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CHOOSING SUBSTANTIVE JUSTICE: A DISCUSSION OF "CHOICE," "RIGHTS" AND THE NEW REPRODUCTIVE TECHNOLOGIES†

April L. Cherry*

For to survive in the mouth of this dragon we call America, we have had to learn this first and most vital lesson — that we were never meant to survive. Not as human beings.

AUDRE LORDE, *The Transformation of Silence into Language and Action*, in *SISTER OUTSIDER* 40, 42 (1984).

INTRODUCTION

In the above quoted passage, Audre Lorde explains the importance of speaking, even in the most difficult of circumstances. She has taught us that our silence does not protect us. She has written: "Because the machine will try to grind you into dust anyway, whether or not we speak. We can sit in our corners mute forever while our sisters and our selves are wasted . . . ; we can sit in our safe corners mute as bottles, and we will still be no less afraid."¹ It is in this spirit that I offer my thoughts about the limits of choice rhetoric and rights-talk in the context of women and reproduction. For it is often noted by feminists that to criticize the foundation of women's reproductive rights is to not fully comprehend the fragility of women's current reproductive rights, and to give fodder to those who wish to further restrict such

† This paper is an expanded version of the speech that Professor Cherry presented at the National Women Law Students' Association Conference, entitled *Consensus and the Community: Diversifying Our Points of View*, at the University of Wisconsin Law School on March 1, 1996.

Editor's Note: For Professor Cherry's complete article on this topic, see 10 *Wis. WOMEN'S L.J.* 161 (1996).

* Assistant Professor of Law, Florida State University College of Law. A.B., Vassar College; J.D., Yale Law School. I would like to thank Lucinda Finley, Catharine MacKinnon, and Harlon Dalton, who, as my teachers, saved my sanity, by being there, by telling me and those like me that we weren't crazy, and by teaching their students that the lives of women of all races and ethnicities, lesbians and gay men, and communities of color are important, and that issues that affect our lives are integral to legal education. Many thanks to Meg Baldwin, Beth Gammie, and Ann McGinley for their friendship and support; M.D. Miles for her patience in listening to me read drafts of this paper; Melanie Stewart for her excellent research; and Kim Epstein, University of Wisconsin School of Law, Class of 1996, who pulled off a wonderful conference.

1. AUDRE LORDE, *The Transformation of Silence into Language and Action*, in *SISTER OUTSIDER* 40, 42 (1984).

rights.² I trust that silence will not save us. However, giving voice to our values and our concerns about women's subordination will, at the very least, do us no harm.

CHOICE RHETORIC

Often feminist discussions regarding contraceptives, sterilization, abortion, and the newer emerging reproductive technologies, such as artificial insemination,³ in vitro fertilization⁴ and even contract pregnancy⁵ are framed around or based in the rhetoric of "choice" and

2. See, e.g., Lynn M. Paltrow, *Test Tube Women: What Future for Motherhood?*, 8 WOMEN'S RIGHTS RPT. 303, 306 (1985) (book review) (the critiques of sex-selective abortions could easily be used to support the anti-abortion movement).

3. Artificial insemination involves the introduction of fresh or formerly frozen sperm into the uterus or vagina of a woman through the use of a catheter or "turkey baster" in order to attempt to produce a pregnancy. The sperm has been collected from a man who has masturbated and ejaculated and whose sperm is collected for the purpose of artificial insemination. This type of insemination is deemed "artificial" because it is non-coital.

4. In order to produce a pregnancy through in-vitro fertilization ("IVF"), a woman's ovaries are stimulated (hyper-ovulated) with powerful fertility drugs, such as Clomid, to produce multiple ripened ova. These ova are removed from the woman's ovaries surgically, through laparoscopy, or non-surgically, through a transvaginal retrieval method. The American Fertility Soc'y, *In-Vitro Fertilization — Embryo Transfer (IVF-ET) in the United States IVF-ET Registry: 1989 Result*, 55 FERTILITY AND STERILITY 14, 15 (1991). A sperm "donation" is received from a man who has masturbated and whose ejaculatory material has been collected. The ova and sperm are combined in a petri dish. Fertilization occurs and the resulting embryos are inseminated into either the donating woman's uterus or into the uterus of another woman. If the embryos implant into the uterine wall of the receiving woman, then a pregnancy begins. See generally, Lori B. Andrews and Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623 (1991). Studies have shown that IVF results in live birth in only 10% of the cases at the best clinic. *Id.* at 644; WOMEN UNDER ATTACK: VICTORIES, BACKLASH AND THE FIGHT FOR REPRODUCTIVE FREEDOM, 33 (Susan E. Davis ed., 1988); see also PATRICIA SPALLONE, *BEYOND CONCEPTION: THE NEW POLITICS OF REPRODUCTION* 63 (1989) (In 1985, the live birth percentage per IVF treatment cycle was 8.5 percent.). Children born as a result of IVF have a higher incident of severe genetic abnormalities, including spina bifida, than children born without the use of such technologies. See, e.g., Andrews and Douglass, *supra* at 649-51; see generally, GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* (1985).

5. Contract pregnancy is also known as surrogate motherhood. It takes one of two forms. Traditionally, a woman is paid to be inseminated with the sperm of the man who pays her. The woman agrees to gestate and birth the fetus and to terminate her parental rights to the resulting child in favor of the man who paid her and sometimes his wife. In this form of contract pregnancy, the birth mother is the genetic mother of the resulting child. In the second form of contract pregnancy, "gestational surrogacy," a woman is paid to be inseminated with the embryo of a contracting couple, who have already had their sperm and ova joined in vitro. In this form of contract pregnancy, the resulting child is not genetically related to its birth mother. Nevertheless, I would argue that the child born to a "gestational" mother has two biological mothers: her birth mother and her genetic mother. *But see Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (natural mother is gamete provider not birth mother). In discussing issues regarding contract pregnancy, I choose not to use the customary

respect for women's bodily integrity. Under choice rhetoric, a woman chooses to use contraception, abort a pre-viable fetus, or use alternative means of insemination based on her private circumstances. We all say that women, because of their status as humans, must have authentic rights to bodily integrity if we, as women, are ever going to obtain meaningful equality in our society. For example, most feminists have supported abortion in the terms of choice and bodily integrity, viewing *any* restriction regarding pre-viability access to abortion as working against the goal of equality for women. I understand the importance of the theory and the rhetoric, and in large part, I believe it. Because of the operation of patriarchy, women historically have not, and currently have, little control over their physical selves. One example of this lack of control over our bodies is the fact that the law did not recognize marital rape as a crime until relatively recently.⁶ Legally, women's bodies were not their own. Legally, women's bodies belonged to the men to whom they were legally attached.⁷ Women in abusive relationships continue to learn that their bodies are not their own, because the State has created so few mechanisms to enable women to authentically maintain control over their bodies.⁸ But given the history of women's lack of control over our bodies, it is not surprising to any of us that "choice," choice with regard to what we do with our bodies, has become central to the feminist discussion of reproductive rights.

There are other reasons why "choice" has become such an important political and rhetorical tool for North American feminists. Choice is an important part of classic liberalism — which assumes that all citizens have a zone of liberty in which to make intimate decisions.⁹ Choosing when or whether to have children has long been deemed

term for this technology because it explicitly labels the genetic mother, in the first instance, and the birth mother, in the second instance, as not the resulting child's "real" mother. Such a construction denigrates the work of pregnancy, as well as the emotional bonds women often form with the developing fetuses they carry.

6. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 Fla. L. Rev. 45, 49 (1990) (In the 1980s, a handful of state judges held or opined in dicta that the marital rape exception constituted a denial of married women's constitutional right to equal protection.). See also MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND*, 156-88, 1850-95 (1989) (examining the social and legal structures supporting battering and rape in late nineteenth century England).

7. Cf. West, *supra* note 6, at 71 ("The marital rape exemption creates, fosters, and encourages . . . a separate state of sovereignty ungoverned by law and insulated from state interference.").

8. R. EMERSON DOBASH AND RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* (1992) (examining legal and social structures supporting the battering of women in the United States); see also Marie Fox, *Legal Responses to Battered Women who Kill*, in LAW AND BODY POLITICS: REGULATING THE FEMALE BODY (Jo Bridgeman and Susan Millins eds., 1995) 171-200 (examining the adequacy of the response of the British justice system to battered women who kill their abusers).

9. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

part of this liberty.¹⁰ The newer reproductive technologies seem to expand our vision of what liberty and choice mean. With technology, reproductive liberty can become not only the right to have or not to have a child, but the right to have a child by any technologically available means.¹¹ As Janet Dolgin noted: "reproductive technology, simply by unfolding, invites human beings to become increasingly autonomous, and to enter into a range of contracts that may prove unlimited. It thus invites, and values, choice."¹² As a result, it also values the principles of classic liberalism, which values autonomy without reference to the effects that the exercise of autonomy has on others, and without reference to the conditions under which choices are made.¹³ So even though the political and rhetorical utility of choice is problematic, choice has nevertheless been an important part of our feminist fight for the control of our bodies.

Because reproductive rights for women are so tenuous and are increasingly more vulnerable,¹⁴ it has been difficult for feminists to seriously discuss the wisdom of the "choice" rhetoric we use when discussing access to abortion or access to any of the new emerging reproductive technologies.¹⁵ I have been thinking about this issue, specifically with regard to feminist responses to sex-selective abortion.¹⁶ For example, although feminist ethicist Tabitha Powledge understands that in the context of sex-selection of children, to prefer males is unavoidably to denigrate females,¹⁷ she nevertheless takes the

10. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation is a fundamental right); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception is a fundamental right); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion of non-viable fetus is a fundamental right); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2816 (1992) (right to abortion is a liberty interest) (O'Connor, Kennedy & Souter, J.J.).

11. See, e.g., John Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 410 (1983).

12. Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-child Bond*, 26 CONN. L. REV. 1261, 1272 (1994).

13. Cf. SPALLONE, *supra* note 4, at 81 ("[W]e similarly hear the argument that women should have the 'free' choice to become 'surrogates' if we wanted. But what does that mean? One survey showed that 40 percent of women who became 'surrogate' mothers were unemployed or on welfare.").

14. See generally, *Casey*, 112 S. Ct. 2791 (decreasing the standard of review of regulations restricting abortion to an "undue burden" review).

15. Tabitha Powledge, *Toward A Moral Policy for Sex Choice*, in *SEX SELECTION OF CHILDREN* 201, 207 (Neil G. Bennett ed., 1983).

16. See April L. Cherry, *A Feminist Understanding of Sex Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161 (1996). For other approaches to the issue of sex-selection and the law, see Jodi Danis, *Sexism and "the Superfluous Female": Arguments for Regulating Pre-Implantation Sex Selection*, 18 HARV. WOMEN'S L.J. 219 (1995); Owen Jones, *Sex Selection: Regulating Technology Enabling the Predetermination of a Child's Gender*, 6 HARV. J.L. & TECH. 1 (1992); George Schedler, *Benign Sex Discrimination Revisited: Constitutional and Moral Issues in Banning Sex-Selection Abortion*, 15 PEPP. L. REV. 295 (1988).

17. Powledge, *supra* note 15, at 207.

position vis-a-vis sex-selection, that in order to protect the improvements women have already achieved, "society should seek no legal restrictions on reproductive freedom, even on a technology that will be used selectively against females."¹⁸ Powledge says that although she "recognize[s] its irony, [she] view[s] this position as part of the price of furthering the goal of equal treatment."¹⁹

The problem here is that our reliance on choice creates a situation in which substantive outcomes are subordinated to process neutrality. In other words, substantive equality is secondary to formal equality, even though we know that formal equality has often allowed deep substantive oppression and subordination to continue.²⁰ For example, as Janice Raymond has noted, "[c]hoice resonates as a quintessential U.S. value, set in a context of a social history that has gradually allowed all sorts of oppressive so-called options, such as prostitution [and] pornography, . . . to be defended in the name of women's right to choose."²¹ We allow people to make decisions, "choices," regardless of the outcome. This classical liberal position protects individuals from unwarranted government intrusion into decisions regarding the private sphere, but it does not require nor does it encourage individuals to behave in ways that further the interests of the community.²² The subordination of substantive outcomes to process neutrality (or to choice) does not necessarily promote women's interests in equality. Thus, by focusing on the process of whether bodily integrity and choice are protected, we fail to pay close attention to the substantive outcome — the abortion of female fetuses — or the denigration of women as a social group.

So we have a dilemma — feminism has traditionally stressed the importance of women's control over their bodies and reproductive control in achieving social, political, and economic equality.²³ Sex-selective abortion, like other "new" reproductive technologies, poses challenges to this traditional feminist position. I think that the use of newer reproductive technologies presents difficulties for traditional feminist thought in this area because the effects of an individual woman's use of the technology goes beyond herself in ways that are potentially dangerous/negative, not just for the woman using the

18. *Id.*

19. *Id.*

20. See CATHARINE MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

21. JANICE RAYMOND, *WOMEN AS WOMBS ix-x* (1993).

22. The classic liberal legal tradition is keenly connected to the classic liberal political tradition associated with the works of Thomas Hobbes and John Locke, which are committed to a formal or procedural conception of justice rather than a conception of law in which substantive justice is deemed more or as significant. Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 276-77 n.38 (1978).

23. ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM* 289-302 (1985).

technology, but for women as a social group. In the case of sex-selective abortion, and other reproductive technologies, "the paradox posed by individual choices eventually alter[s] every woman's experience of maternity and motherhood."²⁴ Use of sex-selective pre-conception and post-conception techniques, for example, is the result of, and becomes one of the causes of, the denigration of women. Boys are chosen over girls because of what it means to be a girl in society. Girls are devalued.²⁵ Sex-selective abortion also decreases the number of women born. We know from research that in societies where men greatly outnumber women, women are heavily restricted in both private and public activity.²⁶ In our analyses of the newer reproductive technologies, we need to remain cognizant that the technical means heralded as *liberating* women's choice are always limited by the social, political, and economic forces that constrain women's "free choice."

RIGHTS AND RIGHTS-TALK

As a society, we often talk about rights as a solution for the inequality we face. I believe that this is true, particularly of those of us who are members of historically and contemporarily oppressed and vilified groups, such as African-Americans, Latinos, Asians, women of all races and ethnic groups, lesbians and gay men, and poor people. As critical race scholar Patricia Williams has explained regarding African-Americans: "For the historically disempowered, the conferring of rights is symbolic of all of the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elaborates one's status from human body to social being."²⁷ Furthermore, historically, the assertion of needs, in addition

24. Laura R. Woliver, *The Deflective Power of Reproductive Technologies: The Impact on Women*, 9 WOMEN AND POL. 17, 19-20 (1989).

25. See, e.g., Nancy E. Williamson, *Boys or Girls? Parental Preference and Sex Control*, 33 POPULATION BULL. 13-14 (1978) (sex preference reflects the roles that women and men or boys and girls play in the society).

26. Women in societies with such unbalanced sex ratios suffer from substantial constraints on their behavior, such as significant penalties for non-virginity before state recognized marriage, proscriptions against adultery, extensive control by men over their wives and daughters, and the marriage of girls and women at younger ages. See MARCIA GUTTENTAG AND PAUL SECORD, TOO MANY WOMEN? THE SEX RATIO QUESTION 79 (1983). Women in these societies are also endangered by female infanticide and neglect, and by strong sex role ideologies, which socially and legally require women to behave according to models of submission and subordination. See Susan Greenhalgh and Jiali Li, *Engendering Reproductive Policy and Practice in Peasant China: For a Feminist Demography of Reproduction*, 20 SIGNS: J. WOMEN IN CULTURE & SOC'Y 601, 601 (1995). For a fuller analysis see Cherly, *supra* note 16, at 168-75.

27. PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 153 (1991). See also RAYMOND, *supra* note 21, at 192 (movement from body to social being is also relevant in women's struggle for reproductive justice).

Feminist legal scholar Fran Olsen has also noted that "[a]s exhortation, the statement that women have rights is an assertion about the kind of society we want to live in, the kind of relations among people we wish to foster, and the kind of behavior that

to the assertion of rights, or in place of the assertion of rights, as advocated by critical legal studies scholars, has been unsuccessful for disenfranchised groups in our society. Again, Williams notes: "For blacks, describing needs has been a dismal failure as political activity. . . . The history of our need is certainly moving enough to have been called poetry, oratory and epic entertainment, but it has never been treated by white institutions as a statement of political priority."²⁸

As a result of these observations, critical race theorists, as well as other scholars of color, have encouraged the fight for rights. Rights, they have found, serve a dual purpose. Rights "facilitate our access to a variety of legal norms and enforcement mechanisms by which we try to indicate . . . important claims,"²⁹ and are useful "to mobilize support for a particular agenda."³⁰ As critical race theorist John Calmore observes: "Until the subjugated group feels a sense of moral outrage, the group will almost certainly fail to resist the injustice that is oppressing it."³¹ Feminist scholar Elizabeth Schneider has also noted that rights talk can "provide a sense of self-hood and collective identity and start a political conversation."³² For example, rights and rights-talk have empowered women as a social group by giving some women power, although limited, over whether and when they choose motherhood. Rights discourse in this context served to foster political education and organization.³³ As a result, rights discourse was used to facilitate justice.

Hence, rights and rights rhetoric can only be useful if they are not separated from issues of social justice and other ethical concerns. In the reproductive area, our focus on individual rights has sometimes allowed us to neglect larger issues of social need and justice.

Many radical feminists are critical of rights-talk due to its justifications of state power based on the enforcement of individual rights.³⁴ Rights and claims to rights are part of the patriarchal system of law which is represented by the belief in the importance of "objectivity, distance and abstraction."³⁵ As a result, rights-talk tends to delegi-

is to be praised or blamed. The assertion that women have rights is a moral claim about how human beings should act toward one another." Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387, 391 (1984). See also Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 611 (1986) (rights discourse can express human and communal values).

28. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 412 (1987).

29. John O. Calmore, *Critical Race Theory, Archie Shepp and Fire Music Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2211 (1992).

30. *Id.*

31. *Id.* (footnote omitted).

32. Schneider, *supra* note 27, at 623.

33. *Id.* at 622-23.

34. See, e.g., RAYMOND, *supra* note 21, at 191.

35. Schneider, *supra* note 27, at 597, 600; Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE

timize women's experience of the world, such as their treatment under the law governing reproductive technologies, and the importance of women's material needs.³⁶ Rights-talk under patriarchy has lead to the emergence of maternal-fetal conflicts in both medicine and law, in which physicians and judges favor fetal interests over the pregnant woman's non-consent or the pregnant woman's freedom.³⁷ Rights-talk has helped us get to a place where we discuss the rights of the free floating fetus as though the fetus were not attached to a woman's womb.³⁸ "Sooner or later we have to expose rights-based perspectives . . . for what they are (in part): a poorly disguised way of preserving things just as they are."³⁹

Even in light of the criticism placed on the value of rights in our society, rights and rights discourse have been, and will continue to be, useful to disenfranchised groups in our struggle for a just society. Rights-talk speaks to the interpretive community. It speaks in the language of those who hold power.⁴⁰ In order for any dissenting view to be seriously considered in legal discourse, those in control must understand the claims of the dispossessed and take those claims seriously. Nevertheless, rights discourse, as currently framed by liberalism, merely permits reform. It will never allow the destruction of patriarchy and hence will never allow the radical changes needed to truly transform women's social and political status. Individual rights are the "tools of a racist patriarchy," to use Audre Lorde's meta-

& Soc'y 635, 655 (1983) (Law "not only reflects a society in which men rule women; it rules in a male way.").

36. With respect of sexuality, Fran Olsen notes: "As an analytic tool, the concept that women have rights seems powerful but in practice it turns out not to be helpful; it cannot answer any difficult questions. [With regard to sexuality] [w]omen's right to freedom of action conflicts with their right to security; their right to substantive equality conflicts with their right to formal equality." Olsen, *supra* note 27, at 391. See also Calmore, *supra* note 29, at 2215 ("Th[e] process whereby rights are defined by law, however, is substantially isolated from the very needs that generated those rights and the values they envisaged.").

37. See, e.g., Robertson, *supra* note 11, at 437-64 (arguing for a legal preference for fetal interests over maternal freedom during pregnancy, labor and delivery); Raleigh Fitkin v. Anderson, 201 A.2d 537 (N.J. 1964) (fetus entitled to benefits of blood transfusion despite pregnant woman's refusal); Jefferson v. Griffin Spaulding County Hospital Authority, 274 S.E.2d 457 (Ga. 1981). See also PETCHESKY, *supra* note 23, at 352-53 (growing number of ob/gyn practitioners view the fetus as their patient independent of the woman who carries it). But see *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (en banc) (recognizing a pregnant woman's right to bodily integrity as against the state's interest in protecting the fetus).

38. For a fuller analysis of this phenomenon see, e.g., PETCHESKY, *supra* note 23, at 334-35.

39. RAYMOND, *supra* note 21, at 191 (quoting Sherene Razack, *Wrong Rights: Feminism Applied to Law*, 10 LE BULLETIN / NEWSLETTER, INSTITUT SIMONE DE BEAUVOIR 13 (1990)).

40. Cf. Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 84-85, 88 (1985) (common law theory of possession gives preference to those who articulate their intentions in a specific vocabulary and in a structure that is approved of and understood by those in power).

phor, and "will never dismantle the master's house."⁴¹ In order for rights to be truly transformative, rights discourse must emphasize the interdependence of autonomy and community, and be connected to the struggle for social justice.⁴²

CHOICE, RIGHTS, AND THE FUTURE OF FEMINIST LEGAL THOUGHT IN THE AREA OF REPRODUCTION

So given the problematic nature of choice and rights rhetoric, what do we do? In order to ethically support rights in the reproductive arena, feminists must seek to ensure that the rights sought do not create new forms of subordination for women of any race or class, or for members of other subordinated groups.⁴³ Feminism must consider whether the right to choose any of the emerging reproductive technologies increases women's reproductive freedom or increases the exploitation of women's reproductive capacities. Feminism must also consider the ways in which reproductive technologies will affect the value or status of women in this gender-based society. Even many feminists who have argued against the legal regulation of reproductive technologies have recognized that the principle of freedom of choice (liberty) must be second to the principles of social fairness and anti-subordination (substantive equality) if women's subordination is to be reduced or eradicated.⁴⁴ There must be a point at which the rights of individual women impinge so strongly on women as a social group that social or legal regulation is required.⁴⁵ Therefore, if rights-talk is to be a useful tool of feminist discourse in this area, freedom of choice must be weighed against the commitment to ending subordination.⁴⁶

In the final analysis, rights discourse must include an understanding of the historical and contemporary injustices towards women, as well as an understanding of women's social training in patriarchy

41. AUDRE LORDE, *The Master's Tools will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110-13 (1984).

42. See Schneider, *supra* note 27, at 611.

43. Cf. Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1771 (1990).

44. See, e.g., Powledge, *supra* note 15; Roberta Steinbacher & Helen B. Holmes, *Sex Choice: Survival and Sisterhood*, in *MAN-MADE WOMEN* 52, 61 (Gena Corea et. al. eds., 1987).

45. See Robyn Rowland, *Motherhood, Patriarchal Power, Alienation and the Issue of 'Choice' in Sex Preselection*, in *MAN-MADE WOMEN*, *supra* note 44, at 74, 84.

46. Several feminist and critical race scholars have stressed the importance of an anti-subordination principle in the quest for equality, and in their critique of liberal rights-talk. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215-34 (1989); Robin West, *supra* note 6; Mari J. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988); Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

which often requires women to collude with patriarchy to our own disadvantage.⁴⁷ As Rosalind Petchesky has stated:

The "right to choose" means very little when women are powerless Women make their own reproductive choices, but they do not make them just as they please; they do not make them under conditions which they themselves create, but under social conditions and constraints which they, as mere individuals, are powerless to change.⁴⁸

Hence, when considering issues of substantive justice and their connection to ethical considerations, we must consider whether rights-talk fully considers the social, economic and political contexts in which women make "choices" concerning the abortion of gendered (female) fetuses.

CONCLUSION

Many reproductive rights, such as the right to buy and use contraception and the right to choose abortion, gave women with economic resources power and control over their lives. These rights allowed women to choose more freely, to decide whether and when to have children. Women with financial resources no longer had to continue unplanned pregnancies or have back-alley abortions.⁴⁹ These rights emphasized the interdependence of individual liberty and communal justice. Giving women the choice to continue or terminate a pregnancy was a choice which had the potential to destroy male control of women's sexuality and reproductive lives.

Sex-selective abortion, however, is different because its consequences do not result in the dismantling of patriarchal domination. We have seen that the overwhelming majority of women who make choices regarding sex-selective abortion make the choice to destroy the female fetus.⁵⁰ Thus, while abortion gives women control over

47. For example, through personal service (homemaking), sexual service (performing intercourse and having children), and ego service (encouragement and attention) to men, women expend much of their creative energies and limit their own career and creative choices. See MARILYN FRYE, *Oppression, in THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 9 (1983); and ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 279-80 (1976).

48. Rosalind Pollack Petchesky, *Reproductive Freedom: Beyond "a Woman's Right to Choose,"* 5 SIGNS: J. WOMEN IN CULTURE & SOC'Y 661, 674-5, (1980) (quoting KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 15 (1963)).

49. Because of the severe limitations on federal funding for abortion, many poor women have been forced to continue unplanned pregnancies or have abortions performed by unlicensed providers. See *Harris v. McRae*, 448 U.S. 297 (1980) (Hyde Amendment, which restricts federal funding for most abortions for poor women, held constitutional).

50. For example, a joint committee of the Indian Parliament found that during the period of 1986-87, as many as 50,000 female fetuses were aborted after sex identification tests were performed. Ajoy Bose, *Abortion: Who Believes in a Woman's Right to Choose?*, GUARDIAN FEATURES, Aug. 11, 1992, at 15.

whether and when to have children, sex-selective abortion gives families⁵¹ control over the sexual composition of future generations. Sex-selective abortion increases the opportunities for gender discrimination.⁵² Instead of reducing the subordination of women and girls, sex-selective abortion increases women's social, economic, political and reproductive exploitation.

51. Much of the medical literature discusses the ethical use of the new reproductive technologies in terms of the impact on "couples" and the impact on society, thereby exhibiting an explicit understanding that the decision of whether to use a new reproductive technology is not based on the woman's interest in reproduction. See, e.g., THE ETHICS COMMITTEE OF THE AMERICAN FERTILITY SOCIETY, *ETHICAL CONSIDERATIONS OF THE NEW REPRODUCTIVE TECHNOLOGIES* (1986); MARY WARNOCK, *A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILISATION AND EMBRYOLOGY* (1984).

52. See generally Cherry, *supra* note 16.



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