

REPRODUCTIVE RIGHTS

The Necessity and Inadequacy of the Reproductive Rights Discourse

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THE RIGHTS DISCOURSE THAT FRAMES THE CURRENT DEBATE surrounding reproductive technologies is both essential and seriously flawed. The liberal-democratic ideology in which this discourse is embedded not only dictates the political necessity and potential of asserting reproductive rights, but it also eventuates the inadequacy of this paradigm for dealing with the complexity of human needs and desires. This article surveys the array of contradictions inherent in the rights framework.

Within the dominant structure of liberal-democratic ideology, the only acknowledged, accepted discourse is that of individual rights, thus making the assertion of rights the sole political forum for the advancement of alternatives and the empowerment of women. The rights discourse is the only official language spoken by the dominant power structure. There are indeed other discourses available, other languages to be spoken (Cixous and Clement, 1986; Irigaray, 1985; Kristeva, 1984), but the language of rights is the only acknowledged or received language and one that the vast majority of feminists feel compelled to speak. However, those dimensions of human existence marginalized in this discourse cannot be disregarded, either in assessments of the efficacy of the discourse or in the pursuit of feminist endeavors and in envisioning feminist existence.

The rights framework is an element of U.S. legality in which judicial interpretation of constitutional rights provides the primary vehicle for advancing the interests of the individual citizen as balanced against the interests of the state. This model assumes an adversarial relationship between desires of diverse individuals and between individuals and the collective.

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Some rights are specified within the Constitution while others are inferred or implied, as determined by judicial edict. The model identifies the fundamental rights of each sovereign individual that are protected until they infringe upon the rights of others, that is, until their "exercise substantially burdens others" (Robertson, 1986: 954), or until the collective good, as embodied in legitimate state interests, is threatened. This rights framework is used to determine whether, and to what extent, the state may curtail an individual's fundamental rights. A compelling state interest must be demonstrated when dealing with adults. A less rigorous standard, demonstration of a significant state interest, applies when the rights of juveniles are in question (Bortner, 1988: 29-31).

The primary right in question within the arena of reproduction is the right to privacy, especially the right to privacy within the realm of "family matters." This right has been explicated by the Supreme Court most fully in the areas of contraception and abortion. The applicability of privacy doctrines to the new reproductive technologies is undeveloped in U.S. Supreme Court cases (Lopez, 1988: 181-184). Even the right to procreate, so entrenched in U.S. ideology of personal fulfillment and family, has not been dealt with as explicitly or extensively as issues concerning the avoidance of procreation through contraception and abortion (Robertson, 1986: 955). Complex questions surround the assumed and sacred right to reproduce when it involves reproduction that employs extracorporeal means; "collaborative" reproductive arrangements (Andrews, 1984: 56); and attempts to control reproduction through contragestives that lessen the likelihood that a fertilized egg will attach to the uterus, i.e., mifepristone (RU 486), commonly called the "French Abortion Pill" (Baulieu, 1989: 13).

The reproductive issues to be considered extend far beyond these technologies and include such questions as whether there is a "right" to bear and raise children in a physically healthy and socially supportive environment (issues of prenatal, postnatal, medical, dental, and child care). The dilemma engulfs the right to *not* reproduce biologically, i.e., the right to use contraceptives, contragestives, and abortion. It encompasses the question of what rights exist for aid to combat infertility, including the controversial methods of artificial insemination, *in vitro* fertilization, and noncommercialized or commercialized surrogacy. It includes the right to not use reproductive technologies such as amniocentesis, genetic screening, genetic engineering, and selective abortion to create the perfect child, including sex selection (Wikler, 1986: 1050). It also must deal with the employment rights of women regardless of whether they are pregnant or within the childbearing years (Hubbard and Henifin, 1984: 99-101; Clarke, 1984: 188-190).

The rights framework has not been extended to encompass the multitude of real possibilities (or the imagined possibilities) that are reconfiguring the

realm of human reproduction. The nascent technologies change at a rate that defies legislative and judicial abilities to keep apace; but more crucial is the fact that the new reproductive technologies portend previously inconceivable social realities and relationships. It is not simply a matter of a time lag between technological advances and legislative enactments; it is a matter of revolutionary notions of human relations for which we have no blueprints or obvious precedents. What was once viewed as biologically given, and therefore a stable, unquestioned dimension of the individual bearer of rights, has become a matter of technological and social manipulation. The reproducing individual becomes a matrix of social relations, a matrix that does not approximate the juridical person esteemed in liberal-democratic legality.

The example of extracorporal conception through *in vitro* fertilization provides an apt illustration. By fragmenting or compartmentalizing parenthood (or, from an alternative perspective, by facilitating the multiplicity of parenthood), these technologies transform or, at the very least, challenge the notion of what is meant by human reproduction, mother, father, child, and family. Through the permutations of egg and sperm contributors, gestational motherhood, and social parenthood, it is possible for a child to have (at least) five "parents" (Gallager, 1987: 140; Lopez, 1988: 176).

One female and one male may contribute eggs and sperm, respectively; embryos may be generated through combination of these "reproductive materials" (Caplan, 1986: 241) in the petri dish (*in vitro*); through embryo transfer, one or multiple embryos may be implanted in the uterus of the gestational mother who need not have been an egg donor nor the intended social parent (i.e., surrogacy); and one, two, or more adults may act as social parents responsible for child-rearing. The latter participants in the collaborative reproduction configuration are commonly portrayed in public policy as a heterosexual married couple, but a single parent or lesbian/gay parents or a community of parents are also possible. The discourse of rights must take into account all of the individuals involved as well as the multitude of attendant experts and professionals. Further, as we will discuss shortly, given the U.S. Supreme Court's emphasis on the state's legitimate and compelling interest in protecting potential human life, embryos become "parties" and all the possible ways in which embryos may be processed, i.e., frozen, stored, transferred, or destroyed, become part of the deliberations (Rothman, 1985: 188; Andrews, 1984: 51–52).

Reproductive technologies and the discourse of reproductive rights have parallel potentials. Both hold promise for the enhancement of women's independence through the provision of alternatives; they simultaneously contain within them the potential for extending social control over women and for the marginalization of essential dimensions of women's needs and desires. Participation in the rights discourse is at once imperative and perilous.

The Necessity of Reproductive Rights Discourse

Participation in the rights discourse is essential for feminists because the well-being and very lives of women are at stake. Though the degree of control exercised varies greatly with an individual's class, racial and ethnic, age, and physical status, reproductive rights involving contraception and abortion afford women increased options and control over their lives.

The acceptable format for discussion and action within the liberal-democratic framework is the advocacy and exercise of rights (Eisenstein, 1988: 188–190; Addelson, 1990: 2–5). Although there are severe limitations to what may be gained, as well as extreme dangers as to what is precluded by such a discourse (Petchesky, 1984: 319), within the current political context the rights-based approach and notion of individual autonomy have empowered women. Especially if the advocacy of women's rights successfully restricts state interests to oversight and record-keeping roles (Lopez, 1988: 177), the rights discourse benefits women by enhancing their power within interpersonal relations and work lives through greater control of their reproductive capacities (Jagger, 1983: 136).

As crucial to the well-being of women as is access to safe and effective contraception and abortion, it is not for this right alone that the championing of reproductive rights is important. The countless hours of advocacy and protest are also prompted because of what these specific issues symbolize, what they represent in the political struggles of contemporary society (Fried, 1988: 139–140). Reproductive technologies and the struggle over access, control, and decision-making autonomy “crystallize issues at the heart of contemporary social and political struggles over sexuality, reproduction, gender relations and the family” (Stanworth, 1987: 4). Debates over a particular technology are inextricably bound to the larger contestation of worldviews, of the battle over which alternative ways of life will be permitted, tolerated, and/or supported.

Behind the debate on abortion, contraception, and reproductive technologies stand questions of the conceptualization of sexuality, the nature of gender relations, the role of women within society, and the voice of professionals, experts, and legislators within the reproductive decision-making matrix. The vociferous abortion debate derives from women's essential need for the right to choose when not to reproduce, but it also derives from the fact that such an assertion of bodily integrity encodes the totality of women's assertions — about their bodies, their lives, their multiplicity, and their potentialities. These debates are part of the “larger war” being “fought for the very ownership of the twentieth century” (Addelson, 1990: 1). The instrumental terminology employed by Addelson simultaneously captures the imperative of a rights dis-

course and its limitations, including its adversarial, atomistic, and objectified image of human existence and society.

The Inadequacy of the Rights Discourse

The major limitations of a reproductive-rights discourse include its great potential for the extension of social control over women in the name of the rights of others (the born, the unborn, the yet-to-be conceived); the extent to which a rights discourse denies women social and economic standing due to the perpetuation of the public-private dichotomy; the extremely restricted scope of juridical rights; and the discourse's inherent denial of human interdependence and communality.

The formulation of the rights discourse carries within it the potential for intensified social control over women in reproductive and also other realms. Because the very format of the discourse is founded upon competing rights of individual parties and a regard for the overarching ("collective") interests of the state, women's rights, activities, and potential may be restricted in the name of the rights of others or in the name of the legitimate interests of the state. When the broader scope of issues is relinquished by confining the discourse to a rights debate, each member is in competition with all others. Despite the portrayal of the state as a neutral arbitrator of these competing interests, a political reality of women's existence within the dominant power structure is that the legal order has systematically functioned to further the long-term interests of patriarchy and capital (Eisenstein, 1988: 51–52).

Those whose rights will compete against the rights of women are not restricted to biological or social fathers, for the rights of many others may also be granted priority over the rights of women. A foremost group of interests and rights is that held by experts and professionals. A host of professionals are involved in the creation, implementation, and administration of reproductive technologies: physicians, health-care professionals, pharmaceutical companies, genetic counselors, baby brokers, and myriad lawyers. Particularly within advanced industrialized societies in which even the most intimate of human needs and desires are mediated through experts, the legal order provides for these interests. Thus, not only does cultural reverence for specialized and secret knowledge increase the power of experts, but the legal order assists in defining social problems as the domain of professionals and experts (Addelson, 1990: 203; Hubbard and Henifin, 1984: 73–74).

Equally or more relevant than the curtailment of a woman's rights due to another individual's rights is the imminent possibility of increased loss of rights due to expanding articulations of the state's "legitimate" interests. As has been demonstrated most graphically by the Supreme Court's *Webster* decision, this dimension of the rights discourse presents a great threat for controlling and restricting women. A foremost component of the discourse of

rights is consideration of the state's compelling interests in protecting adults from themselves and their potentially incompetent judgments (their inability to make decisions), to protect children (by acting "in their best interests"), and to protect "potential human life."

Although the fetus (or the embryo, sperm...) have not yet been granted the legal personhood necessary to assert rights, the state exercises control in the name of this potentiality. In effect, this privileging of the state's interest in potential life (a longstanding construct in the reproductive rights discourse given much weight by *Roe* and even greater force by *Webster*) makes the official legal non-personhood of the fetus barely relevant. Although it employs technically incorrect legal terminology, the widespread discussion of the rights of the fetus and the rights of the unborn clearly reflects the powerful impact of the state's initiatives "on behalf of" and "in the best interests of" potential human life (Morgan, 1985: 223).

With the state cast as the champion of the unborn, and pregnant women cast as potential violators of the state's interest in the unborn, the relationship between a woman and the fetus is defined primarily as an adversarial relationship. Court-ordered surgery to "save" a fetus (that may or may not be viable outside a woman's womb), especially when such surgery threatens the health or life of the woman, provides an example of the perpetuation of the adversarial framework. As one judge who espouses this view stated, "the viable unborn child is literally captive within the mother's body" (*San Diego Tribune*, June 27, 1990: A2). Such logic advocates prescription of pregnant women's conduct, prosecution of those who violate prescriptions, limitations on women's work opportunities to "protect their roles as childbearer or mother" (Field, 1989: 114), removal of newly born children from mothers who are judged to have abused their fetuses, and involuntary surgery on pregnant women or medical interventions aimed at the fetus (*Ibid.*).

It is this construct that permits extensive state intervention in the lives of not only pregnant women but also all fertile women in the child-bearing years (Hubbard and Henifin, 1984). The rights of the fetus (the embryo, the potential life) have priority over the rights of women. Such a view gives voice to discussions of "children" being "abused preconceptively and prenatally — not only by their mothers drinking alcohol, smoking, and using drugs nonmedicinally, but also by their *knowingly* passing on or risking passing genetic diseases" (quoted in Hubbard and Henifin, 1984: 80).

In a similar vein, authorities such as the past president of the American Association for the Advancement of Science, Bentley Glass, make statements such as:

...the right that must become paramount is...the right of every child to be born with a sound physical and mental constitution, based on a

sound genotype. No parents will in that future time have a right to burden society with a malformed or a mentally incompetent child.... [E]very child has the inalienable right to a sound heritage (*Ibid.*: 80).

These quotes depict the morass of rights-permitted discourse that not only privileges the unborn over the woman, but also contains eugenic implications for the reproductive rights of the physically disabled and the condemnation of anyone who would give birth to a "defective" child (Rothman, 1985: 192). Besides establishing a competition among recognized rights, the reproductive-rights discourse is inadequate because it excludes consideration of essential human desires and needs and it minimizes critique of the established order.

The rights discourse is one aspect of a political and conceptual construct that perpetuates a distinction between the private and public realms of human existence. The categorization of the public as requiring proper regulation and the private as beyond regulation (Lopez, 1988: 179), coupled with the portrayal of the public as men's domain and the private as women's domain, has fostered inequality within the family and policies of noninterference in family affairs, regardless of how brutal or unequal. The notion of "privacy" rights and the portrayal of reproductive rights as the natural province of women further this untenable dichotomy that buoys the status quo and legitimates social relations detrimental to women (Jaggar, 1983: 18–20). Concomitantly, this construct has provided a rationale for denying women full standing within the public realm and for excluding them from decision-making powers.

The manner in which the potential of reproductive technologies is realized within society is mediated by the legal order. Thus, the potential of reproductive technologies to enhance autonomous or independent motherhood, particularly through "artificial insemination," *in vitro* fertilization, and embryo transfer, is mitigated by the legal order's preoccupation with issues of concern to men, such as establishing "proof of fatherhood" (Oakley, 1987: 54). The "moral panic" surrounding these possibilities may provide the "rationale for extension of the legal concept of paternity, and that the power of the state to restrict autonomous motherhood will thereby be enhanced" (Stanworth, 1987: 6).

Because of their enormous potential for altering conceptions of family and gender relations, contraception, abortion, and especially the new reproductive technologies generate widespread moral panic. These anxieties and fear go far beyond uneasiness regarding change, to the extent of hysteria and condemnation of that which is perceived as a threat to societal values and interests. Anxieties regarding gender relations hold great potential for producing a static, polarized vision of gender roles (Gallagher, 1987: 147), and frequently result in the identification of "folk devils" (negative role models who embody the perceived threat). The subsequent "ways of coping" that evolve most

commonly entail legislation to punish folk devils and to contain the conditions viewed as threatening. The imagined potentials of reproductive technologies are as relevant to moral panic as are the current possibilities. The rights discourse enhances the legislation of rights other than those of women and the ascendancy of the interests of the state.

Inherent Limitations of Juridical Rights

The reproductive desires and needs of women and men extend far beyond the paltry right to currently available forms of contraception and restricted abortion. Although political and personal energies have been expended almost exclusively within the past five years around the issue of abortion, and of necessity because of the imminence of the violent revocation of this right, such a delimitation of the discourse precludes and renders virtually impossible a discussion of the more complex scope of reproductive needs. We are desperately (an adjective most frequently used to describe the infertile) fighting to maintain the narrowly inscribed reproductive rights so vulnerable to attack.

Many issues are marginalized or completely silenced because a juridical notion of rights is by definition a limiting notion of rights. Based on the established legal system and state, the notion of rights and of juridical justice contributes to the ideological justification for the status quo and for the perpetuation of unequal power relations. Its fundamental assumption, that the political state embodies the collective will of people, mandates that the analysis will focus on the relationship of citizens to the state and its rules (Buchanan, 1982: 54; Eisenstein, 1988: 51–52).

These parameters exclude consideration of the most quintessential aspects of women's lives, their economic, material, and spiritual existences, and obscure injustices of everyday life. Juridical or legal concepts do not provide an efficacious basis for explaining how social relations actually work.

An encompassing and meaningful notion of rights would be based on an evaluation of the quality of human life and the totality of one's relationship to self, others, and nature — not on an externally imposed definition or evaluation of human beings' roles within the state. The concept of individual rights mystifies realities of human existence and provides a cloak for structures of domination (Addelson, 1990: 5). Full emancipation is not to be found in political emancipation and legal rights of citizens in the capitalist state.

This discussion of rights does not include either the "right," need, or desire to have children in a physically healthy and socially supportive environment or the right to equal, democratic voices in the allocation of society's health resources (Brody, 1987: 154). It does not include the right to challenge a for-profit, exploitative economy in which resources are expended in the development and marketing of exotic technologies destined for the affluent few. The

juridical notion of reproductive rights has yet to yield the right to safe, effective, and affordable contraception.

In an even more encompassing sense, the rights discourse within the present political structure diverts attention away from fundamental issues such as the social and economic construction of reproduction and infertility (Cohen and Traub, 1989: 5–6). The rights discourse permits us to grapple with the question of a woman’s right to contraception and abortion or a woman or man’s right to use reproductive technologies to combat infertility. It does not engender discussion or action to deal with the environmental, technological, and social causes of infertility (Morgan, 1985: 225); nor does it contenance a telling of the social and economic conditions that necessitate the right to abort and minimize the opportunity to meaningfully parent. Far less likely than even these issues will be a discussion of the “ideology of family life and the moral economy of women” (*Ibid.*: 231) that include the mandate for biological parenting, the domination of women, and compulsory heterosexuality. The imagery of volition and free-will inherent in the rights framework facilitates a woman’s right to choose without acknowledging the greater context of women’s limited choices and powerlessness:

The “right to choose” means very little when women are powerless.... Women make their own reproductive choices, but they do not make them just as they please; they do not make them under conditions which they themselves create, but under social conditions and constraints which they, as mere individuals, are powerless to change (Rothman, 1985: 192).

The sanctity of the juridical right to enter into contract and the vacuousness of this right are exemplified in the surrogacy-mother contract. Judges have upheld the rights of the biological fathers consistently, by reasserting that surrogate mothers have entered into contracts “freely.” To deny the contractual decision-making ability of women is portrayed as denying their standing and equality within the juridical and rights framework. It does not address the social, economic, and emotional complexities that eventuate such a choice, nor the ideology enforced by judicial edict that considers any woman who could “choose” to enter into such a contract *de facto* an unfit mother.

To speak in the language of rights is to concede the parameters of the discussion and to foreclose the complexity of human lives. Jean Baudrillard (1983: 28–29) forcefully proclaims the dangers of participating in a discourse defined by a capitalist order:

All that capital asks of us is to receive it as rational or to combat it in the name of rationality, to receive it as moral or to combat it in the name of morality.... Capital doesn’t give a damn about the idea of the

contract which is imputed to it — it is a monstrous unprincipled undertaking, nothing more.

The discourse of rights is not an affirmative language: to have a right means at most a right *from* state intervention. It does not entail the right to active governmental support. Nowhere has this been reaffirmed more explicitly than by the plurality in *Webster*:

our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual (*U.S. Law Week 57: 5027*).

To the contrary, rather than establishing a citizen's right to governmental aid in pursuing even those rights interpreted to be fundamental (complementarily, establishing government's responsibility or obligation to help citizens realize their fundamental rights [Petchesky, 1980: 662]), the Supreme Court has legitimated states' use of their considerable powers to hinder a citizen's meaningful exercise of a constitutionally recognized fundamental right. As expressed by the dissenting Justices in *Webster*: "...Missouri has brought to bear the full force of its economic power and control over essential facilities to discourage its citizens from exercising their constitutional rights" (*U.S. Law Week 57: 5036*).

The rights discourse is an element in a model that portrays human beings as individualistic, isolated, atomistic, and sovereign. It is a quintessential portrayal of the objectified and reified subject. Through its championing of the autonomous, free individual as the bearer of rights, the rights discourse denies the interdependence of human beings and denies their communal needs and desires. The sole communal need it recognizes is that of each to be protected from all. Within the rights discourse, "interdependence" is exclusively negative and refers to each atomistic individual's vulnerability to and likelihood of being harmed by all others.

The elements of capitalist jurisprudence emphasize choice, freedom of the autonomous rights bearer, and contract (Stone, 1985: 40). This image permits limited rights and no interdependence. It suggests the extreme inadequacy of such a construct for meeting human needs and desires, for it negates collectivity and communality.

Conclusion

Issues once viewed as biologically given have entered the arena of social decision-making, and the controversy of who will make reproductive decisions using what criteria is imminent. The multiplicity of involved parties, as well as

potential conflicts of interest, highlights fundamental questions underlying the role of law in women's reproductive and economic lives. These controversies reflect the complex dilemmas surrounding changing gender roles in which questions regarding women's rights, state and public interest, and professional expertise are intertwined. Participation in the rights discourse is necessary to maintain the limited control women have gained over their reproductive lives. It must be acknowledged, however, that the rights discourse also provides a viable means for the enhanced social control of women. This discourse advances the status quo by deflecting attention away from essential issues of social and economic justice.

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