June 1990

The Politicization of Reproduction

Berkeley Journal of Gender Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/bglj

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38CC6G

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Gender, Law & Justice by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Review Essay

The Politicization of Reproduction


Reviewed by Joanna K. Weinberg†

I. INTRODUCTION

If we were not already aware of the vastly increased importance of issues relating to reproductive autonomy and the technology of reproduction as we approach the 1990s, a new book, Reproductive Laws for the 1990s1 brings home this point with emphasis. The book grew out of discussions by the Working Group of the Project on Reproductive Laws for the 1990s, and is edited by Sherrill Cohen and Nadine Taub, of the Women's Rights Litigation Clinic at Rutgers Law School, Newark. The Project's beginning hypothesis set the tone for this thoughtful consideration, a working assumption "that our thinking about reproductive law in the coming decades would necessarily be future-oriented [but that] new technologies have emerged out of old social relations, and often play on old notions about a woman's place" (pp 4-5).2

The book is a compilation of position papers and responses by policy makers and theorists, covering a broad range of issues exploring how society might enhance reproductive freedom and gender equity. While there is much that is intriguing and indeed novel in this compilation, readers will be most drawn to its consideration of the range of options in the area of reproductive health and technology, and the ramifications of current dilemmas regarding abortion policy within the pro-choice movement. In no small part, this examination was made even more dramatic

† J.D., L.L.M., Visiting Scholar, Center for the Study of Law and Society, University of California, Berkeley.
1 Sherrill Cohen and Nadine Taub, eds, Reproductive Laws for the 1990s (Humana Press, 1989).
2 All parenthetical page references are to Reproductive Laws for the 1990s, Cohen and Taub (cited in note 1).
by the events of the summer of 1989. When the authors' thoughtful considerations are juxtaposed with the shrill clamor of Supreme Court rhetoric in *Webster v Reproductive Health Services,* and the political and public outcry following the Court's decision, it becomes clear that legal rhetoric yields only a superficial understanding of the complexity of the problem.

A more fitting title for the book would be "Reproductive Policies for the 1990s," since it is far more concerned with the impact of policy and with the social context of reproductive laws and rights than with specific laws. For this reason, the book does not address the issue of a right to abortion alone, but looks also at other issues central to reproductive autonomy: prenatal screening, the fetus as a patient, reproductive hazards in the workplace, time limits on abortion, and alternative modes of reproduction (p 4). The authors should be commended for their choice of topics; these range from the impact of reproductive policies on disparate groups of women, including low-income women, women with disabilities, and women of color, to the ethics of various reproductive technologies. Within that broad spectrum, the authors explore a number of diverse issues: the effect of the "pay-as-you-go" United States health care delivery system on the economics of reproduction and the reality of reproductive "choice"; the increasing medicalization of reproduction through alternative modes of reproduction (such as in vitro fertilization) and fetal intervention techniques (fetal surgery); and the effect of emerging ethical and legal issues on reproductive choice, such as constraints on health care providers, and criminal and civil sanctions on pregnant women.

This review essay attempts to structure a discussion of the emerging social and legal context of reproduction in light of both *Webster* and the issues of fertility technology and reproductive choice in public debate. It also tries to identify the particular conflicts relating to the technology of reproduction that are addressed both by the *Webster* Court and by the authors of *Reproductive Laws for the 1990s.* These conflicts are not limited to the question of whether women do or do not have a right to abortion, and whether the state may place any limitations on that right; they go deeper, to the very nature of reproduction in modern society. Recognizing that "securing full reproductive freedom is key to achieving gender equality," the book argues that "the way that girls are raised to become women has a powerful influence on their reproductive activities—women are both agents and victims of [their] reproductive capacities [and their] 'individual choices' reflect the larger social world" (p 5).

---

3 109 S Ct 3040 (1989).
II. REPRODUCTIVE AUTONOMY AND THE INTERSECTION OF LAW AND POLICY

“Law” and “policy” are broad terms, covering a wide range of political and social arenas. Both the plurality opinion in Webster and the authors of Reproductive Laws for the 1990s focus heavily on the intersections of law, medicine, ethics, and technology, and the role that considerations of morality play in framing the terms of the discussion. They reach, however, quite different conclusions. The Webster Court is primarily concerned with redefining the parameters of women’s privacy rights, and enlarging the state’s interest. In contrast, Reproductive Laws for the 1990s struggles with the definitional question of how to align an ethic of choice within a rapidly-shifting medical, social, and legal framework, one in which the nature of reproduction is necessarily affected by issues of social and economic class, resource allocation, and sophisticated medical technology.

At the heart of the intersection of social and legal issues is the regulation of women’s ability to choose pregnancy or abortion. For the plurality in Webster, this has become a black and white issue; the supremacy of the state’s interest in protecting “life” makes heightened regulation legitimate, if not necessary. In contrast, the pieces in the book—while taking generally a pro-choice stance—are sensitive to the fact that the issue of abortion, never an easy question, has become increasingly troublesome in today’s world because of the impact of technology on reproduction. More specifically, the book makes clear that technology has brought enormous changes to the context of reproduction. Both sophisticated fertility techniques and fetal surgery to correct formerly severe and even fatal defects are increasingly available, and both childbirth and abortion are safer. While these changes have not affected some of the most polarizing questions—for example, when “life” begins—it is increasingly clear that the technological changes force (or should force) a more direct confrontation with the question of “autonomy.”

Another issue cutting across the social and legal spheres is the language of abortion discourse. The rhetoric of the “pro-choice” and “anti-abortion” forces are directed at different targets. “Pro-lifers,” in arguing that life begins at conception, focus their public voice primarily on raising fears about late term abortions and abortion “on demand.” “Pro-choicers” tend to focus attention on the large numbers of early abortions undertaken for compelling moral reasons such as rape or the life and health of the mother, and on the horrors of the “backroom” illegal abortions of the past. Since most abortions occur early in pregnancy, and do not involve women who have been raped or for whom an abortion is

---

medically necessary, the issue for most women comes down to how to balance the interests of an autonomous mother and a non-autonomous or potentially autonomous fetus. The terminology—whether one refers to the developing embryo as a “fetus” or a “baby”—is merely part of the rhetoric.\(^5\) Kristen Luker points out that the selective rhetoric has enabled the positions of the opposing sides to become increasingly solidified.\(^6\) Recent national polls also support this duality; while there is broad-based support for some right to abortion, there is also wide variation regarding what restrictions would be acceptable to a majority of the public.\(^7\)

### III. PRIVACY AND AUTONOMY: THE STATE AND WOMEN’S INTERESTS

Several elements of the decision in *Webster* specifically lend themselves to a comparison with the topics addressed in *Reproductive Laws for the 1990s*. First, the Court seems to have undertaken a substantial recharacterization of the “medical/legal regime” outlined in *Roe v Wade*, while at the same time characterizing the state’s interest in the protection of life as both paramount and monolithic. The second troubling element is the extension of the state’s interest in fetal life back to the time of conception, a radical departure from the rationale of *Roe*. Third, the Court takes an ambivalent view of the role of reproductive technologies, approving the greatly enhanced uses of prenatal testing procedures to determine the gestational age and status of the fetus, but possibly undermining development of new technologies for contraception and conception. Finally, the opinion exacerbates a trend that has been apparent ever since the Supreme Court upheld restrictions on Medicaid-funded abortions nine years ago: the increasingly class-based allocation of abortion resources, with poor women likely now to have less access to abortion and reproductive counseling services, even where direct public funding is not an issue.

#### A. Whose Interests?: *Roe v Wade* Reconsidered—or Reconstructed

The *Webster* opinion provides a counterpoint to the way in which *Reproductive Laws for the 1990s* considers the issues regarding the ethics

---

\(^5\) See, for example, Marian Faux, *Roe v Wade: The Untold Story*, 166 (Macmillan, 1988).


\(^7\) A recent New York Times/CBS News poll showed a slim majority of Americans favored retaining the existing laws making abortion legal (48%), with a much larger percentage opposing the kind of restrictions upheld in *Webster* (57%). However, a significant percentage favored some restrictions, and were opposed to “abortion on demand” (only 7% opposed abortion when a woman’s life is in danger; but 56% opposed abortion for career reasons). Over 60% expressed concern about the government preventing a woman from having an abortion. E.J. Dionne Jr., *Poll Finds Ambivalence on Abortion Persists in U.S.*, NY Times A12 (Aug 3, 1989).
and technology of reproductive laws facing society in the 1990s and beyond. This is not because *Webster* provides any clear answers—it does not. In many respects, *Webster* made the “legal regime” of *Roe* far more murky. The Court’s threat, or promise, to consider additional questions in future terms muddies the waters even further.\(^8\) However, in *Webster* the Supreme Court did substantially redefine the framework for a legal discussion of reproductive issues. The way in which the plurality opinion and Justice O’Connor’s concurring opinion\(^9\) frame the discussion makes clear that a shift in legal doctrine is only partially responsible for the reconsideration of *Roe*, the greatest impact of which has to do with the Court’s feelings about the ethics of reproduction and the impact of technology on reproductive policies.

In *Roe*, issues of ethics and technology were addressed from the perspective of the privacy interests of the women involved; the litmus test, in effect, was whether there were compelling reasons for that interest to be outweighed by interests of the state. But the Court has lessened the grip of the privacy doctrine in recent years, particularly where it has been able to point to a superceding morality, such as a revulsion against homosexual behavior.\(^10\) While *Webster* does not overrule *Roe*, it does substantially re-characterize it. For the plurality in *Webster*, the litmus test is no longer a woman’s privacy interest but the state’s regulatory interests. That this interest is thinly disguised as an interest in fetal rights makes the plurality’s analysis even more troubling. It is clear that the plurality

---

\(^8\) Three cases were up for argument in the October 1989 term: *Hodgson v Minnesota*, 109 S Ct 3240; *Turnock v Ragsdale*, 109 S Ct 3239; and *Ohio v Akron Center for Reproductive Health*, 109 S Ct 3239. *Akron* was settled shortly before the Supreme Court argument; *Hodgson* and *Turnock* were argued in October, 1989. *Hodgson* involves a statute requiring notification to parents before an abortion can be performed on a minor, and *Turnock* involves mandated equipment facility requirements for facilities performing even first trimester abortions. While these issues are not the subject of this review essay, they are clearly relevant to a comprehensive discussion of *Webster*.

\(^9\) Three justices participated in the plurality opinion, authored by Chief Justice Rehnquist (Justices White and Kennedy concurring); Justice Scalia concurred in the judgment, but felt that the Court should recognize that *Roe* was being overruled, and Justice O’Connor concurred in most but not all of the plurality opinion, in a separate concurring opinion. Thus for practical intents, the plurality opinion is the majority opinion for most of the issues discussed, but cannot really be considered to be a majority statement of legal doctrine. Therefore, while I will refer to the Rehnquist opinion as the plurality opinion, and will discuss it as such for purposes of evaluating the present Court’s apparent views as to abortion policy, it should be emphasized that the opinions provide very little guidance in the way of legal doctrine. The major exception to this, however, is the Court’s clear expansion of the scope of what it considers to be the state’s interest in preserving life and potential life (and the concurrent diminution of the presumption of the fundamental nature of a woman’s privacy interest), and the Court’s placing of that interest from the point of conception rather than viability. While also not part of a majority view, the concurring opinions of Justices O’Connor and Scalia appear to incorporate these views.

\(^10\) *Bowers v Hardwick*, 478 US 186 (1986). In *Webster*, the plurality backs away from the focus on privacy, apparently questioning whether the Constitution includes an “unenumerated” general right to privacy, and distinguishing *Roe* from *Griswold v Connecticut*, 381 US 479 (1965) and its progeny by noting that “*Griswold* did not attempt to adopt a whole framework, complete with rules and distinctions, to govern the cases in which the asserted liberty interest would apply.” 109 S Ct at 3057.
is perfectly willing to impose considerable risks to the health of both mother and fetus in order to preserve the state's interest in regulating abortion. In an impassioned and plaintive dissenting opinion, Justice Blackmun worried that the "chill wind" of the new plurality threatens the ability of "millions of women . . . to control their destinies."

The Court is apparently willing to sacrifice a great deal in furtherance of its "benevolent" goal of protection of "life." But whose interests are protected by requiring fetal viability tests that do not presently exist, or that exist with a significant degree of risk both to mother and fetus? Whose interests are protected by a statute that prohibits hospitals that lease land from a government entity from permitting abortions, and that restrict health professionals in such institutions from providing a full range of family planning counseling to their clients, on the grounds that such counseling might include abortion as an option? These and other significant features of the Missouri anti-abortion law upheld in Webster may be as threatening to the interests of fetuses as to their mothers. While the plurality paid lip service to the continuing "liberty interest" of women, the Justices found a compelling state interest as to each challenged provision. By its failure to look beyond a simplistic balancing of the interests of the state and the pregnant woman, the decision in Webster raises disturbing questions for reproductive policies of the future.

In contrast, Reproductive Laws for the 1990s does not limit its examination of reproduction to the perspectives of the pregnant woman or the state. By including perspectives of the disabled, the poor, and the medical and public health communities, it confronts the inherent conflicts of reproductive choice through a multidimensional focus.

Two papers in the book stand out as particular examples of this multipolar analysis. In "Reproductive Laws, Women of Color, and Low-Income Women," Laurie Nsiah-Jefferson argues for the integration of concerns about the effects of race, sex, and poverty into discussions about reproductive health policy. She notes, persuasively, that there is insufficient research available about the reproductive needs of non-Caucasian women, and that research often fails to address cultural and social differences that are related to differences in ethnicity (pp 23-24). She notes that poor women and women of color often live under conditions that make it difficult for them to obtain early abortions, due to financial and geographic barriers (p 26). Prenatal screenings, which provide valu-

---

11 109 S Ct at 3079.
12 While the plurality opinion declined to delineate the right in precise terms, the opinion stated that it believed the right to be "a liberty interest protected by the Due Process Clause [of the Fourteenth Amendment]." 109 S Ct at 3058. This appears to open the door to a serious limitation of the constitutional right, since the plurality implies that it objects to characterization of the right as either a "fundamental" right to abortion, or a "limited fundamental constitutional right." The "liberty interest" might in the future come to be no more than an easily rebuttable presumption.
able information regarding the health and gestational age of fetuses, are often prohibitively expensive and are not always covered by subsidized health insurance (p 31). Minority women are also more likely to be subjected to unsafe workplaces containing reproductive hazards, and are less likely to be informed of the risks of such work environments (pp 41-42). What is needed, she maintains, is a decisional structure that includes the views and life experiences of poor women and women of color, and laws that protect such women from exploitation by the health care delivery system.

In “Reproductive Technology and Disability,” Adrienne Asch suggests that the social context of disability in this country misinforms the public’s attitudes about reproductive technology and its uses (pp 69-124). She worries, for example, about prenatal diagnosis and other reproductive screening technologies leading to more and more characteristics being considered “disabling” or otherwise unacceptable. She notes that disabled women often are pressured not to become mothers. She also struggles with the dilemma of women who choose to abort “defective” fetuses in a way that goes far beyond the Court’s more limited state interest/woman’s interest analysis, with a perspective that asks us to consider the costs of a decision to abort or not to abort to the woman, society, the child, and the overall family.

B. The Beginnings of Fetal Life

One of the most widely publicized elements of the Missouri statute challenged in Webster was its preamble, which places the beginning of fetal life and the state’s interest in the protection of fetal life at conception.\(^\text{13}\) The plurality in Webster declined to rule on the constitutionality of the preamble, holding that the question of whether the preamble’s language might be used to interpret other state statutes or regulations was something that Missouri courts should definitively decide, once that provision is applied in some concrete way. However, this did not prevent the plurality from stating later in the opinion that “we do not see why the State’s interest in protecting human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.”\(^\text{14}\) The Justices in the plurality found that the state has compelling interests in ensuring maternal health \(\text{and}\) in protecting potential human life throughout pregnancy.\(^\text{15}\) The plurality posited that throughout preg-

\(^{13}\) The language of the challenged statute states, in pertinent part, “The life of each human being begins at conception,” and that “unborn children have protectable interests in life, health, and well-being.” Mo Rev Stat § 1.205.1(1), (2) (1986).

\(^{14}\) 109 S Ct at 3057.

\(^{15}\) Id, citing the dissenting opinions in Thornburgh v American College of Obstetricians and Gynecologists, 476 US 747, 795, 828 (1986).
nancy there are two potentially conflicting interests—maternal health and fetal life. In effect, the Court abandoned the balancing structure suggested in *Roe*, whereby the state’s interest in potential life was inherently tied to the fetal gestational age, and would not outweigh the woman’s privacy interest until viability or the third trimester.\footnote{410 US 113, 163 (1973).}

However uncertain the balancing mechanism of *Roe*, the *Webster* plurality would create an even more troublesome scheme. The balancing test adopted in *Roe* was conceptually awkward, the woman’s privacy interest and the state’s interest in potential life taking on different levels of primacy depending on the stage of pregnancy.\footnote{The language used in *Roe* was, “The state does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and it has another important and legitimate interest in protecting the potential of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes ‘compelling.’” 410 US at 162.} Unfortunately, in *Roe* the Court relied on the trimester division to effectuate the balancing test, which has been widely criticized.\footnote{Justice O’Connor, for example, has said that the trimester analysis is on a “collision course” with itself. *Akron v Akron Center for Reproductive Health*, 462 US 416, 458 (1983). It has become increasingly clear even to those supporting abortion rights that the first trimester is expanding, as abortion becomes safer, and that the second trimester may be contracting, as fetal viability moves back in time (although 23-24 weeks continues to be the earliest stage that a fetus might survive outside the womb). See Nancy K. Rhoden, *A Compromise on Abortion?*, 19 Hastings Center Report 32 (July-Aug 1989). However, while the trimester analysis may be a conceptual box, some form of balancing test is probably appropriate, and such a test would likely place some limits on late term abortions (presently a small minority of the total number of abortions). One of the ironies of many of the restrictive measures passed by state legislatures is that they do not prevent abortions, but by placing time-consuming obstacles in the path of women seeking abortions; they increase the likelihood that women will seek late term abortions.}

While the *Webster* plurality was little concerned with the ramifications of its dual-burden mode of analysis, it is precisely this kind of moral dilemma that the authors of *Reproductive Laws for the 1990s* take great care to discuss. While the book might be said to convey an overall pro-choice focus, the editors are careful to include in the discussions the “harder” questions facing proponents of choice in reproductive freedom. One of the paramount issues in this regard is the development of intrauterine surgery technology. Janet Gallagher cautions that the “explosion of technologies that make the fetus seem more accessible” has spurred a resurgence of attitudes that treat women as vessels (p 188). She worries that the fetus “as patient” might engender restrictions on the autonomy of a pregnant woman that go far beyond restrictions on abortion. She also worries that *Roe*’s “viability line” is subject to alteration, a worry that is in part borne out by the *Webster* decision.

In a second commentary, physician Alan Fleischman notes that the fetus is a patient, and suggests an alternative conceptual structure as a way of trying to reconcile maternal and fetal rights and interests. Fleischman would apply two ethical principles to the issue of fetal rights...
The first principle he terms "respect for persons," which includes two sub-principles: (1) that individuals should be treated as autonomous beings, and (2) that persons with diminished autonomy are entitled to protection. This principle would support the right of a woman to determine what happens to her body, and would include her decision regarding a fetus; however, it does not answer the question of whether a fetus is the type of entity that can possess autonomy. Fleischman would say that physicians have an obligation to respect the autonomy of the mother, but that perhaps there is a less clear obligation to protect the fetus's potential autonomy.

Fleischman's second principle attempts to balance these conflicts. The principle of beneficence states that persons are treated in an ethical manner not only by respecting their decisions and protecting them from harm, but by making efforts to secure their best interests or well-being, maximizing possible benefits and minimizing harms. He notes that this is essentially a balancing test between benefits and risks, and is clearly complex when applied to two "patients" simultaneously (mother and fetus). However, he notes that the interests of the fetus do not stem from its moral status as an entity independent from its mother, but derive only from its future standing as a member of the moral community, and that standing is dependent, to a significant degree, on whether the mother has decided to allow the fetus to come to term as a wanted offspring.

While not a fully satisfactory analysis of conflicting rights and interests, the Fleischman scheme has the advantage, ignored by the plurality in Webster, of making clear that it is the mother who bears the chief responsibility for the potential life of a fetus, as she does for the infant and child after birth. In some ways it reflects the type of balancing test used by the Supreme Court in Roe, in which potential fetal interests or rights are incorporated within the realm of maternal interests, at least through most of a pregnancy. The scheme also incorporates the principle of parental autonomy, which has a long history in American legal thought. This principle presumes that the state will not interfere in the relationship between parent and child.

C. The Technology of Reproduction

Another troubling aspect of the Webster plurality's opinion is its inconsistency with regard to the technology of fetal testing and fertility.
A central feature of the challenged Missouri statute was its requirement that there be a determination of fetal viability before a physician can perform an abortion on a woman believed to be twenty or more weeks pregnant. The statute requires first, that the physician shall determine if the fetus is viable according to the degree of skill, care, and proficiency commonly exercised by physicians in the community, and second, that the physician shall use such medical tests as are necessary to make a finding of gestational age, weight, and lung maturity of the unborn child.\(^{22}\)

There are serious problems with the testing requirement. It is not clear to what degree the type of testing required by the statute presently exists, nor whether testing must be performed regardless of the risk to the mother or the fetus. Both O'Connor and the plurality suggest that a common sense interpretation must be given the "plain meaning" of the statutory language.\(^{23}\) If this is true, why does the statute specifically require that this determination be made and noted on the mother's chart? At the present time amniocentesis is the only test that can ascertain lung maturity, and it can do so only after 28-30 weeks gestational age. Amniocentesis is a surgical invasion of the amniotic sac surrounding the fetus through the woman's abdomen, and there are risks to both the woman and the fetus of infection and miscarriage.\(^{24}\) It is also an expensive procedure, costing about $1000.

Moreover, because the Court appears to approve dating the origin of the state's interest in the fetus from conception,\(^{25}\) the technology of contraception and alternative enhanced conception (such as in vitro fertilization) might well be forbidden under the Missouri statutory structure or similar state legislation. Many commonly used contraceptives, including the IUD, high-dose estrogen, the French abortifacient RU-486, and many birth control pills, act to prevent implantation of a fertilized ovum. The new fertilization technologies such as in vitro fertilization ordinarily involve fertilization of several eggs, not all of which will be implanted;

\(^{22}\) In pertinent part, the statute reads,

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examination and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child, and shall enter such findings and determination of viability in the medical record of the mother.

> Mo Rev Stat § 188.029 (1986).

\(^{23}\) "It is well known that fetal lungs do not mature until 33-34 weeks gestation ... If an assessment of the gestational age indicates that the child is less than thirty-three weeks, a general finding can be made that the fetal lungs are not mature." 109 S Ct at 3063. However, premature infants between 24 and 33 weeks gestation frequently do survive, and therefore would be considered viable under the Missouri construction.

\(^{24}\) 109 S Ct at 3070.

\(^{25}\) Justices Scalia and O'Connor appear to share this conclusion, although whether there is actually a majority for this will have to await a subsequent decision.
application of the plurality rationale in *Webster* may prohibit discarding of the "extra" eggs. While these provisions were found to be unconstitutionally vague by the Court of Appeals, the issues were not considered to be ripe for adjudication by the Supreme Court since no such policies had been prohibited by the Missouri legislation.

This is a very slippery slope indeed; unless a continued relational identity between mother and fetus is firmly recognized in both medicine and law, it will become increasingly acceptable to treat every pregnant woman as little more than a maternal environment. The *Webster* plurality comes dangerously close to this analysis. By approving the Missouri statute's goal of "promoting the state's interest in potential human life rather than in maternal health,"

the Court seems inclined to transfer to the fetus the liberty interest formerly accorded to the woman, without addressing the question of whether the fetus is a "person."

However one feels about the moral correctness or legal validity of the Supreme Court's approval of the testing provisions of the Missouri statute in *Webster*, it is clear that the issues need a more prolonged and considered analysis. The authors of *Reproductive Laws for the 1990s* have carefully considered the question of the uses and misuses of reproductive technologies in both fetal testing and fertility enhancement. In the sections on "Prenatal and Neonatal Technology, Abortion and Birth" and "Alternative Forms of Reproduction," the position papers and commentaries make clear that this is an area where the varied and often conflicting themes of morality, law, and medicine must be placed in a broader social context. The book makes important connections between the availability of abortion and contraception, the use of technologically complex testing procedures to determine fetal health and viability, and the rapid escalation of fertility-enhancing technology. The overall position of these sections of the book is that the state's role should be "both an abstentionist and an affirmative role... [and that the state] use its considerable potential for intervention to address directly the underlying problems [such as those] that tend to result in very late abortions" or teen pregnancies (p 131).

In "Commentary: Time Limits on Abortion," Nan Hunter points out that even apart from the question of abortion, the increase in intrusive fetal testing and therapies (for wanted births) has caused the medical profession to consider the fetus to be an independent patient. This is also true in the area of fertility technology; procedures such as in vitro fertili-

---

26 However, at least one aspect of this issue is presently being raised in a Tennessee divorce case in which a trial judge recently awarded custody of seven frozen embryos (the product of an in vitro fertilization procedure) to a woman, despite her estranged husband's objections. The trial judge held that the embryos were "human life" and should be treated in the same manner as any children involved in a custody dispute. Ronald Smothers, *Tennessee Judge Awards Custody of Seven Frozen Embryos to Woman*, NY Times 13 (September 22, 1989).

27 109 S Ct at 3053.
zation or embryo transfer to or from a "surrogate mother" have caused many medical professionals to question precisely who their "patient" is, and have raised troubling questions of parental identity for the legal community. But, she cautions, we must remember that whether we see a fetus as an "entity with enforceable rights or as an especially delicate function of a person's reproductive process" is not a concept mandated by improved technology, but is merely "an ideological construct" (p 132). With regard to third trimester abortions, admittedly a tiny percentage of all abortions, the focus, she argues, must be on the social conditions that are (usually) the preventable cause; no one asserts that women, given the choice, would make their abortion decisions later rather than earlier.

The emerging legal pressures to regulate women's behavior during pregnancy are the subject of the position paper, "Prenatal Screening," by Mary Sue Henifin, Ruth Hubbard, and Judy Norsigian. The authors caution that the expansion in reproductive technology puts women at risk of being placed "in a special category" where their individual liberty and privacy interests would be denied by permitting physicians or the state to impose upon women decisions about use of such technology (p 157). The paper notes that, while constitutional rights of privacy and common-law doctrines of bodily integrity protect the right to refuse or accept most medical treatment, it is not clear whether these include the right to refuse or to use reproductive technologies (p 155). The authors note that these restrictions are more likely to be brought to bear on women who are poor, young, or otherwise disadvantaged.

The paper also warns of a troubling trend toward regulation of the "maternal environment." This has already taken hold in the lower courts. In several instances, women have been charged with homicide or lesser offenses arising from drug or alcohol use during pregnancy, or for refusing to follow a doctor's instructions to refrain from endangering the fetus through activities such as intercourse. Apart from the regulatory issues raised, there are other important concerns having to do with the potential for conflict between privacy and liberty rights of women and the protection of their unborn fetuses. The trend toward punishing substance-abusing women (or women who otherwise ignore prenatal advice) instead of treating them and providing prenatal care, is further evidence of this reverse objectification of women.28 The paper takes a strong posi-

28 See, for example, Wendy Chavkin, Help, Don't Jail Addicted Mothers, NY Times (July 18, 1989). Pregnant women have been sentenced to prison for the duration of their pregnancy for offenses that ordinarily receive probation. See Bill Schachtler, Woman Accused of Contribution to Baby's Demise During Pregnancy, LA Times Pt 2, 1 (Oct 1, 1986). Another woman was convicted of providing cocaine to a minor, after giving birth to a crack-addicted infant. See Katha Politt, A New Assault on Feminism, The Nation 409 (Mar 26, 1990) which discusses the new punitive approach to pregnant drug and alcohol users. An eighteen-year-old woman was "sentenced" to remain on birth control for the rest of her childbearing years, after being convicted of child abuse. Woman's Sentence Is Birth Control, NY Times A22 (May 26, 1988).
tion on the issue of state regulation, recommending that a parental immunity statute be passed to protect women from liability for injuries to a fetus from its mother's "medical decisions, health status, employment, or personal habits prior to or during pregnancy or childbirth" (p 178).

D. The Economic Consequences of Reproductive Regulation

Both the Webster plurality and Reproductive Laws for the 1990s address the social policy choices forced upon pregnant women by the economic consequences of reproductive technologies. The framework of this analysis takes different forms, but its essential feature is that recent Court decisions have made both abortion and sophisticated reproductive technology increasingly unavailable to poor women. The economic segregation of reproductive technologies did not begin with Webster, of course. It first emerged through the political realm, where legislatures denied supplemental medical coverage for abortions under federal Medicare programs and similar state entitlement programs. The courts have also aided the class division on economic lines by upholding such legislative restrictions on the grounds that Roe conferred "no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."29 The segregation has been intensified by the medical profession and private insurers, because the rapid expansion in the technology of reproduction has resulted in costly procedures. Privatized fee-for-service health care and the exclusion of many technologies from subsidized health care and private insurance coverage have made sophisticated reproductive technology, particularly regarding fertility, simply inaccessible to poor women and to many middle class women as well.

If Webster is interpreted to limit fertility or contraceptive technology and if abortion becomes less accessible to the poor and middle class, is it possible that the state, faced with supporting "undesirable" non-white or physically or mentally challenged infants, will permit or even

---

The defendant, Jennifer Johnson, had been rejected from a drug treatment program because the facility was unwilling to bear the potential liability should Johnson's fetus be damaged. Jean Davidson, Newborn Drug Exposure Conviction A "Drastic" First, LA Times 1 (July 31, 1989). See Dawn E. Johnson, The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 Yale L J 599 (1986). The Seventh Circuit recently upheld a company's policy of "protecting" its female employees from possible toxic harm to their fetuses by excluding them from certain (well-paying) jobs during their "childbearing" years, even if the women had stated that they would not become pregnant while working in those jobs. UAW v Johnson Controls, 886 F2d 871 (7th Cir 1989), cert granted International Union v Johnson Controls, 58 USLW 3614 (1990) (Recently the California Court of Appeals decided the same issue for the plaintiff, holding that the company's policy violated the California Fair Employment Practices Act. See Johnson Controls, Inc. v California Fair Employment Commission, 1990 WL 18228 (9th Cir Feb 2, 1990).

29 109 S Ct at 3051.
require abortions for them? Regulation of abortion and fertility can be a double-edged sword. During the oral argument in *Webster*, Justice O'Connor expressed concern that a state might require abortions at some point in the future if overpopulation were to become a serious problem. In her *Webster* opinion, Justice O'Connor was content to avoid a specific ruling on these issues until the Missouri courts took a position. Neither she nor the plurality Justices seemed concerned about the potential economic inequities of the statutory scheme. As to the sophisticated testing requirements making the cost of abortion prohibitive for low and middle income women, the Justices felt that the cost “would only marginally” increase the cost of an abortion and would not “unduly burden” a woman’s decision to seek an abortion.30

In order fully to understand the economic ramifications of *Webster*, it is important to recognize that the Missouri statute carries the principle of fiscal restriction substantially further than previous restrictions on the use of public funds. Previous Supreme Court opinions have approved restrictions on the use of subsidies such as Medicaid to fund abortions.31 But the Missouri statute prohibits utilization of any public facilities and participation of any public employees in the performance of abortions.32 Public facilities are defined to include “any public institution, public facility, public equipment, or any physical asset owned, leased or controlled by this state or any agency or political subdivisions thereof.”33 The potential for sweeping limitations on the number of facilities that may perform or provide counseling regarding abortion is vast; most private medical facilities receive some state or federal aid through research money, construction support, and even patient and equipment subsidies. The majority of low-income women use public hospitals. The language would also apply to private institutions that lease public land or receive state subsidies, as many private hospitals do, and may also apply to private institutions that use public water and sewage lines. However, the Court refused to decide whether these restrictions might have some unconstitutional applications since no specific applications were challenged.

The impact of reproductive technology on poor women, either as “vessels of reproduction” (“reverse eugenics”?) or through economic limitations on access to reproductive technology, is a persistent theme throughout *Reproductive Laws for the 1990s*. Poor and non-white

30 109 S Ct at 3063.
31 In *Maher v Roe*, 432 US 464 (1977), the Supreme Court upheld a Connecticut welfare regulation under which Medicaid recipients received payments for childbirth but not for nontherapeutic abortions; in *Harris v McCrae*, 448 US 297 (1980), the Court held that Title XIX of the Social Security Act does not obligate a participating state to pay for those medically necessary abortions for which Congress has withheld federal funding.
women will likely bear the greatest burden of increased regulation by the state or by commercial interests. Foremost, of course, are the high costs of reproductive and fertility technologies. But even the routine testing performed during pregnancy is expensive and since many women are un- or under-insured, the tests are often out of their reach. This is especially true if, as feared, the decision in Webster permits states to limit development of fertility or contraceptive technology, or to apply the 

These questions are raised throughout the position papers and commentaries in the book. In “Reproductive Laws, Women of Color, and Low-Income Women,” Laurie Nsiah-Jefferson worries that prenatal screening might be used to revitalize the eugenics movement to erase “bad genes” from the gene pool even if they do not inevitably lead to debilitating disease (p 36). Women are sometimes blatantly and most often subtly coerced into sterilization by welfare officials or well-meaning health personnel (pp 46-47). Poor women and women of color have substantially higher sterilization rates than the population as a whole. Nsiah-Jefferson is also troubled by the possibility that, once embryo transfer technology is perfected, “women of color will run a far greater risk of being recruited as surrogate carriers”; that is, “poor and minority women [may be used] as incubators for the white upper and middle classes” (p 52).

Nsiah-Jefferson’s concern is echoed by Wendy Chavkin, Barbara Katz Rothman, and Rayna Rapp in their “Alternative Modes of Reproduction: Other Views and Questions.” They wonder whether “[in] a class-stratified society . . . it is possible to protect [surrogate] mothers from exploitation” without becoming paternalistic (p 405). They also note, as does Lori Andrews in “Alternative Modes of Reproduction,” that “[t]he costs of reproductive technologies [such as in vitro fertilization] are currently sufficiently high that they are generally only within reach of upper-middle class or wealthier people” (p 393).

34 For example, in vitro fertilization, currently costs from $2000 to $5000 per cycle, and usually several attempts are necessary before conception. “Surrogate” parenting contracts performed through the existing commercial facilities usually run about $25,000. Informal arrangements for artificial insemination can be made, at a lower cost, but these carry risks; to avoid some of them, medical screening of potential donors can cost as much as $2000. Alta Imaging, Inc., Berkeley, CA; University of California, San Francisco School of Medicine, Reproductive Genetics Unit. (In contrast, women who bear children under parenting contracts receive about $10,000, in addition to their medical expenses; this may be a strong incentive to poor women to offer themselves as “vessels” of reproduction, as opponents to “surrogate motherhood” contracts have pointed out. See Lori B. Andrews, The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood, 17 Hastings Center Report 35 (1987).

35 Ultrasound examinations, recommended when the size of the fetus is a cause for concern, when there is concern about a life-threatening ectopic pregnancy, and for late-term assessment of possible fetal distress, cost about $200. Amniocentesis and Chorionic Villus Sampling, both used to determine fetal viability as well as the possible existence of fetal defects, cost about $1000.
IV. CONCLUSION: AUTONOMY AND THE PARAMETERS OF REPRODUCTIVE TECHNOLOGY

Both Webster and the authors of Reproductive Laws for the 1990s run the risk of confusing a conceptual construct of autonomy with an actual or legal construct of self-determination. Neither, for example, makes a clear distinction between autonomy and viability. It is autonomy, not viability, that has long formed the basis for both medical and legal definitions of personhood. A physically viable fetus (whatever that might be) is not necessarily an autonomous person.

The conflict between theoretical frameworks of autonomy and self-determination has particular relevance to the provision of social and medical services in the modern welfare state. The modern welfare state places a high value on personal autonomy and seeks societal protection of threats to autonomy. However, it does not always recognize the interdependent status of mother and fetus. This aspect of the issue has repeatedly been ignored by those on both sides of the abortion controversy.

One way to try to sort out the meaning of autonomy is to look at how the term is used in other contexts. Autonomy addresses the nature of the conflict between rights and needs of sentient beings. Discussions about the rights or needs of disabled or non-autonomous people—children, the elderly, the terminally ill—tend to focus on present or past sentience as an integral aspect of autonomy. Sometimes a person with diminished competence or ability to comprehend can be considered an autonomous being, on the basis of past history; a third party can speak for the formerly autonomous person by utilizing that past history. The term "social autonomy" describes the relationship of the citizen to the state in the context of particular kinds of discretionary decisions involving dependent persons. Under this analysis, every community is a dialogue in which each of the participants is reciprocally aware of the state of consciousness of the other participants.

Usually, in a relationship, we presume at a minimum an equality of resources and a process of exchange. In the case of the mother/fetus relationship the exchange is unequal. A fetus is exclusively dependent on the maternal environment, at least prior to viability, and probably for a significant time thereafter. Autonomy, therefore, is in a direct sense dependent on the maternal environment. Any construction that fails to

---

36 See Michael J. Sandel, Liberalism and the Limits of Justice, (Cambridge U Press, 1982). It is, rather, an attempt to incorporate an ethos of community within the liberal definition of due process. See, for example, Martha Minow, Forward: Justice Engendered, 101 Harv L Rev 10 (1987).


take this into consideration seriously underestimates the absolute powerlessness of a fetus. The only way clearly to delineate a construct of autonomy for a fetus would be to formulate a substitute decision-maker who could adequately represent its perspective. It is hard to see that this role could adequately be fulfilled by anyone but the mother.

Ultimately, autonomy is not a monolithic concept, but rather is a cluster of values associated with self-determination—informed consent, freedom of choice, or personal privacy. If a pre-viability fetus cannot achieve anything approaching a realistic autonomy, this suggests that it is autonomy, not viability, that should form the basis of the "when does life begin" discussion.

Reproductive Laws for the 1990s has undertaken a careful and sensitive consideration of the impact on poor women of the lessened accessibility of both abortion and fertility technology. Its greatest limitation is that of the entire pro-choice and anti-abortion debate, the inability to delineate clearly the relational identity of a woman and her fetus. But the concern that emerges from these chapters is precisely what the Webster plurality ignored, that poor women, disabled women, women of color, and their children, will suffer most the long-term effects of state regulation of reproductive autonomy. Women of means will likely continue to be able to make private arrangements for whatever technology they need even if they must do so in a black or gray market.

In The Handmaid's Tale, a book recently released as a movie, Margaret Atwood portrays a society in which women are segregated into wives and breeders. Breeders are the surrogate mothers for the "wife" class and their husbands, and the society regulates the breeders' lives in a manner reminiscent of Orwell's 1984. The society which Margaret Atwood portrayed in hyperbole has come eerily close to enactment as legal doctrine of the United States Supreme Court. For this reason, Reproductive Laws for the 1990s should receive close attention, and both considered scholarship and concerted activism concerning reproductive issues must take center stage.