the fetus, even while it is physically *in utero*.

In a kind of mobius loop, as the barriers to the autonomous standing of fetuses before the law fall away, their status before the bar rises. Thus, despite the fact that the laws are inconsistent, confused and often contradictory across and sometimes within states, (Gately, 309 and n33) the fetus in tort law is now more like a person than not. The unfolding story of the status of the fetus in criminal law is much the same.

Criminal Law

pregnant woman as well. It is important to note, however, that there are those who argue that custody transfers of viable fetuses could be facilitated by forcing pregnant women who have "lost custody" of their fetuses to undergo cesarean sections.

⁹⁹ Tex Fam. Code Ann sec. 15.021(a) (Vernon supp. 1991).

The question most commonly posed under criminal law has been, is the killing of a fetus homicide? Here too the live birth standard has historically been controlling. Unless the fetus is born alive, the courts have held that most criminal homicide statutes do not apply to the death of a fetus. Courts reason that unborn, nonviable fetuses are not "persons" and thus not entitled to state protection. This standard remains intact in many jurisdictions.¹⁰⁰

Recently, there has been significant encroachment on the live birth standard, even in criminal law, however. (Phelan, 479 and n129) For example, a Massachusetts court found in 1989 that a viable fetus is in fact a human being for the purpose of the common-law crime of murder.¹⁰¹ Later, in 1990, a Minnesota court found that the state's homicide statutes do not require that the living organism in the womb (whether an embryo or a fetus) be considered a person or human being, nor does the statute require the state to prove it to have been a "person" at the time of death.¹⁰²

¹⁰⁰ See for example, *U.S. v. Spencer*, 839 F.2d 1341, C.A. 9 (Ariz) 1988, in which court found that infliction of injuries on a fetus who was born alive but later died as a result of the injuries was murder under federal statutes; and see, for example, *State v. Horne* 282 S.C. 444 (1987) in which court argued that unborn viable fetus was not a "person" and therefore the reckless killing of the fetus was not manslaughter under the state statutes.

¹⁰¹ *Com. v. Lawrence*, 536 N.E. 2d 571, 404 Mass. 378.

¹⁰² *State v. Merrill*, 450 N.W.2d 318 (1990).

Historically, the primary difficulty for criminal law has been to determine exactly what constitutes a "live birth." (Glantz, 109) A Florida court, for example, found in 1977 that the removal of the head of a fetus outside the birth canal in order to pull the rest of the body out of the laboring woman precluded live birth, even though the fetus had taken a few breaths before dismemberment.¹⁰³ A number of states have wrestled with similar problems. Increasingly, judges find that the question of when a fetal birth is a live one is complicated by medical technologies which smudge the lines for them between born and uterine life. (Glantz, 110-111)

In an attempt to clarify those now smudged lines, some states have amended their statutes to specifically include the fetus under homicide and other laws to remove the need for determining whether or not the fetus was alive at the time of the action. (Hornick, 539) The California Penal Code, for example, defines murder as "the unlawful killing of a human being, or a fetus with malaise aforethought."¹⁰⁴ The result has been what is perhaps the clearest case of the erosion of the live birth standard. In May of 1994, the

¹⁰³ West's F.S.A. sec. 768.01-768.03. *Duncan v. Flynn*, 3442 So. 2d 123.

¹⁰⁴ See Cal Penal Code Section 187 (West 1983) as cited in Hornick, 539.

California Supreme Court ruled that "an assault on a pregnant woman that kills her fetus can be prosecuted as murder, even if the fetus is not viable." (Lewin, B20. Emphasis added.) According to the *Valley Times* report, Chief Justice Malcom Lucas and the court argued that under the California statute, "The third-party killing of a fetus with malice aforethought is murder... as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks."¹⁰⁵ With this decision, at least in California, it is clear that the live birth standard no longer is required for determining whether or not a "person" has been killed. Not only does this case simply eliminate the live birth and viability standards, it also pushes recognition of the fetus further back into the pregnancy than any other court ruling to date. The California decision has the potential to have a strong influence on future decisions made in the twenty-one other states that now impose some kind of criminal penalties for killing a fetus.¹⁰⁶

¹⁰⁵ Claire Cooper, "It's Murder if Fetus Killed by Third Party, State High Court Rules," *Valley Times*, Tuesday, May 17, 1994 Pleasonton, CA: Leasher Communications Publisher, 1A & 14A.

¹⁰⁶ Those states are: AZ, FL, GA, IL, IN, IA, LA, MI, MS, MT, NH, NV, NY, RI, SD, TN, UT, WA, WI,. As cited in Trindel, n11 & n12.

In a peculiar semantic contortion, laws like the amendment to the California Penal Code, allow for prosecution in cases where fetal death occurred without necessarily ascribing the words "person" or "personhood" to fetuses. This linguistic gymnastic is necessary because of the Supreme Court's ruling in *Roe*. (Erb and Mortensen) Thus, a case based on the "personhood" of the fetus must fail if the court is to adhere to *Roe's* precedent. But this is not to suggest that courts are unsympathetic to claims of fetal harm or death made either by the state or injured parties. It simply means that the courts have become extraordinarily circumspect about their language in order to meet the letter but circumvent the intent of the precedent set by the Court in *Roe*.

In the California case cited just above, for example, the court also argued that "When the state's interest in protecting the life of a developing fetus (by punishing its destruction) is not counterbalanced against a mother's privacy right to an abortion, or other equivalent interest, the state's interest should prevail." (Cooper, 1A) Here the Court avoided the sticky question of calling the fetus a "person," per se, but rather simply declared that it had been killed. While the difference is a matter of linguistic gymnastics, the effect can not be ignored. Regardless of the language chosen, the fetus is increasingly being treated

as person in matters of law.

Additionally, courts are extremely sensitive to the law-making responsibilities of legislative bodies. In these murky fetal personhood cases, some courts choose to rely upon legislative intent to attempt to determine whether or not fetuses should be included under statutes for homicide and manslaughter.¹⁰⁷ Where intent is unclear, many courts have opted not to decide but rather have extended an invitation to the legislature to address the issue for subsequent cases.¹⁰⁸ As one commentator observed, "Courts are loath to answer such questions [about when life begins]. (Gately, 312)

The amendment to the California Penal Code mentioned above was the result of such judicial disinclination to decide, expressed as a challenge to the legislative branches to pick up the gauntlet. The court found itself unhappily bound by legislative language that precluded inclusion of a stillborn 5 pound, late third-trimester fetus as a person under California law. The fetus' death was caused by a

¹⁰⁷ See for example the 1987 Texas case, *Witty v. American General Capital Distributors, Inc.* 727 S.W.2d 503, in which the court ruled that the legislature did not intend the words "individual" or "person" to include fetus.

¹⁰⁸ See for example, the 1989 Pennsylvania case, *Hudak v. Georgy*, 567 a.2d 1095, in which the court argued that creation of a cause of action for a nonviable fetus would be the function of the legislature not the judiciary.

fractured skull, suffered when the father kicked the pregnant woman repeatedly in the abdomen. The court's hands were tied in his prosecution because the statute did not specifically include fetuses as possible victims.¹⁰⁹

(Glantz, 110-111) A strong dissent makes it clear that at least one member of the court recognized the personhood of the fetus. As I will argue next, the legislature's subsequent response concurs. (Glantz, 111)

It would seem, then, that at the present moment the legal status of fetuses is inconsistent, often contradictory and changing daily across jurisdictions as a consequence of the changes in our cultural perception of fetal personhood. (Gately; Erb and Mortensen) As a consequence, some legal scholars, right-to-life activists and fetal rights advocates have joined with members of the judiciary in their calls for legislatures to standardize the status of fetal personhood under law. (Gately; Osowski; Erb and Mortensen) Like the California legislature, many legislative and political bodies throughout the country are responding.

Legislatures and the Statutory Status of the Fetus

While many members of the judiciary point to Roe as the controlling precedent on fetal personhood, others are more

¹⁰⁹ *Keeler v. Superior Court*, 87 Cal. Rpt. 481, 470 P. 2d 617 (1970).

interested in the Court's later decision to let stand -- virtually without comment -- the preamble to the Missouri anti-abortion law contested in *Webster v. Reproductive Health Services*.¹¹⁰ The Missouri preamble declared that "the life of each human being begins at conception." (506-7)

Legal scholars may argue that documents such as preambles or the *Declaration of Independence* have no power to set precedent, but they also acknowledge that such documents do have strong symbolic influence on the public consciousness.

The fact that Missouri legislators declared that in their minds, fetuses are persons, and the Supreme Court did not deny their ability to do so, marks an important political shift.

Since the decision in *Webster* and the subsequent decision in *Casey*, anti-abortion groups have been active at the state level enacting so-called "human life amendments" or other legislation that officially recognizes the fetus in some capacity. Many states have passed or are confronted with legislation that either defines the fetus as a person directly, or does so indirectly through abortion access restrictions. Illinois, Kentucky, Massachusetts, Missouri and Oklahoma, for example, have defined "fetus" and "unborn child" as meaning from fertilization or conception until

¹¹⁰ 492 U.S. at 538 (1989).

birth. (George, 25). A popular initiative declaring fetuses persons from conception was unsuccessfully proposed in Washington during the 1990 elections.¹¹¹ Other states, including Minnesota, New York, Ohio and Wyoming, now require burial of fetal remains in similar fashion to other persons under the law. (George, 54) Similar legislation has also been considered in Missouri.¹¹²

At the federal level, pro-life forces have pushed for adoption of a national fetal person policy. Such legislation proposes to include fetuses as persons under the U.S. Constitution in various forms.¹¹³ For example, the ten legislative proposals for amending the Constitution to afford legal protections to the fetus offered in the 101st Congress included legislation aimed at guaranteeing the "right to life," protection of unborn children, and one even declared that the preborn are entitled to protections of the fifth, thirteenth and fourteenth amendments to the Constitution. (Packwood, 660)

¹¹¹ Abortion Report, March 8, 1991.

¹¹² Abortion Report, March 8, 1991.

¹¹³ For example, S. 158, 97th Cong., 1st Session, 127 Cong. notes at Section 1 (a) "Congress finds that the life of each human being begins at conception. (b) Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings."

In addition, the Republican Party has long supported fetal personhood legislation. The 1988 Republican platform, for example, supported the Human Life Amendment, setting the model for the states and attempting to grant national legitimacy to the idea that fetuses are persons under the Constitution. Some 1988 Republican presidential candidates, conservative evangelist Pat Robertson in particular, based a significant portion of their campaigns on support for the Human Life Amendment.¹¹⁴ Four years later, the 1992 Republican National Convention featured Presidential Candidate Pat Buchanan recalling the need for legislation protecting fetal life.

In this chapter, I have argued that the fetus has gained the judicial status of "rights-bearing-person" as well as an incremental but growing list of legal rights, both through case law and statutory language expressly inviting the fetus to personhood. It would seem that there is a national swell of support for recognizing the fetus as a person, either in statute or in case law. The result has been the incremental development of rights for the fetus under law. In the preceding chapters I argued that there is a crisis in pregnancy currently produced by the development of a cultural and political discourse of fetal personhood,

¹¹⁴ *The Firing Line*, Broadcast 28 October, 1987, Pat Robertson speaker.

generally, and fetal rights, specifically. The crisis comes because expression and protection of those rights comes only at the expense of the rights and interests of the pregnant woman. This transformation in both the identity of the fetus and in the politics surrounding it, have been made cognizable, and in some sense, generated by, the dominant political theory guiding American political culture today -- liberalism. The fetus becomes a person because we have dis/covered it technologically and medically, and familiarized ourselves with its features by placing it in familiar contexts -- that of being human. Specifically, we are inclined to treat the the tiny fetal human as we do children, thus abrogating its need to be fully rational and participatory as a person in Civil Society. Finally, the impulse to protect and afford rights to the fetus, once one sees it as a person, is strongly evident in these legislative and political pitches to formally recognize fetal personhood. These efforts, combined with and fueling the cultural exposure, treatment and recognition of the fetus within medicine, popular culture and the courts, help to insure that the fetus is incrementally gaining human identity.

The fetus comes about its rights in a way that distinguishes it from both adults and children, particularly under the Lockian model I have employed throughout this

discussion. It comes truly "tabula rasa" for the fetus has no history. Unlike women, or African Americans, or the handicapped, who all have a strong history of exclusion from consideration as rights-bearers (due in large measures to their bodily configurations), the fetus has no such baggage dragging it away from the possibility of both rights and personhood. It is as though we have invented the fetus in our very recognition of it.

The condition for pregnant women is vastly different. Women come to the door of personhood carrying a long history that has hitherto defined them as "not persons." Overcoming that baggage, in an effort to secure the full status of liberal persons, as the next section of this work will illustrate, has been difficult indeed. And as will become evident, for the pregnant woman, it has been, at least up until now, a virtually impossible task.

**PART THREE: MAKING (M) OTHER-BODIES;
THE ERASURE OF PREGNANT IDENTITY**

Chapter VI

***Liberalism, Patriarchy and the
Personhood of Pregnant Women***

Part One of this work explored how the fetus has gained the political stature of personhood within liberal discourse. The second part of this work turns now to an examination of the political stature of the pregnant woman within the liberal discourse of personhood. But here it will be argued that women generally, and pregnant women, specifically, can and have achieved a much less secure hold on "personhood" than the fetuses they carry seem to be gaining. In this chapter I will argue that women in general have difficulty establishing their qualifications as persons, despite the theoretical possibility for women's freedom outlined in Locke's liberalism. This is so for two reasons. First, because the requirements of Lockian and subsequent liberal theory for inclusion as political persons are strongly masculinized in character. Second, while Locke demolishes the relationship between patriarchy and political rule, his work does through empowerment of a private world

in which patriarchal power goes undisturbed. My conclusion will suggest that while liberal theory seems to welcome the fetus into the political community, it continues the historical tradition of making it impossible for women, and pregnant women in particular, to achieve real political power and equality. To understand how this is so, this chapter will examine the question, "Are women 'persons'?" in Locke and subsequent liberal theory. For, as we have seen, it is *only* persons whose rights and liberties are to be recognized as having political importance.

To explicate this argument, it is necessary first to revisit the promise of equal political power made to women with the liberal turn. That the promise goes unfulfilled will then be attributed, first, in part, to the historical treatment of women prior to the Enlightenment shift to a theory of equality, and then second to the Lockian model of liberal theory itself.

The Liberal Promise to Women

While demands for fetal rights are a relatively recent phenomenon, women have been pounding their fists against the wall that separates them from political rule since the dawn of Western civilization. Throughout most of history and political thought, women have been rigidly confined to life in the family and subordinated to the power of both monarchs

and male heads of their households. But just as the revolutionary introduction of liberal political philosophy would make possible a discourse of personhood for the fetus, albeit some 300 years after Locke penned his revolutionary thoughts, so too would the advent of liberalism would make possible the development of a discourse of women's rights.

Locke's defeat of both the divine right of kings theory and Filmer's patriarchalism, as profiled previously, was predicated on undermining the divinity of the hereditary ruling body and replacing it with the universalized, undifferentiated human body -- created in God's image and politically subordinate to no one save God the Maker. The very humanity defining all people consists in their status as free and equal beings; their political power is manifested through their separate and individualized liberties and rights; and their qualifications as "persons," whose liberties and rights must be respected by others, is entailed in their capacity and exercise of reason, in accordance with the Laws of Nature. In Locke's design, everyone, not just those who's lineage is traceable back to Adam or some other ruling patriarch, shares equally in the possibility of political right.

This construction of political power worked well to liberate Locke and those like him from absolute rule, but it also served to undermine the historical justification for

the exclusion of women from civic power as well. Just as liberal theory had undermined the idea that material differences in the body were determinative of differences in political power and station among men, so too the historical exclusion of women from civic life based on their bodily differences from men began to seem untenable as well.

Locke's liberalism charged that one's political power rested not in the body, *per se*, but rather, in one's humanity. Thus woman's creation by God as human, with a soul equal to that of any man, meant that the humanity imparted to her by God was as robust as that of any of her male counterparts. Just as God made man "human" by virtue of his equality and freedom, so too, he made woman both human and equally free. Moreover, Locke's explicit attacks on Filmer's patriarchalism as the justification and proof for absolute power also shattered the notion that men had absolute rule over women. Locke not only denied that paternal power over children and women was absolute, he argued that within the family, women have an equal investment in their children by virtue of their gestative contributions to the developing fetus. (Butler, 81-86) In breaking apart the historical justification for patriarchalism, Locke's theory also invalidated the traditional justification for excluding women from politics -- the notion that womanness made one unfit for public life.

As Butler argues, for Locke, "...each woman was permitted to strike a better deal for herself whenever possible." (83)

It would seem, then, that for the first time in history, a political theory granted women the unheard of possibility of access to political authority. This new, revolutionary status for women -- being considered fully human citizens, equal to and undifferentiated from men -- had never before been articulated strongly in political thought. Melissa Butler, for example, notes that Locke's investment in the individual provided the first feminist stepping stone to power for women in the history of the Western world. (Butler, 83-87) As a result, Locke served as the frame for the liberal feminist revolution that would follow on during the next 300 years and which continues today.

At the turn of the 20th century, feminist claims for suffrage, equal education and equal pay are strongly rooted in Locke's political architecture. It is a central tenet of liberalism generally, and liberal feminism specifically, today, that women's bodies, like the bodies of men of color, children, and the handicapped, do not exclude them from political power, for that is not wherein political power lies. "Equality" is the fundamental value of liberal thought and modern feminists continue to argue that women have an equal capacity for rationality and should thus be

given the opportunity to develop it through equal education and training. (Jagger, 36-37)

Why, then, if Locke and the liberal project have provided such strong theoretical ground for women's liberation, is the freedom women now claim so fragmented? American women have successfully attained political "freedom" in some aspects of their lives, but for the most part, they remain simultaneously devalued and subjugated in other areas in the modern world. Why, in the last quarter of the 20th century, more than 300 years after Locke, did it take the Supreme Court an agonizing two years to decide whether or not women have the right to abortion? Why do women remain grossly underrepresented in political office? Excluded from military combat? Pre-occupied as the nurturing center of the family? Subject to great harm and tragedy in their own homes at the hands of their personal "patriarchs"? And how, if women enjoy the same freedoms and liberties shared by men, can a judge order that a "free and equal" woman be strapped down, anesthetized, and forced to undergo a major surgical procedure such as a caesarean section against her will? Is this the treatment of a "free and equal individual" within liberal thought?

Conflicts between individuals are expressed as clashes between their competing "rights" in liberal theory, and, as delineated in Locke, when such clashes occur within Civil

Society, third party adjudication is required for their resolution. As we have seen thus far, in the current fetal rights debate judges must decide between the "rights" of the fetus and the "rights" of the pregnant woman. As indicated in the second chapter such legal contests are often decided in favor of the former to the detriment of the later. To understand why this might be so we must look back even further in history, to understand the view of women that had dominated Western thinking prior to the dawn of liberal equality.

Women, Political Power and Personhood

Women's alleged differences from men -- either biological or experiential -- provided the justification for their exclusion from political power throughout most of Western thought up to the Enlightenment. This was so because throughout most of human history the male body and male experience provided the compass points from which all else was to be measured.

The brilliant work of Thomas Laqueur illustrates this point in an interesting examination of the historical representations of both biological sex and social gender. His work indicates that while women's bodies have been differently interpreted as being either like or unlike the male body, it is the male body which has remained the

standard for measuring what is 'human'. In what he identifies as a "one-sex model" Laqueur's research illustrates how women's bodies and their gender have variously been interpreted as variations on the male. In science, for example, the female body was initially thought by scientists and physicians to be a crude homologue to the male body. (Laqueur, 26) It was alleged to be both a direct mirroring of the male body, with the male reproductive organs turned outside-in to form those of the female, and simultaneously, inferior to it because it was an incomplete or deformed version of the male body. As Laqueur says succinctly, "Women [in this way of thinking] are inverted, and hence less perfect, men. They have exactly the same organs but in exactly the wrong places." (26)

With the subsequent move to a two-sex model, Laqueur argues that the idea of sexual difference then construed the bodies of women and men to be fundamentally different but complimentary. That is, there were "women" and there were "men," and they were distinctly different, but they fit together for man's sexual and procreative pleasure. Once again the female body was construed to be inferior, but this time it was because it was not the male body at all.

Despite their differences, in both models the female is devalued through elevation of the male as the standard of the human, according to Laqueur's findings. Thus,

regardless of whether men were using the "one-sex" or "two-sex" model for understanding human sex, it was still the male body which served as the standard by which all that was "human" was to be measured. any perceived bodily differences translated into corresponding evaluations of women's other abilities, origins and characteristics as also necessarily different from and therefore inferior to that of men as well.

This is not to be understood, however, as meaning that Laqueur believed biology determined identity, but rather the converse. As he notes, "The topographical relationships ... were not themselves to be understood as the basis of sexual hierarchy, but rather as a way of imagining or expressing it. Biology only records a higher truth." (26) What he means is that historically, the perception that women are inferior to men has been read into the bodies of each. This runs contrary to the directional arrow of what modern feminist theorists now call the sex/gender distinction. (Rubin) In this understanding, "gender" -- the socially constructed differences between men and women -- is dimorphized because male and female bodies are posited as dimorphized in biological sex. For Laqueur, however, it is biological sex that becomes dimorphized to justify the historical condition of male power over women. This interplay between differences in sex and gender defines the

history of political thought in its varying explanations for why men dominate women and women are excluded from political life.

In the political theory of Aristotle, for example, women were thought to be insufficiently formed men -- a one-sex model approach to understanding sex differences. His strongly teleological theory argued that given the right conditions, all things tended toward their natural end: for the acorn this meant development into the oak; for the puppy it meant growing into the dog; and for the human it meant maturing into the male. (Saxonhouse; 1991, 32-35) The ultimate telos for the human, said Aristotle, was to develop into the rational, political citizen -- one male by definition. (See excerpt in Mahowald, 266-272) Few actually achieved this goal in his understanding of the world. But unlike slaves and merchants, who were evidence of the male arresting in his development after birth, women were evidence of the arrested development of the human toward its masculine state at conception and during gestation. (Okin, 1979)

Because they were not fully developed, women remained identified with their bodies in Aristotelian thought. In his thinking, women were confined to existence in the world of nature, where they were controlled by their passions and their bodily urges. They never developed the capacity for

rational thought, a quality unique to the fully matured (male) mind. (Okin, 65-66) And as the ruling nature could only emerge within a body that developed to its full capacity, women were biologically unfit for rule. (Mahowald, 274)

Women's identification with nature and the passions of the body continued, despite the decline of Greek civilization and the advent of Christianity. Through the medieval period, Western thought between the two eras was bridged chiefly in the works of St. Thomas Aquinas and St. Augustine.

A devotee of Aristotle, St. Thomas Aquinas melded much of "the philosopher's" works with the teachings of Christianity. In the case of women and sex difference, Aquinas simply piggybacked the moral justification of women's subordination offered in the Biblical tale of "Genesis" onto Aristotle's biological theory of women's inferiority. (Aquinas as excerpted in Mahowald, 276-77) The irrationality previously attributed to woman in Aristotle, together with her identification with nature, were thus naturalized as God's will manifested in creation. (Saxonhouse; 1985, 147) In Thomistic theory, God created woman specifically for procreation. Says Aquinas, "It was necessary for woman to be made, as the Scripture says, as a *helper* to man; not indeed, as a helpmate in other works, as

some say, since man can be more efficiently helped by another man in other works; but as a helper in the work of generation." (as excerpted from Aquinas' "On the First Man," in Mahowald, 277) As Saxonhouse notes, it was of particular importance to St. Thomas that Eve was made from Adam's rib, for this marked a special kind of identification with Adam; Adam would care more for Eve, Aquinas argued, because she was an extension of himself. (148) Here the one-sex model takes on a particularly narcissistic cast.

It is important to note that there was one significant shift from the Classical Greek definition of woman ushered into political theory through the introduction of Christianity. The idea that woman is made in God's image, just like man, would eventually become transformative in the liberal theory that was yet to come. In Christian thought, the souls of women escaped the powerful influence of the gender differences ascribed to their bodies in the material world. In Aquinas, this was expressed in his very Aristotelian belief that the female soul could develop to its natural end and be just like the soul of a male. (Saxonhouse; 1985, 148) Augustine's theory, on the other hand, reflected his belief that women were no different in their capacity for piety from men when they turned their faces to God in the City of God. (Augustine, Book XXII, Chapter 17; Saxonhouse; 1985, 137) Thus the theories of

both Aquinas and Augustine held out the possibility of "equality" for women in both the spiritual and eternal domains. It is also noteworthy that the generally masculine character of Christian thought meant that women's souls were homologued to the pristine male "soul" as well, though Augustine argued that after resurrection women would retain their unique identities as women. (Book XXII, Chapter 17, 1057)

The patriarchalism of the 16th and 17th century, though increasingly influenced by biological arguments for a two-sex model, maintained the historical subordination of women to men as natural and reasonable. Patriarchal thought was an amalgam of classical constructions of woman as natural and inferior to man and Biblical interpretations about woman's weakness and emotionality. It filtered these two theoretical strains through the empirically evident, historical subjection of women in the family, arriving at the rather tautological argument that women were inferior to men in politics because they were divinely subjected to them within the family. In somewhat of a theoretical reversal, patriarchal control of women by men was then used to justify the absolute, hierarchical rule of monarchy.

The work of Sir Robert Filmer was archetypical of patriarchalist thinkers, as discussed previously. Patriarchal power meant that by virtue of their position as

fathers, men were entitled to rule. (Eisenstein, 38; Elshtain, 102) Women, because of their inferior bodies, their drives to passion (as evidenced by Eve), and their historical place in the family, were thus to be ruled by men. Like St. Thomas Aquinas, Filmer found it extremely important that in *Genesis*, God made Adam first and then plucked Eve from Adam's rib. To Filmer, this made Eve a kind of daughter/wife to Adam, subordinate to him in her creation like all his children. (Eshtain, 104)

In traditional thought, then, women were excluded from political power because they were construed as tied to the body, naturally inferior in constitution, and incapable of the rational thought necessary to be citizens. In short, they were not men.

Much of this thought has hinged on the bodily differences of women from men, whether the model used was one-sexed or two.

The political theory of John Locke was a revolutionary disruption of this historical chain around women's freedom.

As was argued above, making new use of the Christian notion that all people are created by God equally, Locke devalued the importance of bodily and natural differences for political rule. In doing so he built a theory of liberalism that allowed for the possibility of women's political power.

Lockian Liberalism and the Possibility for Women's Personhood

As outlined in Chapter Three, Locke's theory provided a powerful challenge to the theories of absolute rule and patriarchalism. In first attacking patriarchy as the grounds for absolute politics, and then positing an alternative theory of political power premised on individual equality, Locke shattered the idea that political status was determined by heredity and divine hierarchy. In order to invalidate Filmer's theory of patriarchalism, Locke had to refute the idea that fathers had absolute rule over children. Doing so required, in part, that he elevate the status of women as parents to be equal to and perhaps superior to that of fathers. (I, 55) Furthermore, it required him to contest the idea that man had vast, absolute power over woman within the family as well. His construction of individualized political power, vested not in the particular features of the body, but rather in the universal state of humanity, allowed women to escape subordination because they were not men.

This meant that traditional arguments about woman's inferior nature, or her identification with the body, and even her incapacity for rationality, were no longer valid arguments, at least in the case of political authority. Offering a means for invalidating these age-old arguments

about woman's inferiority allowed the possibility that women could claim political equality with men for the first time in history.

On the surface, women would seem to meet all of the requirements Locke indicates are necessary for them to be considered rights-bearing persons in liberal thought; they are evidently human in that they are created by God in his image, they have the shape of the human body (though this assertion will be contested later on), and they are endowed with the capacity for reason at their creation. But recall from the earlier discussion that being human does not mean that one necessarily is a person within Locke's design. Personhood requires not just the *capacity* for reasoning in one's humanity, but the *exercise* of rationality as well. For Locke, those who reason right and behave in accordance with the Laws of Nature, are persons, both politically and legally. Those who fail to consult reason, however, are relegated to a political status akin to that of the beasts -- without the rights and liberties that command the respect of others. (See for example, II 8,12) The first state is one of rationality, the second is one of irrationality. The fetus fits in, it will be remembered, because Locke makes provision for a third category -- the special state of pre-rationality enjoyed by children as they develop and learn to use their capacity for reason.

Given the long history of women's association with irrationality, where do they fit in Locke's theory? Does the fact that he argues, unlike Aristotle, Aquinas and others, that women have, at least, the *capacity* for reason, translate into their ability to exercise that reason in a recognizable fashion? If the political status of personhood for women hinges on their capacity for reason, at least in part, then we must consider whether or not Locke found women capable of exercising rationality to determine whether or not they were "persons" in his theory.

Locke's Promises Half-fulfilled

A number of feminist political theorists have given Locke's position on the political status of women close examination. In general he has received mixed reviews. On the one hand, some theorists credit Locke with articulating the first political theory which makes possible the inclusion of women in political life. As noted earlier, Melissa Butler, for example, acknowledges that Locke's theory of individualism creates the possibility that women could "overcome their natural limitations; each woman [being] permitted to strike a better deal for herself whenever possible." (Butler, 37)

On the other hand, other feminist theorists accuse Locke of being disingenuous in his invitation to women to

reach for political power. Elshtain, Eizenstein and Pateman, for example, all maintain that Locke never really intended that women should exercise the formal political rights offered them in liberal theory. Even Butler admits that unlike many of his contemporaries, Locke dodges the difficult task of addressing directly the political status of women within his work. (41)

The criticisms of Locke are numerous, but they break down into three basic categories: first, that establishing women's rationality is problematic given Locke's definition and description of the origins of rationality; second, that Locke's maintenance of patriarchal control of women through the construction of a private world, one which both supports and makes possible the public, abrogates the idea that women are ever really "free" individuals. Confinement to the private world of patriarchal rule, the argument goes, correspondingly confines women to life in a world outside of Locke's rationality; and finally, the public/private distinction of Locke and subsequent liberal theory actually needs women to remain in the private in order for the public to be possible. I will explore and expand on each of these arguments briefly in my effort to answer the question, "Are women persons in liberal theory?"

Rationality

As asserted earlier, women have historically been held to be incapable of rationality throughout most of Western history and political thought. As a consequence, women come to Locke's theory of individual equality with a history that denies from the outset their qualification as rational persons. Locke's belief that all human beings, by definition, are created with the capacity for reason challenged the categorical denial of the possibility of women's rationality. But, as we have seen, having the capacity for rationality is fundamentally different from developing and exercising that capacity in Locke. In order for women to establish their qualifications as rights-bearing persons they must meet both criteria. Locke's theory gives women the first; demonstrating the second has proven to be more problematic.

The recent work of Zillah Eisenstein argues that when Locke holds out the possibility that women can exercise their rationality, he does so disengenuously. She believes that the problem with rationality for women in liberal theory lies in their exclusion from the kinds of political powers Locke argued men in Civil Society should have. (1986)

Specifically, Eisenstein reads Locke as requiring the acquisition and maintenance of property as evidence of the exercise of rationality. (33-4) In this reading of Locke

Eizenstein keeps with the work of C.B. MacPherson, who advances the theory that persons in Locke's design are really acquisitive, "possessive individuals."

Eisenstein says that women's exclusion from property-holding in Locke's age resulted in their actual exclusion from political participation. (44-46) Since women did not and could not own property, regardless of the theoretical possibilities offered by liberal theory, they continued to be denied such rights and privileges. In Eisenstein's reading of Locke, if women could not own property, they could not be rational. She is thus concerned with the exercise of rationality as manifested in the acquisition and use of capital (thus poor, unlanded, white men were also excluded from citizenship). (45)

The work of other liberal feminist theorists has located women's exclusion from personhood at a prior point, at the *origin and development* of rationality. The traditional charge that women are irrational or incapable of rationality has been met with arguments that focus on how their reason has been developed socially. The first major feminist theorist to address this issue was Mary Wollstonecraft. In her work, *A Vindication of the Rights of Women*, Wollstonecraft argues that while women may seem to behave like self-absorbed, petty children, incapable of reason, they do so because they have been educated only to

vanity and to women's concerns. (Rossi, 43, 47-8) Were they educated in the same way, with the same purposes, as are men, Wollstonecraft believed that women would behave as rationally as men claim to behave. She believed strongly that women should be granted full and equal political power, but she acknowledged that women would first need to be educated for such purposes. (Rossie, 42 & 46-48)

John Stuart Mill, whose work followed on that of Wollstonecraft by some fifty years, echoed the liberal belief that women should have equal political rights. He also argued that women seemed irrational, not because of their natures, but rather because they were treated differently from birth than were men. Said Mill, "I deny that any one knows, or can know, the nature of the two sexes, as long as they have only been seen in their present relation to one another...What is now called the antue of women is an eminently artificial thing -- the result of forced repression ins some directions, unnatural stimulation in others." (as excerpted in Mahowald, 49) He likewise advocated that women receive equal and comparable education with men. His confidence in women's potential to exercise their reason was so strong that he went so far as to make the then-outrageous suggestion that women should have the vote, the power to own property and the ability to divorce in their own interests. (Mill in Rossi, 217-219) Such

political powers had historically been reserved exclusively for men as women had been denied any political identity.

As a modern liberal feminist, Jean Bethke Elshtain's work, *Public Man, Private Woman*, points to Locke's separation of the world into the distinct spheres of public and private as the source of women's inability to exercise reason. As she notes, in Locke, the public world -- the world of Civil Society -- is the site of politics. The private, on the other hand, is the location of the social world. Reason guides life in the public for Locke, while nature, expressed as passion, guides life in the private. It is this distinction which makes possible his theoretical triumph over Filmer, but it is also this distinction that relegates women to a position of powerlessness. (116-119) In Elshtain's reading of Locke, women remain associated with the natural -- the source of passion and the site of the private. (122) Because they are politically "voiceless" in Locke's era, she finds them necessarily confined to the private world without access to politics and reason. (119)

Taken together, these interpretations suggest that establishing women's rationality, even in liberal theory, is problematic. While I do not disagree with any of these readings, I want to argue that the problem is even more complex for women. As numerous thinkers have charged, liberal theory as constructed in Locke is inherently

"masculine" in design. This creates two problems. First, where women can be like men, they can be perceived as rational. Where they can not be, however, they will be found to be something other than rational. Second, and this is the more subtle point perhaps, the idea of "masculinity" requires some oppositional "femininity" against which to measure itself. Woman's "irrationality" has historically functioned to define, at least in part, what is "rational," both prior to and also within liberal thinking. It is my assertion that the problems these issues pose to liberal theory originate with Locke's epistemology of rationality.

Reason, in Locke's epistemology, begins with sensation and perception. Human beings acquire their knowledge experientially -- there are no "innate" ideas that come with creation. (*Essay*, XXVII, 9) Locke specifically applies this idea to the fetus *in utero* as well. (*Essay*, IX, 6) Paradoxically, his theory also argues that if people reason *right*, they will all come to the same understanding of the Laws of Nature and of the world. In Elshtain's words, "Locke presumes that *the same knowledge is shared by all.*" (118, her emphasis) This means that human beings must all experience the same sensations and perceptions in order to arrive at the same conclusions. Elshtain finds, however, that "the public sphere is the *only* sphere in which this [shared rationality] holds." This is so, she says, quoting

Umberto Unger, because "Men differ by what they desire, but they are capable of knowing the world *in the same way*. Particular desires felt by the individual are arbitrary from the standpoint of the understanding." (118, her emphasis) In her argument, if reason is distinct from passion, and it is passion that guides life in the private sphere, and women are confined to the private sphere, then women are necessarily irrational because they are purely passion driven.

With Elshtain I agree that women are excluded from reason because of how their lives are occupied, but I differ with her interpretation of the problem. I suggest alternatively that life in the private sphere is not one of irrationality but rather one of "a-rationality." Unlike his portrayal of the condition of irrationality -- a state wherein one fails to consult, neglects or rejects right reason -- Locke's work holds that life in the private world is guided by instinct, nature and biology. He attributes the begetting of children, for example, to "natural impulses" on the part of the man to spread his seed. (II, 54) Sensations and natural instinct are the private phenomena that get transformed into political use through reason. Thus the mind mediates the body's existence. Women, who spend much of their lives occupied by natural, instinctual events such as child-bearing, also spend much of

their lives in this state of a-rationality. Locke recognizes that men also experience instinctual drives, but for men, those periods are brief compared to the lives of women. Men are capable of developing beyond it -- that after all is the project of "civilization," as Freud would one day argue.

This condition, which I have called "a-rationality," is thus a fourth state in Locke's epistemological theory of rationality. Up to this point I have identified three possible states of reason: rationality, irrationality, and pre-rationality. In liberalism, one's moral status is determined in large measure by one's relationship to reason.

Correspondingly, one's capacity for changing political identity is also predicted by one's state of reason. Thus, those who are irrational and thereby excluded from the protections of their rights and liberties, can (potentially) consult their reason and begin to act in accordance with the Laws of Nature. When they do so, they become active members of Civil Society rather than warriors opposing it. Children (and for some, fetuses) have only to mature into their capacity for reason in order to be able to exercise their rights on their own behalf. If Elshtain and I read Locke right, it would seem that the only thing preventing women from developing their reason is to move their lives from the private into life in the public. But there is a second

problem with Locke's theory that makes this shift for women impossible; it is the demand for them to remain irrational, so that men can identify themselves as men through their rationality.

I disagree with Elshtain on a second and equally subtle point in her understanding of Locke's theory. She contends that because women are epistemologically confined to the private sphere, they are excluded from exercising their rational capacity in the public. (119-120) I would like to argue that not only do women spend much of their lives in the private, and thus in the a-rational sphere, they are also simply ineligible for the very notion of a shared "rationality" with men in the public in the first place. If reason is generated by common experience, then women, by virtue of their differing experiences and sensations from men -- experiences noted earlier like gendered subordination, familial responsibilities and care, pregnancy and childbirth -- must, by definition, be incapable of experiencing the world the way men do. One can surmise that the standard for determining what is "reasonable" in Locke was constructed through his own set of experiences -- it is assured that pregnancy, gender oppression and childbirth were not included on his list. Women's sensations can't be reconciled to those of men for reason is inherently masculinized from the outset. Consequently, women can never

achieve public rationality, regardless of their lives in the private.

Superficially, the liberal feminist demand that women experience the same education as men in order to develop their rational capacities -- to be like men -- would seem to address this problem. But upon closer examination, it becomes obvious that it would also require that women *not* experience the sensations peculiar to women's lives. On the one hand, this might seem attractive to those not interested in pregnancy, childbirth, etc. On the other, however, it is clear that this is once again capitulation to the command that the human be the male. As I will suggest below, while meeting this demand may be possible, even desirable, for some women, satisfying it is simply impossible for pregnant women. Furthermore, as will be argued in the next two sections, liberalism requires women to occupy the private in order for the public to exist. If women were to turn "male" and rational, thus shifting their identities solely to the public, liberalism itself would be imperiled.

Patriarchy

Locke's political thought suffers from a second problem with regards to successfully claiming personhood for women.

The triumph of his theoretical project requires the separation of patriarchal and political power, but it does

not require the abolition of patriarchalism altogether. Rather, Locke relocates patriarchal power into the private world of the social and the family. Doing so allows him to make free and equal all men, but it compromises the possibility of freedom for women.

As numerous scholars have pointed out, Locke's theory constructs two parallel universes of power -- the public world of political power and the private world of social power. (Elshtain, 118-121; Eisenstein, 47-8) Individual equality reigns in the first; patriarchal power continues to dominate undisturbed in the second. While Filmer's patriarchal model of rule was dismantled and replaced in the public sphere in Locke's work, it continued to be the model for relationships between families in the private, with only minor modification. (Eisenstein, 39-40) As a result, private patriarchalism and public individualism are very compatible notions, as long as one is concerned only about equalizing political power between men. But when one adds the problem of women's freedom to the mix, the comfortable companionship between the two theories becomes impossible for women can not be "free" and "equal" in the public while remaining disempowered and subordinate in the private.

It is generally conceded that Locke was only marginally concerned, if at all, with the problem of women's rights. Jean Elshtain, for example, holds that despite his

separation of patriarchy from political power, Locke's resurrection of it in the private indicates that he never really intended women's lives to be lived equally with men. (121-2) Unlike Filmer, however, Locke at least acknowledged some level of women's parental authority over their children in the private. Locke argued, for example, that all political and governmental power was conventional in nature but he attributed the differences in power between men and women to nature. He argued essentially that men rape their wives because they are driven to do so by nature. (I, 54) Elsewhere, Locke held that in any argument between the a husband and a wife, the reason of the man should be prevail because nature makes him the abler and the stronger of the two. (Mahowald, 158-60; Eisenstein, 42) Finally, in what is perhaps his most revealing and sweeping generalization on the subject, Locke notes that there is some reason in nature for men to rule women. (Okin 1983, 199)

It would seem, then, that Locke was not much interested in the elimination of patriarchy. Women, however, are keenly concerned with the promise of liberty made to them by liberal theory. Until patriarchal power is dismantled, either through redefinition of private power or through the demise of the public/private distinction, the promise of liberal theory remains elusive for women. The demolition of patriarchal power in the private may prove nearly

impossible, given the fact that, as will be argued next, the success of Locke's public world actually requires a robust private world, in which women do much of the work.

The Public Need for Private Women

Women have historically played only a minimally overt role in public life. Thus, their participation in the public has never been considered particularly vital. The same can not be said, however, of life in the social and private sphere. There, women have been at the very center of familial and private life. When Locke's theory drew a clear distinction between the two, it did not simultaneously release women from their identification with the private world. What is more, by cordoning off a distinct "public" world for politics, most of the concerns of daily life were relegated to a world controlled by the same ungoverned male power of patriarchy. In reading liberal theory, it becomes obvious that the artificial and conventional public sphere needs the private sphere in order to function.

Metaphorically, Locke's theory needs women to darn the socks of its citizenry. This is a subtle but important point. The unexamined private sphere makes Civil Society possible.

On the surface, Locke's theory looks as though it is fairly a-social. He acknowledges that parents are driven by biological urges to procreate, and that children are

nurtured to their exercise of reason at adulthood within the private family, but his naturalization of the family renders it invisible.

In one of the more complex readings of Locke's theory, Pateman makes a related but separate argument about Locke's offer of political power to women. She contends that Locke's theory of equality for women is chimerical because it is based on conjugal right for men. While Locke seems to imply that women are free to contract into marriage, Pateman questions why they would choose to do so in the first place, given the fact that doing so renders them politically powerless. She posits the notion that Locke's theory is flawed from the outset: that women are never actually free to contract into marriage and that women must therefore be conquered by the protected conjugal rights of men. In Pateman's reading of liberal theory, women are never given access to equal liberty and individuality. (1988)

Thus it becomes impossible for women to actually exercise their personhood, (1) because they do not reason like men; (2) they remain under patriarchal control in the private; and (3) their subordinate identity is maintained within the family because liberal theory needs it to be so.

The remaining question here is, how have these limitations in liberal theory translated into the modern, liberal world?

It is to this last question that we now turn.

Are Women Persons in Modern Liberalism?

After 30 years of feminist struggle, it may seem absurd to all but the most politically conservative members of the far right to ask whether or not women are persons in the modern, liberal world. The first and second waves of the women's movement have been about demanding that Locke's promise of equality be kept for women. Struggles for women's recognition and inclusion in the Lockian model of liberal personhood have concentrated on equalizing women's access to education, the political process and the work environment. Demolition of these structural barriers has proceeded slowly but markedly. As a result, women have come a long way from the lives of women during Aristotle's era, or even during the age of John Locke. In the United States women have enjoyed the vote for three quarters of a century; property rights became theirs with the Married Woman's Property Acts in the 19th century; the Supreme Court has upheld women's claims for equal treatment in the workplace ushered in by the Civil Rights Act of 1964. (Lindgren and Taub, 1988) It would seem that as the twentieth century crawls to a close, our application of liberalism has made possible women's access to the rights and privileges of the public sphere.

What becomes evident upon closer examination, however, is that women have only been able to claim "personhood" primarily when they have been able to construct themselves as "equal to men" -- where "equality" actually translates as "like." When women can pass as men their personhood is fairly secure. But when, for material or other reasons, women seem like "women," the story changes. Pregnant women, menstruating women, lactating women, even potentially pregnant women, have often been excluded from equal treatment under the law and within liberal political structures. (West, 1991)

This is due in part to the fact that the "individual" of Lockian and subsequent liberalism remains male in theory, if not in function. As was true with Laqueur's one and two sex models of history, the male remains at the center of human identity in liberal individualism. Additionally, and certainly related, is the fact that, as established in Locke, what has not changed is the relationship to patriarchy that persists in the private. Our most modern of modern patriarchies (see Pateman, who credits Locke, Hobbes and Rousseau with the invention of this most recent version, 1988, 19-38) continues today. Women continue to be identified with the familial, the natural and the site of

sexuality.¹¹⁵ Women continue as well to do the majority of the housework, care-giving, familial organization and social work. For example, Okin notes that in households where women work full-time as wage-earners, men contribute on average, only 2-minutes more per day of housework than is contributed by men who live in households where women are full-time homemakers. (1990, 153)

It would seem that even in this modern period, Locke's model has been strictly adhered to: the public sphere thrives because the private enables it to do so. The expansion of the public sector to include women (though still marginal in many arenas) has eroded very little the political power of patriarchy in the private. In Locke's theory, this was a kind of power not akin to political power.

This makes sense, for the concerns Locke addressed were concerns that touched him personally. Acquisition of power in the family was not a problem for Locke or any other man of his social class. The inequalities of the family could be naturalized by him because they did not disadvantage him.

¹¹⁵ I would argue the site of both hetero and homosexuality in the context in which it is expressed today. This is a difference, I would also suggest from the focus of homosexuality in perhaps other periods, including during the height of Ancient Greece. In that period, I would argue women were not at the center of homosexuality as they are today. But that is an argument beyond the scope of this work.

But as will become evident in Chapter Eight, the struggles of women generally, and pregnant women particularly, to have their peculiarly "female" "rights" recognized by the conventional and formal political structure results from their condition of confinement to the private sphere, where their subordination continues. The problem for women is no longer one of suffrage, but rather of suffering through battery or surviving through rape, problems, which until recently, were considered a-political problems because they were private in nature. By drawing such issues into the public and demanding political solutions to such crisis in women's lives, women are using the promises of liberal theory to undermine finally the power of patriarchal rule. Whether or not liberal theory itself, as well as heterosexuality, can adapt to equality in the familial has yet to be determined. As we shall see with pregnancy, however, it may be impossible to recognize pregnant women as rights-bearing persons while simultaneously recognizing the fetus as a rights-bearing person within the language of liberalism. In the mean time, we must now ask, if women come compromised to the possibility of personhood in Locke and the post-Lockian age of liberalism, what is their status when they are pregnant. Are *pregnant* women persons?

Is the Pregnant Woman a Person?

If women's routine, daily lived experiences are outside the epistemological frame of men, the condition of pregnancy surely is beyond comprehension. Pregnancy, like much of women's lives, is a natural phenomenon for Locke. It is guided not by a reasoning mind, but rather by the drives and demands of biology and instinct. As such, it is an event outside of will or reasoned action. If it is outside reason, what is it then? It is both a condition of a-rationality as an instinctual, biological phenomenon, and, when put in the context of abortion and fetal rights, it has the potential to render the woman of concern irrational, by Lockian standards.

A-rationality

Pregnancy is both a state and an experience that renders women a-rational within an Lockean theoretical framework for at least two reasons. When discussing the state of women's rationality, it was argued above that experiences outside of the male world view can be considered a-rational generally. This is so because what men sense and experience defines what is rational. Correspondingly, whatever they do not experience is outside of the definition of reason; it is without reason, it is a-rational. Pregnancy is just this kind of foreign experience and

sensation. Like all sensations for Locke, it informs the interpretations and perceptions of the pregnant woman, and thus her reason, but because it is beyond the masculine experience, it is incomprehensible.

The second ground for arguing that pregnancy makes women a-rational in Locke's design is that it is an experience that is beyond will. Among the markers that separate the rational person from the irrational human being in Locke's theory is the exercise of will; yet one can not will pregnancy -- it simply happens. I would contend that pregnancy is unlike other instinctual drives or passions in Lockian theory. Drives and passions are momentary temporal impulses: pregnancy is a state of being. Instinctual impulses can impel one to behave, even to violate one's reason, but only for a moment. One can reason one's way out of such momentary lapses. But the same can not be said for pregnancy. As a biological event which proceeds at its own pace, it happens to the pregnant woman. Unless she aborts it, she is helpless to deny, interfere, stop, encourage or satisfy it, while simultaneously, it structures her sensations, interpretations and perceptions of the world. In a Lockean context, it renders her a-rational with respect to her own will.

Thus woman's personhood when pregnant is significantly compromised by the very condition of pregnancy itself. In

order to be a person whose rights are to be respected and protected, one must clearly demonstrate that one is acting on one's interests and by one's reasoned will. Pregnancy imposes a kind of biological chaos on the reasoning woman that severely hampers her ability to illustrate her own competence. But the next section will demonstrate that attempting to assert control over pregnancy may move her out of the category of the a-rational, not into the category of rational, but rather, into the category of the beast: the irrational.

Irrationality

Rights-bearing persons are such because they consult reason in order to understand the Laws of Nature and to learn how they should live their lives. They must be capable of recognizing their own interests and acting on those interests. But suppose that a pregnant woman identifies terminating her pregnancy as being in her own interest. Is she being "rational" in Locke's understanding of the concept? Or, is she being *irrational* because she is defying her "natural" command to protect and care for her developing fetus? On the other hand, is wanting to be not pregnant *more rational* because it is a more cognizable position to take within a world where rationality is

typically defined from within male experience?

A key definition of maleness is being unpregnant of course. In this reasoning, the Law of Nature might support her desire to terminate her pregnancy. On the other hand, however, Nature also impels woman to procreate and to nurture her children. Recall that Locke's theory is dependent on parents assuming responsibility to care for and educate their children to the age of majority. It is also God's mandate that they should do so. From this perspective, choosing to "kill" one's fetus is thus an irrational idea. Moreover, since rationality is established by a male standard, and medicine has become strongly masculinized through the past century, choosing to ignore what the medical community tells a pregnant woman is a "rational" course of action to protect the fetus during pregnancy, is irrational as well. Thus the only conclusion that can be reached from these contradictory states of "reason" is that for a woman to desire to be unpregnant is irrational. What makes the distinction possible is separating woman from man. While men reasonably do not want to be pregnant, women naturally do. Defying nature thus is against one's nature, and is therefore irrational from the outset. As we learned previously, the needs and desires of irrational people can be overridden in the political community.

What status does the pregnant woman have as a political "person" with "rights" in Lockian theory, then? First, as a woman, she is entitled to those rights, but as with undeveloped children, it is unclear or perhaps doubtful that women ever achieve full capacity as members of the public community, simply because so much of their lives are occupied with the experiences and sensations of the private, social world. In the fetal-rights context, if the fetus is not valued and afforded recognition as human, then wanting to be *not* pregnant makes sense in a male system of rationality. Thus being *not* pregnant is comprehensible. However, if the fetus is perceived as human, then deciding/wanting to abort it is, according to Lockian theory, irrational for three reasons. First, parents are supposed to care for their children, according to the Law of Nature. Second, no one may bring harm to another person. As outlined in the previous chapter, causing harm to another places one in a State of War with that person. In Locke's terms, it is an irrational act and it excludes one from the protections of rights and liberties. Finally, women are supposed to be pregnant according to the drives of the natural world. The paradox pregnant women are left with is this: Locke argues that one must help others only to the point that it detracts from one's own life. On the surface, this would seem to be the argument of women seeking

abortion, or women who refuse particular medical treatments for their fetuses. But in the specific case of pregnancy, women are supposed, by definition, to care for their young.

How, then, can one argue that a woman makes a *rational* decision to violate the Law of Nature -- an inherently *irrational* act, according to Locke?

In a confrontation with a fetal "person" any desires or actions on the part of the pregnant woman that either threaten or potentially harm the fetus, are *irrational* in traditional Liberal theory and thus *not protected*. The only acceptable exception would be to protect her own life from harm or threat. As indicated earlier within the liberal construction of human identity there are only two recognizable categories of the human: persons and those who are like beasts. Fetuses, by virtue of their condition as works-in-progress, fall into the first category and are therefore necessarily protected by their rights and liberties through their parents. Pregnant women, however, who generally inhabit the unspoken social world of nature, but who intentionally choose to threaten or harm their fetuses, fall into the second category and thus forfeit the protections afforded them as "persons." In Lockian liberalism, then, pregnant women who do not act like pregnant women, or who act counter to the "nature" of pregnant women, are *not* persons in his design.

Curiously, doctors and others who bring women to court demanding their submission to medical treatments deemed vital to the preservation of the fetus often discuss pregnant women's refusals as "irrational." It is inconceivable that a pregnant woman could be rational if she defies the greater authority of predominantly male professions like medicine and the law.

The Paradox of Individualism in the Body of the Pregnant Woman

A second and related problem for women's personhood in liberal theory is the state of her body. While Locke disposed of inequality based on differences between individual bodies, he left behind an outline of what counts as "human." Locke's universalized, unmarked "body" was at the same time heavily marked by masculinity -- it was presumed to be autonomous and individualized. This poses a serious problem for pregnant women. Once the fetus a woman carries becomes politically "individualized" in its own personhood, her body begins to be perceived less and less as the body of an autonomous individual, and more and more like some kind of inexplicable duality. At best she becomes a kind of siamese twin, at worst she becomes the vessel surrounding the fetal person who resides within. Lockian liberalism, steeped in a masculine experiential

epistemology, has no room for the multiplicitousness that is pregnancy. It is an oxymoron without resolution in liberal terms. Thus in a great moment of theoretical irony and paradox, as the pregnant woman physically grows out of her liberal body through gestational development, her fetus grows into its own.

If we revisit court holdings in both abortion and fetal rights cases, this paradox of pregnancy is clearly evident.

The trimester standard in *Roe* parallels my argument perfectly: when the woman seems most like she is not-pregnant (in the first trimester of pregnancy), and the fetus is least evident and thus least "human," her rights to terminate her pregnancy have been sustained by the Supreme Court. As the pregnancy develops and the fetus matures, however, and both become more materially evident, the fetus becomes more "human" and more individualized. At the same time, the woman increasingly seems less individualized. We begin to say she is "eating for two," for example. In these later stages of pregnancy the Court has been unwilling to continue to count a pregnant woman's privacy rights as more important than protecting the fetus she carries. Even the language of "privacy" becomes increasingly difficult to apply to a significantly pregnant woman; how can a pregnant woman be "private" at all? Recent erosion of the trimester framework in *Casey* reflects the success pro-fetus advocates

have had, in conjunction with dramatic changes in medical technology, in moving the individualization of the fetus back toward conception. For the Court, the fetus develops into a liberal enough body that it finds the state's interest in protecting it compelling.

It is important to note that in a second bizarre twist, the dual identity ascribed to pregnant women is not simultaneously ascribed to their fetuses, however. That is, the fetus is perceived not as one of two equal siamese twins, but rather as a tiny person who is materially dependent upon but politically independent from the pregnant woman.¹¹⁶ Pro-fetus imagery tends, as Petchesky and Stabile have argued, to construct the fetus as a tiny individual, floating in an anonymous space capsule. (Petchesky, 1987; Stabile 1992) Medicine too now treats the fetus as a separate and "individual" patient. (Phelan, 462) This construction erases the connection the fetus has to the pregnant woman who gestates it. As we have seen, it gives the illusion that it could exist independent of the pregnant body and has contributed to judicial pleas to protect

¹¹⁶ A good analogy is the tiny marsupial joey of the kangaroo. The joey, born a virtual embryo, moves from the birth canal to the gestational pouch all on its own. It will remain in the pouch for some time, sustained by the kangaroo's milk and the protection of the pouch. In this condition it is at one and the same time, physically 'independent' but materially dependent for its survival.

fetuses from the pregnant women who carry them.

The second reason that the fetus escapes the dual identity of the pregnant woman who carries it is that despite the fact that her personhood wanes as that of her fetus rises, the pregnant woman carries the Lockian burden of parental protection -- a veritable one-way street. Locke specifically notes that the child has no obligations to care for the parent until the child reaches the age of majority. (II 60-68) The child can not reason for the parent, only the converse. Thus it is the parent, who in some sense, shares its identity with her child. Once the dividing line between born and unborn "children" is erased, as has been suggested above, that parental responsibility reaches back to the fetus as well. Thus we "see" the fetus as an individual but we "see" the pregnant woman as the (m)other, as will be discussed in the next chapter.

In this chapter I have argued that while Locke and liberal theory seem to offer the possibility of political equality and political rights to women, Locke's epistemological framework undergirding his theory of individualism is inherently masculine and thus, in large part, it excludes women from inclusion as rational persons.

I have also argued that for pregnant women, the problem is even more complex, for not only does being pregnant render them a-rational and thus outside personhood, the meanings

ascribed to the material condition of pregnancy, for both the pregnant woman and the fetus, make her unrecognizable as an "individual" in liberal thought.

Our relegation of things natural to the private has left us with a surprisingly limited public discourse about pregnancy. As the next chapter will explain, this lack of a public consciousness about pregnancy works in turn against women's efforts to gain political identity as well.

Chapter VII

Erasing Pregnancy:

Constructions of Pregnant Identity

And amid the silence, as a positive answer to the mother's question, a voice quite unlike all the restrained voices that had been speaking in the room made itself heard. It was a bold, insolent voice that had no consideration for anything, it was the cry of the new human being who had so *incomprehensibly* appeared from some *unknown realm*.¹¹⁷

Transvaginal oocyte recovery, fertilization in vitro, and embryo transfer to an artificially perfused uterus will render *motherhood*, as we recognize it, *obsolete*.¹¹⁸ (emphasis added)

Americans were shocked by an August 1991 issue of *Vanity Fair* that sported a full-cover picture of Demi Moore's hugely pregnant and buck-naked form. The magazine received an avalanche of letters from readers responding to the picture; while some were fairly supportive, in general,

¹¹⁷ Anna Karenina, Part 7, Chapter 15, pp 843 (Knopf, 1992 edition). Emphasis added.

¹¹⁸ Paul G. McDonough. 1988. Comment. in Fertility and Sterility, 50 (6):1001-1002, as quoted in Julien S. Murphy, Feminist Perspectives in Medical Ethics, Helen Bequaert Holmes and Laura M. Purdy, eds., Bloomington: Indiana University Press, 1992.

the comments received by *Vanity Fair* were quite hostile. Many readers declared the picture "obscene" and "disgusting" and admonished the magazine for showing it. The editor noted that this single cover caused more controversy than any other in its history; it elicited over one hundred television and radio shows and some 1,500 newspaper articles. (Stabile, 190)¹¹⁹

In a culture that has rendered the naked female form an omnipresent commercial and political fetish, it is curious that such an image would produce such a strong, negative reaction. One wonders how we can account for this near hysterical public response?

It is true that other, equally stormy, reactions to nudity have certainly marked much of American history and many religious or cultural doctrines have traditionally held the naked human form to be either disturbing when exposed or simply found it to be obscene. As a result, at various periods throughout American history, efforts to control the distribution and consumption of such imagery have resulted in a variety of legal or other efforts to obscure nude illustrations from the public eye. Adoption of the 1873

¹¹⁹ It should also be noted that the controversial cover was responsible for the highest selling rate for any Vanity Fair issue in its history. Magazine editors credit the element of nudity in the photograph for its success, despite the controversy it sparked. (Huhn, 22)

Comstock laws, for example, attempted to prohibit the distribution of nude photographs and other "obscene" materials.¹²⁰ Most recently, the Congressional controversy over federal funding for Roger Maplethorpe's exhibition of male nudes resulted in demands from Senator Jesse Helms that all funds for the National Endowment for the Arts be withdrawn. Evocative of such responses, some shopkeepers wrapped the recent Demi Moore issue of *Vanity Fair* in brown paper coverings, treating it like a pornographic magazine which, until recently, have typically been covered when displayed in public until only very recently.¹²¹ Despite these extreme reactions, however, all but the most pornographic renditions of primarily women's nudity have become quite commonplace in our visual landscape through sculpture, painting, film, television, the print mediums and literature. Even the more gynecological or graphic representations of women's bodies are readily available in the marketplace, as a walk down any major street past Manhattan "newsstands" will attest. It would seem, then, that the negative reaction to the *Vogue* cover is not easily

¹²⁰ The Comstock Laws had greater reach than this, however. They included prohibitions on distribution of materials relating to birth control and abortion as well. (see Lindgren and Taub, 466)

¹²¹ Many stores, who distribute pornographic materials today, continue to require that the full body nude pictures of (primarily) women on the covers of those magazines

attributable to a sudden (and very temporary) rise in indignation about public displays of a woman's nude body.

Furthermore, it seems unlikely that the reaction was in response to the exposure of specific areas of Moore's body either. Certainly no more intimate areas of her body were revealed than are daily bared on other magazine covers, for works such as *Cosmopolitan*, *Esquire*, or *The National Enquirer*.

And finally, it is unlikely that the public was reacting to the fact that it was *Demi Moore* in particular who had taken off her clothes for the picture. Moore's nudity is not novel; she has made a career out of her removing her clothes before both still and moving cameras and as a result, her physical terrain is quite familiar to many of the American populous. If, then, women's nudity is no longer much of a cause celebre, nor is the exposure of particular parts of their bodies particularly noteworthy anymore, and if it was not *Demi Moore's* nudity that caused the ruckus, then, I can only conclude that what most readers found to be so disturbing in the *Vanity Fair* picture was something unique to the image itself, and, in this case, that unique element was the depiction of an unclad pregnant female body -- *Demi Moore's* or otherwise.

continue to be obscured. Opaque plastic wrap has replaced much of the brown paper wrapping of old.

It is my contention that the public's reaction to the Demi Moore photograph was not predominantly a reaction of moral indignation, but rather, it was a quite predictable response to experiencing an uncanny sight: that is, a sight which is both unfamiliar and in some ways frightening. The uncanny spectacle experienced by those who caught sight of the *Vanity Fair* cover was the vision of a (perhaps familiar) naked woman's body that was also visibly pregnant. Such an experience is indeed uncanny, because our cultural and political mores have historically limited our exposure to the material phenomena of pregnancy in general, with this being even more true for experiences of nude pregnancies, as the reaction to the *Vanity Fair* cover made shockingly clear.

Pregnancy has traditionally been contained and limited to discourses which were to take place either in the privacy and intimacy of the home or the doctor's office. Until only very recently pregnancy has not been a public, and therefore political, event. Curiously, this remains fairly true yet today, despite three decades of feminist politics arguing for women's equality and access to the public world.

While we are now increasingly familiar with the ballooning expanse of maternity smocks at the market place, and even in some advertising, most of us still don't know what the bare pregnant bellies of women other than ourselves, or perhaps those of our close family members or friends, actually look

like, and we certainly have little experience of "publicly" nude pregnancy in any case.

Thus, in the absence of a cultural reference for understanding the Moore picture it seems that we were forced to fall back on what we "know" about women. The primary references we have had for interpreting representations of the female body -- references that have been constructed through a visual and cultural discourse that has been almost entirely exclusive of pregnancy -- have been defined by the dominant and incommensurate discourses of woman as fetishized sex object and woman as mother.¹²² The construction of the Moore photograph simultaneously invoked both discourses about women, but they are discourses that have historically been held as incommensurate; mothers are heavenly, divine and chaste, not sexy and naked! And so too the converse is true as well. Moore was both "woman as the object of sex," as demarcated by her nudity, and "woman as mother," as demarcated by her pregnancy. Thus those who's

¹²² Why these two discourses should be maintained as mutually exclusive is a topic for further research. The easy answer, of course, would make reference to the Freudian construction of the Oedipal response by men toward their mothers and toward female sexuality in general. The significant challenges posed to Freud's work over the past seven decades convinces me that this is an inadequate explanation, however, I am not inclined to tackle this issue herein. Suffice it to say that the desire to keep "mother" and "sexual woman" separate continues to be commonly expressed throughout popular culture yet today, for whatever reason.

first experience of nude pregnancy was the Demi Moore pictorial reacted with a kind of cultural vertigo or cognitive dissonance: we didn't know what to make of it for we had no frame of reference for interpreting it. We found the idea of a "sexy mama" frightening indeed.

In addition to the discomfort experienced at the sight of Moore as a "sexy mama" we also had to wrestle with the simple fact that the pregnant body, in any form, has historically gone under- or unrepresented throughout most of our cultural depictions and treatments of women. Further, however, not only are we unfamiliar with nude pregnant women, we are unfamiliar with pregnancy in any guise. As I will suggest below, this virtual erasure of the pregnant body from our cultural consciousness has broad implications for how we treat pregnancy culturally and how we recognize its power politically. As we saw in the previous chapter, pregnant women's grasp on liberal personhood has been, at best, tenuous historically. In part this is so, I argued, because what it "means" to be a woman is to be driven by natural forces rather than the forces of reason; pregnancy is the clearest example of woman's surrender to nature. Pregnancy is thus arational, and, since pregnant women evidently lack the capacity exercise reason over pregnancy, they lack the qualities of personhood need to insure their identities in the political arena.

This chapter will provide a brief overview and discussion of the historical treatment and depiction of the pregnant body throughout Western culture. My argument is that there are virtually no representations of pregnancy within our cultural constructions of "woman." This is so because of two key related reasons. First, selling a patriarchal view of human life has required that pregnancy be absented and replaced by the development of a near meta-theory of what has become a model of humanity that is cast as being universally masculine in form. When men posit "man" as the universal human, they must somehow account for or contend with the counterfactual evidence of woman's primary role in human reproduction. As a result, woman's pregnancy has necessarily been erased, manipulated, or displaced by a pervasive, but subtly invoked theory of androgenetic human reproduction, that is, a theory of reproduction that gives primacy to the male in the generation of our human offspring. As we shall see, making real such a myth of male-dominated procreation has required careful control of our exposure to counterfactual experiences like pregnancy and the subtle manipulation of our understanding of the replication of our species. Obviously such a case has been easier to make at the moments in reproduction where man can be construed as physically relevant, but the gestational process in particular renders

the male figure an exile of the waiting room, where he must wait until he can get his hands on his fully-formed offspring and once again claim the lion's share of responsibility for human reproduction. Various means have been employed in the installation of man as *the* relevant agent in the reproductive process. As I will outline below, these have included such bold steps as simply retelling the birth tale or dislocating birth from the female body. In recent times this has included a more technological turn, the cooptation of pregnancy by medical practitioners.

Second, I will argue that the uncontrollable material phenomenon of pregnancy has successfully been cordoned off within a carefully constructed narrative of the "maternal," which displaces the identity of pregnant women from their own state of embodiment to their future status as (m)others. A discourse of maternity, I will suggest, is one devised and controlled within a patriarchal culture such that it renders women the objects of their children rather than the contrary. As such, they are denied the possibility of having a political identity unique to their condition.

This discussion will finally lead me back to the question of the new fetal rights campaign, where I will conclude that the erasure of pregnancy from our political landscape has resulted in its disempowerment, rendering the pregnant woman invisible in the political struggle over the

fate of the fetus.

Absent Pregnant Bodies

What do we, as members of an American political culture, know about pregnancy? How have we come to what knowledge we have acquired? And what does pregnancy mean to us, politically, today? There are a number of ways we could go about answering these questions. For example, we could examine the medical literature about pregnancy in order to understand how physicians have come to perceive and treat the gestating body. But this would give only a very narrow perspective, one that is typically outside of mainstream meaning construction. A second way would be to examine how the pregnant body has been depicted throughout our history in various popular culture mediums such as art, literature and television broadcasts. Examining such cultural snapshots of pregnancy, if you will, could provide a means for us to understand how we have construed and/or derived its political value and meaning.

Such an approach was used herein.

My purpose was to explore how the pregnant body has been presented and treated as a facet of our cultural record of ourselves. My original expectations were two-fold: first, I supposed that images of the pregnant body would be found primarily in conjunction with works of art depicting

familial or maternal settings. My second hypothesis was that because women are so strongly associated with maternity -- though they may not necessarily be "naturally" inclined to become mothers -- I expected to find that pictures of pregnant women in familial or mothering settings would be widespread as a means of directing or reinforcing women's inclinations to become mothers.

To confirm this hypothesis, I randomly scanned a variety of cultural resources covering Western civilization from antiquity to the present, paying particular attention to sources I thought most likely to include representations of the pregnant form. For example, the search included art history books, "how to paint and sketch" manuals, a small sample of "great" western literature, a selection of popular magazines of different eras and types, and a number of American films and television programs. While my research was neither systematic nor comprehensive, it was broad enough to provide a snap shot impression of our historical depictions of pregnancy.

My findings, though only preliminary in form, were quite remarkable: after surveying multiple hundreds of images of women's bodies, only a handful of pictures or representations of pregnancy were discovered across any of the mediums examined, and those images that were located

were only rarely concerned about pregnancy itself. For example, it seems that on the whole, the history of high and fine art -- a medium that is otherwise saturated with and obsessed by a fascination for and fetishization of the female figure -- is remarkably devoid of depictions of the female body as pregnant. Print and sculpture books are replete with naked and semi-clad illustrations of women's bodies, women with infants at the breast, and women together with men, other women, or children, but they are virtually barren of any artistic portrayals of pregnant women.¹²³ I found no studies of the pregnant form; no casual inclusions

¹²³ I should like to make a methodological note here. My search was random at best and certainly far from exhaustive. It may be, then, that there are actually more representations of the pregnant body in the great works of art than my search discovered. This is one of those peculiar empirical traps: I can't prove that artists and others providing social and cultural snap shots of their values and meanings haven't often depicted the pregnant body. I can only record that my survey of books on art revealed few obviously pregnant bodies. If such art exists, it has been so systematically excluded from the mainstream of the public art world, that it too has been erased. Which of course poses an intriguing question that goes beyond the scope of this work. So too, one could argue that pregnant bodies are everywhere present in art but they simply "aren't showing yet." A medical historian in the late 19th century, for example, argued strongly that the Mona Lisa was pregnant. (Broude and Garrard, 67-8) Whether she or any other woman depicted in a painting is pregnant or not is not relevant to my argument. Regardless of the actual state of pregnancy, none of these works of art have been about the topic of pregnancy in such a way as to make pregnancy contextually evident and thus relevant to the meaning of the work.

of the pregnant body in paintings with groups of other, non-pregnant subjects; and no discussions of "how to" draw pregnancy in art manuals.

In fact, only a handful of pictures of pregnant women were located at all, and of those, pregnancy *per se* was rarely the actual topic of the painting. An 1883 work by Nikolai Alexandrovitch Iaroshenko, for example, entitled *Thrown Out (At the Station)*, shows a very pregnant young woman, standing surrounded by luggage, staring dejectedly into the corner of what looks like a train station.

(Nochlin, 227) Though her pregnancy is clearly advanced, it is obscured somewhat by the heavy brown fabric of her dress.

The work provides a clear commentary about her presumably out-of-wedlock conception.

A second example, Dirk Bouts' 15th century painting, *Visitation*, portrays the mothers of Christ and John the Baptist, each with her hand on the other's pregnant stomach, in what is referred to as a "traditional visitation" scene of the era. (Carroll, 150) The women's faces are sorrowful and pained, reflecting their transition "away from the violence of the brides' induction into sexuality and toward their future maternity." (Carroll, 151) Once again, while the main subjects in the work are visibly pregnant, their swelling bellies serve primarily as testimony to their sexual initiation. The pregnancies *themselves* do not seem

to be of particular importance.

Even within these few pictures it should be evident by my description that though a pregnancy was clearly depicted in each, the works were not about pregnancy or the pregnant woman, but rather they were concerned with other issues that can be symbolized or demarcated by pregnancy. Most commonly works of art that included pregnancy did so as a means of commenting on the sexual behavior of unwed young women. In no case, however, was the pregnant woman *herself* the subject of the artwork.

One might anticipate, that in addition to serving as cultural critiques of women's sexual behavior, a common theme in Western pregnancy art would be imagery of the Christ child and the Virgin Mary. Despite repeated references to such imagery in various art masterpiece books, however, only a few images of a *pregnant* Mary were found. It is interesting to note that in one such illustration, Mary's pregnancy is represented, not by an extended abdomen, but rather by a miniaturized portrait of a well-developed Christ child painted over her stomach. (Zinserling, 97) Thus, while the fact of Mary's pregnancy is alluded to, the actual material transformation caused to her body by gestation is excised from the work; it is indeed, not only an immaculate conception that is represented, but an immaculate gestation as well.

A mid-1600's Rembrandt was more difficult to interpret. This painting, entitled, *Woman Holding a Balance*, shows a heavily pregnant woman standing in a gentle shadow, examining a two-sided, weighted balance in her hands. (Bal, 2) While the focus of the picture includes her pregnant form, it is not clear that pregnancy is the focus of the work *per se*. What is being "balanced" through the metaphor of the instrument is not immediately evident. That pregnancy is somehow involved in that decision of balance is quite clear, however.

Another illustration found in the search for images of pregnancy included a vague drawing of a pregnant woman depicted in an early teracotta relief of a "midwife obstetrician." That work portrays a woman giving birth into the hands of a waiting midwife. (Broude and Garrard, 71) No date was given for the work, but it is included in a collection on early Greek and Roman artwork. Overall, however, despite a concerted effort to find collections or single portrayals of pregnancy prior to the modern period, the findings were sparse.

A slight shift in the tone and/or focus of art works addressing or including pregnancy is evident around the turn of the twentieth century, at least in the West, though no significant increase in the number or percentage of such pictures was evident. For example, an unusual 1920 work by

German painter Armand Bouten, entitled *Birth*, shows a one-eyed fetus issuing from between the legs of a screaming woman as she lays upon the buildings of a city. Standing over and through her is a man who scratches his head -- perhaps in bemusement. (Heller, print #14) The volume editor describes the painting as representing "woman as the generative source, delivering her child in pain, but attached to a cosmic past and to recollections of death..." (Heller) A second, now fairly well-known piece done in 1969 by Monica Sjoö, is called *God Giving Birth* and features a nude female figure squatting as she delivers the head of humanity. Intriguingly, the initial display of this work elicited responses similar to those leveled at the Demi Moore photograph. According to the work's commentator, the image was "inspired by a goddess-worshipping religion and exhibited in the "Womanpower" exhibition [in London in 1969], [it] aroused intense controversy and the artist was threatened with legal action on charges of blasphemy and obscenity." (Chadwick, 326-7) It should be noted that both of these modern works actually concerned with birth rather than the many months of pregnancy that precedes that definitive event.

A more recent painting provided the only truly obvious commentary on pregnancy. This was Alice Neel's, *Pregnant Maria*. In this modern, 1964 work, a visibly nude and very

pregnant woman reclines on a bed, in a manner evocative of other reclining nudes of women in art. This work was easily distinguished from the rest by the fact that it is specifically about being pregnant, as even the title of the work makes clear. (Chadwick, 324) This single painting was unique in its explicit treatment of pregnancy among the thousands of other photographic depictions of art examined.

That the subject was nude was of particular note given the uproar about the Demi Moore pictorial some thirty years later. In total, then, the findings from my search for representations of pregnancy were quite sparse; artists have apparently not found the pregnant body to be an interesting subject for only extremely rarely has pregnancy been the subject of an artist's work. When my attention turned to examining Western literature, similar results are found.

A cursory examination of the "great" Western literature uncovered an equally sparse number of novels which treat pregnancy in any way. Though women were more commonly mentioned as being pregnant, or as having been pregnant, among the many novels that were examined, discussions of the pregnant body or pregnancy were essentially absent there as well. Nor were discussions of *being* pregnant included in any of the "great works" of fiction that included discussions of pregnancy generally. That is, while pregnancies and deliveries were noted, the pregnancies

themselves were not the subject of the works. The topics of pregnancy and childbirth appear in works by authors like Jane Austin, George Elliot and the Brontes but, as one commentator noted, this is done by "allow[ing] their characters to give birth in relative privacy and comfort" -- in essence, pregnancy and birth go on outside the pages of the texts. (Evans, 75)

One notable exception is Tolstoy's *Anna Karenina* in which both Anna and Kitty are pregnant and give birth during the development of the story. As with the paintings about un-wed pregnancies, however, Tolstoy juxtaposes the pregnancies of the two women to reinforce his interpretation of the differences between women who bear children in and out of wedlock. (Evans, 74-80) One study of pregnancy in nineteenth-century novels suggests that this use of childbearing to draw distinctions between "good women" and "bad women" has historically been the primary use of pregnancy in western literature. (MacPike, 57) While it is true that conception is a feature of pregnancy, it is also true that much interesting human life goes on during pregnancy, regardless of how it was initiated. It is this topic of discourse that is missing from our literature about humanity.

In *Anna Karenina*, Kitty's pregnancy is, perhaps uniquely, given particular attention. Once again, however,

the pregnancy actually serves as a means for Tolstoy to help the reader learn about something other than the pregnancy itself; we learn how Kitty's pregnancy and labor affect her husband, Levin, rather than how it affects and is experienced by Kitty herself. The author's exacting depiction of Kitty's delivery is revealed through a careful discussion of Levin's growing sense of impotence in response to her screams of pain. It is Levin, we come to understand, who is really laboring while Kitty pushes her baby out into the world. (Tolstoy, Part 7, Chapter 15) Thus Kitty, her pregnancy and her birth, are important only as a backdrop for exploring man's role in reproduction. This transposition of the agent who suffers during labor and delivery from the pregnant woman (in this case Kitty) to some male who is suffering because he is ultimately superfluous to reproduction after conception and prior to birth (Levin) is, I will suggest, the result of a need to reconstruct or view human reproduction as fundamentally male-focused, or androgenetic in character.

In a number of other novels, while sexual behavior of (primarily) young women is the topic of the work, the resulting pregnancies go unrepresented. *The Scarlet Letter* is a good example. Hester Prinn's 'sexual transgression' and subsequent pregnancy are discussed only in the most circumspect of language, but their presence looms over the

story. That the story actually begins three months after her daughter, Pearl, is born does not erase their importance in the novel. (Hawthorne in Murfin, 63) However, we never experience or come to know Hester as a pregnant woman. That part of her identity is not of interest to Hawthorne.

As indicated above, my efforts to locate portrayals of pregnancy in Western literature was but an introductory scan, at best. But even an examination of feminist works about the representation of pregnancy in literature (most of which can only be found through a search for "motherhood", and then it comprises only a small segment of that literature) revealed few instances in which pregnancy was the focus of a literary endeavor. This may be due, in part, to the fact that historically most writers, like most painters and other artists, were overwhelmingly male until recently. At first glance one might not be surprised that men have not been motivated or interested in explorations of pregnancy and the pregnant body because the experience is fundamentally foreign to them. But as I will suggest below, patriarchal interests may have a significant investment in the programmatic erasure of pregnancy from the public eye as a uniquely female phenomenon and that may account, at least in part, for the veritable dearth of pregnancy in Western writing.

This dearth of depictions of pregnancy and pregnant bodies has also been common within the creative works generated for the popular and electronic mediums. It is only very recently that images of pregnant women have been allowed to creep into either the film or broadcast mediums.

Early in the history of film, for example, pregnancies were written into the story lines of works like "The Sin of Madelon Claudet" and "The Torch Singer," but as a rule, characters were forbidden from "showing" that they were pregnant in these pictures. Both of these films, like so many of this era, focused not on the pregnancies themselves, but rather on the un-wed status of the women characters who were pregnant. Barbara Stanwyck's pregnant figure in the 1950 film, "No Man of Her Own," was a groundbreaking moment for the topic in film. But, as we have seen was true for other artistic portrayals of pregnancy, the reason she was pregnant in this film was to demonstrate that she had engaged in heterosexual activity outside of marriage. The pregnancy itself was simply a by-product of her behavior; it held no intrinsic interest as the topic of a film. (Chira, H-16) Since that time, pregnancies have increasingly appeared in motion pictures, though their primary functions have been to demarcate women characters as mothers and/or sinners -- either in or out of wedlock.

What Stanwyck's character did for film, Lucille Ball's

character, Lucy Riccardo, did for the small screen. In 1953, Lucille Ball decided to write her own pregnancy into the script of her television show *I Love Lucy*. Amid censor objections and a host of outraged letters that declared her decision to show her pregnant form to be "obscene" Ms. Ball forged ahead. Once persuaded that she would not take "no" for an answer, reluctant corporate sponsors encouraged the show's media handlers to turn her pregnancy into a cultural media event. (Higham, 132) As a result, on the day both Lucys (the real and the fictitious) gave birth, Americans were on the edges of their seats, waiting to see if the real Lucy delivered a boy, as had the television Lucy, earlier that day. Americans, who seem to have an insatiable appetite for reality that mirrors fantasy, were gratified that Lucy did indeed deliver the much-anticipated male child on that day. (Gould, 29:2)

Since Lucy's breakthrough televised pregnancy, images of pregnancy have become more commonplace. During the 1980's, then-Today show host, Jane Pauley's pregnancies became popular culture events and were followed as closely as any news story in America. Since Pauley's breakthrough exposure of her pregnancies, such events have become commonplace. The pregnancies of her successors and competitors have all become "part of the show." In fact, pregnant news anchors and television personalities have

become so commonplace that talk show host Kathy Lee Gifford's most recent pregnancy became the daily focus of conversation on her show, *Live with Regis and Kathy Lee*.

In addition to the pregnancies of these well-known television personalities other women's pregnancies have become more common in television as show themes. In the past couple of years, American sitcoms like *Roseanne*, *Murphy Brown* and *Northern Exposure* have featured scripts that either included or focused upon the pregnancies of their characters. While the story lines of these shows have often focused on the delivery as the climax of the story line, a few episodes have been devoted to thinking about what it means to be pregnant to particular characters. In so doing, they have drawn a new kind of attention to the pregnant body. In one recent and memorable episode, *Roseanne's* sister, Jackie, lifts up her shirt to stroke her hugely pregnant belly, thereby exposing it for all the world to see. It is a political as well as sensual act foreign to the history of Western civilization.

Until recently this paucity of images of pregnancy noted in the broadcast industry has been equally evident in popular magazines, even those that are touted as "women's" magazine. A survey of *Look* magazine advertisements from the late 1960's, for example, located only one advertisement in which a pregnant body was shown. The Allstate ad pictured a

noticeably pregnant woman in a maternity dress, standing on a bathroom scales that her male companion (husband?) had bent down to read. The ad copy did not mention the woman directly and the caption read only, "Think we'll have twins?"¹²⁴

In a more recent ad, former CBS News morning anchor Paula Zahn appeared in a *New York Times Magazine* fashion pictorial with the large curve of her pregnant belly starkly outlined against the backdrop of her outstretched sweater. The caption for the photo read, "The on- and off- camera appeal of Paula Zahn of CBS News is reflected in the all-American clothes she chooses to wear, pregnant or not."¹²⁵ While this ad was clearly about her pregnancy, or at least included it as a primary feature of the ad layout, it proved to be a fairly uncommon sort of advertisement. Pregnant women still do not routinely appear in American advertising campaigns.

In general, then, these popular culture depictions of

¹²⁴ *Look* magazine, "Get a \$16,000 family package of life insurance...\$17 a month," advertisement, February 7, 1967, 79. It is interesting that while the advertisement is about life insurance, the discourse constructed within the picture is about how much weight the woman has gained in her pregnancy. It would seem that minimizing the size of women's bodies, even during pregnancy, has a long history in western political cultures.

¹²⁵ *The New York Times Magazine*, October 24, 1993, section D, 194.

pregnancy in the broadcast and print mediums remain breakthrough images. The inclusion of a pregnancy on most television soap operas and other shows is still intended to signify a woman's sexual transgressions or her extra-marital sexuality, rather than anything intrinsically interesting about the pregnant body itself. When represented on the small screen, pregnancies are often violent, painful or end in tragedy for the pregnant woman. (Rogers, 82)

Finally, it is worth noting, that in a world in which virtually *everything and anything* having to do with the female body makes its way into the pornography industry, it is fascinating that there are no great sexual images or few pictorial studies of pregnant bodies in the copious pornographic materials available today.¹²⁶ This may return us to the incommensurability of sex and motherhood evoked by a pregnant Demi Moore's seeming transgression of posing nude, particularly for a "mainstream" "women's magazine" like *Vanity Fair*.

Only recently have pregnant women felt comfortable being in public spaces such as the marketplace or other

¹²⁶ I once saw an advertisement in the late '70's for a pornographic magazine entitled something like "pregnant bitches in heat" which featured naked and very pregnant women in explicit pornographic imagery. Whether this publication is still around today I do not know, and in any case, it certainly could not be construed as having occupied anything more than an ancillary position in the dominant popular culture.

public venues. Historically, the period of "confinement" meant literally that; pregnant women (at least of middle and upper class) hid their pregnancies behind closed doors until well after the birth. This tradition began to ebb during the early part of this century as more women entered the labor force, carrying their pregnancies with them. Though pregnant women now routinely visit the theatre or the local Walmart, it is only at the close of the twentieth century that we can entertain the prospect of a pregnant member of Congress. The idea of a pregnant president remains foreign to most, I suspect. Thus, despite being surrounded by pregnant women during the average work-a-day, our culture remains remarkably unreflective of pregnant life.

In sum, the relative absence of representations of the pregnant form in Western culture is striking. Given the reality that a good number of women are pregnant at any one time, and that each of us is the product of a pregnancy, it is intriguing that such a common feature of human life is so absent from our recorded re-presentations of ourselves. In the face of all this absence, one is compelled to ask, where have all the pregnant bodies gone and why have they disappeared? For an explanation I turn now to the role of pregnancy as a function of reproduction in what I will call the socially constructed meta-myth of patriarchal "androgenesis."

Patriarchal Reproduction and Androgenesis

Feminists have long noted that men have historically posited themselves as the universal model of the "human." In the words of Beauvoir, a patriarchally constructed understanding of human life means that "there is an absolute human type, the masculine." (Beauvoir, xviii) Thinkers like Aristotle argued that man is the superior form of the human being and that woman is but the deformed or incomplete version of man. Again, in Beauvoir's words, this means that man represents "both the positive and the neutral," whereas woman represents "only the negative, defined by [her] limiting criteria,..." (xviii) Much of early western second wave feminist work has been concerned with identifying the origins of the boldly narcissistic view of humanity as modeled on a male universal that has been created by men.¹²⁷ Regardless of why it has been posited, the fact is that women have continually struggled against the model in their search for political power. The case is particularly poignant for women who are pregnant.

In any case, successfully establishing their claim that "man is the human" has been fairly easy on many counts --

¹²⁷ See for example the works of: Alision Jagger; Rosemarie Tong; Mary O'Brien; Nancy Chodorow; Catherine MacKinnon; Mary Wollstonecraft; Andrea Dworkin; Susan Brownmiller; Sarah Grimke; Charlotte Perkins Gilman, etc.

those with power can construct virtually any vision of reality they so choose. But on at least one count, making the claim for a masculinized, universal humanity must confront the counterfactual and at least potentially destabilizing evidence of women's role in human reproduction. Reproduction troubles the idea of masculine universal humanity in at least two instances: first, men simply don't reproduce by themselves, which means that they simply can't be the perfect or complete model of the species. Surely the failure to be able to reproduce the species challenges the idea that man is the human. Second, the corollary idea, that woman is the inferior half of the species, is mitigated by the fact that she can do what man clearly can't -- she can gestate our offspring. (O'Brien) This makes maintenance of a universal masculine human ideal problematic as well.

Men have typically answered these challenges either through denigrating the importance or relevance of the natural, the bodily and the physical, with which reproduction is closely associated, or, by balding attempting to coopt reproduction for themselves. Success with the first strategy -- elevating the reason of the mind over the matter of the body -- would eventually spawn the mind/body dualism that demarcated much early Greek writing but which was give more concrete form in the modern period

and which laid the ground for the Christian shift away from valuing the body toward valuing the unencumbered life of the "spirit."¹²⁸ In both cases connection to the body becomes both devalued and undesirable. Thus, through a magnificent inversion, woman's intimate relationship to the body during gestation, birth and lactation becomes a sign of her inadequacy rather than a mark of her humanity. (Beauvoir, xvii-xix) This, then, frees man from the albatross of having to account in his story of his own human perfection for his inability to reproduce alone, and to carry the major burden of reproduction in his otherwise universally perfect human form.

The second approach, however, has been more subtle. Here, man has actually attempted to deny the counterfactual evidence of woman's role in reproduction by claiming the lion's share of responsibility for creating our offspring -- despite all evidence to the contrary. (O'Brien; 1981, 47-51; French, 13-14, 105) Because the reproductive process does indeed involve the contributions of both women and men at different points as it develops, men have asserted control over reproduction, at least at the points where they are physically involved: aka at conception and after birth. Historically men have been fairly successful at diverting

¹²⁸ See St. Augustine's *City of God* on this point generally.

attention away from the importance and contribution of women and toward themselves during heterosexual intercourse, and thus the moment of conception in reproduction. Further, they have quite effectively maintained dominion over the lives of their children once born through the imposition of legal, cultural and political tools that insure male hegemony over children as property. But the male body becomes disturbingly (for a universal masculine humanity) superfluous, however, during both pregnancy and birth. Thus by-passing these two material obstacles has required a more complex social (re)construction of human reproduction, which, I argue, has entailed the necessary absenting or erasure of the pregnant body in combination with its immersion in a carefully constructed and carefully controlled discourse of maternity.

As I noted, the first problem confronting a patriarchal ideology is the simple fact that it takes two sexes to reproduce in human species. In the construction of the masculine as the universal image of the human, and the feminine as the particular and flawed "other," patriarchal ideology requires a clever way to assert the male as the primary actor in reproduction. Throughout Western history, male philosophers have repeatedly tackled this problem. For example, in his, *On the Generation of Animals*, Aristotle creates what is perhaps the most overt interpretation of

human reproduction as androgenetically structured. According to his theory, it was actually the male semen that activated the embryo in the process of conception. Man provided spirit, reason, the essence of the human; woman contributed only menstrual blood and the womb as a place for gestation. In his hierarchy of soul and form over the material, man's active contribution of the former uses woman's passive contribution of the later, in such a way as to construct conception as a male phenomenon. (Homans, 154-5) This "fantasy [that] the child originates in and belongs to the father and that the mother provides merely the environment in which the child grows" (155) has a long history since its formal construction in Aristotle's biological works.

The story of the Immaculate Conception makes essentially the same argument. As Margaret Homans puts it, "Christ as God's word must pass through a mother's [sic] body, but in as spiritual and nonphysical a manner as possible, scarcely touching or being touched by female flesh." (157) Mary is present, but it is the male God who is creating the baby Jesus.

The theory of the "humunculus," a later "scientific" extension of the idea that the fetus arrives fully formed from the male body and is only nourished by the pregnant woman, thrived in the late 1600's following the discovery of

what one researcher, Leeuwenhoek, first described as "animalcula." (154) It is fascinating to realize that this discovery, which countered directly the Aristotelian notion that man made a spiritual rather than material contribution to conception, was used to sustain Aristotle's conclusions about male control of conception.

One could be tempted to attribute these masculinized constructions of conception to a lack of scientific information. As science reveals more about the material process of fertilization, however, the proclivity to cast it in "active male" and "passive female" terms persists. The "objective" and predominantly male modern scientists, themselves made men in part by the myth of male generation, continue to write the human reproductive cycle in the same language of male activity and female passivity. (Tuana, 55)

This myth even persists within popular culture and is reproduced in films such as Woody Allen's *Everything You Always Wanted to Know About Sex* and the more recent film *Look Who's Talking*. These films depict sperm as tiny, volitional men setting out from the male body on a mission of conception. This "conception" is portrayed as the uniting of some passive material (the egg) with the already intact little man (the sperm). The imagery is strikingly evocative of the drawings of the "animalcules," rendered by Hartsoeker more than 300 years before. (Tuana, 54) Thus men

have posited themselves as the creators (perhaps creating a male god as creator in their own image) and simultaneously denigrating, trivializing and even erasing women's contributions to gestation and birth. As a result, pregnancy (and thus women) becomes the least relevant component of the reproductive cycle in the androgenetic model of human reproduction.

While the effect of this androgenetic vision of human reproduction has been to situate the male as the primary actor in reproduction, conception is not the only place where men have inserted themselves in the process of reproduction; they have invoked a similar claim to ownership of the child following birth.

The most obvious evidence of the male claim to having created the born child is the tradition of male property interest in children. As feminist theorists have long argued, the history of the "family" in the West is the history of male claims for ownership of both women and children. One of the many negative effects this has had on women is that it deflects attention away from their role in reproduction. The passing on of the patriarch's name, for example, erases the evidence of the mother's role in reproducing those children.

But gaining control of the conception and childrearing phases of reproduction has been relatively easy for men.

They have had less success and had to go to greater, sometimes more bizarre, lengths with the problem of pregnancy, however.

As indicated at the outset, the material realities of gestation and birth are more tricky to circumvent or deny. Historically, a key strategy has been to simply construct a discourse of male birth. The classic example is from Greek mythology in which Zeus delivers Athena from his head. (Bullfinch, 90) Zeus' androgenetic birth virtually eliminates the elements of conception, gestation and childrearing as Athena (Minerva to the Romans) was born "from his brain, mature, and in complete armour." (90)

Other Greeks have made parallel attempts. In his dialogue, *The Symposium*, Plato creates what one commentator describes as a kind of "spiritual pregnancy" for men in his description of the reproduction of the human species. (Pender, 72) Plato retells the birthing story giving man a place which, in the order of things in nature, he surely can not otherwise claim.

In order to relocate birth into men in such stories, however, the imagery of birthing women must somehow be erased. The glaring absence of illustrations of women giving birth in the art of antiquity facilitates this end. When we don't talk about or discuss women's pregnancies, when we render them invisible, it is easier to accept other

mythological explanations for reproduction.

Another method for dislocating the importance of women in childbirth has been to portray birth as originating from non-human origins. Two examples of this approach were discovered in my examination of great art. An early Greek relief titled, *Birth of Aphrodite*, shows Aphrodite rising up "from the watery depths." According to the myth she was "born from the foam of the sea," rather than from the body of a pregnant woman. (Zinserling, 162) Though there are alternative accounts of her birth, most Greek mythology credits her with such an immaculate birth. (Bulfinch, 17)

An equally interesting example of this displacement of the pregnant body during birth is a fresco painted by Bernardino Luini around 1500 that is called, *The Birth of Adonis*. In this work, the child is delivered, not from the body of a woman, but from the opening of a tree. Once again, this imagery de-constructs and re-constructs the story of birth so as to make women and pregnancy completely superfluous.

Despite the possible effectiveness of these rhetorical strategies for re-constructing conception, birth and childrearing, the pregnant body remains confoundingly problematic in the role of reproduction: regardless of the myths men weave, the fact remains that to date, every child born has gestated in the body of a woman. Thus men have had

to find more complex strategies for dealing with the dangers posed to the universality of the male being by the material reality of the pregnant body. One method has been the increasing medicalization of childbearing, in which the (predominantly) male physician becomes the orchestrator, manager and thus key actor in the pregnancy. The second, equally effective approach, has been the cultural erasure of the pregnant body in favor of a discourse of (m)otherhood.

The Phenomenon of Dr. Mom

The meteoric rise of medical science in the 20th century has had important consequences for pregnant women. On the one hand, childbearing has become less life threatening and in many cases less complicated by the arts of medicine. On the other hand, the masculinization of the medical model has elevated the role of the male physician, displacing both women midwives and pregnant women in the process. (See generally Gordon: Rothman; Raymond; Trebilcot; and Stabile, 193)¹²⁹ As Carole Stabile notes, quoting Emily Martin, "obstetrics has functioned, since it replaced midwifery in the latter half of the nineteenth century, to control pregnancy using science and technology, as well as to dismiss women's experience and knowledge of their

¹²⁹ It is interesting to note that the one depiction of midwifery located in all of the art work surveyed was produced in antiquity. See above.

bodies." (193) Physicians are now routinely referred to as "obstetrical managers" by both practitioners and in the professional journals. The pregnant body is now commonly referred to simply as the "maternal environment."

In order that the potential power of the pregnant body might be successfully undermined and replaced by the cultural power of the male physician, however, the pregnant form must become transparent or absent in the discourse of reproduction. As noted in the fourth chapter, current technologies such as the sonogram facilitate that phenomenon. (Petchesky; Stabile, 194-199) I would suggest, however, that while technology further erases the pregnant form, men have been carefully absenting the pregnant body since the dawn of Western civilization and the death of the era when goddesses and "fertility" symbols reigned. (Lerner)

The evidence for this erasure is abundant, as the first half of this chapter attests. In addition, pregnant women have historically been "confined" during the latter months of their pregnancies, thus keeping them from the public eye.

For example, a wonderful examination of Virginia women's diary and letter entries about their experiences with childbearing and birth during the late 1700 and early 1800's exquisitely details the cumbersome lengths to which women and men gone to talk about a subject unrepresented in discourse. Authors Lewis and Lockridge extract descriptions

of pregnancy such as "trial," "affliction," and "one of the evils of this life," as only a small sample of the phrases used to communicate about pregnancy. (7) Absent a common visual or linguistic discourse about the pregnant figure, a patriarchal interpretation of pregnancy conveniently fills the space created with the more manageable discourse of the maternal. Despite a discourse of natural maternalism, the practices of childcare are socially constructed and thus manipulable.

Pregnancy and the Trope of the (M)other-body

The recorded history of Western culture, while devoid until recently of images of the pregnant form, is replete with representations of "motherhood." The art books examined for this discussion were filled with images representing and thus constructing the maternal: women have been painted suckling, tending, holding and interacting with children by the score. "Family" imagery is frequently encapsulated by the mere presence of woman with a solitary child. Images of the Virgin Mary and the Christ child are perhaps the most common representation of motherhood, but they are rivaled by the significant number of other woman-child pairings in art.

This abundant representation of "mothers" creates a robust discourse of the maternal that has engulfed pregnancy

in the absence of a competing visual discourse about the pregnant body. When we see the pregnant body, we see it in drag, as it were; we drape it in "maternity clothes." We confine women to "maternity wards" during labor and delivery and the only terms we have for describing a pregnant woman are "mothers" and/or "mothers-to-be." We have even coined the phrase "surrogate mother" to describe a woman who elects to gestate a fetus for someone else.

This substitution of maternal language to talk about pregnancy is understandable in part because the historical erasure of the material pregnant body has left us without a language with which to discuss it otherwise. As a result, pregnancy, as a *political phenomenon*, has gone untheorized and unexplored; we don't *know* what pregnancy *is*. When we look at a picture of the pregnant body what exactly is it that we are looking at?

Furthermore, when one sees human reproduction depicted either as the heterosexual act of sex or as mother-with-child, the idea of pregnancy seems amorphous. As a temporal event (as though conception and motherhood were not), it takes the position of transition between the "real" parts of reproduction -- conception and mothering. To describe a pregnant woman we must say that "she is going to be a mother." This displaces her identity into the future -- for a pregnant person has no "real" identity *per se*.

Ironically, in this process the pregnant body slips into "motherhood" through its own absence.

This is in opposition to what one sees when one is looking at a representation of motherhood. "Motherhood," which is a set of behaviors, not a material state, has been easily constructed as a seemingly tangible discourse that can be "represented" by pairing women with children in visual or other cultural means. As a result, we "know" motherhood when we see it.

Intriguingly, the idea of motherhood, as I have tried to indicate here through the use of off-setting parens, (e.g. (m)otherhood) has historically focused attention away from the woman and toward the other that is the child. That is, she is only present as a reflection of identity away from herself. In service to a patriarchal ideology that can not materially reproduce and tend its own offspring, the other of (m)othering is the wider political culture that needs those children for it to be viable. The liberal tradition of Republican Motherhood is a classic example of this. Mary Wollstonecraft and others of her time argued that women should be educated, not for their own purposes, but rather so that they could be good mothers and raise future (male) citizens. In becoming "mother," woman's identity becomes displaced from the subject of pregnancy to the object of reproduction.

Beginning with Simone de Beauvoir, the radical feminist critiques of thinkers like Firestone, Daly and Rich have argued that this construction of (m)other serves the needs of patriarchal ideology well, but does a great disservice to the women who must fulfill the role. It leaves the pregnant person without a political identity or discourse of her own.

Liberalism, as was argued previously, requires the same kind of absence of women -- the dislocation of the social act of (m)othering outside of the political world, carefully confined to the private world of the social. Liberalism needs its children to be educated to reason and to one day sign their name on the consent line, but it has no means for nurturing in the public. Thus women as (m)others must stay behind, in the service of liberalism and under patriarchal power, to insure the well-being of children who will one day be public persons.

In addition, pregnancy and motherhood are simply not the same. One individual pregnant person may choose to make them identical for her own purposes, but another may not. Without a political identity, however, those who are pregnant but reject the ideology of "motherhood" become the abject and the abhorrent. The specter of the "un-maternal" pregnant woman thus has the potential to deconstruct the painstakingly created myth of the maternal pregnant body.

The combination of a history of absenting the pregnant

body, fostering a discourse of the maternal, and the medicalization of pregnancy have succeeded in the late 20th century in creating a new and potentially lethal method for patriarchal access to the fetus. As argued above, the recent construction of fetal identity and arguments for fetal rights is hinged upon the invisibility of the pregnant person. (D. Condit; Petchesky, Stabile). The new medical interventions that allow both visual and physical access to the fetus *in utero* seem reasonable only if the obstetricians and others do not see the pregnant body as having an identity apart from the fetus. To see the pregnant woman as the "mother" is to see the pregnant body in service to the fetus inside. When the pregnant woman is operating in a non-threatening fashion (non-threatening to those whose power is derived in part from the subordination of women) and is behaving like a "good mother," there is no need in a patriarchal culture to claim the fetus she gestates; in some sense she has already offered it up as not her own. But for those women who fall into the category of the "un-mother" pregnant woman -- women who take drugs, use alcohol, reject their newborns, become pregnant as a pre-teen or out of wedlock, or refuse medical treatment, as examples -- patriarchal power, reified through the control of offspring, must be re-asserted by invoking its power as the force responsible for reproduction.

This becomes possible because there is no "there, there" for a culture that has been shielded from the imagery of the pregnant form. Without a conception of the pregnant body as anything other than "mother," courts, judges, lawyers, and a world steeped in a masculine universal vision of humanity, have no way to recognize the pregnant person. She is culturally invisible once she behaves like a pregnant un-mother. She, like Demi Moore, becomes the uncanny.

Conclusion

It would seem, then, that the simple act of exposing Demi Moore's naked, pregnant body was a profoundly political one. In stripping off the cloak of her maternity smock, her unruly pregnant body confronted us with a number of discourses that did not look in the least like "motherhood."

As I said at the outset, the hostile and unsettled reaction of *Vanity Fair* readers is understandable when one realizes that they did not know at what they were looking.

As feminist women and others gain power in Western culture (even as it becomes more multi-culturally inclusive and thus perhaps deconstructs from the inside out), artists like Roseanne and others will be even more effective at exposing and thus forcing us to explore the meanings of the pregnant body. In arguing here for the disaggregation of the pregnant body from the discourse of the maternal, in

order to begin to conceive of a politics for pregnant persons, I am conscious that many feminists have argued exactly the opposite, citing a number of potential threats to the lives of women that might arise with the untethering of the pregnant body and motherhood. (Stabile, 193) But if, as I asserted in the previous chapter, women generally, but pregnant women in particular, have difficulty establishing their personhood within a liberal political culture, it may be necessary for us to make commonplace the pregnant person within our visual and verbal representations of the human. Doing so means displacing the myth of androgenesis with the material evidence of women's pregnant bodies. As the next chapter will make clear, at least one additional step may be necessary to achieve this effort. That is the construction of a legal identity and discourse for pregnant women in which pregnancy itself is the center of focus.

Chapter VIII

The Legal Construction of the Pregnant Person

"Why can't a woman be more like a man?"¹³⁰

As has been argued throughout this work, among the many revolutionary promises of Enlightenment liberalism was, at the very least, an abstract promise of woman's political "equality." As we've seen thus far, such "equality" entails recognition of one's rationality and one's humanity and the corollary recognition that one is also endowed with the same rights and privileges as all others -- regardless of the material configuration of one's body or other distinguishing features. Thus women's "differences" -- implicitly meaning differences *from men* -- should not preclude them from enjoying equal status as rights-bearers in the public domain. It should be clear by now, however, that complicating both the liberal equality project and women's ability to cash in on that revolutionary promissory note of equal treatment, has been the maintenance of, and in fact the strong dependence upon, the traditional patriarchal power structures that undergird liberal theory in the private world. Thus, while women are ideally "equal" in

¹³⁰ Lyric from *My Fair Lady*.

their creation as self sovereigns in the public world, they are simultaneously *required* by an unchecked patriarchy to be subordinated in the private world. (Eisenstein, 16) The construction of woman's identity under this Lockian model is thus an impossible, and lethal two-edged sword for women; they are "free" in the public, but their lives are to be spent in the private, where freedom is not nature's chief concern.

Nowhere is this inherent contradiction in the social and political construction of women's identity more evident than in the historical treatment of women in American law. The courts --until recently nearly unanimously male in composition -- have struggled for the past one hundred-plus years with their perceptions that women are suited primarily for the private world of family life, a place where public laws have seldom been permitted voice. It is only recently, as the result of repeated and consistent challenges by liberal feminists and others, that the courts have been forced to abandon their stalwart defense of a legal doctrine based on sex differences.

This has been due, in part, to the fact that because women have historically been identified as and with their reproductive capacities, as illustrated in the previous chapter, this reproductive identification has also rendered them essentially absent in the view of the law. As

Catherine MacKinnon would say, "the law sees and treats women the way men see and treat women." (432) In looking at how women have been treated under law in Western history, it would seem that men have primarily "seen" women as defined by their capacity for pregnancy and other potential procreative functions, regardless of their extant, individual material states at any particular points in time.

As a result, the law has historically failed to see women as entitled to the kinds of political protections afforded 'persons' of a liberal regime because they are private reproducers. As we saw earlier with the construction of fetal identity, how the law sees and treats one, simultaneously constructs its understanding of them. Thus, where the Court treats the fetus with the respect, dignity and protections afforded persons, the fetus gains the patina of personhood, which in turn makes it more difficult to treat it as other than a person the next time around. With the pregnant woman, however, the construction and reification of her private identity as pregnant -- and therefore 'different,' 'handicapped,' or 'inferior' from unpregnant persons -- has rendered her *less* visible and thus less powerful in the public arena. Additionally, while the fetus comes to law on a virtual blank identity slate, pregnant women come encumbered by a long history of already ascribed meanings, perceptions and historical treatment.

Almost inevitably, the Court has relied upon these historical meanings to frame their understanding and thus their adjudicatory approach to pregnancy. As we shall see, it is the very presence of the possibility of pregnancy that has erased public identity for women as legal agents throughout much of our history, and, in some cases, yet today.

In this chapter it will be argued that as complicated as both liberal theory and law are for women generally, pregnancy simply amplifies the Court's difficulties in figuring out what "equality" means for women. This is so because, as we have seen thus far, pregnancy has historically been treated as a "natural" phenomenon and thus regulated strictly by patriarchal values within the private sphere. (Eisenstein, 16) Pregnant women are understood as private sphere (m)others, and as such, their identities have been construed as socially permeable, lacking the discrete boundaries that typically characterize atomized persons in liberal theory. Consequently, the task of establishing the autonomy and independence necessary for claiming individualized rights as pregnant persons in the public domain remains, as yet, fairly elusive.

This chapter will examine the history and present status of pregnant women within American law. It will claim that, for the most part, women lack standing as rights-

entitled persons, specifically with respect to control of their own pregnancies. I will outline how, though the courts continue to wrestle with how to understand pregnant women as "equal" rights-bearers, they have made only minimal efforts to understand the idea of "pregnancy rights" and to understand what such rights could possibly entail.

Moreover, I will suggest that over the past one-hundred plus years, small revolutionary moments -- moments catalyzed by demands for women's equality, have resulted in halting and moderate successes for recognizing the rights of women to some command of their bodies, generally, and their pregnant bodies in some circumstances. But as I will argue, most of these gains have been concerned with protecting women's rights to *not* be pregnant -- that is, to be more like men. The result is that while there is an increasingly robust body of constitutional and case law supporting a woman's rights to avoid or terminate pregnancy, there is but scant recognition of rights for women that actually recognize their political authority over their own pregnancies in the public and thus political arena.

The two primary areas where rights specific to pregnancy have been established are the workplace and reproduction. The first provides a long, illustrative history of the Court's struggle with and against demands for "equal treatment" for women in the workplace. The second,

the area of so-called reproductive rights, affords little help in establishing a solid identity of personhood in pregnancy with abundant rights for pregnant women because it is primarily about not being pregnant (and thus being more like men.) Where issues about pregnancy rights do come in, they have been entangled with the idea of motherhood and questions of genetic identity as they are transmitted through the contributions of ovum and sperm. As a result, when challenged in the courts by the assertion of opposing fetal "rights," pregnant women have little precedent nor historical support from which to make countervailing arguments about the nature and superiority of their own claims to "rights" over their own, individual pregnancies.

Women and the Law: Separate Spheres

As with the case of the fetus, the development of a body of law pertinent to pregnancy has been slow and incremental. Unlike with questions of fetal rights, however, the problems confronting pregnant women have been different. For much of Western history, the courts dealt with pregnant women indistinguishably from their treatment of non-pregnant women. The reason for this was simple: women were distinguished from men within the law chiefly because of their capacity for childbirth. Thus, the courts have historically identified women's difference from men by

focusing on their biological and social roles in reproduction: pregnancy and motherhood. These roles, the courts argued early on, were separate and distinct from those of men. It was nature, not man nor politics, that determined that women had a different political identity from men and thus it was natural that women could and would be treated differently within political and legal structures as well. Modern scholars have labelled this naturalized theory of sex and gender difference the "separate spheres" doctrine.

The first major legal challenge of the separate treatment of women under the Constitution came in the 1869 case, *Bradwell v. Illinois*.¹³¹ Myra Bradwell applied to practice law in the state of Illinois where she had successfully passed the examination for practice, and in fact, had for some years been the publisher and editor of *The Chicago Legal News*, a renowned Chicago law journal. The state of Illinois denied her admission to practice, however, on the grounds that

you would not be bound by the obligations necessary to be assumed where the relation of attorney and client shall exist, by reason of the disability imposed by your married condition -- it being assumed that you are a married woman."¹³²

¹³¹ 83 U.S. 130, 21 L.Ed. 442 (1873).

¹³² Letter from N.L. Freeman, Law Clerk, State of Illinois, October 7, 1869, as recounted in Morello. Bradwell was not the first woman to attempt to gain

At the time of this decision, married women were still legally considered subordinate to and inseparable from their husbands, according to a common law tradition known as *couverture*. This doctrine, (from the French, *femme couvert*, meaning literally to cover over the woman [as if to make her invisible]) held that upon marriage, women became literally 'civilly dead', transferring their political rights into the hands of their husbands. In doing so, they also surrendered their rights to make independent agreements and contracts.¹³³

The Illinois Court's reasoning was impeccable for its time: if a woman couldn't legally make contracts for herself because she was married, she certainly couldn't make

admission to a state bar to practice law -- only the first to be officially rejected by both the state in which she applied and the Supreme Court. Morello credits Margaret Brent as the first woman lawyer in America. Brent settled in the colonies in Maryland in 1638, having acquired her skills as litigator in Britain before coming to America. (1-8) A number of other women practiced as lawyers, but like Brent, were never formally admitted to the profession. An African-American woman, Lucy Terry Prince, was reportedly the first woman to address the Supreme Court, doing so in 1795 on behalf of her son, who she wanted admitted to Williams College for Men. (8) The state of Iowa has the privilege of being the first state to formally admit a woman to its legal bar. In June of 1869, twenty-three year old Belle Babb Mansfield officially became the first woman lawyer in the United States. (11) For an interesting and eye-opening account of the history of women in the practice of law in the United States, see Morello, 1987, generally.

¹³³ From William Blackstone, *Commentaries on the Laws of England*. 4 vols. Book I, Chapter 15. 1765-69. As recounted in Lindgren and Taub, 6-8.

contracts with clients as an attorney. What the Court artfully left unchallenged, however, was the very idea of *coveture* itself. And in fact, it would take American courts nearly one hundred more years before it would even begin to question the reasonableness of that doctrine.

Bradwell challenged the state's decision in the Illinois State Supreme Court, but the state court concurred with the original decision. The Court's grounds for denial, however, was that simply being a woman was reason enough to exclude her, regardless of her marital status. Said the Court, "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth..." And further, "We are certainly warranted in saying, that when the Legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended equally to men and women...." (as cited in Morello, 18) Bradwell finally appealed her case to the U.S. Supreme Court, thereby bringing to the nation's highest court the first gender-based case of its kind.

Here too the higher court concurred with the lower. Justice Samuel F. Miller, in a deft opinion for the majority, held that while women were indeed entitled as citizens to the privileges and immunities of the

Constitution, the practice of law had never been considered one of those privileges. Consequently, the Court reasoned, the state could bar women from the legal profession without further explanation. Using this tactic, the majority were able to dodge overtly the question of sex equality at the heart of the *Bradwell* case, while simultaneously giving sex-based discrimination a kind of constitutional imprimatur.

This slight-of-hand approach to the problem failed to satisfy one member of that bench, however. Justice Joseph P. Bradley added a concurring opinion to the decision in which he saw fit to resurrect and then amplify the gender-based justification articulated earlier by the Illinois high court. In keeping with that language, Bradley declared that civil law and nature have "always recognized a wide difference in the respective spheres and destinies of man and woman." While man "is, or should be, woman's protector and defender," woman was suited not for work outside the home, but rather was destined by both Creation and nature to "fulfil (sic) the noble and benign offices of wife and mother." (134) In Bradley's thinking, woman's biological capacity for procreation determines her destiny. She is, in some sense, less human than her male counterpart. While on the one hand, it is evident that Bradley was interested in reaffirming the differences between men and women, perhaps as a way of defending masculine power and authority, it is

also important to note that the sphere to which he argues women should be confined is familial and maternal and has historically been devoid of the political rights fundamental to citizens in liberal regimes.

For many years following Bradley's opinion, the history of women and the law was conspicuously preoccupied with judicial arguments that wrestled with, and for the most part, simply Reaffirmed the belief that when it comes to women, "biology is destiny." Included under the broad umbrella of "biology" has been everything and anything that has had to do with reproduction, keeping the home, and functioning as a wife and/or mother. In keeping with this failure to distinguish between differing roles for women, the Court has often also treated conception, pregnancy, child-rearing and motherhood as though they were all one and the same. The meager body of law that specifically addresses pregnancy owes its origins to the small number of cases in which the Court has singled out pregnancy as demonstrative of the problem women's biology poses to questions of "equal rights."

As the Court's thinking on the question of gender difference developed, primarily through law related to the workplace, its belief in the separate spheres doctrine became increasingly entrenched over the years. The judiciary's belief in separate, sex-based spheres for women

and men eventually spawned two methods for addressing questions about how to treat women legally, particularly in the workplace. The first, known today as protectionism, held that it was constitutionally permissible to treat women differently than men when it came to work if the purpose was to "protect" them in their "delicate" state of existence. The second approach, now known as "compensationism," okayed treating women differently than men in the workplace to "compensate" them for their other, "special" burdens as women. Intriguingly, while both protectionism and compensationism were offered as "special" or "extra" conditions made available to women, in both cases the effect was to reduce the hold women could claim on their own self-sovereignty and thus personhood. The Court thus rendered women legally incompetent to reason out what would be good for themselves work-wise, whether pregnant or not.

Protectionism

Protectionism emerged first with a 1908 case, *Muller v. Oregon*, that dealt chiefly with the question who had the power to control and/or regulate labor agreements between workers and management.¹³⁴ At issue was an Oregon statute that precluded women from working in "any mechanical

¹³⁴ 208 U.S. 412 (1908).

establishment, or factory, or laundry in this state more than ten hours during any one day." (as excerpted in Lindgren and Taub, 1993; 38) The case was significant because of a Supreme Court decision three years earlier striking down a New York law that limited the number of hours bakers could work during any given week.¹³⁵ The Court based its decision on the argument that state regulation of the number of hours a laborer might work violated the Fourteenth Amendment due process rights of workers to make contracts between themselves and their employers. This ruling effectively denied states the regulatory power to intercede on behalf of workers under any circumstances. Pro-labor strategists hoped that a subsequent challenge to the Oregon law regulating the work hours of women would provide a means for undermining the Court's decision in *Lochner*.

The Court did in fact find that the State of Oregon could limit the hours a woman could work in order to protect her from the stresses and strains of working too much. As Justice Brewer argued in the majority opinion,

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on

¹³⁵ *Lochner v. New York*, 198 U.S. 45.

her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. (326)

It is obvious that while the Court was deeply concerned about the Fourteenth Amendment due process rights of workers in *Lochner* -- those who were presumptively male, it displayed absolutely no equivalent concern for the due process rights of women as workers in *Muller*. This is evidently so because the Court found that woman's difference as the primary reproducer of the species put her in a category with respect to her ability to make decisions for herself that was radically different from that of men. This difference justified the state mandating differential treatment. As Justice Brewer continued:

Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for man, and could not be sustained. (327)

The Court seems untroubled by its argument that while male workers must have a political voice, that is, some volition in decision-making about how much and how long to work, women must be "protected" from exercising such control over their own lives. Importantly, the Court does not argue that

this is so because of any inherent risk to the pregnant woman herself, but rather because of the potential risk to her (implied) fetus qua offspring. She occupies no particular importance for the Court -- either constitutionally or as a person, irrespective of her fetus.

Thus, in *Muller*, the Court takes an important step in erasing the possibility that a pregnant woman could exercise control over her own body in a public way. Protectionism becomes a kind of early double-speak for the disempowerment of women; in exclusion there is freedom, at least for women.

Protectionist arguments like the one mounted by the Court in *Muller* had been popular for a number of years leading up to that decision. Janet Sayers, for example, chronicles the use of such arguments to exclude women from colleges and universities throughout the country just prior to the turn of the century. (9-27) Ironically, the same protectionist health and maternity arguments that would later be used in the work setting were first used to exclude women from educational institutions on the grounds that work was less taxing to the female body than was studying and thinking. In his then-widely-read work on education, *Sex and Education*, Edward Clark, for example, argued that women were more suited to factory life than to education because it was the use of the mind that was likely to pose a serious hazard to the reproductive health of a young woman rather

than her efforts at labor. (Sayers, 20) It is interesting to note that in the protectionist arguments made to exclude women either from work or from education noted here, exclusionary treatment was legitimated and supported by "research" from both the scientific and medical fields. The desires of women to work or to learn could hardly be given much weight in the face of counter arguments from doctors and academicians.

In the case of workplace law, the impact of the Court's decision in *Muller* was immediately felt throughout the country as states swiftly caught up the Court's invitation to regulate women's participation in the workforce -- all on the grounds of "protecting" them from the dangers posed to their bodies by work. Lindgren and Taub note that in the nine years following the decision, "nineteen states passed laws restricting women's working day." (1993; 40) The long-term effect was to elevate the desirability of men as workers, for their work hours were not restricted, and to decrease the incomes of working women in areas affected by such legislation.

An additional concern raised by the decision in *Muller* is the Court's elision of pregnancy and the capacity for pregnancy. Standing on one's feet day after day may be injurious to a pregnant woman, according to the Court, but even when she is not pregnant such labor is damaging to her

for what she will one day become -- a pregnant woman. The importance of this judicial construction of women's identity as always, inevitably pregnant -- regardless of her actual material status -- would become starkly evident some eighty-five years later in another protectionism case, *U.A.W. v. Johnson Controls, Inc.*¹³⁶

This case will receive a closer examination below, but suffice it to say here that Johnson Controls, Inc., a battery manufacturer, felt justified in excluding and regulating the working conditions of not just pregnant women, but *all* women "of child bearing capacity," regardless of their age, marital status, sexual/affectional orientation, etc. Using a standard protectionist argument, Johnson Controls justified their policy on the grounds that they were concerned about the potential harm lead contamination might pose to the fetuses of women who *might* become pregnant.¹³⁷

Among the many ironies of that case, however, as was

¹³⁶ *U.A.W. v. Johnson Controls, Inc.* 499 U.S. 187, (1991); 111 S.Ct. 1196.

¹³⁷ Lead is used in the production of batteries. It evidently becomes airborne quite easily and is thus ingested by breathing and absorbed into the skin upon contact. In the case of Johnson Controls, unlike with *Muller*, the fact that the concern was for the fetus specifically and not the pregnant worker was explicit in the court records.

pointed out by Justice Sandra Day O'Connor¹³⁸ during oral argument before the Court, was that *there were no actual fetuses at risk in this case*. This was so because Johnson Controls removed *all women before they could become pregnant from the lead-contamination areas*. This blanket treatment of women as inevitably on the verge of pregnancy did not trouble the lower courts, however, who uniformly found in favor of Johnson Controls. The battery manufacturer adopted the *Muller* approach of treating all women as if they were perpetually pregnant or were in danger of becoming pregnant at any moment and the lower courts concurred. In their brief presented to the Supreme Court upon argument for the case, lawyers for Johnson Controls even argued that a woman "never knows when she might become pregnant," thus necessitating the prophylactic treatment of all women as if they were pregnant at all times.

This lengthy judicial devotion to sex-based protectionism would finally be interrupted, however, both by the Civil Rights Act of 1964 and its later amendment known as the Pregnancy Discrimination Act, which made it illegal to discriminate in the workplace against women generally,

¹³⁸ Sandra Day O'Connor is the first woman ever to be appointed to the U.S. Supreme Court. To this date in history she is one of only two women ever to serve on the U.S. Supreme Court. She was joined by Justice Ruth Bader Ginsburg in 1993.

and then later, pregnant women specifically, and by the Supreme Court's eventual decision in *Johnson Controls*. In a landmark ruling, made nearly a century after *Muller*, the Court struck down the battery manufacturer's protectionist policy, taking with it more than a century of protectionist rationale. In its decision the Court held that *Johnson Controls'* sex-based policy discriminated against women and violated the Fourteenth Amendment's admonition that women and men should be treated equally under the law. In making this ruling the Court sent a long overdue blow to the ideology of separate spheres and the practice of protectionist jurisprudence.

Developing on a parallel course to the Court's philosophy of protectionism was a second, equally crippling theory of law for women, known as compensationism. It would take a number of years to sever the head of this judicial doctrine as well.

Compensatory Law

The idea that women should be relieved or excluded from some public duties or responsibilities -- that is, "compensated" -- because they suffer an "additional burden" by virtue of their biological and social participation in motherhood became the law of the land for the first time in 1937 with the Supreme Court's decision in *Breedlove v.*

Suttles.¹³⁹ In that case, the state of Georgia had imposed a dollar poll tax on every inhabitant of the State, excluding blind men and all women who did not register to vote. Mr. Breedlove filed suit to be allowed to register to vote without having to pay the poll tax on the grounds that such a law violated the Constitution. Both lower courts upheld the law, as did the U.S. Supreme Court. According to the decision proffered by Associate Justice Butler, writing for the majority, such a discriminatory poll tax is permissible under the Constitution because

The tax being upon persons, women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them from taxes....Discrimination in favor of all women being permissible, appellant may not complain because the tax is laid only upon some or object to registration of women without payment of taxes for previous years.
(207)

Here once again the Court reasons that woman has a specific destiny that lies outside of the public and political world; one which exempts her from having to participate in that political world. While on the one hand this seems to be a boon for women, relieving them of odious public responsibilities, it does so only at the expense of their full participation as citizens. Thus this boon came at a very high price. Again the object lesson for women seemed

¹³⁹ *Breedlove v. Suttles*, 302 U.S. 277 (1937).

to be that in exclusion there is freedom.

Once established, such arguments for compensation would continue to be made by the Court until as recently as 1961, where, in a case involving challenges to all-male juries, the Court would again echo the same separate spheres-based rhetoric. In *Hoyt v. Florida* a woman was convicted by an all-male jury of the second degree murder of her husband.¹⁴⁰

She appealed on the grounds that her Fourteenth Amendment rights had been violated by having to stand before a jury exclusive of women. At that time, the State of Florida had exempted all women from mandatory jury duty, but it did allow individual women, who might elect to register for selection, to serve as jurors at their own will. The Court found against Hoyt, arguing that

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. (61-62)

The language here is once again familiar. In a lovely paradox, it is a virtual paraphrase of the Court's language in the protectionist cases it declares elsewhere herein to

¹⁴⁰ *Hoyt v. Florida*, 368 U.S. 57 (1961).

have abandoned.

On the surface this case might seem less onerous than others previously discussed because a woman could at least opt for full participation in the public world, should she so desire -- or that is what the Court would have one believe. But the effect of this kind of "special" treatment of women, grounded in their "maternal burdens," identifies them yet again with both the home and their reproductive life, and treats their rights and responsibilities in the public sphere as if they aren't quite substantial; certainly not as substantial as their commitments to life in the home, and certainly not as substantial as those of people who's main domain was not the home -- men.

It is equally clear from the Court's own admission here that the times were changing, however. The Court had begun to feel the pressure of the then-dawning second wave of the women's movement that would soon roll through the country during the late sixties and throughout the seventies. With it would finally come new rights and possibilities for women generally, and pregnant women particularly.

The Second Wave Era: Civil Rights for Women

While the first wave of the Women's Movement in America concentrated on gaining the vote for (primarily white)

women, the second wave was concerned with a broader spectrum of rights demands, from equal treatment at work to the right to terminate an unwanted pregnancy. Just as the first wave came on the heels of the abolition movement prior to and during the Civil War, so too the second wave was strongly indebted to the racial civil rights movement of the 1950's and '60's. Inclusion of the category of "sex" in the Civil Rights Act of 1964 was a watershed moment in the history of the recognition of civil rights for women -- though it would take a few years to begin to manifest itself. For the first time women could point to some statutory or legal precedent that explicitly included them under the rubric of "equal treatment."

This second wave, armed with and energized by the language of the Civil Rights Act of 1964, brought new challenges to the Court, forcing it to take another look at its historical treatment of women under the Constitution. As a result of the inclusion of the so-called Reconstruction Amendments to the Constitution, including the 13th, 14th, and 15th Amendments, the Court had developed a hard test to determine whether laws in fact afforded (primarily) African American with "equal protection" under the law. This so-called "equal protection" analysis required that laws which potentially infringed on the rights of individuals because of their race be subjected to the "strict scrutiny" of the

courts. Such laws were almost uniformly struck down by a Court armed with both the constitutional language of the 14th Amendment and the statutory language of the Civil Rights Act of 1964. This 'strict scrutiny' test required that in order for such discriminatory laws to pass constitutional muster, the state must prove a compelling reason for enacting such laws, and that the means used to achieve its goals are absolutely necessary. Few laws could be shown to pass such a stringent set of requirements. As a result, the strict scrutiny test became a key tool in the Court's efforts to end structural racial discrimination in the country.

The first major constitutional challenge of the treatment of women under the Equal Protection Clause of the Fourteenth that allowed the Court to flirt with applying such severe anti-discrimination standards to cases of sex discrimination came in the guise of a 1971 case, *Reed v. Reed*.¹⁴¹ There the Court held invalid an Idaho state law which required that when an otherwise equally situated man and woman were both contending to serve as the executor of an estate, the man should uniformly be given preference. The State of Idaho justified this statute on the grounds that it reduced administrative costs by heading off lengthy

¹⁴¹ *Reed v. Reed*, 404 U.S. 71 (1971).

and expensive legal challenges by women. Justice Burger, writing for the Court, held that while the objective of "reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy," it failed to do so without bruising the equal protection rights of women. (76) This marked the first time that the highest Court in the land had signalled its willingness to recognize that women's "different" status did not justify their unequal treatment under the Constitution. It also signalled that the Court was willing to apply a more rigid standard of analysis to gender equal protection cases, though it refrained from going so far as to extend the strict scrutiny test to questions of sex discrimination.

In a subsequent case, *Frontiero v. Richardson*¹⁴², however, the Court toyed openly with the idea of treating sex exactly like race and demanding its most stringent test for cases of discrimination. In this case, the Court struck down an Air Force rule requiring that husbands of women members of the Air Force prove that they did not provide at least half of the family income in order to qualify for dependent spouse benefits. No such requirement was made of the wives of male Air Force members. The rule was challenged by Sharon Frontiero on the grounds that her Fifth

¹⁴² 411 U.S. 677 (1973).

Amendment Due Process Rights had been violated because of her sex.

Despite its near unanimous agreement that Airwoman Frontiero had been illegally discriminated against by the U.S. Air Force, the Court was unable to get a majority to include sex under the so-called strict scrutiny test in Frontiero. Consequently, while she won her case, no precedent-setting analysis was established for future women as a result of the Court's split decision. A separate, concurring opinion written by Justice Powell, indicated that he and perhaps other members of the Court were reluctant to do judicially what they anticipated would soon be done politically through national adoption of the then-pending Equal Rights Amendment (ERA) to the Constitution. He believed that passage of the ERA would "resolve the substance of this precise question" and obviate the need for the Court to submit sex-based discrimination to its strict scrutiny analysis. (692) The Justice's prescience proved faulty, however, and the ERA failed to pass successfully through the amendment process, and with it, the possibility for a "no-exceptions" constitutional approach to sex-based treatment. As a result, the Court would again find itself confronted with having to decide how strict it would be in analyzing questions of gender discrimination.

Finally in the 1976 case, *Craig v. Boren*, the Court

came to a decision about how it would treat women's claims for equal protection. In this case, one involving state-mandated differential minimum drinking ages for women and men, the Court settled on a standard that has come to be known variously as the heightened scrutiny or middle-tier test.¹⁴³ Under this standard, laws which infringe on the equal protection rights of women will only be sustained by the Court if they fulfill an important governmental objective and do so through substantially related means. This strong test, while not as stringent as the one used in the case of race, has been successful in eliminating most forms of gender discrimination brought to the Court's attention.

As a result, the legal position of women generally has enjoyed marked improvement over the past 20 years. Differential treatment, based on sex, whether grounded in a justification of separate spheres protectionism or compensationism, has finally been abandoned by the courts in favor of a model of "equality" that tolerates little difference in the overt treatment of women and men.¹⁴⁴ But equal protection for women generally does not necessarily

¹⁴³ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁴⁴ There are exceptions to this. A key example is in the case of laws relating to sexual assault of minors. See particularly *Michael M. v. Super. Ct. of Sonoma City* 450 U.S. 464 (1981).

translate into equal protection for pregnancy. As the next section will show, development of rights specific to pregnancy would take a parallel but separate course as they developed.

Pregnant Persons and the Law

In none of the landmark equal protection cases just noted was pregnancy specifically at issue. As asserted at the outset, the Court's early justification for its differential treatment of women had been based on its construction of women as biologically different from men, referring generally to their reproductive physiology. In those cases, lower courts and state and federal legislative bodies had, as had the U.S. Supreme Court, treated women differently, assuming biological difference requires corresponding differential treatment. During the seventies the Court seemed to follow the rest of the country in striving to separate both the identities of "Woman" from particular "women" and of "Women" from "pregnant women". This meant that the Court could find laws, which treated women who were not pregnant differently from men, in violation of their constitutional "equal rights" because no real "differences" between men and women could be discerned. In essence, absent pregnancy (and some other particular

circumstances which the Court would eventually identify as legitimate) the Court was able to see women as no different from men in these situations.¹⁴⁵ If a woman seemed just like any man, the Court could not condone differential treatment under the Constitution.

But what about when a pregnancy was actually at issue?

When the woman of concern really was not "like a man" because she was pregnant? The Court has had a much more difficult time getting their hands around the concept of equal treatment for *pregnant* women. For, as I have argued in previous chapters, the hidden completion of the sentence "Equal to whom?" has historically been read "equal to *man*."

Whereas the Court could find no biological justification for treating a woman as less capable of handling the estate of her dead son than her former husband, as it did in *Reed* for example, seeing that kind of "equality" in the face of pregnancy has proven to be much more difficult. The case most illustrative of the kinds of theoretical gymnastics resorted to by the Court in order to resolve the problem of equality/pregnancy is another '70's era case, *Geduldig v. Aiello*.¹⁴⁶

¹⁴⁵ Such exceptions are known as Bona Fide Occupational Qualifications (BFOQs). These are requirements that are biologically sex-determined. Thus, it would be permissible to advertise for "Men only" for a job of sperm donation.

¹⁴⁶ *Geduldig v. Aiello* 417 U.S. 484 (1974).

In this case a California state disability fund had excluded pregnancy from insurance coverage, arguing that it was interested in keeping the cost of insurance low for all its participants. When the challenge to the state rule reached the Court, the Court found itself seemingly frozen in an impossible theoretical game of equality-twister. The majority believed very strongly that pregnant women were not equal to men and could be treated differently. The shadows of separate spheres, protectionism and compensatory laws could be seen lingering over the Court's head when it came to issues of pregnancy. But the Court, like much of the country, had turned a corner on discrimination against women generally. Thus the only solution the Court could arrive at was to draw a distinction between pregnant women, on the one hand, and all other non-pregnant persons, on the other. The Court ruled that pregnancy could be treated differently under the Constitution because to do so did not effect a discrimination based on gender (the Court's choice of language). The Court's rather tortured explanation, delegated to Justice Stewart, and relegated perhaps with some embarrassment to the fine print of a footnote, is worth particular note:

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition -- pregnancy -- from the list of compensable disabilities. While it is true that only women can become pregnant, it does

not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra*, and *Frontiero, supra*.

Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. (FN 20, 496-7)

In the Court's eyes, then, there are really two kinds of people: those who are like men and those who are not.

Whereas previously, the second category had included *all* women, here the Court is forced to bifurcate the category of women into those who are most like men and those who are not due to pregnancy.

The effect is to re-stabilize the dominance of the universal male as the standard against which others are measured, chiefly by making pregnant women the oppositional "other," just as all women had been previously so classified. If one follows the Court's reasoning it is possible to end up where the Court does, but only if one thinks about gender in the very narrow terms employed in the

Court's logic. While it is true that women are not their capacity for pregnancy, and much of the women's movement has been devoted to drawing clear distinctions between Woman and her capacity for pregnancy, it is also true that the capacity for pregnancy is a distinct feature of many women; just as having a prostate and the capacity to produce sperm is a distinct feature among most men.

What the Court concludes here is that pregnant persons are not a distinct class of persons, but rather merely persons suffering from a distinct condition. Thus *pregnancy itself* has no particular political status. In fact, the converse is true; pregnant women can be discriminated against without bruising the Constitution's demand for equal protection. In Justice Stewart's twisted logic, it isn't the *woman* part of a pregnant woman that is being discriminated against, only her *pregnancy*, and that has no standing under the Constitution.

Despite the Court's theoretical leap in 1976 with *Craig v. Boren* in establishing a new, more robust standard for equal protection violations on the basis of sex, it did not pull back from its decision in *Geduldig*. In fact, two years later, in a similar case, *General Electric Co. V. Gilbert*, the Court reaffirmed its opinion.¹⁴⁷ Once again at issue was

¹⁴⁷ *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

the exclusion of pregnancy from a company's disability plan.

A class action suit was filed on behalf of a number of women employees on the grounds that the company rule constituted sex discrimination and violated Title VII of the Civil Rights Act of 1964. In this case, as it had in *Geduldig*, the Court did not find that differential treatment of pregnant women constituted a discrimination against them because of their sex. As a result, the Court's bizarre reconstruction of rights-bearing persons as exclusive of pregnant women continued unmolested in law.

With *Gilbert* it became clear that the Courts were not going to reconsider the question of pregnancy. Congress, spurred on by organized and angry women's groups, stepped in and finally overturned the Court's decision legislatively through an amendment to Title VII of the Civil Rights Act of 1964, entitled the Pregnancy Discrimination Act (PDA) of 1978. This new legislation was intended specifically to insure that pregnant women would not be discriminated against on account of their status, at least at their places of work. Whereas the Court had argued in *Gilbert* that the language in Title VII was unclear on the question of pregnancy, the language in the PDA was explicit and to the point. It read in part:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical

conditions; and women affected by pregnancy, childbirth, and related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability to work... (As cited in Lindgren and Taub, 1993: 114)

It was finally clear that Congress and President Jimmy Carter intended for pregnant women to have the same working rights as those enjoyed by all other citizens.

Enactment of the PDA marked a monumental moment in the historical development of pregnancy rights; for the first time in Western history, women as pregnant persons were recognized as being rights-bearers in their own right. No longer could pregnancy be used to justify treating women differently from men in the workplace. Additionally, unlike the early history of women and work that had been dominated by a discourse steeped in separate spheres thinking, institutionalization of the PDA meant that for the first time, the decision about whether or not a pregnant woman worked during her pregnancy was to be made by her, and her alone. This was, perhaps, the first real moment in which pregnant women were recognized as having significant legal control over their pregnant bodies in a fundamentally public arena.

The power of both the PDA and the subsequent dramatic change its adoption effected in the judiciary can be seen in the Court's treatment of a '90's version of protectionist

policy already discussed briefly above, the case of *Johnson Controls*. The battery manufacturing company was keenly interested in protecting itself from the possibility of future liability suits brought by children with disabilities born to women parents who worked in the lead-contaminated areas of their battery plant. Johnson Controls made arguments very parallel to those made in previous cases for protectionism: it was for the good of the offspring that women be barred from the dangerous (and not coincidentally highest paying) jobs in the company. This time around, however, armed with the language of the PDA, Justice Sandra Day O'Connor grilled the lawyers from Johnson Controls during oral argument, demanding they confront the language of the PDA. The Court's dissatisfaction with the company's explanation was illustrated in the majority decision, which ruled against them. As Justice Blackmun wrote for the majority,

The PDA's amendment to Title VII contains a BFOQ¹⁴⁸ standard of its own: unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment related purposes." This language clearly sets forth Congress' remedy for discrimination

¹⁴⁸ A BFOQ is a Bona Fide Occupational Qualification. Added to the language of Title VII to insure that truly gender specific exceptions in the workplace could be authorized. The definition of a BFOQ was intentionally narrowed. A good example might be ovum donation. It would be an acceptable BFOQ to require that anyone applying for a job as an ovum donator be a woman.

on the basis of pregnancy and potential pregnancy. Women who are either pregnant or potentially pregnant must be treated like others "similar in their ability ... to work." In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.... (204)

We have no difficulty concluding that Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else.

Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress had mandated this choice through Title VII, as amended by the Pregnancy Discrimination Act. (206-7)

Thus, in one stroke of the legislative pen, a stroke reaffirmed by the ink of the Court, the long history of treating women generally, and pregnant women particularly, as if they had no rights to equal employment under the Constitution, were obliterated. It would seem that because of the decision in *Johnson Controls* the question of what rights a pregnant woman has in the workplace are today very clear, thanks to Congressional intervention: she can not be treated differently at work because she is pregnant. We can translate that into saying a pregnant woman has the right to work and have the same employment opportunities as any other citizen today. This gives her a kind of political status unlike any she has experienced previously. The most empowering part of the *Johnson Controls* decision is that it

would seem to leave to the pregnant woman the power to decide whether or not to work during her pregnancy. This is important within the fetal rights debate because it puts the woman's decision-making power in control of the pregnancy.

But before this is taken as a cause for celebration, it is important to remember first that there were no actual fetuses in *Johnson Controls*. Rather, this was a case about women of childbearing capacity, rather than women who were actually pregnant. Despite the Court's own words about the treatment of "pregnancy and potential pregnancy," it remains unclear what the status would be if such a protectionist policy directed against women who were actually pregnant, in circumstances where harm to the fetus could be clearly demonstrated, were to be challenged in court. Additionally, the particular rights recognition granted in the PDA has only very narrow application to the workplace, and does not extend to other non-work-related rights questions.

Also important to note here is that Blackmun's language subtly works to erase the pregnancy part of pregnant women, thereby allowing him to "equalize" the rights of women and men as "parents." It is true that in this case there was strong evidence provided in arguments from amici briefs that lead poisoning also affects the sperm of men who are contaminated, as well as the born children of male parents who carry lead detritus home on their clothes after work.

In this sense, the Court is correct to note that both male and female parents can endanger their born children, and perhaps developing fetuses, through lead contamination. What Blackmun does here that potentially endangers the political power of pregnancy, however, is to erase it within his own language. Pregnant women become parents (thus once again equating pregnancy with motherhood) and somehow, through a discursive slight of hand, men become equally situated with respect to pregnancy. The difficulties of the special treatment/equal treatment debate highlight the potential threat here: claiming that pregnancy is a special condition reifies the idea that women are "different" from and thus historically read unequal to men. On the other hand, denying that pregnancy is a *different* experience than non-pregnancy is to require that we somehow make pregnancy fit the universalized male model: that we once again erase it, in service to a masculinized liberal human identity.

As we saw in the second chapter of this work, the courts are struggling with how to 'count' the pregnant woman's political power over her pregnancy when her interests and desires are challenged by third parties in the name of protecting her fetus. Unlike with the case of *Johnson Controls*, where Congress stepped in to clarifying and firmly establish the political identity of pregnant women, in challenges to women's non-work related behaviors

during pregnancy, there is little support for treating women as persons with rights to decide the course of their own pregnancies. To understand why this is so, we must next look at the second major area of law that touches on pregnancy, reproductive rights law.

Reproductive Law and Pregnancy: the Right to Be Unpregnant

Upon first glance, the moniker given to this area of law would seem to portend important and beneficial things for pregnancy. "Reproductive Rights" and in some cases, "Pregnancy Rights" would seem to imply that there is a strong body of law addressing women's rights during pregnancy. Intriguingly, however, that is not exactly the case. I would argue, in fact, that there is a veritable dearth of case or statutory law that clearly articulates a woman's rights during pregnancy. Rather, what we know as "reproductive rights" are concerned chiefly with being not pregnant. As a result, there is an incredible vacuum that occupies the space where women's rights as pregnant persons should be. The irony is that discussing "reproductive rights" (meaning non-reproduction rights) functions to give the illusion that no such vacuum exists. In order to understand the impact of this rights vacuum, created by an absence of rights specific to pregnancy, we should first look carefully at what reproductive rights pregnant women

can in fact claim.

Pregnancy and Reproductive Rights

A casual data base search of popular culture, legal and feminist journals using the key words "reproductive rights" will result in literally thousands of citations. While a similar search using the specific phrase "pregnancy rights" will be slightly more limited, one will still get hundreds of "hits" from the data base. This would imply that there is a substantial body of work on a variety of reproductive rights. In reality, however, an examination of the articles demarcated by those "hits" will reveal that virtually all of them are concerned either with contraception or abortion. Now, while both contraception and abortion are legitimately reproductive issues, and the development of rights in both areas has been important to the emancipation of women from patriarchal control and configuration of both the family and women's lives, neither is much concerned with pregnancy itself. The abortion rights battle, tenuously won with the Court's 1973 decision in *Roe v. Wade*, has gone a great distance in giving a woman the right to legally and safely terminate her pregnancy, at least at her own expense and during the first twelve weeks she is pregnant. What is curious about this right, however, is that it works to "equalize" women into becoming more like men. That is, they

reify the Court's decision in *Geduldig* in an odd fashion -- they help re-divide the world into two kinds of people, men (and unpregnant women who are like men) and pregnant women (who are not like men).

There are other, more recent legal decisions that have also touched on questions about a woman's "pregnancy rights," including a case involving frozen embryos and another involving surrogate pregnancy. In the frozen embryos case the courts examined the rights of a pregnant woman to claim cryogenically frozen embryos that were produced using her ovum and extra uterine fertilization.¹⁴⁹

In this case the woman who provided the ovum wanted to donate the frozen embryos to another infertile couple so that they might be implanted and gestated to term as the children of that couple. She had originally wanted to implant them into her own body, but after a difficult divorce from her husband, the sperm donor, she decided against self-implantation. The donor of the sperm, however, wanted "custody" of the embryos to prevent them from being implanted and gestated to term. The Court found in this case that the sperm donor's interest in not becoming a father outweighed the interests of the ovum donor to permit the embryos the opportunity of development. The

¹⁴⁹ *Davis v. Davis*, 842 S.W.2d 588 (1992).

Court's decision is premised on an interesting, and potentially dangerous (to women), interpretation of the value of male versus female genetic contributions to offspring. First, the Court equates fatherhood directly to genetic contribution. It is unclear, however, whether it does the same for motherhood. Second, by arguing that the man's interest in avoiding parenthood outweighs the woman's interest in making it possible for her fertilized ovum to be matured through a pregnancy, the Court leans heavily on the side of "not pregnancy" versus "pregnancy." As being "not pregnant" is man's 'natural' state, it would seem to suggest that the Court has fallen back on a traditional, masculinized understanding of the value of both the embryo and pregnancy.

In the famed *Baby M* case, the Supreme Court examined a woman's right to a born child she conceived and gestated under contract for surrogate pregnancy.¹⁵⁰ In this famous surrogate pregnancy case, while the Court refused to terminate Mary Beth Whitehead's parental rights, arguing essentially that she was in no condition to make a surrogacy contract prior to the birth of her child, it did award

¹⁵⁰ *In the Matter of Baby M*, New Jersey Supreme Court. 573 A.2d. 1127 (1988).

The standard term here is surrogate motherhood, but as should have become evident in the previous chapter, this author does not believe that m(O)therhood and pregnancy are the same thing and will not be treated as such herein.

custody to David Stern, the sperm donor in the case. At first glance one might be tempted to infer that the justices had at least recognized the process of pregnancy as important in establishing a woman's claim to pregnancy. But, as the Court makes evident in its finding, it gave little weight to the pain and suffering experienced by Mary Beth Whitehead during the invitro fertilization (IVF) process, arguing that it "must be viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood." The Court also gave little weight to the phenomenon of pregnancy itself. In fact, as decisions subsequent to the *Baby M* case illustrate, the Court is positively dismissive of pregnancy as constituting an important part of either the life of a woman or the child she eventually bears. For example, in *Johnson v. Calvert*, a gestational surrogate, who was not the ovum donor, was denied any parental rights when she subsequently claimed custody.¹⁵¹ What the Court found to be dispositive of the case was the relative importance of the genetic contributors; those who provide gametes have rights, those who 'merely' gestate have none. In the broader view this has potentially devastating consequences for adoptive parents (as has become manifested by cases such as the case

¹⁵¹ *Johnson v. Calvert* 851, P.2d 776 (1993).

of Baby Richard during 1995, in which the "birth parents" were ultimately awarded custody after a four year custody battle, during which the child resided exclusively with its adoptive family.) While this decision should also be of concern to women who employ artificial insemination, it is positively alarming when discussing the precedential foundations of pregnancy rights.

Each of these cases will be found in a search for "pregnancy rights," and yet in the resulting case law, the courts have clearly ruled that the rights of the women involved are substantially subordinate to the rights of the men who have challenged them. According to the Court's decision in *Johnson*, pregnancy has virtually no political power to establish an interest in offspring. Decisions such as these only serve to reconfirm the relative invisibility of pregnancy within the politics of reproduction.

In all of these cases, then, the law addressed questions about pregnancy, but in each case what was at issue was either a pregnant woman's rights to *not* be pregnant, or her rights to the products of her conception when she is not pregnant, but none of them address her rights *during* pregnancy. The one possible exception is the *Johnson* case, and there, the outcome is not encouraging for the rights of pregnant women. Outside of the workplace it is thus unclear what rights, if any, a pregnant woman can in

fact claim with respect to her pregnancy.

Conclusion

In this chapter I have argued that women generally and pregnant women specifically have had a difficult time achieving judicial recognition of their "personhood" before the law. This is so, I would like to suggest, because of the historical naturalization of pregnancy, which thereby renders it outside general, public discourse, and within a liberal regime, outside the particular discourse of "rights." As I have argued all along, liberalism, in its original design, depended in large measure on the successful maintenance of patriarchal relations outside the visible margins of civil society -- in the so-called private sphere.

This is so because Locke and his theoretical progeny designed a system that may be suitable (marginally) for a model of human life comprised of lone stags who roam atomistically through lush woods and abundant fields, attending only to their own needs and desires. For a profoundly social species like human beings, however, this a-social Lockian model is both starkly misleading and woefully inadequate. Throughout his work, Locke *himself* argues that education of the young to their exercise of reason is the primary function of parenting in the private world of home and family. Though Locke and other liberals

might be read as emphasizing the masculine, autonomous model that law seems to have focused upon, it is clear that he and they also recognized the fundamentally social nature of our species, as exemplified by our long and very dependent infancy, childhood and adolescence. And even if the fact that we pair and/or group up to raise children is not sufficient counter-factual evidence to the lone-stag-in-the-forest archetype, the fact that we are now burgeoning a global population of nearly 6 billion people suggests that, like it or not, "natural" or not, we *must* be social by sheer virtue of our numbers and the limited space we can comfortably occupy.

But as I have asserted, in Locke's model, all of the social elements of human life that make the political world possible are relegated to the private sphere -- a world where power is patriarchal in form and thus inequitably apportioned. There, the business of reproducing the species goes on subtly directed by a patriarchal social structure that is given license on the grounds that it is simply what the Laws of Nature dictate. In his theory, Locke left to nature, then, any means for accommodating public (and therefore political) claims about concerns that were designed to be private. As a result, such claims have

historically been incomprehensible as matters for the law.¹⁵²

In a peculiar sense liberal theory holds as inherently *irrational* anyone who has to consult man's law (sic) to figure out what should be done for something as natural as a pregnancy. This is so because consulting reason reveals Nature's commands and it is Nature which commands the world of reproduction.

What is more, as I have outlined in previous chapters, the pregnant body seems to fail to meet the criteria for being considered a liberal body once the fetus has been accounted for and recognized as a "person" itself. How, then, can one construct intelligible "rights" for a pregnant woman who seemingly does not fit the liberal model of "rights bearer" because she is not singular, individualized, nor autonomous, and who has historically lacked standing before the law because of her natural but not political condition?

As we have seen thus far, recent case history in the area of treatment in the workplace may provide a modicum of guidance for the courts in the future, and certainly the PDA offers some promise. But it is important to note that the PDA was drafted prior to the real explosion of the fetal identity revolution. The major political discourse about

¹⁵² The histories of marital rape law and spousal abuse law are excellent examples.

pregnancy at that time focused on issues surrounding the abortion debate, a debate, as I have asserted, that is primarily concerned with women's abilities to become not pregnant. The present meanings we are increasingly ascribing to the fetus had not yet begun to stick at the time of the drafting of the PDA. Further, as I noted earlier, despite the marked shift in the Court's treatment of pregnancy made with its decision in the *Johnson Controls* case, it is important to recall that there were no actual fetuses at issue there. It would be a gross miscalculation to translate the outcome of that case to any possible outcome in a case in which direct fetal "harm" could be demonstrated before the court. One must only reread the second chapter of this work to recall how the courts have in fact dealt with women whom they find to be actually "endangering" their fetuses by the their actions during pregnancy.

In sum, the courts have agreed upon few pregnancy rights, and this is so, at least in part, because in its original configuration, liberal theory provided no means for recognizing the distinct rights needs of pregnant persons. As we have adopted, been shaped by, and in some cases modified our use of liberal theory over these past three hundred-plus years, we have left virtually unchanged our naturalized treatment of pregnancy. As a result, what this

should tell us, is that the outcomes of fetal rights cases are virtually assured; in moments of medical, legal and/or political conflict, the strong and growing claims for fetal rights will continue to trump the weaker counter-claims of pregnant women. It is difficult for courts to hear the demands by pregnant women that they be recognized as the person who should determine the course and outcomes of their pregnancies when no such "rights" have yet been articulated and identified before the law. Until this happens, pregnant women will remain vulnerable to the demands that they behave "rationally" and subordinate themselves to the rights of the fetuses they carry.

Chapter IX

Conclusions:

The Poverty of Personhood

This project began with the observation that in American law and political culture, pregnancy is increasingly becoming a battleground where pregnant women, the fetuses they carry and parties external to the pregnant body, vie for political power and control of their "rights."

In recent years, many judges, physicians, legislators and others have come to regard the fetus as a person and therefore become more inclined to afford it a multitude of corresponding rights. As we have seen, the result has been a variety of state-sanctioned incursions into and punishments exercised upon the bodies of pregnant women, all performed in the name of protecting the fetus.

In its attempt to examine these startling phenomenon, two questions have been central to this work. The first has been to account for why and how the fetus has gained its new status as a rights-bearing "person." The second has been to examine how, when their so-called "rights" collide, this new social and political status for the fetus has resulted in its ability to trump the rights of the pregnant woman of whom it is a part. As noted in the first two chapters,

these are important research questions, not only because of the forced interventions that have already been suffered by pregnant women, but also because we stand poised in time on the leading-edge of a technological tsunami that will bring with it even greater exposures to fetal being. This means that the peak swell in demand for recognition and contextualization of the fetus has yet to occur, and when it does, the politics of fetal identity will bring in its wake even more drastic interventions into the bodies and rights of pregnant women than those already experienced. If we are to understand how to confront this impending political typhoon, we must first be able to account for the earliest ripples in its development.

Throughout this work, my thesis has been that the relative *success* of claims to fetal rights and recognitions -- claims that have been realized with court ordered medical treatments, criminal prosecutions, and civil actions levied against pregnant women -- are the result of a perceived *imbalance* between the alleged competing claims for personhood made by both pregnant women and their fetuses. While some have attributed this imbalance to a kind of lingering cultural sexism, a primary goal of this work has been to go beyond that more obvious conclusion and explore how differential perceptions of the moral and political status of both the fetus and pregnant women have developed

and thus account for the widening disparity in political power between them.

In large measure, this work has found that our emerging treatment of the fetus as a person, and the corresponding affirmations of fetal rights that have accompanied such treatment, are the predictable responses of a strongly liberal political culture confronted with its recent dis/covery of fetal being. As the third, fourth and fifth chapters demonstrated, new experiences of fetal development are becoming increasingly common to both pregnant women and the world around them. This is due in large measure to the technological and medical innovations of the waning twentieth century that now allow visual and other access to the fetus *in utero*. This increasing exposure to the fetus impels us to contextualize and shape it -- to locate our perceptions and experiences of the fetus within already familiar constructs and ideologies. And it is here that our historical dependence on liberal theory begins to direct how we think about our recent dis/covery of the fetus and about the phenomenon of pregnancy in general.

It was argued above that we easily translate fetal value into fetal personhood because our new and increasing exposures to and experiences of fetal being come to us within a very limited range of alternatives for interpretation. Guided by the lens of liberalism, that has

so strongly shaped American political culture from the Founding onward, we inevitably translate human political value into the political status of 'personhood'. We do so because being a 'person,' and thus by definition created with "equal political power and equal rights," is what being a human being is according to liberal theory. Beings and matter which *fail* to qualify as 'persons' are relegated to an instrumental status like that attributed to animals or other property and material goods intended for humanity's use. This means that our options for making political and/or social sense of our experiences of the fetus are necessarily limited; we can either construct the fetus as a person -- albeit a baby or a child-like person -- or we can regard it as though it had no inherent political value and treat it accordingly. In any case, we see the autonomous person in the fetus because that is the only means we have to think about it. This is further facilitated by recent technological manipulations and treatments of pregnancy which seemingly isolate the fetus from the pregnant body, thus giving it the illusion of autonomy and individuality -- both crucial qualities for liberal "persons."

But because the social construction of fetal identity is dynamic and quite recent, as easy as this personification of our experiences of the fetus may sound, neither the interpretation nor application of liberal theory which

triggers that process has gone without objection nor controversy. As I noted, there are strong philosophical and political objections to the on-going construction of fetal identity, objections that are made by thinkers and activists who interpret fetal being differently. Their objections are typically motivated by a primary concern for the threat fetal personhood poses to pregnant women and for good reason, as we have seen. As illustrated in chapters Three, Four and Five, those who resist the notion of fetal personhood argue that the fetus is not a person because it fails to meet the threshold prerequisites for personhood traditionally required in liberal thought: it is not human and it can not reason.

Those who make such claims base their opposition on empirical grounds. They deny, for example, that the material fetal body is in fact a *human* body, as evident by its undeveloped state. They point to measurable differences between the configurations of the 'human' heart, brain, etc. and those of the fetus and infer that the clear physical differences between fetuses and born human beings exclude them from the possibility of personhood. Additionally, they point to the fact that, despite what our visual depictions of fetal being may look like, the fetus *in utero* is not physically individuated from the pregnant woman of whom it is a part. Because it is not born, they argue, the fetus is

incapable of the kind of autonomous, hedonic existence they assert delineates the kind of personhood characteristic of liberal thought. As it is only through birth that the material individuality necessary for being fully human can be conferred, they conclude that unborn fetuses simply are not human beings and can therefore not be treated like rights-bearing persons.

Finally, they also deny that the fetus is capable of reason -- a prime requisite within liberal theory. They argue, for example, that it is the capacity for reason and the ability to act on that reason which distinguishes one as a person entitled to rights. They hold that just as small children are developmentally and educationally incapable of exercising reason, so too fetuses fail to qualify as rights-bearers because they can not think about their own interests nor pursue actions to meet their needs. In short, fetuses are not rational and therefore, whatever they are, they are not persons.

In the continuing struggle to create meaning for fetal being, such objections to its personhood have been responded to by those who perceive the fetus as being human and thus persons. Like their opponents, they too rely on empirical evidence in support of their contentions. For example, they point to the fact that the unique genetic markers of the human species as a whole, and individual humans as

particular beings, are present from conception and do not change either at birth or with later physical maturation. It is thus their claim that genetic identity is clearly the dispositive feature of individual human identity. Further, they employ what Chapter Three described as the 'beating heart strategy' to draw attention to the *similarities* between the material bodies of fetuses and "other" human beings. Unlike their opponents, they claim that the fetus has all of the necessary features of the human body. They emphasize, for example, how an early sonogram can clearly detect both the sound of a "thumping heart" and the image of that "heart" at work. That it is perhaps shaped differently than an adult heart fails to persuade them that the fetus is not a person. Rather, they point to the fact that all human beings have distinguishing physical features based on maturational differences, but they deny that such difference justifies making discriminations in political power between them. In this view, lesser development neither denies the material presence of particular features, nor makes the fetus any less human.

At the center of the arguments made by both sides on the question of the humanity of the fetus is the assumption that what defines being 'human' is an empirically provable question. To the contrary, however, regardless of the robustness of the scientific evidence supporting the claims

of either side, what it means to be a "human being" is in fact *politically* contested and *socially* constructed. This means that empirical evidence, rather than being dispositive of the question of whether or not the fetus is a human being, functions only as one tool among many for making a persuasive, political argument for or against fetal humanity. Thus, those who see and articulate the humanity in the beating "heart" of the fetus do so because they perceive the fetus as having value. As such, they bring a different interpretation of "heartness" to the question. While such an impulse to anthropomorphize the fetus may be derived from a variety of sources, including religious teachings about the impartation of the human soul at conception, medical and commercial exposure to fetal being, or previous experiences of pregnancy, the framework given to such impulses are strongly shaped by the fundamental assumptions of liberal thought.

To the contrary, those who deny the notion that the fetus is a person do so because they afford its being no social or political value. Ironically, this too is a claim guided by the base tenets of liberal theory. While they may have had experiences of fetal life, similar to those of advocates for fetal personhood, the fact that within a liberal context recognition of fetal being can translate into an attack on the rights and bodies of pregnant women

requires them to reject any urge to humanize the fetus. The structures of liberalism require the weighing and adjudication of "rights" contests in such essentially a zero-sum configuration. Thus, recognition of fetal value must inevitably jeopardize the rights of pregnant women at moments when their interests seem to diverge. This means that with their attention focused on the humanity and rights of the pregnant woman, the same empirical "fact" of tissue movement caused by muscular or vascular contraction thus fails to evoke the more anthropomorphized response to it as a human "heart." To do otherwise would be to legitimate fetal identity and thus destabilize the already tenuous hold women have on their demands for rights recognition.

Furthermore, in staking their claims against personification of the fetus on empirical evidence, those who oppose the idea of fetal personhood must ultimately resort to fundamentally *illiberal* argument which makes it even more difficult to make their case convincingly. Recall that it was the ability to displace the power of the material body as the key marker of political identity that distinguished the theoretical revolution of liberalism from its predecessor, the divine right of kings theory. If Locke and the other liberals had not discredited the corporeal footing that supported absolutism, their arguments for universal self rule would have been impossible. As a

consequence of liberal theory, then, when claims to the personhood of women, the handicapped, persons of African descent and others have been challenged, members of those groups have been able declare that their differing material features are not relevant to making the case for either their humanity or their political power. Certainly if material conditions of the body such as the configuration of the heart, their genetic blueprints, or that they were born had ever been dispositive for determining whether one was indeed a person, the history of African Americans, women, the handicapped and others would have been much less troubled than it has been; they certainly qualify on those grounds. Where they have been met with challenges to their humanity has been on other material grounds such as reproductive organ location, skin color and the ability to move unassisted through space. They have answered those challenges with the liberal sledgehammer of equality-in-creation not bodily configuration. Those who support fetal personhood similarly argue against the importance of material/physical distinctions in determining the political status of the fetus. Objections to their claims are difficult to sustain, at least on these traditional liberal grounds.

The objection to fetal personhood stemming from the question of the fetus's capacity for reason has also had

trouble finding solid theoretical ground in classical liberalism. This is so because, despite the fact that it begins from a clearly liberal premise, it actually ignores the traditional liberal treatment of children. Chapter Three noted that while it is certainly true for Locke and most liberals that what makes all persons equal is their capacity for reason, it is also true that all persons must be educated to the exercise of that reason. Locke's founding liberalism specifically held that while children are not yet able to exercise reason, they are certainly born with the capacity for it. This inability to demonstrate one's rationality as a child does not disqualify the child from having rights in the liberal design, but rather simply means that s/he is given a special status which anticipates her/his future ability to participate as a reasoning adult.

Until that time, the rights and interests of pre-rational children are to be protected by reasonable surrogates in the form of their parents. Adults, by contrast, *must* demonstrate the exercise of their reason or risk the forfeiture of their rights for acting irrationally. While some claim that small children are without rights in a liberal system, such arguments are difficult to sustain in a polity that has historically treated its children with some measure of protection, and certainly in the present climate, public recognition of children's rights continues to build.

My conclusion, then, upon examining the on-going process of constructing social identity for the newly dis/covered fetus is that the fetus is indeed becoming a person today. This is so because what constitutes being human is not an empirically provable question but rather a politically and socially manufactured one that is shaped and created by competing values and theoretical perspectives. In a political and social environment in which *many* fetuses are anticipated, and their development is often welcomed by both the pregnant women of whom they are a part and other people tertiary to pregnancy, it is much easier to make the case for fetus *qua* baby-human than it is to make the counter-claim that the fetus is but an organic, biotic blob of meaningless tissue. For the most part, we want to find a way to think about the fetus, for most pregnancies that are not terminated early-on are wanted and eagerly anticipated.

Thinking about that "little thing in there" as a tiny baby is the best option available in a liberal political culture that privileges the autonomous individual as the elemental political unit and which offers no alternative means for understanding the complexities that inhere in the process of pregnancy. It is important to note as well, that in an environment in which many fetuses are both wanted and anticipated, the treatment of it as a tiny individualized person creates little crisis in our social, political, or

legal culture. It is only when that fetus is unwanted, primarily as in the case of abortion, or when a dispute about how to treat that fetus while it is *in utero* arises, that this regard for it as a person poses such a threat.

Which brings me to the second major inquiry of this work, which was devoted to examining the origins of such "threats" and accounting for the outcomes which disempower pregnant women in favor of their fetuses when such conflicts have been adjudicated. At this point the work turned to examining the social construction of the political identity of pregnant women.

There I found that unlike as was the case for the fetus, pregnant women come to the debate about fetal rights encumbered by a previously maimed political identity that has long roots in our liberal history. Specifically, women's grasp on personhood has always been quite fragile, and, at times, wholly impossible. This is so because what it has meant to be a person has often been framed in direct opposition to what it has meant to be a woman -- even within the "liberating" discourse of liberal thought. It is the continuing liberal identification of "Woman" with the private, familial world where their subjugation to a naturalized patriarchy goes undisturbed, which cripples their ability to claim independent personhood in the public.

Furthermore, the materiality of pregnancy is antithetical

to the historically masculinized model of the universal human as individualized, autonomous, and directed by reason rather than nature. In order to understand why this might be so, it was necessary to examine the question of the personhood of pregnant women.

Part Three of this work examined the relationship of women, generally, and pregnant women, specifically, to the liberal construction of personhood. It was concluded that pregnant women's claims on personhood are significantly mitigated by a number of factors. The first is the explicit, historical exclusion of women from the public sphere prior to liberalism, combined with their continuing struggle for personhood under a liberal ideology. Prior to liberalism, to be a "woman" meant segregation to the non-political, naturalized life of the home. Following liberalism women have enjoyed a more mixed interpretation about their appropriate "place" and political identity. On the one hand, liberal theory extends women a promise of "equality" and rights, but on the other hand, liberal theory's dependence on a public/private schism continues to segregate women to private life of the home, where "equality" is not the guiding construct. As a result, while they seek the full responsibilities and privileges of personhood, their efforts are severely compromised because they remained anchored to and identified with the

naturalized patriarchal family.

Further, as many recent feminists have argued, the universal image of personhood evoked in liberal thought has turned out to be one that was cast in a predominantly male image. As a consequence, women continue to struggle with the idea that they must conform to the masculinized image of what it means to be a person in order to finally be "equal" in the public realm. It is difficult to make the material reality of pregnancy -- perhaps the key marker of what it means to *not* be a man -- conform to a masculinized version of the universal human person.

The second reason that pregnant women's grip on personhood remains tenuous is that pregnancy itself has a history of treatment as a natural phenomenon. Liberal theory, particularly the work of John Locke, for example, held that life in the family and other social elements like reproduction are governed by Natural Law, which is expressed both through reason and through instinct. Pregnancy in particular is supposed to be guided by a "maternal instinct" which is fundamentally outside of rationality. I have argued that this renders pregnant women a-rational during pregnancy. This is so because they do not "will" their pregnancies but rather simply "do what nature tells them" to do. As a result, they are unqualified for personhood while pregnant.

Further complicating our perceptions and treatment of pregnant women generally is both a remarkable absence of public exposure to and experience of pregnant women and, as a consequence, a rather sizeable vacuum in the theoretical treatment of pregnancy. I argued in Chapter Seven that this absence of public familiarity with a discourse of pregnancy is the result of the historical displacement and suppression of the pregnant body within a patriarchally-based myth of androgenesis. In an attempt to project, understand, and perhaps justify the male body and experience as the universal human form, Western cultural history and philosophy are replete with evidence of a sustained effort to construct human reproduction as a fundamentally male endeavor. This effort has required suppressing the counter-veiling material and theoretical phenomenon of the pregnant body, either through its erasure or through the transformation of the physical state of pregnancy into the social practice of maternity. If, as I argued was true for the fetus, widespread public exposure and experience translates into a need to contextualize and value those experiences, our resulting conceptualizations about pregnant women are necessarily and predictably limited by contrast.

A third problem that compromises the ability of pregnant women to assert a firm grasp on their personhood and their rights while pregnant is that they have difficulty

proving their capacity for exercising reason when pregnant.

For example, when pregnant women dispute the "expert" opinions of doctors or others in regards to their pregnancies, or they engage in behaviors that these "experts" assert may be potentially harmful to developing fetuses, they demarcate themselves as irrational and therefore in forfeiture of their rights. On the other hand, when their decisions and actions during pregnancy go unchallenged by third parties, expecting women seem reasonable enough to be unmolested in their pregnancies. However, as noted above, we have the perception that this is not necessarily because they are behaving rationally, but rather, because they are behaving instinctively, and thus a-rationally. This means that pregnancy becomes a contest between the dictates of either nature or science, with the pregnant woman serving primarily as a conduit between the two. It is therefore quite predictable that we should have difficulty identifying exactly what it means to act rationally or make reasonable decisions about a pregnancy when those actions or decisions seem to disagree either with nature (for some as is the case in abortion, for example) or with science (for some as is the case in which a woman refuses a cesarean section, for example). Moreover, exacerbating our perceptions of pregnant women's grasp on reason is the fact that when they engage in what may seem to

third parties to be *clearly* irrational acts, like using illicit or other drugs, smoking or consuming alcohol, the perception that they are incapable of using reason about their pregnancies is further substantiated. Thus pregnant women may be perceived to be either a-rational or irrational, but rarely will we identify their actions as being distinctly rational in and of themselves, except when they are not in disagreement with either science or nature.

That is, when they are in full agreement and compliance with the demands and influences of persons external to their pregnancies and beyond their control -- when they have most abdicated their subjectivity -- only then do they seem to be at their most rational.

Finally, I argued that pregnant women's rights are difficult to enumerate or even conceptualize for the courts and others because they remain virtually inarticulated to date. That is, most so-called reproductive rights primarily address women's rights to not be pregnant. While in a liberal political culture that has traditionally been defined by masculine identity, it is not surprising that the preponderance of rights identified for women *qua* pregnant women have worked to make them more like men, the result is that there are few clearly identified "rights" unique to pregnancy. Those rights that have successfully been claimed by pregnant women in response to fetal rights challenges are

not particularly helpful in constructing solid case law for pregnant women's rights. It is unclear, for example, what the nebulous right to "control one's body" inherent in the privacy right recognized by the courts in *Grisswold* and *Roe v. Wade* might mean to a pregnant woman's decisions concerning the course of her pregnancy, particularly in the face of "expert" testimony that suggests her actions are irrational. As even the Supreme Court acknowledged, it is difficult to conceptualize and/or defend a pregnant woman's right to 'kill', 'harm' or otherwise 'abuse' her fetus if it is, in fact, a person. In the face of the growing tidal wave of fetal personhood, the possible rights claims that can be made by pregnant women become increasingly difficult to conceptualize.

As a result, we have virtually no theoretical consideration of pregnancy from which to extract a set of "rights" claims specific to pregnancy; we have yet to begin to define what the political power of pregnancy might look like. In short, we have no idea what to make of pregnancy as a public and thus political phenomenon. Combine this with a naturalized view of motherhood that is held to be self-sacrificing at the core, and the result is that when perceived needs of the fetus challenge those of the pregnant woman through claims for protection of fetal rights, the fetus is seemingly well positioned for triumph.

Predictably, then, this is exactly what has been happening in the cases of court-ordered medical interventions, prosecutions and incarceration illustrated in the second chapter. The obvious difficulties pregnant women experience in their efforts to defend themselves against third party demands for interventions and invasions of their bodies in the name of protecting fetal personhood means that it is not surprising that judges and others can see their way clear to "find for the fetus" and order incarceration, invasive surgery, etc. In a liberal political culture, court battles over rights and personhood are how such disputes about power are resolved. When an opposing party can make the stronger case for the fundamental nature of their rights, or can argue convincingly that their opponent's actions are irrational, they are quite likely to succeed. In the case of court battles over what is the appropriate way to treat a fetus, as it stands now, pregnant women will continue to lose the rhetorical and political battle against medical and judicial invasions of their bodies and rights, and all in the name of protecting the tiny fetal "persons" who they are creating inside.

Finally, I must note that at an even greater risk in such situations are poor women and women of color, who come from groups which have suffered even more profound disempowerment under the historical tent of liberal thought.

Their claims to rights and reason have fallen on deaf ears throughout much of our country's history; it is unlikely that the court's will see such women afresh simply because they are not pregnant.

This is not a particularly cheerful conclusion to a work of this nature. It predicts a future wrought with court battles that are spurred on by doctors, hospital administrators, lawyers, husbands, boyfriends and others, and that will ultimately be resolved by the further occupation or invasion of the bodies of pregnant women -- in one fashion or another.

So what is the answer? How do we resolve this problem?

Most efforts to answer these questions have been driven by the particular political agendas of differing groups. For example, as was noted at the end of the second chapter, those who see the fetal rights crisis as a crisis for the fetus argue for even greater control of the bodies of pregnant women. Their arguments range from stopping all abortion to requiring all women of child-bearing age to be legally required to take folic acid in the event they become pregnant unwittingly. For them, the solution is to definitively declare the fetus a person and protect fetal rights at all costs, including those so highly imposed on pregnant women.

Among the myriad negative outcomes one can envision with this approach is an inevitable decrease in the numbers of women seeking medical advice during pregnancy. For example, many women engaged in so-called "risk" behaviors would certainly avoid revealing their condition to their medical practitioner if they knew that the likely outcome would be a forced caesarean section and incarceration for fetal endangerment.

The opposite approach is equally fraught with difficulties, however. The pro-choice political agenda has made similar demands but, in their case, they require strengthening the rights of women, generally, and, though less clearly articulated, the rights of pregnant women as well. This means denying the fetus any kind of value other than that ascribed by the pregnant woman and precluding the possibility that the public has responsibility for its protection, regardless of the pregnant woman's actions. For some this means going so far as to argue against the use of ultrasound technology during pregnancy and for women to reject the use of any invasive medical treatment during pregnancy. (Petchesky)

Ironically, a likely outcome of this approach, given the argument made above about the robustness of fetal identity now and in the future, is that women's rights claims can at best be brought up to be equal to those of

their fetuses. After years of fighting for equal rights with men, this ultimately means that the liberal feminist battle will turn to fighting for equality with their fetuses. Given the theoretical constraints discussed throughout this work, I'm unconvinced that such "equality" is actually possible in the first place, nor is the specter of the courts weighing "equal" claims about pregnancy interests, so that women win sometimes and fetuses win at other times, any more satisfactory.

I find none of these solutions satisfactory. That is because they are all made from within the same theoretical framework of liberalism that has spawned the "crisis" in fetal "rights" and which has subsequently turned pregnancy into the site of legal and political contests in the first place. The "personhood" of either the pregnant woman or the fetus is important only if one accepts the initial axiom that pregnancy can be construed as a liberal condition of being -- as a state of two "individual human beings" with divergent needs and interests. But pregnancy, whatever it is, is not singular, autonomous nor willable. The relationship between the pregnant woman and her fetus is not based on rights but rather on a kind of communion -- a communion of tissue, of nourishment, of movement through space and of wellness. For example, a cocaine-addicted woman affects not only the developing body of her fetus but

the wellness of her own body as well. Pregnancy is thus a fundamentally social condition that is ill-suited to the lone-stag in the forest model that comprises the liberal model of what it means to be human. Rather, pregnancy is but a part of a continuum of materiality and sociality that can not readily be dissected into discrete and comprehensible moments of conflict resolution. But it is a part of the human condition that has received far too little theoretical consideration for us to begin to suggest exactly what it "is" at this point in time.

And this is why such "contests" about the disposition of pregnancies are ultimately unresolvable through the courts. While it is certainly true that judges can, and have, "award(ed)" custody to third parties, impose(d) court-ordered medical treatments, and incarcerate(d) pregnant women, and can do the converse as well, it means only that they have solved the conflict but not achieved the goal. In most cases, such "crises" in pregnancy are driven by concerns for a healthy outcome to a pregnancy because we, as social beings, care that our offspring are well and healthy.

But such wellness and health is not achievable in any one discrete moment of existence; rather, it is a function of social support and care throughout a lifetime of existence.

And because pregnancy is a *fundamentally unique material state of human existence* it is not possible to achieve

exclusive care for either the fetus or the pregnant woman of whom it is a part. Thus, when a judge orders a woman to undergo a caesarean section to deliver her triplets on her doctor's advice, all that has happened is that one decision, which affects but one facet of a discrete moment in continuum of a life process, has been made. All of the other, various needs and requirements of the developing fetuses lie beyond the confines of that decision. The care, nurturing, support, love and valuation of those fetuses, all of which may be as relevant to their wellness as how they are delivered into the world for any given pregnancy, are left back in the hands of the pregnant woman against whom the court has ordered such invasions.

Healthy pregnancies come from wanted pregnancies by women who are supported in their social environment as they conceive, gestate, deliver and care for their offspring. Insuring that women have the option of pregnancy, or the option to avoid pregnancy, the ability to have the best medical advice, the information necessary for make good decisions about the treatment and care of their bodies -- both while pregnant and otherwise, and the support needed to facilitate them as they reproduce the species, simply can not be provided by a political culture which draws its primary world view from liberalism. Liberalism simply isn't equipped to deal with the question of pregnancy.

What we need, then, is to begin a concerted theoretical examination of the role, meaning and phenomenon of pregnancy, not merely as biological event, and certainly not as "natural" process, but rather as a feature of human political and social relations. From the "glint in the eye" of those who will participate in the biological reproductive process, to the hand that will stroke the forehead of the one-day-born child, we need to begin to think through a theoretical framework that originates not from atomization, rationality and rights -- values that separate us from one another at all points of our politics, but rather from a point of nurturance, caregiving and social responsibility.

The works of some early (primarily radical and/or cultural) feminists like Charlotte Perkins Gilman, Marge Piercy, Shulameth Firestone, Mary O'Brien and Sherrie Tepper, though disparate in their views, and often cast in utopic images or presented through the genre of science fiction, provide differing images for us to employ as foundational beginnings for thinking about the politics of pregnancy -- in all its complexities.

In addition to penning the startling representation of pregnancy recounted in the opening epigram of this work, Simone de Beauvoir also wrote that women should avoid pregnancy and childrearing because they endangered a woman's ability to live freely in the world -- both conditions were

akin to slavery for her. (72) She, like most existentialist thinkers of her time, was profoundly influenced by the fundamental ideas of liberal political thought. For her, and some modern feminists as well,¹⁵³ the only solution to the political problems women face is for women to abandon their reproductive opportunities. When one thinks about the forced medical treatments or incarcerations experienced by pregnant women thus far in this country, one could be readily inclined to agree. But that is only if you accept the idea that we can not think differently about what it means to be human, or that the fundamental tenets of liberalism are *the* truth about human politics. But there are alternative visions of how we ought to live and organize our political relations, one's which readily draw on the ideas that rights and equality are certainly important ideals that we have gained from liberal thinking, but that also hold that it is time, perhaps, to evolve to another level of understanding about what it means to be human. Such ideologies, many of them derived from socialist and feminist thinking, take as their prime axiom the idea that human life, like pregnancy is fundamentally social in a way that liberalism is unable to comprehend. In such a way of

¹⁵³ See for example, Shulameth Firestone's *Dialectic of Sex* or Jeffner Allen's essay, "Motherhood: The Annihilation of Women," in Joyce Trebilcott, *Mothering: Essays in Feminist Theory*.

thinking, the idea that the fetus is at odds with the pregnant woman who creates it is simply inconceivable. Had Beauvoir had the benefit of such alternative perspectives, and had we all had the benefit of such ideas, the fetal rights crisis might no longer be.

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