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M IS FOR THE MANY THINGS*

CAROL SANGER**

People have gotten quite a few things about mothers and motherhood wrong over the last 700 or so years. Educators, historians, jurists, philosophers, physicians, social workers, and theologians have been telling us what mothers are like: what they need, how they feel, what pleases them, how and how well they think. Mothers didn't love their children in the fifteenth century¹ and loved them too much in the 1950s.² Black mothers felt no pain in childbirth,³ and white mothers felt no pleasure in intercourse.⁴ The obligations of motherhood, physical and social, have

* Howard Johnson, Lyrics, Theodore Morse, Music, *M-O-T-H-E-R (A Word That Means the World to Me)* (1915, renewed 1943).

** Professor of Law, Santa Clara Law School. I am grateful to Stephanie Wildman, Jeremy Waldron, Deborah Rhode, Ed Baker and Barbara Babcock for helping me think this through, to Linda Williams and Nancy Ota for their research help, and to Laura Fry for her editing.

1. PHILIP ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 38-43 (Robert Baldick trans. 1962). Arias argued that during the Middle Ages parental indifference was a response to high infant mortality rates ("people could not allow themselves to become too attached to something that was regarded as a probable loss"). *Id.* at 38.

2. DAVID LEVY, *MATERNAL OVERPROTECTION* (1943). The contributions of Levy and others to the post-war development of "motherhood as pathology" are discussed in BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN* 211-39 (1978).

3. For a history of labor pain management in twentieth-century America (including the "Twilight Sleep"), see MARGARET SANDELOWSKI, *PAIN, PLEASURE, AND AMERICAN CHILDBIRTH* (1984). Even well into this century, a common belief among hospital staff was that "women from certain racial or ethnic groups made more noise but suffered less pain and hence needed less analgesic or anesthesia than women from other groups." RICHARD W. WERTZ & DOROTHY C. WERTZ, *LYING-IN, A HISTORY OF CHILDBIRTH IN AMERICA* 169 (1977). See also CYNTHIA EAGLE RUSSETT, *SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD* 57 (1989) (discussing the intolerance of women and savages to pain); see also JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* at 19 (1985) (discussing expectations about slave women, childbirth, and work).

4. "By the 1860s and 1870s, [medical writers] counseled husbands that frigidity was rooted in women's very nature. Women's only sexual desire, these doctors argued, was reproductive." CAROL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 23 (1985). Scientific assessments of women's pleasure in sex have continued into this century. Once sexual intercourse as a source of women's satisfaction became accepted, psychoanalytic determinations about the appropriate *location* of the satisfaction (vaginal or clitoral) replaced pronouncements about its existence. The connection between sex and motherhood, however, remained: "Psychical unacceptance of the maternal function and defective maternal instinct [are] . . . frequently related to the normal failure in women to establish the erotic function." Psychoanalyst Helen Deutsch *quoted in* B. EHRENREICH & D. ENGLISH, *supra* note 2, at 246.

been used to explain why women should not work, vote,⁵ compete in sports,⁶ take public transportation⁷ or think too hard.⁸

This essay is not an attempt to set the record straight. That massive task is being undertaken by others whose dissatisfactions with established medical, historical, and social facts have led them to uncover a different record with a truer ring. It now appears that, in general, women *did* feel affection for their children and mourned their deaths,⁹ that childbirth *was* painful, and that women's brains are *not* directly connected to their reproductive organs.¹⁰ This reevaluation of knowledge is the product of a deliberate, hard-won and on-going reformation of inquiry, in part the result of women themselves doing, consuming, and guiding research.

5. The anti-suffragism movement drew easily from contemporary theological, biological, and sociological arguments, each proving that women's voting meant the end of the family. AILEEN KRADITOR, *IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, 20 (1971) ("Housewives! You do not need a ballot to clean out your sink spout. A handful of potash and some boiling water is quicker and cheaper. . . . Control of the temper makes a happier home than control of elections. . . ." *Id.* at 24, quoting leaflet entitled "Household Hints.")

Motherhood also played a role in *obtaining* women's suffrage, as advocates shifted from a model of egalitarianism to more essentialist concepts. Isabella Beecher Hooker argued in 1871 that "[m]others for the first time in history are able to assert . . . their right to be a protective and purifying power in the political society into which [their] children are to enter." Quoted in Ellen C. DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836, 851-52 (1987). Motherly virtues were also used to argue for and against other forms of political participation, such as serving on juries. Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L. J. 59 (1986). For a history of the competing uses of the "rhetoric of roles," see DEBORAH L. RHODE, *JUSTICE AND GENDER* 14-24 (1989).

6. HELEN LENSKEYJ, *OUT OF BOUNDS: WOMEN, SPORTS & SEXUALITY* 27-38 (1986). See also KATHLEEN E. MCCRONE, *SPORT AND THE PHYSICAL EMANCIPATION OF ENGLISH WOMEN 1870-1914*, 192-215 (1988). See generally Ch. Two, "Maintaining Motherhood" ("overdeveloped arms and legs robbed the reproductive system of vital force," *id.* at 27); participation in sports threatened motherhood in two ways; it was unhealthy (leading to "womb irritation") and unfeminine (leading to spinsterhood).

7. VIRGINIA SCHARFF, *TAKING THE WHEEL: WOMEN AND THE COMING OF THE MOTOR AGE* 1-6 (1991).

8. "[O]ver-brainwork . . . affects that part of [woman] which is sacred to heredity." Rita Rhodes, *Women, Motherhood, and Infertility: The Social and Historical Context* 6 J. SOC. WORK & HUM. SEXUALITY 5, 10 (1987) (quoting psychologist G. Stanley Hall in the 1903 address to the National Education Association.). Hall and other influential 19th-century specialists in evolution, psychology and medicine supported and advanced the idea of a closed economy of bodily functions. The use of one body part, such as the brain, drained vitality from other parts, such as the uterus. Thus Hall explained that "[the bachelor woman] has taken up and utilized in her own life all that was meant for her descendants, and has so overdrawn her account with heredity that . . . she is also completely sterile." C. RUSSETT, *supra* note 3, at 120; see generally Ch. 4, "The Machinery of the Body," *id.* at 104.

9. LINDA POLLACK, *FORGOTTEN CHILDREN* 51 (1983); Patricia Crawford, *'The Sucking Child': Adult Attitudes to Child Care in the First Year of Life in Seventeenth Century England*, 1 CONTINUITY AND CHANGE, 23, 24-35 (1986).

10. B. EHRENREICH & D. ENGLISH, *supra* note 2, at 120-21.

Women in academic and public life have begun to come into power in Carolyn Heilbrun's sense of the word: "the ability to take one's place in whatever discourse is essential to action and the right to have one's part matter."¹¹ The "well-known facts" that everyone knows have now been thrown into question, and the questions themselves are now the focus of examination. Why were certain issues raised and others not; why were particular avenues of inquiry pursued and others derided? Like revisionists in other fields,¹² feminist scholars have had to rethink the basic terms of inquiry, as well as reconsider what was made of the answers that had been given. There is now keener attention to the questions asked,¹³ the sources considered,¹⁴ and the analyses used.¹⁵

This is all to the good. But while scholarship about women and their lives in general is more focused and more critical than in the past, we may still be in danger of making mistakes about motherhood. In this essay I want to discuss why that is so, what the nature of those mistakes is likely to be, and why it matters to get claims about mothers and motherhood right.

My basic argument is this: Motherhood is a central but confusing icon within our social structure. It is at once dominating and dominated, much as mothers are both revered and regulated. The reverence and regulation are not so much in conflict as in league. The rules remind women of how to behave in order to stay revered. This reverence is something

11. CAROLYN HEILBRUN, *WRITING A WOMAN'S LIFE* 18 (1988).

12. Cf. C. VANN WOODWARD, *THINKING BACK: THE PERILS OF WRITING HISTORY* (1986). Woodward became an historian in the early 1930s when a "prevailing and all but universally accepted consensus" about southern history held firm. He explains that "aspiring revisionists were warned . . . against any 'departure from the well-known facts.' The well-known facts constituted the perfect justification for the discrediting of Reconstruction. . . ." *Id.* at 24.

13. Katherine A. Bartlett, *Feminist Methodologies*, 103 HARV. L. REV. 829, 834 (1990). Striking examples of the failure to ask the women's question are found in the area of medical research and health care where treatment for women has been based on male models. See Council on Ethical and Judicial Affairs, *Gender Differences in Clinical Decision Making*, 266 JAMA 559-62 (1991) (reviewing sex bias in research, diagnosis and treatment). Attention to the exclusion of women as research subjects from studies on such conditions as heart disease, aging, and breast cancer led to the formation of an Office of Research on Women's Health at the National Institutes of Health. Olympia Snow, *Women's Health: A Focus for the 1990s*, 65 ACAD. MED. 684-85 (1990).

14. Martha Minow continues to urge and engage in the practice of looking for stories omitted from legal texts. See Martha Minow, *Forming Underneath Everything that Grows: Towards A History of Family Law*, 1985 WIS. L. REV. 819, 820; and Martha Minow, *Identities*, 3 YALE J. L. & HUM. 97 (1990).

15. One issue now under investigation is whether the sex of the knower is epistemologically significant. This debate is taking place with regard to scientific knowledge; see the discussion in Clifford Geertz, *A Lab of One's Own*, N.Y. REV. OF BOOKS, November 8, 1990, at 19-23; and as a broader philosophical inquiry, see LORRAINE CODE, *WHAT CAN SHE KNOW* (1991).

more than a fan club for mothers. It matters in such practical and concrete ways as keeping one's children, having credibility in court, getting promoted at work, and so on.

The connection between maternal reverence and reward is possible because of an understanding within American culture that there is a way that mothers are supposed to be. Bearing or raising children is only a technical prerequisite to that special status, not its definition. Instead, much thinking about mothers starts from an adherence to an ideal model of motherhood which, even adjusted for the late twentieth century, few mothers match. The ideal model is used to determine what conduct by mothers is in some official sense "motherly;" that model then becomes the essence of what mothers are about, an unstated reference point in the formation of public policy and the application of legal rules. For most of this century, the dominant model of motherhood has meant something closer to "housewife"—a married, nonworking, inherently selfless, largely nonsexual, white woman with children.¹⁶

But (some) things change. Mothers are now too varied to satisfy the model and too alert to want to. Many women with children now work. Many mothers are unmarried. Some are older than one thinks of mothers as being, others are younger. Current snapshots of "Mother"—without a husband, behind a desk, with braces, in jail—seem oddly captioned. These images raise questions about model motherhood. Whose model is it? How is it constructed and sustained? What are its main rivals? That is, what alternative models of motherhood are sidelined or discredited or obscured by the hegemony of this one?

For what motherhood means—as an icon, an institution, a role or a status—is no longer certain. Mothers themselves are now startlingly different and more varied than the institution of motherhood—which once would have offered them immediate complimentary membership—has been able to acknowledge. Even a simple question like who *is* a mother no longer has a simple answer, now that genetic contribution, gestation, and stroller pushing may each be provided by a different woman. Different kinds of mothers and their supporters now claim not only membership in the institution of modern motherhood but participatory drafting

16. For the origins of the transcendent mother, see Ruth H. Bloch, *American Feminine Ideals in Transition: The Rise of the Moral Mother, 1785-1815*, 4 FEM. STUD. 101 (1978). As Eileen Boris has observed, by the late 19th century African-American women's organizations and white women's organizations invoked a discourse that "relied on the same central image—the altruistic, protective, and nurturing mother. . . . [Yet w]ithin the word 'mother,' as used by many reformers and makers of public policy, lurked the referent 'white.'" Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political"*, 2 YALE J. L. & FEMINISM 25, 26-27 (1989).

rights in its terms. Motherhood has become what philosophers call an "essentially contested concept,"¹⁷ as competing claims about its nature, essence, and obligations are urged and defended.

The vigor of this contest is to be expected, for much rests on who "counts" as a mother and who does not. An array of interests and concerns about personal worth, social status, legal entitlements, public morality, public costs, children's welfare, and family preservation are now at stake. To receive the good-housekeeping stamp of approval for one's relationship with a child secures privileges, respect, and support (such as it exists) from the rest of the community. On the other side, the tangible and the symbolic deprivations are equally powerful. Excluding certain women with children from the status of mother or regarding them as marginal or deviant cases serves to deny them some or all of the actual and symbolic power that maternity sometimes confers.¹⁸

My aim here is not to resolve all this. I want instead to focus on the continuing relationship between what we think we know about mothers and the regulation of their lives. There is a lot of regulation going around lately—what mothers drink, where they work, who they live with, what they live on. These issues are stubbornly connected to underlying notions, some entrenched and some uprooted, about what the essential characteristics of mothers are taken to be. Getting those characteristics right—accurately depicting what mothers do, understanding why mothers make particular choices or, better still, getting a clear sense of whether there *are* such essential characteristics—is central to any prospect that the regulation of women's behavior will comprehend and respect the complexity of their lives.

My topic then is both the content and uses of knowledge, specifically knowledge about mothers. I begin by looking at the issue of motherhood within legal scholarship. The essay then discusses the problem of maternal essentialism. I am content with Diana Fuss' explanation of the term essentialism—"most commonly understood as a belief in the real, true, essence of things, the invariable and fixed properties which define the "whatness" of a given entity."¹⁹ By "maternal essentialism" I mean the belief that the real, true "whatness" of women is motherhood. The point

17. W. B. Gallie, *Essentially Contested Concepts* in PHILOSOPHY AND THE HISTORICAL UNDERSTANDING 157-91 (1964).

18. Kenneth Karst suggests a masculine version of this. The exclusion of certain categories of men (African-Americans and homosexuals) from military service intentionally deprived them of the cultural symbol of masculinity. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 501 (1991).

19. DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* xi (1989).

is nicely conveyed by the following index entry: "Motherhood, as only justification of feminine existence."²⁰

The final section of the paper tests the concept of maternal essentialism within the context of one particular set of facts: What do we know about why women want to have children? I explore that question by comparing two different groups of women who choose to have children: HIV-positive women and infertile women. The aim is not to come up with comprehensive policy recommendations for either group. Instead, the point of the comparison is to suggest how hard we have to think about what we know, what we think we know, and what we ought to know about women's lives so that when specific policies for particular mothers *are* under construction, we will keep more firmly in mind how essentially complicated facts about women, mothers, and feminine existence are.

I. MOTHERHOOD THE SUBJECT

Motherhood is at present and at last, academically fashionable. With few exceptions such as Adrienne Rich's *Of Woman Born* in 1976, motherhood's neglect in curricula and scholarship mirrored its uneasy reception by feminists in general. The identification of motherhood as a source of subordination led early feminists to direct their energies toward creating social structures less encumbered by maternal obligation. Thus, feminist politics aimed at such reforms as increasing access to abortion, child care, property, education, and jobs. Distancing women from motherhood seemed the key to a better life. More recently, however, the problems of mothers themselves (or at least the problems of some mothers) have been included within feminist political agenda: mothers in the workplace,²¹ mothers seeking child custody and support,²² mothers and health care.²³

20. BRAM DIJKSTRA, *IDOLS OF PERVERSITY: FANTASIES OF FEMININE EVIL IN FIN-DE-SIECLE CULTURE* 443 (1986).

21. See Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1180-82 (1991). Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750 (1990).

22. See Martha L. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L. J. 459 (1990).

23. L. Rachel Eisenstein, *Prenatal Healthcare: Today's Solution to the Future's Loss*, 18 FLA. ST. U. L. REV. 467 (1991); Maggi Machala & Margaret W. Miner, *Piecing Together the Crazy Quilt of Prenatal Care*, 106 PUB. HEALTH REP. 353 (1991).

Within the academy consideration of motherhood was avoided for many of the same reasons that made women's issues in general disfavored topics of research: too soft, not important, no funding, few colleagues, and who cares. The study of motherhood may have been a particularly suspicious choice for scholarship, risking confirmation in the eyes of colleagues who knew all along what women, even professional women, were really about. In areas where mothers *were* studied, like psychology, the undertaking was tinged with an assumption of pathology. The inquiry was essentially to discover why mothers made everyone crazy.²⁴ This was not a particularly unfeminist position. As Betty Friedan explained²⁵ and Anne Sexton demonstrated,²⁶ motherhood made mothers crazy too.

Similar constraints were at work in legal scholarship. As in other fields, writing on women's topics was a precarious career decision.²⁷ And too, there is no reason why all women, all feminists, or all mothers should want to write about motherhood. But neither personal nor professional preferences, even if politic, seem sufficient to explain the lack of attention given to motherhood, especially by feminist legal theorists. An important example is Catharine MacKinnon's omission of mothering

24. Paula Caplan & Ian Hall-McCorquodale, *Mother-Blaming in Major Clinical Journals*, 55 AM. J. OF ORTHOPSYCHIATRY 345-53 (1985). The practice goes back to the early days of psychology. In 1928, a psychologist dedicated his book on child development "to the first mother who brings up a happy child." JOHN BROADUS WATSON, *PSYCHOLOGICAL CARE OF INFANT AND CHILD* (1928), cited in Catherine McBride-Chang, Carol Nagy Jacklin & Chandra Reynolds, *Mother-Blaming, Psychology and The Law*, 1 S. CAL. REV. L. & WOMEN'S STUD. 69 (1992). Nancy Chodorow and Susan Contratto argue that much contemporary feminist writing continues to focus on the harm that mothers do to their children. Their psychoanalytic explanation is that:

[d]rawing from and reflecting a cultural ideology and infantile sense of infantile need and maternal responsibility for the outcomes of child-rearing, feminists begin by identifying with the child and blaming the mother, or by expecting her to be more than perfect.

See Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 54, 67 (Barrie Thorne & Marilyn Yalom eds. 1982).

25. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963). For a social history of the domestic life of housewives that led up to a book like *THE FEMININE MYSTIQUE*, see the discussion in GLENNA MATTHEWS, *JUST A HOUSEWIFE: THE RISE AND FALL OF DOMESTICITY IN AMERICA* (1987) ("Before [Friedan] published her book, women were most often blamed personally for their unhappiness. Afterwards, there began to be an appreciation that social arrangements could receive some of the blame.") *Id.* at 219.

26. DIANNE W. MIDDLEBROOK, *ANNE SEXTON: A BIOGRAPHY* (1991).

27. Deborah Rhode, *The "No-Problem" Problem: Feminist Challenges & Cultural Change*, 100 YALE L.J. 1731, 1733 (1991).

from her many powerful descriptions and analyses of women's subordination.²⁸ Child rearing takes its place among the other services MacKinnon identifies that women perform for men,²⁹ and children, while unmentioned, are certainly the implicit product of the denial of reproductive control that MacKinnon forcefully addresses. But as Stephanie Wildman has pointed out, the absence of mother's lives with children in MacKinnon's description of "women's concrete reality"³⁰ "renders invisible and irrelevant to her feminism unmodified this reality of most women's lives."³¹

I want to suggest that feminism itself, inspired *and* constrained by its commitment to improving the lives of women, is in part responsible for motherhood's delayed debut in feminist legal scholarship. The two explanations I offer look to the influence of reformist strategies and to feminism's understandable insistence on working through issues of sex first. Like all theoretical disciplines inspired by the doctrine of praxis, feminism has been alert to the implicit as well as explicit relationships

28. Susan Okin makes a similar point about the absence of meaningful consideration of children and child care in the work of feminist political theorist Carol Pateman. Susan Okin, *Feminism, the Individual, and Contract Theory*, 100 ETHICS 658, 669 (1990) (reviewing CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988)). Pateman presents a lucid and compelling account of the status of a *wife* in the patriarchal household, dissolving the impression that it has more in common with contract than with slavery. See C. PATEMAN, *id.*, 116-88. But she says little about the role of childcare in that servitude and nothing about the predicament of a woman for whom bearing and nurturing a child—without servitude—might seem an attractive option. There is however, greater attention to motherhood in Pateman's most recent collection of essays, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* 198-99 (1989).

29. CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 10, 246 (1989).

30. *Id.* at 244.

31. Stephanie M. Wildman, *Review Essay: The Power of Women*, 2 YALE J. L. & FEMINISM 435, 452 (reviewing CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1990)). Wildman points out that respect for feminist methodology requires attention to the experience of mothering—women talking about their lives with children. *Id.* at 450. My observations are that women *sometimes* talk about their lives with children. At other times, at least for women professionals, there is a hesitation to reveal how much of one's life mothering takes up. To be sure, it is sometimes just boring to listen to people go on about their children, so the absence of "children's talk" may signal social courtesy and not just fear of sounding swamped or untheoretical.

between theories, goals, and practical consequences.³² Certainly a sensitivity to political consequences has contributed to a circumscribed consideration of motherhood within legal scholarship.³³ Consider, for example, two topics clearly related to motherhood that *have* been high on the feminist agenda: abortion and child custody. Because the law in these areas has been (and remains) actively contested, scholarship regarding both abortion and custody has had significant strategic dimensions that have necessarily obscured, or at least delayed, fuller consideration of the meaning of the work of motherhood.

Abortion first. The legal theories that secured the right to abortion developed within a framework of privacy that focused on a woman's right to control her trimestered body. That analysis necessarily diverted attention from a woman's interest in controlling her post-pregnant, child-now-out-of-body life. As abortion became a reproductive rather than a maternal issue, the very idea of motherhood became antithetical to a pro-choice position instead of its essence.³⁴ But deciding whether or not to have an abortion is making a decision exactly about what place motherhood will occupy in one's life. The decision necessarily encompasses hard thinking on such questions as when one should become a mother, how often, with whom, and what obligations already exist to other children, to a partner, or to oneself.

Ceding motherhood as an experience, a symbol, and a virtue to the anti-abortion camp³⁵ has had consequences for how we explore (or do

32. See Margaret J. Radin, *The Pragmatist and the Feminist*, 65 S. CAL. L. REV. 1699 (1990). Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 833-36 (1989) (proposing a restructured wage labor system which takes real parenting into account as opposed to redescribing the system in theoretically attractive gender-neutral terms).

33. The discipline of women's history "is also characterized by extraordinary tensions: between practical politics and academic scholarship; between received disciplinary standards and interdisciplinary influences; between history's theoretical stance and feminism's need for theory." JOAN SCOTT, *GENDER AND THE POLITICS OF HISTORY* 17 (1988).

34. The Supreme Court has contributed to this result. As Reva Siegel argues, the logic of *Roe v. Wade* "left women who sought to defend *Roe* in an untenable spot: To defend *Roe*, they disparaged the significance of unborn life, when they in fact objected to the 'interest in potential life' as a regulatory interest in controlling *their* bodies and lives." Reva Siegel, *Reasoning from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 348-49 (1992). Abortion was not always seen as an "unmotherly" act, as the 1962 case of Sherri Finkbine, Romper Room hostess and mother of four, made clear. Finkbine, who had taken the drug thalidomide, sought an abortion. She was unable to obtain one in the United States, even though her case for an abortion "clearly did not attack the key social symbols of 'family' or 'motherhood.'" CELESTE M. CONDIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 28-33 (1990).

35. For a discussion of how the political right has monopolized the vocabulary of the family, see Rushworth M. Kidder, *Marriage in America: Staking Out High Ground in 'Pro Family' Debate*, Christian Sci. Monitor, Nov. 26, 1985 at 25. One mechanism has been to portray the fetus through

not explore) other issues relating to mothers. For example, Maureen Sweeney argues that oversimplification of the abortion issue on a theoretical level has led to a general silence within the feminist community regarding the issue of adoption, particularly the concerns of birth mothers.³⁶ She suggests that the women's movement has too firmly adopted the dichotomy of adoption as the alternative to abortion so that favoring adoption is too quickly equated with opposing abortion. Much the same can be said about the hostile attitude of many feminists toward infertile women whose desires for children are often viewed as no more than "evidence for women's oppressive socialization to become mothers, and their continued subservience to institutionalized medicine. . . ."³⁷ The fear here seems to be that by recognizing the desire to be a mother, one may inadvertently strengthen or validate arguments that oppose abortion and women's claims to control their fertility.³⁸

Custody is a second issue where doctrinal and political priorities have diverted attention from thinking more broadly about the functions of motherhood. The principal modern reform in custody law—the shift from the tender years maternal presumption to the gender neutral "best interests of the child" test—occurred in the early 1970s when "equality" dominated the feminist stage. In those days, favoring the tender years presumption—agreeing that mothers should automatically receive custody of their children—smacked of dowdy maternalism and role inequality. "Difference" as a competing basis for reform had not yet begun to act up. As a result, the theories of custody became conceptually estranged from the business of mothering.

visual imagery as a free standing (or free floating) family member, unprotected by and unconnected to its mother; see discussion of the anti-abortion film *The Silent Scream*, in Rosalind Petchesky, *Foetal Images: The Power of Visual Culture in the Politics of Reproduction*, in *REPRODUCTIVE TECHNOLOGIES* 57-64 (Michelle Stanworth ed., 1987).

36. Maureen Sweeney, *Between Sorrow and Happy Endings: A New Paradigm of Adoption*, 2 *YALE J. L. & FEMINISM* 329, 335 (1990).

37. Margaret J. Sandelowski, *Failures of Volition: Female Agency and Infertility in Historical Perspective*, 15 *SIGNS* 475, 498 (1990). Barbara Rothman argues that infertility treatment incorporates much that is bad for women within the American medical establishment:

it is available only to the well-to-do, it is male dominated, and it is offered in a way that is totally divorced from the context of one's life. And worse, it doesn't work. In vitro fertilization (IVF) fails 90 percent of the women who try it.

BARBARA K. ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* 148 (1989).

38. Dorothy Roberts points out that another consequence of the feminist emphasis on abortion has been a failure to incorporate the reproductive needs of poor women of color, such things as "the right to bear healthy children." Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419, 1461-62 n.214 (1991).

But custody law has evolved. Women observed and experienced the economically harsh consequences of equality, or what Martha Fineman identifies as the "illusion of inequality,"³⁹ in the broader context of no-fault divorce and the American labor market.⁴⁰ Different and more sophisticated notions of common sense and fairness now direct many women toward a primary caretaker rule. This standard favors women not because of their inherently sweeter natures, but because mothers tend to do the daily tasks that are the stuff of parenting.⁴¹ Consideration of custody now starts not from a preference for gender equality with custody rules falling in behind, but from an assessment of what having custody of a child means—in many ways a description of mothering—and the legal implications that follow from that.⁴²

Legal and political strategies offer one explanation of feminism's obscured view of motherhood. Another reason motherhood has been what I would describe as a "second stage feminist issue" is that in uncovering law's complicity with patriarchy, before one gets to motherhood one stumbles upon sex. This is the necessary beginning. Sexual intercourse has preceded motherhood in almost every individual case. But the fact of motherhood itself immediately reinforces the conditions that have made oppression through sex possible. Gerda Lerner and others argue that because women were mothers, they have always been more vulnerable to sexual subordination and thus to other forms of domestic and economic oppression.⁴³ The assignment of child rearing to women is at the core of the sexual division of labor. Feminist theorists recognize this relationship, but until recently they have been content to describe only the function of mothering within the patriarchal scheme, rather than to explore the job itself.⁴⁴

39. MARTHA FINEMAN, *THE ILLUSION OF EQUALITY* 26-33 (1991) (urging a transition within feminism from the ideal of equality to its abdication).

40. As Victor Fuchs points out, divorce is not the only cause of women's lesser economic status. See generally VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 1988), especially Ch. Three, "The More Things Change . . ." 32-52 (describing consequences for women of occupational segregation, hours of paid work, and sex-based wage gaps). But while divorce may not be the central explanation, having children is: "the biggest source of women's economic disadvantage [is] their greater desire for and concern about children." *Id.* at 140, 60-64.

41. *Garska v. McCoy*, 167 W. Va. 59, 278 S.E. 2d 357 (1981).

42. For a history and critique of custody law, see Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

43. GERDA LERNER, *THE CREATION OF PATRIARCHY* 38-53 (1986). See also Judith Grant, *Intimate Work: The Regulation of Female Sexuality and Reproduction*, 1 S. CAL. REV. L. & WOMEN'S STUD. 225, (1992) (examining patriarchy and the control of women's sexuality).

44. Another reason the experience of mothering may have been downplayed within legal discourse is because "until child rearing encroaches upon the male privilege of ownership or control," law isn't so very interested. Wildman, *supra* note 31, at 450. But not taking a topic seriously until

Another explanation for focusing the investigation on sex first is that rape, pornography, and sexual harassment are vivid issues that could not wait. In contrast to the immediacy of sexual violence, the harms of motherhood are quieter—quodidian rather than dramatic. The harms of motherhood are also less universally accepted among women themselves. We properly reject rape out of hand, but motherhood is more complicated because of an ambivalence towards the task and the idea. For some women the ambivalence is a kind of embarrassment; the decision to become a mother, especially if happily taken, seems to unravel or compromise whatever accommodation between the personal and political they had worked out.

Of course, for many women, the discovery of motherhood as a source of complicated pleasures is nothing new. As bell hooks has insisted, deciding where oppression lies has long depended on who was calling the shots:

Some white middle class, college-educated women argued that motherhood was a serious obstacle to women's liberation. . . . Had black women voiced their views on motherhood, it would not have been named a serious obstacle to our freedom as women. Racism, availability of jobs, lack of skills or education and a number of other issues would have been at the top of the list—but not motherhood.⁴⁵

Hooks argues that motherhood has become politically important only because enough white women have finally entered an inhospitable work place and are recognizing, as black women who have always worked outside their homes have long known, that homelife can sometimes provide contrasting satisfactions.⁴⁶

As a result of all these factors, current scholarship now recognizes that motherhood is here to stay, "as experience or as subject for research, now as controversial as it once was bland."⁴⁷ Some of the controversy is familiar. Increased attention to motherhood, even when supportive of the institution, has awakened old claims about its role in the oppression of women. New reproductive technologies have provided additional fuel for the fire as there are now more routes to motherhood, complete with

law does is playing by boys' rules, and, as Wildman points out, feminists have rejected that approach in areas like pornography and sexual harassment. Nervousness about naming, let alone claiming, the experiences of motherhood may have played a part here.

45. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 133 (1984).

46. *Id.* at 134.

47. Editor's Note, *On the Reproduction of Mothering: A Methodological Debate*, 6 *SIGNS* 482 (1981).

their own technologically enhanced potential for oppression.⁴⁸ At the same time, revised and more positive feminist views about motherhood's virtues now find greater acceptance.⁴⁹ Michelle Stanworth describes the tension:

On the one hand, maternal practices are increasingly acknowledged as a source of alternative values. . . . On the other hand, the material and social disadvantages that follow from childcare; the cultural associations with birth that condemn women to an inferior place in symbolic systems; the psychological effects on future adults of asymmetrical mothercare: all suggests that motherhood locks women into structures of dependency and powerlessness.⁵⁰

The inclusion and reconsideration of motherhood in legal scholarship is due in part to work in other disciplines that has been too rich and too related to ignore. Lenore Weitzman's observations about the economic consequences of divorce for mothers,⁵¹ Nancy Chodorow's exploration of why women mother,⁵² and Susan Okin's insistence on the interrelation between family life and social justice⁵³ not only call for but compel consideration of law's complicity in existing arrangements. The willingness of legal scholars at last to "turn outward"⁵⁴ may be a case of not wanting to be left behind.

Recent legal attention to motherhood also results from women and mothers acting in ways that have provoked legal responses. Women contract to become mothers; pregnant women are arrested for abuse to fetuses; women aren't hired because they might become mothers and are

48. See note 180-87 and accompanying text, *infra*. Stanworth suggests that conflicts among feminists about motherhood play out more safely on technological turf: "The fears generated by conceptive technologies may be a way not only for women to articulate perceived threats to motherhood, but also to keep those threats at bay, by projecting them onto one particular group of women (the infertile) who aren't 'really' women anyway." Michelle Stanworth, *Birth Pangs*, in *CONFLICTS IN FEMINISM* 296-97 (Marianne Hirsch & Evelyn Keller eds., 1990).

49. See e.g., Sarah Ruddick, *Maternal Thinking* in *RETHINKING THE FAMILY*, *supra* note 24, at 76 (1982).

50. M. Stanworth, *supra* note 48.

51. LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). Although Weitzman's findings have been criticized as overstating both the degree of poverty into which women fall and the role of no-fault in bringing about that reduced economic status, see e.g., Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 75 (Stephen D. Sugarman & Herma Hill Kay eds., 1990), Weitzman's central point holds: women (and children) are significantly less well off after divorce.

52. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

53. SUSAN OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989).

54. Martha Minow, *Law Turning Outward*, 73 *TELOS* 79 (1987).

fired because they have. In our society these activities have become legal matters, litigated, legislated, and taught in law schools, if sometimes under fancier aliases such as reproductive technologies, workplace safety, or lawyering skills.

Legal scholars are now reviewing how law conceptualizes mothers—historically,⁵⁵ comparatively,⁵⁶ and functionally⁵⁷—in an effort to understand what social and economic values those conceptualizations represent and the uses to which they may be put. The starting point for much of this work is in the observed or self-described experiences of mothers. For example, legal biography is increasingly illuminated by consideration of the ways that women lawyers,⁵⁸ law professors, and law reformers⁵⁹ have taken account of their own motherhood, personally and strategically.

My own work on mothers who choose to separate from their children is another example.⁶⁰ That project explores the ways in which law regards one particular aspect of mothering—its rejection, as seen in decisions by mothers to part from their children. Such decisions are of great interest to the law and are regulated accordingly. Some regulations prohibit decisions to separate (the case of surrogacy); others monitor them (adoptions); and still others require separation (the case of workfare). The differences among these regulations tell us something about official expectations regarding maternal duties, about the regard in which different mothers are held, and about where and under what circumstances deviations from maternal norms are permitted or required.

55. Martha Chamallas with Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); Hendrik Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness*, in *LAW IN EVERYDAY LIFE* (Austin Sarat ed., forthcoming).

56. MARY ANNE GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Taimie Bryant, *OYA-KO Shinju: Death at the Center of the Heart*, 8 UCLA PAC. BASIN L.J. 1 (1990).

57. Polikoff, *supra* note 22, at 274.

58. Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L. J. 849 (1991). Foltz, the first woman to graduate from law school in California (and inventor of the office of public defender) was exceptional in that she already had five children before she became a lawyer. It was generally thought that "lady lawyers" (like all other professional woman) would give up family for career. See Virginia G. Drachman, *Women Lawyers and the Quest for Professional Identity in Late Nineteenth-Century America*, 88 MICH. L. REV. 2414, 2433-37 (1990) (discussing marital patterns among Michigan's early women law graduates; those who married and stayed "in practice" tended to assist in their husbands' law offices).

59. Elizabeth B. Clark, *Self-Ownership and the Political Theory of Elizabeth Cady Stanton*, 21 CONN. L. REV. 905 (1989).

60. Carol Sanger, *Self and Separation: Legal and Literary Responses to Maternal Decisions to Separate from Children* (unpublished manuscript on file with author).

But the task here is something more than a cataloguing of maternal experiences. We are trying to understand both the existing and the desirable relationship between the law and women who are mothers. An immediate complexity revealed by the undertaking is the question of when a woman's status as a mother—for women are rarely *only* mothers—should signify legally. Within our culture motherhood is taken as an all-embracing status affecting almost the whole of mothers' lives, not just the parts devoted to their children. When does it matter that an accident victim,⁶¹ a welfare claimant,⁶² a job applicant,⁶³ a battered wife,⁶⁴ a prospective juror,⁶⁵ an unsentenced defendant,⁶⁶ or a prisoner⁶⁷ is also a mother? Under what circumstances do concerns about motherhood, either in individual cases or as a social category, contribute to or control a legal or policy decision? With whom does authority reside to decide what role mothering will take? And what model of motherhood will be invoked in making these decisions?

These questions are all ways of asking where motherhood fits in the context of women's lives and in law and legal culture. Part of the work of feminist legal scholars is to develop analyses that locate sensible boundaries and transit points between women's multiple and reconfiguring identities. Consider a mother who is someone's lover, a law student, and a reservist in the National Guard. Should a custody decision be

61. See Chamallas, *supra* note 55, at 814.

62. See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (describing how the representation of a welfare mother by her lawyer conflicted with the self-representation by the client herself). The Notes are not explicitly billed as a motherhood case. In explaining the importance to Mrs. G. of using her welfare check for the "unnecessary" Sunday shoes, White focuses on the central role of religion and the Black Church within Mrs. G.'s community. *Id.* at 48-49. But I have always been struck by the fact that she bought the shoes for her *daughters*, a mother's particular pride, especially in the setting of church.

63. See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, *UAW v. Johnson Controls Inc.*, 111 S. Ct. 1196 (1991).

64. See Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

65. See Weisbrod, *supra* note 5.

66. See Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 FED. SENT. R. 194 (1990) (discussing ways U. S. Sentencing Commission took parental responsibilities into consideration when developing the Sentencing Reform Act of 1984). Bush also notes that the Model Penal Code and state statutes authorize judges to consider the presence of children as a factor weighing against incarceration. On the other hand, being a mother can also land a woman in jail. *Cf.* Roberts, *supra* note 38, at 1431 (discussing protective incarceration of pregnant drug addicts); MINN. STAT. § 626.55 (West Supp. 1992).

67. See Phyllis Jo Baunach, *You Can't Be a Mother and Be in Prison . . . Can You? Impacts of the Mother-Child Separation*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN: WOMEN OFFENDERS, VICTIMS, WORKERS* 155 (Barbara R. Price & Natalie J. Sokoloff eds. 1982).

influenced by the fact that she has an intimate companion,⁶⁸ studies law,⁶⁹ or may be called to active service?⁷⁰ Should her law school or the legal profession or the armed forces take account of her status as a mother?⁷¹ When should a woman's maternal identity prevail over the many other identities she holds simultaneously?

The issue is not easy. Identification as a mother for one purpose risks permanence or overuse of the identity for other purposes. One approach is to follow Dean Herma Kay's sensible description of pregnancy as episodic:⁷² a condition that is legally relevant when it is physically relevant. The technique is a bit harder with motherhood than with pregnancy. A woman with children is always a mother; the status does not physically come and go. Nevertheless, we have no trouble separating the parental status of fathers from their other roles. Thus the task with regard to women is not impossible but only less familiar. We must simply and repeatedly ask in each instance whether it is relevant that the lover/student/soldier is a mother?

The situation is all the more complicated because motherhood is not only one among a woman's many statuses, it is a relational status as well. That is, every mother is *somebody's* mother and her relationship with that person may also be multi-faceted. Her child may at different times during her life be her darling or her assailant, her landlord or her tenant, her debtor or her source of support, her greatest comfort or her endless concern. How crucial to law are the changing natures of these maternal relationships? Motherhood is also often relational with respect to another adult, as many mothers have husbands or partners. To the

68. See *Jarrett v. Jarrett*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979).

69. See *In re Marriage of Tresnak*, 210 Minn. 12, 297 N.W.2d. 109 (1980) (reversing lower court holding awarding custody to father. The lower court stated that "although [attending law school] is commendable indeed insofar as [the mother's] ambition for a career is concerned . . . it is not necessarily for the best interest and welfare of her minor children." 297 N.W.2d at 111). Mothers who were music teachers and H.&R. Block regional managers also lost custody on account of their jobs: *Gulyas v. Gulyas*, 75 Mich. App. 138, 254 N.W.2d 818 (1977); *Masek v. Masek*, 89 S.D. 62, 228 N.W.2d 334 (1975).

70. See Tracy Schroth, *Dad Wins Child Custody After Army Mom Ships Out*, N. J. L. J., Thursday, August 22, 1991, at 3, col. 1. The husband obtained an ex parte order granting him custody on grounds that his wife had, by virtue of her military posting to Germany, abandoned the children. The children were living with her mother at the time the order was obtained. The order was in clear violation of the Soldiers' and Sailors' Civil Relief Act and was later overturned. *Id.*

71. Some schools are beginning to address the problems faced by students who are single parents, especially women on welfare, Sally Johnson, *Helping Single Parents Find Success in College*, N. Y. Times, August 28, 1991 B. 19, col 1.

72. Herma Hill Kay, *Equality and Difference: A Perspective on the Case of Pregnancy*, 1 BERKELEY WOMEN'S LAW J. 1, 21 (1985).

extent that spousal relationships encompass legal and personal obligations, they too complicate consideration of motherhood. What, for example, is the appropriate hierarchy of loyalties—legally, personally, culturally—for a woman who puts her marital status and relationship above her maternal one?⁷³

The task for scholars is the harder for these contradictory demands. It requires an acknowledgment and a full description of the substantial room that motherhood takes up in women's lives. But it also requires that motherhood, despite its capacity to overwhelm, not be mistaken for the whole show. At the very time that scholarship becomes more located in the experiences of mothers, mothers should not be reduced to only those experiences. As the next section makes clear, such attempts at distilling all women into mothers and all mothers into good ones are bound to be unreliable.

II. MATERNAL ESSENTIALISM

"Motherhood" is no more successful or safe an essentialist concept than "woman," a term now shaken up, if not straightened out, by scholars for whom the generic gendered "we" was unsatisfying, inauthentic, and unnecessary. The particular folly of maternal essentialism is highlighted by Patricia Hill Collins' description of the varied meanings of motherhood for women within the Black community. "Some women view motherhood as a truly burdensome condition that stifles their creativity, exploits their labor, and makes them partners in their own oppression. Others see motherhood as providing a base for self-actualization, status in the Black community, and a catalyst for social activism."⁷⁴

Like "women," "mothers" too has an extensive and diverse membership list. Attempts to organize the members sometimes follow the broad and familiar adjectives signifying race, class, or sexual orientation that are used to acknowledge diversity among women in general: Hispanic mothers, middle-class mothers, lesbian mothers. Some adjectives

73. Hartog provides a 19th-century example of this hierarchy of relationships. See Hartog, *supra* note 53. Hartog describes how Bailey's primary conception of herself as a wife, informed and sustained by her religious convictions, prevented her (for a time) from acting upon the knowledge of her husband's incest with their daughter.

74. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 118 (1991). For discussions of the problem of essentialism in general, see ELIZABETH SPELMAN, *INESSENTIAL WOMAN* 80-159 (1988). Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150-160 (1989). Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

take on special connotation when attached to "mother." Think, for example, of the difference between a "single woman" and a "single mother" or between "working woman" (the old "working girl") and "working mother." Mothers also have certain exclusive subdivisions—surrogate mothers, birth mothers, adoptive mothers, mothers of twins, and grandmothers, not to mention the mother of all categories, the "good mother."

The phrases are often useful. They widen our understanding of who counts as a mother and of the range of experience and meaning (to the mother and to others) that the status encompasses. For example, as Elizabeth Spelman and Angela Davis have explained, "the work of mate/mother/nurturer has a different meaning depending on whether it is contrasted to work that has high social value and ensures economic independence or to labor that is forced, degrading, and unpaid. . . . The mother/housewife . . . role doesn't have the same meaning for those who experience racism as it does for those who are not so oppressed. . . ." ⁷⁵

But while rounding up the usual adjectives is a good place to start in attempting to comprehend the complexity of mother's lives, some adjectives are still more equal than others. Not *all* modifiers broaden our understanding of motherhood. For example, the term "welfare mother" usually signals exclusion rather than diversity,⁷⁶ and as Robert Hayman has pointed out, "the words 'mentally retarded' . . . carry with them a presumption that mentally retarded people are unfit parents."⁷⁷ Even "working mother" has its problems—the adjective suggests something less than a genuine unmodified mother and it fails to comprehend the work of "non-working mothers."

In contrast, consider the "good mother."⁷⁸ The phrase reveals deep and stubborn limits on efforts toward recognizing maternal diversity. While motherhood is now properly understood to include a greater range of circumstances than in the past, there remains an ethic or assumption of goodness about *all* mothers that serves to disparage other characteristics that signify real differences. The assumption of maternal goodness, bankable currency within this culture, emphasizes certain transcendent

75. E. SPELMAN, *supra* note 74, at 123, incorporating Angela Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, 3 BLACK SCHOLARS 7 (Dec. 1971).

76. Susan H. Hertz, *The Politics of the Welfare Mothers Movement: A Case Study*, 2 SIGNS 600, 605 (1977).

77. Robert L. Hayman, Jr. *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1243 (1990).

78. For an examination of psychology's hefty contribution to the development of the "bad mother" label, see McBride-Chang, Jacklin, Reynolds, *supra* note 24.

qualities that all mothers are thought to share. "Good" mothers, almost a code for "real" mothers, do things like love their children and want what is best for them, abstract attributes that I believe most mothers share. But these abstractions have been assigned concrete counterparts: good mothers don't leave their children,⁷⁹ they do provide them with (preferably employed) fathers,⁸⁰ and they don't sleep around.⁸¹ And *these* representations of maternal caring are not always shared by or available to all mothers, even all "good" ones.

Part of the problem is that adding "good" to "mother" turns "mother" into a functional term. We all know that knives cut and that a good knife is one that cuts well. Automobiles transport us and a good car is one that starts every time you turn the key. The use of "good," whether before knife or car, signifies a consensus about what the function of the thing is and an ability to discern which things perform the function well. Similarly, the ease and assurance with which the term good mother is used in our culture indicates a consensus about what the function of a mother is, and what it means to perform that function well.

But confidence about good mothering may be less well-founded than in the case of other functional concepts. How far can we get in coming up with an uncontroversial account of the true function or essence of a mother? We know that mothers have something to do with, and in most cases are responsible for, bringing up children.⁸² But the standard? Putting aside thresholds of abuse or neglect, there may be no common yardstick for measuring this task. How a good mother raises her children may depend, for example, on what color(s) she, her children, and their neighbors are. As Elizabeth Spelman explains,

[b]lack mothering is different from white mothering in terms of the knowledge mothers have about how their children will be greeted by a

79. A study of suburban mothers in Sydney, Australia, puts the same attribute in slightly different terms: "A 'good mother' puts her children first" and "young children need their mothers in constant attendance." BETSY WEARING, *THE IDEOLOGY OF MOTHERHOOD: A STUDY OF SYDNEY SUBURBAN MOTHERS* 49, 60 (1984).

80. Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274. "[T]he core and common problem facing [both divorced and single poor mothers] is identified as the missing mate." *Id.* at 276.

81. Carol Sanger, *Seasoned to the Use*, 87 MICH. L. REV. 1338 (1989).

82. Sara Ruddick describes three aspects of what bringing up children, or "maternal practice," may encompass: preserving the child's life, fostering her growth, and shaping an acceptable child. SARA RUDDICK, *MATERNAL THINKING: TOWARDS A POLITICS OF PEACE* 78-86 (1989). As Patricia Hill Collins points out in her work on Black motherhood, these duties are sometimes shared by "othermothers—women who assist blood mothers . . . Grandmothers, sisters, aunts, or cousins [who] act as othermothers by taking on child-care responsibilities for one another's children." P. COLLINS, *supra* note 74, at 119-20.

racist society. This knowledge of difference, and this difference in knowledge, may be connected with differences in what a mother's love or nurturing means.⁸³

On top of considerations generated by race, there are also questions about what it means for a woman to be a good mother to a daughter⁸⁴ or to a son.⁸⁵

To understand the problem of the term good mother and the uses to which it is put, it is useful to think about the difference between essentialism and having things in common. Because mothering is performed in a variety of styles and under a variety of circumstances, it is hard to argue that there is an essence to the status other than having a child. We can be far more confident in saying that mothers have certain things in common with other mothers: they buy particular food, they have less free time, and so on. These are the particulars that make up the task of mothering, although as Sara Ruddick reminds us the ways that women mother "are always and only expressed by people in particular cultures and classes of their culture, living in specific geographical, technological, and historical settings."⁸⁶ Thus, to say that all mothers are basically alike mistakes commonalities for essentialism. The second term suggests innate and inevitable qualities; the first derives from shared experience.

The political implications of maternal essentialism are significant. If all mothers—that is, women with children—are regarded as essentially alike, then other characteristics perhaps more relevant to the particular circumstance at hand—such as wealth or education—may be subordinated or ignored. Precisely this phenomenon was at work in the politics that shaped American welfare policy regarding work requirements. When Aid to Dependent Children (ADC) was first introduced during the New Deal, the idea was that poor mothers, like other more

83. E. SPELMAN, *supra* note 74, at 99.

84. Being a good mother can easily result in an internal conflict of loyalties—to one's children and to one's self. For example, acting in the interests of children may mean "training daughters for powerlessness." S. RUDDICK, *supra* note 82, at 85. This presents a particular dilemma for Black mothers who must "demonstrate varying combinations of behaviors devoted to ensuring their daughters' survival—such as providing them with the basic necessities and protecting them in dangerous environments—to helping their daughters go further than the mothers themselves were allowed to go." P. COLLINS, *supra* note 74, at 124.

85. For a powerful discussion of the relationships between African-American mothers and their sons, see JOYCE E. KING & CAROLYN A. MITCHELL, *BLACK MOTHERS TO SONS: JUXTAPOSING AFRICAN-AMERICAN LITERATURE WITH SOCIAL PRACTICE* (1990). See also LINDA R. FORCEY, *MOTHERS OF SONS: TOWARD AN UNDERSTANDING OF RESPONSIBILITY* (1987).

86. *Id.* at 78.

fortunate mothers, should be able to remain at home and raise their children.⁸⁷ This model, premised on the benefit to child and to country of proper home life for children, lasted until 1968 when a version of the current regime, Aid to Families with Dependent Children (AFDC), was imposed. Benefits to poor mothers then became conditioned upon their working outside the home under the Work Incentive Program (WIN). A variety of factors contributed to the change including an increase in the overall number of recipients, a change in the perceived composition of AFDC recipients from white widows to black single mothers, and the recharacterization of welfare benefits from discretionary charity to status-based entitlement.⁸⁸ One argument in particular was used repeatedly and effectively to urge and justify the shift: If mothers who were not receiving public assistance were doing wage work voluntarily, there was no reason why "welfare mothers" should not work as well.⁸⁹

By appearing to treat all mothers the same, a politically appealing equality argument took center stage. It provided comfort in its apparent fairness—never mind the externalities of mothers' circumstances, such things as job availability, skill levels, entry wages, second incomes, and social support systems that might explain why some mothers work and others don't.⁹⁰ Why, it was asked, should working mothers pay taxes to support nonworking mothers? By taking motherhood as the central category into which women with children are placed, differences among mothers can at once be both obscured (all mothers are alike) and exploited (look at what those lucky mothers over there are getting!).

Pitting some mothers against other mothers, as in the case of welfare benefits, illustrates a second problem with the political uses of motherhood. We take as a starting point in this culture that mothers are, on the whole, good. They love their children and are willing to sacrifice for them. There is much mileage in these (often justified) presumptions of selflessness, as women who organize politically as mothers—Mothers

87. For the history of ADC and its transition to AFDC, see Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. OF L. & SOC. CHANGE 457, 472-83 (1987-88). Martha Fineman points out that widows are still preferred; they are "typically entitled to generous social security benefits; whereas mothers who are divorced or who never marry are left to the variability of the child support system or AFDC." Fineman, *supra* note 80, at 282.

88. Fineman, *supra* note 80, at 279-85. See also Sylvia A. Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983).

89. LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 74 (1986).

90. Law, *supra* note 88.

Against Drunk Driving,⁹¹ Los Madres de Plaza de Mayo⁹²—have long been aware. We breathe in a kind of background purity when it comes to mothers. Yet those presumptions are quickly dropped when mothers are cast in opposition to some sweeter or more sympathetic group. Mothers so cast suddenly appear as wicked creatures, usually characterized by some version of selfishness.⁹³ Immediate and familiar examples include the range of activities—having intercourse, ordering a daiquiri, or working in battery manufacture—now captured by the adversarial phrase “maternal rights versus fetal rights.”

Family leave legislation provides another, less familiar example of motherhood's susceptibility to political use when mothers' interests are recast from noble to selfish. In the politics of parental leave, mothers are charged with thwarting the interests of two different groups—other (mostly male) workers and poor women. Family leave legislation requires that employers give one parent within a family an unpaid leave of several weeks following the birth or adoption of a child (or to care for a seriously ill family member) with the assurance of equivalent work when the parent returns. While about half the states currently provide for family leave in some form,⁹⁴ no federal legislation exists. Congress's most recent attempt, The Family and Medical Leave Act of 1993 was vetoed by President Bush,⁹⁵ and motherhood has much to do with that result.

Mothers become the villains of the piece because, gender neutral “parent” language aside,⁹⁶ it is mothers who care for new children and for sick family members.⁹⁷ Because mothers take time off to care for relatives, they—not parents in general or fathers or families or children

91. The first anti-drunk driving organization was called RID [Reduce Intoxicated Drivers] and got nowhere. Frank J. Weed, *Grass-Roots Activism and the Drunk Driving Issue: A Survey of MADD Chapters*, 9 LAW & POL'Y 259, 260-61 (1987).

92. For a history of the Mothers of the Plaza de Mayo, see Nora A. Femenia, *Argentina's Mothers of Plaza de Mayo: The Mourning Process from Junta to Democracy*, 13 FEM. STUD. 9 (1987). The difficulties of sustaining the mothers' movement after the introduction of political issues less directly connected to their status as mothers are discussed in Ann Snitow, *A Gender Diary* in CONFLICTS IN FEMINISM 20-24 *supra* note 48 (exploring the relationship in grassroots politics between feminists and “motherists”).

93. This characterization is not news to stepmothers.

94. See Donna Lenhoff & Sylvia Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 HARV. J. ON LEGIS. 403 (1989).

95. See Steven Holmes, *Bush Vetoes Bill on Family Leave*, N.Y. Times, June 30, 1990, at A9, col. 5. H.R. 770, 101st Congress, 1st Sess. (1989).

96. S. OKIN, *supra* note 53.

97. Fathers tend not to take parental leave even when it is available. They may take time off, but prefer to use vacation days or sick days. See Joseph Pleck, *Fathers and Infant Care Leave* in THE PARENTAL LEAVE CRISIS 177, 187 (Edward Zigler & Meryl Frank eds., 1988). This behavior

or infants—are identified as the beneficiaries of leave legislation. This image persists despite the fact that family leaves, in clear contrast to maternity leaves intended to help mothers recover from childbirth, “[seek] to address the issues of stability and emotional development of the *family*: that mothers and fathers and infants need a period together immediately after birth to adjust to, grow into, and establish their new roles and identities.”⁹⁸

Because mothers alone are seen to benefit from the legislation, charges of unfairness set in. First, mandatory policies for leaves are seen as depriving workers of other benefits they might rather have. This was one basis of President Bush’s 1990 veto.⁹⁹ The argument assumes that up until now employee benefits have fairly acknowledged the needs of all workers, so that parental leaves would suddenly skew benefits in favor of women. Yet recent work on unions, one example of employee representation, suggests that they have “demonstrated a thin commitment at the bargaining table to issues of concern to women,” such as child care, maternity benefits, or parental leaves.¹⁰⁰

A second challenge to family leave legislation comes not from the Chamber of Commerce but from feminists concerned that middle-class working mothers will benefit from leave legislation at the expense of poor “low-skill female employees who [will] lose their jobs or fail to obtain employment because of the increased wage bill faced by the employer.”¹⁰¹ This charge is also based on the correlation between gain to working mothers and deprivation to others, but differs from the one leveled by President Bush. His attack pitched workers of the same class against each other in the fight over benefits. This argument means to identify a class-based antagonism between middle class working mothers and poor women “who lack either access to or a voice with which to influence the lobbying efforts of their relatively more affluent sisters.”¹⁰²

seems directly related to employer disapproval of men who take parental leaves. See D. RHODE, *supra* note 5, at 122-23.

98. Meryl Frank & Robyn Lipner, *History of Maternity Leave in Europe and the United States*, in THE PARENTAL LEAVE CRISIS, *supra* note 97, at 3 (emphasis added). See also T. Berry Brazelton, *Issues for Working Parents*, in THE PARENTAL LEAVE CRISIS, *supra* note 97, at 40-42, for exact benefits to come from close contact in early months.

99. Ann Devroy, *President Vetoes Bill on Unpaid Family Leave*, Wash. Post, June 30, 1990 at A4.

100. See Crain, *supra* note 21, at 1180-82.

101. Maria O. Hylton, “Parental” Leaves and Poor Women: *Paying the Price for Time Off*, 52 U. PITT. L. REV. 475, 493 (1991).

102. *Id.* at 519.

The argument is troubling on several counts. First, the underlying economic argument, drawn from the model of minimum wage legislation, asserts that requiring a specific benefit will increase unemployment. But we have decided as a society that even if minimum wage requirements have this effect, securing a higher standard of employment for all workers is worth the possible loss of jobs at the margin. Similar reasoning applies to family leave legislation. Unpaid family leaves are minimal reforms in any society that asserts an authentic interest in family values and attachments. Moreover, the loss of jobs due to increased employer costs from unpaid family leaves is not proven. For example, a 1991 study on the economic consequences to employers in states with mandatory leave laws found that most employers perceived no significant increase in operating costs.¹⁰³

Second, the argument that poor women are harmed by family leaves has it backwards. It may well be that family leaves did not become politically viable until enough middle class women joined the work force to have a stake in the issue. But family leaves particularly benefit women who are part of "the working poor"—"those individuals who regularly work at the minimum wage or less, do not customarily receive any benefits, including medical coverage for themselves or their families, and face constant job instability."¹⁰⁴ For the working poor who are disproportionately made up of women, African-American, Hispanic, and certain Asian groups,¹⁰⁵ family leaves make the difference between job security and unemployment. Certainly wealthier mothers will be able to make greater use of such leaves and with less sacrifice,¹⁰⁶ but job reinstatement

103. FAMILIES AND WORK INSTITUTE, BEYOND THE PARENTAL LEAVE DEBATE: THE IMPACT OF LAWS IN FOUR STATES 52-54 (May 1991). The study examined the effects of mandatory unpaid leave legislation in Oregon, Minnesota, Wisconsin, and Rhode Island and found that employers tended to redistribute work within the company and to hire temporary employees. See generally Maria Ontiveros, *The Myths of Market Forces, Mothers and Private Employment: The Parental Leave Veto*, CORNELL J. L. & PUB. POL'Y (forthcoming Spring 1992). It may be that costs are saved because temporary workers receive fewer benefits than the regular employees. Recall, however, that the leaves to mothers are *unpaid*, and so their salaries to some degree are available to hire replacement workers.

104. Patricia A. Shiu, *Work and Family: Policies for the Working Poor*, 26 HARV. J. ON LEGIS. 349, 351 (1989).

105. *Id.*

106. Really wealthy women may not bother with leaves at all but simply stop working while their children are small. This trend is frequently noted for women attorneys. See Patricia Mairs, *Bringing Up Baby: Attorney/Mothers are Increasingly Leaving Their Jobs, Saying Motherhood and Law Don't Mix*, NAT'L. L.J., March 14, 1988, at 1, col. 1. Articles on women professionals usually focus on why motherhood and lawyering don't mix, often without acknowledging the underlying privilege (marriage to a well-paid husband) that makes the voluntary work leave possible. The *unpaid* nature of family leaves makes them particularly difficult for single mothers to take. DENISE

is crucial for a low-income working mother who takes an unpaid leave. New mothers with no family leave report considerably worse economic circumstances than women with some form of leave.¹⁰⁷ We know that the least privileged, most vulnerable workers—including unmarried mothers and part-time employees—are those most frequently without job-protected leaves.¹⁰⁸ There is no question that the benefit should be better—the leave paid, the period longer.¹⁰⁹ But until proper and comprehensive policies are in place, family leaves help keep working mothers out of worse poverty than that secured by minimum wage work.¹¹⁰

I do not mean to obscure the many real differences among women.¹¹¹ Issues of motherhood and mothering provoke particularly serious divisions among women on class and racial lines. Surrogate motherhood provides a recent and dramatic example of class differences, although the issue has been played out in an every day sort of way with regard to child care, as poor women have always taken care of the children of richer women.¹¹² A third example, discussed in the next section, involves differences in the availability of treatment for infertile women who are wealthy or who are poor.

My point is only that in the case of family leaves, class differences may not always mean class exploitation. Leaves for all mothers may be the price of leaves for any mothers. Wanting to be with a sick child, or

GALAMBOS Comment, *Work Time/Family Time: A Critique of Wisconsin's Family and Medical Leave Act*, 5 WIS. WOMEN'S L.J. 127, 136-37 (1990).

107. ROBERTA M. SPALTER-ROTH & HEIDI I. HARTMANN, UNNECESSARY LOSSES: COSTS TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE (1990) at x.

108. Women's Legal Defense Fund Fact Sheet, Family Leave: Low Income Workers (1991).

109. As Victor Fuchs argues, if the purpose of family leave is the well-being of new or sick children, child allowances paid to *all* mothers, in the workforce or not, make even better sense than the regressive subsidies of unpaid leave. V. FUCHS, *supra* note 40. A more recent study reveals that "[m]ost poor children do not live in households that would be the chief beneficiaries of employer-mandated [paid parental leave] programs." Victor R. Fuchs & Diane M. Reklis, *America's Poor Children: Economic Perspectives and Policy Options*, 255 SCIENCE 41,45 (1992).

110. Like social security payments to the elderly, the purpose of family leaves might be viewed not as the elimination of poverty but as a mechanism to keep a greater number of people from hitting that depth.

111. See, e.g., White, *supra* note 62, at 45-48 (considering how lawyer's strategy of "scripting [client] as a victim" conflicted with client's decision to present things differently).

112. PHYLLIS PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945, 67 (1990) (describing the "racial-ethnic map" of domestic employment during the 1930s). Another example, raising many of the same issues as parental leave, is whether the regulation of women's homework, such jobs as garment piecework or word processing, is good for working mothers or bad for all women. See Eileen Boris, *Homework and Women's Rights: The Case of the Vermont Knitters*, HOMEWORK 234, 246 (Eileen Boris & Cynthia Daniels eds. 1989).

wanting at least not to risk one's job by acting on the desire, is a preference I suspect many mothers share. Mandated leave policies do not *require* that mothers turn into nurses; they simply ensure that a mother who chooses to stay home does not become unemployed.

Like arguments based on "fetal rights," opposition to family leave legislation reveals the precariousness of motherhood as a category of transcendent virtue. The reverence or goodwill we allot to mothers is rather more narrow and superficial than leading cultural indicators first suggest. When mothers become an interest group, or worse, a *special* interest group, goodwill dissipates. This is especially true when, as in the case of family leaves, the benefit to children is not immediately apparent (family bonding?) or when it appears the mother herself benefits ("I wouldn't mind staying home for a few weeks to play with a baby") or when there are potential costs that may be absorbed by someone in addition to the mother.

This last point returns us to the good mother. One of her familiar characteristics is selflessness. In this culture mothers are asked to give up many things in the interests of maternity: sleep, the fast track and sexuality¹¹³ are three examples. The costs of such sacrifices are generally distributed evenly across mothers alone. Family leave legislation sets a limit on maternal selflessness by removing a woman's job as one of the things she must give up in order to be a good mother, the kind who will stay home with a sick child.

III. THE IMPORTANCE OF GETTING THINGS RIGHT

I want now to give two examples of how getting facts straight has mattered in public debate and policy formation on issues crucial to how mothers live their lives. The first example is local and focuses on prenatal care for low-income women in Oakland, California. The second example is national and concerns the issue of family size for mothers who receive Aid to Families with Dependent Children (AFDC). I then turn to a third area where the content of rules, the commitment of resources, and the relationship of policies to facts are still being decided. This section explores the situation of two groups of women who choose to have children, women with AIDS and infertile women.

113. For a sobering discussion of why patriarchy requires the division between motherhood and sexuality ("one of the most overdetermined dichotomies in our culture"), see Iris M. Young, *Breasted Experience*, in *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 189, 196-200 (1990) (Focusing on how maternal sexuality conflicts with maternal selflessness).

Before turning to the Oakland example, I want briefly to consider why the quality of mothers' lives is a matter of social concern at all. To some extent we care about mothers because we believe that the quality of their lives, as measured by such things as their health, peace of mind, and earning capacity, benefits the lives of their children.¹¹⁴ Yet the goal is something different from turning the t-shirt logo—"Unless Mama's Happy, Nobody's Happy"—into social policy, for mothers are often regulated in ways that disregard maternal preferences or happiness. Restrictions on a mother's overnight guests or on her alcohol consumption are two examples. Moreover, individual happiness as a goal of legislation seems slightly frivolous, something to be mocked in *Doonesbury* or despaired of in *Habits of the Heart*.¹¹⁵

Rather, we aim for a society where children can flourish and the well-being of their caretakers sometimes is understood to contribute to

114. With the exception of Mother's Day, I could think of no American policy or tradition that honors or rewards mothers themselves for being mothers, rather in the way we thank veterans for services rendered. There has been social recognition for the loss of motherhood. For example, during World War II mothers whose sons were killed in combat received gold stars as symbols of maternal sacrifice. See generally DORIS WEATHERFORD, *AMERICAN WOMEN AND WORLD WAR II* (1990) (on the experience of mothers who lost their sons in World War II); Daryl Kelley, *Flags Fly Daily for Gold Star Mothers*, Los Angeles Times, July 4, 1985, Part 8, at col. 1 (describing retirement community of Gold Star mothers).

There are perhaps two instances of legal compensation for mothering. The first also attends to the loss of a child: Courts now include as a foreseeable element of damages the emotional distress a parent may experience at witnessing the death of her child. See e.g., *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912 (1968).

The second example arises in the context of custody. In theory the primary caretaker rule awards a child to the parent who has performed the larger share of parenting tasks during the marriage. The idea behind the rule is that it provides continuity for the child, equalizes bargaining between parents, and acknowledges the indeterminacy of judicial custody decisions. Another view is that it rewards or compensates the parent—almost always the mother—for doing the job. For criticisms of this rule, see Becker, *supra* note 42, at 74-86.

115. ROBERT M. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER, & STEVEN M. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985). But maternal "happiness" is not so clearly just an individual matter. We know, for example, that pre-school children do better by certain standard developmental measures when their mothers are either working outside the home because they want to or staying home because they want to. Anita M. Farel, *Effects of Preferred Maternal Roles, Maternal Employment, and Sociodemographic Status on School Adjustment and Competence*, 51 CHILD DEV. 1179, 1184 (1980) (study undertaken to learn the effects of maternal employment on child development found that "children whose mothers' attitudes toward work and work behavior are congruent score higher on several measures of adjustment and competence than children of mothers whose behavior and attitudes are not congruent."). This suggests not just that we should order more T-shirts but that if policies for women are truly pegged to the well-being of children then those policies should facilitate women's preferences either to work (in part by providing real support for quality child care) or to stay home (by providing mothers' pensions so that the choice is feasible).

this goal.¹¹⁶ Policies that benefit mothers are usually good for children¹¹⁷ and are therefore tolerated even though the mother is benefitted first, also, or incidentally—a “joint consumption” model of benefit receipt.¹¹⁸ The airlines recognize this; mothers are told to put on their oxygen masks before assisting the child seated next to them. Courts have followed similar reasoning; recall that the United States Supreme Court upheld progressive-era legislation limiting the number of hours women could be required to work out of concern for “the future well-being of the race,”¹¹⁹ though “race” referred to white, not human.¹²⁰ Acknowledging that the well-being of children is bound up with that of their parents is still a selective enterprise. The version now playing in American politics pretends that lowering welfare payments to AFDC mothers does not really harm their children.

To the extent that concern for children *has* guided policy decisions about mothers, or at least white mothers, where do the interests of women in their many non-maternal capacities come into play? As I have said, mothers are rarely only mothers. They are also workers, wives, and citizens. Policies which ignore these other roles and focus only on a

116. The social welfare legislation of France is premised on this understanding. Nancy Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 130, 133-34 (1990).

117. Sometimes the well-being of children can also improve the lives of mothers. For example, it is easier to be the mother of a healthy child than a sick child. Occasionally legislation explicitly recognizes the connection between the two sets of interests. For example, the first purpose of licensing child care facilities—requiring such basics as enough space, enough adults, and a fire extinguisher—is to promote safe environments for the *children* in daycare. See CAL. HEALTH & SAFETY CODE §§ 1596.72-1596.73 (Deering, 1991). But the assurance of these safeguards contributes to parental well-being as well. The California legislature found that “good quality child care services are an essential service for working parents” and a purpose of the California licensing statute is “to recognize that affordable, quality licensed child care is critical to the well-being of parents and children in this state.” *Id.* Victor Fuchs argues powerfully and explicitly for a range of child-centered policies, such as child allowances and parental leaves, that improve the economic status of women by improving the lives of their children. See V. FUCHS, *supra* note 40, at 130-138.

118. The “joint consumption” model is more familiar and more acceptable in the context of divorce where mothers necessarily live in the same house and eat the same food as their children, even if the private funds that pay the rent are designated as child support. Public benefits, such as housing, are rarely extended to families because the moral entitlement of the child is seen as quite different from the undeserving “mooching” parent. For a discussion of how the inability “to break the link” between parents and children constrains public assistance to children, see NORTON GRUBB, *BROKEN PROMISES* 197-201 (1982).

119. *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908).

120. As Eileen Boris has pointed out, the restrictions upheld in *Muller*:

applied only to limited groups of women because the legislation exempted from coverage agricultural, non-profit, and usually domestic workers. . . . That these were the very jobs held by women of color further suggests how the term ‘mother’ in the judge-made discourse referred to white women.

E. BORIS, *supra* note 16, at 47.

woman's status as a mother or potential mother risk an essentialist overbreadth. The complexity of women's multiple roles has implications for our task here. In evaluating the accuracy of facts that underlie the governance of mothers, it is not enough to get just the facts about *mothers* straight. We must also consider how and whether other aspects of a woman's life, whether freely chosen or involuntarily imposed, are relevant to decisions she makes as a mother, and we must get those facts straight too.

An example from the area of custody highlights the challenge. Consider women who are both mothers seeking custody and the victims of battering. Behavior that is reasonable in the second category—disparaging the other parent, moving repeatedly—may prejudice a determination in the first.¹²¹ Mere identification as a battered woman, with attendant suppositions about “learned helplessness,” may be taken as a characteristic inconsistent with good mothering. Judges must learn to differentiate behavior associated with battering from what may be a separate record of conduct as a mother.¹²²

Identifying and isolating facts relevant to a particular situation are not always so difficult, as the case of pre-natal care in Oakland suggests. A recent project of the Urban Strategies Council, a nonprofit organization in Oakland, has been to improve access to prenatal care citywide.¹²³ The correlations between low birth weight, a healthy childhood, and pre-natal health care are now well understood, and the average birth weights of Oakland newborns are dramatically low.¹²⁴ The initial assumption underlying the project was that young single mothers probably didn't know that they *needed* prenatal care. Organizers therefore planned to buy bill board space on buses to advertise the need for early care.

But interviews with a number of mothers proved the assumption wrong. Pregnant women were not ignorant about the need for prenatal

121. See Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Alleged*, 27 JUDGES' J. 8 (Spring, 1988).

122. See Women Judges' Fund for Justice, *Judicial Training Materials on Child Custody and Visitation: Facilitators' Manual* 70-78 (1991) (training materials on custody determinations in cases in which domestic violence has been alleged).

123. Address by Angela Blackwell, Executive Director, Urban Strategies Council of Oakland, Effective Strategies on Behalf of Children at Risk, Santa Clara Law School (Mar. 16, 1991). The Urban Strategies Council is a nonprofit policy and advocacy group whose goal is to decrease the city's persistent poverty.

124. “Although Alameda County's 1987 black infant mortality rate was 15.3, in some census tracts in East and West Oakland, the rate exceeded 20 deaths per 1,000 live births. For comparison, the non-black infant death rate was 7.2.” Martin Halstuk, *Syphilis and Crack Taking Big Toll of Black Babies, U.S. Epidemics Reflected in Oakland*, S.F. Chron. Mar. 26, 1990 at A2.

care. They knew quite well what they needed; the problem was getting it. Women were not using the clinics because the clinics were inaccessible. Women had to try repeatedly before anyone would answer the phone at the local clinic, it took months between call and appointment, three bus transfers to get there, and then hours waiting even with an appointment.¹²⁵ These are not small matters, as anyone who has abandoned an effort for similar frustrations—especially with children in tow, especially when not feeling well—will know. These facts, rather than an absence of information or common sense, shaped the mother's decision-making on the issue.

The Oakland interview data revealed to planners that advertisements on buses would make little difference. Child care at clinics, better transportation, reasonable time periods between request and appointment, and treating patients with courtesy might. These are more than matters of convenience. For example, time delays in starting prenatal care are particularly dangerous for pregnant teenagers who often ignore their pregnancies until they "show." Yet early prenatal care is critically linked to increasing infants' birth weights.¹²⁶ Thus, timely appointments, like transportation and child care, really matter. The problem in Oakland was not bad mothers but overtaxed poor women. I use the case not to solve this specific problem but to show how the issue was initially framed, the facts investigated, and the solutions subsequently revised. The project was marked by a willingness to find out what was really going on and to relinquish logical but inaccurate initial suppositions.

A second and less satisfying example of the relationship between facts and policy involves the continuing debate within American welfare policy about whether higher levels of assistance act as incentives for recipients to have more children. In his explanation for the persistence of poverty in America, Charles Murray established as something close to fact within American welfare discourse that there is a causal link between welfare benefits and childbearing among the poor.¹²⁷ Yet, as

125. Transportation is a significant issue for lower-income women in other contexts. A study of Michigan's mandatory work requirement program for AFDC recipients found that "lack of adequate transportation continues to be a major disincentive to full [program] participation. For young parents, this may entail transportation both to the workplace and to the child care center or babysitter." Patricia L. Sorenson, *Women, Work and Welfare: A Summary of Work Incentives and Work Requirements for AFDC Recipients in Michigan*, 20 CLEARINGHOUSE REV. 110, 118 (1986).

126. Kate S. Lombardi, A New Parental Clinic Opens for Teenagers, N.Y. Times, Sept. 22, 1991, Sect. 12 WC, at 6, col. 5 (before this clinic, women waited six to eight weeks for their first prenatal appointment).

127. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984). Murray recently restated his view: "The evil of the modern welfare system is not that it bribes

many others have pointed out, "researchers have not been able to find any substantial evidence to support Murray's thesis."¹²⁸ But what is made of this information? Consider the response of The Report From the White House Working Group on the Family which relied heavily on Murray:

Statistical evidence does not prove those suppositions [that welfare benefits are an incentive to bear children]; and yet even the most casual observer of public assistance programs understands there is indeed some relationship between the availability of welfare and the inclination of many young women to bear fatherless children.¹²⁹

A kind of factual overdrive kicks in to take care of facts that are politically unattractive or culturally unacceptable.¹³⁰ The policy debate seems unable to shake free from what "everybody really knows" and respond to actual evidence that shows minimal correlation between childbearing and benefit levels.¹³¹ States continue to restrict benefits as an explicit disincentive to poor unmarried women.¹³²

The remainder of this essay explores the relationship between facts and policy through a variation of the question raised by the AFDC debate: why do women choose to have children? My concern is not the more abstract question of *why* women mother (the various theoretical explanations of why women *have* the job).¹³³ I want instead to look at

women to have babies—wanting to have babies is natural" Charles Murray, *Stop Favoring Unwed Mothers*, N.Y. Times, Jan. 15, 1992, at A23 col. 2. He now argues that what welfare does is remove the financial incentive for poor women to put children up for adoption. *Id.* Thus the incentive is not that women will *have* children, but that they will keep them.

128. THEODORE R. MARMOR, JERRY L. MASHAW & PHILIP L. HARVEY, *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* (1990). The authors point out that objective indicia that might support Murray's thesis, such as higher rates of illegitimacy in states with higher welfare payments or more illegitimacy among people likely to receive AFDC in comparison with illegitimacy among the rest of the population, do not pan out. *Id.* at 111. They argue that the causes of increased poverty in the United States are not government's attempts to relieve it, but "rising average unemployment rates, an increase in the percentage of the population in high-risk groups, and a long-term trend toward inequality in the distribution of earned income." *Id.* at 114-124.

129. GARY BAUER, *THE FAMILY: PRESERVING AMERICA'S FUTURE, A REPORT TO THE PRESIDENT FROM THE WHITE HOUSE WORKING GROUP ON THE FAMILY* 24, (1986).

130. The White House Working Group Report is full of such business. For example, the report disregards the powerful statistics on teenage sexuality by challenging the definitions: "Almost half of all unmarried 18 year old girls are virgins. Of the remainder—incorrectly labeled 'sexually active'—almost one in seven had engaged in intercourse only once. About 40 percent had not had intercourse within the last month." *Id.* at 26.

131. D. RHODE, *supra* note 5, at 111-31.

132. See Wayne King, *Senate Sends Florio Welfare Bill that Limits Benefits for Mothers*, N.Y. Times, Jan. 14, 1992, at A1, col. 1.

133. Alice Rossi, *A Biosocial Perspective on Parenting*, 106 DAEDALUS 2 (1977) (biological explanations); N. CHODOROW, *supra* note 52 (psychoanalytic explanations).

conscious, self-reported explanations by women about why they *want* the job. A clear understanding of answers to that question is crucial for any analysis concerned with the real, as opposed to imagined or misunderstood, incentive-effects of law or social policy.

A. HAVING A CHILD

Motherhood, in its individual sense, starts with a decision to have a child. Women come to that decision in a number of ways, some actively seeking pregnancy, others not. In this section I compare women who choose to have children, whether their pregnancies resulted from deliberation, contraceptive failure, or just "taking chances,"¹³⁴ with other women who choose to have children.¹³⁵ This may sound like a most unpromising discussion. What's to discuss at a convention of pro-natalists? There are several possible topics. The first item might be the discordance between pronatal rhetoric and the absence of anything like comprehensive policies concerned with the welfare of mothers. In this country having babies is encouraged by policies ranging from the federal gag rule on pregnancy counseling¹³⁶ to increasingly restricted access to abortions. There is, however, little parallel approval or support in the form of universal maternity leaves, health care, mothers' pensions, or subsidized child care—the kinds of social welfare legislation uncontroversially in place throughout western Europe.¹³⁷ The burdens of the American non-system fall most heavily, as must be expected, on poorer mothers who are sometimes faulted for having children in the first place.

The disparities between poor mothers and wealthier ones, between encouraging childbirth and disregarding real children, leads to a second issue worth discussing. How is it that maternity is a praiseworthy aspiration for some women while for others it is condemned as a sign of irresponsibility or irrationality? Consider attitudes towards lesbians,¹³⁸

134. KRISTIN LUKER, *TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT* (1975).

135. Discussing a woman's "choice" to have a child assumes a real option not to continue the pregnancy. Such an option results from a combination of circumstances that are all now in diminishing supply: reliable information about abortion and its alternatives, financial means, physical opportunity, and sufficient privacy to make and to carry out the decision. For the moment, this discussion continues in an artificial light that assumes the availability of real choice across the board.

136. Adam Clymer, *Bill to Let Clinics Discuss Abortion is Vetoed by Bush*, N.Y. Times, at A1, Nov. 20, 1991.

137. M. GLENDON, *supra* note 56 at 134-38, Nancy Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311 (1989).

138. See Frank Zepezauer, *Lesbian Sabotage*, 15 HUM. LIFE REV. 103 (1989).

teenagers,¹³⁹ single women,¹⁴⁰ disabled women,¹⁴¹ career women,¹⁴² immigrant women,¹⁴³ women on welfare,¹⁴⁴ and women with enough children already,¹⁴⁵ who decide to have children. In addition to the general absence of social legislation, a range of specific policies has served to punish or disadvantage mothers in these categories. These include sterilization,¹⁴⁶ limiting the receipt or the amount of public assistance,¹⁴⁷ dismissal from employment,¹⁴⁸ denial of education,¹⁴⁹ termination of parental rights,¹⁵⁰ and restrictions on custody¹⁵¹ and liberty.¹⁵²

139. The very description of teenage mothers as children having children "is for many people an acknowledgment of irresponsible sexual activity on the mothers' parts." Diana Pearce, *Children Having Children: Teenage Pregnancy and Public Policy*, in *THE POLITICS OF PREGNANCY: ADOLESCENT SEXUALITY AND PUBLIC POLICY* (Deborah Rhode, Annette Lawson eds. forthcoming).

140. Much of the hostility toward unwed motherhood comes from its identification as the cause of welfare dependence. The governor of Wisconsin has proposed to increase assistance benefits for mothers who marry. Rogers Worthington, *Governor Proposes to Reward Marriage*, Chicago Tribune, Feb. 14, 1991, at C25.

141. Thomas K. Gilhool & Judith A. Gran, *Legal Rights of Disabled Parents*, in *CHILDREN OF HANDICAPPED PARENTS: RESEARCH AND CLINICAL PERSPECTIVES* 11 (S. Kenneth Thurman ed. 1985).

142. See *supra* notes 87-90 and accompanying text.

143. Carol Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 GEO. IMMIGR. L.J. 295 (1987).

144. Fineman, *supra* note 80. Fineman alerts us to the intersections among the different categories of "bad" mothers.

145. A number of state legislatures are considering incentives to reduce family size for women receiving welfare. A proposal in Wyoming would pay the mother's childbirth expenses for any child put up for adoption; a Kansas bill would pay welfare recipients \$500 for using Norplant; and Wisconsin may cap welfare benefits to teenage mothers regardless of the number of children they have. Isabel Wilkerson, *Wisconsin Welfare Plan: To Reward the Married*, N.Y. Times, Feb. 12, 1991, at A16, col. 1.

146. See generally PHILIP REILLY, *THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES* (1991) (examining the rise and decline of eugenic sterilization).

147. For example, under the state's Learnfare program, Wisconsin ties the amount of welfare to the school attendance record of high school students whose mothers receive AFDC. See Paul Taylor, *Welfare Policy's 'New Paternalism' Uses Benefits to Alter Recipients' Behavior*, Wash. Post, June 8, 1991, at A3.

148. Unwed pregnant persons can be fired if there is a bona fide business reason for requiring an unpregnant status. Regina Austin locates the rule in the context of the real unwed life of Chrystal Chambers of Omaha, Nebraska in *Sapphire Bound!*, 1989 WIS. L. REV. 539, 549-58.

149. Pregnancy and motherhood were removed as grounds for expulsion from public school in 1974. Education Amendments, 34 C.F.R. § 106.40 (1986). See generally GAIL ZELLMAN, *THE RESPONSE OF SCHOOLS TO TEENAGE PREGNANCY AND PARENTHOOD* (1981).

150. Hayman, *supra* note 77.

151. *Gulyas v. Gulyas*, 75 Mich. App. 138, 254 N.W.2d 818 (1977) (career woman); *T.C.H. v. K.M.H.*, 784 S.W.2d 281 (Mo. App. 1989) (lesbian); *Caywood v. Harris*, 646 S.W.2d 144 (Mo. App. 1983) (economic status).

152. See James W. Wilton, *Hospitalization and Treatment During Pregnancy: Neutral Health Statutes as Models for Legislation to Protect Children from Prenatal Drug and Alcohol Exposure*, 25 FAM. L. Q. 149 (1991).

To understand why the motherhood of some women is encouraged and that of others disparaged, this last section compares two different groups of women who choose to have children: infertile women and HIV-positive women. How does what we think to be true—"the facts"—about mothers in each category influence social attitudes and policy decisions about them? Both groups are increasing in numbers. Between 1980 and 1988, the number of women of childbearing age who died of AIDS quadrupled.¹⁵³ The number of women being treated for infertility has also risen sharply.¹⁵⁴ But infertile women and HIV-infected mothers have things in common beyond their increasing populations. First, while infertile women certainly have greater financial, social, and public support, neither group is particularly popular. Second, their decisions to become mothers are motivated by rather similar views about the meaning of motherhood.

The starting point in this analysis is that both groups of mothers have made decisions. That is certainly clear in the case of infertile women. Their decisions are necessarily deliberate and are reaffirmed through the significant patience, effort, and expense involved in trying to conceive. HIV-infected women who continue their pregnancies have also made a decision,¹⁵⁵ although for many people that "decision" is regarded as something so outside the bounds of rationality that it does not really count as a decision at all.

Before looking at these two specific groups, what do we know about why women in general decide to have children? Certain reasons we glean informally from the lives around us. Women have children because they love them or the idea of them, to keep a marriage together, to meet social, spousal or parental expectations, to experience pregnancy, or to pass on the family name, genes, or silver. Sometimes children are conceived for the benefit of existing children: to keep someone from being an only child, or in a more recent and dramatic example, to provide marrow

153. Susan Chu, *Impact of the Human Immunodeficiency Virus Epidemic on Mortality in Women of Reproductive Age*, 264 JAMA 225, 228 (1990). The implications of this for pediatric AIDS cases are significant and already apparent. In the Bronx, for example, one in every 43 babies is born to an HIV-positive mother. Levine & Dubler, *infra* note 191, at 326. It is important to recognize that children born to HIV-infected mothers do not necessarily carry the virus themselves. See discussion *infra* note 221 and accompanying text.

154. Common explanations include delayed childbearing, environmental factors, physical damage due to sexually transmitted diseases. Sandelowski, *supra* note 37, at 479.

155. This assumes that they have had access to the means to terminate their pregnancies; see *infra*, notes 214-16 and accompanying text.

for a dying sibling.¹⁵⁶ Jean Verveers summarizes the scene: in a pronatalist society like ours, the social meaning of parenthood encompasses moral and civic obligation, marital and sexual success, personal maturity and normality.¹⁵⁷

Many of these practical-sounding reasons for wanting to have children represent broader personal ideologies concerning how women view the world and their place in it. For many women motherhood comes close to being life's central meaning: the most important, satisfying, desired thing a woman can do.¹⁵⁸ The sources of the desire for children are many. Some argue that biology explains it; others stress psychoanalytic factors.¹⁵⁹ Social factors are often in serious play as well; throughout much of American history motherhood has been women's main opportunity for civic contribution.¹⁶⁰ Religions and ethnic groups also stress the importance of children (and so the value of mothers). The measure of maternal success may take different forms—the number of children, their sex, how many get into medical school—but it is difficult to think of a religion or ethnic group within American culture that does not reward motherhood or present girls with cues about their place in the system early on.

One version of the centrality of motherhood is represented in the views of pro-life abortion activists, for whom motherhood is "the most fulfilling role that women can have."¹⁶¹ Motherhood becomes an organizing principal for much of the rest of life. For example, sex is seen

156. See Denis Hamilton, *Woman Is Having Baby to Save Her Ailing Daughter*, L.A. Times, Feb. 16, 1990, at A1, col. 1; Abigail Trafford, *Brave New Reasons for Mothering: Having a Baby to Produce a Potential Organ Donor*, Wash. Post, Feb. 27, 1990, at Z6.

157. JEAN VERVEERS, *CHILDLESS BY CHOICE* 3-6 (1980). Conversely, intentional childlessness is seen as a flouting of religious authority, an avoidance of responsibility, a hindrance to marital adjustment, a rejection of gender roles, and a sign of social immaturity and psychological maladjustment. *Id.* at 4, Table 1.

158. Depending on who the mother is, reasons for wanting a child that are usually taken as sound are at other times characterized as pathological. For example, the birth of a child is recognized within the culture as a sign of a adulthood, accomplishment and a source of satisfaction. But in *D.F. v. State*, a parental termination case, "the trial court was entitled to accept the psychologist's opinion testimony that the [nineteen-year-old mother] wants to keep her baby to get back at her parents, to use as a symbol of personal accomplishment, and as a means of providing a feeling of love to herself." 525 S.W. 2d 933 (Tex. 1975).

159. See *infra* notes 168-70.

160. See generally LINDA KERBER, *WOMEN OF THE REPUBLIC* 283 (1980) ("In the years of the early Republic a consensus developed around the idea that a mother, committed to the service of her family and to the state, might serve a political purpose. Those who opposed women in politics had to meet the proposal that women could—and should—play a political role through the raising of a patriotic child.") German history had its own special version; see Leila Rupp, *Mothers of the Volk: The Images of Women in Nazi Ideology*, 3 SIGNS 362 (1977).

161. See KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 160 (1984).

as essentially and exclusively procreative, and motherhood, rather than professional status, is the primary source of self-worth. For these women, opposition to abortion is bound up with a comprehensive and mutually reinforcing set of beliefs and practices on other issues that define the meaning of their own lives. For example, abortion is unacceptable because "[w]hen pregnancy is discretionary—when people are allowed to put anything else they value in front of it—then motherhood has been demoted from a sacred calling to a job."¹⁶²

Of course, it is not necessary to oppose abortion in order to make a vigorous claim to motherhood. Many pro-choice activists are or intend to become mothers and some of their best friends are mothers. They simply do not view motherhood as their exclusive and defining social role. These women oppose *involuntary* motherhood, not the entire project. Accordingly, they do not regard pregnancy as a central justification for (or the necessary outcome of) sexual intercourse, and they are more likely than anti-abortion women to make educational and professional "life commitments" that lessen their dependence on motherhood as a primary source of satisfaction.¹⁶³ Pro-choice women take mothering seriously in a different way. For them, parenting means "giving a child the best set of emotional, psychological, social, and financial resources that one can arrange as a preparation for future life. . . . Good parents are seen as arranging life (and child-bearing) so that this can be done most effectively."¹⁶⁴ In sum, conceptions about the importance of motherhood cause both groups of activists to choose and arrange social resources in ways that complement their original position on mothering.¹⁶⁵ This

162. *Id.* at 205. Finding something noble in abortion is also perceived as a danger. For example, the use of fetal tissue to advance research and treatment of such conditions as Parkinson's Disease has interrupted the anti-abortion grip on the moral high ground. Pro-choice advocates consider this research a beneficial side-effect of a woman's decision, though not an independent motivation. The anti-abortion side, however, has recognized the use of fetal tissue to save an existing life (other than the mother's) as "humanitarian." This characterization unsettles the rhetoric of baby-killing. Thus anti-abortion advocates have organized the ban on fetal tissue research ostensibly to prevent women from succumbing to their own humanitarian instincts.

163. *Id.* at 199-200.

164. *Id.* at 181.

165. I am aware that by focusing on two groups of women who differ primarily in when and how many children they want to have, this discussion may seem to be slipping into pronatalism ("the existence of structural and ideological pressures resulting in socially prescribed parenthood as a precondition for all adult roles.") Martha Gimenez, *Feminism, Pronatalism, and Motherhood*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 287, 290 (Joyce Trebilcock ed. 1983). But description is not necessarily endorsement. Surely Gimenez is right that many women "might not have become mothers and today would have had considerably better opportunities if pronatalism had not impelled them into motherhood." *Id.* at 300. At the same time, many women choose to have children even understanding the complexities of that decision, and they express deep satisfaction with the experience, despite its complexities. See David Chambers, *Accommodation and Satisfaction: Women and*

same paradigm—a reinforcing combination of values, beliefs and circumstances—is useful in understanding some of the reasons why other women such as those treated for infertility, who are mostly white and well-off, and HIV-positive mothers, who are mostly women of color and poor, choose to have children.

B. INFERTILE WOMEN

One way to understand the importance of motherhood is to look at the impact of its unavailability. Studies of infertile women report with great consistency that the diagnosis of infertility commonly results in feelings of personal failure, sexual inadequacy, stigmatization, isolation, hopelessness, shame, anger, guilt, and depression.¹⁶⁶ Compared to mothers and voluntarily childless women, infertile women rated life as “less-interesting, emptier, and more disappointing.”¹⁶⁷ In explaining why they want to have children, a frequent and immediate response in one study was that “it’s just a feeling.”¹⁶⁸ But the women were able to put content to the feeling. They wanted to have children because

Men Lawyers and the Balance of Work and Family, 14 LAW & SOC. INQ. 251, 274-78 (1989). The focus here, however, is less on the causes of the desire to mother, than on the experiences of women who want to.

166. See Charlene E. Miall, *Reproductive Technology vs. the Stigma of Involuntary Childlessness*, 70 J. CONTEMP. SOC. WORK 43, 45-46 (1989) (discussing feelings of personal failure and stigmatization).

Because the mechanism of fertility is sex, intimacy between partners is often interpreted as “[t]he amount and quality of semen, the functioning of the female organs, the timing and method of sexual intercourse—all are closely examined. . .” Nancy B. Bryant & Charlotte Collin, *Human Sexuality and Feminism: A New Approach to Perinatal Social Work*, 14 J. OF SOC. WORK & HUM. SEXUALITY 103, 107 (1985); Karen Reed, *The Effect of Fertility on Female Sexuality*, 2 PRE- & PERINATAL PSYCH. 57 (1987). For a discussion of the problems of isolation, guilt, anger and depression, see Victor J. Callan, *The Personal and Marital Adjustment of Mothers and of Voluntarily and Involuntarily Childless Wives*, 49 J. MARRIAGE & FAM. 847, 849 (1987); Ann Lalos, Othon Lalos, Lars Jacobsson & Bo Von Schoultz, *Depression, Guilt and Isolation Among Infertile Women and Their Partners*, 5 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 197, 201, 202 (1986). On the brightish side, Callan reports that involuntarily childless women “were more pleased than other women with opportunities for relaxation, the amount of sleep, time to themselves, and their independence.” Callan, *supra* at 853.

167. *Id.* at 853. Some argue that such responses demonstrate how well-trained women have become: we will pay fortunes, endure surgeries, take drugs, exchange sexual spontaneity for scheduled ovulation, and buy babies from poor women all to perpetuate a primary mechanism of patriarchy—motherhood. Socialization surely plays a part in women’s desire to mother. Nonetheless, women who want children are not socially constructing the pain they feel when they cannot have them. If we mean to put our collective money on “experience,” then we must acknowledge what infertile women say, despite the difficulties. See Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81 (1987).

168. Ann Lalos, Lars Jacobsson, Othon Lalos & Bo Von Schoultz, *The Wish to Have a Child*, 72 ACTA PSYCHIATRICA SCANDANAVICA 476, 477 (1985).

they felt something was missing, they loved children and wanted to have someone to live for, they saw a child as part of their self-fulfillment, it was natural to have children and it should be good for their relationship. They thought their anxiety about getting old or dying would lessen if they had a child.¹⁶⁹

Until recently, these desires could be satisfied for infertile women only through the mechanism of adoption.¹⁷⁰ But biological motherhood is now more attainable, as the newer reproductive technologies sidestep or remedy many underlying physical problems. These technologies both alter and reinforce the psychological dynamics of infertility. For some infertile women, hope and determination (some would argue obsession) replace despair (some would argue adjustment). The technologies are themselves an acknowledgment of the social importance of motherhood, as research institutes, hospitals, corporations, advertising agencies, and infertile couples devote substantial resources towards making motherhood possible.¹⁷¹

Of course, the picture is more complicated than magazine cover headlines ("How a dazzling array of medical breakthroughs has made CURING INFERTILITY more than just a dream")¹⁷² suggest. For one thing, infertility has not been "cured" for many infertile women. While some of the simpler procedures, like unblocking scarred fallopian tubes, work well and consistently, the percentage of live births resulting from the more dramatic techniques such as in vitro fertilization is quite low.¹⁷³ Second, the cure (whether it works or not) is so expensive as to be limited to only the wealthy or well-insured. The average cost of treatment using vitro fertilization is at least \$22,000.¹⁷⁴

Social attitudes toward the women who use the new technologies add further complexity. Infertile women are not seen as uniformly deserving, but sometimes as simply spoiled. This is in part because the infertile women receiving treatment who are usually studied in social science literature and reported in the popular press are not *all* infertile women. They are instead the ones credited with the current "infertility

169. *Id.* at 477-78.

170. Indeed, proof of infertility was long a standard requirement for many adoption agencies.

171. *50% Success Rate in \$1 Billion Infertility Fight*, N.Y. Times, May 18, 1988, at A25, col. 1.

172. TIME, Sept. 30, 1991, Cover page.

173. Warren E. Leary, *In Vitro Fertilization Clinics Vary Widely in Success Rates*, N.Y. Times, Mar. 10, 1989, at A16, col. 1.

174. OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, INFERTILITY: MEDICAL AND SOCIAL CHOICES (1988) [hereinafter MEDICAL & SOCIAL CHOICES].

epidemic.”¹⁷⁵ Often older and more educated, many postponed pregnancy while studying and working.¹⁷⁶ They are, as the Wall Street Journal put it, “aging baby boomers [who] decide to have children [now].”¹⁷⁷

There is a hint of “serves you right” to women who come to the idea of motherhood late. Infertility is “the price liberated women and young, upwardly mobile professional couples pay for prioritizing the establishment of careers, the acquisition of material goods and the pursuit of sexual pleasure over the having of children.”¹⁷⁸ This assessment replays a consistent medical theme of the last hundred years, now presented in aging Yuppie guise: infertility results as much from women improperly diverting their attention from motherhood as from innate physical causes.¹⁷⁹

Infertile women are criticized by some for having delayed childbearing until later in life and by others for pursuing the goal of motherhood so ardently. The latter criticism has at least two aspects. The first holds that nothing reveals the social construction of motherhood so well as the new reproductive technologies. If motherhood has always been a key source of women’s oppression,¹⁸⁰ then manufactured motherhood compounds the problem by making it all the more impossible for women ever to just say no. Indeed, for some the very persistence of infertile women symbolizes “the perversity of women’s socialization.”¹⁸¹

175. Philip Elmer Dewitt, *Making Babies*, TIME, Sept. 30, 1991, at 56.

176. “Many [of us] began to regard motherhood as a form of early retirement, something we might do after our other work was done (or at least definitively established). When our lives, professional and personal, were ‘in order,’ then we could have babies.” Laura Cunningham, *Mommy Oldest*, N.Y. Times, October 7, 1991 (Magazine), at 22.

177. Pamela Sebastian, *Business Bulletin*, Wall St. J., Oct. 19, 1989, at A1, col. 5.

178. Sandelowski, *supra* note 37, at 476. (the link between women’s emancipation and their fertility status has been part of professional medical literature since the 19th century.).

179. In the late 19th century, explanations for infertility focused as much on the voluntary activities of women that brought on infertility (such as thinking and masturbation) as on physical causes that were not the result of voluntary action. Because white mothers were so important to their families, their race, and their nation, their failure to reproduce became a source of guilt and, once accepted as caused by women’s deliberate choices, a source of culpability as well. By the 1950s, a renewed cultural emphasis on motherhood combined with a Freudian gloss on agency heightened the sense of failure for infertile women and set the stage for the guilt and depression found in the more recent studies. *Id.* at 480-496.

180. Martha Gimenez argues that feminist writing has contributed to the oppression of women by its failure to “posit a childfree status as a real and legitimate option for women [which] tacitly and unwittingly supports the dominant pronatalist ideologies and practices that take motherhood for granted.” Gimenez, *supra* note 165, at 300, 308-309.

181. Margarete Sandelowski, *Faultlines: Infertility and Imperiled Sisterhood*, 16 FEM. STUDIES 33, 41 (1990) (objecting to this position).

A different concern is that the technologies which aim for a genetic link between infertile mother and fetus reinforce a hierarchy among forms of parenthood. As Charlene Miall argues, the emphasis on conceiving one's own child by one or another technological means "perpetuates a value system that devalues involuntary childlessness and conceptualizes parenthood as a process of childbearing and childrearing. It also lends credence to the belief that the blood tie is one of the most important components of good parenting. . . ."¹⁸² This belief in turn reinforces the perception that infertility is a kind of immutable inferiority.

While the location of contemporary infertility discourse in this group of older, wealthier, whiter women has highlighted a number of philosophical differences among women with regard to motherhood, it has also obscured an important practical disparity. Not *all* infertile women have the chance to benefit from the new reproductive technologies. Simply put, the infertility of poor women is not regarded as a problem, or at least not as a problem society chooses to solve.¹⁸³ While women of color suffer disproportionately from infertility,¹⁸⁴ fertility treatment is available only to women who have personal wealth or in the

182. C. Miall, *supra* note 166, at 50. Such values have important implications for the many infertile couples who will not eventually conceive a child but who have bought into a hierarchy of parenthood with a vengeance. For example, adoptive parents continue to report informal stigmatization about their "second best" method of family formation. Charlene E. Miall, *The Stigma of Adoptive Parent Status: Perceptions of Community Attitudes Toward Adoption and the Experience of Informal Social Sanctioning*, 36 FAM. REL. 34 (1987).

183. The infertility of poor women has been disregarded historically as well. In the last century, science served in the cause:

Despite the fact that the incidence of sterility was at least as great in the poorer classes and among those engaged in strenuous physical labor, physicians legitimated their concern about the dysfunction in upper-income women by theorizing that physical labor and poverty were favorable to fertility, while indolence and wealth were associated with decreased fertility.

Sandelowski, *supra* note 37, at 486.

This disregard for infertility fits into a larger social context in which Black motherhood has been devalued. See Roberts, *supra* note 38, at 1436-44 (historical overview of the devaluation of Black mothers from slavery to the present).

184. Laurie Nsiah-Jefferson reports that "Black women have an infertility rate one and one-half times higher than that of white women." The explanations include "genetic disorders such as sickle cell anemia, alcohol and drug abuse, nutritional deficiencies, infectious diseases such as gonorrhea and pelvic inflammatory disease (PID) that have gone untreated, and infections after childbirth or subsequent to a poorly performed abortion." Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in REPRODUCTIVE LAWS OF THE 1990s, 23, 49-50 (Nadine Taub & Sherrill Cohen eds. 1989).

few states where private insurance covers infertility.¹⁸⁵ Infertility treatment is expressly excluded under Medicaid coverage.¹⁸⁶ While the federal government has sympathetically acknowledged the "life long legacy of infertility,"¹⁸⁷ it does not regard its treatment as necessary or worth paying for.

Yet poor women and women of color want to have children for many of the same reasons that wealthy women or white women do.¹⁸⁸ Motherhood may have special meaning within the African-American community where maternity was historically neither voluntary nor permanent. In addition, as Laurie Nsiah-Jefferson explains, in communities of color, "[a]s a result of cultural norms and restricted opportunities for women to have a profession or a career, motherhood and family life are generally valued very highly."¹⁸⁹ As a consequence, a diagnosis of infertility may be especially difficult when compounded by the unavailability of either medical treatment or adoption, which until recently, was not widely available to many people of color.¹⁹⁰

We end up with a split screen. We know that infertile women are not always regarded sympathetically and, in the case of poor women, are not regarded at all. At the same time, the desires of middle class women to conceive and inventive ways to satisfy their desire are taken seriously within the medical establishment and generally approved within the larger community.

185. Gail D. Cox, *Insurers Being Forced to Pay for Fertility Right*, Nat. L. J., April 11, 1988, at 14. (describing efforts of insurers to exclude in vitro fertilization under experimental treatment exclusion and responses by four states to limit the exclusions); see also *The Cost of Conception: Insurer must Pay*, A.B.A. J. 83 July, 1990 (where insurance manual discusses "the illness of infertility" and policy covers microsurgery on fallopian tubes, in vitro fertilization cannot be excluded).

186. See John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 989 (1986).

187. MEDICAL AND SOCIAL CHOICES, *supra* note 174, at 2, 7.

188. Lois W. Hoffman & Jean D. Manis, *The Value of Children in the United States: A New Approach to the Study of Fertility*, 41 J. MARRIAGE & FAM. 583 (1979) (reporting data on studies of psychological satisfaction as a reason for having children; the studies included white, black, and Hispanic subjects).

189. Nsiah-Jefferson, *supra* note 184, at 51. Motherhood does not necessarily have to be biological; "Despite strong cultural norms encouraging women to become biological mothers, women who choose not to do so often receive recognition and status from other mother relationships that they establish with Black children." P. COLLINS, *supra* note 74 at 120.

190. Nsiah-Jefferson observes that formal adoption has been less common as a tradition and less available practically, as adoption agencies tended not to consider or recruit people of color as adoptive parents. *Id.* at 51-52. Only 7% of the mothers who adopted children in 1987 were African-American. Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class*, 1991 DUKE L.J. 324, 351.

C. HIV-POSITIVE MOTHERS

In a recent study, Carol Levine and Nancy Dubler summarize the prevailing view about HIV-infected mothers: "Most public-health officials, physicians, policy makers, and the general public consider the stark reality of the birth of HIV-infected babies inexplicable, unjustifiable, or immoral."¹⁹¹ The inexplicability results in part from stopping short on the facts. There is an assumption that the decision of an HIV-infected woman to have a child can only have resulted from carelessness, stupidity or ignorance. No one in their right mind, the argument goes, would choose to bring up a child under such dismal conditions. To the extent that the mother's volition is acknowledged, it is tainted as the selfishness of a woman willing to subject her child to the kind of life it will face with a mother like her. For many people, "the decision to reproduce under the specter of AIDS" is a paradigmatic example of parental irresponsibility."¹⁹²

Why do people describe it this way? Part of the explanation is that choosing to have a child under conditions that men and women in other, more privileged circumstances would not choose or even contemplate removes the decision that *was* made from the realm of rationality. The only way to make sense of an unthinkable situation is to describe the decision as making no sense. If this explanation is accurate, the formation of policies begins with an irrational act as a fact in evidence. But as I argue below, that characterization seems wrong.

In contrast to infertile women, the decisions of HIV-infected women to have children can be broken down into two parts: becoming pregnant and deciding not to abort. Kristin Luker's "theory of contraceptive risk-taking" contributes to an understanding of why women become pregnant. She explains that "Women assign values to the costs associated with contraceptive use and the benefits attached to pregnancy. The result is a series of complicated, contextual calculations."¹⁹³ Some of the costs reported by women in Luker's mid-1970s study—such as feared

191. Carol Levine & Nancy N. Dubler, *Uncertain Risks and Bitter Realities: The Reproductive Choices of HIV-infected Women*, 68 MILBANK Q. 321, 322 (1990) Levine and Dubler have worked with AIDS-infected women at Montefiore Medical Center in the Bronx. The following discussion draws from their study. I thank John A. Robertson for first suggesting this article to me.

192. John D. Arras, *AIDS and Reproductive Decisions: Having Children in Fear and Trembling*, 68 THE MILBANK Q. 353, 354 (1990).

193. K. LUKER, *supra* note 134, at 111. Luker presented the model of contraceptive risk-taking as an alternative to the two prevailing theories: contraceptive ignorance (women don't know enough about contraceptive methods) and intra-psychic conflict (women subconsciously resist using the methods they do know).

weight gain from the pill—may now be outdated. Others remain current: reluctance to alienate one's partners by the delay or messiness that accompany contraceptive use or by the request that he use contraception; the difficulty or disinclination to interrupt sex; acknowledging one's sexuality by being ready for sex when you aren't supposed to be thinking about it in the first place.¹⁹⁴

Luker's model challenges the assumptions that contraception has no costs and that unwanted pregnancies have no benefits. It recognizes that: contraception often has social, emotional, financial, and physical costs which are reasonable in the context in which they occur, and that pregnancies, including those which ultimately end in abortions, have benefits which are conscious, social, and equally reasonable in the context in which they occur.¹⁹⁵

These costs and benefits may play out somewhat differently in the social, financial, emotional, and physical world of women at greatest risk for AIDS, predominantly poor women of color from large cities.¹⁹⁶

Many of the reasons why HIV-positive women become pregnant mirror the developing data on the contraceptive behavior of poor, young, or substance-abusing women. This parallel makes sense; unprotected intercourse puts women at simultaneous risk for both pregnancy and AIDS. Center for Disease Control statistics indicate that of the currently reported 18,000 cases of women with AIDS, 33% of the women were exposed through heterosexual conduct. Some women continue to risk AIDS for the same reasons they risk pregnancy. Discussions among women prisoners in an AIDS counseling program focused on the question of "why we find ourselves in situations where men won't use condoms and [why] we can't make them."¹⁹⁷ The women's list included: "I'm too shy"; "Men think they ruin it"; "He'll think I'm accusing him of cheating"; "I'm afraid he'll get violent"; "Who will support me?"; "I just don't *talk* about sex"; "Condoms don't allow total pleasure."¹⁹⁸ Other women, out of ignorance or trust, may not have thought they were

194. *Id.*, at 37-64.

195. *Id.* at 36. The matter is the more complicated because assessments about the likelihood/benefits/costs of pregnancy are not one time calculations: "women are exposed to opportunities to take contraceptive risks literally thousands of times over their sexual careers." *Id.* at 111.

196. In 1988, the number of AIDS deaths in black women between the ages of fifteen and forty-four was nine times that for white women with AIDS. In both New Jersey and New York, HIV/AIDS was the third leading cause of death for women. Chu, *supra* note 153, at 227.

197. Kathy Boudin & Judy Clark, *A Community of Women Organize Themselves to Cope with the AIDS Crisis: A Case Study from Bedford Hills Correction Facility*, 1 COLUM. J. GENDER & LAW 47 (1991).

198. *Id.* at 61.

at risk for AIDS at all. Many first learn they carry the AIDS virus only when their babies test positive at birth.¹⁹⁹ The popular press has encouraged women to downplay the risk; *Cosmopolitan* magazine "reassured" its readers that so long as they had "ordinary sexual intercourse"—even with an HIV-positive man—they were probably not at risk.²⁰⁰

But recent data suggest that a growing number of teenage girls are infected with the AIDS virus through heterosexual contact. Studies of seventeen and eighteen year olds applying for military service, where testing for the virus is now mandatory, show that "prevalences among teenage applicants were greater among those who were nonwhite, who lived in densely populated counties, and who lived in metropolitan areas with high incidences of reported cases of AIDS."²⁰¹ The prevalence among the young women applicants was greater than that among young men; "the most likely reason . . . is that they are more likely to have older, infected sexual partners than are males."²⁰²

Teenagers get pregnant for many reasons. They may lack information, access, and skill about contraceptive use. Within particular communities of adolescent girls, pregnancy may have special value, representing intimate contact, however brief.²⁰³ And, young women at greatest risk for both pregnancy and HIV infection "do not have access to economic or educational institutions that reward postponed childbearing."²⁰⁴

Another explanation for pregnancy among HIV-infected women is drug related. Of the women who contacted the virus through heterosexual activity, nearly two thirds had sexual contact with an IV drug user and 51% of all cases acquired it through their own intravenous drug

199. Newborns who test positive may not actually be infected as the testing "reveals only the presence or absence of maternal antibodies and thus establishes if the mothers are infected, not if the infants themselves are infected." Working Group, *HIV Infection, Pregnant Women, and Newborns: A Policy Proposal for Information and Testing*, 264 JAMA 2416 (1990).

200. Robert E. Gould, *Reassuring News About AIDS: A Doctor Tells You Why You May Not Be at Risk*, COSMOPOLITAN January 1988, at 46.

201. Donald S. Burke, John F. Brundage, Mary Goldenbaum, Lytt I. Gardner, Michael Peterson, Robert Visvitine, Robert Redfield, and the Walter Reed Retrovirus Research Group, *Human Immunodeficiency Virus Infections in Teenagers: Seroprevalence Among Applicants for US Military Service*, 263 JAMA 2074, 2076 (1990).

202. *Id.* at 2077. Thirty-three percent of women in the adolescent/adult category of reported AIDS cases were exposed through heterosexual conduct. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES HIV/AIDS SURVEILLANCE, 10 (July, 1991).

203. Austin, *supra* note 148.

204. Levine & Dubler, *supra* note 191, at 330. See also JOELLE SANDER, *BEFORE THEIR TIME: FOUR GENERATIONS OF TEENAGE MOTHERS* (1991) (an oral history of one family).

use.²⁰⁵ About 13% of those infected were exposed to the AIDS virus through more than one risk factor, for example, through both IV drug use and heterosexual contact.²⁰⁶ This overlap points up the complex social environment in which the risk of AIDS and pregnancy is increased by combinations of social, economic and cultural factors. For example, many drug-addicted women work as prostitutes. For them the frequency of sex, the inability to demand that the man use a condom, and a "hypersexuality" resulting from the use of crack, push risk closer to likelihood.²⁰⁷ There is also a social component to drug use. Generally, "most addicts have experienced strong social pressure to continue sharing needles. The 'shooting partner' may be the most significant social relation in the drug use sub-culture, often such partners are also sexual partners."²⁰⁸

Conceptions of risk are necessarily contextual. Many women whose social class, race, and age make them most susceptible to the AIDS virus live dangerous lives already: "Addicts already risk their lives every time they inject drugs. Prostitutes are also well aware of life-threatening risks as part of their activities. Living in urban ghettos entails innumerable risks. . . ."²⁰⁹ In short, for women whom "poverty and location have placed in the path of HIV," and for whom the risks of "abuse, violence, loss of housing, illness, discrimination are daily fare, . . . AIDS is just another, and less immediate, risk."²¹⁰

But once HIV-infected women become pregnant, why do they not abort? We know that pregnancy may be "an event of immense social significance [connoting] fertility, femininity, adulthood, independence, and a wide variety of other meanings."²¹¹ In Luker's study these "other meanings" include such things as feeling valuable, promoting (or at least testing) commitment from one's partner, and getting attention (from

205. HIV/AIDS SURVEILLANCE, *supra* note 202, at 10. About one tenth of the women who contracted the virus through heterosexual sexual had sex with a bisexual male and another tenth were born in a "Pattern-II country" (sub-Saharan Africa and some Caribbean countries) with little IV drug use or homosexuality.

206. Vivian Shayne & Barbara Kaplan, *Double Victims: Poor Women and AIDS*, 17 WOMEN & HEALTH 21, 25 (1991).

207. Levine & Dubler, *supra* note 191, at 331. In addition, as Michelle Oberman points out, contraceptive methods which require a high degree of user motivation or partner cooperation (condoms and diaphragms) or a well-scheduled life (birth control pills) or are not relatively cheap are not well-suited to the needs of addicted women. Michelle Oberman, *Sex, Drugs, Pregnancy and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 513 (1992).

208. Shayne & Kaplan, *supra* note 206, at 23-25.

209. *Id.* at 33.

210. Levine & Dubler, *supra* note 191, at 331.

211. K. LUKER, *supra* note 134, at 41.

partner, from parents).²¹² Recall, though, that the women interviewed by Luker were clients at an abortion clinic. For them, "the potential benefits of pregnancy seldom became real; they vanished with the verdict of a positive pregnancy test or were later outweighed by the actual costs of the pregnancy; hence the decision to seek a therapeutic abortion."²¹³ With AIDS mothers we go a step further. While calculations about pregnancy's costs and benefits may well have factored into the decisions of HIV-infected mothers at the time they took contraceptive risk, these women have decided that the benefits of *motherhood* outweigh the costs even after the "verdict." How does this calculation work?

First, as for some women who are not HIV-positive, abortion may not be an acceptable or an available response to pregnancy. Within minority communities there may be particular concerns about abortion as a continuation of control over the fertility of poor women.²¹⁴ Even HIV-positive women who *want* an abortion often encounter serious problems in obtaining one. A 1990 study by the New York City Commission of Human Rights found that 20 out of 50 abortion clinics canceled appointments with a patient after learning she was HIV-positive.²¹⁵ This specific discrimination occurs against an already grim background in which poverty makes even routine reproductive medical care hard to come by.²¹⁶

But many HIV-infected women choose not to abort. For them, as for other women, "a baby is the chance to have something concrete to love, or as important, to be loved by. It is proof of fertility and the visible sign of having been loved or at least touched by another."²¹⁷ The value of having a child may be intensified by virtue of the illness. For those who can "face their own mortality, [pregnancy] is a chance to leave someone behind for a mother or husband to care for in the future . . . the

212. *Id.* at 65, "The Benefits of Pregnancy." One benefit of pregnancy for many women in the study was the confirmation of their fertility, a relief following the fairly common warnings by gynecologists during the 1970s that women might have trouble conceiving after being on the pill. *Id.* at 69.

213. *Id.*

214. Nsiah-Jefferson, *supra* note 184, at 39, 46-52.

215. Elisabeth Rosenthal, *Abortion Clinics Often Reject Patients with the AIDS Virus*, N.Y. Times, Oct. 23, 1990, at A1, col. 5; see also *AIDS, Abortion, and Fairness*, N.Y. Times, Oct. 27, 1990, at A1, col. 1.

216. See Nadine Brozan, *Poor are Rocked by Closing of Gynecological Clinics*, N.Y. Times, Mar. 25, 1991, at B1, col. 2 (reporting that the closing clinics used by low-income women means "no examinations, no counseling, no prescriptions for birth control pills or diaphragms, no Pap smears and no referrals to obstetricians or for abortions.")

217. Levine & Dubler, *supra* note 191, at 334.

link to immortality that genealogy represents.”²¹⁸ A mother’s desire to have children may also be linked to her history with other children. Levine and Dubler report that many AIDS mothers have

profound yearnings for lost children—children lost because of inadequately treated maternal drug use . . . difficulties in conceiving or carrying a child, a not always discriminating foster care system, the spiriting away of children by women’s mothers, children’s fathers, and other family members, thereby eliminating the possibility of communication between mothers and children. . . .²¹⁹

Such desires are familiar outside the context of AIDS and poverty. Doctors often advise women who have had miscarriages or have lost children through death or premature birth to “try again.” But some argue that while wanting to have children is one thing, deliberately giving birth to a child who may have a fatal disease is something quite different.²²⁰ There are several responses to this position. First, some women do not know they have AIDS at the time they become pregnant. Second, an HIV-positive woman does not necessarily transmit the virus to her fetus. Currently, the best evidence suggests that a child born to an HIV-infected mother has a 30% chance of being born with or developing the disease.²²¹ In this regard HIV-positive women are like other mothers who have genetically transmitted fatal diseases, such as Tay-Sachs. Some members of each group are willing to risk pregnancy and hope for a healthy child. A difference between them is that most women who learn that their fetus is affected by Tay-Sachs choose to abort, a decision compatible with their religious and cultural ideology.²²² Many AIDS mothers, on the other hand, do not abort, for the reasons discussed above. They are perhaps more like mothers who have chosen not to abort after learning of another genetic deficiency, such as Downs syndrome, through some form of prenatal screening. Pediatric AIDS is like Down’s Syndrome in another way. The stigma accompanying AIDS may at times overshadow the physical consequences of the condition. Thus part of the expected maternal calculation might be to consider the

218. *Id.* at 335.

219. *Id.* at 337, quoting an unpublished paper by Anitra Pivnic.

220. There is substantial disapproval of mothers who risk transmission of conditions far less dire, such as physical abnormalities. See, e.g., Steven A. Holmes, *TV Anchor’s Disability Stirs Dispute*, N.Y. Times, Aug. 23, 1991, at 16, col.3 (controversy over pregnancy of mother with genetic condition that fuses fingers and toes); see generally Adrienne Asch, *Reproductive Technology and Disability*, in REPRODUCTIVE LAWS, *supra* note 177, at 69.

221. Chu, *supra* note 153, at 225-29.

222. Levine and Dubler, *supra* note 191, at 335-36.

range of social discrimination and disadvantage a child with AIDS will likely face.²²³

But the "expected calculation" leads to a third reason why the prospect of giving birth to a sick or stigmatized child may not seem very out of the ordinary to many women with the AIDS virus. Babies born to poor women are often at risk physically, starting with the immediate developmental deficit of low birth weights. The cause of such risks is not very complicated. It is simply poverty. Poverty continues to harm children as they grow: poor nutrition, inadequate medical care, the toxicity of their homes, their playgrounds, the physical dangers of life in rough neighborhoods.²²⁴ My argument is not that because dangers are common within certain communities, one more is of no consequence. Rather, the risk of harm to their children is something that many of these mothers have come to expect.

Of course, AIDS transforms the risk of harm into certainty. A mother with AIDS is going to die. We know generally that securing a physical link to the future is a common motive for having a child. For AIDS mothers, the issue of mortality is not a distant concept of "some day" but is present and vivid. From the mother's perspective, the birth of a child may provide comfort. But still, others ask, how can any woman in good moral conscience choose to deliver an orphan? Part of the answer is that our society is selective in deciding when such a decision is noble and when it is not. As Levine and Dubler point out, if the population of AIDS mothers was made up of the (predominantly white) wives of hemophiliacs, public attitudes might be much different.²²⁵ They might then be seen as unlucky rather than undeserving.

223. Familiar examples include AIDS-infected children being denied public schooling. For an analysis of possible discrimination of AIDS children in the receipt of medical care, see James Bopp & Deborah Gardner, *AIDS Babies, Crack Babies: Challenges to the Law*, 7 ISSUES IN L. & MED. 3 (1991) (urging that Section 504 of the Rehabilitation Act of 1973—protecting handicapped persons—be applied to infants born HIV-positive).

224. Joanne Ball, *Endangered: Black Men: AIDS, Drugs, Crime Lower Life Expectancy*, The Boston Globe, June 4, 1989, at 85; Katherine Ratcliffe, *Fusing Civil, Environmental Rights*, Christian Sci. Monitor, May 24, 1991 at 12; Lena Williams, *Race Bias Found in Location of Toxic Dumps*, N.Y. Times, Apr. 16, 1987, at A20, col. 1. See also Sally Ann Connell, *And the Children Keep on Dying*, S.F. Chron., June 10, 1990, at 3 (reporting on clusters of childhood cancers in farm worker families with high exposures to pesticides.). One articulation of the problem is not that poor children have dangerous childhoods, but that they have no childhood at all. See ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (1991).

225. Levine & Dubler, *supra* note 191, at 323. The authors note that giving birth on death's door (especially if one is dying of Movie Star's disease as in *Steel Magnolias*) is sometimes even regarded as meaningful.

CONCLUSION

Despite the significant differences in health, race, and class between women with AIDS and women treated for infertility, each group explains the decision to have children in similar ways, invoking conceptions of posterity, self-worth, and love. The decision to have a baby is related to the availability of other sources of identity, satisfaction, and status. Some women, such as the pro-choice activists in Luker's study, allocate and schedule the use of those resources to enhance their eventual choice of motherhood. Other women have turned to motherhood after recognizing that anticipated satisfactions from work were not to be realized. Kathleen Gerson describes the course of women who entered the labor force in the 1970s and then "veered toward domesticity:"

Although their jobs often appeared promising at the outset, this initial glow tended toward monotony and frustration as blocks to upward mobility were encountered. The resulting demoralization at the workplace dampened their initial enthusiasm for paid work, eased their ambivalence toward motherhood, and turned them toward the home in spite of their earlier aversion to domesticity.²²⁶

Still other women, such as the anti-abortion activists in Luker's study, gave low priority to their careers as a primary source of satisfaction in the first place.²²⁷

Without doubt, most women treated for infertility have chosen maternity from a broad range of nonmaternal sources of satisfaction available to them.²²⁸ But if we accept motherhood as a good choice for women whose lives are rich in resources because it is understood to be a source of self- and community esteem, of family life, of continuity, and of loving relationships, then the decision to have a child when made by women with few external resources, should make similar sense. I am not arguing that the absence of social resources is the entire explanation for choosing to have children. Motherhood is something more complex and more central than a fallback position. But if we understand that women dying from AIDS choose to have children for reasons like the reasons of sisters, friends and colleagues we may know more intimately, then the maternity of AIDS mothers may seem as reasonable and perhaps as important, if far more difficult, as the more familiar models.

226. KATHLEEN GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* 103 (1985).

227. K. LUKER, *supra* note 134.

228. Middle class infertile women also have more options for maternity, since, in contrast to lower class women, they are more often eligible to adopt.

Does the fact that infertile women and women with AIDS choose to have children for much the same reasons subvert my earlier assertions about the precariousness of any concept of maternal essentialism? Are women as mothers really more alike than not, after all? I think the answer is still no. Indeed, the comparison between AIDS-infected and infertile women highlights rather than undermines the difference between motherhood as an essentialist concept and motherhood as a status characterized by common experiences. That difference, in turn, illuminates the importance of getting facts about mothers as straight as we can.

Essentialism suggests something both innate and inevitable. If mothers are all the same in the ways that count, there is little need to explore any particular set of circumstances. The essence is known *a priori*: each mother is but a variation on a theme. Mothers—real ones—are kind, healthy, caring and married. Thus, essentialism has a normative aspect; there *is* such a thing as a good mother. This scheme has tremendous implications for policy setting. If mothers are essentially the same, they should be treated the same. Women who appear to be unlike the essentially good mother should also be treated the same as one another, but less favorably than the more authentic version. By denying diversity and discounting experience, essentialism blunts inquiry.

In contrast, thinking about mothers as having things in common requires continuing inquiry and evaluation. What values, experiences, and desires are shared? How do we know? As the cases above indicate, women may desire children for quite similar reasons. At the same time, huge differences distinguish the preferences: When do they want to have them? How many do they want to have? Under what circumstances?

The fact that AIDS mothers and infertile women may want children for similar reasons does not mean that their circumstances are the same or that their decisions have the same costs. They may share a common desire to become mothers, but what they do *not* have in common may be a longer list: quality of medical care, income level, security for themselves and their children. These material conditions are inseparable from issues of maternity. Consider just the issue of medical care. Medical protocols offered to infertile women require more than patient wealth. They rely on a woman's familiarity, patience, and trust of doctors and medicine, attributes more likely acquired in relatively privileged circumstances where most problems are solved, often medically. Advanced technologies come to the rescue in part because they fit comfortably into the world in which middle class infertility arises. The role of professional medicine in the lives of poor women is much different and makes the

treatment of both AIDS and of pregnancy deeply problematic. For example, experimental (or even routine) drug therapies are "vitaly important, but [are] irrelevant for people whose lives never intersect with primary health care."²²⁹ Similarly, control of contraception and prenatal medical care are necessarily more complicated for women who "have little or no primary health care, rely on emergency room maternity care, have few reproductive options, experience dwindling power in sexual relationships and have always found that their needs are regarded as dispensable by those charged with appropriating resources."²³⁰

Important practical policy decisions rest on how we view AIDS mothers and infertile women. Should pregnant women and their newborn children be tested for AIDS?²³¹ Should AIDS be grounds for limiting a woman's right to conceive?²³² Should maternal AIDS be grounds for removing children under neglect statutes?²³³ Should infertility treatment be included within present schemes of public and private health care?²³⁴ Should greater attention be given to encouraging adoption than to "curing" infertility? These questions are all ways of asking what we think about motherhood in these more difficult cases. The answers depend crucially on which facts we identify and take as important.

229. Arline Zarembka & Katherine M. Franke, *Women in the AIDS Epidemic: A Portrait of Unmet Needs*, 9 ST. LOUIS U. PUB. L. REV. 519, 520 (1990).

230. *Id.* at 520-21. The overlay of drug addiction to poverty and HIV make the likelihood of receiving prenatal care all the more remote; drug treatment programs are reluctant to take on pregnant addicts for whom treatment will be costly and time-consuming, and whose pregnancies may be high risk. Oberman, *supra* note 207 at 518-19.

231. Mandatory AIDS testing is commonly urged for two groups of people—those who meet high risk profiles and those who may expose others to their bodily fluids. See Steven Eisenstat, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing Governmental Public Health Interests with the Individual's Privacy Interest*, 52 U. PITT. L. REV. 327, 337-339 (1991). The latter category usually includes prisoners, rapists, or patients. Under this rationale, pregnant women—whose transmission of bodily fluids is a certainty—seem likely additions. See generally Working Group, *HIV Infection*, *supra* note 199, at 2416 (setting forth proposal for informing all pregnant women and new mothers about the AIDS epidemic and the availability of testing but rejecting the idea of mandatory testing.)

232. See John Kydd, *AIDS and Family Law*, 44 WASH. ST. B. NEWS 9, 10 (March 1990) (The 1989 Association of Family and Conciliation Courts AIDS Policy states "The HIV status of a mother should be considered grounds for limiting her right to conceive or her right to parent her child"). But see Kristin B. Glen, *Parents With AIDS, Children With AIDS*, 29 JUDGES' J. 15, 20 (1990) (arguing that sterilization orders against HIV-positive or infected mothers should not be granted).

233. AIDS has already been a factor in custody disputes; see Note, *Public Hysteria, Private Conflict: Child Custody and Visitation Disputes Involving an HIV infected Parent*, 63 N.Y.U. L. REV. 1092 (1988). See generally Glen, *supra* note 232 (reviewing effect of AIDS of either parent or child on traditional applications of custody, adoption and foster care law).

234. See Henry Greely, *AIDS and the American Health Care Financing System*, 51 U. PITT. L. REV. 73 (1989).

For example, suppose we come to understand that for HIV-positive women, having a baby may well be "the most reasonable and available choice, a natural outcome of all the forces in their lives, in which avenues for self-definition and expression other than mothering are largely absent."²³⁵ We might choose to focus on and to respect the word "choice" and respond by providing HIV-positive mothers with services they need, such as assistance with child care and custody arrangements during sickness and upon death, good medical care and planning mechanisms for their future health care decisions.²³⁶ Or we might focus on the term "available" and increase the availability of other options, such as appropriate contraception or safe and accessible abortions. We might even take on the social significance of motherhood directly. *Why* is motherhood reasonable when other forms of self-definition are absent? *Why* are other forms absent in the first place?

The fact-finding process encourages us to recognize the ways in which different mothers may be alike—the role of motherhood as a cornerstone of women's self-esteem within our society is an example. But such similarities ought not be confused with a false, if tempting, order of essential characteristics. The aim here is to recognize shared moments of maternal experience without obscuring the range of diverse circumstances in which they arise. Using commonalities as an organizing principle for thinking about mothers requires vigilance, for the concept recognizes a fluidity about the subject group. Women who are mothers are likely to come together in constantly reconstituting formations that depend on their age, the ages of their children, their incomes, their politics. This fluidity means that the facts we want to know and the inquiries necessary to uncover them are likely to be complicated. This is not necessarily good news for mothers. In a political culture where complexities are crunched into sound bites, a status as complicated as modern motherhood tests public patience.

The old version of motherhood was simpler and more predictable. Mothers now are not as easy to deal with as was once the case. They are smarter, poorer, older and younger. These changes have not gone completely unnoticed. Women with children are no longer identified as mothers all the time or for all purposes. Differences among mothers are now recognized more readily and there is now a better prospect than there used to be that these differences will be taken seriously in policy formation. But everything still depends, in the end, on how we think

235. Levine & Dubler, *supra* note 191 at 323.

236. Zarembka & Franke, *supra* note 229, at 536-41.

about the concerns and characteristics that mothers share, and how we distinguish mothers from one another.

To look for commonalities among mothers is to be alert and open to findings of diversity. To divine an essence of motherhood is to suppose in advance of inquiry that any differences we find will turn out to be superficial. Even in the midst of diversity we have discovered that the essentialist temptation remains alluring. There is still a tendency to retreat to the comforting poetry of an ideal type:

"M" is for the million things she gave me,
"O" means only that she's growing old,
"T" is for the tears were shed to save me,
"H" is for her heart of purest gold,
"E" is for her eyes, with lovelight shining,
"R" means right, and right she'll always be,
Put them all together, they spell "MOTHER,"
A word that means the world to me.²³⁷

237. Johnson & Morse, *supra* note *.